COVINGTON

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In Brief
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Constitutional issues

***White Oak Realty, L.L.C. v. U.S. Army Corps of Engineers*, No. 2:13-cv-04761, 2017 WL 1153350 (E.D. La. Mar. 28, 2017), *appeal pending,* No. 17-30438.**
A federal district court dismissed a lawsuit brought by plaintiff realty companies challenging the mitigation requirements imposed by the U.S. Army Corps of Engineers on a tract of land owned by plaintiffs in Louisiana. Plaintiffs sought to use soil and clay ("borrow material") on their property in a Corps project to reinforce certain levees and floodwalls. The Corps concurred as to the suitability of the borrow material, but advised plaintiffs that mitigation of environmental impacts must occur through the purchase of mitigation bank credits. The district court rejected plaintiffs' argument that its property was taken without just compensation as required by the Fifth Amendment. The court concluded that the imposition of the mitigation requirement for borrow material does not destroy any "bundle of rights" that plaintiffs held by virtue of owning the land. The plaintiffs do not have a compensable property interest in selling their borrow material for use in the Corps' project without satisfying the Corps' mitigation bank requirement, the court stated, and thus the regulatory takings claim must be dismissed.

***Pennsylvania General Energy Co. LLC v. Grant Township*, No. 1:14-cv-00209, 2017 WL 1215444 (W.D. Pa. Apr. 2, 2017).**
A magistrate judge sustained a corporate challenge to a municipal ordinance on constitutional grounds. Plaintiff Pennsylvania General Energy Company, LLC (PGE) owns and operates natural gas wells in the town and obtained a permit from the U.S. Environmental Protection Agency (EPA) for an injection well to dispose of brine and other fluids produced from the wells. The town of Grant subsequently adopted a Community Bill of Rights ordinance that prohibited any corporation from disposing of waste from oil and gas extraction and invalidated any permit by any state or federal entity that would violate this prohibition. The magistrate's opinion concludes that the ordinance violates the equal protection clause because the ordinance applies to corporations and not individuals. If the goals of the ordinance "can only be achieved through the elimination of fracking, it makes no constitutional sense to allow the same activity by individuals." The opinion also concludes that the ordinance unlawfully limits a company's right to challenge the ordinance only through approved community meetings and thus "shuts the courthouse door to litigants, which it cannot constitutionally do." Finally, the judge concluded that the ordinance violates substantive due process because it attempts to elevate "inalienable" rights over those provided by federal and state constitutions and law.

CERCLA

***Waterkeeper Alliance v. EPA*, 853 F.3d 527 (D.C. Cir. 2017).**
The D.C. Circuit vacated a rule requiring reporting of air releases from animal wastes under the Emergency Planning and Community Right to Know Act (EPCRA) for large concentrated animal

feeding operations known as CAFOs, but exempting CAFO's from Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) reporting and exempting other farms from reporting under both CERCLA and EPCRA. EPA justified the exemption on the grounds that in most cases a federal response is impractical and unlikely. The opinion states that the statutes set forth a straightforward and "sweeping" reporting requirement for any releases over the reportable quantity. Moreover, the court states that EPA does not have "carte blanche to ignore the statute whenever it decides that the reporting requirements aren't worth the trouble." With respect to the *de minimis* doctrine invoked by EPA, the record "suggests the potentiality of some real benefits," noting that the risk "isn't just theoretical; people have become seriously ill and even died as a result of pit agitation." It is not at all clear why it would be impractical for EPA to investigate or issue abatement orders in appropriate cases, the opinion states. Judge Brown's concurrence agrees that the final rule "ran afoul of the underlying statutes" but warns against collapsing the *Chevron* two-step process into a single "reasonableness" inquiry.

***Town of Islip v. Datre*, No 2:16-cv-02156, 2017 WL 1157188 (E.D.N.Y. Mar. 28, 2017).**
A district court dismissed a town's CERCLA and Racketeer Influenced and Corrupt Organizations Act (RICO) lawsuit alleging that a church known as Iglesia De Jesucristo Palabra Mieland and other individual defendants dumped hazardous waste in placing new fill on a soccer field at a park in New York, and thereafter conspired to fraudulently conceal the disposal. The Church and other defendants had received permission to replace the topsoil on the park's soccer fields. Other defendants subsequently dumped thousands of tons of construction debris, contaminated fill, and other wastes on the field. The Church defendants moved to dismiss. The district court concluded that the complaint fails to state plausible claims for wire fraud or CERCLA arranger liability because it fails to allege facts from which it could be plausibly inferred that the Church defendants knew, or should have known, that the material dumped in the park contained hazardous substances. The opinion emphasizes that courts interpreting the Supreme Court's decision in *Burlington Northern & Santa Fe Railroad Co. v. U.S.*, 556 U.S. 599 (2009) have consistently included "the term 'hazardous' in describing the relevant intent." The court also held that the complaint does not plausibly allege state law claims against the Church defendants for nuisance, trespass, fraud, or restitution.

