

ENVIRONMENTAL CITIZENS' SUIT DEFENSE: PREPARING FOR "PRIVATE ATTORNEYS GENERAL" IN THE TRUMP ADMINISTRATION

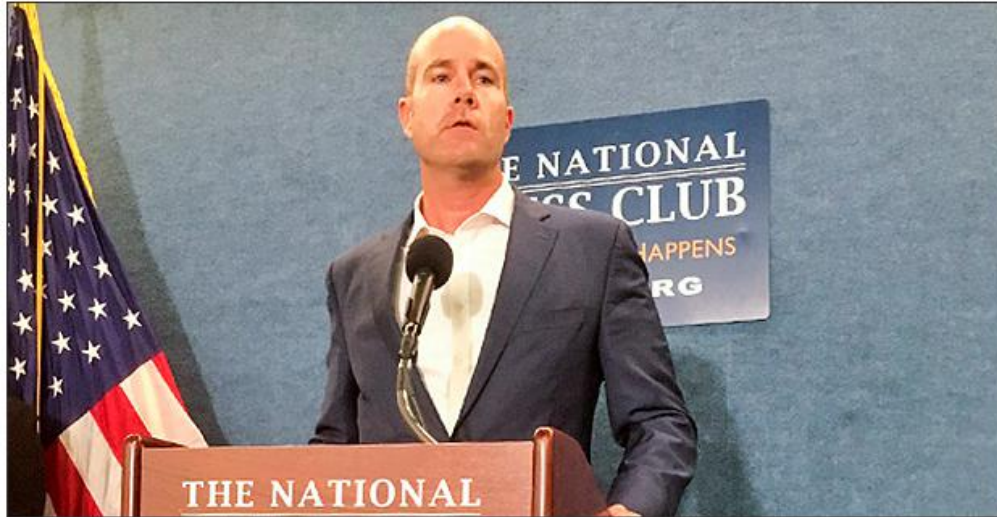
February 7, 2017

ADVOCACY

Enviros gear up for riders, pipeline fights

Hannah Hess, E&E News reporter

Published: Thursday, November 10, 2016



DAILY NEWS

NRDC Eyes Bush-Era Strategy To Counter Trump EPA Weakening Of Rules

January 05, 2017

DAILY NEWS

Environmentalists Prepare 'Defense' Strategy To Oppose Trump's Agenda

December 02, 2016

PIPELINES

Enviros, now on the outs with White House, look to the courts

Jean Chemnick and Emily Holden, E&E News reporters

Published: Wednesday, January 25, 2017



OVERVIEW OF CITIZEN SUITS

Mike Wigmore and Theresa Romanosky

OVERVIEW OF CITIZEN SUIT ACTIONS

- Many of the major federal environmental statutes contain provisions allowing private citizens (or groups of citizens) to bring suit against alleged violators of those statutes.
 - Clean Water Act (33 U.S.C. § 1365)
 - Clean Air Act (42 U.S.C. § 7604)
 - RCRA (42 U.S.C. § 6972)
 - TSCA (15 U.S.C. § 2619)
 - Endangered Species Act (16 § 1540(g))
 - CERCLA (42 U.S.C. § 9659)

OVERVIEW OF CITIZEN SUIT ACTIONS

- Most federal environmental citizen suit provisions have a similar structure:
 - *Plaintiff* – an individual or organization with “standing” to do so, and otherwise satisfies the conditions under the statute, may prosecute an enforcement action.
 - *Defendant* – any party that is alleged to have violated an order, condition, or established standard.

OVERVIEW OF CITIZEN SUIT ACTIONS

- *Notice* – before filing a complaint in federal court, Plaintiffs generally must give notice to the potential defendant and to the government of their intent to bring suit.
- *Remedies* – Plaintiffs may seek injunctive relief and civil penalties. Courts may also award attorney fees and costs to prevailing plaintiffs.

STRATEGY

UPON RECEIPT OF NOTICE OF INTENT TO FILE SUIT

- It is imperative that any notice of intent to file suit be treated as a high priority.
- If handled properly, particularly if regulators are willing to collaborate, the citizen suit can often be resolved before it is even filed.

