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Secretary Chertoff invoked the power again in 2007 to waive a long list of federal, state, and local laws to facilitate construction of fencing along the Arizona border. *See* 72 Fed. Reg. 60,870 (Oct. 26, 2007). Environmental interest groups had challenged the Arizona fence project on a variety of grounds, and the federal district court issued a temporary restraining order. The secretary responded with the waiver. The court quickly vacated the temporary restraining order and dismissed claims that Section 102's grant of waiver authority violated separation of powers and other constitutional bounds. The court ruled that the waiver provision is not equivalent to the power to amend or repeal duly enacted laws, that it is not an unconstitutional delegation of legislative power to the executive branch given the sufficient statutory principle that the waiver be "necessary to ensure expeditious construction of the barriers and roads," and that the construction of the border fence pertains to both foreign affairs and immigration control—areas over which the president traditionally exercises independent constitutional authority. *See Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119 (D.D.C. 2007). The Supreme Court denied certiorari without comment. Secretary Chertoff used the waiver again in 2008 for a 450-mile stretch spanning all four border states. *See* 73 Fed. Reg. 18,294 (Apr. 3, 2008). A lawsuit challenging this massive waiver was dismissed on grounds similar to the *Defenders of Wildlife* decision, with no appeal taken. *See Cnty. of El Paso v. Chertoff*, No. EP-08-CA-196 FM, 2008 WL 4372693 (W.D. Tex. Aug. 29, 2008).

The REAL ID Act waiver authority has not been used again since 2008, but neither has the REAL ID Act waiver provision been touched. The upshot is that while all environmental laws could apply to President Trump's proposed wall along our border with Mexico, his administration appears likely to exercise the waiver power to assert that there is no environmental law of the wall.

Energy security and border security are important public policy goals, and it is understandable that the president and Congress would wish that no unreasonable obstacles stand in the way of achieving them. At a time when the growing concentration of power in the executive has raised substantial concern, however, the presidential permit and the REAL ID Act waiver are likely to attract continuing scrutiny and controversy for how much discretion they give the president over deeming what is and is not an unreasonable obstacle. Ironically, whereas many members of Congress are among the most vocal critics of growing executive branch power, Congress has done nothing to check the presidential permit program for oil pipelines and actually created the apparently unbounded waiver power of the REAL ID Act. Opponents of both regimes have thus far made little headway, albeit with only in a handful of district court opinions and one denial of certiorari on the books. With litigation already ensuing over the Keystone XL permit, and any exercise of waiver for more border wall likely to attract a lawsuit in an instant, it looks like the courts are not finished yet.

Mr. Ruhl is the David Daniels Allen Distinguished Chair in Law at Vanderbilt University Law School in Nashville, Tennessee, and a member of the editorial board of Natural Resources & Environment. *He may be reached at jb.ruhl@vanderbilt.edu.*

Jury Trials under Environmental Statutes

Douglas A. Henderson and Justin T. Wong

Under the Clean Water Act (CWA), the Clean Air Act, and other environmental statutes, when and on what issues is a plaintiff—or defendant—entitled to a jury trial? However straightforward this question might sound, it triggers a range of challenging constitutional construction and statutory interpretation issues, often so blurred that parties simply agree to a bench trial.

As for the constitutional requirements, the Seventh Amendment to the U.S. Constitution provides that "in Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved . . . ." With respect to environmental cases, the U.S. Supreme Court's decision in *Tull v. U.S.*, 481 U.S. 412 (1987), is the touchstone opinion applying the right to trial by jury articulated by the Seventh Amendment to the CWA and other environmental statutes.

In a decision by Justice William Brennan, the *Tull* Court examined whether a party—in this case, the defendant—had a right to a jury trial on both liability and penalties in an action under the CWA. As for the facts, a landowner placed fill material at various locations but contended the fill had not been placed in jurisdictional "wetlands." Although the U.S. Department of Justice conceded there were triable issues of fact on whether such areas were jurisdictional wetlands, the trial court denied the defendant's request for a jury trial.

