

Speaker 1:

Welcome to Legal Environmental Insights, a Greenberg Traurig podcast.

Bernadette Rappold:

Welcome to Getting Through, the Greenberg Traurig podcast on environmental law issues. Today, I'm so thrilled to be joined by my friend and law partner Chris Torres. He's an environmental shareholder and toxic tort lawyer in our Tampa office. Chris, welcome to the show.

Chris Torres:

Thank you, Bern. It's always nice to be with you. I'm a shareholder with Greenberg Traurig's Tampa office and a large part of my practice is in environmental and toxic tort litigation. Worked on a number of large cases from class actions to mass torts to high exposure single plaintiff cases, defended air emission cases, surface water discharge cases, groundwater discharge cases, involving all sorts of constituents.

Chris Torres:

Like so many of us, my favorite part of the job outside of arguing in court when those opportunities arise is largely working with scientists and other experts and attacking the experts on the other side of a case. As most of our listeners are more than aware, one of the key issues in any toxic tort case is causation, both general and specific.

Chris Torres:

I enjoy learning and doing the preparation necessary to take a good deposition of the other side's expert and setting up how I might demonstrate a lack of reliability and opinions that expert might be rendering.

Chris Torres:

The result of all this is that my tendency as a practitioner is to view cases through that prism, through that lens, so the way I'll talk about mostly everything today is through that lens. What does this mean to me as a practitioner. That may mean the same thing to you as well. What I'll ask for, Bern, is a little latitude and forgiveness if you or our listeners hear me personalize some of my views regarding some of the issues in the cases we'll address today.

Bernadette Rappold:

You got it, Chris. I'm excited to hear your take on some of the big and important cases of the past year. I know that you have worked a lot over past years on the American Bar Association's Year In Review. Can you tell me a little bit about what your involvement with that's been?

Chris Torres:

Yeah. Sure. I appreciate that. Every year, the ABA section of environmental, energy, and resources publishes a year in review that provides summaries of the year prepared by the various committees in the section.

Chris Torres:

We have prepared the year in review contribution for the environmental enforcement and crimes committee for probably the last five or six years. I don't know exactly when we started but it's been a

number of years. If anyone is really interested in having a good overview of the important environmental issues of 2020, that year in review is an incredibly helpful source and what I plan on doing today, Bern, is probably talking about some of the cases that we covered in the year in review.

Bernadette Rappold:

That's great. Well, I know that one of the things that folks have been interested in is EPA's focus. In recent years, EPA shifted how it talks about some of this from an enforcement perspective. It used to call these a priority areas, national enforcement initiatives. Now they call them national compliance initiatives. Can you say a few words about that, Chris?

Chris Torres:

Yeah. Sure. Whether that changes back again, I'm not entirely sure with the new administration but it seemed as though under the Trump administration that there might be ... I don't want to call it cooperation because that wouldn't really be accurate but there was a greater focus on just the fundamentals of environmental compliance I think. I'm not necessarily sure whether that was to provide more certainty or just the political leanings of the administration but you're right, the national enforcement initiatives became national compliance issues. They're changed but not dramatically.

Chris Torres:

A few of those are, for example, creating cleaner air for communities by reducing excess emissions of harmful pollutants. One of the things about these and all other actions that EPA is taking is that as a defense lawyer defending toxic torts, I always imagine sort of the plaintiff's bar lurking in the background of everything that the government does.

Chris Torres:

I do think that regardless of whether they were enforcement initiatives or today compliance initiatives that they're still important for every day practitioners to have some sense of what EPA has deemed important. There are other things, obviously, that these compliance initiatives sort of show us.

Chris Torres:

For example, stopping after-market defeat devices for vehicles and engines. Here this is obviously hardware, software designed to defeat emission controls on vehicles and engines and so, for example, when you're defending an air toxic tort case, we're always looking at alternative sources of constituents and those might be the cars on the highway by you or other facilities or unlawful emissions from other sources.

Chris Torres:

While we could generally look at an industry and say, "Okay, the government is focused in on that" there's also much more to be aware of. Some of the other initiatives that we see having parallels or relationships to some of the cases we defend are, for example, reducing hazardous air emissions from waste facilities.

Chris Torres:

One of the things that EPA is focused on there is with respect to leak detection and repair requirements for equipment used in the storage and treatment of hazardous waste and a lot of the cases that we have

seen lately, that I've worked on lately, have involved fugitive emissions. There may be a specific reason. My practice is ... The last big cases that I've been working on have all been in Florida and there's some statutory reasons for this but still, something else to look at. You're not just looking at emissions stacks. You're looking at entire processes of industries, facilities, and clients and how all those things contribute.