STRATEGY

UPON RECEIPT OF NOTICE OF INTENT TO FILE SUIT

- The first step in addressing a citizen suit is to evaluate realistically whether the claims can survive a motion to dismiss and motion for summary judgment.
 - Motion to Dismiss?
 - Do plaintiffs have standing?
 - Did plaintiffs give proper notice?
 - Is the conduct alleged a violation of the statute/order/permit?
 - Is the suit otherwise barred as a matter of law under statute?
 - Does the facility have a permit that allows for the discharge or emission?

Investigate plaintiff's standing

- Plaintiffs must demonstrate a concrete “injury in fact” that is causally linked to a redressable harm.
 - Consider where plaintiff or its members live and whether it is likely that they use or visit areas impacted by the alleged violation.
 - Standing is often liberally construed in an environmental context.

- Notice
 - All citizen suit provisions require the potential plaintiffs to notify defendants of their intent to sue.
 - Carefully review plaintiff's fulfillment of the statute's notice requirement.

STRATEGY

BARRED BY STATUTE

- Citizen Suits are intended to “supplement rather than to supplant” the enforcement power of government agencies.” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987).
 - Thus, a citizen suit will be prohibited if EPA or another agency is “diligently prosecuting” the alleged violation.

STRATEGY

BARRED BY STATUTE

1. Diligent Prosecution

Citizen suit provisions provide a statutory bar against bringing a citizen suit when an agency is “diligently prosecuting” a civil action, or, in more limited cases, an administrative proceeding.

2. Ongoing Violation

Has allegedly illegal activity ceased, or can it be ceased with no likelihood of recurrence before suit is filed?

STRATEGY

PERMIT SHIELD

- Most citizen suit provisions include “permit shields,” or provisions providing that parties with valid permits who are in compliance with the permit limitations are deemed to be in compliance with the law with respect to permitted actions.
 - Consider whether disputed material facts are necessary to arguments.

STRATEGY

RESPOND TO THE NOTICE

- Once you have fully evaluated the strengths and weaknesses of the claims made in the notice letter, always respond to a Notice of Intent.
 - The context of your response is dictated by the strengths of your case.
 - There is no downside to responding:
 - Plaintiffs may elect not to pursue suit.
 - Regardless, you'll need to assess your case before the 60-day clock runs out and a complaint is filed in federal court, so there is little to lose.

MOOTNESS

- If a potential violation has occurred, which cannot be remedied before the expiration of the notice period, consider reaching out to the federal or state agency responsible for enforcement of the statute.
 - Consider a negotiated consent decree or consent agreement to resolve all past violations and to ensure future compliance.
 - This could provide a diligent prosecution defense if the enforcement action is filed before the citizen suit is filed or, possibly a mootness argument if filed after.

STRATEGY

IF LITIGATION IS UNAVOIDABLE

- If attempts to dissuade Plaintiffs from filing suit are unsuccessful, a company will need to litigate.
 - But...
 - Best case scenario is a Motion to Dismiss or Motion for Judgment on the Pleadings.
 - Otherwise, possibility of resolution on Cross-Motions for Summary Judgment.
 - This likely will entail extensive discovery and experts.
 - Further, at this stage, any settlement with plaintiff will likely involve the payment of attorney fees.



