

# SUSTAINABLE DEVELOPMENT LAW & POLICY



EXPLORING HOW TODAY'S DEVELOPMENT AFFECTS FUTURE GENERATIONS AROUND THE GLOBE

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# EDITORS' NOTE

The *Sustainable Development Law & Policy Brief (SDLP)* strives to address and analyze cutting-edge legal issues developing within the fields of environmental law and sustainable development. For the last nineteen years, *SDLP* has examined the tension between the private sector, often blamed for environmental degradation, and the public sector, which is often viewed as having the more environmentally-friendly interests.

The judicial system frequently undertakes the role of resolving these conflicts between the private and public sectors. This issue of *SDLP* examines the evolving disputes over which courts preside and the solutions that result. From federal appellate courts employing varying approaches to hazardous waste remediation to a rapidly changing Supreme Court, it is clear that the future of environmental concerns will be decided by the judiciary. These judicial decisions highlight varying paradigms for protecting both natural resources and human populations from environmental harms. The issue further highlights potential conflicts that may arise in our ever-changing society on topics ranging from Artificial Intelligence to plastic microbead regulation. Further, how courts construe statutory rights, such as citizen suit provisions, has the potential to pave the way for a new era of jurisprudence.

On behalf of the *Sustainable Development Law & Policy Brief*, we would like to thank the contributing authors for their time and insight that made this publication possible. We would also like to thank our staff and editorial board for their hard work and dedication to *SDLP*. Additionally, we would like to thank our faculty advisors, without whom we would not have the opportunity to share our views on the future of environmental law through *SDLP*. Lastly, we would like to thank our readers for their continuing interest and support over the last nineteen years.

Sincerely,



Nicole Waxman  
Editor-in-Chief



Elizabeth Platt  
Editor-in-Chief

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# ABOUT SDLP

*The Sustainable Development Law & Policy Brief* (ISSN 1552-3721) is a student-run initiative at American University Washington College of Law that is published twice each academic year. The *Brief* embraces an interdisciplinary focus to provide a broad view of current legal, political, and social developments. It was founded to provide a forum for those interested in promoting sustainable economic development, conservation, environmental justice, and biodiversity throughout the world.

Because our publication focuses on reconciling the tensions found within our ecosystem, it spans a broad range of environmental issues such as sustainable development; trade; renewable energy; environmental justice; air, water, and noise regulation; climate change; land use, conservation, and property rights; resource use and regulation; and animal protection.

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# A PATTERN OF RULING AGAINST MOTHER NATURE: WILDLIFE SPECIES CASES DECIDED BY JUSTICE KAVANAUGH ON THE DC CIRCUIT

By William J. Snape, III\*

## I. INTRODUCTION

Brett Kavanaugh was sworn in as the 114th individual to serve on the United States Supreme Court on October 6, 2018, following perhaps the most acrimonious Senate debate and vote in history.<sup>1</sup> Before this nomination to be an associate justice, Justice Kavanaugh served on the United States Court of Appeals for the D.C. Circuit for twelve years.<sup>2</sup> Although many progressive and citizen interest groups have expressed concern or objection over the nomination – including environmental groups concerned about a wide range of issues from climate change and toxic pollutants to safe drinking water and scientific integrity – no systematic analysis of his D.C. Circuit decisions has been done for wildlife conservation.<sup>3</sup> The federal laws of wildlife protection – including endangered species, migratory bird, and marine mammal statutes – raise important and poignant questions about the human relationship with the natural world, and about the rule of law generally. Because wildlife is generally not owned by any human until lawfully taken into possession, society's treatment of wildlife reveals not only our shared values outside the modern market system, but also our compassion for other sentient beings.<sup>4</sup>

During his dozen years on the federal bench, Justice Kavanaugh has been a part of eighteen wildlife species decisions and has ruled against wildlife 17.25 times,<sup>5</sup> this is a ninety-six (96) percent record against wildlife. By comparison, D.C. Circuit Judge David Sentelle, a former Chief Judge and conservative jurist, possesses a 57-43 “against wildlife” score.<sup>6</sup> Judge Merrick Garland, a former Chief Judge and moderate jurist, possesses a 46-54 “against wildlife” score.<sup>7</sup> In sum, Justice Kavanaugh's ninety-six percent anti-wildlife record is significantly higher than comparable conservative and moderate scores of fifty-seven percent anti-wildlife (Sentelle) and forty-six percent anti-wildlife (Garland) records.

These numbers, along with Justice Kavanaugh's own words through his written decisions, demonstrate a tangible and significant bias against wildlife conservation. Whenever a vested economic interest runs up against a wildlife conflict, Justice Kavanaugh almost always rules against the public interest in wildlife protection.

## II. METHODOLOGY

All D.C. Circuit cases mentioning the word “species,” “marine mammal,” “wildlife,” or “migratory bird” were identified, using the names of Judges Kavanaugh, Sentelle, and Garland as an additional filter.<sup>8</sup> Several cases identified possessed more

than one of the searched terms. Many other identified cases had one or more terms, but possessed no cause of action or sought relief pertaining to actual wildlife protection in any way; these cases were excluded from this study.<sup>9</sup> All of the wildlife cases involving Justice Kavanaugh are listed and discussed in this paper.<sup>10</sup> The methodology was a conservative approach because where wildlife conservation was a background issue and the decision was based on a procedural matter unrelated to federal wildlife law, the case was excluded from the analysis. Similarly, Justice Kavanaugh cases primarily dealing with public health or general environmental issues were also excluded from this study. The wildlife cases (and their dispositions) decided by Judge Sentelle and Judge Garland are included in the Appendices of this article. Justice Kavanaugh's ninety-six percent anti-wildlife record is significantly higher than comparable conservative and moderate scores of fifty-seven percent anti-wildlife (Sentelle) and forty-six percent anti-wildlife (Garland) records.

## III. ANALYSIS

Federal wildlife law is mostly a statutory or treaty-based phenomenon implemented by federal agency rules and policies.<sup>11</sup> Traditionally, states hold their primary jurisdiction over wildlife in trust for their citizens.<sup>12</sup> Utilizing primarily the commerce, tax, treaty, and/or federal lands clauses of the U.S. Constitution, Congress has been participating in wildlife conservation efforts in the United States since the 1900 Lacey Act.<sup>13</sup>

Today, a bevy of federal statutes – ranging from the Endangered Species Act<sup>14</sup> and Marine Mammal Protection Act<sup>15</sup> to the Migratory Bird Treaty Act<sup>16</sup> and the Magnuson-Stevens Fisheries Conservation Act,<sup>17</sup> not to mention the National Environmental Policy Act (NEPA)<sup>18</sup> and public lands laws<sup>19</sup> provide protections to thousands of different fish and wildlife species. While the Environmental Protection Agency (EPA) figures into some of these federal wildlife decisions, most of the decisions are by other “environmental” agencies including the Department of the Interior, Interior's Fish and Wildlife Service (FWS) and Bureau of Land Management (BLM), the Department of Commerce, Commerce's National Marine Fisheries Service (NMFS), the Army Corps of Engineers, the Forest Service under

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the Department of Agriculture, the Department of State, and others.

Examining Justice Kavanaugh's wildlife cases on the D.C. Circuit is instructive for at least two reasons. First, these cases involve a variety and diversity of parties and legal issues that affect many other sectors of society. Second, the entire concept of wildlife conservation is frequently one where a vested and specific economic interest is somehow pitted against the public's interest in wildlife protection generally. All U.S. wildlife statutes possess mechanisms to address and ameliorate these conflicts, but because only a human being can currently possess legal standing to sue in U.S. courts, humans seeking to protect wildlife species often must literally challenge other human economic development. In other words, the "public interest" is frequently the central beneficiary of wildlife conservation because wildlife, by definition, is owned by no one in particular, but held in trust under the law for all people.<sup>20</sup>

Justice Brett Kavanaugh holds well-recognized skepticism in other areas of environmental law such as Clean Air Act protection and global warming regulation.<sup>21</sup> The question accordingly arises whether Justice Kavanaugh possesses other objective biases.<sup>22</sup> In this study, all of Justice Kavanaugh's D.C. Circuit decisions involving animal and plant species were analyzed, as discussed in the Methodology.<sup>23</sup> An examination of wildlife law is also relevant and timely because the Supreme Court has recently shown renewed interest in the Endangered Species Act (ESA) by deciding an ESA case this term, *Weyerhaeuser Company v. U.S. Fish and Wildlife Service*.<sup>24</sup> In this 8-0 decision, which Justice Kavanaugh did not participate in because he had not yet been confirmed, the Court held that the Secretary of Interior's decision not to exclude portions of critical habitat under the ESA was reviewable agency action by a federal court.<sup>25</sup> The Supreme Court remanded to the Fifth Circuit to determine whether the FWS decision not to exclude any dusky gopher frog critical habitat on about 1500 acres owned by Weyerhaeuser, was arbitrary and capricious in light of the economic analysis performed by FWS consultants, as well as the entire administrative record including the agency expert's scientific assessment of the biological suitability of the lands in question.<sup>26</sup> It is quite plausible that this case could again find its way back to the Supreme Court after the Fifth Circuit makes its factual determination of the new legal framework articulated by Chief Justice Roberts in this unanimous decision.

Justice Kennedy was often the swing vote on the United States Supreme Court in favor of environmental and wildlife protection under the Clean Water Act, Clean Air Act, ESA, and other laws.<sup>27</sup> Justice Kavanaugh, however, does appear to have a statistically proven bias against wildlife species during litigation. Of the eighteen (18) wildlife species cases that he has actively participated on during his twelve-year tenure on the D.C. Circuit, he has ruled against wildlife species over seventeen times (17.25 to be exact, because two decisions possessed "split" species outcomes). Thus, wildlife species lose approximately ninety-six percent of the time when before Justice Kavanaugh. In addition, when Justice Kavanaugh issues written decisions on wildlife

species himself, they are always strongly and stridently on the side against wildlife and species protection.

Whenever wildlife is up against either a corporation or the Republican Party, Justice Kavanaugh seemingly goes out of his way to defeat wildlife.<sup>28</sup> For example, in *American Bird Conservancy v. Federal Communications Commission*,<sup>29</sup> Justice Kavanaugh, in dissent, misstated the conservation plaintiff's injuries.<sup>30</sup> In *Carpenter Industrial Council v. Zinke*,<sup>31</sup> Justice Kavanaugh granted standing to the timber industry to challenge threatened spotted owl critical habitat on federal public lands.<sup>32</sup> He explained that even if the industry only lost one dollar as a result of the critical habitat designation, it would still constitute an "injury-in-fact for standing purposes."<sup>33</sup> In *Otay Mesa, LP v. Department of the Interior*,<sup>34</sup> Justice Kavanaugh, in an ESA critical habitat case, held FWS biologists to a very high level of scientific certainty.<sup>35</sup> In *Mingo Logan v. Environmental Protection Agency*,<sup>36</sup> Justice Kavanaugh, in dissent, sought to overturn EPA's decision to address massive water pollution from mountaintop removal for coal extraction.<sup>37</sup> *West Virginia v. U.S. Environmental Protection Agency*,<sup>38</sup> was one of a series of decisions and currently active cases where Justice Kavanaugh expressed hostility toward regulating greenhouse gases that kill wildlife and humans alike.<sup>39</sup> In *Fund for Animals v. Kempthorne*,<sup>40</sup> Justice Kavanaugh dismissed the importance of four migratory bird treaties in a separate and unnecessary concurrence.<sup>41</sup>

These wildlife species-related decisions, including Justice Kavanaugh's frequently aggressive opinions, are discussed and analyzed more fully below, in chronological order. Cumulatively, Justice Kavanaugh's ninety-six percent record against wildlife represents a noticeable bias.<sup>42</sup>

#### **IV. JUSTICE KAVANAUGH'S DEMONSTRATED ANTI-WILDLIFE BIAS IN D.C. CIRCUIT CASES**

*Fund for Animals v. Kempthorne*, 472 F.3d 872 (D.C. Cir. 2006) (two opinions by Justice Kavanaugh).

In Justice Kavanaugh's first wildlife case on the D.C. Circuit, he made his anti-wildlife sentiment immediately known.<sup>43</sup> He took the unusual step of writing both the opinion of the court, as well as an unnecessary concurring opinion, which no other judge joined.<sup>44</sup> In his concurrence, he addressed his view that the Migratory Bird Treaties<sup>45</sup> are not self-executing, and thus deserve no credence in interpreting the Migratory Bird Treaty Act (MBTA) itself.<sup>46</sup> This position completely ignored the many treaties that have shaped U.S. wildlife statutes.<sup>47</sup> It is also a position that revealed Justice Kavanaugh's many conflicting views on executive power and privilege.<sup>48</sup> In this case, an animal welfare group and property owners challenged the FWS decision not to list the mute swan as protected under the MBTA in response to a plan by the Maryland Department of Natural Resources to kill a portion of the state's adult mute swans.<sup>49</sup> The MBTA was passed in 1918 pursuant to the first Migratory Bird Treaty of 1916 with the United Kingdom and Canada, and the statute explicitly makes it "unlawful to hunt or kill migratory



birds included in the terms of the conventions.”<sup>50</sup> Congress amended the MBTA in 2004 so that it “applies only to migratory bird species that are native to the United States” or its territories.<sup>51</sup> The plaintiffs argued here that the MBTA still includes protection for the mute swan because: (1) the statute still reads that it is “unlawful . . . [to] hunt . . . [or] kill . . . any migratory bird . . . that is included in the terms of the conventions,” and the “sense of Congress” provision within the amended statute stated that, “it is the sense of Congress that the language of the section is consistent with the intent and language of the [four] bilateral treaties implemented by this section,” and (2) the statute must therefore be deemed ambiguous and not interpreted to abrogate a treaty.<sup>52</sup> Justice Kavanaugh ruled against wildlife by holding that the MBTA excluded mute swans despite the wording of the four migratory bird treaties to the contrary.<sup>53</sup>

Justice Kavanaugh Decision in *Fund for Animals: Against Wildlife Species*

*Oceana v. Gutierrez*, 488 F. 3d 1020 (D.C. Cir. 2007).

Justice Kavanaugh was part of a majority decision that rejected an ESA consultation challenge to the Department of Commerce’s approval of longline fishing in the Atlantic Ocean and Gulf of Mexico of swordfish and tuna.<sup>54</sup> Despite undisputed scientific evidence that longline fishing is killing too many endangered leatherback turtles, Justice Kavanaugh and his panel decided for the Bush Commerce Department.<sup>55</sup> As the majority conceded at the end of their opinion “since the [Reasonable and Prudent Alternative] already includes hook and gear removal requirements, ‘the only remaining way to achieve further reductions in leatherback mortality in the pelagic longline fishery would be through closures that reduce fishing effort in areas of high leatherback bycatch.’”<sup>56</sup> Although the federal agency had the authority to issue such closures, it declined to do so here and many endangered sea turtles consequently died.<sup>57</sup>

Justice Kavanaugh Decision in *Oceana, Inc.: Against Wildlife Species*

*American Bird Conservancy v. Federal Communications Commission*, 516 F.3d 1027 (D.C. Cir. 2008) (Dissenting Opinion by Justice Kavanaugh).

The majority opinion ruled that the Federal Communications Commission (FCC) violated both NEPA and Section 7 of the ESA because of cell tower approvals in the Gulf Coast region that harmed many bird species.<sup>58</sup> Justice Kavanaugh dissented, calling the lawsuit by conservation groups “unripe.”<sup>59</sup> The two majority judges stated in response to Justice Kavanaugh:

Our dissenting colleague’s assertion that this case is unripe . . . rests on the mistaken assumption that the Commission has set about reconsidering Petitioner’s precise requests through its nationwide inquiry into the migratory bird issue. However . . . [the Commission] nowhere indicates [it is] reconsidering the Gulf Coast petition calling for a programmatic Environmental Impact Statement under NEPA, formal consultation

under the ESA, or notice of pending tower registration applications.<sup>60</sup>

In addition, not even the FCC made Justice Kavanaugh’s extreme argument, as the majority noted: “[n]either point is lost on the Commission: not only does its brief not invoke the ripeness doctrine, but while the Commission explicitly deferred consideration of Petitioners’ MBTA claim to the nationwide proceeding, it denied and dismissed Petitioners’ ESA and NEPA claims.”<sup>61</sup>

Justice Kavanaugh Decision in *American Bird Conservancy: Against Wildlife Species*

*North Carolina Fisheries Association v. Gutierrez*, 550 F.3d 16 (D.C. Cir. 2008).

Fishermen won a federal district court decision under the Magnuson-Stevens Fishery Conservation and Management Act for the NMFS’s failure to promulgate a rebuilding plan for certain fish species following a determination that such species were “overfished.”<sup>62</sup> After the district court approved a remedy unsatisfactory to the plaintiff fishermen, the D.C. Circuit heard the appeal.<sup>63</sup> Justice Kavanaugh and his panel rejected the requested remedy by the fishermen, opining that while it “does seem rather peculiar – perhaps even a bit fishy – that the Service promulgated Amendment 15A without accompanying regulations . . . we lack jurisdiction at this stage in the proceedings.”<sup>64</sup> The court dismissed the case on jurisdictional grounds, despite the plaintiff fishermen’s strong claims on the merits.

Justice Kavanaugh Decision *North Carolina Fisheries Association: Against Wildlife Species*

*Eastern Niagara Public Power Alliance v. Federal Energy Regulatory Commission*, 558 F.3d 564 (D.C. Cir. 2009) (Opinion by Justice Kavanaugh).

Justice Kavanaugh decided against several communities in western New York who were challenging a 2007 Federal Energy Regulatory Commission (FERC) licensing decision that approved the New York Power Authority’s (NYPA) fifty-year relicensing application to operate the Niagara Power Project, a hydroelectric facility about five miles downriver from Niagara Falls.<sup>65</sup> The Federal Power Act directs FERC to issue licenses for the “construction, operation, and maintenance of hydroelectric projects on certain U.S. waters,” and in ruling on the licensing applications for hydroelectric facilities, FERC must consider an array of criteria.<sup>66</sup> Some of these criteria include energy conservation, the protection of fish and wildlife, recreational opportunities, and environmental quality. Additionally, for relicensing applications, factors include the project’s safety, efficiency, reliability, and its effects on the communities it serves.<sup>67</sup> In arguing against FERC, the plaintiffs made several arguments, including: (1) that a fifty-year license was too long and not consistent with agency practice regarding the terms of licenses; and (2) that FERC, as a condition of granting the license, should have required the state power agency to mitigate certain adverse environmental impacts allegedly caused by the project, particularly

shoreline erosion.<sup>68</sup> Justice Kavanaugh ruled against wildlife by holding that the fifty-year license to operate the Niagara Power Project was “reasonable” despite the real negative impacts the New York citizens had identified with the FERC project.<sup>69</sup>

Justice Kavanaugh Decision *Eastern Niagara Public Power Alliance: Against Wildlife Species*

*Otay Mesa, LP v. U.S. Department of the Interior*, 646 F.3d 914 (D.C. Cir. 2011) (Opinion by Justice Kavanaugh).<sup>70</sup>

Justice Kavanaugh wrote the decision upholding the ESA challenge by the real estate industry, which sought rejection of the FWS designation of critical habitat for the San Diego fairy shrimp.<sup>71</sup> Although the federal district court judge in this case found, based on expert biologist testimony, that the “FWS was reasonable in its consideration that San Diego fairy shrimp found in a hospitable location in 2001 would have also occupied the same location in 1997[,]”<sup>72</sup> Justice Kavanaugh was unimpressed with federal scientific expertise.<sup>73</sup> Justice Kavanaugh overturned the district court’s factual assessment, finding that the FWS needed to continue looking for the rare habitat of a highly endangered species.<sup>74</sup> The court remanded the case to the Agency.<sup>75</sup>

Justice Kavanaugh Decision in *Otay Mesa, LP: Against Wildlife Species*

*Sierra Club v. Van Antwerp*, 661 F.3d 1147 (D.C. Cir. 2012).

In this case, Justice Kavanaugh was on a panel that ruled almost entirely on behalf of the U.S. Army Corps of Engineers and the decision to issue a permit authorizing the discharge of dredge and fill material into specified wetlands – including waters of the United States – outside rapidly developing Tampa, Florida.<sup>76</sup> Although the district court had found the Corps to be in violation of the Clean Water Act, Justice Kavanaugh’s panel reversed almost in its entirety.<sup>77</sup> Conservationists argued that the project adversely impacted the wood stork and the indigo snake.<sup>78</sup> The panel and Justice Kavanaugh rejected further protections for the wood stork.<sup>79</sup> For the indigo snake, despite un rebutted expert testimony from the FWS biologist about negative impacts to the snake, the court stated “we do not reach the issue of whether formal [ESA Section 7] consultation is required, but the Corps must make some determination on the issue of habitat fragmentation, both for ESA and NEPA purposes.”<sup>80</sup> Thus, Justice Kavanaugh ruled against the wood stork and though he ruled in favor of the indigo snake, he did not order a biological opinion for the species, as he was authorized to do, and that could have helped the snake the most.<sup>81</sup>

Justice Kavanaugh Decision in *Sierra Club: Three-Quarters Against Wildlife/One-Quarter for Wildlife Species*<sup>82</sup>

*Friends of the Blackwater v. Salazar*, 691 F.3d 428 (D.C. Cir. 2012).

Justice Kavanaugh was part of a majority that overturned a federal district court decision in favor of the West Virginia Northern Flying Squirrel and its recovery plan.<sup>83</sup> Justice Kavanaugh interpreted the recovery plan as non-binding and

allowed the delisting of this species despite the fact the requirements of the recovery plan were not met.<sup>84</sup> As Circuit Judge Rogers stated in dissent:

[Justice Kavanaugh] defers to the Secretary’s interpretation, contrary to the plain text of the Endangered Species Act . . . that [the squirrel] loses all protection even though the recovery criteria in its recovery plan have not been met and those criteria are revised . . . without required notice and prior consideration of public comments. But even assuming, as the court concludes, the ESA is ambiguous, the Secretary was arbitrary and capricious in delisting the squirrel based in material part on an analysis revising the recovery plan criteria that was not publicly noticed until the final delisting rule. . . .<sup>85</sup>

This decision not only was a loss for the squirrels, but it also was a loss of a significant rollback of the conservation force of ESA recovery plans.<sup>86</sup>

Justice Kavanaugh Decision in *Friends of the Blackwater: Against Wildlife Species*

*Conservation Force v. Jewell*, 733 F.3d 1200 (D.C. Cir. 2013).

Judge Merrick Garland wrote for the unanimous panel that included Justice Kavanaugh, and ruled against the plaintiffs (backed by the Sierra Club) who were challenging the FWS’s protection, management and import permitting of the markhor, “an impressive subspecies of wild goat that inhabits an arid, mountainous region of Pakistan.”<sup>87</sup> Despite repeated delays in responding to the plaintiffs by the Agency before the litigation was filed, the majority panel held that the cause of action to down-list the species was moot because the plaintiffs possessed no standing to challenge the FWS’s considerable delays in processing permits.<sup>88</sup> This case was a split decision because, although the conservation action sought by the plaintiffs was questionable, the court did correctly opine on the processing delays by the Agency.<sup>89</sup>

Justice Kavanaugh Decision in *Conservation Force: Half-Against Wildlife Species/Half-for Wildlife Species*

*Center for Biological Diversity v. U.S. Environmental Protection Agency*, 749 F.3d 1079 (D.C. Cir. 2014).