Chris Torres:

There is, of course, reducing risks of accidental releases at industrial and chemical facilities and this is where you have, for example, a chemical accident that we've seen in the past and so, for example, this might, where a large personal injury case resulting, where a number of people have been impacted might not normally be suitable, say, for example, for class treatment. It might be suitable under the right circumstances in a single incident situation.

Chris Torres:

Again, sort of looking at these things as though ... Not just for what they're focused on but for I think for what they mean at a broader level to practitioners. The last two I'll address really quickly is reducing non-compliance, significant non-compliance with the NPDES permits, the National Pollutant Discharge Elimination System permits, and here, yes, there is, of course, the focus on compliance or non-compliance with these permits but there's also an EPA focus aimed at resolving data issues that have resulted in facilities being identified in non-compliance.

Chris Torres:

Some things that this shows is what the importance is of record keeping, what the importance is of electronic data systems and how this information is managed. Finally, we have reducing non-compliance with drinking water standards at community water systems and we've obviously seen things like Flint and other situations like that but now when you start getting into real sort of health issues, we need to be a lot more focused for our clients on either side of the beast.

Chris Torres:

Those are the NCIs, the National Compliance Initiatives, and why I think they speak to me a little.

Bernadette Rappold:

Got it. Well, thanks for running those down. At least, for the short term, those NCIs will remain in place until the new administration develops its own, whatever they decide to call them.

Bernadette Rappold:

Let's shift gears here if we can, Chris, and talk about some of the notable civil cases and decisions in 2020.

Chris Torres:

Yeah. Sure. These are, again, all in our year in review contribution for the environmental enforcement and crimes committee. I guess I'll start with a TSCA, a toxic substance control act enforcement case. This one is interesting, not because of its size but there was a TSCA violation by Detroit Renovations and HGTV host, Nicole Curtis, and this was for the program Rehab Addict.

Chris Torres:

It involved issues around the safe handling and disposal of lead paint during these renovation projects. EPA entered into a final order here that had Nicole Curtis use her celebrity to address lead paint issues. For example, if you were to look at the final order you would see all of these conditions that include her using graphic overlays placed on video productions regarding lead paint issues, addressing lead paint issues in her email newsletter, addressing them in her Instagram account, addressing them in her Twitter account, on her Facebook account, on her website, and even distributing information at public appearances related to home renovations.

Chris Torres:

I think one of the things that you see here is there may be in a settlement or resolution with the government, ways to flexibly address the government's concerns. I thought that was interesting.

Chris Torres:

There was a nationwide settlement to resolve those violations and this was a significant settlement. It was a \$20.75 million penalty, which was the highest civil penalty to date for a settlement under [inaudible 00:15:11]. Of course, there were corporate wide programs to ensure that the contractors hired were certified and trained to use lead safe work practices. That's another important settlement.

Chris Torres:

On the Clean Water Act side, there was a settlement with an entity, Dyno Nobel, regarding violations of the Clean Water Act and RCRA, and this involved the disposal of hazardous waste including explosives at a facility. Of course, here, the consent decree required Dyno Nobel to implement pollution controls and pay a civil penalty of almost \$3 million.

Chris Torres:

We also commented on Plains Pipeline settlement resources and here the entities, there was a pipeline leak of crude oil that reached Refugio Beach in Santa Barbara, California. Here, Plains was required to pay a \$24 million penalty that was spread out among various agencies but still, obviously, a significant penalty.

Chris Torres:

Then you see things involving sanitary sewer overflows and the Clean Water Act. An example of that is a settlement with the city of Corpus Christi. Here, the consent decree required the implementation of a comprehensive remediation plan estimated to cost over \$600 million over 15 years, in addition to a \$1.1 million civil penalty.

Chris Torres:

Here, what you see is sort of the importance of infrastructure and maintenance where these sanitary sewer overflows were the result of unclean systems and not having grease control programs that caused the sewage blockage. Of course, we're all sort of aware of the financial restraints that so many jurisdictions face and the difficulty of that but there is another side and that's when the government might enforce a certain compliance. Again, most of life is a balancing of interests and how those get done.

Chris Torres:

On the Clean Air Act enforcement side, there was a Kohler company settlement and, here, Kohler manufactured and sold these small spark ignition engine and these were used for things like lawnmowers, ride mowers, landscaping equipment, generators, those types of engines.

