

ARTICLES

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Differential Access to Justice in Environmental Cases Involving Private Property and Public Laws

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Twenty-five years ago, students in the environmental law program at the University of Oregon founded the Journal of Environmental Law and Litigation (JELL). Starting a new law journal is never an easy enterprise, but these students would not be denied. With no initial financial support from the law school, students built JELL into a widely respected source for both scholarly and practical articles on an exceptionally wide variety of topics. Many of these students now have distinguished careers in the field of environmental law. In the twenty-five years since its initial issue, JELL has proved to be not only an outstanding resource on issues involving law and the environment, but also a catalyst for conferences, debates, and

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interdisciplinary work on the most pressing environmental issues of the last twenty-five years.

At the time of JELL's inception in 1986, one of the courses I taught at the law school was an environmental law clinic. In this clinic, students worked on behalf of nonprofit citizen groups in cases involving federal environmental laws. Many of the battles in these cases involved whether our clients should even be allowed to present the substance of their cases in court. Procedural defenses such as standing, ripeness, exhaustion, and deference to administrative agencies were (and still are) common in these public law cases. During this time, we faced an increasing body of Supreme Court jurisprudence that expanded these defenses and diminished citizen access to courts to enforce environmental laws.

In 2003, I left the law school and began representing public agencies (primarily municipalities and water districts) in tort litigation against polluters of public drinking water supplies (primarily groundwater). In this practice, I have had to become familiar with case law addressing common law tort remedies for interference with property interests—especially property interests in groundwater. The contrast between jurisprudence involving access to courts to present tort claims involving property interests and jurisprudence involving access to courts to present claims involving public rights and public laws is stark.

In cases involving tort claims for environmental damage to private property, courts, including the Supreme Court, have been generous in keeping the door to the courthouse open so that the substance of such claims can be determined. In such cases, defendants use the “preemption” defense in much the same way that defendants in public law cases use standing, exhaustion, and ripeness—that is, to argue that courts may not even reach the substance of a plaintiff's claim. It is illuminating to compare jurisprudence, including Supreme Court jurisprudence, on preemption in tort cases with jurisprudence, including Supreme Court jurisprudence, on standing in citizen suits. Such a comparison reveals that courts are more willing to allow citizens access to courts to redress environmental harm to private property than they are to allow citizen access to the courts to redress environmental harm to public resources.

I

PREEMPTION JURISPRUDENCE IN TORT CASES INVOLVING HAZARDOUS SUBSTANCES AND PROPERTY DAMAGE.

The United States Supreme Court, while restricting the ability of citizens to enforce public laws, has broadly interpreted “savings” provisions in environmental (and other) legislation to allow state tort claims to proceed despite potential interference with federal regulatory programs. A plausible explanation for this contrast is that a fundamentally conservative Court is predisposed to protect private property interests and historical causes of action but reluctant to protect public rights through the relatively new means of citizen suits (as opposed to the traditional enforcement of public rights by the executive branch alone).

In *Bates v. Dow Agrosciences LLC*,¹ for example, the Court rejected an argument that imposing common law liability on pesticide manufacturers would conflict with the comprehensive regulatory authority given to the Environmental Protection Agency (EPA) by the Federal Insecticide, Fungicide, and Rodenticide Act² (FIFRA). The Court rejected these arguments even in the absence of a “savings” provision in FIFRA specifically preserving state common law causes of action. The Court held: “The long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against pre-emption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.”³

The *Bates* Court specifically held that jury verdicts in tort cases were not to be treated as the equivalent of state regulatory “requirements” for purposes of preemption analysis. The Court held: “The Court of Appeals was . . . quite wrong when it assumed that an[] event, such as a jury verdict, that might ‘induce’ a . . . manufacturer to change its [conduct] should be viewed as a requirement.”⁴ The *Bates* Court was not concerned that allowing juries to decide tort claims involving subject matter regulated by federal agencies might result in inconsistent standards. The Court specifically found that “properly instructed juries might on occasion reach contrary conclusions on a

¹ 544 U.S. 431 (2005).

² 7 U.S.C.S. §§ 136–136y (LexisNexis 2012).

³ 544 U.S. at 449.

⁴ *Id.* at 443.

similar issue,”⁵ but this fact did not compel a finding that state tort claims were preempted by federal legislation.

Even when the Court has found that federal legislation preempts or precludes federal common law, it has carefully distinguished traditional state common law remedies. In *American Electric Power Co., Inc. v. Connecticut*,⁶ the Court found that the Clean Air Act preempted any federal common law of nuisance that might otherwise apply to carbon dioxide generating activities that contributed to global warming. The Court held that it need not address whether there was a federal common law right of the nature claimed by plaintiffs, because “[a]ny such claim would be displaced by the federal legislation authorizing EPA to regulate carbon-dioxide emissions.”⁷

The *American Electric* Court made two important observations about state tort law in the course of finding federal common law preemption. First, it emphasized that to the extent there is a body of federal common law, such law relies heavily on state common law for its guiding principles.⁸ Second, the Court made clear that it was *not* ruling on whether state common law nuisance remedies were preempted by the Clean Air Act.⁹

The Court’s willingness to preserve state common law remedies in the face of federal preemption arguments has not been limited to the field of environmental law. In *Williamson v. Mazda Motors of America, Inc.*,¹⁰ the Court found the fact that tort damages would make one agency proposed alternative more expensive than another agency proposed alternative did not create “conflict preemption.”¹¹

The *Williamson* Court went on to explain:

[T]o infer from the mere existence of such a cost-effectiveness judgment that the federal agency intends to bar States from imposing stricter standards would treat all such federal standards as if they were maximum standards, eliminating the possibility that the

⁵ *Id.* at 452.