CLEAN AIR ACT CITIZEN SUITS: CAUSES, PREVENTION, AND TREATMENT

Eric Groten

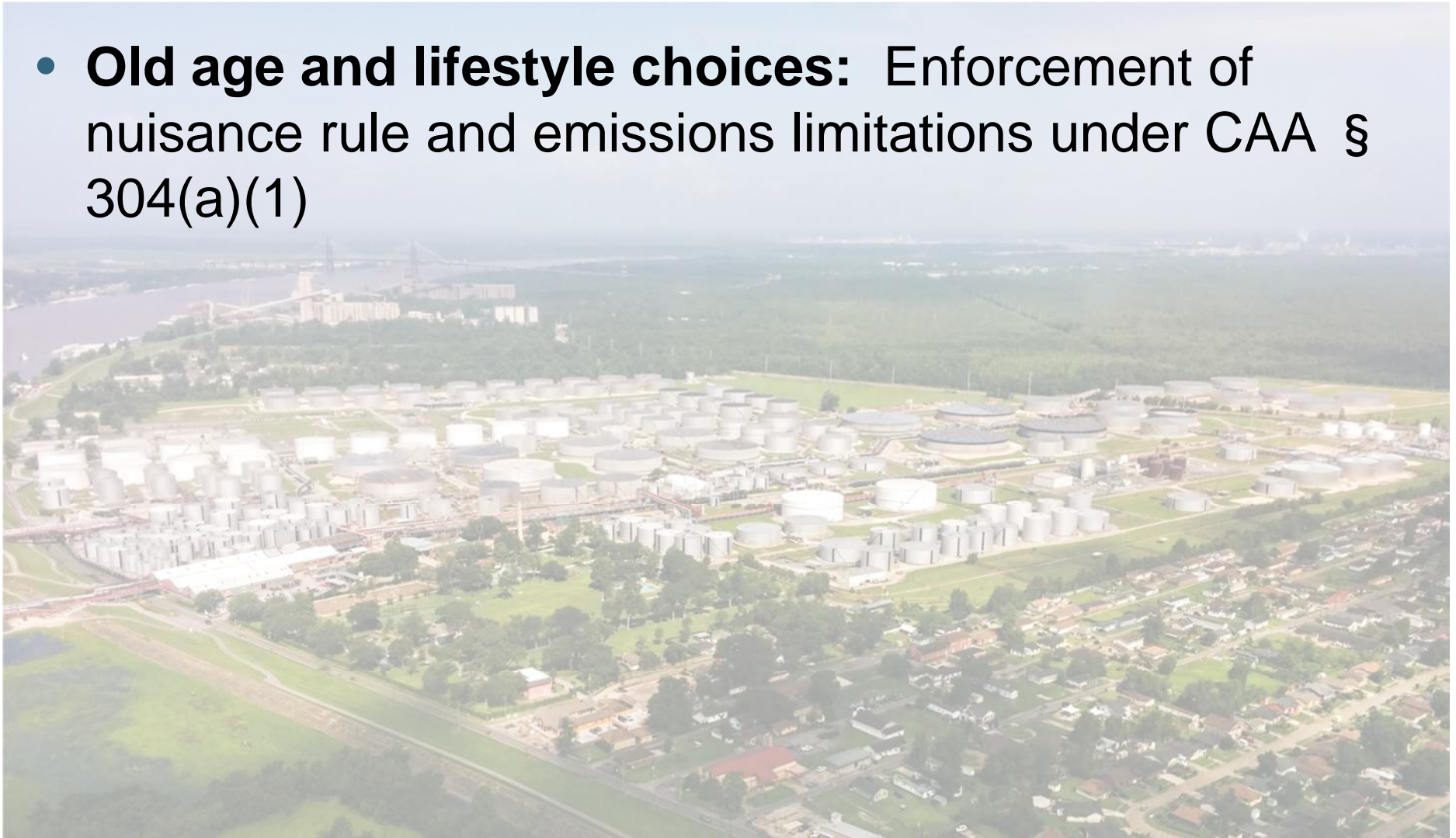
CAUSES AND SYMPTOMOLOGY

- **Irritation:** Enforcement based on alleged defects in pre-construction authorization (collateral attacks) under CAA § 304(a)(3)
 - Local NIMBY
 - National NGO BANANA target
 - Competitor

CAUSES AND SYMPTOMOLOGY

CONTINUED

- **Old age and lifestyle choices:** Enforcement of nuisance rule and emissions limitations under CAA § 304(a)(1)



OUTCOMES

- **Penalty:** Statutory penalty to U.S. Treasury or up to \$100,000 fine to local causes
- **Injunctive relief**
- **Attorney fees**

