

## REPRESENTATIVE MATTERS

### Clean Air Act

The federal Clean Air Act (CAA) provides several avenues for the federal government and individuals to file lawsuits alleging CAA violations. We have extensive experience successfully representing utility and other clients in litigation concerning compliance with the CAA's New Source Review (NSR) permitting requirements, New Source Performance Standards, and hazardous air pollutants standards.

Our CAA litigation defense experience includes:

- Defending allegations by the State of New Jersey that our client's coal-fired power plant in eastern Pennsylvania violated NSR and related Title V permit provisions.
- Defending an action brought by the federal government alleging NSR, Title V permit, NSPS and state operating permit violations at a coal-fired generating unit in Kentucky.
- Successfully settling Sierra Club claims alleging NSR, NSPS and opacity violations at our client's coal-fired plant in Ohio.
- Successfully obtaining dismissal of New York's claims that Prevention of Significant Deterioration (PSD) and Title V permit violations occurred at two coal-fired power plants in New York prior to their sale to our client on the basis that there was no successor liability under the PSD provisions of the CAA.
- Assisting our client in negotiating a comprehensive settlement with EPA and several states concerning alleged NSR, NSPS and other CAA violations at its five North American refineries.
- Obtaining a favorable settlement in a citizen suit alleging opacity and PM emission limit violations at our client's coal-fired plant in Pennsylvania.

### Challenges to U.S. Environmental Protection Agency (EPA) Action or Inaction

We have also successfully initiated and intervened on behalf of companies in litigation involving final agency actions and nondiscretionary duties of the U.S. EPA on key Clean Air Act issues.

Our experience in this area of CAA litigation includes:

- Representing two Texas trade associations in a federal district challenge to EPA's failure to timely act on approving certain Texas air quality rules.
- Representing a large national trade association in litigation involving challenges to EPA's denial of California's request for a preemption waiver under the CAA to regulate greenhouse gas emissions from motor vehicles.
- Representing clients in a challenge to a major EPA regulatory program under the CAA, the Clean Air Interstate Rule,

before the U.S. Court of Appeals, District of Columbia Circuit.

- Intervening on behalf of clients in filing petitions for review concerning the D.C. Circuit's decision on the EPA's Clean Air Mercury Rule.
- Intervening on behalf of a multi-client industry coalition before the U.S. Court of Appeals, Fifth Circuit, in a successful defense of a challenge to the EPA's approval of the Beaumont/Port Arthur ozone attainment deadline.
- Intervening on behalf of electric generating clients in several cases involving the denial by the EPA of objections made by states and environmental groups to Title V permits issued by the EPA.
- Intervening on behalf of a large oil company client in litigation concerning a challenge to a LNG project brought in the U.S. Court of Appeals, Fifth Circuit.

### **Superfund Cost Recovery and Natural Resource Damages**

We have successfully represented numerous Fortune 500 and other companies on a wide range of Superfund cost recovery and natural resource damage actions, both in alternative dispute resolution and formal judicial proceedings, including successful recoveries from the federal government as a potentially responsible party at various remediation sites.

Our experience includes serving as common counsel for multiparty Potentially Responsible Party (PRP) groups in connection with cleanup actions under federal and state laws, where we

have negotiated innovative and creative settlement agreements with federal and state regulatory agencies.

Our federal Superfund cost recovery and natural resource damages litigation experience includes:

- Winning a significant cost-sharing agreement for a major wireless telephone company. We were able to negotiate a highly favorable settlement agreement from the United States in connection with a cost recovery claim made by a wireless carrier against the federal government. As part of this claim, this carrier had sought reimbursement from the government in connection with the cleanup of a formerly-utilized, top-secret old government facility. Under the settlement, the U.S. has agreed to pay a fair portion of the past costs and close to 50% of any future costs for the cleanup.
- Defending a major manufacturer and obtaining a favorable global settlement in a Superfund action brought by the U.S. Department of Justice and the Texas Attorney General's Office for response actions and natural resource damages associated with mercury in bay sediments.
- Representing numerous clients in defending against EPA and state claims and negotiating cost-effective and appropriate cleanups with the federal and state governments at several dozen single and multi-party state and federal Superfund sites across the country.
- Preparing for litigation and mediation by developing effective strategies for defending our clients against improper

allegations of liability and/or excessive claims for response costs by the government and determining our clients' respective allocated share of responsibility for site response costs.