⁶ 131 S. Ct. 2527 (2011).

⁷ *Id.* at 2537.

⁸ *Id.* at 2536.

⁹ *Id.* at 2540 (“None of the parties have briefed preemption or otherwise addressed the availability of a claim under state nuisance law. We therefore leave the matter open for consideration on remand.”).

¹⁰ 131 S. Ct. 1131.

¹¹ *Id.* at 1139 (“[T]he fact that DOT made a negative judgment about cost effectiveness—cannot by itself show that DOT sought to forbid common-law tort suits in which a judge or jury might reach a different conclusion.”).

federal agency seeks only to set forth a minimum standard potentially supplemented through state tort law. We cannot reconcile this consequence with a statutory saving clause that foresees the likelihood of a continued meaningful role for state tort law.¹²

The *Williamson* Court emphasized that the key inquiry was whether giving manufacturers a choice was a specific goal of Congress, or whether giving manufacturers a choice was a means to an end for Congress. Unless providing manufacturers with a choice was a specific goal of Congress, the Court was unwilling to find intent to preempt state tort law.

The Supreme Court's expansive approach to remedies for injury to private property has not been limited to rejecting preemption arguments. The Court has also generously interpreted federal legislation authorizing recovery of the expenses involved in removing hazardous substances from private property. In *Cooper Industries, Inc. v. Aviall Services, Inc.*,¹³ for example, the Court emphasized that the "sole function" of the savings clause of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) "is to clarify that § 113(f)(1) [§ 9613(f)(1)] does nothing to 'diminish' any cause(s) of action for contribution that may exist independently of § 113(f)(1)."¹⁴

In *United States v. Atlantic Research Corp.*,¹⁵ the Court addressed the relationship between the private response cost provisions of § 107(a)(4)(B) of CERCLA and the "contribution" provisions of § 113(f) of CERCLA. The Court rejected the argument that § 113(f) bars parties who are themselves "responsible" for contamination from invoking § 107(a)(4)(B) to recover from other responsible parties.¹⁶

¹² *Id.* (emphasis omitted).

¹³ 543 U.S. 157 (2004).

¹⁴ *Id.* at 579.

¹⁵ 551 U.S. 128 (2007).

¹⁶ *See id.* at 138–39. Prior to the *Atl. Research* decision, some courts were unwilling to allow parallel common law contribution claims in CERCLA actions involving one potentially responsible party (PRP) suing another PRP. Even then, however, as the court stated in *Allied Corp. v. Frola* (D.N.J., Sept. 21, 1993, No. Civ. A. 87-462):

Although the court will bar [plaintiffs'] indemnification claims, it would strain the meaning of "contribution bar" beyond common sense and congressional intent to find that section 113(f)(2) precludes state tort claims. This claim is not a thinly veiled "change in nomenclature" to sneak by section 113(f)(2), but an independent

The Court found that § 107(a)(4)(B)'s authorization of causes of action to recover remediation costs "sweep[s] in virtually all persons likely to incur cleanup costs."¹⁷

The Court also rejected the argument that allowing responsible parties to recover response costs would interfere with the incentives for settlement contained in the contribution provisions of § 113(f).¹⁸

The Court found:

[P]ermitting PRPs to seek recovery under § 107(a) will not eviscerate the settlement bar set forth in § 113(f)(2). That provision prohibits § 113(f) contribution claims against "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement . . ." 42 U.S.C. § 9613(f)(2). The settlement bar does not by its terms protect against cost-recovery liability under § 107(a). For several reasons, we doubt this supposed loophole would discourage settlement. First, as stated above, a defendant PRP may trigger equitable apportionment by filing a § 113(f) counterclaim. A district court applying traditional rules of equity would undoubtedly consider any prior settlement as part of the liability calculus.¹⁹

University of Oregon School of Law and JELL alumnus Jay Geck argued on behalf of amicus curiae the State of Washington for the winning side in *Atlantic Research*.

State and lower federal courts have also broadly interpreted statutory remedies for environmental injuries to private property and have been reluctant to find preemption of state tort law remedies in environmental cases.

For example, in *PMC, Inc. v. Sherwin-Williams Co.*,²⁰ the Seventh Circuit held:

The purpose of CERCLA's savings clause is to preserve to victims of toxic wastes the other remedies they may have under federal or state law The legislature doesn't want to wipe out people's rights inadvertently, with the possible consequence of making the

claim with its own elements. That judicial construction of CERCLA has found CERCLA to preserve consistent state remedies reinforces today's decision.