PREVENTIVE HEALTH MEASURES

- **Neighborhood and governmental relations**



PREVENTIVE HEALTH MEASURES

CONTINUED

- **Good hygiene**

- Remove “nuisance rules” and similar provisions from SIPs
- Eliminate SIP approval/State law disconformities
- Clarity of obligation: Test methods and averaging times
 - Beware “credible evidence”
 - Beware “NextGen”
 - Beware changes in emission factors

PREVENTIVE HEALTH MEASURES

CONTINUED

- **Good hygiene (cont'd)**
 - Title V permit shield for ambiguous or contentious obligations
 - Caution in reporting, including STEERS reports and audit findings
 - Comprehensive governmental settlements
- **Comply!**

TREATMENT

MOTION TO DISMISS

- Governmental preemption (in § 304(a)(1) cases)
 - Action in court of law
 - Diligent prosecution
- Standing: Frame as redressability issue
- Lack of ongoing violations
- Statute of limitations
- Adequacy of notice
(in § 304(a)(1) cases)

TREATMENT

MOTION TO DISMISS (CONTINUED)

- Collateral attacks (depending on whether claim is “without permit” or “defective permit ”):
 - With Title V review
 - Without Title V
 - Deficient PSD/NNSR permit
 - No PSD/NNSR permit
 - Abstention in case of conflict with proceedings before state agency

TREATMENT

MOTION TO DISMISS (CONTINUED)

- “Emission standard or limitation”?
- Otherwise federally enforceable? (e.g., incorporation by reference; SIP approval status)
- Remedy selection: Mitigation questionable, even for EPA