Chris Torres:

Here, the engines didn't conform with the certification applications that the companies submitted and the allegation was that Kohler had used defeat devices to get past emissions. Of course, a defeat device is a device that interferes or disables emission controls when the machine is in real world use.

Chris Torres:

In that vein, there was also the German auto manufacturer Daimler, which proposed a consent decree to resolve Clean Air Act violations for, similarly, emissions test issues and failing to disclose defeat devices in a quarter of a million vehicles. There, the company was required to recall non-compliant vehicles, offer extended warranties, pay a significant civil penalty of \$875 million and implement a pollution mitigation program among other things.

Chris Torres:

Then probably on the RCRA side, there was a JR Simplot's company and its subsidiary Simplot Phosphates and here there was a RCRA violation for failing to properly determine permit or dispose of hazardous waste and failing to properly report a toxic release and reporting is, obviously, a critical issue. There, Simplot would pay a civil penalty of \$775,000 and implement a plan to ensure regulatory compliance.

Chris Torres:

I'll stop there on the civil side and I don't know if you have any observations regarding these things, Bern, but I'll stop there on the civil side before we get to the criminal.

Bernadette Rappold:

No. That was a great rundown of some of the more notable cases. Some of them strike me as interesting given what's happened over the past few years at EPA. For example, the Clean Water Act case against Corpus Christi is just one of the latest in a series of cases that the agency has brought against municipalities for sewer overflows. It'll be interesting to see now, in particular, what happens on the Clean Air Act side with tamper and defeat enforcement because that seems to be increasingly a focus of the agency.

Bernadette Rappold:

Let's turn now, you did a great rundown, thank you, of the civil actions of note. What decisions struck you as being notable on the criminal side?

Chris Torres:

Yeah. Thanks. A few of them are Clean Air Act and, again, another Clean Air Act case involved a lab operator, for example, in ... I think this was in Mississippi. This was a lab operator who was hired to test water samples to help ensure water quality for a number of towns in the Mississippi Delta and this

operator was alleged to have falsified thousands of water test results, including results used to confirm drinking water safety.

Chris Torres:

This lab operator pleaded guilty to five felony counts of making false material statements and documents are required to be maintained under the Clean Water Act. Again, the intent here was, obviously, poor, to say the least. This operator was sentenced to 18 months in prison as a result of that.

Bernadette Rappold:

If I can just interject just for one quick second there just to say that as a former federal regulator myself, I know that a lot of times in cases that involve false statements, for a variety of reasons those often get prioritized for criminal enforcement. The system that EPA has in place really does depend on getting accurate information from the regulated community. This is the kind of thing that can put you right in the crosshairs of the criminal enforcement folks.

Chris Torres:

Yeah. That's a really key observation or key statement to make because sometimes it's better to fall on a sword and the facts are what the facts are. Don't hide them. I think that's a good lesson.

Chris Torres:

This one is interesting. This is a case, US versus Coleman, and it's in my circuit, in the 11th Circuit [inaudible 00:28:03], and it's a Clean Water Act case. Here, Coleman pleaded guilty and was serving an 18 month sentence but the 11th Circuit found that the government failed to proffer evidence that oil dumped by Coleman entered into navigable water, and the government had only stated that the drain that Coleman dumped oil into eventually connected through a series of tributaries to navigable body of water.

Chris Torres:

The court rejected this mere hydrologic connection test and instead required evidence that the discharge "significantly" affects navigable water. The reason I say this is interesting is because when we talk about County of Maui and the Supreme Court cases we'll, obviously, address some different factors but factors nonetheless that practitioners need to pay attention to. Obviously, one of the things that I guess is common in most disciplines but is sort of inescapable in ours is an attention to the facts of a case, the science involved in a case, and I think that makes the practitioners in our fields I think it makes us lucky where we get to not just address legal issues and basic facts but complicated facts and some pretty interesting science as well.

Chris Torres:

Regarding hazardous waste, there was CG Roxane, which is the maker of Crystal Geysers, a natural alpine springwater. Here, CG Roxane was ordered to pay \$5 million in criminal fines, was required to implement a compliance program and serve three years probation for RCRA violations and violations of the Hazardous Materials Transportation Act. Here, the company removed naturally occurring arsenic from groundwater using sand filters and that resulted in arsenic contaminated water that was stored in a manmade pond for a decade and a half.