The plaintiffs challenged the EPA’s delays in issuing required new “secondary” national ambient air quality standards for oxides of nitrogen, oxides of sulphur, and other related compounds that contribute to acid rain.<sup>90</sup> The impacts from acid rain can be devastating to ecosystems, from harming water bodies of all kinds and sizes, to killing many plants and trees in certain forests.<sup>91</sup> The EPA had already admitted that the current secondary air standards were “not adequate to protect against the adverse impacts of aquatic acidification on sensitive ecosystems.”<sup>92</sup> However, because the EPA convinced a panel, which included Justice Kavanaugh, that it was not yet “certain” it could promulgate a standard, Justice Kavanaugh and his fellow judges let the

EPA off the hook for a clear obligation of the Clean Air Act.<sup>93</sup> The court concluded: “[i]n other words, the fact that we have rejected certainty as an appropriate goal . . . does not mean that regulation is required (or permitted) no matter how much uncertainty the agency faces.”<sup>94</sup> By allowing the EPA off the hook, Justice Kavanaugh once again ruled against needed protections for wildlife.

Justice Kavanaugh Decision in *Center for Biological Diversity*: Against Wildlife Species

*Friends of Animals v. Ashe*, 808 F.3d 900 (D.C. Cir. 2015) (Opinion by Justice Kavanaugh).

In March 2012, Friends of Animals petitioned the FWS to list ten species of sturgeon as endangered or threatened species under the ESA.<sup>95</sup> The ESA obligates the Agency to make an initial determination on the species petition within ninety days after receipt of the petition.<sup>96</sup> However, the FWS issued no determinations for any of the species petitioned.<sup>97</sup> On August 16, 2013, well beyond the ninety-day period, Friends of Animals sent the FWS written notice, as required by statute prior to filing a lawsuit, that the Agency had failed to make initial and final determinations for the ten species of sturgeon.<sup>98</sup> The federal government argued that Friends of Animals had failed to provide proper notice of the lawsuit.<sup>99</sup> Justice Kavanaugh wrote the majority opinion for the Court<sup>100</sup> and stated that,

[t]he question here—whether Friends of Animals complied with the notice requirement of the Act—boils down to a very narrow and extraordinarily technical question regarding the timing of notice,” and that “[because] Friends of Animals did not wait until after the issuance of the positive initial determinations to provide 60 days’ notice of the allegedly overdue final determinations, its suit seeking to compel the final determinations is barred.”<sup>101</sup>

Here, Justice Kavanaugh found a way to deny the plaintiffs an opportunity to protect wildlife threatened with extinction.<sup>102</sup>

Justice Kavanaugh Decision in *Friends of Animals*: Against Wildlife Species

*Defenders of Wildlife v. Jewell*, 815 F.3d 1 (D.C. Cir. 2016).

A panel that included Justice Kavanaugh ruled against ESA protections for the dunes sagebrush lizard of New Mexico and Texas, whose habitat closely overlaps with current and potential drilling actions by the oil and gas industry.<sup>103</sup> The court considered whether a weak and unenforceable state management agreement could be considered in denying ESA protections for the lizard.<sup>104</sup> Despite serious problems with the Texas plan especially, the panel side-stepped the issue of adequacy of the state conservation plans by noting that the Department of the Interior had “new information” from the states and the federal agencies.<sup>105</sup> Further, the industry itself that indicated “current and future threats are not of sufficient imminence, intensity, or magnitude to indicate that the lizard . . . is in danger of extinction,

or likely to become endangered within the foreseeable future.”<sup>106</sup> Thus, Justice Kavanaugh supported a spurious policy reversal by the FWS that lessened protections for the lizard.<sup>107</sup>

Justice Kavanaugh Decision in *Defenders of Wildlife*: Against Wildlife Species

*Ark Initiative v. Tidwell*, 816 F.3d 119 (D.C. Cir. 2016).

Justice Kavanaugh was part of a panel that ruled against full protections for “roadless areas” under the National Forest Management Act and NEPA.<sup>108</sup> Despite the statute requirement that roadless areas contain no roads or developments, this panel allowed the Forest Service to permit ski facilities in prime wildlife habitat for the lynx and countless other species, based upon the discretion of the Agency to exclude certain multiple use areas from roadless protection under the original Clinton-era roadless rule.<sup>109</sup> The result of the decision here is to allow recreational skiing on approximately 8,300 acres of land despite the harm to the lynx’s habitat.<sup>110</sup>

Justice Kavanaugh Decision *Ark Initiative*: Against Wildlife Species

*Friends of Animals v. Jewell*, 824 F.3d 1033 (D.C. Cir. 2016).

The plaintiffs and appellants attempted to protect three species of ESA-listed foreign antelopes: the scimitar-horned oryx, addax, and dama gazelle.<sup>111</sup> After the George W. Bush Administration issued an import take permit exemption for these three highly endangered mammals,<sup>112</sup> Friends of Animals successfully sued to stop the harmful practice of sport hunt importing.<sup>113</sup> After that previous litigation, Congress passed a rider on an appropriations bill allowing the FWS exemption program for the three species of antelope.<sup>114</sup> The D.C. Circuit, including Justice Kavanaugh, upheld Congress’ ability to pass such riders: “Congress acted within constitutional bounds when it passed Section 127. Therefore, there can be no doubt that the [FWS] was fully authorized to reinstate the Captive-Bred Exemption.”<sup>115</sup>

Justice Kavanaugh Decision *Friends of Animals*: Against Wildlife Species

*Earthreports, Inc. v. Federal Energy Regulatory Commission*, 828 F.3d 949 (D.C. Cir. 2016).

Justice Kavanaugh was part of a panel that ruled against species protection, including NEPA protections on behalf of the highly endangered North Atlantic right whale.<sup>116</sup> At issue in this case was approval of the highly controversial Cove Point liquefied natural gas (LNG) plant off the west shore of the Chesapeake Bay, Maryland.<sup>117</sup> The judges, including Justice Kavanaugh, held that “because petitioners fail to show that the Commission’s NEPA analysis was deficient for failing to consider indirect effects of the Cove Point conversion project or inadequately considered their remaining concerns and that [FERC] thus acted arbitrarily and capriciously, we deny the petition for review.”<sup>118</sup> Justice Kavanaugh here disregarded the plaintiff’s attempt to protect species under NEPA, by deferring



to FERC's questionable determination of negligible impact to the wildlife species.<sup>119</sup>

Justice Kavanaugh Decision *Earthreports, Inc: Against Wildlife Species*

*Mingo Logan Coal Co. v. U.S. Environmental Protection Agency*, 829 F.3d 710 (D.C. Cir. 2016) (Dissenting Opinion by Justice Kavanaugh).

Justice Kavanaugh wrote a defiant dissent in a case involving the waste caused by mountaintop removal to mine coal.<sup>120</sup> Although the EPA had voluminous scientific studies demonstrating that dumping this waste into rivers and streams would have an “unacceptable adverse impacts” to the environment and wildlife species, Justice Kavanaugh would have issued the mining company the permit, which the EPA had revoked through its clear and unambiguous authority under the Clean Water Act.<sup>121</sup> In other words, Justice Kavanaugh had no problem with the coal company continuing to pollute and destroy rivers and streams with their waste from an industrial practice that already greatly contributes to global warming and toxic air pollution.<sup>122</sup> Justice Kavanaugh argued that the coal company's cost-benefit analysis should override the Agency's public health assessments.<sup>123</sup> As the majority said of Justice Kavanaugh's dissent:

In reply to our dissenting colleague's one-paragraph *cri de coeur* characterizing Mingo Logan's forfeiture as “entirely unfair” based on EPA's stance that costs are “irrelevant,” . . . we have an equally pithy reply: A party has an obligation to substantiate its position, including in the face of its opponent's rejection thereof . . . . Forfeiture here is hardly “unfair” to Mingo Logan but, in any event, its minimal proof of its costs—as far as we can tell—mirrors their de minimis nature. And even if the EPA could be tagged with the “bait-and-switch” charge—a proposition we roundly reject—Mingo Logan's failure to prove up its costs on review by the district court should mute its lament. In the end, Mingo Logan at no point—not before the EPA nor in district court—made any effort to describe its costs or make an argument about them. In that light, Mingo Logan can hardly now complain about unfairness. Moreover, as we have noted . . . Mingo Logan effectively accepted the EPA's position on the relevance of its reliance costs. It is hardly “unfair” to expect Mingo Logan to have raised whatever arguments it might have about the EPA's position before the EPA itself.<sup>124</sup>

Thus, Justice Kavanaugh's attempt to illegally insert cost-benefit analysis into a case could have had disastrous impacts on many species within the Appalachian ecosystems.<sup>125</sup>

Justice Kavanaugh Decision in *Mingo Logan Coal Co.: Against Wildlife Species*

*Carpenters Industrial Council v. Zinke*, 854 F.3d 1 (D.C. Cir. 2017) (Opinion by Justice Kavanaugh).

Justice Kavanaugh wrote the majority opinion for this case, in which the timber industry sued FWS over its designation of critical habitat for the northern spotted owl in the Pacific Northwest.<sup>126</sup> In 2012, the FWS designated 9.5 million acres of federal forest lands in California, Oregon, and Washington as critical habitat for the northern spotted owl under the ESA.<sup>127</sup> In response to the designation, the plaintiff, a forest products manufacturing trade association comprised of companies that source timber from those forest lands, sued the FWS to challenge the legality of this critical habitat designation.<sup>128</sup> Justice Kavanaugh opened his decision by stating that, “[w]hen the government adopts a rule that makes it more difficult to harvest timber from certain forest lands, lumber companies that obtain timber from those forest lands may lose a source of timber supply and suffer economic harm.”<sup>129</sup> Justice Kavanaugh further noted that the displacement of the timber industry in the Pacific Northwest as a prime economic force has been a “phenomenon occur[ing] in the Pacific Northwest . . . .”<sup>130</sup> Responding to the question of whether or not the plaintiffs had standing to challenge the FWS designation of critical habitat, Justice Kavanaugh ruled that the Council had demonstrated a

[S]ubstantial probability that the critical habitat designation will cause a decrease in the supply of timber from the designated forest lands, that Council Members obtain their timber from those forest lands, and that Council members will suffer economic harm as a result of the decrease in the timber supply from those forest lands.<sup>131</sup>

Justice Kavanaugh ruled squarely in favor of the timber and wood products industry and against the conservation and protection of wildlife.<sup>132</sup>

Justice Kavanaugh Decision in *Carpenters Industrial Council: Against Wildlife Species*

*West Virginia v. U.S. Environmental Protection Agency*, active and pending, D.C. Circuit (Case No. 15-1363) (after stay and remand by U.S Supreme Court).

This ongoing litigation concerns fossil fuel states and industries against the Obama Clean Power Plan, which seeks to reduce greenhouse gas (GHG) pollution from utilities under Section 111 of the Clean Air Act.<sup>133</sup> At the two-day oral argument before the D.C. Circuit in September 2016, Justice Kavanaugh asserted that “[t]he policy is laudable. The earth is warming. Humans are contributing. I understand the international impact and the problem of the commons. The pope's involved. If Congress does this, they can account for the people who lose their jobs. If we do this, we can't.”<sup>134</sup> Justice Kavanaugh's legal position on climate change is deceitful for several reasons. First, Congress has already “done this” through the Clean Air Act, which not only commands that the EPA reduce all air pollutants that are found to harm human health and public welfare, but also specifically includes the term “climate” as part of what the Agency must consider as “effects” on public welfare.<sup>135</sup> Equally problematic,

Justice Kavanaugh's position is at odds with the Supreme Court's historic decision in *Massachusetts v. U.S. Environmental Protection Agency*,<sup>136</sup> where a coalition of states and environmental groups defeated the George W. Bush Administration's refusal to regulate GHGs under the Clean Air Act; the Supreme Court squarely held that the EPA does have such authority and must utilize it.<sup>137</sup> Finally, as it relates to the power of Congress, Justice Kavanaugh has unequivocally and repeatedly attacked Congressional attempts to limit the amount of money and the secrecy of money in federal elections.<sup>138</sup>

The Clean Power Plan litigation cuts to the heart of a central legal question to all of environmental and wildlife law: would Justice Kavanaugh support any meaningful attempt by the EPA to regulate and limit GHGs, or would he throw his lot behind President Trump and the small industry handful who still deny climate change is even a problem? Further, would Justice Kavanaugh support a repeal or weakening of *Massachusetts v. U.S. Environmental Protection Agency*, either by supporting a repeal or weakening of the carbon dioxide/greenhouse gas endangerment finding(s) or by judicially effectuating or blessing agency inaction on any meaningful regulatory response to an endangerment finding.<sup>139</sup> Thousands of plant and animal species, on land and in water, are at grave risk because of global warming and climate change.<sup>140</sup>

Justice Kavanaugh position in *West Virginia: Against Wildlife Species*.

## V. THE FUTURE FOR WILDLIFE UNDER KAVANAUGH

While it is undeniably typical for most long-standing federal judges to rule for and against certain interests based upon the facts and law of a particular case, as well as the specific procedural history of the case, it is nonetheless unusual for a judge on the federal bench to rule consistently against one set of interests over another. Justice Kavanaugh regularly and routinely decided in favor of corporate and industrial interests over the "public

interest."<sup>141</sup> As it relates to wildlife species cases specifically, Justice Kavanaugh's meager four percent favorable decision record on behalf of wildlife "species" is alarming.

Justice Kavanaugh is a man who apparently has already made up his mind. He frequently stretches statutes to comport with his own personal policy view of the world. Ninety-six percent of the time, Mother Earth loses under Justice Kavanaugh. Again, Justice Kavanaugh's paltry four percent pro-wildlife record is far outside the judicial mainstream as compared to a conservative (Judge Sentelle with a forty-three percent pro-wildlife record) and a moderate (Garland with fifty-six percent pro-wildlife record) judge.

In the summer and autumn of 2018, a rational defender of wildlife conservation could have concluded that possessing only eight Justices for a few extra months might have served the Court, and the country, better in the long run.<sup>142</sup> At the very least, no final vote should have occurred in the Senate until all of Justice Kavanaugh's governmental records were released to the public.<sup>143</sup> The stakes are now too high for the Supreme Court's deciding vote to be driven by party allegiance. We need a truly independent and fair jurist on the Supreme Court at this pivotal point in the country's history. How many other Trump appointees are like Justice Kavanaugh?<sup>144</sup>

## VI. CONCLUSION

Unless he resigns or is impeached, Justice Kavanaugh will have a lasting impact on the U.S. Supreme Court and the laws of our country. From wildlife's perspective, Justice Kavanaugh possesses the angry hand, the one that writes hostile decision after hostile decision against the public's unique interest in wildlife. The dusky gopher frogs in *Weyerhaeuser Company v. U.S. Fish and Wildlife Service* are certainly happy Mr. Kavanaugh was still a judge when that case was heard before the high court. Only a change of heart by the Justice himself will ensure future justice for wildlife in the United States.<sup>145</sup>



## ENDNOTES

<sup>1</sup> See Seung Min Kim & John Wagner, *Kavanaugh sworn in as Supreme Court justice after divided Senate votes for confirmation*, WASH. POST (Oct. 10, 2018), [https://www.washingtonpost.com/politics/kavanaugh-vote-divided-senate-poised-to-confirm-trumps-nominee/2018/10/06/64bf69fa-c969-11e8-b2b5-79270f9cce17\\_story.html?utm\\_term=.c3e6df30c49c](https://www.washingtonpost.com/politics/kavanaugh-vote-divided-senate-poised-to-confirm-trumps-nominee/2018/10/06/64bf69fa-c969-11e8-b2b5-79270f9cce17_story.html?utm_term=.c3e6df30c49c).

<sup>2</sup> *Current Members*, SUPREME COURT, <https://www.supremecourt.gov/about/biographies.aspx> (last visited Nov. 26, 2018).

<sup>3</sup> Letter from Alaska Wilderness League et al. on Opposing the Supreme Court Nomination of Judge Brett Kavanaugh to Chuck Grassley et al., Chairman, Senate Judicial Comm. (Aug. 10, 2018), <https://www.cleanwateraction.org/sites/default/files/docs/publications/Oppose%20Judge%20Kavanaugh%20Environmental%20Community%20letter%208-10-18.pdf>.

<sup>4</sup> *Pierson v. Post*, 3 Cai. R. 175, 175 (1805).

<sup>5</sup> The fraction is explained by two "split" decisions.

<sup>6</sup> See *infra* Appendix A.

<sup>7</sup> See *infra* Appendix B.

<sup>8</sup> The author used Bloomberg Law to complete this search. See BLOOMBERG LAW, <https://www.bna.com/bloomberglaw/> (last visited Dec. 20, 2018).

<sup>9</sup> *Id.*

<sup>10</sup> See *infra* Part III.

<sup>11</sup> See Edward E. Shea, *Environmental Law of the United States*, COMP. ENVTL. LAW & REG. § 56:1 (Nicholas A. Robinson et al. eds., 2018).

<sup>12</sup> See *id.*; see also *Hughes v. Oklahoma*, 441 U.S. 322, 324 (1979) (discussing state governments' trustee role in protecting wildlife not otherwise protected by the federal government); *Lacoste v. Dep't of Conservation*, 263 U.S. 186, 187 (1924) (discussing state ownership of wild animals within that state's territory).

<sup>13</sup> The original Lacey Act, amended several times subsequently, was written to prevent wildlife taken in violation of one state's laws to be taken to another state. 16 U.S.C. §§ 3371-78 (2012); see also 1934 Fish and Wildlife Conservation Act, 16 U.S.C. §§ 661-667(c) (2012) (requiring the federal government to minimize and mitigate the adverse impacts upon wildlife from federal projects).

<sup>14</sup> Endangered Species Act, 16 U.S.C. §§ 1531-1544 [hereinafter ESA].

<sup>15</sup> See Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1421(h) [hereinafter MMPA] (emphasizing that marine mammals should be protected, and the primary objective should be to maintain the health and stability of marine ecosystems).

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# CAN COURTS STOP CITIZENS FROM PROSECUTING CRIMINAL CASES UNDER THE CLEAN WATER ACT?

Hannah Gardenswartz\*

The citizen suit provision in the Clean Air Act<sup>1</sup> was copied almost verbatim into the Clean Water Act, with one key change:

If the Administrator or State has commenced and is diligently prosecuting a civil *or criminal* action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.<sup>2</sup>

The addition of “or criminal” opens up a new possibility for intervention under the Clean Water Act that was not available under the Clean Air Act. This Article argues that citizens have a right to intervene in criminal actions brought by the government under the Clean Water Act; however, doing so would be so disruptive to the penal system that a court could not allow intervention in this context.

## I. HISTORY OF THE CLEAN AIR ACT AND CLEAN WATER ACT

The Clean Air Act incorporated the first modern citizen suit provision in 1970. Since then, almost all major environmental statutes—including the Clean Water Act—have included citizen suit provisions.<sup>3</sup> The citizen suit provisions were designed so that if the government should fail to bring a case, the public is guaranteed the right to seek enforcement of the statute.<sup>4</sup> The Senate Committee on Public Works specifically allowed for intervention by both the public – at the court’s discretion – and the Environmental Protection Agency’s (EPA) Administrator.<sup>5</sup> The House of Representative’s bill did not include a provision for citizen suits, but the Senate amendment authorized citizen suits against violators, government agencies, and the EPA Administrator.<sup>6</sup> In the end, Congress knew that the provision for citizen suits was far-reaching, but the provision was included anyway because it was necessary to ensure that the Clean Air Act was enforced.<sup>7</sup>

The citizen suit provisions of the Clean Water Act were expressly modeled on the Clean Air Act, but with the unusual addition that citizens may intervene in criminal cases.<sup>8</sup> However, the legislative history is silent on why Congress chose to modify the Clean Air Act citizen suit provision to potentially allow citizen intervention in criminal cases.<sup>9</sup> Public interest groups took advantage of the ability to participate in the enforcement of the Clean Water Act, and private civil enforcement quickly exceeded federal civil enforcement.<sup>10</sup> In some years private Clean Water Act litigation has equaled overall civil enforcement

by both the state and federal governments.<sup>11</sup> While the doctrine of standing has been used to limit private litigation,<sup>12</sup> the citizen suit provisions and the ability to intervene in cases has pushed public participation in Clean Water Act civil enforcement action. Because of a large amount of public participation in the civil realm, it is surprising that there are no cases where citizens have intervened in criminal cases.

## II. RULES GOVERNING INTERVENTION

If interventions in criminal cases were to be allowed, the procedure for doing so would be modeled on the Federal Rules of Civil Procedure (“Civil Rules”) and Federal Rules of Criminal Procedure (“Criminal Rules”). The court would be able to interpret the rules for intervenors and the rules for victims together to create a procedure for citizen intervention in criminal cases.

The Civil Rules already provide the procedure for intervenors. Civil Rule 24(a)(1) requires that courts *must* permit intervention if a federal statute gives citizens the unconditional right.<sup>13</sup> A party has a right to intervene only if the intervenor shows timeliness, an interest regarding the action, a practical impairment of the party’s ability to protect that interest, and an inadequate representation by the parties to the suit.<sup>14</sup>

Under the Criminal Rules, victims have a right to participate in the prosecution of a crime.<sup>15</sup> Victims have a right to be given “reasonable, accurate, and timely notice” of public proceedings in the case and be heard at public hearings regarding release, pleas, or sentencing.<sup>16</sup>

If intervenors are allowed in criminal Clean Water Act cases, it will be difficult for the intervening party to show inadequate representation by the prosecution. Once the intervenor clears that hurdle, the participation allowed could be similar to the participation rights of victims.<sup>17</sup>

## III. WHY CITIZENS CANNOT INTERVENE IN CRIMINAL CASES

The difference between civil cases and criminal cases is more likely to be the factor that allows for intervention in one context and precludes it in the other. The government brings criminal cases on behalf of the people<sup>18</sup>—this is one of the defining elements of how criminal cases are prosecuted.<sup>19</sup> Criminal cases are treated as offenses against the community at large, and the *community* then brings the case, not the victim.<sup>20</sup> Under the Clean Water Act, citizens are only able to intervene in cases being brought by the government because the case centers on an

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offense against the community at large.<sup>21</sup> In this way, the civil environmental law cases are similar in purpose to criminal law cases.

One of the biggest distinctions between civil cases and criminal law cases is the type of remedy or penalty that may be sought.<sup>22</sup> In criminal law, the remedy may be punitive and may include incarceration as a punishment for behavior the community deems to be wrong.<sup>23</sup> In Clean Water Act citizen suits, citizens are only allowed to seek injunctive relief for ongoing violations.<sup>24</sup> Because citizens are strictly limited in what remedies they are allowed to seek, allowing them to use the criminal justice system would be inconsistent with the Court's precedent.

## IV. CONCLUSION

Legislative history shows that the purpose of the Clean Air Act and Clean Water Act citizen suit provisions is to give citizens the ability to bring cases when the government fails to do so. The legislative history of the Clean Water Act does not directly address why Congress choose to allow intervention in the criminal context, yet the plain meaning of the Act directly states that citizens would have a right to intervene in criminal cases. Further, the legislative and judiciary branches already provide a specific set of rules that require the courts to give citizens the right to intervene in the civil cases. Therefore, on plain reading of the statutes and legislative history, citizens may intervene in Clean Water Act criminal cases. While the statute's purpose aligns with that of the criminal system, courts could not allow citizens to intervene and use the penalties of the criminal justice system.