1993 WL 388970 at 11 (1993).

¹⁷ *Atl. Research Corp.*, 551 U.S. at 129.

¹⁸ *Id.* In rejecting the Third Circuit's reasoning in *In re Reading Co.*, the *Atl. Research* opinion cited the Third Circuit's most recent case applying this reasoning, *E.I. DuPont de Nemours & Co. v. U.S.*, 460 F.3d 515 (3d Cir. 2006). *Id.*

¹⁹ *Atl. Research Corp.*, 551 U.S. at 140–41.

²⁰ 151 F.3d 610 (7th Cir. 1998).

intended beneficiaries . . . worse off [CERCLA] was not intended to wipe out the common law of nuisance.²¹

In *Board of Education of the Gorham Fayette Local v. D.H. Holdings Corp.*,²² after extensively reviewing the legislative history of CERCLA's "savings" clause, the court found that § 9613 of CERCLA does not preempt state common law damage claims for contamination of property, even adjacent to CERCLA cleanup sites.²³

In *Samples v. Conoco, Inc.*, the court rejected a claim that plaintiffs' common law claims "in effect" challenged the adequacy of the cleanup at the site.²⁴ The *Samples* court considered the "savings clauses" in CERCLA and the extensive legislative history addressing common law damage claims and CERCLA's cost recovery mechanisms. The *Samples* court found:

Plaintiffs' lawsuit does not constitute a "challenge" to the consent decree The lawsuit is not an action designed to review or contest the remedy selected by the EPA, prior to implementation; it is not an action designed to obtain a court order directing the EPA to select a different remedy; it is not an action designed to delay, enjoin, or prevent the implementation of a remedy selected by EPA; and it is not a citizen suit²⁵

²¹ *Id.* at 617–18. See also CERCLA § 9607(i) (exempting some pesticide applications from CERCLA, but providing: "Nothing in this paragraph shall affect or modify in any way the obligations or liability of any person under . . . common law, for damages, injury, or loss resulting from a release or a threatened release of any hazardous substance or for removal or remedial action"). 42 U.S.C.A. § 9614(c)(1)(B) (West 2012).

²² No. 3:04 CV 7390 at 1–2 (N.D. Ohio 2005).

²³ See *Samples v. Conoco, Inc.*, 165 F. Supp.2d 1303, 1312 (N.D. Fla. 2001) (common law damage claims for cost of removing PCE from property adjacent to regulated site is not preempted by CERCLA); *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liab. Litig.*, 488 F.3d 112, 134–35 (2d Cir. 2007) (rejecting preemption challenge to groundwater contamination claims); *In re Methyl Tertiary Butyl Ether ("MTBE") Products Liab. Litig.*, 341 F. Supp.2d 386, 403–11 (S.D.N.Y. 2004); *Courtaulds Aerospace, Inc. v. Huffman* 1994 WL 508163, at 4 (E.D. Cal., June 9, 1994, No. CV-F-91-518 OWW) (adjacent landowner whose property was contaminated allowed to challenge inadequate and underfunded government remediation).

²⁴ See *Samples*, 165 F. Supp. 2d 1303 (the cleanup was the subject of a consent decree by the same court that rejected the preemption challenge).

²⁵ *Id.* at 1315–16. These descriptions of the pre-enforcement challenges barred by § 9613(h) are similar to cases such as *McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325 (9th Cir. 1995), *Hanford Downwinders Coal., Inc. v. Dowdle*, 71 F.3d 1469 (9th Cir. 1995), and *Fort Ord Toxics Project, Inc. v. Cal. Env'tl. Prot. Agency*, 189 F.3d 828 (9th Cir. 1999), in which agencies conducting cleanups were named defendants. Claims that common law actions indirectly challenge cleanups, in contrast, have generally met with judicial skepticism.

The *Samples* court's review of the legislative history of 42 U.S.C. § 9613(h) (the provision of CERCLA addressing "preenforcement" direct challenges to EPA actions), cites sponsor after sponsor, on both sides of the aisle, assuring members of Congress that CERCLA would not be used as a shield to bar state common law claims brought by adjacent landowners. Typical of these comments are those of Senator Stafford, a member of the Conference Committee, who stated:

The time of review of judicial challenges to cleanups is governed by 113(h) for those suits to which it is applicable. It is not by any means applicable to all suits. For purposes of those based on State law, for example, 113(h) governs only those brought under State law which is applicable or relevant and appropriate as defined under Section 121 [i.e., challenges based on state cleanup standards.] In no case is State nuisance law, whether public or private nuisance, affected by 113(h).²⁶

In *City of Modesto Redevelopment Agency v. Superior Court*, the court held that manufacturers and distributors of perchloroethylene (PCE) could be held liable for the contamination caused by PCE released at dry cleaning operations if, under the totality of the evidence, it was shown that defendants created, or assisted in the creation, of a nuisance.²⁷ Upon remand, the trial court issued a lengthy Final Statement of Decision:

The manufacturer defendants in this case did more than simply place their PCE products into the stream of commerce without adequate warnings. Because their PCE products were fungible, the manufacturers competed in the marketplace by touting their expertise, professionalism, and individualized services. Their customers were relatively high volume businesses and used substantial amounts of PCE on a daily basis, and the manufacturers encouraged these businesses to rely on the manufacturers' advice,

²⁶ *Samples*, 165 F.Supp. 2d at 1312 (quoting 132 CONG. REC. 28,406, 28,410 (1986) (emphasis omitted)). See also *Fireman's Fund Ins. Co. v. City of Lodi*, 302 F.3d 928, 941–52 (9th Cir. 2002) ("CERCLA contains three separate savings clauses [including § 9652(d)'s "common law" savings language] [W]e see no reason why California cities may not enact municipal environmental response ordinances keying cleanup to standards other than the NCP. . . . [A] city may borrow or adapt the NCP as it sees fit An agreement with or authorization from the state is not a prerequisite to local environmental legislation."); *City of Lodi v. Randtron*, 118 Cal. App. 4th 337, 352–53 (2004) (citing the savings provision of the Water Code, § 13002, and concluding that municipalities have authority to "provid[e] for the summary abatement of a public nuisance [citations] and for relief from contamination and pollution . . ."); *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 127 (3d Cir. 1991) ("Congress did not intend for CERCLA remedies to preempt complementary state remedies.").

²⁷ 119 Cal. App. 4th 28, 40–41 (2004).

instruction and expertise. The manufacturers published newsletters to their customers, provided technical literature to their customers, and trained sales personnel to promote reliance by the customers on the manufacturer's expertise. . . .

With knowledge of the customers' improper waste handling and disposal practices, the manufacturers nevertheless failed for too long to include in their written and oral communications to their customers the message that those PCE waste handling and disposal practices, whose origins were found in the recommendations of the manufacturers themselves, should be stopped. By the time the message was effectively delivered, the contamination here at issue had already occurred. The manufacturers did too little too late to undo the harm that they had earlier caused. In short, the essential transgressions were affirmative acts, *viz* the delivery of improper messages not timely withdrawn.²⁸

These rulings would never have been issued, of course, if the trial court concluded that state nuisance law was preempted by federal hazardous waste laws such as CERCLA.

In *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*,²⁹ the court rejected an argument by defendants that the Orange County Water District's (OCWD) common law damage claims for groundwater contamination should be stayed because they might interfere with the remedial efforts of other agencies:

OCWD responds that other agencies have not and generally do not provide the types of remediation it seeks to fund. While other agencies such as the Regional Board or OCHCA may engage in spill-site remediation, they do not attempt remediation or containment of MTBE plumes that may have escaped the spill site before remediation efforts began (or may persist despite such efforts), which is in part what OCWD seeks here. OCWD asks this Court for monetary relief necessary to proactively identify and remediate or contain MTBE plumes that have already escaped a spill site and may eventually make their way into the groundwater basins served by OCWD. Defendants characterize OCWD's plans to address plumes rather than spill sites as "second-guessing" the decisions of other agencies. The record suggests, however, that OCWD's proposal would complement, not negate, the other agencies' efforts, and that the other agencies might welcome the additional assistance. Further, the agencies' regulatory decisions and remediation plans are guided at least in part by the availability of resources, such that lack of remedial action by an agency cannot be taken as a decision that no further remediation is necessary. Thus

²⁸ Slip Op. at 17–18.

²⁹ No. 1:00-1898, 2007 WL 700819 (S.D.N.Y. Mar. 7, 2007).

it is inappropriate to classify OCWD's supplemental efforts as "second-guessing."³⁰

The court rejected defendants' argument that allowing OCWD's suit to proceed "guarantees inconsistent results that will jeopardize the ability of the regulatory system effectively to investigate and remediate groundwater contamination."³¹

Because multiple agencies are responsible for remediation efforts within a geographic area, and because a defendant's conduct in handling MTBE often has effects that cross water district boundaries, it is perfectly reasonable that even a single MTBE release could subject a defendant to the concurrent oversight of several agencies. If defendants' concern is that they might be "double-charged" for redundant remediation efforts, that is an issue of damages, not primary jurisdiction, and defendants will have the opportunity to be heard on that issue at the appropriate time.³²

Although CERCLA's private response cost remedies are limited to incurred costs and declaratory relief, the Ninth Circuit determined, in *Stanton Road Associates v. Lohrey Enterprise*, that this limitation does not apply to state common law claims for future response costs because CERCLA's savings clause expressly preserved such common law claims.³³ The concern behind CERCLA's remedies limitation—"allowing recovery for future costs absent any binding commitment to incur these costs would leave no incentive to complete the cleanup"³⁴—can be alleviated for common law claims by equitable trusts or similar accounts. In *Stanton Road Associates*, the Ninth Circuit approved just such a procedure and upheld placing "future response costs" of \$1,100,000 into a trust account to be used for remediating PCE on property adjacent to a dry cleaning site.³⁵

Of course, agency decisions about how to employ limited resources when it comes to addressing hazardous waste must include the discretion to allow private parties to proceed with tort actions without agencies joining in such actions.