- Obtaining a multi-million dollar settlement for the owner of an industrial manufacturing site in a Superfund cost recovery and contribution action that also involved related common law claims against the former owners and operators of the property.
- Successfully defending a multinational consumer products company in which the United States sought to impose more than \$100 million in CERCLA "operator" liability on our client based on the former activities of a corporate subsidiary. This case resulted in one of the most important U.S. Supreme Court decisions under CERCLA, with the Court finding that Superfund liability can be imposed on corporate parents for the actions of their subsidiaries only if the corporate parent exercised actual control over the hazardous waste-related activities performed at a particular cleanup site.
- Representing a major international oil company in pursuing multi-million dollar CERCLA cost recovery and contribution claims against the federal government. These claims seek to recoup the cleanup costs that our client has incurred and will continue to incur in remediating environmental contamination that resulted from war-time production activities at several large oil refinery facilities.
- Prosecuting a CERCLA cost recovery and contribution action on behalf of a large, international manufacturing company against more than a dozen recalcitrant PRPs at a very large federal Superfund site in New England. We have employed a novel litigation strategy that is designed to establish the defendant PRPs' liability at this site in an expeditious, cost-effective manner, and then to pursue settlements where possible and to otherwise seek summary judgment as to any remaining recalcitrant PRPs' responsibility for both past costs and future response costs at this site.
- Advising one of our industrial clients in an extensive mediation/allocation process for establishing this client's "divisible" or "allocated" share of responsibility for the past and future cleanup costs at a major Superfund site in California. As part of this process, we engaged experts to assist us with evaluating the waste materials allegedly contributed by our client to the site, and we prepared a targeted allocation brief for the mediation/allocation process that provided a comprehensive analysis of the volume and toxicity associated with our client's alleged wastes and their potential connection to the proposed site cleanup. Through our efforts our client was able to resolve its liability at the site as a *de minimis* party.

#### Toxic Tort and Class Actions

Baker Botts has one of the leading toxic tort practices in the country. Our experience in handling toxic tort cases covers the spectrum from small individual plaintiff cases to mass tort litigation and class actions--including

cases in which entire communities have filed suit.

Our toxic tort and class action experience includes:

- Representing a chemical company in the first proceeding with the new Texas Judicial Panel on Multidistrict Litigation: We secured an order that effectively transferred all newly filed asbestos cases statewide to a single district judge for pretrial proceedings.
- Defending a manufacturing company in Alabama from 22 lawsuits brought by 2,200 plaintiffs alleging damage from air emissions.
- Defending a major manufacturer alleged to have released trichloroethylene in South Texas from claims by various neighboring land owners and residents claiming personal injuries, nuisance and trespass: Claims from over 1,000 plaintiffs seeking hundreds of millions of dollars in damages were favorably resolved prior to trial.
- Representing a major oil company in a series of approximately 75 lawsuits after thousands of plaintiffs sued over a large hydrofluoric acid spill at its refinery in Texas City: Several of these cases were tried to verdict and the balance were settled for significantly less than the plaintiffs' lawyers had expected when the suits were filed. Ultimately, the client sued the contractor who was responsible for causing the leak and obtained a judgment sufficient to cover all of its litigation expenses and amounts paid in settlements.
- Representing chemical company defendant in a lawsuit alleging that exposure to benzene caused plaintiff's fatal leukemia. We obtained summary judgment and an order that struck plaintiff's causation experts.
- Defending a dairy farm operator alleged to have contaminated a city's water supply due to its manure management practices: We secured an order stating that phosphorous in cow manure is not necessarily a hazardous substance under CERCLA. The city's multimillion-dollar CERCLA claim was resolved favorably prior to trial.

#### Climate Change

Companies face a pending threat of climate-related suits under nuisance and other theories. We represent major power producing companies in high-profile climate lawsuits.