## ENDNOTES

<sup>1</sup> 42 U.S.C. § 7604(b)(1)(B) (2012) ("If the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.").

<sup>2</sup> 33 U.S.C. § 1365(b)(1)(B) (2012) (emphasis added).

<sup>3</sup> Mark Seidenfeld & Janna Satz Nugent, "The Friendship of the People: Citizen Participation in Environmental Enforcement," 73 GEO. WASH. L. REV. 269, 283-84 (2005).

<sup>4</sup> S. Rep. No. 91-1196 at 21 (Sept. 17, 1970) (guaranteeing the public the right to seek "vigorous enforcement," should the federal, state, or local governments fail to bring a case); see also *Friends of the Earth v. Carey*, 535 F.2d 165, 173 (2d Cir. 1976) ("[T]he very purpose of the citizens' liberal right of action is to stir slumbering agencies and to circumvent bureaucratic inaction that interferes with the scheduled satisfaction of the federal air quality goals.").

<sup>5</sup> S. Rep. No. 91-1196 at 56 (Sept. 17, 1970) ("Where the Secretary is not automatically a party to the action, he must intervene to present evidence and argument on the merits of the petition. Others may also intervene at the court's discretion.").

<sup>6</sup> See Conf. Rep. No. 91-1783 at 55-56 (Dec. 17, 1970) (retaining the Senate's citizen suit provision during the reconciliation process, but with limitations as to the cases that could be brought by citizens against the EPA Administrator).

<sup>7</sup> See 91 Cong. Rec. 19223 (June 10, 1970); S. Rep. No. 91-1196 at 36-39 (Sept. 17, 1970).

<sup>8</sup> *Nat. Resources Def. Council v. Train*, 510 F.2d 692, 699 (D.C. Cir. 1974) ("The citizen suits provision of section 505 was explicitly modeled on the provision enacted in the Clean Air Amendments of 1970.").

<sup>9</sup> See, e.g., S. Rep. No. 92-414 at 79-82 (discussing the citizen suit provision but not mentioning citizen intervention in criminal cases).

<sup>10</sup> Seidenfeld & Nugent, *supra* note 3, at 285.

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., *Friends of the Earth v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 184-88 (2000) (limiting Article III standing to injury to the plaintiff, not injury to the environment); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108-10 (1998) (finding that because the citizen group alleges only a past

infraction, injunctive relief will not redress the injury, and that because the relief sought would not remedy the alleged injury, the citizens lack standing).

<sup>13</sup> FED. R. CIV. P. 24(a)(1).

<sup>14</sup> See, e.g., *United States v. Oregon*, 913 F.2d 576, 587 (9th Cir. 1990).

<sup>15</sup> 18 U.S.C. § 3771 (2012); FED. R. CRIM. P. 60.

<sup>16</sup> FED. R. CRIM. P. 60(a)(1), (a)(3).

<sup>17</sup> The Crime Victims' Rights Act defines "crime victim" as "a person directly or proximately harmed as the result of the commission of a Federal offense." 18 U.S.C. § 3771(e) (2012). However, an environmental crime may be a crime without a victim or the party with interest seeking to may not be the crime victim. As such, the normal rules for victim participation would not be applicable to the party seeking to intervene.

<sup>18</sup> Samuel W. Buell, *Why Do Prosecutors Say Anything? The Case of Corporate Crime*, 96 N.C.L. REV. 823, 840 (2018) ("[P]rosecutors seem to share an abiding and reasonable belief that . . . their 'client' is the public . . . Prosecutors act with a fiduciary-like concept of their relationship to the communities in which they work—'your officials know your best interests' . . .").

<sup>19</sup> But see *id.* (noting that until the 19th century, victims often had the burden of directly prosecuting criminal cases, and, though uncommon, victims are still sometimes allowed to privately prosecute cases in England).

<sup>20</sup> See *Criminal Law*, BLACK'S LAW DICTIONARY (10TH ED. 2014) (defining criminal law as "the body of law defining offenses against the community at large").

<sup>21</sup> 33 U.S.C. § 1365(b)(1)(B) (2012).

<sup>22</sup> See Henry M. Hart Jr., *The Aims of Criminal Law*, 23 LAW AND CONTEMP. PROBS., 401, 404 (1958) ("What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition.").

<sup>23</sup> See *id.* at 405 (defining crime as "conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.").

<sup>24</sup> *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987); *United States v. City of Toledo*, 867 F. Supp. 595, 597 (N.D. Ohio 1994). But see *Friends of the Earth v. Laidlaw Envtl. Serv., Inc.*, 528 U.S. 167, 181 (2000) (holding that if the defendant continues to violate a statute after the citizen suit has commenced, then the plaintiff has standing to sue for penalties to be paid the U.S. because of the deterrent effect of those penalties).



# USING ARTIFICIAL INTELLIGENCE TO IMPROVE DATA ACCURACY OF AIR POLLUTANTS UNDER THE CLEAN AIR ACT

Lauren Palley\*

Over the last century, industrialization and the air pollution that has come with it have put the planet and its future stability at risk.<sup>1</sup> Artificial intelligence technology (AI), part of a larger “Fourth Industrial Revolution,” has the potential to mitigate these effects through widespread implementation by the Environmental Protection Agency (EPA).<sup>2</sup> The EPA is the governmental agency responsible for regulating air pollutants pursuant to the Clean Air Act (CAA).<sup>3</sup> Congress delegated the authority to the EPA to regulate greenhouse gases (GHGs), such as carbon dioxide, that trap solar energy in the atmosphere.<sup>4</sup> Under the CAA and the Supreme Court’s decision in *Massachusetts v. U.S. Environmental Protection Agency*,<sup>5</sup> the EPA has both the authority and the duty to regulate GHGs using AI since it is the best available technology.

The CAA requires the EPA to set health-based standards for ambient air quality, set deadlines as to when the achievement of those standards must be met, and set national emission standards for large sources of air pollution, including motor vehicles, power plants, and other industrial sources.<sup>6</sup> Section 109 of the CAA requires the EPA to establish National Ambient Air Quality Standards (NAAQS) for pollutants that endanger the public health or welfare, in the EPA Administrator’s judgment, and whose presence in ambient air results from numerous or diverse sources.<sup>7</sup> The NAAQS for “certain common and widespread pollutants” must be based on the “latest science.”<sup>8</sup> The latest science is AI, and therefore, the EPA has the authority under the CAA to use AI in relation to the NAAQS.

AI describes computer systems that simulate human intelligence through their ability to think, learn, and sense their environment.<sup>9</sup> AI is the most advanced technology for analyzing large amounts of data, reaching conclusions about that data, finding patterns, and predicting future behavior.<sup>10</sup> It has the potential to be at the forefront of solving climate change issues and creating a more sustainable future if it is implemented in various key areas, especially in data collection and processing of air pollutants pursuant to the EPA’s duty. AI can assist with measuring harmful GHGs that have previously been invisible to the naked eye, particularly methane, more effectively and thus creating a larger, more accurate dataset to analyze.<sup>11</sup> Acting under its authority and duty to regulate GHGs, the EPA’s implementation of AI would allow pollution that was previously difficult to observe, measure, and report to be visible by all parties involved in real time.

Additionally, case law over the last decade has further defined the EPA’s authority and duty to regulate GHGs using the

newest technologies. In *Massachusetts v. U.S. Environmental Protection Agency*, the Supreme Court relied heavily on scientific data regarding global warming when it established that the EPA not only has the ability, but also has a duty to regulate GHGs as they fall under the CAA’s definition of “air pollutant.”<sup>12</sup> The Court also emphasized in a later case, *American Electric Power Co. v. Connecticut*,<sup>13</sup> that due to Congress’s delegation of authority to the EPA, it is the most equipped body to deal with GHGs because agencies can utilize “scientific, economic, and technological resources.”<sup>14</sup> Additionally, the Court ruled in *Utility Air Regulatory Group v. U.S. Environmental Protection Agency*<sup>15</sup> that the Agency has the authority to require the best available control technology (BACT) from certain previously regulated sources.<sup>16</sup> Therefore, the EPA’s authority to regulate GHGs using the best technology available, such as AI, is consistent with relevant case law.<sup>17</sup>


The Office of Inspector General (OIG) of the EPA authored a report and key example where AI could be beneficial and should be implemented. The report showed that of all major CAA facilities that have had an evaluation in the last five years, data uploaded into the EPA’s Enforcement and Compliance History Online (ECHO) system was inaccurate.<sup>18</sup> Data was either not reported or was inaccurately entered into the database.<sup>19</sup> These errors went undetected “because of a lack of data quality oversight that would identify facilities overdue for [Full Compliance Evaluation].”<sup>20</sup> This inaccurate data hindered the EPA’s oversight of compliance programs and allowed for numerous major CAA facilities to potentially emit large amounts of undetected or unreported air pollutants.

Taking new technologies into consideration under its authority and duty to regulate GHGs using the most advanced technology, the EPA finalized a rule in 2016 establishing new source performance standards for the oil and natural gas sector.<sup>21</sup> In part, it mandates that “monitoring of the components must be conducted using optical gas imaging,”<sup>22</sup> in addition to adding a provision for emerging technology such as continuous emissions monitoring technologies.<sup>23</sup> Optical gas imaging (OGI) is the use of infrared cameras to detect invisible pollution such as methane leaks and provides images of a leak depicted as black clouds.<sup>24</sup> However, while these images are helpful, they cannot provide quantitative information about the fugitive emissions they photograph.<sup>25</sup> Quantitative data is crucial for GHG management because “you can’t improve what you can’t measure.”<sup>26</sup> The

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EPA's implementation of AI is necessary, in addition to OGI, to measure several key GHG emissions. Without the use of AI, the EPA is failing to meet its duty to regulate GHGs using the newest available technology.

Because the EPA has the authority to regulate significant air pollutants that are emitted from facilities, accurate data collection is crucial for effective reporting. Once the data is gathered, the EPA must efficiently analyze it to achieve accurate results to view past, current, and future emissions. Gathering accurate emissions data is only one step of the process, but it is essential

for determining NAAQS. As part of EPA's Next Generation Compliance Program, the EPA is "commit[ed]" to start using outside sources for data to improve data accuracy.<sup>27</sup> Once EPA integrates AI within the Agency and employs outside sources, the technology would benefit the entities it regulates, decisionmakers, and all communities impacted by air pollution.<sup>28</sup> Pursuant to the CAA and relevant case law, the EPA is required to use the latest available technology and must strive to incorporate artificial intelligence more widely and with more urgency. 

## ENDNOTES

<sup>1</sup> Celine Herweijer, Dominic Waughray, *Fourth Industrial Revolution for the Earth: Harnessing Artificial Intelligence for the Earth*, PRICEWATERHOUSECOOPERS (JAN. 2018), <https://www.pwc.com/gx/en/sustainability/assets/ai-for-the-earth-jan-2018.pdf> (referring to a "Fourth Industrial Revolution" characterized by AI, an "established digital economy . . . the Internet of Things, robots, autonomous vehicles, biotechnology, nanotechnology and quantum computing" that will transform current industries).

<sup>2</sup> *Id.* (discussing how AI is only one characteristic of the "Fourth Industrial Revolution").

<sup>3</sup> 42 U.S.C. § 7401 (2012).

<sup>4</sup> *Massachusetts v. U.S. Env'tl. Prot. Agency*, 549 U.S. 497, 497 (2007) (holding that the EPA has the authority to regulate GHGs and explaining the danger of GHG as "when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat").

<sup>5</sup> *Id.*

<sup>6</sup> CONG. RESEARCH SERV., RL 30853, *CLEAN AIR ACT: A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS* (NOV. 7, 2018) [hereinafter *Clean Air Act: A Summary*].

<sup>7</sup> *Id.* at 3 (referring to the Administrator of the EPA, the head of the agency).

<sup>8</sup> *Clean Air Act Requirements and History*, U.S. ENVTL. PROT. AGENCY (JAN. 10, 2017), <https://www.epa.gov/clean-air-act-overview/clean-air-act-requirements-and-history>; see also *Clean Air Act: A Summary*, *supra* note 6, at 3 (discussing that the CAA requires the EPA to review the scientific data which the standards are based every five years).

<sup>9</sup> *Using Artificial Intelligence in Law Departments*, THOMSON REUTERS, 2018 [https://1.next.westlaw.com/Document/Iddbbd1a8003511e89bf099c0ee06c731/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default](https://1.next.westlaw.com/Document/Iddbbd1a8003511e89bf099c0ee06c731/View/FullText.html?contextData=(sc.Default)&transitionType=Default) (last visited Dec. 20, 2018) (noting how AI improves tasks over time, but this is not an official legal definition).

<sup>10</sup> *Id.*

<sup>11</sup> See Cynthia Giles, *Next Generation Compliance*, 30 ENVTL. FORUM 22, 22 (SEPT./OCT. 2013).

<sup>12</sup> *Massachusetts*, 549 U.S. at 506 (citing to the CAA's definition of "air pollutant" to include "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air").

<sup>13</sup> 564 U.S. 410 (2011).

<sup>14</sup> *Id.* at 428 (reinforcing that the EPA, as the expert agency on the matter, is best suited "to serve as primary regulator of greenhouse gases").

<sup>15</sup> 573 U.S. 302 (2014).

<sup>16</sup> *Id.* at 331 (holding the EPA's decision to require best available control technology for greenhouse gases emitted by certain sources is permissible under the Clean Air Act).

<sup>17</sup> *E.g., id.* at 329; *Am. Elec. Power Co.*, 564 U.S. at 410; *Massachusetts*, 549 U.S. at 497.

<sup>18</sup> U.S. ENVTL. PROT. AGENCY, ENFORCEMENT AND COMPLIANCE: CLEAN AIR ACT FACILITY EVALUATIONS ARE CONDUCTED, BUT INACCURATE DATA HINDER EPA OVERSIGHT AND PUBLIC AWARENESS 9 (2016) (explaining how the EPA conducts facility evaluations for all major CAA facilities in accordance with the Compliance Monitoring Strategy (CMS) to ensure companies' compliance with EPA laws and regulations).

<sup>19</sup> *Id.* (clarifying that ECHO integrates data from other EPA databases to provide the public with facility-specific compliance information data from other EPA databases to provide the public with facility-specific compliance information).

<sup>20</sup> *Id.*

<sup>21</sup> Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, Final Rule, 81 Fed. Reg. 107, 35824 (Jun. 3, 2016).

<sup>22</sup> *Id.* at 35846 (asserting its authority to regulate monitoring and repair of fugitive emission components at well sites and compressor stations).

<sup>23</sup> *Id.* at 35861 (allowing for the use of emerging technology, like continuous emissions monitoring technologies, and agreeing that the continued development of these cost-effective technologies should be encouraged); see also David A. Hindin & Jon D. Silberman, *Designing More Effective Rules and Permits*, 7 GEO. WASH. J. ENERGY & ENVTL. L. 103, 123 (2016) ("[P]roviding regulated entities with accurate measures, in a standardized format, of deviations indication that regulatory requirements are being, or may soon be, violated.").

<sup>24</sup> Laith Amin, *Disruptive Technology Meets the Intractable Challenge of Fugitive Gas Emissions*, ADVISIAN, <https://www.worleyparsons.com/~media/Files/W/WorleyParsons/documents/markets/fugitivegasemissions.pdf> (last visited Nov. 12, 2018). (explaining how OGI utilizes infrared technology to capture emissions otherwise invisible to the human eye); see also Robert L. Glicksman, David L. Markell & Claire Monteleoni, *Technological Innovation, Data Analytics, and Environmental Enforcement*, 44 ECOLOGY L. Q. 41, 67 (2017) (discussing how agencies, including the EPA, are starting to utilize infrared camera technology).

<sup>25</sup> Amin, *supra* note 24.

<sup>26</sup> *Id.*

<sup>27</sup> Glicksman, Markell & Monteleoni, *supra* note 24, at 69; see also Giles, *supra* note 11 (describing the EPA's Next Generation Compliance initiative and its five key components: design regulations and permits, advances emissions and pollutant detection technology, electronic reporting, expanded transparency, and innovative enforcement).

<sup>28</sup> Glicksman, Markell & Monteleoni, *supra* note 24, at 65.

# REAL PROPERTY SUBLESSORS ESCAPE CERCLA OWNER LIABILITY IN THE SECOND CIRCUIT

By Alison Shlom\*

## I. INTRODUCTION

Under federal law, a tenant who subleases a property to a sublessee who contaminates the site may be liable for cleanup costs depending on which federal court hears the case.<sup>1</sup> The Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA) circular definition of a property "owner" has resulted in a circuit split on this issue.<sup>2</sup> In the Second Circuit, courts rely on a five-factor test to determine owner liability.<sup>3</sup> In sharp contrast, the Ninth Circuit incorporates state-specific law to assign owner liability.<sup>4</sup>

The Second Circuit recently decided *Next Millennium, LLC v. Adchem Corp.*,<sup>5</sup> where Pufahl Realty, which changed its name to NSR Corp. and assigned all of its assets to NSR Company (NSR), leased a building located at 89 Frost Street, North Hempstead, New York.<sup>6</sup> NSR subleased the property from 1973 to 1976 without the landlord's consent or notice.<sup>7</sup> The sublessee, Lincoln, installed a commercial dry cleaner that used large amounts of perchloroethylene (PCE) in its daily operations, which resulted in groundwater contamination and required on-site remediation.<sup>8</sup> Twenty years later, between 1997 and 1998, Next Millennium and 101 Frost (Next Millennium) purchased the contaminated property, confident that they could recover upcoming cleanup expenses from the previous sublessor and sublessee as liable parties.<sup>9</sup>

Next Millennium claimed that NSR was a *de facto* owner at the time of contamination under a site control theory of ownership.<sup>10</sup> The Court of Appeals rejected all claims, referring to the precedent set in *Commander Oil v. Barlo Equipment Corporation*,<sup>11</sup> the controlling ownership test at the time of the decision.<sup>12</sup> In *Commander Oil*, the Second Circuit established a five-factor test to determine ownership.<sup>13</sup> The five factors are: (1) the length of the lease and rights of the owner/lessor to determine use of the property; (2) the terms of the lease allowing the owners to terminate the lease before it expires; (3) the right of the lessee to sublet the property without notifying the owner; (4) the lessee's responsibility to pay taxes, assessments, insurance, and operation and maintenance costs; and (5) the lessee's responsibility to make repairs.<sup>14</sup> The court found that NSR was not an owner under the *Commander Oil* test, and Lincoln, the original tenant corporation, had dissolved by the time of suit.<sup>15</sup> Therefore, the sublessor and sublessee escaped contribution and joint and several liability.<sup>16</sup>

Next Millennium filed a petition for certiorari with the Supreme Court, challenging the *Commander Oil* five-factor test.<sup>17</sup> The petitioners argued that a sublessor should be liable

for costs of cleaning up contamination when the sublessor satisfies the state-specific common law definition of "owner," had exclusive site control, and polluted the site through its operations.<sup>18</sup> The Supreme Court denied certiorari.<sup>19</sup>

The *Commander Oil* test diverges from use of state-specific common law in assigning owner liability under CERCLA, yet it remains the law in the Second Circuit.<sup>20</sup> Consequently, a subsequent buyer such as Next Millennium—which had no site control at the time of the polluting event, did not sublease the property to polluting sublessees, and did not profit from the contamination—potentially bears the burden of paying for all cleanup costs without contribution from other parties.<sup>21</sup>

This comment argues that the Second Circuit's divergence from the state-specific common law regarding owner liability under CERCLA is inconsistent with Congress's clear intent, unlike the Ninth Circuit's approach, because it does not incorporate state-specific common law and it separates "owner" from "operator." Part II describes Congress's intent for CERCLA liability.<sup>22</sup> Part II also explains the creation of the Second Circuit's ownership test, the Ninth Circuit's state-specific common law approach to ownership, and the common law in New York and California, respectively, regarding ownership.<sup>23</sup> Part III argues that the Second Circuit ownership test is inconsistent with Congress's intent for strict owner liability by deviating from the state common law definition of "owner," while the Ninth Circuit approach provides a clear guideline, using state common law to assign owner liability under CERCLA.<sup>24</sup> Part IV recommends that the Supreme Court or Congress overturn the Second Circuit ownership test because it is inconsistent with the remedial purposes of CERCLA.<sup>25</sup> This comment concludes that the Second Circuit ownership test deters investors from purchasing contaminated land due to the likelihood of litigation on the indicia of ownership.<sup>26</sup>

## II. BACKGROUND

Hazardous waste sites pose a serious threat to the environment and human health.<sup>27</sup> In 1980, prior to an administrative change, Congress acknowledged the significance of these harms and enacted CERCLA.<sup>28</sup>

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## A. CERCLA

### 1. BACKGROUND AND CONGRESSIONAL INTENT

Congress enacted CERCLA in 1980 to facilitate prompt cleanup of hazardous waste sites and place the financial burden of environmental contamination on those responsible and benefitting from the externalized cost of the waste.<sup>29</sup> Congress enacted CERCLA to impose liability for clean-up of land and water retroactively, lay out a process for identifying priority sites, and determine the appropriate response actions.<sup>30</sup>

Under CERCLA, the government is authorized to respond to a release of a hazardous substance and then recover cleanup costs from potentially liable parties.<sup>31</sup> Congress intended that courts hold liable those who are responsible for the contamination so long as the interpretation is supported expressly by the statute or by the legislative history.<sup>32</sup>

CERCLA lacked clarity, and in 1986, Congress clarified CERCLA with the Superfund Amendments and Reauthorization Act (SARA).<sup>33</sup> Ten years later, in 1996, Congress made a second attempt at clarification with the Asset Conservation, Lender Liability, and Deposit Insurance Protection Act (ACA).<sup>34</sup> However, neither set of amendments clarified the basic meaning of the word “owner.”<sup>35</sup>

For three decades, plaintiffs persuaded the courts that CERCLA’s remedial purpose mandates a liberal interpretation and broad application of the statute.<sup>36</sup> However, in *CTS Corp. v. Waldburger*,<sup>37</sup> the Supreme Court explicitly urged lower courts to honor the statutory text.<sup>38</sup> It is still unclear, however, whether lower courts are ready to accept *Waldburger* as the proverbial nail in CERCLA’s broad remedial purpose’s coffin.