³⁰ *Id.* at *6 (citations and emphasis omitted).

³¹ *Id.* (citation omitted).

³² *Id.* at n.58.

³³ 984 F.2d 1015, 1022 (9th Cir. 1993).

³⁴ *In re Dant & Russell, Inc.* 951 F.2d 246, 250 (9th Cir. 1991).

³⁵ *Stanton*, 984 F.2d at 1017, 1021–22; see also *New Mexico v. Gen. Elec. Co.*, 335 F. Supp. 2d 1185, 1263 (D. N.M. 2004) (proposing an equitable or constructive "cleanup trust" supervised by the court).

In *Thomas v. FAG Bearings Corp.*, FAG moved to join the Missouri Department of Natural Resources (MDNR) as a necessary party in an action against FAG for remediation costs.³⁶ FAG based its motion, in part, on MDNR's previous statement that it intended to sue FAG for the costs of remediation. FAG contended that joinder was necessary to prevent FAG "from incurring double, multiple, or otherwise inconsistent obligations."³⁷ Over MDNR's objection to joinder, the district court granted FAG's motion and joined MDNR as a defendant.³⁸

MDNR argued on appeal that involuntary joinder interfered with MDNR's sovereign power to decide when to prosecute and when not to prosecute—decisions at the heart of the agency's executive powers. The Court of Appeals agreed, finding that a suit is "against the state" if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act."³⁹ Applying this definition, the Eighth Circuit held that the Eleventh Amendment barred the involuntary joinder of MDNR:

Involuntary joinder will compel MDNR to act by forcing it to prosecute FAG at a time and place dictated by the federal courts. This disrespect for state autonomy in decision-making is precisely what the Eleventh Amendment was intended to avoid. Indeed, "[t]he very object and purpose of the Eleventh Amendment [is] to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."

Permitting coercive joinder also undermines the two aims of the Eleventh Amendment: protection for a state's autonomy and protection for its pocketbook. Involuntary joinder diminishes state sovereignty by permitting FAG to unilaterally waive MDNR's Eleventh Amendment immunity. As a general matter, only unmistakable and explicit waiver by the state itself qualifies as a waiver of Eleventh Amendment immunity.⁴⁰

The assumption that state agencies will (or must) address all contamination at all sites runs counter to the reality that agencies have

³⁶ 50 F.3d 502, 503–04 (8th Cir.1995).

³⁷ *Id.* at 504.

³⁸ *Id.*

³⁹ *Id.* at 505 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101, n.11 (1984) (internal citations omitted)).

⁴⁰ *Id.* at 505–06 (citations omitted).

limited resources and their discretion in deciding how and where to expend those resources must be acknowledged and protected. Although CERCLA and the HSAA grant responsible agencies the authority to clean up the furthest reaches of every plume of contamination, those agencies have neither the resources nor a statutory directive to do so. Rather than imposing nondiscretionary mandates, both CERCLA and the HSAA grant agencies discretionary authority to address contamination within the limits of agency resources.

As with citizen suits, private tort actions can and do complement the efforts of regulatory agencies when it comes to contamination of public water supplies. In *City of Modesto*, the defendants argued that allowing private tort remedies would interfere with the discretion of regulatory agencies to make cleanup decisions. In response, plaintiffs obtained a declaration from the Counsel for the Regional Water Quality Control Boards in California stating, in part:

4. The Regional Water Boards do not have sufficient resources to issue Cleanup and Abatement Orders pursuant to California Water Code section 13304 or seek judicial injunctions pursuant to California Water Code sections 13002(c) or 13340 to compel all dischargers to undertake investigative and remedial actions at all polluted sites for which they are responsible.

5. The Regional Water Boards do not have sufficient resources to thoroughly oversee all aspects of investigative and remedial activities at all polluted sites.

6. While the Regional Water Boards use some of their resources to issue Cleanup and Abatement Orders or seek injunctions to compel investigative and remedial actions at some polluted sites, the Regional Water Boards also use a substantial portion of their resources to engage in limited oversight of voluntary investigation and remediation efforts at many other polluted sites throughout the state.

7. Therefore, the Regional Water Boards have a substantial interest in the continued ability of non-dischargers (including public and private entities) and dischargers to both compel dischargers to undertake investigative and remedial actions at polluted sites and to voluntarily undertake investigative and remedial actions themselves.⁴¹

Lower courts have also been generous in interpreting legislation designed to preserve private remedies in hazardous waste

⁴¹ Declaration of Philip G. Wyels, Assistant Chief Counsel in the California State Water Resources Control Board's Office of Chief Counsel.

contaminations from arguments that the remedies are barred by statutes of limitations. The Ninth Circuit held in *O'Connor v. Boeing North America*, that section 9658 of CERCLA preempts California law with respect to the commencement of the statute of limitations period in cases involving hazardous substances.⁴² Under section 9658, the statute commences only when a plaintiff has “knowledge of the critical facts of his injury, which are that he has been hurt and who has inflicted the injury.”⁴³ The Ninth Circuit stated:

[W]e reject an interpretation of the federal discovery rule that would commence limitations periods upon mere suspicion of the elements of a claim. Under the circumstances presented here, such a standard would result in “the filing of preventative and often unnecessary claims, lodged simply to forestall the running of the statute of limitations.”⁴⁴

The court sensibly stated, “We seek to forestall such a ‘legal cascade.’”⁴⁵

The Ninth Circuit went on to make clear that CERCLA was intended to extend discovery periods due to the inherent uncertainties in determining the subsurface movement of contamination: “The effect of [section 9658] is to ensure that if a state statute of limitations provides a commencement date for claims . . . resulting from release of contaminants that is earlier than the commencement date defined in section 9658, then plaintiffs benefit from the more generous commencement date.”⁴⁶

⁴² 311 F.3d 1139, 1146 (9th Cir. 2002).

⁴³ *Id.* at 1147 (majority opinion) (citation omitted).

⁴⁴ *Id.* at 1148. As the Ninth Circuit also explained, section 9658 preempts less generous state standards regardless of whether the state case alleges a CERCLA cause of action: “[D]efendants contend that the federal standard of discovery of claims does not apply to plaintiffs’ state court claims because plaintiffs, as individuals, have not alleged an underlying CERCLA claim. We disagree. Section 9658 applies to actions that assert state law claims without an accompanying CERCLA claim.” *Id.* at 1148–49.

⁴⁵ *Id.* See also *Lessord v. Gen. Elec. Co.*, 258 F.Supp.2d 209, 2189 (“[T]he mere fact that plaintiffs might have known that there was some contamination of their property does not mean that they could or should have sued everyone who *might* be liable. . . . Plaintiffs in toxic tort cases . . . should not be encouraged to take a shotgun approach”) (emphasis in original).

⁴⁶ *Id.* at 1146. See also *Angeles Chem. Co. v. Spencer & Jones*, 44 Cal. App. 4th 112, 113 (1996) (“The principal question on this appeal is whether the ‘discovery rule’ mandated by CERCLA preempts California’s 10-year limitations period, where the claims are based on a latent construction defect that results in the toxic contamination of the plaintiff’s property. We conclude that it does.”); *Bibeau v. Pac. Nw. Research Found., Inc.* 188 F.3d 1105, 1108 (9th Cir. 1999) (“Under this rule [§ 9658], the statute only begins to

In *Lessord v. General Electric Co.*,⁴⁷ contamination on plaintiffs' property emanated from either a 3M site or a GE site.⁴⁸ In ruling on a summary judgment motion based on the statute of limitations, the court noted that the statute commences only after discovering both the injury and the cause.⁴⁹ Even though "plaintiffs concede[d] that they were aware at some point prior to 1999 of the presence of some minimum levels of contaminants in the stream," and the plaintiffs' action was not filed until 2001, the court concluded that it did not support "a finding that, as a matter of law, the limitations period began to run when plaintiffs first became aware of such low levels of contaminants."⁵⁰ A September 1999 letter reporting high levels of contaminants also did not trigger the statute of limitations because the letter "did not identify any suspected source of the contamination."⁵¹

Assuming *arguendo* that plaintiffs were long aware that there was some sort of contamination on their property, they still needed some evidentiary basis for asserting liability before they sued [defendants]. In fact, had plaintiffs commenced this action in 1996 . . . defendants very likely would have moved to dismiss for failure to state a claim.⁵²

In some respects, tort remedies in environmental cases have provided more flexibility for fashioning practical relief than public law remedies. Public law remedies are often all-or-nothing

run once a plaintiff has knowledge of the 'critical facts' of his injury, which are 'that he has been hurt and who has inflicted the injury.')

(citations omitted); *Fisher v. Ceiba Specialty Chems. Corp.* 2007 WL 2995525, at 15 (S.D. Ala. Oct. 11, 2007) (commencement period under section 9658 "begin[s] running not when the harmful action occurred . . . but rather when plaintiffs knew or reasonably should have known that [defendant's] actions had damaged their property.')

⁴⁷ 258 F.Supp. 2d 209 (W.D.N.Y. 2002).

⁴⁸ *Id.* at 210–11.

⁴⁹ *Id.* at 215.

⁵⁰ *Id.* at 216, n.7.

⁵¹ *Id.* at 217. The court stated:

It must also be remembered that the GE Site is not the only source of chemical contamination in the area, and that there are various contaminants at issue here. As stated, the mere fact that plaintiffs might have known that there was some contamination of their property does not mean that they could or should have sued everyone who *might* be liable. At this point, it is not even clear that the TCEs indicated on the map originated at the GE Site, so it cannot be said as a matter of law that plaintiffs' alleged receipt of this map triggered the limitations period for their claims against GE and [the subsequent site owner].

Id. at 218 (emphasis in original).

⁵² *Id.* at 219.

propositions, where an agency action is either enjoined or not. Tort remedies provide greater opportunities for creative voluntary solutions between parties (who are not bound by the procedural obligations of federal agencies). And, of course, courts have great discretion to fashion equitable remedies in tort cases involving environmental issues—particularly in nuisance cases.