In *Tull*, the Supreme Court—after first determining that the CWA did not itself provide a jury trial right—concluded the Seventh Amendment provided a jury trial right for "those actions that are analogous to 'Suits at Common law.'" 481 U.S. at 417. Working from this premise, the Court developed a two-part test to make this determination. First, in evaluating whether a right to jury trial is required, the statutory action must be compared to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. The Seventh Amendment right to a jury trial applies to those statutory rights that are analogous to common law causes of actions decided by English law courts. Second, the remedy sought must be examined to determine whether it is legal or equitable in nature, because only legal actions are entitled to a jury trial. After a lengthy historical analysis of English and Colonial common law actions, the Supreme Court held that a right to a jury trial exists to determine liability under the CWA, but not the amount of penalties or other remedies, if any, which are determined by the court.

In *Tull*, although the United States was the plaintiff opposing a jury trial, the identity of a plaintiff does not change the jury trial analysis. In a North Carolina case, the trial court explained that as far as the right to a jury trial is concerned, private plaintiffs seeking civil penalties in a citizens' suit are no different from the government itself so asserting in a lawsuit. *N.C. Envtl. Justice Network v. Taylor*, 2014 U.S. Dist. LEXIS 177773, at *7 (E.D.N.C. Dec. 29, 2014). At the same

time, however, the Seventh Amendment right to a jury trial does not apply when the United States is a *defendant*. *See Mays v. TVA*, 699 F. Supp. 2d 991, 1031 (E.D. Tenn. 2010).

Under the Supreme Court's *Tull* two-part test, numerous issues arise in litigation under the CWA and other acts where it is not clear whether a jury or a judge must make the determination. Typically, when a court considers the availability of a jury trial, it conducts a full analysis under both of the *Tull* factors. Either one of the factors can be dispositive.

For example, a federal district court in Louisiana analyzed whether claims under the Oil Pollution Act (OPA) related to the Deepwater Horizon oil spill were entitled to jury determination. With respect to the first prong in *Tull*, it examined at length whether OPA claims were more akin to admiralty claims (which are not entitled to a jury) or trespass claims (warranting a jury) under English common law. *In re Oil Spill*, 98 F. Supp. 3d 872, 881 (E.D. La. 2015). Ultimately, the trial court concluded that the particular OPA claims were more like a common law trespass claim because the damages asserted occurred both onshore and at sea. Accordingly, the court found jury trials were available under OPA under these facts.

Yet, just because liability under one environmental statute may be an issue for the jury, it does not necessarily follow that a jury decides liability under all environmental statues. Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), claims for contribution and declaratory judgment regularly are found to be equitable in nature and not subject to a jury demand. *See, e.g., Evansville Greenway & Remediation Tr. v. S. Ind. Gas & Elec. Co.*, 661 F. Supp. 2d 989, 1013–1014 (S.D. Ind. 2009). Unlike cases seeking a civil penalty, because the relief sought under CERCLA is equitable in nature, jury trials on CERCLA liability are not available under the Seventh Amendment. *See Neumann v. Carlson Envtl., Inc.*, 429 F. Supp. 2d 946, 959 (N.D. Ill. 2006) (collecting cases).

Under the Resource Conservation and Recovery Act (RCRA), however, the analysis is far less settled. For a party seeking injunctive relief under a RCRA citizens' suit, one court held that a jury trial was not available because the relief was equitable in nature. *Metal Processing Co. v. Amoco Oil Co.*, 173 F.R.D. 244, 247 (E.D. Wis. 1997). Under other facts, however, another court found that a party pursuing a citizens' suit for an imminent and substantial endangerment under RCRA conceivably could be entitled to a jury in certain circumstances, depending on the facts and remedies involved. *See N.C. Envtl. Justice Network v. Taylor*, 2014 U.S. Dist. LEXIS 177773 (E.D.N.C. Dec. 29, 2014). Still another court found that where a request for civil penalties is "inextricably entangled" with a request for injunctive relief, RCRA provides no right for a jury trial. *Sanchez v. Esso Standard Oil de Puerto Rico, Inc.*, 2010 U.S. Dist. LEXIS 82646, *9 (D.P.R., Aug. 5, 2010). Complicating things further, the delegation of RCRA implementation to the states may even cancel out the Seventh Amendment right. In *Keeny v. Electro-Tech, Inc.*, 1994 Conn. Super. LEXIS 1270 (Conn. Super., May 16, 1994), the defendant sought a trial by jury to determine violations for certain RCRA hazardous regulations implemented in Connecticut, arguing that because the federal program was delegated to the state, the Seventh Amendment analysis should control. Rejecting that argument, the court found that, under applicable Connecticut law, no jury trial was available to determine hazardous waste violations. So the availability of jury trials under RCRA remains difficult to predict.