### 2. LIABLE PARTIES UNDER SECTION 107

CERCLA liability under Section 107 extends to four classes of potentially liable parties (PRPs).<sup>39</sup> These classes include current owners and operators of a property, certain past owners and operators, arrangers of disposal of hazardous waste, and transporters of hazardous waste.<sup>40</sup> Congress rejected a general causation formula that would assign liability for contamination based on a party’s connection to the site.<sup>41</sup> This distinction holds owners and operators liable for contaminated facilities and facilities that show a threat of contamination regardless of whether the owner or operator caused the contamination.<sup>42</sup>

The statutory language is circular and vaguely defines an owner and operator as “any person owning or operating” contaminated property.<sup>43</sup> The circular definition of owner and operator gave courts the discretion to assign meaning to the statutory language and therefore govern CERCLA liability.<sup>44</sup> Congress intended that courts decide the circumstances under which a holder of a less-than-fee-simple interest in real property is subject to owner liability, but the definition remains indeterminate and creates confusion in the enforcement of the statute.<sup>45</sup>

Ownership of land under CERCLA is a property issue, and property law questions are traditionally a matter of state law.<sup>46</sup> The Supreme Court established that state courts determine property interests based on their own rules.<sup>47</sup> The Supreme Court

clarified in *United States v. Bestfoods*<sup>48</sup> that when Congress gave the word “operator” a circular definition, the definition should be based on the plain meaning of the word and state common law.<sup>49</sup> The Second Circuit interpreted *Bestfoods* to distinguish “owner” and “operator,” while the Ninth Circuit interpreted *Bestfoods* as direction to follow the state common law definition of “owner.”<sup>50</sup>

### 3. JOINT AND SEVERAL LIABILITY UNDER CERCLA

CERCLA is a strict liability statute and imposes liability on some parties who may not have acted culpably.<sup>51</sup> By the time Congress enacted CERCLA, courts had established that in pollution cases where two or more defendants cause indivisible harm, the defendant could seek contribution from their joint tortfeasors.<sup>52</sup> Harm at a CERCLA site is usually indivisible,<sup>53</sup> and therefore courts hold defendants jointly and severally liable under CERCLA.<sup>54</sup>

Congress deleted CERCLA’s original joint and several liability section, saying that the standard should be the same as the Clean Water Act Section 311.<sup>55</sup> However, Courts have determined that Congress intended that courts incorporate joint and several liability principles in judicial interpretation.<sup>56</sup> Congress envisioned that doctrines of federal common law govern liability issues of federal government interest that are not resolved expressly in CERCLA.<sup>57</sup>

The Second Restatement of Torts makes joint and several liability the presumption.<sup>58</sup> When the Environmental Protection Agency (EPA) immediately cleans up a CERCLA site, courts assign joint and several liability to the liable parties.<sup>59</sup> On the other hand, when the harm is less immediate, a private party may clean up the CERCLA site, and courts assign either joint and several or several liability to parties who are liable.<sup>60</sup>

### 4. THE RIGHT TO SEEK CONTRIBUTION UNDER SECTION 113(F)

Congress amended CERCLA in 1986 with SARA to permit private persons to sue to recover at least some of their cleanup costs from other PRPs under Section 113(f).<sup>61</sup> This amendment created a separate federal cause of action and eased the burden of the original defendant sued by the EPA.<sup>62</sup> A defendant who is found liable under Section 107 is entitled to relief under Section 113(f) by seeking contribution from other PRPs if the defendant can demonstrate divisibility of the environmental harm.<sup>63</sup> The court may allocate costs as it determines appropriate.<sup>64</sup> In *Cooper Industries, Inc. v. Aviall Services, Inc.*<sup>65</sup> and *United States v. Atlantic Research Corp.*,<sup>66</sup> the Supreme Court held that a private party who has not been sued under CERCLA 106 or 107(a) may not obtain contribution under 113(f)(1) from other liable parties.<sup>67</sup> These cases modified the extent of contribution rights and limited the ability of private parties to recover response costs.<sup>68</sup>

### 5. THE BONA FIDE PROSPECTIVE PURCHASER DEFENSE TO CERCLA LIABILITY

Investors that conduct Environmental Site Assessments may be exempt from CERCLA liability under the “bona fide prospective purchaser” (BFPP) exemption.<sup>69</sup> The application



of the BFPP provision became clearly enforceable for tenants under the Brownfields Utilization, Investment, and Local Development Act of 2018.<sup>70</sup> A tenant whose lease of a property began after January 11, 2002 can establish a BFPP defense to CERCLA owner liability, and thereby escape liability when leasing previously-contaminated property.<sup>71</sup>

## B. CIRCUIT SPLIT IN APPROACHING OWNER LIABILITY UNDER CERCLA

The circular definition of a property “owner” under CERCLA has resulted in a circuit split.<sup>72</sup> In the Second Circuit, courts depend on a five-factor test to determine owner liability.<sup>73</sup> The Ninth Circuit, on the other hand, incorporates state-specific law to assign owner liability.<sup>74</sup>

### 1. THE SECOND CIRCUIT OWNERSHIP TEST

Under New York common law, tenants (and not landlords) are held responsible for injury caused by the condition of use of leased property.<sup>75</sup> To interpret state environmental statutes, New York courts follow the principle that tort liability concerning property depends on occupation and control.<sup>76</sup> However, the Second Circuit framework for CERCLA owner liability does not follow this principle.<sup>77</sup>

In *Commander Oil*, the Second Circuit generated a new five-factor test to determine de facto ownership of a lessee under CERCLA.<sup>78</sup> Commander Oil owned a lot that Barlo subleased to Pasley.<sup>79</sup> The subleased lot housed petroleum storage tanks, and Pasley used the lot to repackage solvents purchased in bulk and to reclaim and revitalize used solvents.<sup>80</sup> The EPA discovered contamination and remediated the site, and Commander Oil agreed to reimburse the EPA for costs.<sup>81</sup> Commander Oil sought contribution under CERCLA from Barlo and Pasley as potentially liable parties.<sup>82</sup> The court found that Barlo did not possess sufficient “attributes of ownership” because all factors showed that Barlo did not have the rights and obligations of an owner.<sup>83</sup>

The Second Circuit’s definition of “owner” is not determined by state law.<sup>84</sup> In *Bestfoods*, the Supreme Court differentiated “owner” from “operator.”<sup>85</sup> As the Supreme Court clarified, Congress intended that the court use plain meaning of the word “operator” and state common law as bedrock principles.<sup>86</sup> The Second Circuit interpreted *Bestfoods* to define “owner” and “operator” as disjunctive.<sup>87</sup> Disjunctive definitions lead to a limited interpretation of liability and the Second Circuit framework incentivizes litigation.<sup>88</sup>

### 2. THE NINTH CIRCUIT COMMON LAW OWNERSHIP TEST

By contrast, the Ninth Circuit follows the Supreme Court’s guidance in *Bestfoods* and uses state common law to determine owner liability under CERCLA.<sup>89</sup> California common law distinguishes between possessory interests, such as revocable permits and ownership interests.<sup>90</sup>

The Ninth Circuit used state common law when examining whether an easement constitutes ownership for CERCLA liability in *Long Beach Unified School District v. Dorothy B. Goodwin California Living Trust*.<sup>91</sup> The easement holders (M&P) ran

a non-polluting pipeline across a parcel of land.<sup>92</sup> The local school district sued the tenant who maintained a waste pit that contaminated the land, and the tenant settled.<sup>93</sup> The local school district also sued M&P under CERCLA for contribution, even though the pipeline had no connection to the waste pit.<sup>94</sup> The court found that holding an easement does not itself constitute “ownership” in relevant civil state property law because an easement is merely a limited right to use property that is possessed by another entity.<sup>95</sup>

In *City of Los Angeles v. San Pedro Boat Works*,<sup>96</sup> Pacific American, whose successor-in-interest was BCI Coca-Cola, possessed revocable permits from the City of Los Angeles for Berth 44 boat works.<sup>97</sup> The City found contamination on the site and claimed that BCI Coca-Cola was liable as an owner under CERCLA.<sup>98</sup> The Ninth Circuit held that BCI Coca-Cola merely held possessory interests and therefore was not an owner.<sup>99</sup> The court limited owner liability to those who hold the “sticks in the bundle of rights.”<sup>100</sup>

In *El Paso Natural Gas Co. v. United States*,<sup>101</sup> the District Court of Arizona recognized that a party holding a fee title could have less than absolute ownership.<sup>102</sup> However, it also held that a fee title holder with plenary and supervisory powers is liable as an owner under CERCLA.<sup>103</sup> The United States maintained power over the reservation land at the time of the contamination and thus was deemed liable under CERCLA as an owner.<sup>104</sup>

## III. ANALYSIS

### A. THE SECOND CIRCUIT DIVERGED FROM CONGRESSIONAL INTENT BY CREATING A FEDERAL TEST FOR OWNERSHIP AND SEPARATING “OWNER” FROM “OPERATOR.”

When enacting CERCLA, Congress empowered courts to interpret liability.<sup>105</sup> However, a court must follow Congress’s intent to develop the common law for CERCLA ownership liability, place the financial burden of environmental contamination on those responsible and benefitting from the activities that caused the waste, and interpret the statute broadly and liberally so long as the interpretation is supported expressly in the statute or through legislative history.<sup>106</sup> The Second Circuit’s five-factor test for determining ownership does not follow state common law and does not allow Congress’s goals for CERCLA to manifest.<sup>107</sup> In contrast, the Ninth Circuit uses the state-specific property law definition of “ownership.”<sup>108</sup> The Ninth Circuit’s interpretation of CERCLA liability offers clear guidelines for investors in land and therefore incentivizes early settlements, as intended by Congress.<sup>109</sup>

### 1. THE SECOND CIRCUIT’S OWNERSHIP TEST FACTORS ARE SUSCEPTIBLE TO MANIPULATION IN LITIGATION WHICH CREATES A BARRIER FOR INVESTMENT.

The Second Circuit created a five-factor ownership test to limit the site control ownership test and to separate “owner” from “operator.”<sup>110</sup> The judge-made test for ownership applies to both Section 107 and Section 113(f) of CERCLA, which allow the government to recoup financial losses and for private

parties to split the costs of contamination cleanup among other PRPs.<sup>111</sup> The *Commander Oil* test is an expanded version of the site-control test, which Second Circuit courts rejected for being overbroad.<sup>112</sup>

While the Ninth Circuit follows a state common law approach, as instructed by both legislative history and the Supreme Court in *Bestfoods*, the Second Circuit diverged from the state common law definition of ownership when deciding *Commander Oil* by creating this five-factor ownership test.<sup>113</sup> Congress's remedial goals in enacting CERCLA were to facilitate prompt cleanup of hazardous waste sites and to hold parties liable who were ultimately responsible for the contamination, dependent on the facts of the case.<sup>114</sup> In particular, Congress intended the principles of state common law govern liability issues not resolved expressly in CERCLA because common law principles are traditional and evolving.<sup>115</sup> While presenting the final, compromised CERCLA bill, Senator Randolph and Representative Florio expressly encouraged the development of common law in determining the liability of joint tortfeasors who are responsible for the costs of cleanup under CERCLA, which would, in turn, promote uniformity of interpretation of the statute.<sup>116</sup> The Second Circuit's five-factor test expands on the site control test rather than following the state-specific definition of "owner," and therefore, the Second Circuit's method for defining ownership under CERCLA is inconsistent with Congressional intent.<sup>117</sup>

In addition to applying state common law, Congress intended that CERCLA incentivize quick clean-up of contaminated land, which requires that courts grant incentives for investors to buy and clean contaminated land efficiently, such as a streamlined path to receive contribution from other PRPs.<sup>118</sup> The Second Circuit's five-factor *Commander Oil* ownership test is easily manipulated, thereby incentivizing litigation.<sup>119</sup> Due to this manipulation, a party who seeks contribution from other PRPs may not be able to obtain such contribution.<sup>120</sup> This test goes against the purpose of CERCLA and does not provide a sufficient incentive to avoid contamination of land.<sup>121</sup> As evidenced in *Next Millennium*, the Second Circuit holds a subsequent purchaser solely liable based on a federal judge-made law that contradicts the state property law, which may have required contribution from the prior lessee that sublet the facility to a contaminating sublessee.<sup>122</sup>

Congress enacted CERCLA to place the financial burden of environmental contamination on those responsible and benefiting from the activities that caused the waste.<sup>123</sup> As a result of the *Commander Oil* ownership test, a subsequent owner in the Second Circuit who had no site control, did not sublease the property to the polluting sublessees, and did not profit from the contamination bears the burden of providing all cleanup costs.<sup>124</sup> Meanwhile, sublessors who had site control and occupation of the facility at the time of contamination escape ownership liability because the lease is designated as typical and does not transfer ownership to the lessee.<sup>125</sup> The *Commander Oil* ownership test does not follow the Congressional intent to put the financial burden of cleanup on all parties who are responsible for the land

contamination.<sup>126</sup> Additionally, *Commander Oil* diverges from congressional intent because the test relieves sublessors from owner liability despite acting as an owner.<sup>127</sup> The Ninth Circuit has discredited and rejected *Commander Oil* as improper in determining ownership liability under CERCLA, demonstrating the Second Circuit's divergence from the intended common law application of owner liability.<sup>128</sup>

Rather than defining "owner" under CERCLA as determined by state law, the Second Circuit's federal judge-made law merely expanded the site-control test.<sup>129</sup> Under New York Common Law, tenants and not landlords are generally held responsible for injury caused by leased property.<sup>130</sup> Additionally, New York courts follow the principle that liability in tort concerning property generally depends on occupation and control.<sup>131</sup> In *Commander Oil*, the Second Circuit declined to follow the settled principles of New York common law, which provide an easy standard to meet "ownership" and therefore is a more expansive approach and holds more PRPs liable for cleanup costs.<sup>132</sup> The Second Circuit's approach to ownership liability has more factors to consider, which results in a narrower framework for owner liability under CERCLA.<sup>133</sup>

In addition to its inconsistency with Congressional intent to follow state common law, the Second Circuit's interpretation of CERCLA liability in *Commander Oil* limits the reach of owner liability by defining "owner" as separate from "operator."<sup>134</sup> In determining whether Barlo was an "owner" and therefore liable for contribution, the Second Circuit's *Commander Oil* ownership test rejected the common law site control test for ownership liability, reasoning that this definition of "owner" is too similar to "operator."<sup>135</sup> The Second Circuit looked to *Bestfoods*, and interpreted the Supreme Court's decision to mean that courts should distinguish "owner" and "operator."<sup>136</sup> In *Commander Oil*, the court reasoned that control over a facility could establish operation, so if site control could also establish ownership, then operation would be merely a subset of ownership.<sup>137</sup> However, the rule of decision for the term "operator" in *Bestfoods* is analogous to the term "owner" because Congress gave both terms circular definitions in CERCLA.<sup>138</sup> Therefore, the Second Circuit did not follow the Supreme Court's precedent and rely on state common law to define "owner" when the statute provides a circular definition of the term.<sup>139</sup> The Second Circuit's ownership test does not support the New York common law principle in determining ownership under CERCLA and is inconsistent with legislative history.<sup>140</sup>

Furthermore, the Second Circuit misinterprets Sections 107(a)(1) and (2) of CERCLA by separating owner and operator liability.<sup>141</sup> Congress assigns liability to owners, operators, or both under CERCLA.<sup>142</sup> Sections 107(a)(1) and (2) of CERCLA use "and" and "or" interchangeably.<sup>143</sup> Owner and operator substantially overlap in the language of the statute; thus courts are instructed by the language to interpret them overlapping rather than as alternatives.<sup>144</sup> If Congress intended owners and operators to be separate and not overlapping, they would always use "or" or would write "the owner and the operator" rather than "the owner and operator."<sup>145</sup>

## 2. THE NINTH CIRCUIT'S CONSTRUCTION OF OWNER LIABILITY HOLDS LIABLE BOTH THE PASSIVE TITLE OWNER OF REAL PROPERTY WHO ACQUIESCES IN ANOTHER'S CONTAMINATION AND THE ACTIVE OPERATOR OF THE FACILITY.

Congress intended for courts to develop a state common law definition of "owner."<sup>146</sup> The Ninth Circuit applies the common law definition of "owner" to determine whether to assign liability under CERCLA Sections 107 and 113(f).<sup>147</sup> The Ninth Circuit, but not the Second Circuit, has uniformly applied CERCLA owner liability as intended by Congress by developing the state common law definition of "owner."<sup>148</sup>

The Ninth Circuit has followed legislative intent by incorporating the state-specific definition of "owner" from relevant property law cases.<sup>149</sup> The Ninth Circuit focuses on case law rather than the immediate and unique facts of each case, and questions the role of "indicia of ownership."<sup>150</sup> The Ninth Circuit courts continue to develop a consistent common law definition of "owner" to determine owner liability under CERCLA by relying on principles such as expansions and adaptations of the site control test to determine ownership.<sup>151</sup>

The Ninth Circuit has developed the common law distinction of whether an easement holder is an owner, thereby honoring Congressional intent to apply the state-specific definition of "owner."<sup>152</sup> The Ninth Circuit's potential "bundle of rights" exception to the common law distinction between possessory and ownership rights differs from the *Commander Oil* test because the bundle of rights exception limits liability to those who enjoy the rights of ownership, while the *Commander Oil* test is an expanded version of the site control test.<sup>153</sup>

The Ninth Circuit's framework for assigning owner liability has developed by incorporating state common law, as Congress intended.<sup>154</sup> In *Long Beach*, the Ninth Circuit looked to both federal and California common law to determine the definition of "owner" in regards to CERCLA liability.<sup>155</sup> The court noted that circular definitions within a statute show Congressional intent for courts to apply "ordinary meanings" rather than unusual or technical alternative meanings.<sup>156</sup> The common law clearly states that there is a distinction between holding an easement and owning the contaminated land.<sup>157</sup> Therefore, the court applied this definition and found that merely holding an easement is not sufficient to constitute "ownership" for purposes of CERCLA liability.<sup>158</sup> In *San Pedro*, which also took place in California, the court continued to build upon the California common law, including the holding from *Long Beach*, and further distinguished between ownership interests and possessory interests.<sup>159</sup> In *San Pedro*, the court found that site control was not enough, and built upon the site control test with state common law regarding a fee title owner's control over a permittee's use of the property.<sup>160</sup>

Unlike the Second Circuit, the Ninth Circuit follows state common law and thus imposes liability only on parties responsible under state law providing clear guidelines for investors in land.<sup>161</sup> In enacting CERCLA, Congress intended to place

the financial burden of contamination on those who were actually responsible, based on the four categories under CERCLA Section 104 rather than by causation.<sup>162</sup> In *El Paso Natural Gas*, the Ninth Circuit recognized that a party holding the fee title could have less than absolute ownership, but that a fee title holder with plenary and supervisory powers constitutes an owner that is liable under CERCLA, and therefore the court held the supervisor of the facility liable for the contamination.<sup>163</sup> The defendants, who held fee title and substantial powers over the land, contributed to the costs of cleanup.<sup>164</sup> This interpretation of CERCLA liability under Sections 107 and 113(f) supports the statute's remedial purpose of holding liable those who were ultimately responsible and who may have benefitted from the externalized cost of contamination, or who were otherwise connected with the contaminated site.<sup>165</sup>

The Ninth Circuit has taken an approach that focuses on applying state common law and fulfilling the remedial purposes of the CERCLA statute.<sup>166</sup> By following the state common law definition of "owner," a sublessor in the Ninth Circuit who has site control and otherwise acts as an owner of the facility is likely to be liable as an owner under CERCLA for the remedial costs of contamination by their sublessees.<sup>167</sup>

### B. THE SUBLESSOR IN NEXT MILLENNIUM WOULD HAVE BEEN HELD LIABLE IF THE SECOND CIRCUIT USED THE NINTH CIRCUIT FRAMEWORK FOR CERCLA OWNER LIABILITY.

In *Department of Toxic Substances Control v. Hearstside Residential Corp.*,<sup>168</sup> the Ninth Circuit defined current owner and operator status under CERCLA at the time cleanup costs are incurred rather than a recovery lawsuit seeking reimbursement is filed.<sup>169</sup> Subsequent purchasers who incur the cost of cleanup, therefore, are considered current owners of a property.<sup>170</sup> Following this precedent, *Next Millennium* was held liable as the current owner in *Next Millennium* rather than the original polluter.<sup>171</sup> However, *Next Millennium* could have sought contribution from the previous owners under Section 113(f).<sup>172</sup>

The Second Circuit tried *Next Millennium* and, as a result, the subsequent purchaser of the property—who had no site control at the time of the contamination, did not sublease the property, and did not profit from the contamination—bore the burden of providing all cleanup costs.<sup>173</sup> *Next Millennium* sought contribution from the sublessors for cleanup costs of the contamination to 89 Frost Street under CERCLA Sections 107 and 113(f).<sup>174</sup> The Second Circuit did not have the authority to overrule the *Commander Oil* test, and as a result, the tenants, who sublet the property to a contaminating subtenant, escaped ownership liability.<sup>175</sup>

When Congress enacted CERCLA, it intended the statute to facilitate prompt cleanup of hazardous waste sites and place the financial burden of environmental contamination on those responsible for and benefitting from the activities that caused the waste.<sup>176</sup> Furthermore, Congress intended that courts consider legislative history while interpreting the plain language of the statute.<sup>177</sup> If the Second Circuit ruled consistently with



congressional intent and applied New York's common law in *Next Millennium*, the sublessor may have been held liable as an owner.<sup>178</sup>

The Second Circuit misinterpreted the statutory language of CERCLA Sections 107(a)(1) and 107(a)(2) in *Next Millennium* by defining "owner" and "operator" as completely separate terms.<sup>179</sup> The court would not have distinguished between owner and operator if it had followed Congress's intent and the language of the statute because the statute uses "owners and operators" and "owners or operators" interchangeably.<sup>180</sup> By using these terms interchangeably, Congress intended that the terms overlap.<sup>181</sup>

The *Next Millennium* sublessor would have likely passed the common law test for ownership because the sublessor leased to the sublessee without notice or consent of the landowner.<sup>182</sup> *San Pedro Boat Works* shows that the "bundle of rights" exception in the Ninth Circuit covers this type of control over land.<sup>183</sup> Under New York common law, courts generally look to occupation and control of the site.<sup>184</sup> The sublessor in *Next Millennium* exercised control over the facility at 89 Frost Street at the time that the sublessee contaminated the facility, and therefore the Second Circuit would have likely held the sublessor liable if it applied New York common law to assess the sublessor's ownership status.<sup>185</sup> This is unlike *3550 Stevens Creek Associates v. Barclays Bank*,<sup>186</sup> where the Ninth Circuit did not extend owner liability to past and present owners of commercial buildings containing asbestos.<sup>187</sup> However, contamination of PCE is commonly tried in CERCLA cases and is at the heart of CERCLA.<sup>188</sup> The limitation in *3550 Stevens Creek Associates* would likely not apply to *Next Millennium* because there was more relevant common law regarding PCE contamination than there was common law for commercial buildings containing asbestos.<sup>189</sup> The Second Circuit did not follow a state common law approach and instead followed the *Commander Oil* five-factor test, which is judge-made law.<sup>190</sup> Despite there being no authority that limits ownership to one party, the Second Circuit's interpretation focused on whether the sublessor was either an operator or an owner.<sup>191</sup>

It is likely that the Ninth Circuit would distinguish *Next Millennium* from other Ninth Circuit cases that find easement holders are not held liable as owners under CERCLA.<sup>192</sup> In *San Pedro Boat Works*, Pacific American, whose successor-in-interest was BCI Coca-Cola, possessed revocable permits from the City of Los Angeles for ten months for Berth 44 boat works and, after the city investigated the site, found that it was contaminated.<sup>193</sup> The city claimed that BCI Coca-Cola was liable as an owner under CERCLA during the contamination.<sup>194</sup> The court followed *Long Beach* and looked to the common law definition of "owner," including California common law which said that there is a distinction between holding an easement and owning the contaminated land.<sup>195</sup> The court distinguished between ownership interests and possessory interests and held that because Pacific American was a holder of mere possessory interests, BCI Coca-Cola was not an owner and therefore not held liable as an owner.<sup>196</sup> *San Pedro Boat Works* and *Long Beach* would

be distinguished from *Next Millennium* because common law differs from New York to California, and New York common law regarding property typically holds tenants liable for tort caused by actions on a property.<sup>197</sup> Unlike in *San Pedro Boat Works* and *Long Beach*, the defendants in *Next Millennium* held ownership interests because they subleased the property without notice or consent from the landlord and were, therefore, owners in effect.<sup>198</sup> The Ninth Circuit rejected the Second Circuit interpretation of owner liability, further showing the contrast of the likely outcome if the Second Circuit tried *Next Millennium* using the Ninth Circuit's reasoning.<sup>199</sup> The Second Circuit, using the same approach as the Ninth Circuit, should have applied New York common law standard when deciding *Next Millennium* by using an occupation and site control test.<sup>200</sup>