II

JURISPRUDENCE ON STANDING IN CITIZEN SUITS TO ENFORCE ENVIRONMENTAL LAWS

In contrast to the solicitous approach courts have taken to preserving causes of action for environmental damage to private property, courts have been reluctant to broadly grant citizen access to courts to enforce public rights.

The current Supreme Court's hostility toward private enforcement of public laws is most dramatically evident in the Court's opinion in *Lujan v. National Wildlife Foundation*.⁵³ In *Lujan*, the Court began reversing several decades of standing jurisprudence by distinguishing its opinion in *United States v. Students Challenging United States Regulatory Procedures (SCRAP)*.⁵⁴ The *SCRAP* opinion upheld a lower court's refusal to dismiss, on standing grounds, a challenge by law students to railroad rate increases that allegedly discriminated against recycled material.⁵⁵

The plaintiff in *Lujan* challenged the Secretary of the Interior's "land withdrawal review program," under which the Secretary was permitting land previously withdrawn from development activities, such as mining and timber cutting, to become eligible for such activities.⁵⁶ Despite the fact that the plaintiff in *Lujan* was a national environmental organization whose members were more obviously affected by such a program than the law students had been by the rate making challenged in *SCRAP*, the *Lujan* majority found that the plaintiff had failed to establish standing.⁵⁷ The Court distinguished *SCRAP* on the basis that *SCRAP* involved a motion to dismiss under Federal Rule of Civil Procedure 12(b), where the allegations of the

⁵³ See 497 U.S. 871 (1990).

⁵⁴ See 412 U.S. 669 (1973).

⁵⁵ See *id.*

⁵⁶ *Lujan*, 497 U.S. at 875–78.

⁵⁷ *Id.* at 889.

complaint were to be taken as true, whereas *Lujan* involved a motion for summary judgment under Federal Rule of Civil Procedure 56, where the plaintiff was obligated to present evidence to support challenged facts.⁵⁸ The Court then found that the affidavits presented by the plaintiff to meet its evidentiary obligations were not sufficiently specific about the harm suffered by the plaintiff to satisfy standing requirements.⁵⁹

Since *Lujan*, courts have applied increased scrutiny to plaintiff claims of harm sufficient to support standing and have viewed declarations explaining harm with increased skepticism. In *Summers v. Earth Island Institute*,⁶⁰ environmental groups represented by University of Oregon School of Law and JELL alumnus Matt Kenna sued the U.S. Forest Service, challenging regulations that exempted small timber salvage projects of 250 acres or less from the notice, comment, and appeals process required under the Forest Service Decisionmaking and Appeals Reform Act.⁶¹

Writing for the majority, Justice Scalia held that although plaintiffs had initially submitted a declaration establishing harm from a particular timber sale, a settlement with respect to that sale had eliminated standing.⁶² Justice Scalia went on to hold that a subsequent declaration failed to identify a specific area that was both threatened by the regulations and used by the declarant, and plaintiffs therefore failed to establish standing.⁶³ For Justice Scalia, it did not matter that the challenged regulation denied a procedural right embedded in the underlying legislation (the right to comment on Forest Service proposals that impacted the environment).⁶⁴ To Justice Scalia and the majority, “a procedural right *in vacuo*” is not enough to provide standing.⁶⁵ It was irrelevant that Congress created the procedural right because Congress cannot by statute remove the injury in fact requirement of constitutional standing.⁶⁶

⁵⁸ *Id.*

⁵⁹ *Id.* at 899.

⁶⁰ *See* 555 U.S. 488 (2009).

⁶¹ *Id.* at 490.

⁶² *See id.* at 497.

⁶³ *Id.* at 495–97.

⁶⁴ *Id.* at 496.

⁶⁵ *Id.* at 496.

⁶⁶ *Earth Island Inst.*, 555 U.S. at 496.

As with *Lujan*, this opinion championed form over substance and barred the courthouse door to a citizen group seeking to hold the executive branch accountable for noncompliance with a law adopted by the legislative branch.

The dissent, consisting of Justices Breyer, Stevens, Souter, and Ginsburg, noted that the plaintiff organizations had thousands of members around the country, and the likelihood was high that the Forest Service's self-granted exemption from environmental procedures for thousands of timber sales would have an impact on the organizations' members.⁶⁷ As Justice Breyer noted: "To know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where it is bound to arrive. The law of standing does not require the latter kind of specificity. How could it?"⁶⁸ Justice Breyer may have intended this question to be sincere, but the answer is clear—it can be required when five Justices on the Supreme Court demand it.

III CHALLENGES TO PLAINTIFFS' COUNSEL AS AN ADDITIONAL RESTRICTION ON ACCESS TO COURTS

Citizen suits to enforce environmental laws and tort cases on behalf of public entities to recover for environmental damages do share a common phenomenon: attempts by defense counsel to make plaintiffs' counsel, rather than the substance of the case, a primary issue. Defendants in public interest environmental law cases, including many cases handled by the environmental clinic at the University of Oregon School of Law, often challenge the right of attorneys representing environmental groups to bring public law actions.⁶⁹

In *Orange County Water District v. Arnold Engineering Co.*,⁷⁰ the defendants attempted to disqualify my law firm from bringing a public nuisance action on behalf of our public entity client, OCWD,

⁶⁷ *Id.* at 502–03.