The right to jury trials under state environmental statutes likewise depends on the specific features of the state constitutions and state statutes involved. In *F.P. Woll & Co. v. Fifth & Mitchell St., Corp.*, 2005 U.S. Dist. LEXIS 13194 (E.D. Pa. July 1, 2005), a federal district court in Pennsylvania found that two state statutes implicated by the same set of facts involving property contamination differed when it came to the availability of a jury trial. In that case, the Pennsylvania Hazardous Sites Clean-Up Act was determined to be nearly identical to CERCLA—allowing recovery of response costs and contribution—and thus providing relief that was equitable in nature and not subject to a jury trial. However, the Pennsylvania Storage Tank Act (STA), which allows for recovery of both response costs and compensatory damages for property damage, was found to require the availability of a jury trial under the Seventh Amendment. For the court, compensatory damages under the STA were similar to the historical action for nuisance, which allowed for remedies that were legal in nature. As a result, the court concluded that the STA actions were entitled to a jury trial under Pennsylvania law.

Making things even more challenging, the issue in many environmental cases, particularly in citizens' suits under environmental statutes, is whether an environmental permit has been violated. But the interpretation of permit conditions is a question of law for the courts, not juries, to decide. *See, e.g., Am. Canoe Ass'n v. D.C. Water & Sewer Auth.*, 306 F. Supp. 2d 30, 41 (D.C. Cir. 2004). That rule creates a situation where, after a court determines the meaning of a permit condition, a jury may decide whether the permit was violated. In *Jones Creek Investors, LLC v. Columbia County*, 98 F. Supp. 3d 1279, 1299 (S.D. Ga. 2015), the court determined whether a National Pollutant Discharge Elimination System permit required the permittee to reduce certain pollutants to the "maximum extent practicable" or whether some other standard governed. After that legal interpretation was made, the *Jones Creek* court found, it would be for the jury to decide if the specific standard had been violated.

Where claims involve multiple environmental statutes, the issues to be decided by a judge and by a jury can vary, resulting in a range of intertwined determinations. Even where just one environmental statute is at play, a jury could hear certain issues and facts related to liability and related issues, but the judge could determine others related to penalty and remedy under the same statute. In either case, because the risk of jury confusion or prejudice increases when information relevant to the issues a judge must decide is also presented to a jury, it becomes a herculean task to make sure judge and jury do not interfere with each other's legal decision-making authority.

Practically, the risk of jury confusion and the potential for reversal in permit cases often result in parties moving forward with a bench trial on all issues, even where a jury trial may be technically available on certain issues. In *Hernandez v. Esso Standard Oil Co.*, 2009 U.S. Dist. LEXIS 12788 (D.P.R. Feb. 19, 2009), the Puerto Rico district court "strongly encouraged" the parties to waive a jury trial in favor of a bench trial on their CERCLA, CWA, and RCRA claims. For the *Esso* court, a bench trial would benefit both parties because "a significant part of the evidence which is to be presented is relevant only to the penalty and relief rulings, which must ultimately be made by the court." *Id.* at *7. As the court noted, "presenting such evidence in a cumulative manner will have a significant prejudicial effect on the jury, which will at some point

outweigh the probative value." *Id.* But if a bench trial were selected, the court could "entertain without difficulty continuous testimony from the same witnesses as to both liability, as well as penalty/remedy aspects." *Id.* at *7–*8. The court also could conditionally accept evidence that is objected to, subject to a subsequent ruling on its admissibility and weight, and the parties could present post-trial briefs both on liability and on penalty and relief.

As the *Esso* court's plea makes clear, the challenges of parsing through issues and weighing evidence in environmental cases may be a task better left to the bench alone. Because no one approach fits under all environmental statutes, the litigation realities of jury trials and the risks related to juror determinations of technical issues—and not the rights under the Seventh Amendment—often explain why parties move forward with bench trials in statutory environmental cases.

Mr. Henderson is a partner and Mr. Wong is an associate at Troutman Sanders LLP in Atlanta, Georgia. They may be reached at douglas.henderson@troutmansanders.com and justin.wong@troutmansanders.com.

The Buzz: EU Steps Up on Bee Protection

Madeline June Kass

The United States, long a leader in environmental protection, appears to be entering a period of retrenchment and retraction from adoption and enforcement of laws aimed at protecting human health and the environment. As the United States stands down, the European Union (EU) appears poised, if not already positioned, to stand in as a global environmental leader. A comparison of U.S. and EU efforts to address global declines in bees reflects this shift in global environmental leadership.