The Ninth Circuit would have likely held the sublessor liable as an owner under CERCLA because Congress intended that the courts would broadly and liberally apply CERCLA liability.<sup>201</sup> Setting precedent that holds a sublessor liable would be considered a liberal interpretation of the statute.<sup>202</sup> The Ninth Circuit would have prioritized liberal interpretation of the statute because it follows the Congressional intent for CERCLA liability.<sup>203</sup> This finding would be similar to *El Paso Natural Gas* because the defendants were found liable as owners despite having granted significant property interests to another party.<sup>204</sup> In both cases, the defendants held substantial powers over the property.<sup>205</sup> However, the Second Circuit's *Commander Oil* test narrowly interprets CERCLA liability.<sup>206</sup>

The Ninth Circuit's approach does not focus on the unique facts of a case, unlike the Second Circuit.<sup>207</sup> Therefore, the Ninth Circuit's approach to CERCLA owner liability in *Next Millennium* would have focused on the relevant common law regarding subleases rather than the *Commander Oil* five-factor test.<sup>208</sup> This finding would have turned out differently if tried in the Ninth Circuit; if a court looks to the common law rather than to the unique facts of the case, then the five-factors may not be addressed in considering whether the sublessor is an "owner."<sup>209</sup> In New York, common law for liability in tort generally depends on occupation and control.<sup>210</sup> The sublessor in *Next Millennium* had control over the property, and therefore, the Ninth Circuit would have likely found that the sublessor was an owner under CERCLA Sections 104 and 113(f) to contribute to cleanup costs of the contamination.<sup>211</sup>

The court would have likely placed the financial burden on the sublessor because the sublessor was ultimately responsible for the contamination.<sup>212</sup> Congress intended to hold those responsible for contamination liable to pay for the cleanup.<sup>213</sup> The Ninth Circuit's interpretation of CERCLA liability focuses on the remedial aspect of the statute.<sup>214</sup> The sublessor in *Next Millennium* would ultimately be responsible for the contamination because it subleased the facility to contaminating sublessees without the consent or notice of the landlord and had full control over the facility.<sup>215</sup> Additionally, the sublessor profited substantially from the sublease, which is a significant indicator that it would bear the financial burden of cleanup if the Second Circuit had followed the Ninth Circuit's correct interpretation of the



statute.<sup>216</sup> The original purpose behind CERCLA was to hold parties liable for contamination who are ultimately responsible for the contamination, and so looking to who had control of the site at the time of the contamination is an acceptable means of determining who is liable as an owner under CERCLA.<sup>217</sup>

The Ninth Circuit also would have likely held the sublessors liable as owners, so that the landowner could receive contribution because the Ninth Circuit has previously provided an incentive for private parties to pay for cleanup or to settle with the confidence that they can be recuperated by other potentially liable parties.<sup>218</sup> The Second Circuit's holding in *Next Millennium* sets a precedent for future potentially liable parties to refuse to remediate a site and encourages litigation on the *Commander Oil* five-factor test rather than settlement.<sup>219</sup> The Ninth Circuit knowingly rejected the *Commander Oil* five-factor test and therefore avoided these legislative issues for a statute that is already heavily litigated.<sup>220</sup>

#### IV. POLICY RECOMMENDATION

The disposal of hazardous waste endangers public health and the environment.<sup>221</sup> The United States has many contaminated sites, and Congress enacted CERCLA to quickly and effectively clean these sites by encouraging private parties to voluntarily clean up contaminated sites.<sup>222</sup> The Supreme Court of the United States declined the opportunity to correct the Second Circuit's *Commander Oil* test by denying certiorari in *Next Millennium*.<sup>223</sup> As a result, confusion remains as to what land investors can expect when buying contaminated property in the Second Circuit.<sup>224</sup>

The *Commander Oil* factor test provides an unpredictable outcome which incentivizes litigation rather than early settlement, and this is against CERCLA's remedial purpose.<sup>225</sup> Investors are more likely to buy land if they can be confident that other PRPs will share the financial burden of cleanup.<sup>226</sup> If litigation is required to ensure contribution of other PRPs, investors are less likely to invest, and the contaminated sites will remain contaminated.<sup>227</sup> The Second Circuit's *Commander Oil* test to determine owner liability is flexible and nebulous, creating an unpredictable barrier for investors and therefore investors are less likely to invest in contaminated land.<sup>228</sup>

The Ninth Circuit adhered to the interpretation of owner as found in California common law, which provides clear

expectations for investors of land.<sup>229</sup> Unlike the Second Circuit, the Ninth Circuit reached a proper interpretation of CERCLA ownership liability by placing those liable who were responsible for the contamination, because it follows state common law and thus provides clear guidelines for investors in land.<sup>230</sup>

The Second Circuit has stated that it does not have the authority to overturn the *Commander Oil* ownership test itself, so the Supreme Court or Congress must overturn the *Commander Oil* ownership test.<sup>231</sup> Congress quickly drafted the language of CERCLA, and Congress could fix its mistake by amending the statute to set a clear path for establishing CERCLA liability against a tenant of a facility.<sup>232</sup> An easy solution that would still allow states to incorporate state-specific definitions of common law would be to add "and/or" when discussing "owner and operator" and "owner or operator."<sup>233</sup> This solution would clarify Congress's intent to extend liability and would invalidate the Second Circuit's current approach.<sup>234</sup> Alternatively, the Supreme Court should overturn the five-factor test in favor of a definition of "owner" based on state-specific property law.<sup>235</sup>

#### V. CONCLUSION

Despite a divergence from use of state-specific common law in assigning owner liability under CERCLA, *Commander Oil* remains the law in the Second Circuit.<sup>236</sup> Consequently, a subsequent buyer who has no site control at the time of the polluting event, does not sublease the property to polluting sublessees, and does not profit from the contamination may bear the burden of providing all cleanup costs and may not receive contribution from other potentially liable parties if bringing their case in the Second Circuit.<sup>237</sup> On the other hand, the Ninth Circuit, which follows a clear state definition of "owner" that can predict whether PRPs will settle, fulfills Congress's intent and continues to incentivize private cleanup of contaminated sites.<sup>238</sup>

After *Next Millennium*, it is likely that lawyers in the Second Circuit will advise their clients to beware of purchasing contaminated land due to the likeliness of litigation on the indicia of ownership.<sup>239</sup> As a result, contaminated sites in the Second Circuit on the National Priorities List will remain stagnant, and contamination will continue to damage the environment and create further risks for public health.<sup>240</sup>



#### ENDNOTES

<sup>1</sup> See Petition for Writ of Certiorari at 3–4, *Next Millennium Realty, LLC v. Adchem Corp.*, 138 S. Ct. 510 (2017) (No. 17-468) (arguing that the Second Circuit's interpretation of ownership liability does not accomplish the remedial goals of the statute to hold those responsible that created the contamination).

<sup>2</sup> See 42 U.S.C. § 9601 (2012) (defining "owner or operator" as any person owning or operating); see generally Petition for Writ of Certiorari, *supra* note 4.

<sup>3</sup> See Petition for Writ of Certiorari, *supra* note 1, at 7–8, (casting doubt on the five-factor test for ownership).

<sup>4</sup> See *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 448 (9th Cir. 2011) (looking to California property law); see also *Next Millennium Realty, LLC v. Adchem Corp.*, No. CV 03-5985(GRB), 2016 WL 1178957

(E.D.N.Y. Mar. 23, 2016), *aff'd sub nom.* *Next Millennium Realty, LLC v. Adchem Corp.*, 690 F. App'x 710 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 510 (2017) (describing a circuit divergence in interpretation of the definition of "owner" regarding CERCLA liability for sublessors).

<sup>5</sup> 690 F. App'x 710 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 510 (2017).

<sup>6</sup> *Id.* at 712.

<sup>7</sup> See *Next Millennium Realty, LLC*, 2016 WL 1178957 at \*2 (failing to address the lack of notice or consent by the landlord in finding the sublessor not liable as an owner).

# BAN ON PLASTIC MICROBEADS: TOO NARROW, OR JUST NARROW ENOUGH?

Liz Michalowska\*

President Barack Obama signed the Microbead-Free Waters Act of 2015 (MFWA) which banned plastic microbeads in 2015.<sup>1</sup> The MFWA specifically banned plastic microbeads found in cosmetic consumer exfoliants that get rinsed and released into waste-water treatment centers, which then flow into lakes, rivers, and oceans.<sup>2</sup> However, the MFWA does not regulate microbeads found in consumer products that are not rinsed off, such as deodorants, lotions, or other non-cleansing products. The Act also does not ban non-cosmetic microbeads, ranging from those found in cleaning products and medical applications to oil and gas exploration. Critics of the MFWA argue that the ban is too narrow because it does not include all products that contain microbeads,<sup>3</sup> and because it does not do enough to rid marine environments of already existing microbeads.<sup>4</sup> This article will argue that the federal ban is just narrow enough because it closed several statutory loopholes created by individual state bans before the MFWA passed.

Defined under the MFWA as tiny pieces of plastic less than five millimeters in diameter, microbeads, also known as microplastics, are added to many consumer products.<sup>5</sup> Because of their small size, microbeads easily enter waterways through the discharge of municipal sewage and liquid waste. The Great Lakes, in particular, have a large concentration of microplastics.<sup>6</sup> According to a study published in the *Marine Pollution Bulletin*, the 5 Gyres Institute and State University of New York Fredonia found that of the plastics found in the Great Lakes, microplastics comprised 90% of the plastics.<sup>7</sup> Microbeads present a greater health risk than larger plastic debris because they resemble aquatic food, leading fish and other organisms mistakenly consume them.<sup>8</sup> Once ingested, the toxic chemicals in microbeads can transfer into the body tissues of fish and other organisms that are frequently consumed by humans.<sup>9</sup>

Because of Lake Michigan's importance to Illinois, state legislators decided to take the lead in counteracting pollution in the Great Lakes. On June 8, 2014, Governor Pat Quinn signed legislation to make Illinois the first state in the nation to ban the manufacture and sale of personal care products containing synthetic plastic microbeads. Soon after, other states passed their own laws banning microbeads, including New Jersey, Colorado, Indiana, Maryland, Maine, Wisconsin, Connecticut, and California.<sup>10</sup> The problem with individual state responses, however, was that there was too much room for interpretation, and it allowed for the possibility of manufacturers finding loopholes in the law.

When Illinois passed its law, it banned its citizens from manufacturing for sale and accepting for sale personal care products containing synthetic plastic microbeads.<sup>11</sup> The state ban defined synthetic plastic microbeads as "any intentionally added, non-biodegradable, solid plastic particle measured less than five millimeters in size, and that is used to exfoliate or cleanse in a rinse-off product."<sup>12</sup> Following the Illinois ban, New Jersey, Colorado, Maryland, Maine, Wisconsin, Connecticut, and California (in that order) implemented their own bans, largely defining microbeads in the same manner.<sup>13</sup> The problem with this definition is that the word "non-biodegradable" created a loophole for manufacturers to add microbeads that are biodegradable. The definition further allowed for a broad interpretation for what biodegradable means. Without a clearer provision, a manufacturer can produce microbeads that do technically decompose, but take years, sometimes decades, to do so.<sup>14</sup>

To address the ambiguity, the MFWA clearly defined plastic microbead as "any solid plastic particle that is less than five millimeters in size and is intended to be used to exfoliate or cleanse the human body or any part thereof."<sup>15</sup> The federal law makes no exception for biodegradable beads. Not only does that clarify the definition of microbeads, but it also alleviates the need to define the term "non-biodegradable" found in so many state laws. In prohibiting all microbeads, and not just non-biodegradable ones, the MFWA takes an important step toward preventing further microbead contamination.

Additionally, not all states prohibited the manufacturing and accepting for sale of products containing plastic microbeads. Only eight states prohibited the manufacture, and sometimes the production, for sale of personal care products containing microbeads.<sup>16</sup> Of those, only six states included language banning the acceptance for sale of these products.<sup>17</sup> Furthermore, only three states included language prohibiting the offer for sale on such products.<sup>18</sup> The differences in language could have led to loopholes available to those who import or simply distribute products with microbeads. Microbeads manufacturers are generally global and develop products for the national market. The varying and ambiguous state-by-state bans would have created distribution and marketing challenges. Making the federal ban this narrow was the most fitting way to address the microbead contamination of waterways because the MFWA clarified what manufacturers were authorized to do.

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To further address what manufacturers and retailers could and could not do, Congress enacted simpler language. The MFWA prohibits “[t]he manufacture or the introduction or delivery for introduction into interstate commerce of a rinse-off cosmetic that contains intentionally-added plastic microbeads.”<sup>19</sup> The vital language in the legislation is the phrase “interstate commerce.”<sup>20</sup> The Commerce Clause grants Congress authority to regulate commerce between states.<sup>21</sup> “Interstate commerce” applies to all steps in a product’s manufacture, packaging, and distribution, so it is rare that a cosmetic product on the market is not in “interstate commerce” under the law.<sup>22</sup> As such, this phrase eliminates any uncertainty regarding the manufacture or the distribution of cosmetic rinse-off products with plastic microbeads.

Because it eliminates uncertainty and potential loopholes, the MFWA is an important first step toward reducing new pollution into maritime environments. Removing existing microbeads is difficult, so Congress used its authority under the Commerce Clause to prevent further contamination. By focusing on what Congress could do immediately, it created a solution to an existing problem, and it did so practically and economically. The narrowness of the legislation works because it closed potential loopholes industries could have exploited, and the MFWA paved the way for keeping future microbead pollution out of our waterways.



## ENDNOTES

<sup>1</sup> David A. Striffling, *The Microbead-Free Waters Act of 2015: Model for Future Environmental Legislation, or Black Swan*, 32 J. LAND USE & ENVT'L. L. 151, 158 (2016).

<sup>2</sup> Sarah Kettenmann, *Nationwide Ban on Plastic Microbeads in Cosmetics*, 31 NAT. RESOURCES & ENV'T 58 (2016).

<sup>3</sup> Striffling, *supra* note 1, at 159, 161-62.

<sup>4</sup> Davis Truslow, *Microbeads and the Toxics Use Reduction Act: Preventing Pollution at Its Source*, 44 B.C. ENVT'L. AFF. L. REV. 149, 155 (2017).

<sup>5</sup> *Id.* at 149, 152.

<sup>6</sup> *Id.* at 153.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 154.

<sup>10</sup> Nicholas J. Schroeck, *Microplastic Pollution in the Great Lakes: State, Federal, and Common Law Solutions*, 93 U. DET. MERCY L. REV. 273, 275 (2016).

<sup>11</sup> 415 Ill. Comp. Stat. Ann. 5/52.5(c)-(d) (2015).

<sup>12</sup> 415 Ill. Comp. Stat. Ann. 5/52.5(a) (2015).

<sup>13</sup> Schroeck, *supra* note 10, at 276-81.

<sup>14</sup> *Id.* at 282.

<sup>15</sup> 21 U.S.C. § 331(ddd)(2)(A) (2015).

<sup>16</sup> Schroeck, *supra* note 10, at 283 (noting that only Illinois, New Jersey, Colorado, Indiana, Maryland, Maine, Wisconsin, and Connecticut microbead laws have language prohibiting the manufacture, and sometimes production, for sale of products containing microbeads).

<sup>17</sup> *Id.* (distinguishing that only Illinois, Colorado, Indiana, Maryland, Maine, and Wisconsin microbead laws include language banning the acceptance for sale of products containing microbeads).

<sup>18</sup> *Id.* (highlighting that only New Jersey, Connecticut, and California include language banning the offer for sale on such products).

<sup>19</sup> 21 U.S.C. § 331(ddd)(1) (2015) (amending the Federal Food Drug and Cosmetic Act).

<sup>20</sup> *Id.*

<sup>21</sup> U.S. CONST. ART. 1, § 8, CL. 3.

<sup>22</sup> U.S. Food & Drug Admin., *Key Legal Concepts: Interstate Commerce, Adulterated, and Misbranded*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (NOV. 3, 2017) [https://www.fda.gov/Cosmetics/GuidanceRegulation/LawsRegulations/ucm074248.htm#Interstate\\_Commerce](https://www.fda.gov/Cosmetics/GuidanceRegulation/LawsRegulations/ucm074248.htm#Interstate_Commerce).

## ENDNOTES: A PATTERN OF RULING AGAINST MOTHER NATURE: WILDLIFE SPECIES CASES DECIDED BY JUSTICE KAVANAUGH ON THE DC CIRCUIT

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<sup>16</sup> See Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 [hereinafter MBTA] (making it unlawful to take, kill, or possess migratory birds); see also 50 C.F.R. § 10.13 (2016) (listing the protected birds under the Migratory Bird Treaty Act and treaties).

<sup>17</sup> See Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1891 (acting to conserve and manage fishery resources found off the coasts of the United States).

<sup>18</sup> See generally National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 [hereinafter NEPA] (enriching the understanding of the importance of natural resources and ecological systems to citizens).

<sup>19</sup> See, e.g., National Park Organic Act, 54 U.S.C. § 100101 (2012); National Forest Management Act, 16 U.S.C. §§ 1601-1687 (2012); Federal Land Management and Policy Act, 43 U.S.C. §§ 1701-1787 (2012); National Wildlife Refuge System Act, 16 U.S.C. §§ 668dd-668ee (2012).

<sup>20</sup> See Joseph Tomain, *Kavanaugh's Political Leanings Likely Will Be Written into Law*, CINCINNATI ENQUIRER (August 6, 2018), <https://www.cincinnati.com/story/opinion/2018/08/06/opinion-kavanaughs-political-leanings-likely-written-into-law/862653002/> (stating that environmental cases often “pit corporate interests against the public interest for a clean and healthy environment. Here, Kavanaugh’s ‘hands-off’ approach to policy is jettisoned. In his opinions, Kavanaugh is unafraid to strain the interpretation of statutes, engage the judiciary in policymaking, and, on occasion, give mini-lectures on constitutional law and government. His environmental law opinions, then, directly involve policy and politics. In other words, Kavanaugh is unafraid to make, not follow, the law”).

<sup>21</sup> See, e.g., U.S. Envtl. Prot. Agency v. EME Homer City Generation, 572 U.S. 489, 524 (2014) (overturning Justice Kavanaugh’s decision 6-2 in a case where Justice Kavanaugh holds the EPA to an illegally high standard of review, with human lives and health on the line); Mexichem Fluor, Inc. v. U.S. Envtl. Prot. Agency, 866 F.3d 451, 453-54, 464 (D.C. Cir. 2017) (stating Justice Kavanaugh, over a powerful dissent, created a new reading of Section 612 of the Clean Air Act that allows foreign manufacturers of ozone-depleting and climate change-inducing hydrofluorocarbons to avoid regulation; this decision, too, has been appealed to the U.S. Supreme Court on a writ of certiorari).

<sup>22</sup> According to an August 2018 Public Citizen study, Justice Kavanaugh ruled in favor of Big Business – defined as the Chamber of Commerce, National Association of Manufacturers, and American Petroleum Institute – in twenty-five (25) of the thirty-three (33) cases in this category, for a seventy-six percent favorable bias rate. *Judge Brett Kavanaugh’s Decisions in Cases with Leading Business Association Involvement*, CHAMBER WATCH (Aug. 30, 2018), <https://www.chamberofcommercewatch.org/judge-kavanaugh-business-decisions/>.

<sup>23</sup> *Id.*

<sup>24</sup> No. 17-71, slip op. 1 (U.S. Nov. 27, 2018).

<sup>25</sup> *Id.* at 15.

<sup>26</sup> *Id.*

<sup>27</sup> See, e.g., Massachusetts v. U.S. Envtl. Prot. Agency, 549 U.S. 497, 534-35 (2007) (forcing the EPA to take action under the Clean Air Act against global warming and climate change); *Rapanos v. United States*, 547 U.S. 715, 733-37 (2006) (emphasizing that regulation of wetlands falls under the Clean Water Act); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 687, 703-08 (1995) (upholding the inclusion of “habitat harm” as definition of “take” under the ESA).

<sup>28</sup> See *Carpenter Indus. Council v. Zinke*, 854 F.3d 1, 9 (D.C. Cir. 2017); *Otay Mesa Prop., L.P. v. U.S. Dep’t of the Interior*, 646 F.3d 914, 918-19 (D.C. Cir. 2011); *Am. Bird Conservancy v. Fed. Comm. Comm’n*, 516 F.3d 1027, 1035-37 (D.C. Cir. 2008).

<sup>29</sup> *Am. Bird Conservancy, Inc.*, 516 F.3d at 1035-37.

<sup>30</sup> *Id.* at 1031 n.1 (explaining that Justice Kavanaugh was incorrect in asserting that the petitioner’s case was not ripe because the FCC was not, in fact, reconsidering its order regarding migratory birds and communication towers in the Gulf Coast region).

<sup>31</sup> 854 F.3d at 1.

<sup>32</sup> *Id.* at 5 (“A dollar of economic harm is still an injury-in-fact for standing purposes.”).

<sup>33</sup> *Id.*

<sup>34</sup> 646 F.3d 914 (D.C. Cir. 2011).

<sup>35</sup> *Id.* at 918 (finding that, absent further explanation, a survey of the plaintiffs’ property which found an endangered species in one location was not enough to demonstrate that the plaintiffs’ property was occupied by that species for the purposes of the ESA).

<sup>36</sup> 829 F.3d 710 (D.C. Cir. 2016).

<sup>37</sup> *Id.* at 732 (Kavanaugh, J., dissenting) (emphasis in original) (contending that the “EPA considered the benefits to animals of revoking the permit, but [the] EPA never considered the costs to humans”).

<sup>38</sup> Order No. 15-1363 (D.C. Cir. 2018) (concerning the Clean Power Plan).

<sup>39</sup> *Id.*

<sup>40</sup> 472 F.3d 872 (D.C. Cir. 2006).

<sup>41</sup> *Id.* at 879-82 (Kavanaugh, J., concurring).

<sup>42</sup> Justice Kavanaugh’s 96-4 “against wildlife” total score is notable because other judges on the D.C. Circuit scored much better than Justice Kavanaugh’s. Judge David Sentelle, for example, undoubtedly a conservative jurist, appointed by President Reagan to fill Justice Scalia’s seat on the D.C. Circuit, possesses a 57-43 “against wildlife” score. Judge Merrick Garland, President Obama’s pick to replace Justice Scalia on the Supreme Court, but who never received a vote by the majority Senate Republicans, possesses a 46-54 “against wildlife” score, meaning he votes with wildlife fifty-four percent of the time. See *infra* Appendix A and B.

<sup>43</sup> *Fund for Animals v. Kempthorne*, 472 F.3d 872, 873 (D.C. Cir. 2006) (holding that “[t]he amended Migratory Bird Treaty Act does not ban the hunting or killing of non-native migratory bird species, including mute swans”).

<sup>44</sup> *Id.* at 873, 879.