TREATMENT

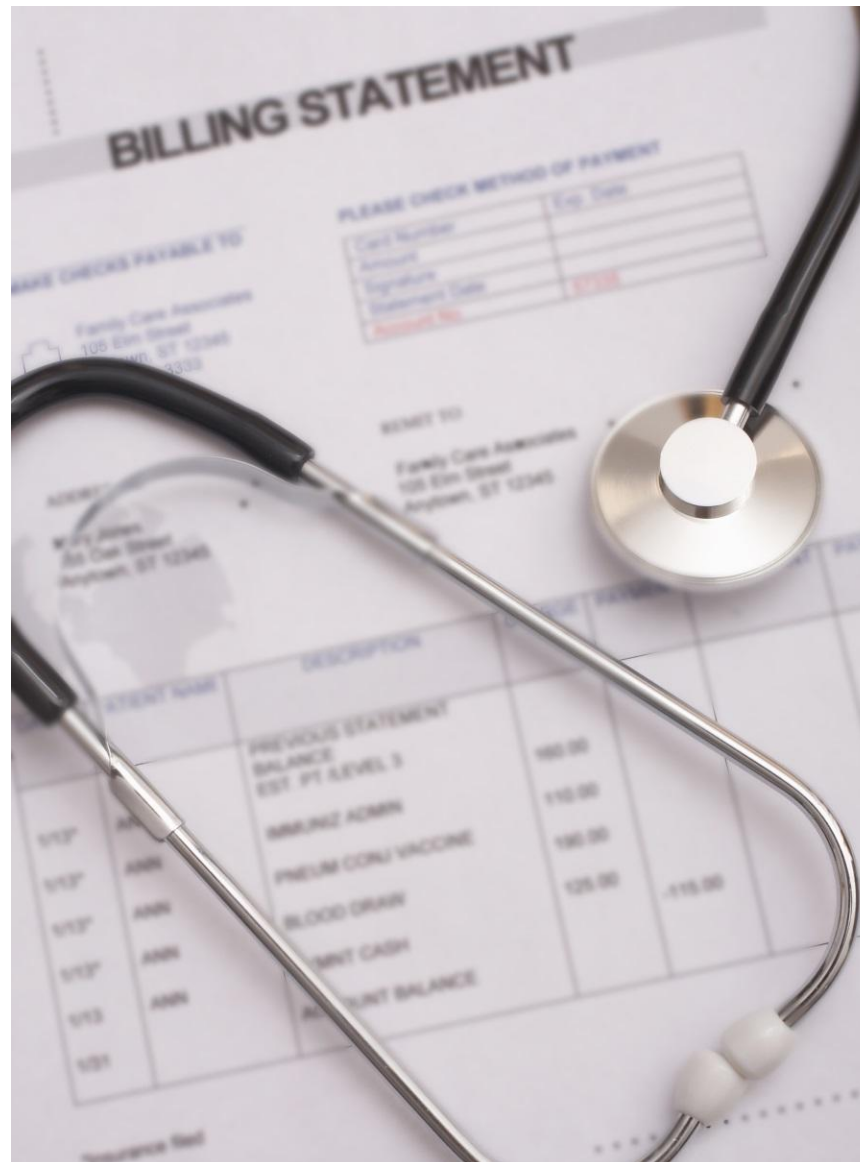
SUMMARY JUDGMENT ISSUES

- Permit shield (affirmative defense)
- Title V deviation reports: Violations or *indications* of violations?
- “Credible evidence”
- Affirmative defense for unavailability

SURGICAL TREATMENT TRIAL



GETTING THE DOCTOR TO PAY YOU





SPECIAL LITIGATION ISSUES IN CITIZEN SUITS

Lewis Sutherland

CASE MANAGEMENT ISSUES ASSOCIATED WITH CITIZEN SUITS

- Cost management of the discovery process
 - Take a shot at working with Plaintiffs
 - Negotiate an agreed discovery order
- Discovery consistent with proving your affirmative case

CASE MANAGEMENT ISSUES ASSOCIATED WITH CITIZEN SUITS

- Simultaneous regulatory and litigation proceedings
 - Coordinate strategy and objectives
 - Experts (share or not?)
 - Consent Orders
 - NGO efforts to force participation in regulatory proceeding
- Bifurcation and jury determination of liability
 - *North Carolina Environmental Justice Network v. Taylor*, 2014 WL 7384970 (E.D.N.C. Dec. 29, 2014)

PRIVILEGE ISSUES

- Multiple, overlapping roles of technical consultants and experts creates uncertainty regarding privilege
- Address privilege strategically in the hiring and assignment of work for technical consultants and company experts

PRIVILEGE ISSUES

- Attorney-client and work product privileges are not always a neat fit
- Attorney client privilege
 - Applies to (1) communications (2) between privileged persons (3) made in confidence (4) **for the purpose of legal advice**
 - The “**translator**” role in the context of environmental consultants
- Work product privilege
 - Protects documents **prepared in anticipation of litigation**
 - “Dual-use” documents create ambiguity –anticipation of litigation must be the “driving force behind preparation of [the] document”

PRIVILEGE ISSUES

- Testifying Experts
 - Draft reports protected by privilege (FRCP 26(b)(4)(B))
 - Communications with litigation attorney protected by privilege with these exceptions: (FRCP 26(b)(4)(C))
 - Compensation
 - Facts or data provided by attorney
 - Assumptions provided by attorney

PRIVILEGE ISSUES

- Consulting experts: “specifically employed . . . in anticipation of litigation” and will not testify
 - Can potentially shield factual development, BUT
 - Sharing of data or analysis with a testifying expert opens up discovery

EXPERTS

- Citizen suit litigation is frequently “expert driven”
 - Retain your key testifying experts early
 - Pros and cons of using company experts

EXPERT REPORTS

Expert reports

- Plan for your motion practice
- Get what you need in the report both in language and graphics
- Consider using key graphics to enhance your brief

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SPEAKER BIOS

BIOGRAPHY



MICHAEL WIGMORE
PARTNER, ENVIRONMENTAL & NATURAL
RESOURCES

Washington, DC



+1.202.639.6778



mwigmore@velaw.com

Chambers USA, Environment (District of Columbia),
2009—2016

Legal 500 U.S., Environment Litigation, 2013—2015;
Environment: Transaction & Regulatory, 2013—2014

The Best Lawyers in America® (Woodward/White, Inc.),
Litigation: Environmental, 2013—2017

Mike's practice focuses on representing clients with respect to public lands and natural resources matters in federal and state courts and administrative agencies, including the U.S. Army Corps of Engineers, U.S. Forest Service, National Park Service, U.S. Fish and Wildlife Service, Bureau of Land Management, Bureau of Ocean Energy Management, and the EPA.