⁶⁸ *Id.* at 508.

⁶⁹ See Robert R. Kuehn, *Lessons From Forty Years Of Interference In Law School Clinics*, 24 GEO. J. LEGAL ETHICS 59 (2011). See also Robert R. Kuehn, *Undermining Justice: The Legal Profession's Role In Restricting Access To Legal Representation*, 2006 UTAH L. REV. 1039 (2006).

⁷⁰ 127 Cal. Rptr. 3d 328 (2011).

on a contingency basis. The defense argued that such cases were so similar to criminal prosecutions that they could only be pursued by neutral in-house attorneys with no financial interest in the outcome of the case.

In seeking disqualification, the defendants relied on *People ex rel. Clancy v. Superior Court of Riverside County*⁷¹ and *County of Santa Clara v. Superior Court of Santa Clara County*⁷² for the proposition that public entities cannot retain contingency counsel to represent them in public nuisance actions. *Clancy* and *Santa Clara* involved public nuisance claims filed in the name of the people pursuant to California Code of Civil Procedure section 731. In both cases, the only remedy sought was abatement of the nuisance.

To rebut these charges and distinguish *Clancy*, OCWD pointed out that although its case involved a nuisance claim, the case was being prosecuted on behalf of OCWD, not “the people.” Contingency counsel had a client and was answerable to that client. Therefore, the case did not involve the risk of private counsel with public enforcement discretion and a financial incentive to prosecute that so concerned the *Clancy* court.

In *Santa Clara*, the court emphasized, “we specifically observed in *Clancy* that the government was not precluded from engaging private counsel on a contingent-fee basis in an ordinary civil case.”⁷³ The *Santa Clara* court also found that the analysis in *Clancy* had been “unnecessarily broad and failed to take into account the wide spectrum of cases that fall within the public-nuisance rubric.”⁷⁴

In *Priceline.com, Inc. v. City of Anaheim*,⁷⁵ the court rejected an argument that a city could not employ outside contingency counsel to prosecute tax claims. The court observed:

[W]e are troubled by the notion that lawyers are more apt to treat defendants unfairly if they are paid pursuant to a contingency fee agreement, rather than an hourly fee agreement. *Clancy* identifies the contingency fee lawyers’ financial interest in the outcome of a

⁷¹ 39 Cal. 3d 740 (1985).

⁷² 235 P.3d 21 (Cal. 2010).

⁷³ *Id.* at 54. As the *Priceline* court noted: “[I]t would appear California governments have routinely retained contingency fee counsel for decades, before and after *Clancy*.” *Priceline.com, infra*, note 75, at 1141. *See also* *In re City of San Diego* (9th Cir. 2008) 291 F. App’x. 798, 799–800 (noting that *Clancy* does not bar public entities from using contingency counsel to pursue nuisance claims for economic damages).

⁷⁴ *Santa Clara*, 50 Cal. 4th at 31–32.

⁷⁵ *Priceline.com, Inc. v. City of Anaheim*, 180 Cal App. 4th, 1130 (2010).

case as a factor that may interfere with the duty of neutrality. But it is just as easily argued that a contingency fee lawyer is *less* likely to pursue meritless litigation, whereas an hourly fee lawyer may have a financial motivation to continue prosecuting litigation discovered to lack merit. In short, we question the unstated assumption upon which *Clancy* is based.⁷⁶

The *Priceline* court's observation regarding the financial interests of hourly rate and contingency counsel is accurate but incomplete. Hourly rate defense counsel's financial motivations are to bill more hours. This can lead to a reluctance to settle litigation that should be settled, thus harming not only the interests of defense counsel's clients, but also the plaintiff's interests, as limited dollars go to meritless defenses rather than to make whole plaintiffs with legitimate claims. Hourly rate counsel may also be willing to prosecute meritless claims in order to earn significant fees.⁷⁷

IV CONCLUSION

During the twenty-five years that JELL has been publishing, courts have been receptive to private remedies for environmental harm to private property but hostile to citizen attempts to enforce public rights to a clean environment. Although this might be explained by a judicial view that enforcement of public rights is the job of the executive branch, such a view ignores the resource limitations and political susceptibility of the executive branch. If environmental legislation is to accomplish its intended purpose, courts must be at least as solicitous of citizen enforcement efforts as they have been of the rights of private parties to recover for environmental damage to property interests. Courts should also discourage efforts to make opposing counsel, rather than substantive claims, the focus of litigation in the environmental arena.

⁷⁶ *Id.* at 1148–49.

⁷⁷ See *Seltzer v. Morton*, 154 P. 3d 561 (Mont. 2007) (holding that a large law firm engaged in legal thuggery in attempting to get art authenticator to retract opinion).