<sup>45</sup> See generally Convention for the Protection of Migratory Birds, U.S. – Great Britain, Aug. 16, 1916, 39 Stat. 1702; Convention Between the United States of America and the United Mexican States for the Protection of Migratory Birds, Etc., February 7, 1963, 50 Stat. 1311; The Convention Between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction, and Their Environment, Mar. 4, 1972, 25 U.S.T. 3329; Convention Between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, 29 U.S.T. 4647.

<sup>46</sup> *Fund for Animals Inc.*, 472 F.3d at 881-82.

<sup>47</sup> See, e.g., 1911 Treaty for the Preservation and Protection of Fur Seals, July 7, 1911, 37 Stat. 154; 1942 Western Hemisphere Convention on Nature Protection and Wildlife Preservation, May 1, 1942, 56 Stat. 1374; 161 U.N.T.S. 193; 1975 Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 12 I.L.M. 1085; 1976 Agreement on Conservation of Polar Bears, Nov. 15, 1973, 13 I.L.M. 13.

<sup>48</sup> Despite voluminous U.S. Supreme Court precedent upholding the law-making force of treaties pursuant to U.S. Const. Art. II, § 2, Justice Kavanaugh’s unnecessary “extra” concurrence also oddly laments treaties’ ability “to eliminate the House of Representatives from the law-making process.” *Fund for Animals*, 472 F.3d at 881 (Kavanaugh, J., concurring); see also Darren Samuelsohn, *Kavanaugh’s Words on Presidential Probes Come Back to Haunt Him*, POLITICO (July 10, 2018), <https://www.politico.com/story/2018/07/10/brett-kavanaugh-presidential-investigations-708705>.

<sup>49</sup> *Fund for Animals*, 472 F.3d at 875-76.

<sup>50</sup> *Id.* at 873 (quoting 16 U.S.C. § 703(a) (2012)).

<sup>51</sup> Migratory Bird Treaty Reform Act of 2004, 16 U.S.C. § 703 (a)(1) (2012).

<sup>52</sup> *Fund for Animals*, 472 F.3d at 876-77.

<sup>53</sup> *Id.* at 873, 879.

<sup>54</sup> *Oceana, Inc. v. Gutierrez*, 488 F.3d 1020, 1021, 1025 (D.C. Cir. 2007).

<sup>55</sup> *Id.* at 1021-22, 1025-26.

<sup>56</sup> *Id.* at 1025-26.

<sup>57</sup> See *id.* at 1021-22, 1025-26.

<sup>58</sup> See *Am. Bird Conservancy v. Fed. Comm. Comm’n*, 516 F.3d 1027, 1034-35 (D.C. Cir. 2008).

<sup>59</sup> *Id.* at 1035.

<sup>60</sup> *Id.* at 1031.

<sup>61</sup> *Id.*

<sup>62</sup> *North Carolina Fisheries Ass’n v. Gutierrez*, 550 F.3d 16, 17 (D.C. Cir. 2008).

<sup>63</sup> *Id.* at 19.

<sup>64</sup> *Id.* at 21.



<sup>65</sup> E. Niagara Pub. Power All. v. Fed. Energy Regulatory Comm’n, 558 F.3d 564, 566 (D.C. Cir. 2009).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*; see also 16 U.S.C. § 808(a)(2)(D) (2012).

<sup>68</sup> E. Niagara Pub. Power All., 558 F.3d at 567.

<sup>69</sup> *Id.* at 567-68.

<sup>70</sup> For full disclosure, the author represented and argued for the Defendant-Intervenor, which was on the losing side of the case.

<sup>71</sup> Otay Mesa Prop. v. U.S. Dep’t of Interior, 646 F.3d 914, 916-19 (D.C. Cir. 2011) [hereinafter *Otay Mesa II*].

<sup>72</sup> Otay Mesa Prop. v. U.S. Dep’t of Interior, 714 F. Supp. 2d 73, 83 (D.D.C. 2010) [hereinafter *Otay Mesa I*].

<sup>73</sup> *Otay Mesa II*, 646 F.3d at 916-17.

<sup>74</sup> *Id.* at 918-19.

<sup>75</sup> *Id.* at 919.

<sup>76</sup> Sierra Club v. Van Antwerp, 661 F.3d 1147, 1149-50 (D.C. Cir. 2012) [hereinafter *Sierra Club II*].

<sup>77</sup> *Id.*; see also Sierra Club v. Van Antwerp, 719 F. Supp. 2d 58, 76 (D.D.C. 2010) [hereinafter *Sierra Club I*].

<sup>78</sup> *Sierra Club I*, 719 F. Supp. 2d at 61.

<sup>79</sup> *Sierra Club II*, 661 F.3d at 1156.

<sup>80</sup> *Id.* at 1157.

<sup>81</sup> See 16 U.S.C. § 1538(a)(2) (2012); see also *Sierra Club II*, 661 F.3d at 1156.

<sup>82</sup> Justice Kavanaugh did not order ESA Section 7 consultation in this case despite the clear federal scientific evidence that the snake would be harmed. On other environmental cases where it has been alleged Justice Kavanaugh was “pro-environment,” these very small handful of decisions are easily explainable on other grounds. See, e.g., Nat’l Mining Assoc. v. McCarthy, 758 F.3d 243 (D.C. Cir. 2014) (holding that the Clean Water Act did not prohibit interagency coordination and that an EPA guidance on state-issued water pollution permits was not subject to judicial review); Nat. Res. Def. Council v. U.S. Envtl. Prot. Agency, 749 F. 3d 1055 (D.C. Cir. 2014) (denying the Natural Resources Defense Council’s petition on cement pollution except with regard to clearly suspect the EPA affirmative defense policy in the Agency rule); Am. Trucking Ass’n v. Envt. Prot. Agency, 600 F.3d 624 (D.C. Cir. 2010) (upholding stricter California motor vehicle standards). Assuming these flimsy “defenses of the environment” represent “two total wins,” even a broken clock is correct twice per day.

<sup>83</sup> Friends of Blackwater v. Salazar, 691 F.3d 428, 439-40 (D.C. Cir. 2012).

<sup>84</sup> *Id.* at 438 (arguing the impracticability of the Secretary adopting criteria that “by their nature could never be met and hence would preclude delisting a species so long as those criteria remain in effect”).

<sup>85</sup> *Id.* at 440.

<sup>86</sup> 16 U.S.C. § 1535(f) (2012) (stating that state laws may be more, but not less, restrictive than the regulations in the ESA).

<sup>87</sup> Conservation Force v. Jewell, 733 F.3d 1200, 1202, 1207 (D.C. Cir. 2013).

<sup>88</sup> *Id.* at 1207.

<sup>89</sup> *Id.* at 1203-05.

<sup>90</sup> Center for Biological Diversity v. U.S. Envtl. Prot. Agency, 749 F.3d 1079, 1080 (D.C. Cir. 2014); see generally Clean Air Act, 42 U.S.C.S. § 7409(b)(2) (describing national secondary ambient air quality standards which specify “a level of air quality the attainment and maintenance of which . . . is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air”).

<sup>91</sup> See generally *Center for Biological Diversity*, 749 F.3d at 1080-82.

<sup>92</sup> *Id.* at 1085 (quoting the Final Rule, 77 Fed. Reg. 10218, 20,236 (Apr. 3, 2012), to explain that direct exposure is not the only way in which chemicals can cause harm).

<sup>93</sup> *Id.* at 1089 (quoting the rule and explaining that the EPA “determined that a revision was not ‘appropriate’ when scientific uncertainty deprived the Agency of a ‘reasoned way to choose’ an appropriate standard”).

<sup>94</sup> *Id.* at 1090 n.18.

<sup>95</sup> *Id.* at 903.

<sup>96</sup> *Id.* at 901.

<sup>97</sup> *Id.*; see also 16 U.S.C. § 1533 (a)(1) (2012) (stating that determinations are conclusions that a species is or is not endangered or threatened); 16 U.S.C. § 1533 (b)(3)-(4) (2012) (outlining the statutory time frames by which FWS or NMFS must respond to petitions to list or delist)

<sup>98</sup> *Friends of Animals v. Ashe*, 808 F.3d 900, 901 (D.C. Cir. 2015).

<sup>99</sup> *Id.* at 903.

<sup>100</sup> *Id.* at 900-01.

<sup>101</sup> *Id.* at 904-05.

<sup>102</sup> See 16 U.S.C. § 1533(b)(3)(B) (2012).

<sup>103</sup> Defs. of Wildlife v. Jewell, 815 F.3d 1, 3, 5 (D.C. Cir. 2016).

<sup>104</sup> *Id.* at 3, 7, 8.

<sup>105</sup> *Id.* at 7.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 3, 6-7.

<sup>108</sup> Ark Initiative v. Tidwell, 816 F.3d 119, 121, 122 (D.C. Cir. 2016); see 36 C.F.R. § 294.41 (defining roadless area characteristics as “(1) high quality or undisturbed soil, water, and air; (2) sources of public drinking water; (3) diversity of plant and animal communities; (4) Habitat for threatened, endangered, proposed, candidate, and sensitive species, and for those species dependent on large, undisturbed areas of land; (5) primitive, semi-primitive nonmotorized and semi-primitive motorized classes of dispersed recreation; (6) reference landscapes; (7) natural-appearing landscapes with high scenic quality; (8) traditional cultural properties and sacred sites; and (9) other locally identified unique characteristics”).

<sup>109</sup> See *Ark Initiative*, 816 F.3d at 122, 128.

<sup>110</sup> *Id.* at 122.

<sup>111</sup> See *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102, 105-06 (D.D.C. 2009).

<sup>112</sup> See 16 U.S.C. § 1539(a)(1)(A).

<sup>113</sup> See *Salazar*, 626 F. Supp. 2d at 107 (stating the cause of action and discussing the import take permit exemption to the ESA that allows for the trade of hunted trophies of an endangered captive-bred animal).

<sup>114</sup> See *Friends of Animals v. Jewell*, 824 F.3d 1033, 1036-37 (D.C. Cir. 2016).

<sup>115</sup> *Id.* at 1037.

<sup>116</sup> See *Earthreports, Inc. v. Fed. Energy Regulatory Comm’n*, 828 F.3d 949, 952 (D.C. Cir. 2016).

<sup>117</sup> *Id.* at 952.

<sup>118</sup> *Id.* at 959.

<sup>119</sup> See generally *id.*

<sup>120</sup> Mingo Logan Coal Co. v. U.S. Envtl. Prot. Agency, 829 F.3d 710, 730-41 (D.C. Cir. 2016) (Kavanaugh, J., dissenting).

<sup>121</sup> *Id.* at 717, 730; see also Clean Water Act, 33 U.S.C. §§ 1251-1388. The Clean Water Act’s wetlands provisions, under Section 404 of the Act, have proven to be a lightning rod for conservative legal activists, including Justice Kavanaugh, over the years.

<sup>122</sup> See generally *Mingo Logan Coal Co.*, 829 F.3d at 732, 737-38 (Kavanaugh, J., dissenting) (construing a cost-benefit analysis to the EPA’s permit decision making under Section 404 of the Clean Water Act).

<sup>123</sup> See *id.*

<sup>124</sup> *Id.* at 722, 723-24 n.7.

<sup>125</sup> See *id.*

<sup>126</sup> *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 2 (D.C. Cir. 2017).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 2-3.

<sup>132</sup> *Id.* at 9.

<sup>133</sup> See generally Clean Air Act, 42 U.S.C. §§ 7401-7671 (2012).

<sup>134</sup> Coral Davenport, *Appeals Court Hears Challenges to Obama’s Climate Change Rule*, N.Y. TIMES (Sept. 27, 2016), <https://www.nytimes.com/2016/09/28/us/politics/appeals-court-hears-challenge-to-obamas-climate-change-rules.html>.

<sup>135</sup> 42 U.S.C. § 7602(h).

<sup>136</sup> 549 U.S. 497 (2007).

<sup>137</sup> See *id.* at 534.

<sup>138</sup> See, e.g., *Emily’s List v. Fed. Election Comm’n*, 581 F.3d 1, 4 (D.C. Cir. 2009) (“The First Amendment, as interpreted by the Supreme Court, protects the right of individual citizens to spend unlimited amounts to express their views about policy issues and candidates for public office.”).

<sup>139</sup> See, e.g., 42 U.S.C. § 7521(a)(1)–(3) (2012) (obligating the Agency’s to make endangerment findings in specific circumstances).

<sup>140</sup> See generally Donald J. Wuebbles, David W. Fahey, & Kathy A. Hibbard, *Climate Science Special Report: Fourth National Climate Assessment*, U.S. GLOBAL CLIMATE CHANGE RESEARCH PROGRAM (2017) (analyzing how human-caused climate pollution has led to a number of negative impacts including wildlife and habitat declines).

<sup>141</sup> See generally Robert Weissman, *An analysis of Justice Kavanaugh's Opinions in Split-Decision Cases*, PUBLIC CITIZEN (2018) (finding an “overwhelming tendency to reach conclusions favorable to business interests and opposed to consumers, workers, environmental protections, and victims of human rights abuses”).

<sup>142</sup> The U.S. Constitution places no upper or lower limit on the number of Supreme Court justices. The number does not need to be nine. In the short term, the Senate should not be “rushed” in confirming an ideological jurist who would tip the balance of the Court, particularly with mid-term elections coming up, as well as the ongoing criminal investigation of the President and his aides. See, e.g., Bobby Cervantes, *Ted Cruz Says ‘Long Historical Precedent’ for Smaller Supreme Court*, POLITIFACT (Nov. 23, 2016), <https://www.politifact.com/texas/statements/2016/nov/23/ted-cruz/ted-cruz-says-long-historical-precedent-smaller-su/> (explaining that throughout the history of the Supreme Court, there have been large gaps of time with only eight justices, several times lasting over one year); Nick Fahey, *The Supreme Court Can Deal with Eight Justices*, CNBC (Mar. 3, 2016), <https://www.cnbc.com/2016/03/03/the-supreme-court-can-deal-with-eight-justices.html> (noting that nearly twenty percent of all Supreme Court opinions since 1946 have been tie votes).

<sup>143</sup> See, e.g., Igor Bobic, *Democratic Senator says Brett Kavanaugh confirmation process is “Not Normal,”* HUFFINGTON POST (Sept. 2, 2018), [https://www.huffingtonpost.com/entry/brett-kavanaugh-documents\\_us\\_5b8c0a28e4b0cf7b00373cf9](https://www.huffingtonpost.com/entry/brett-kavanaugh-documents_us_5b8c0a28e4b0cf7b00373cf9); John Bowden, *Feinstein ‘Alarmed’ National Archives is Withholding Kavanaugh Documents*, THE HILL (Aug. 8, 2018), <http://thehill.com/homenews/senate/400860-feinstein-alarmed-national-archives-is-withholding-kavanaugh-documents><http://thehill.com/homenews/senate/400860-feinstein-alarmed-national-archives-is-withholding-kavanaugh-documents>; Sheryl Stolberg, *White House Withholds 100,000 pages of Judge Brett Kavanaugh’s Records*, N.Y. TIMES (Sept. 1, 2018), <https://www.nytimes.com/2018/09/01/us/politics/kavanaugh-records.html>.

<sup>144</sup> Jordain Carney, *Republicans Confirming Trump’s Court Nominees at Record Pace*, THE HILL (May 1, 2018), <https://thehill.com/homenews/senate/385728-republicans-confirming-trumps-court-nominees-at-record-pace>.  
<sup>145</sup> Cf. “And I brought you into a plentiful country, to eat the fruit thereof and the goodness thereof: but when ye entered, ye defiled my land, and made mine heritage an abomination.” *Jeremiah* 2:7 (King James).

## ENDNOTES: REAL PROPERTY SUBLESSORS ESCAPE CERCLA OWNER LIABILITY IN THE SECOND CIRCUIT

*continued from page 21*

<sup>8</sup> See *id.* (adding that an employee of the sublessee later burned the site to the ground, causing further PCE contamination).

<sup>9</sup> See *Next Millennium Realty, LLC v. Adchem Corp.*, 2017 WL 4350729, at \*10 (2017) (explaining that Next Millennium voluntarily conducted a cleanup of the site upon purchase in 1987-98 and sought cost recovery and contribution under CERCLA Sections 107, 113(f)(3)(B), and (g)(2)).

<sup>10</sup> See Brief for Defendants-Appellees at 5, *Next Millennium Realty, LLC v. Adchem Corp.*, 2016 WL 5699964 (2d Cir. 2016) (No. 16-1260-cv) (arguing that strict liability is justified due to NSR’s benefit from the activities that caused the contamination).

<sup>11</sup> 215 F.3d 321 (2d Cir. 2000).

<sup>12</sup> See *Next Millennium*, 690 F. App’x at 714 (denying the plaintiff’s request to overrule *Commander Oil* due to case law that says the court is bound by prior decisions unless overruled by an en banc panel or by the Supreme Court).

<sup>13</sup> See generally *Commander Oil Corp.*, 215 F.3d at 321 (diverging from the state-specific common law definition of “owner” under CERCLA).

<sup>14</sup> See *id.* at 330-31 (explaining that the five factors are non-exclusive).

<sup>15</sup> See *Next Millennium Realty, LLC v. Adchem Corp.*, No. CV 03-5985(ARL), 2014 WL 5425488, at \*11 (E.D.N.Y. Oct. 22, 2014), *aff’d sub nom.* *Next Millennium Realty, LLC v. Adchem Corp.*, 690 F. App’x 710, 715 (2d Cir. 2017) (concluding that the landowner had the benefits and responsibilities of ownership).

<sup>16</sup> See *id.* (refusing to hold the dissolved corporation responsible despite the tenant acting as an owner by subleasing to an operator who caused the contamination of the site).

<sup>17</sup> See generally *Commander Oil Corp.*, 215 F.3d at 327 (emphasizing the distinctions between “owner” and “operator” and assigning liability based on the unique facts of the case).

<sup>18</sup> See Petition for Writ of Certiorari, *supra* note 1, at i (distinguishing the facts of the case from the factors set by *Commander Oil*).

<sup>19</sup> See *Next Millennium Realty, LLC v. Adchem Corp.*, 138 S. Ct. 510 (2017) (giving no explanation as to why the Supreme Court denied certiorari).

<sup>20</sup> See generally, *Next Millennium Realty, LLC v. Adchem Corp.*, No. CV 03-5985(GRB), 2016 WL 1178957 (E.D.N.Y. Mar. 23, 2016).

<sup>21</sup> See Petition for Writ of Certiorari, *supra* note 1, at i, (asking the Supreme Court to change the standards for determining owner liability under CERCLA).

<sup>22</sup> See *infra* Part II (discussing Congressional intent and liability under CERCLA).

<sup>23</sup> See *infra* Part II (outlining CERCLA, liability, contribution, and the Circuit split in owner liability under CERCLA).

<sup>24</sup> See *infra* Part III (demonstrating that courts that follow state common law definition of “ownership” place the financial burden of cleanup on those responsible for the contamination).

<sup>25</sup> See *infra* Part IV (explaining that the Second Circuit does not have the authority to overturn the flawed test itself).

<sup>26</sup> See *infra* Part V (concluding that the Second Circuit’s CERCLA interpretation does not hold true to the purpose of the statute).

<sup>27</sup> See Joseph A. Fischer, *All CERCLA Plaintiffs Are Not Created Equal: Private Parties, Settlements, and the Ucata*, 30 Hous. L. Rev. 1979, 1988-90 (1994).

<sup>28</sup> See 126 Cong. Rec. 31, 981-82, reprinted in 1 Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act, 1980, at 820-23 (1983).

<sup>29</sup> Congress did not include a statement of congressional findings or a declaration of the statute’s policies, purposes, and goals as it usually does for environmental statutes, but courts have divined the larger remedial purposes of the statute. See *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997) (explaining that Congress enacted CERCLA to facilitate prompt cleanup of hazardous waste sites and shift the cost of environmental response from taxpayers to parties who benefitted from activities that caused harmful waste).

<sup>30</sup> See 80 AM. JUR. 3D *PROOF OF FACTS* § 281, 293-94 (2004) (detailing Congress’s intent and scope for CERCLA liability).

<sup>31</sup> See 42 U.S.C. § 9604(a) (2012) (highlighting the President’s broad authority to act in response to contaminations).

<sup>32</sup> The original House bill makes it clear that Congress intended to impose liability on “any person who caused or contributed to the release or threatened release . . . .” H.R. 7020, 96th Cong. § 3071(a)(1)(C) (1980), reprinted in 2 A Legislative History of the Comprehensive Environmental Response, Compensation, and Liability Act, 1980, at 39 (1983). However, this causation language was omitted from the final bill. See 126 Cong. Rec. 31,981-82, reprinted in 1 LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT, 1980, at 821-24 (1983); see also B.F. GOODRICH CO. v. MURTHA, 958 F.2d 1192, 1198 (2d Cir. 1992) (explaining that CERCLA extends to those who contribute to the problems caused by hazardous substances); 3550 Stevens Creek Assoc. v. Barclays, 915 F.2d 1355, 1363 (9TH CIR. 1990) (explaining that CERCLA resulted from compromise within Congress to pass the statute quickly).

<sup>33</sup> See 42 U.S.C. § 9607(b) (2012) (amending CERCLA to exempt subsequent “innocent owners” from liability).

<sup>34</sup> See 42 U.S.C. § 9601(20)(F) (2012) (clarifying that the definition of “participation in management” requires more than “the capacity to influence, or the unexercised right to control . . . .”); Timothy Holly, Comment, *Potential Responsibility Under CERCLA: Canadyne-Georgia Corp. v. Nationsbank, N.A. (South)—An Illustration of Why We Need a Common Federal Rule Defining “Owned” and “Operated,”* 12 VILL. ENVTL. L.J. 119, 131-32 (2001) (noting that while SARA helped achieve a comprehensive CERCLA program, it did not clarify the circular definition of “owner”).

<sup>35</sup> See Holly, *supra* note 34, at 168-69 (clarifying that “participating in the management” as defined in ACA did not define “owner” as defined in section 101 of CERCLA).

<sup>36</sup> See, e.g., *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1986) (citing *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985)) (“[W]e will not interpret section 9607(a) in any way that

apparently frustrates the statute's goals, in the absence of a specific congressional intent otherwise.”).

<sup>37</sup> 573 U.S. 1 (2014).

<sup>38</sup> *Id.* at 17-19.

<sup>39</sup> See *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (explaining that Section 107 does not limit recovery of response costs to PRPs that caused the contamination).

<sup>40</sup> See 42 U.S.C. §§ 9607(a)(1)-(4) (2012) (holding parties liable for government response costs, private response costs, costs related to destruction or loss of natural resources, and costs of health studies).

<sup>41</sup> See *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 938 (9th Cir. 2008), *rev'd*, 556 U.S. 599 (2009) (noting that connection to contamination is not dispositive).

<sup>42</sup> See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (noting that section 9607(a)(1) imposes strict liability on the current owner of a facility from which there is contamination, without regard to causation).

<sup>43</sup> 42 U.S.C. § 9601(20)(A)(ii); see *El Paso Nat. Gas Co. v. United States*, No. CV-14-08165-PCT-DGC, 2017 WL 2405266, at \*2 (D. Ariz. June 2, 2017) (explaining that when Congress assigns a circular definition, a court typically looks to the word's ordinary meaning).

<sup>44</sup> *Cf.* *United States v. Bestfoods*, 524 U.S. 51, 66 (1998) (looking to the plain definition and common law definition to determine “operator” liability under CERCLA).