Starting decades earlier, but blossoming during the U.S. environmental movement of the 1970s, the United States "pioneered some of the most important innovations in environmental law—the creation of national parks, environmental impact statement requirements, freedom of information and right-to-know legislation . . . ." Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 Va. Envtl. L.J. 1, 19 (2007). More recently, however, it can be argued that the EU has overtaken the United States as the world's torchbearer of environmental protection. As one scholar explains:

> From a purely regulatory perspective, the U.S. has arguably reduced its international environmental leadership footprint in response to domestic politics that often see environmental and economic interests as opposing forces, even placing itself at a strategic disadvantage sometimes. In contrast, the EU has used its vast regulatory power over the Common Market to drive its economies to progressively incorporate environmental concerns as root considerations in commercial policies.

Michael L. Buenger, *The EU'S ETS and Global Aviation: Why "Local Rules" Still Matter and May Matter Even More in the Future*, 41 Denv. J. Int'l L. & Pol'y 417, 431 (2013). Thus, in a reversal of roles, today the EU often innovates environmental safeguards and the United States follows.

The bee's knees. Let's start with a few bee fun facts. There are over 20,000 bee species globally—including more than 4,000 U.S. native species and over 1,800 EU native species. Bees come in an assortment of colors, beyond basic yellow and black (including a stunning metallic green and a deep royal blue); many live solitary existences below ground in "burrows dug in soil, holes in wood, old beetle holes and even hollowed-out grass stems;" they can be bumblebee big, pea-sized, or as small as a grain of rice; and most do not sting people. Brandon Keim, *Beyond Black and Yellow: The Stunning Colors of America's Native Bees*, WIRED (Aug. 12, 2013). Beyond the familiar honey and bumble bee varieties, curiosities exist such as the snubbed snouted "wild sweet potato" bee, the dirt excavating "sunflower leafcutting bee," the rugged "arctic bumble bee," human perspiration seeking "sweat" bees, and even parasitic nest invading "cuckoo" bees. *See* Kelsey Kopec, Center for Biological Diversity, *Pollinators in Peril: A Systematic Status Review of North American and Hawaiian Native Bees*, 6–9 (2017) (Pollinators in Peril).

These magnificent tiny creatures contribute well beyond their weight-class to biodiversity (especially plant diversity) and ecosystem functioning, beautifying our natural environment and feeding humankind. Bees pollinate. Globally, bees play a lion's share role in both wild plant pollination (almost 90 percent of wild plants depend on some form of insect pollination) and food crop pollination (contributing to as much as "one of every three bites of food"). Pollinators in Peril at 2. Not surprisingly then, the U.S. government has concluded, "[p]ollinators—including honey bees, other managed bees, and wild, native bees—are critical to our nation's economy, food security, and environmental health." U.S. Gov't Accountability Office, GAO-16-220, *Bee Health: USDA and EPA Should Take Additional Actions to Address Threats to Bee Populations* 7 (Feb. 10, 2016) (GAO: Threats to Bee Populations). Similarly, the EU European Commission has concluded: "Bees are critically important for the environment and to the [EU] economy." European Commission, *Honey Bees*, https://ec.europa.eu/food/animals/live_animals/bees_en. Translated into dollars, the pollination services delivered by bees are valued around $23.5 billion a year in Europe and roughly $18 billion per year in the United States—yes, that's "billions" with nine zeroes. *See* IUCN, European Red List of Bees §1.4 (2014) (European Red List of Bees); Hillary Rosner, *Return of the Natives: How Wild Bees Will Save Our Agriculture System*, 309 Sci. Am. 3 (Sept. 2013). So, when you hear the buzz, don't just think honey. Think fruits and vegetables, nuts, and a quarter million different plants. *See* Beatriz Moisset & Stephen Buchmann, *Bee Basics: An Introduction to Our Native Bees* (2011 USDA Forest Service).

The buzzkill. And now for the not-so-fun facts. Bees are in serious decline globally. In the United States, among native bees for which there is sufficient data for assessment, more than half are declining, and almost a quarter are imperiled. Pollinators in Peril at 5. In addition, the U.S. Pollinator Health Task Force found non-native honey bees "have been in serious decline for more than three decades in the United States," and noted correlated increases in beekeeper costs to