Chris Torres:

CG Roxane then hired two companies to transport the waste water to a facility not authorized to receive it without proper manifests or identification of waste. This sort of goes back to what you were saying earlier about the compliance that's so critical.

Chris Torres:

I'll stop there on the criminal side. Of course, there are other cases but I don't want to go too long. I'll stop there on the criminal side, Bern.

Bernadette Rappold:

Great. Thanks. You know, you touched on the 11th Circuit decision regarding the government's proof that a discharge reached a navigable water and, obviously, you alluded to it already that the Supreme Court this year entered a really important decision on that very topic, about what kind of connection must there be between the discharge and the navigable waters. Maybe going a little bit to the facts of the County of Maui case.

Chris Torres:

Yeah. I'd love to. There were a couple of important Supreme Court decisions this year. You're right. One of the key ones is County of Maui versus Hawaii Wildlife Fund. You're right. It's an important case because it addresses EPA's jurisdiction under the Clean Water Act. Of course, the Clean Water Act requires a NPDES permit, a National Pollutant Discharge Elimination System permit, for the discharge of pollutants from point source to navigable waters.

Chris Torres:

What happened in this case was a waste water reclamation facility, treating waste water generated by businesses and homes, injected this treated waste water into underground injection control wells. That waste water effluent had been treated to meet recycled water standards but, of course, when the effluent is injected it mixes with groundwater and it disperses, right? Both vertically and horizontally. In this case, until it eventually migrates to the ocean.

Chris Torres:

The question that arose was whether the Clean Water Act required a NPDES permit under those circumstances. What the court held in a 6-3 decision was that the Clean Water Act requires a permit for any discharge from the treatment facility or a comparable industrial facility into groundwater wells and thus the groundwater when there exists what the court called a "functional equivalent" is the term of a direct discharge from a point source into navigable waters.

Chris Torres:

The court provided a nonexclusive list of seven factors that might be relevant, that would be relevant in determining whether a discharge from a point source to a jurisdiction of water is the functional equivalent of a direct discharge.

Chris Torres:

The factors that the court outlined in its decision are, number one, transit time, two, distance traveled, and by the way, the court stated that the time and distance would be the most important factors in most cases but distance traveled. Three, the nature of the materials through which the pollutants travel.

Four, the extent of dilution or chemical change as the constituents travel. Five, the amount of pollutant entering navigable waters relative to the amount of pollutant that leaves the point source. Six, the manner and buyer, the area in which the pollutant enters navigable waters. Seven, the degree to which the pollution at that point has maintained its specific identity. Here, the court said, "Whether pollutants arrive at navigable waters after traveling through groundwater are from a point source depends on how similar to or different from the particular discharge is to a direct discharge."

Chris Torres:

In December, the EPA issued a guidance memorandum applying the decision in connection with whether a NPDES permit is required for discharges. In that guidance, EPA identified an additional factor that it says may prove relevant and should be considered when performing a functional equivalent analysis. That's the design and performance of the system or facility from which a pollutant is released.

Chris Torres:

This is an important decision and, of course, one that like so many in our field, will require an analysis in each case as we sort of watch the law develop on the functional equivalent analysis as these things get fleshed out over time. That was a key decision. Thanks for pointing me to it.

Chris Torres:

The other important decision, environmental decision from the Supreme Court that should be addressed is Atlantic Richfield versus Christian. That case involved the Anaconda Copper Mine and Smelting Ring Site in Montana that started operations more than a century ago in 1884 and continued for nearly 100 years. The operations resulted in concentrations of arsenic, lead, copper, cadmium and zinc in the soil and the groundwater and the surface water at the site.

Chris Torres:

The site was, of course, prioritized under CERCLA as a Superfund site almost 40 years ago. Atlantic Richfield had been working with the EPA for 35 years to remediate the site at a cost of nearly half a billion dollars. There were private landowners within the site who sued Atlantic Richfield in Montana State Court alleging that the smelter operations caused damage to their property.

Chris Torres:

They sought a common law claim under Montana law for restoration damages under which they would have to use any award to clean up their properties. They argued that the restoration of their properties would require work in excess of what the EPA required Atlantic Richfield to do to perform in the selected CERCLA remedy.

Chris Torres:

Atlantic Richfield challenged the plaintiff's restoration claim arguing that it was jurisdictionally barred under a CERCLA section 113B, which provides that a district court "shall have exclusive jurisdiction over all controversies arising under this chapter."

Chris Torres:



Atlantic Richfield also argued that the landowners are potentially responsible parties and accordingly must seek EPA approval before engaging in any remedial action. Finally, it argued that CERCLA preempted state common law claims for restoration.