<sup>45</sup> See *Kelley v. U.S. Envtl. Prot. Agency*, 15 F.3d 1100, 1107-08 (D.C. Cir. 1994) (explaining that Congress intended the courts to adjudicate Section 107, rather than the Environmental Protection Agency); see also Reply Brief in Support of Petition for Writ of Certiorari at 2, *Next Millennium Realty, LLC v. Adchem Corp.*, 2017 WL 5479484, \*2-3 (2017) (demonstrating how courts correctly looked to state common law to determine the appropriate interpretation of the statute). *Cf. Bestfoods*, 524 U.S. at 56 (noting that the tautological definition of “owner or operator” prompts judiciary review).

<sup>46</sup> See Shelby D. Green, *Understanding CERCLA Through Webster's New World Dictionary and State Common Law: Forestalling the Federalization of Property Law*, 44 NEW ENG. L. REV. 835, 868 (2010) (arguing that state property law should replace federal standards).

<sup>47</sup> See *id.* at 860 (noting that the U.S. Constitution does not define property law).

<sup>48</sup> See *Bestfoods*, 524 U.S. at 66.

<sup>49</sup> See *id.* at 63 (acknowledging the disagreement among courts as to whether courts should apply state or federal common law).

<sup>50</sup> See *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 327 (2d Cir. 2000) (acknowledging that Congress gave “owner” a circular definition under CERCLA).

<sup>51</sup> See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (holding that causation is not a requirement to be held liable under CERCLA); *El Paso Nat. Gas Co. v. United States*, No. CV-14-08165-PCT-DGC, 2017 WL 2405266, at \*2 (D. Ariz. June 2, 2017) (holding parties liable retroactively when Congress first enacted the statute).

<sup>52</sup> See Fischer, *supra* note 27, at 2007 (explaining that the burden of proving divisibility is on the defendant).

<sup>53</sup> See *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 807, 810 (S.D. Ohio 1983) (applying joint and several liability when the harm is indivisible regardless of whether there is a reasonable basis for apportionment and finding that the burden of proof on the defendants to prove that the harm is not indivisible).

<sup>54</sup> See Fischer, *supra* note 27, at 1979, 2006-07 (explaining the precedential standard).

<sup>55</sup> See *Chem-Dyne Corp.*, 572 F. Supp. at 806-07.

<sup>56</sup> See *generally id.* (evaluating the standards for liability under section 311 of the Clean Water Act and the Restatement divisibility rule and deciding to evaluate cases based on their unique facts).

<sup>57</sup> See *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1489 (D. Colo. 1985) (citing 126 Cong. Rec. 30,932 (1980)) (encouraging courts to use state common law to determine when joint tortfeasors become liable under CERCLA to incentivize settlement and therefore promote investment in land).

<sup>58</sup> See 42 U.S.C. § 9613(f)(1) (2012) (clarifying CERCLA with SARA that there is contribution); *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992) (imposing joint and several liability where contamination is indivisible); RESTATEMENT (SECOND) OF TORTS § 433A (AM. LAW INST. 1965) (presuming liability to be joint and several without a reasonable basis upon which to determine the contribution of each cause of a single harm);

<sup>59</sup> See *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 935 (9th Cir. 2008) (noting that circuits have looked to common law principles of tort for guidance as to how to impose joint and several liability), *rev'd* 556 U.S. 599 (2009).

<sup>60</sup> See *id.*

<sup>61</sup> See *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 156 (7th Cir. 1988) (clarifying that a party can be liable as an owner without a connection to the release of pollution and permits).

<sup>62</sup> See *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989) (affirming joint and several liability).

<sup>63</sup> See *id.* at 1508 (adding that to seek contribution, a defendant must demonstrate that it paid more than its fair share).

<sup>64</sup> See 42 U.S.C. § 9613(f) (2012); see, e.g., *United States v. Twp. of Brighton*, 153 F.3d 307, 318-319 (6th Cir. 1998) (using a list of factors to determine divisibility that was part of an unsuccessful CERCLA amendment, sponsored by Senator Al Gore and therefore known as the “Gore Factors”).

<sup>65</sup> 543 U.S. 157 (2004).

<sup>66</sup> 551 U.S. 128 (2007).

<sup>67</sup> *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 163 (2004).

<sup>68</sup> See *id.* (distinguishing that CERCLA provides for a right to cost recovery under Section 107 in some situations and a separate right to contribution under Section 113 in other situations).

<sup>69</sup> Small Business Liability Relief and Brownfields Revitalization Act, 42 U.S.C. §§ 9601, 9607 (2012) (enacting what is generally known as the 2002 Brownfield Amendment).

<sup>70</sup> See Consolidated Appropriations Act, 2018, H.R. 1625, 115th Cong., Div. N § 5 (2018) (defining “bona fide prospective purchaser” to include landowners and tenants and reaffirming their consequent exemption from CERCLA liability).

<sup>71</sup> See *id.* (establishing three avenues for tenants to assert a bona fide prospective purchaser defense similar to the innocent landowner defense).

<sup>72</sup> See 42 U.S.C. § 9601(20) (2012).

<sup>73</sup> See *Next Millennium Realty, LLC v. Adchem Corp.*, 138 S. Ct. 510 (2017) (No. 17-468); Petition for Writ of Certiorari, *supra* note 1, at i.

<sup>74</sup> See *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 447-48 (9th Cir. 2011) (looking to California property law); see also *Next Millennium Realty, LLC v. Adchem Corp.*, No. CV 03-5985(GRB), 2016 WL 1178957, \*5 (E.D.N.Y. Mar. 23, 2016), *aff'd sub nom.* *Next Millennium Realty, LLC v. Adchem Corp.*, 690 F. App'x 710 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 510 (2017) (describing a circuit divergence in interpretation of the definition of “owner” regarding CERCLA liability for sublessors).

<sup>75</sup> See Petition for Writ of Certiorari, *supra* note 1, at 8-9 (explaining that New York common law treats lessees as owners if they exercise control over a site at the time of an injury-causing activity).

<sup>76</sup> See, e.g., *Rivera v. Nelson Realty, LLC*, 858 N.E.2d 1127, 1128-29 (N.Y. 2006) (noting that a statute or contract may assign liability to a landlord for tort on the property).

<sup>77</sup> See *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 328 (2d Cir. 2000) (abandoning New York common law principles).

<sup>78</sup> See *generally id.* at 321 (suggesting that some sublessors may be held liable as a *de facto* owner).

<sup>79</sup> See *id.* at 324 (relieving Barlo from liability).

<sup>80</sup> See *id.* (analyzing whether a sublessor can be held liable as a *de facto* owner under CERCLA).

<sup>81</sup> See *id.* at 325 (explaining that the original discovery of contamination was nine years before this suit); see also 42 U.S.C. § 9601 (defining remediation as “those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment”).

<sup>82</sup> See *Commander Oil Corp.*, 215 F.3d at 325 (reversing partial summary judgment).

<sup>83</sup> See *id.* at 331-32 (showing that Commander Oil retained all rights of an owner); see *generally* *Next Millennium Realty, LLC v. Adchem Corp.*, 690 F. App'x 710, 714 (2d Cir.), *cert. denied*, 138 S. Ct. 510 (2017) (explaining that the decisions of prior panels bind the Second Circuit unless an *en banc* panel of the Second Circuit, or the Supreme Court, overrules the decision).

<sup>84</sup> See *id.* at 327-28 (distinguishing *Bestfoods* and *Commander Oil*); see also *id.* at 328-29 (reasoning that site control is exclusively an “operator”



characteristic). See generally *United States v. Bestfoods*, 524 U.S. 51, 66 (1998) (defining “operate” as to manage, direct, or conduct contaminating actions).

<sup>85</sup> *Bestfoods*, 524 U.S. at 52.

<sup>86</sup> *Id.* at 56 (noting that a circular definition requires court interpretation).

<sup>87</sup> See *Commander Oil*, 215 F.3d at 328 (deciding to treat “owner” as separate from “operator”).

<sup>88</sup> See Petition for Writ of Certiorari, *supra* note 1, at 10 (noting that the *Commander Oil* test encourages litigation).

<sup>89</sup> See *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 447 (9th Cir. 2011) (encouraging imposition of cleanup costs on those who are responsible for contamination).

<sup>90</sup> See *id.* at 449–50 (9th Cir. 2011) (emphasizing that a lease confers greater possessory interest than a revocable permit).

<sup>91</sup> See *Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Tr.*, 32 F.3d 1364, 1368 (9th Cir. 1994) (looking to California property law).

<sup>92</sup> See *San Pedro Boat Works*, 635 F.3d at 447.

<sup>93</sup> See *id.* at 447.

<sup>94</sup> See *Long Beach Unified Sch. Dist.*, 32 F.3d at 1366, 1369 (demonstrating voluntary acceptance of responsibility for contamination, which Congress intended).

<sup>95</sup> See *id.* at 1368 (explaining that circular definitions imply that terms take their “ordinary” meaning).

<sup>96</sup> 635 F.3d 440 (9th Cir. 2011).

<sup>97</sup> See *id.* at 444–45 (explaining that revocable permits confer property interest that is less than that of a lease); see also Reply Brief in Support of Petition for Writ of Certiorari at 2, *Next Millennium Realty, LLC v. Adchem Corp.*, 2017 WL 5479484 (2017) (arguing that leases usually have greater property interest than revocable permits; therefore, *Commander Oil* and *San Pedro Boat Works* have notably different approaches to CERCLA liability).

<sup>98</sup> See *San Pedro Boat Works*, 635 F.3d at 447 (explaining that the successor-in-interest constitutes an “owner” if Pacific American is an “owner”).

<sup>99</sup> See *id.* at 443 (distinguishing ownership interests and possessory interests).

<sup>100</sup> See *id.* at 451 (recognizing that Pacific American did not have the power to convey the permit without the owner’s approval).

<sup>101</sup> No. CV-14-08165-PCT-DGC, 2017 WL 2405266 (D. Ariz. June 2, 2017).

<sup>102</sup> See *id.* at \*1.

<sup>103</sup> See *id.* at \*4 (looking to state property law and rejecting the plaintiff’s argument that a party is liable if it merely holds fee title).

<sup>104</sup> See *id.* at \*5 (noting that California property law interprets “owner” without a modifier to mean “absolute owner”); see also *Cal. Dep’t of Toxic Substances Control v. Hearthside Residential Corp.*, 613 F.3d 910, 915 (9th Cir. 2010) (defining ownership at the time cleanup costs are incurred to prevent delay of lawsuits).

<sup>105</sup> See *Kelley v. U.S. Envtl. Prot. Agency*, 15 F.3d 1100, 1111 (D.C. Cir. 1994) (explaining that the preponderance-of-the-evidence standard in § 106(b) (2)(C) signals that Congress intended to reserve determinations of CERCLA liability for the courts).

<sup>106</sup> See generally *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1486 (D. Colo. 1985) (explaining that Congress empowered federal courts to interpret the statute within the intentions of the Congress).

<sup>107</sup> See *3550 Stevens Creek Assocs. v. Barclays Bank*, 915 F.2d 1355, 1365 (9th Cir. 1990) (reasoning that narrow interpretations of CERCLA liability frustrate the purposes of the statute).

<sup>108</sup> See *id.* at 1366 (Pregerson, J., dissenting) (explaining that there is no clear common law remedy for disposal of commercial building materials that use asbestos, and the court should have treated this issue more broadly and within reach of CERCLA liability to follow Congressional intent).

<sup>109</sup> See, e.g., *El Paso Nat. Gas Co. v. United States*, No. CV-14-08165-PCT-DGC, 2017 WL 3492993, at \*1 (D. Ariz. Aug. 15, 2017) (considering the purpose of broad liability in determining that the defendants were liable as owners under CERCLA).

<sup>110</sup> See generally *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321 (2d Cir. 2000) (diverging from the state-specific common law definition of “owner” under CERCLA).

<sup>111</sup> See *United States v. Bestfoods*, 524 U.S. 51, 56 (1998) (reaching a decision based on the plain meaning of the word “operator” and state common law as bedrock principles when Congress used the word “operator” and gave the term a circular definition); *ASARCO*, 608 F. Supp. at 1490 (using the Second Circuit’s five-factor ownership test to define “ownership” of both PRPs and “victims” of cleanup costs for contamination under CERCLA).

<sup>112</sup> See James Morrow, *Owning Up: Determining the Proper Test for Ownership Liability Under CERCLA*, 43 WASH. U. J.L. & POL’Y 333, 350 (2013) (explaining that site control is indicative of operation rather than ownership). See generally *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 448 (9th Cir. 2011) (recognizing that site control is an important consideration in determining ownership, but that alone, it is insufficient).

<sup>113</sup> See Petition for Writ of Certiorari, *supra* note 1, at i (emphasizing that Congress intended courts determine liability using the state property law definition of “owner”).

<sup>114</sup> See *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997) (noting that CERCLA creates private rights of action). But see *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (clarifying that Congress rejected a causation requirement for liability despite the underlying goal to place the financial burden of contamination on those who are connected to the site).

<sup>115</sup> See *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 613 (2009) (confirming the importance of developing common law in defining the scope of CERCLA liability nine years after *Commander Oil* was tried and held); see, e.g., *ASARCO*, 608 F. Supp. at 1490 (following a clear majority state common law rule in favor of contribution).

<sup>116</sup> See *ASARCO*, 608 F. Supp. at 1489 (citing 126 Cong. Rec. 30,932 (1980)) (emphasizing that developing the common law would foster uniformity among judicial interpretation of the statute).

<sup>117</sup> See *United States v. Bestfoods*, 524 U.S. 51, 64 (1998) (explaining that circuits disagree over whether to rely on state common law or federal common law for veil piercing). Compare *Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Tr.*, 32 F.3d 1364, 1368 (9th Cir. 1994) (concluding that the circular definition of “owner” within the statute demonstrates Congress’s intent that courts incorporate common law definitions within the terms of the statute), with *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 327 (2d Cir. 2000) (reasoning that the circular definition of “owner” within the statute “does not automatically assign liability to every party that has a connection to the contaminated facility”).

<sup>118</sup> See, e.g., *El Paso Nat. Gas Co. v. United States*, No. CV-14-08165-PCT-DGC, 2017 WL 3492993, at \*1 (D. Ariz. Aug. 15, 2017) (looking to the remedial purpose of broad liability in determining that the defendants were liable as owners under CERCLA).

<sup>119</sup> See *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 443, 449 (9th Cir. 2011) (rejecting the Second Circuit’s factor test as susceptible to manipulation); see, e.g., Petition for Writ of Certiorari, *supra* note 1, at 8 (showing that *Commander Oil* is susceptible to manipulation in litigation because the factors are unclear which allows courts too much discretion which would result in a narrower interpretation of CERCLA liability).

<sup>120</sup> See *San Pedro Boat Works*, 635 F.3d at 443 (emphasizing further the importance in the ability to be able to seek contribution so that investors in land know what to expect and can take actions that do not make themselves susceptible to this manipulation).

<sup>121</sup> See *id.* at 447 (suggesting that the government would prefer to allow liberal contribution to incentivize landowners pay for their own cleanup of contamination, rather than rely on government funding to clean up).

<sup>122</sup> See Petition for Writ of Certiorari, *supra* note 1 (arguing that the Second Circuit’s interpretation of ownership liability does not accomplish the remedial goals of the statute to hold those responsible that created the contamination).

<sup>123</sup> See *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1578 (5th Cir. 1997) (explaining that remedial actions are generally permanent responses whereas removal actions are generally immediate or interim).

<sup>124</sup> See Petition for Writ of Certiorari, *supra* note 1, at 9 (arguing that where a tenant subleases a site without notice or consent to the owner and benefits from the sublease, there should be a path of liability to hold the sublessor liable for the cleanup of the sublessee’s contaminating actions).

<sup>125</sup> See *id.* (arguing that the *Commander Oil* ownership test is susceptible to manipulation in litigation, which makes the test inconsistent with Congress’s intent).

<sup>126</sup> See, e.g., *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 330 (2d Cir. 2000) (holding Barlo not liable as an owner despite Barlo having attributes of ownership because Barlo did not manage, direct, or conduct operations specifically related to the pollution).

<sup>127</sup> See Petition for Writ of Certiorari, *supra* note 1, at 8 (suggesting that where a sublessor completely facilitates and controls access to property when pollution occurs that such sublessors should not be relieved from owner liability).



<sup>128</sup> See, e.g., *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 449 (9th Cir. 2011) (rejecting both the *Commander Oil* ownership test and the site control test for not clearly outlining what an investor in a facility can expect when seeking contribution from other PRPs).

<sup>129</sup> See *Commander Oil*, 215 F.3d at 330 (creating a five-factor test based on the specific facts of a case rather than from legislative history); 126 Cong. Rec. 30,932 (1980) (emphasizing the intent for a broad interpretation of CERCLA liability).

<sup>130</sup> See Petition for Writ of Certiorari *supra* note 1, at 8–9 (arguing that the Supreme Court should overrule *Commander Oil* because it does not follow the remedial purposes of the statute).

<sup>131</sup> See, e.g., *Rivera v. Nelson Realty, LLC*, 858 N.E.2d 1127, 1129 (N.Y. 2006) (noting that statute or contract may assign liability to a landlord for tort on the property, but this is not the presumption).

<sup>132</sup> See *Commander Oil*, 215 F.3d at 329 (releasing a tenant from ownership liability despite having attributes of ownership, thereby allowing a PRP to escape liability when Congress intended that PRP to be held liable for cleanup costs).

<sup>133</sup> See *id.* (expanding upon the site control test, which follows the state common law definition of “ownership” along with occupation of a property, which creates a higher standard for PRPs to meet).

<sup>134</sup> See *id.* at 328 (reasoning that the definition of “operator” assigned by the Supreme Court in *Bestfoods* should not overlap with the definition of “owner”).

<sup>135</sup> See *id.* at 328–29 (finding that site control alone is an improper basis for the imposition on lessees of owner liability).

<sup>136</sup> See *id.* at 327 (noting that Congress gave “owner” a circular definition under CERCLA).

<sup>137</sup> See *id.* at 329 (acknowledging that lessees are often liable as operators, but not usually as owners under CERCLA).

<sup>138</sup> See *United States v. Bestfoods*, 524 U.S. 51, 52 (1998) (noting that common law principles are the presumption for interpreting a statute that does not directly instruct otherwise); Petition for Writ of Certiorari, *supra* note 1, at 8 (emphasizing that property law is a matter of state law, not federal law).

<sup>139</sup> Cf. *Bestfoods*, 524 U.S. at 65 (finding that PRPs may be liable as operators where they are not liable as owners).

<sup>140</sup> See *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1489 (D. Colo. 1985) (supporting the development of the federal common law to achieve uniformity of the law).

<sup>141</sup> See *United States v. Md. Bank & Tr. Co.*, 632 F. Supp. 573, 577 (D. Md. 1986) (explaining that a party may be held liable as “the owner and operator,” and also may be held liable as either the “owner” or the “operator”).

<sup>142</sup> See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1050 (2d Cir. 1985) (holding the defendant liable as both owner and operator).

<sup>143</sup> See 42 U.S.C. § 9607(a)(1)–(2) (stating “the owner and operator of a vessel or a facility” and “any person who . . . owned or operated”); see, e.g., *Shore Realty Corp.*, 759 F.2d at 1052 (suggesting that an “owner” may or may not also be the “operator” of a property).

<sup>144</sup> See *Maryland Bank*, 632 F. Supp. at 578 (finding that operator and owner can be held liable separately but acknowledging from the grammar of statute that a party can be held liable as both).

<sup>145</sup> See *id.* (explaining that due to Congress’s haste in writing the statute, courts need not interpret the statute as exact).

<sup>146</sup> See generally *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484, 1486 (D. Colo. 1985) (noting that federal courts may use their discretion to interpret the statute within the intentions of the Congress).

<sup>147</sup> See *id.* (concluding that Congress empowered federal courts to decide whether to permit contribution among responsible parties).

<sup>148</sup> See generally Petition for Writ of Certiorari, *supra* note 1 (comparing the Second Circuit ownership test to the Ninth Circuit approach to CERCLA ownership liability and arguing that the Second Circuit ownership test is incorrect).

<sup>149</sup> See *El Paso Nat. Gas Co. v. United States*, No. CV-14-08165-PCT-DGC, 2017 WL 2405266, at \*4 (D. Ariz. June 2, 2017) (relying on California case law to determine that a fee title owner has control over how a holder of a permit uses the property).

<sup>150</sup> Compare *id.* at \*7 (citing *Castlerock Estates, Inc. v. Estate of Markham*, 871 F. Supp. 360, 364 (N.D. Cal. 1994)) (questioning “indicia of ownership,” which may no longer be good law in California, in determining owner liability under CERCLA, and noting that even *San Pedro* discussed the unique facts of the case to support its finding), with *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 330–331 (2d Cir. 2000) (applying the unique facts of the

case to a factor test to determine liability, and expanding the common law site control test).

<sup>151</sup> See *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 449 (9th Cir. 2011) (rejecting both the *Commander Oil* test and the “site control” test).

<sup>152</sup> See, e.g., *Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Tr.*, 32 F.3d 1364, 1368 (9th Cir. 1994) (analyzing mostly California common law); *San Pedro Boat Works*, 635 F.3d at 448 (looking to common law to distinguish between ownership interests and possessory interests); *El Paso Nat. Gas Co.*, 2017 WL 2405266, at \*5 (following the example of common law to look to the law governing the property rather than to the unique facts of the case).

<sup>153</sup> Compare *El Paso Nat. Gas Co.*, 2017 WL 2405266, at \*5 (questioning whether fee title is sufficient to define ownership for liability under CERCLA) with *Commander Oil*, 215 F.3d at 330 (deciding that site control alone is insufficient for defining ownership under CERCLA).

<sup>154</sup> See, e.g., *San Pedro Boat Works*, 635 F.3d at 449 (looking to state common law to determine that merely holding possessory interests does not constitute an owner under CERCLA); *Long Beach Unified Sch. Dist.*, 32 F.3d at 1368 (looking to state common law to determine that holding an easement does not itself constitute “ownership” holding).

<sup>155</sup> See *Long Beach Unified Sch. Dist.*, 32 F.3d at 1368 (noting that Congress purposefully wrote a circular definition for “owner” in CERCLA).

<sup>156</sup> See *id.* at 1370 (affirming the district court’s decision to grant the defendant’s motion to dismiss, because merely having an easement does not constitute “ownership”).

<sup>157</sup> See *id.*

<sup>158</sup> *Id.* at 1368 (recognizing the distinctions between property interest and rights of exclusion, and between owning an easement and owning the property itself).

<sup>159</sup> See generally *San Pedro Boat Works*, 635 F.3d at 443 (holding that because Pacific American was a holder of mere possessory interests, BCI Coca-Cola was not an owner and therefore not held liable as an owner).

<sup>160</sup> See *id.* (holding that Pacific American was not liable as an owner for contribution to costs of cleanup).

<sup>161</sup> See Petition for Writ of Certiorari, *supra* note 1, at 8 (calling upon the Supreme Court to overturn the Second Circuit’s ownership test).

<sup>162</sup> See *id.* at 9 (explaining that under New York common law, courts generally hold tenants and not landlords responsible for injury caused by the leased property).