***U.S. v. Dico Inc. and Titan Tire Corp.*, No. 4:10-cv-00503, 2017 U.S. Dist. LEXIS 52787 (S.D. Iowa Mar. 27, 2017).**
A district court denied a motion by a tire company to compel the United States to produce communications between Department of Justice (DOJ) attorneys and a witness or, alternatively, to prevent the government from offering portions of the witness' testimony at trial. The case arose from an EPA order under CERCLA requiring the company to prevent the further release of polychlorinated biphenyls into the environment from the site. After granting summary judgment to the government on liability, the court conducted a bench trial on the issue of damages. In December 2015, the Eighth Circuit reversed the trial court's grant of summary judgment on arranger liability and punitive damage claims. Subsequently, Dr. George, an environmental consultant who worked for the defendant tire company, sent an e-mail to the lead DOJ attorney stating that he had "evidence that Bill Campbell [tire company president] perjured during the Court case…." DOJ then assigned a team of attorneys (the "Filter Team") insulated from the trial team, to interview Dr. George and review copies of documents provided by Dr. George. The court concluded that the Filter Team's communications with Dr. George and his counsel were privileged under the work-

product doctrine. The opinion also notes that because the DOJ trial team did not have access to the correspondence that the defendants sought to compel, defendants had not suffered prejudice based on an inability to anticipate how the documents may be used at trial. Finally, the court denied defendants' motion to prevent the government from offering Dr. George's deposition testimony at trial, noting that defendants were represented at the taking of the deposition.

Water quality

***Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 8:16-cv-04003, ____F. Supp. __,** 2017 WL 2266875 **(D.S.C. Apr. 20, 2017).**
A district court granted defendant pipeline companies' motion to dismiss an environmental group's claim that they violated the Clean Water Act (CWA) through unlawful discharges of gasoline and petroleum substances arising from a pipeline leak. The South Carolina Department of Health and Environmental Control was involved in the oversight and enforcement of remediation efforts. The court agreed with defendants that there was no requirement to obtain a National Pollutant Discharge Elimination System permit because there was and is no point source discharge of pollutants "directly into navigable waters." It was undisputed that the underground pipeline leaked petroleum into the ground, which in turn led to contamination of soil and groundwater. However, to find for plaintiffs in this case, the opinion states, "would result in the CWA applying to every discharge into the soil and groundwater no matter its location." Moreover, the court concludes, "the pollution that allegedly may reach navigable waters is nonpoint source pollution" because "there is no discrete mechanism conveying pollutants to navigable waters." Finally, the opinion rejects the plaintiffs' argument that defendants discharged pollutants to groundwater, concluding that navigable waters do not include groundwater even if it hydrologically connected to surface waters.

RCRA

***Sierra Club v. Chesapeake Operating, LLC*, No. CIV-16-134F, 2017 WL 1287546 (W.D. Okla. Apr. 18, 2017).**
A district court dismissed the Sierra Club's suit, for declaratory and injunctive relief under the Resource Conservation and Recovery Act, alleging that deep injection of liquid wastes from oil and gas extraction has contributed to an increase in earthquakes in Oklahoma and southern Kansas. The Sierra Club alleges that earthquake risks in Oklahoma are the highest in the nation and present an imminent and substantial danger to public health and the environment. The district court agreed with defendants' position that the court should decline jurisdiction under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) abstention and primary jurisdiction because the Oklahoma Corporation Commission (OCC) has taken action in response to increased seismicity caused by wastewater disposal activities. The court took note of the decision of the governor of Oklahoma to form a Coordinating Council on Seismic Activity and to approve funding to the OCC to aid in their response to earthquake activity. The court also stated that timely and adequate state court review is available to the Sierra Club, and ruled that the primary jurisdiction to redress the harm alleged by plaintiffs rests with the OCC. In conclusion, the opinion states that

the “court is ill-equipped to outperform” the OCC in responding to the challenge of seismic activity.