Our climate litigation experience includes:

- Representing two major power producers in *Native Village of Kivalina vs. ExxonMobil et al.* We successfully obtained the dismissal of one *Kivalina* defendant.
- Representing major power producer in *Comer, et al. v. Murphy Oil USA, et al.*, alleging damages from Hurricane Katrina related to climate change.

#### Environmental-Related Products Liability

Methyl-tertiary-butyl-ether (MTBE), a gasoline additive designed to reduce air pollution, has been the subject of numerous lawsuits related to groundwater

contamination. While several of our MTBE lawsuits are ongoing, we have already successfully negotiated settlements in many of the cases.

Our environmental products liability litigation experience includes:

- Serving as national counsel to two leading refiners and a chemical company in over 50 product liability lawsuits across the country alleging that gasoline containing MTBE contaminated water supply wells.
- Representing a major petroleum company in defending an ongoing class action on behalf of all owners of underground storage tanks in the State of West Virginia. We were successful in instituting a very favorable and innovative trial plan in that case which requires plaintiffs to first establish “general causation” and then, in separate trials, demonstrate damage on an individual basis.

#### **Endangered Species Act**

Opposition groups have become skilled at challenging projects on Endangered Species Act (ESA) grounds, and these challenges often escalate to federal court litigation. We have represented project developers in many ESA cases across the country and have experience briefing the Supreme Court on ESA issues.

Our ESA litigation experience includes:

- Representing a large national homebuilder association and a number of local governments in the U.S. Court of Appeals for the District of Columbia in a case challenging the constitutional authority of Fish and

Wildlife Service (FWS) to impose restrictions on private parties regulating the taking of a species (the Delhi Sands flower-loving fly) with minimal impacts on interstate commerce.

- Representing a large landowner in litigation in federal district court in California challenging the designation of critical habitat for a number of species that inhabit vernal pools.
- Representing a large national homebuilder association in litigation in Florida federal district court and the U.S. Court of Appeals for the Eleventh Circuit in litigation by a number of environmental groups challenging a Biological Opinion issued by FWS in connection with a Section 7 consultation with the Federal Emergency Management Agency (FEMA) concerning issuing flood insurance for development projects in the Florida Keys. The district court judge found the Biological Opinion to be flawed and issued a ruling prohibiting FEMA from issuing any flood insurance policies in the Keys until it had completed a new Biological Opinion to the satisfaction of the court.
- Representing the largest landowner in southern Orange County, California in litigation in the U.S. District Court for the Central District of California challenging the designation of critical habitat for the coastal California gnatcatcher.

- Filing *amicus* briefs on behalf of clients in the U.S. Supreme Court in several cases arising under the ESA.

#### **Environmental Claims in Bankruptcy**

Bankruptcy can involve environmental claims that result in complex environmental litigation. We integrate our environmental practice, particularly our litigation, waste and remediation capabilities, within the larger bankruptcy action to effectively handle environmental claims and related litigation.

Our environmental claims in bankruptcy experience includes:

- Representing a national metals mining, smelting and refining company in connection with \$6.5 billion in environmental bankruptcy claims at approximately 75 sites across the country, described by the U.S. Department of Justice as the most complicated environmental bankruptcy in history.

#### **Environmental Arbitration/Mediation**

Multinationals with assets abroad risk having high-dollar foreign assets expropriated under the pretext of environmental infractions and other disputes. These international disputes often present an additional layer of complexity relating to conflicts of law, sovereign immunity, the act-of-state doctrine, the forum *non conveniens* doctrine, international service and international discovery.

We advise clients on international environmental arbitration matters and are fortunate that we can quickly assemble a cross-disciplinary team that includes our arbitration and mediation lawyers from our other offices around the globe. Our arbitration group has handled matters in virtually every industry, on both institutional and *ad hoc* arbitrations.

Our environmental arbitration/mediation experience includes:

- Representing the claimant, a joint venture between two large U.S. oil companies, in an US \$11 billion ICC arbitration arising out of the Republic's unilateral decision to terminate the joint venture's rights in Yemen after 20 years of continuous operations under a production sharing agreement. As part of this representation, our lawyers teamed with technical experts to develop an auditing and sampling program that allowed for the assessment of environmental impacts to air, soil, groundwater and vegetation from petroleum constituents and the identification of appropriate remediation standards and guidelines in the Middle East.