<sup>163</sup> See *El Paso Nat. Gas Co. v. United States*, No. CV-14-08165-PCT-DGC, 2017 WL 3492993, at \*5 (D. Ariz. Aug. 15, 2017) (emphasizing the relevance of federal statutory and common law in addition to the ordinary meaning of property ownership in deciding to hold the party liable that was responsible for the contamination).

<sup>164</sup> See *id.* at \*3. (noting that no authority limits ownership to one entity).

<sup>165</sup> See *id.* at \*5. (explaining that although the Navajo Nation had a significant property interest in the land, the defendants were held liable as owners when considering the remedial purpose of the statute and the defendants’ supervisory and plenary powers in the land).

<sup>166</sup> See, e.g., *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 447 (9th Cir. 2011) (relieving a party who did not know or have reason to know of the contamination); *Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Tr.*, 32 F.3d 1364, 1366 (9th Cir. 1994) (avoiding placing the burden on those who merely have an easement for the facility and are not responsible for the pollution); *El Paso Nat. Gas Co.*, 2017 WL 2405266, at \*1, \*5 (D. Ariz. June 2, 2017).

<sup>167</sup> See Petition for Writ of Certiorari, *supra* note 1, at 11 (noting that Congress intended to encourage parties to share the costs of cleanup).

<sup>168</sup> 613 F.3d 910 (9th Cir. 2010).

<sup>169</sup> See *id.* at 916 (calculating the statute of limitations from the time a party incurs cleanup costs).

<sup>170</sup> See *id.* at 915 (noting that lawsuits would be delayed if ownership was calculated at the time a lawsuit was filed).

<sup>171</sup> See *Next Millennium Realty, LLC v. Adchem Corp.*, No. CV 03-5985(GRB), 2016 WL 1178957 (E.D.N.Y. Mar. 23, 2016), *aff’d sub nom.* *Next Millennium Realty, LLC v. Adchem Corp.*, 690 F. App’x 710 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 510 (2017) (holding the subsequent buyer liable as the owner and not allowing the subsequent buyer to receive contribution from the other PRPs).

<sup>172</sup> See Petition for Writ of Certiorari, *supra* note 1, at 10 (noting that Congress intended that PRPs share the costs of cleanup and therefore the subsequent buyer could have sought contribution from the PRPs).

<sup>173</sup> *Next Millennium*, 690 F. App'x at 714 (explaining the plaintiff's argument that tenants who sublease a site without notice or consent to the owner and benefit from the sublease should be held liable for the cleanup of contaminants that occur as a result of the sublease).

<sup>174</sup> See *id.* (emphasizing that the subsequent purchaser was understandably confident that the other PRPs would be held liable).

<sup>175</sup> See Petition for Writ of Certiorari, *supra* note 1, at 7 (demonstrating the room for manipulation in Second Circuit litigation of CERCLA liability, which makes the *Commander Oil* factor test invalid and inconsistent with Congress's intent).

<sup>176</sup> See OHM Remediation Servs. v. Evans Cooperage Co., 116 F.3d 1574, 1578 (5th Cir. 1997) (specifying that all sued parties are "potentially liable").

<sup>177</sup> See B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992) (expressing that the Supreme Court has held that courts should follow the plain language of the statute); 3550 Stevens Creek Assocs. v. Barclays Bank, 915 F.2d 1355, 1363 (9th Cir. 1990) (enforcing broad interpretations that the statute also permits on its face).

<sup>178</sup> See Petition for Writ of Certiorari, *supra* note 1, at 8 (explaining that under New York common law, liability in tort concerning property generally depends on occupation and control, and New York's courts followed this principle to interpret state environmental statutes). *But see* Dept. of Toxic Substances Control v. Hearthside Residential Corp., 613 F.3d 910, 914 (9th Cir. 2010) (explaining that the statute of limitations is calculated from the time cleanup costs are incurred).

<sup>179</sup> See, e.g., New York v. Shore Realty Corp., 759 F.2d 1032, 1050 (2d Cir. 1985) (finding the defendant sufficiently liable as both owner and operator of the facility).

<sup>180</sup> See United States v. Md. Bank & Tr. Co., 632 F. Supp. 573, 577 (D. Md. 1986) (explaining that a party may be held liable as "the owner and operator," the "owner," or the "operator").

<sup>181</sup> See *id.* at 578 (assigning operator and owner liability separately and explaining the imperfect nature of the statute's grammar).

<sup>182</sup> See Petition for Writ of Certiorari, *supra* note 1, at i (arguing that tenants who sublease a site without notice or consent to the owner and benefit from the sublease should be held liable for the cleanup of contaminants that occur as a result of the sublease).

<sup>183</sup> See City of Los Angeles v. San Pedro Boat Works, 635 F.3d 440, 444–45 (9th Cir. 2011) (recognizing that the PRP did not have the power to convey the revocable permit without the landowner's approval and thus did not pass the "bundle of sticks" rule).

<sup>184</sup> See Petition for Writ of Certiorari, *supra* note 1, at 8–9 (relying on state common law for land and buildings, and specifying that in New York common law, this rule remains the presumption unless expressly modified by contract or statute).

<sup>185</sup> See *id.* (concluding that because New York common law generally depends on occupation and control, the sublessor of the facility, not the landlord, should be held responsible).

<sup>186</sup> See 3550 Stevens Creek Assocs. v. Barclays Bank, 915 F.2d 1355, 1365 (9th Cir. 1990) (finding that CERCLA's strict liability cannot be extended to past and present owners of buildings containing asbestos).

<sup>187</sup> Compare *Next Millennium Realty, LLC v. Adchem Corp.*, No. CV 03-5985(GRB), 2016 WL 1178957 (E.D.N.Y. Mar. 23, 2016), *aff'd sub nom.* *Next Millennium Realty, LLC v. Adchem Corp.*, 690 F. App'x 710 (2d Cir. 2017), *cert. denied*, *Next Millennium Realty, LLC v. Adchem Corp.*, 138 S. Ct. 510 (2017) (describing that the sublessor may have exercised site control over the property, but still finding that the sublessor was not liable for contribution because it was dissolved) with 3550 Stevens Creek Assocs., 915 F.2d at 1365 (noting that the PRP did not hold the "bundle of rights" that are required under California common law to constitute ownership, and therefore finding the PRP not liable as an owner under CERCLA).

<sup>188</sup> See 3550 Stevens Creek Assocs., 915 F.2d at 1365 (Pregerson, J., dissenting) (noting that Section 107(a)(2) applies to a narrow private class of landowners under CERCLA).

<sup>189</sup> See *id.* (recognizing that a narrow interpretation of CERCLA liability would frustrate the purpose of the statute, and instead applying a narrow interpretation of owner liability due to lack of relevant common law regarding asbestos disposal).

<sup>190</sup> See *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 327 (2d Cir. 2000) (recognizing the difficulty in limiting CERCLA liability, yet limiting liability to those who do not pass a five-factor test).

<sup>191</sup> See *id.* at 327–28 (distinguishing between *Bestfoods* and *Commander Oil*). See generally *United States v. Bestfoods*, 524 U.S. 51, 52 (1998) (defining "operator" as the entity that manages, directs, or conducts contaminating actions).

<sup>192</sup> See *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 448 (9th Cir. 2011) (specifying that an easement alone does not constitute ownership and that other elements are required to be liable under CERCLA).

<sup>193</sup> See *id.* at 445 (looking to common law in the state where the land at issue is located).

<sup>194</sup> See *id.* at 447 (explaining that BCI Coca-Cola, as successor-in-interest to Pacific American, would constitute an "owner" if Pacific American constitutes an "owner").

<sup>195</sup> See *id.* at 448–49 (considering case law where courts looked at site control to determine ownership and expressly rejecting the *Commander Oil* factor test as nebulous and flexible).

<sup>196</sup> See *id.* at 449 (rejecting the Second Circuit's factor test as susceptible to manipulation).

<sup>197</sup> See Petition for Writ of Certiorari, *supra* note 1, at 9 (explaining that New York common law presumes tenants and not landlords are held responsible for injury caused by leased property).

<sup>198</sup> See *id.* (stating that the Ninth Circuit follows Congress's intent to hold liable as owners those who retained the power of the property).

<sup>199</sup> See *id.* at 8–9 (explaining that New York common law has treated lessees as owners when they have control over the site at the time of injury or contamination).

<sup>200</sup> See generally *id.* (summarizing that the New York common law test for ownership is whether the party had occupation and site control).

<sup>201</sup> See B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992); 3550 Stevens Creek Associates v. Barclays Bank, 915 F.2d 1355, 1363 (9th Cir. 1990) (enforcing broad interpretations that are also permitted on the face of the statute).

<sup>202</sup> See Petition for Writ of Certiorari, *supra* note 1, at 6–7 (arguing that the indicia of ownership test is unpredictable).

<sup>203</sup> See 3550 Stevens Creek Associates, 915 F.2d at 1363 (interpreting CERCLA broadly because it is a remedial statute).

<sup>204</sup> See *El Paso Nat. Gas Co. v. United States*, No. CV-14-08165-PCT-DGC, 2017 WL 3492993, at \*5 (D. Ariz. Aug. 15, 2017) (specifying that the defendants granted the Navajo Nation exclusive use and occupancy of the property, and yet the defendants remained liable as owners).

<sup>205</sup> See *id.* (finding that the defendants' power over the land contributed to their liability as owners under CERCLA).

<sup>206</sup> See *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 449 (9th Cir. 2011) (defining the term "owner" by common law rather than by a factor test and criticizing the *Commander Oil* five-factor test as easy to manipulate in litigation due to flexible factors).

<sup>207</sup> Compare *El Paso Nat. Gas Co.*, 2017 WL 2405266, at \*7 (citing *Cas-tlerock Estates, Inc. v. Estate of Markham*, 871 F. Supp. 360, 364 (N.D. Cal. 1994)) (questioning the role of "indicia of ownership," which may no longer be good law in California, in determining owner liability under CERCLA, and noting that even *San Pedro* discussed the unique facts of the case to support its finding), with *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 330–331 (2d Cir. 2000) (applying the unique facts of the case to a factor test to determine liability, and expanding the common law site control test).

<sup>208</sup> See *El Paso Nat. Gas Co.*, 2017 WL 2405266, at \*7 (focusing on the relevant common law).

<sup>209</sup> See Petition for Writ of Certiorari, *supra* note 1, at 7 (noting that the five factors are easy to manipulate due to their nebulous nature).

<sup>210</sup> See *id.* (noting that New York's courts followed the common law to interpret state environmental statutes).

<sup>211</sup> See, e.g., *El Paso Nat. Gas Co.*, 2017 WL 3492993, at \*5 (holding defendants liable because they had significant power and control over the property).

<sup>212</sup> See Petition for Writ of Certiorari, *supra* note 1, at 7 (explaining that New York common law generally holds tenants and not landlords responsible for injury caused by the leased property).

<sup>213</sup> See OHM Remediation Servs. v. Evans Cooperage Co., 116 F.3d 1574, 1578 (5th Cir. 1997) (distributing liability among those who were responsible for the contamination, so that they bore the financial burden of the costs of cleanup of the contamination).

<sup>214</sup> See, e.g., 3550 Stevens Creek Assocs. v. Barclays Bank, 915 F.2d 1355, 1363 (9th Cir. 1990) (recognizing that despite broad interpretation of CERCLA liability, construction of a statute cannot extend to what is not permitted on the face of the statute or to what is not supported by legislative history).

<sup>215</sup> See Petition for Writ of Certiorari, *supra* note 1, at 10 (arguing that Congress should create a clear path for liability of lessees where a tenant has exclusive control of a facility, subleases without the landlord's consent or notice, and profits substantially from subleasing the facility).

<sup>216</sup> See *id.* at 9–10 (referencing judicial precedent that promotes recovery from responsible parties).

<sup>217</sup> See *id.* at 10 (emphasizing that a sublessor who has exclusive control over a facility should be an indicator of ownership).

<sup>218</sup> See *id.* (explaining that Next Millennium agreed to conduct the site remediation, with the confidence that other liable parties would contribute to the financial burden).

<sup>219</sup> See *id.* (noting that Congressional intent is typically followed by courts, with the Second Circuit as the exception).

<sup>220</sup> See *id.* (noting that the Second Circuit has not followed congressional intent). See generally *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 449 (9th Cir. 2011) (rejecting the *Commander Oil* ownership test because it does not clearly outline what an investor in a facility can expect).

<sup>221</sup> See Fischer, *supra* note 27, at 1987 (explaining that government response rather than private cleanup delays cleanup).

<sup>222</sup> See *id.* at 1984 (explaining that government response rather than private cleanup delays cleanup).

<sup>223</sup> See *Next Millennium Realty, LLC v. Adchem Corp.*, 138 S. Ct. 510, 199 (2017) (providing no explanation as to why certiorari was denied).

<sup>224</sup> See generally Petition for Writ of Certiorari, *supra* note 1 (arguing that the five-factor *Commander Oil* test does not allow an investor in land to predict the outcome of a contribution suit).

<sup>225</sup> See, e.g., *id.* (showing that *Commander Oil* is susceptible to manipulation in litigation because the factors are unclear, giving courts too much discretion which is likely to result in a narrower interpretation of CERCLA liability).

<sup>226</sup> See, e.g., *id.* at i (emphasizing that the subsequent purchaser was understandably confident that the other PRPs would be held liable under CERCLA Section 113(f)).

<sup>227</sup> See Fischer, *supra* note 27, at 1987 (noting the importance of private cleanup, and that the CERCLA amendments confirm the importance of the remedial goals of the statute).

<sup>228</sup> See *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 448–49 (9th Cir. 2011) (considering case law where courts looked at site control to determine ownership and expressly rejecting the *Commander Oil* factor test as nebulous and flexible).

<sup>229</sup> See generally *id.* (explaining that parties of a CERCLA suit should be able to expect a certain outcome, which would incentivize quick settlements).

<sup>230</sup> See 42 U.S.C. § 9601(20)(a) (2012) (defining “owner or operator” as a party that owns or operates); Petition for Writ of Certiorari, *supra* note 1, at 8 (calling upon the Supreme Court to overturn the Second Circuit's ownership test).

<sup>231</sup> See *Next Millennium Realty, LLC v. Adchem Corp.*, No. CV 03-5985(GRB), 2016 WL 1178957 (E.D.N.Y. Mar. 23, 2016), *aff'd sub nom.* *Next Millennium Realty, LLC v. Adchem Corp.*, 690 F. App'x 710 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 510 (2017) (denying the plaintiff's request to overrule *Commander Oil* due to case law that says the court is bound by prior decisions unless overruled by an en banc panel or by the Supreme Court).

<sup>232</sup> Cf. *Holly*, *supra* note 34 at 159-61 (emphasizing the need for uniformity in the application of CERCLA).

<sup>233</sup> Cf. *id.* (noting the diversity among state case law under CERCLA).

<sup>234</sup> See generally *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321 (separating “owner” and “operator,” therefore limiting liability to either “owner” or “operator” liability rather than both).

<sup>235</sup> The Supreme Court must wait to grant certiorari in a case alternative to *Next Millennium*, where the tenant corporation has not been dissolved. Cf. Petition for Writ of Certiorari, *supra* note 1, at 8 (arguing that the Supreme Court should overrule *Commander Oil*).

<sup>236</sup> See *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992) (prioritizing congressional intent when making pivotal decisions regarding CERCLA interpretation).

<sup>237</sup> See Petition for Writ of Certiorari, *supra* note 1, at i (asking the Supreme Court to change the standards for determining owner liability under CERCLA).

<sup>238</sup> See, e.g., *El Paso Nat. Gas Co. v. United States*, No. CV-14-08165-PCT-DGC, 2017 WL 3492993, at \*1 (D. Ariz. Aug. 15, 2017) (relying on CERCLA's remedial purpose to support that the defendants were liable as owners under CERCLA).

<sup>239</sup> See, e.g., *id.* at \*1 (noting that the Ninth Circuit's approach to owner liability under CERCLA allows parties of a case to predict the outcome).

<sup>240</sup> See Fischer, *supra* note 27, at 2003 (noting that CERCLA attempts to remove hazards of contamination quickly and efficiently).

# APPENDICES:

## A PATTERN OF RULING AGAINST MOTHER NATURE:

### WILDLIFE SPECIES CASES DECIDED BY JUSTICE KAVANAUGH ON THE DC CIRCUIT

By William J. Snape, III\*

#### APPENDIX A

Judge Sentelle's Wildlife Decisions	
Case	Notes
<i>Friends of Animals v. Jewell</i> , 824 F.3d 1033 (D.C. Cir. 2016)	Against wildlife
<i>Bldg. Indus. Ass'n of Superior Cal. v. Babbitt</i> , 161 F.3d 740 (D.C. Cir. 1998)	For wildlife
<i>Am. Wildlands v. Kempthorne</i> , 530 F.3d 991 (D.C. Cir. 2008)	Against wildlife
<i>Nat. Ass'n. of Home Builders v. Babbitt</i> , 130 F.3d 1041 (D.C. Cir. 1997)	Against wildlife
<i>Defs. of Wildlife v. Gutierrez</i> , 532 F.3d 913 (D.C. Cir. 2008)	Against wildlife
<i>Sweet Home Chapter of Cmty. for a Great Or. v. Babbitt</i> , 17 F.3d 1463 (D.C. Cir. 1994)	Against wildlife
<i>Ctr. for Biological Diversity v. U.S. Dep't. of Interior</i> , 563 F.3d 466 (D.C. Cir. 2009)	Half for wildlife
<i>Nat. Res. Def. Council, Inc. v. Hodel</i> , 865 F.2d 288 (D.C. Cir. 1988)	Half for wildlife
<i>Theodore Roosevelt Conservation Partn. v. Salazar</i> , 661 F.3d 66 (D.C. Cir. 2011) (Majority Opinion)	Against wildlife
<i>Anglers Conservation Network v. Pritzker</i> , 809 F.3d 664 (D.C. Cir. 2016) (Majority Opinion)	Against wildlife
<i>Marcum v. Salazar</i> , 694 F.3d 123 (D.C. Cir. 2012) (Majority Opinion)	For wildlife
<i>Spirit of the Sage Council v. Norton</i> , 411 F.3d 225 (D.C. Cir. 2005) (Majority Opinion)	For wildlife
<i>Animal Legal Def. Fund, Inc. v. Glickman</i> , 204 F.3d 229 (D.C. Cir. 2000) (Majority Opinion)	Against wildlife
<i>Defs. of Wildlife &amp; Sierra Club v. Perciasepe</i> , 714 F.3d 1317 (D.C. Cir. 2013) (Majority Opinion)	For wildlife
<i>Rhineland Paper Co. v. Fed. Energy Regulatory Comm'n</i> , 405 F.3d 1 (D.C. Cir. 2005) (Majority Opinion)	For wildlife
<i>Theodore Roosevelt Conservation Partn. v. Salazar</i> , 616 F.3d 497 (D.C. Cir. 2010) (Majority Opinion)	Against wildlife
<i>Grunewald v. Jarvis</i> , 776 F.3d 893 (D.C. Cir. 2015) (Majority Opinion)	Half/half
<i>C &amp; W Fish Co. v. Fox</i> , 931 F.2d 1556 (D.C. Cir. 1991)	Against wildlife
<i>Ala. Power Co. v. Fed. Energy Regulatory Comm'n</i> , 979 F.2d 1561 (D.C. Cir. 1992)	For wildlife
<i>Ctr. for Biological Diversity v. U.S. Env'tl. Prot. Agency</i> , 749 F.3d 1079 (D.C. Cir. 2014)	Against wildlife
<i>S.D. Warren Co. v. Fed. Energy Regulatory Comm'n</i> , 164 Fed. Appx. 1 (D.C. Cir. 2005)	For wildlife
<i>Nat. Ass'n. of Home Builders v. U.S. Army Corps of Eng'rs</i> , 264 Fed. Appx. 10 (D.C. Cir. 2008)	For wildlife
<i>Am. Rivers &amp; Ala. Rivers All. v. Fed. Energy Regulatory Comm'n</i> , 895 F.3d 32 (D.C. Cir. 2018)	For wildlife
<i>Nat'l Wildlife Federation v. Fed. Energy Regulatory Comm'n</i> , 912 F.2d 1471 (D.C. Cir. 1990)	Against wildlife
<i>Oceana, Inc. v. Locke</i> , 670 F.3d 1238 (D.C. Cir. 2011)	For wildlife
<i>Rancho Viejo, LLC v. Norton</i> , 334 F.3d 1158 (D.C. Cir. 2003)	Against wildlife
<i>Fla. Audubon Soc'y v. Bentsen</i> , 94 F.3d 658 (D.C. Cir. 1996)	Against wildlife
27 TOTAL CASES	
11.5 CASES FOR WILDLIFE	
43% FOR WILDLIFE	
57% AGAINST WILDLIFE	



## APPENDIX B

Judge Garland's Wildlife Decision	
Case	Notes
<i>Safari Club Int'l &amp; Nat'l Rifle Ass'n of Am. v. Zinke</i> , 878 F.3d 316 (D.C. Cir. 2017)	Half for/half against wildlife
<i>Am. Wildlands v. Kempthorne</i> , 530 F.3d 991 (D.C. Cir. 2008)	Against wildlife
<i>In re Polar Bear Endangered Species Act Listing &amp; Section 4(d) Rule Litig. (Safari Club Int'l v. Salazar)</i> , 709 F.3d 1 (D.C. Cir. 2013)	Half for/half against
<i>Fund for Animals, Inc. v. Kempthorne</i> , 472 F.3d 872 (D.C. Cir. 2006)	Half for/half against
<i>Rancho Viejo, LLC v. Norton</i> , 323 F.3d 1062 (D.C. Cir. 2003)	For wildlife
<i>Conservation Force, Inc. v. Jewell</i> , 733 F.3d 1200 (D.C. Cir. 2013)	Half for/half against
<i>Am. Bird Conservancy, Inc. v. Fed. Comm'n Comm'n</i> , 516 F.3d 1027 (D.C. Cir. 2008)	For wildlife
<i>Sierra Club v. Van Antwerp</i> , 661 F.3d 1147 (D.C. Cir. 2012)	Three quarters against/ one quarter for
<i>Swanson Grp. Mfg., LLC v. Jewell</i> , 790 F.3d 235 (D.C. Cir. 2015)	For wildlife
<i>Animal Legal Def. Fund, Inc. v. Glickman</i> , 204 F.3d 229 (D.C. Cir. 2000)	Against wildlife
<i>Theodore Roosevelt Conservation Partn. v. Salazar</i> , 616 F.3d 497 (D.C. Cir. 2010)	Against wildlife
<i>Gerber v. Norton</i> , 294 F.3d 173 (D.C. Cir. 2002)	For wildlife
<i>Grunewald v. Jarvis</i> , 776 F.3d 893 (D.C. Cir. 2015)	Half for/half against
<i>Humane Soc'y of the U.S. v. Glickman</i> , 217 F.3d 882 (D.C. Cir. 2000)	For wildlife
<i>Oceana, Inc. v. Locke</i> , 670 F.3d 1238 (D.C. Cir. 2011)	For wildlife
<i>Conservation Law Found. v. Fed. Energy Regulatory Comm'n</i> , 216 F.3d 41 (D.C. Cir. 2000)	Against wildlife
<i>Davis v. Latschar</i> , 202 F.3d 359 (D.C. Cir. 2000)	One half for/one half against
17 TOTAL CASE	
9.25 FOR SPECIES	
54% FOR WILDLIFE	
46% AGAINST WILDLIFE	



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