Mike has extensive experience in matters arising under the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), Migratory Bird Treaty Act (MBTA), Federal Land Policy and Management Act (FLPMA), Outer Continental Shelf Lands Act (OCSLA), Clean Water Act (CWA), Rivers and Harbors Act, Clean Air Act (CAA), Oil Pollution Act (OPA), National Historic Preservation Act (NHPA), and related state statutes.

Mike has successfully represented clients in obtaining, and defending in court, permits and authorizations for such projects as upstream oil and gas development, industrial and manufacturing facilities, high-voltage electric transmission lines, gas and liquids pipelines, undersea fiber optic cables, and waterfront commercial developments.

According to *Chambers USA*, "Clients compliment [Mike's] ability to combine 'detailed knowledge of statutes, impending regulations and case law with sound business advice'" (2009) and "praise his 'unbelievably good case-handling abilities'" (2010).

BIOGRAPHY



Washington, DC



+1.202.639.6693



tromanosky@velaw.com

Theresa's principal area of practice is environmental litigation and regulation, with an emphasis on environmental enforcement defense, citizen suit defense, permitting of and defending challenges to infrastructure and energy development projects, and regulatory compliance. She assists with a variety of litigation and regulatory matters under the federal environmental and public lands statutes, including the Clean Water Act, the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

BIOGRAPHY



Austin, TX



+1.512.542.8709



egroten@velaw.com

Eric is a full-service Clean Air Act practitioner. His thirty-year career has allowed him to undertake the wide array of legal work generated by state and federal air quality laws, including the defense of cases brought to enforce them, prosecution of applications for the permits they require, transaction of emission rights created by them, counseling on and auditing of compliance with them, and changing those laws and the rules that implement them.

Chambers USA described Eric as “a highly experienced air emissions lawyer, distinguished in the market by the sizable volume of contested air permitting work he undertakes.”

Chambers USA, Environment (Texas), 2004–2016

The Best Lawyers in America® (Woodward/White, Inc.),
Litigation–Environmental Law, 2006–2017

International Who's Who of Business Lawyers (Law
Research Business, Ltd.), Environmental Law, 2011

Who's Who Legal: Texas, (Law Business Research
Ltd.), Environmental Law, 2007–2011 and 2016

Selected to the Texas Super Lawyers list, *Super
Lawyers* (Thomson Reuters) 2003–2016

BIOGRAPHY



Houston, TX



+1.713.758.2367



lsutherland@velaw.com

Lewis has been practicing environmental law since 1993, and has a broad range of environmental law experience encompassing litigation, business transactions, and client counseling. His litigation practice includes toxic tort, Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, and a multitude of other statutory and common law claims in both state and federal courts. Lewis' litigation practice also encompasses a broad range of class action and complex litigation experience arising from toxic tort, products liability, insurance, consumer protection, and other types of actions. He has substantial experience addressing complex scientific and engineering issues in the litigation context, and has worked with nationally recognized scientific experts in a number of different fields to address failure analysis investigations and to develop related expert testimony.

Lewis' business transactions and client counseling practice focuses on a wide variety of environmental matters that arise in business transactions, including environmental due diligence, negotiating and drafting environmental risk and liability allocation provisions in contracts, and resolution of related disputes.



THANK YOU

Austin
T +1.512.542.8400

Beijing
T +86.10.6414.5500

Dallas
T +1.214.220.7700

Dubai
T +971.4.330.1800

Hong Kong
T +852.3658.6400

Houston
T +1.713.758.2222

London
T +44.20.7065.6000

Moscow
T +7.495.544.5800

New York
T +1.212.237.0000

Palo Alto
T +1.650.687.8200

Richmond
T +1.804.327.6300

Riyadh
T +966.11.250.0800

San Francisco
T +1.415.979.6900

Taipei
T +886.2.2176.5388

Tokyo
T +81.3.3282.0450

Washington
T +1.202.639.6500