Chris Torres:

The court held that CERCLA did not strip the Montana courts of jurisdiction over the lawsuit as the landowners common law claims arose under Montana law and not the act. The Supreme Court also held that the landowners were potentially responsible parties under the act, therefore, requiring EPA approval to take any remedial action.

Chris Torres:

The case leaves us with really unanswered practical questions around a settlement of CERCLA liability, including whether the settlements will carry finality and whether landowners could more readily engage with EPA around remedies. The concerns are obvious. The decision seems to stand for the proposition that state courts retain jurisdiction to impose liability under state law theories, notwithstanding CERCLA.

Chris Torres:

Something like this I'm confident challengers will view this as yet another reason to raise state court tort claims in state courts. The Atlantic Richfield decision, we'll see how that plays out.

Chris Torres:

Going back to one point in County of Maui regarding the functional equivalent analysis is not directly related here but the Supreme Court decision recently entered an order. In that case, the court enjoined California from enforcing a ban on indoor worship but wouldn't enter an injunction with respect to the state's enforcement of a 25% capacity cap on indoor worship. It permitted California to prohibit chanting and singing at indoor worship services.

Chris Torres:

There was an interesting point made by Sotomayor and some of the other justices that I love that says "Justices of this court are not scientists. Nor do we know much about public health policy yet today the court displaces the judgements of experts about how to respond to a raging pandemic. The court orders California to weaken its restrictions on public gatherings by making a special exception for worship services."

Chris Torres:

The only comment I want to make here is seeing how science gets played out in our court. We see it in one case, even though a layperson might not see it as scientific but you see on one side the functional equivalent test that courts are going to have to determine and you see on the other side the statements of Kagan, Breyer and Sotomayor on saying that the justices of this court are not scientists, which is something we all know, but yet courts are required to address the science that we often have to deal with.

Chris Torres:

I'll stop there on the Supreme Court, Bern.

Bernadette Rappold:

Oh, well, I think that's a really key point about the judiciary's role as scientific gatekeepers. Then trying to understand how the current composition of the Supreme Court will change that or take us in a different direction than we've been in a while.

Bernadette Rappold:

Apropos of that with just the few minutes we have left here, I'm wondering if you could just speak a minute or two about the recent appointments to the high court and the courts of appeals and if you can say anything about what you think those appointments bode for environmental cases?

Chris Torres:

Yeah. Yeah. It's more than just the Supreme Court appointments, looking last at Justice Coney Barrett and her originalism and what that will mean for how the Supreme Court addresses environmental matters and, really, whether solutions will have to be legislative versus judicial because the court is addressing issues through this originalist framework.

Chris Torres:

When you look at a South Bay United Pentecostal versus Newsom, it's early to tell, early to say ... I want to be fair to everyone here ... It's not just the Supreme Court however because we have to look at all the district court appointment and the appointments to the various circuit courts as well. Most of the business gets done at the district court level. We're going to want to see how the Trump appointees function in the federal bench and whether we'll see a change in how environmental issues are treated as a result.

Chris Torres:

It won't just be the cases that go before these judges that we're looking at, how do they apply CWA issue or a RCRA issue or a CERCLA issue or a toxic tort issue but, for example, we spent a lot of time talking about settlements, EPA settlements. How are they going to receive and treat settlements that need court approval? I think that's going to be interesting. We're going to watch that.

Chris Torres:

I went back and I just looked at the number of appointments and I think we somehow have this idea that the Trump administration appointed a massive amount of judges. I'm just looking at the numbers, three Supreme Court justices, 54 Court of Appeal judges, 174 district court judges for a total of 226. Obama appointed 55 Appeal Court judges, 268 district court judges, and Bush appointed even more of each.

Chris Torres:

I think the difference that we'll be watching from the Trump administration is, obviously, what Gorsuch, Kavanaugh and Coney Barrett do. It's going to be interesting. I am ready to be surprised because we all will be at some point or another.

Bernadette Rappold:

Yeah. Absolutely. There have been big changes and we'll have to see where those changes lead us. Well, Chris, I want to thank you so much for spending some time with me here this afternoon and to our listeners for tuning in.

**Bernadette Rappold:**

Once again, my name is Bernadette Rappold. I'm with my friend and partner Chris Torres. We expect to be having a number of new episodes of this podcast coming soon. Until we meet again, stay safe, take care, and we look forward to visiting with you again soon. Thanks.