



## A double whammy: air pollution and COVID-19 in Pennsylvania's Mon Valley

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Mon Valley Works continued to flare untreated coke oven gas after the December 24, 2018 fire.

PITTSBURGH—NELC continues to press ahead with PennEnvironment and Clean Air Council's lawsuit against U.S. Steel, even as the COVID-19 pandemic rages on. Fortunately, Pennsylvania federal courts have adapted to the pandemic by holding remote proceedings, and are permitting the taking of depositions using remote video technology.

NELC's suit, filed in April 2019, alleges that U.S. Steel emitted extraordinarily high levels of air pollutants while pollution controls at its Clairton, Pennsylvania, coke plant were offline for more than three months. NELC's attorneys are moving forward with discovery, gathering evidence to prepare for trial, and are obtaining detailed reports from expert witnesses whom they will call to testify at trial. A focus of this testimony will be U.S. Steel's systemic failure to do the basic inspection and maintenance of its

facilities that could prevent such catastrophic air pollution incidents from occurring.

Meanwhile, the COVID-19 pandemic has highlighted the vital importance of this lawsuit. The respiratory virus sweeping the nation has a particularly devastating effect on populations already suffering from high levels of air pollution. In May, *The New York Times* reported that "Harvard specialists found that coronavirus patients in areas with historically heavy air pollution are more likely to die than patients elsewhere."

And COVID-19 has hit hard in Allegheny County, where U.S. Steel's coke plant and other production facilities are located. The Allegheny County Health Department (a co-plaintiff in the NELC lawsuit) is striving to be the community's bulwark against the virus and air pollu-

tion. But the Health Department has its work cut out for it.

In July, Allegheny County was facing between 100 and 200 new reported cases of COVID-19 each day. Those cases came in a county that the American Lung Association rates as having the second-worst air quality in Pennsylvania and as being among the worst in the nation for year-round air particle pollution.

As in other parts of the country, Allegheny County is urging residents to stay home if they are sick. Unlike in most of the rest of the country, however, shelter-in-place orders are familiar to Allegheny County residents. For years, the communities around U.S. Steel's plants have dealt with periodic recommendations to stay at home, only then the threat was not a virus—it was the very air itself.



## U.S. Supreme Court reaffirms scope and purpose of the Clean Water Act: Pollutant discharges through groundwater are not exempt

WASHINGTON, D.C.—On April 23, the nation’s highest court dealt a significant blow to the Trump administration’s attempt to dismantle the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA).

That law, passed by Congress almost 50 years ago, prohibits the unpermitted discharge of pollutants from a point source—such as a factory’s wastewater discharge pipe—to surface waters. Unless the discharger has obtained, and is complying with the terms of, a permit authorizing such discharge, it is flatly illegal.

Indeed, the permitting requirement is perhaps the CWA’s central feature, as the permit incorporates the pollution limits and reporting requirements mandated by the various provisions of the statute.

Until recently, the U.S. Environmental Protection Agency (EPA) had taken the sensible position that pollutant discharges from a point source that reach surface waters through hydrologically connected groundwater are subject to the CWA’s permitting requirement. In 2019, however, after receiving requests from industry groups, the agency issued an “interpretive statement” disavowing its earlier interpretation, and filed an amicus curiae (friend of the court) brief with the United States Supreme Court urging it to dismiss a CWA suit brought against the County of Maui, Hawaii, for discharging sewage through groundwater to the Pacific Ocean. Discharges to surface waters through groundwater, EPA argued, are outside of the CWA’s permitting requirements.

In a 6-to-3 opinion, the Supreme Court pointedly disagreed. “We do not defer

here to EPA’s interpretation of the statute,” the court ruled, noting that “EPA itself has changed its mind” about the very issue in question. “[T]o follow EPA’s reading,” the court reasoned, “would open a loophole allowing easy evasion of the statutory provision’s basic purposes. Such an interpretation is neither persuasive nor reasonable.”

The loophole the court had in mind is easy to envision. In the court’s own words: “Where a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies.”

The court did not hold that any discharge through groundwater is covered by the CWA permitting requirement, but rather only those that are the “functional equivalent of a direct discharge” to surface waters. The court identified a number of factors that could enter into this functional equivalency analysis, including the distance between the point source and the surface waters and the time it takes for pollutants to travel from the point source to those waters. “If the pipe ends 50 miles from navigable waters,” the court explained, “and the pipe emits pollutants that travel with groundwater, mix with much other material, and end up in navigable waters only many years later, the permitting requirements likely do not apply.”

Plainly, however, the court has reaffirmed the purpose of the CWA’s permitting requirement, and has sent a message to the federal courts—and to EPA and the states—that the attempted “loophole” has been closed.

## Supreme Court broadens scope of Casella’s potential liability, while judge affirms First Amendment protections for citizen plaintiffs

BETHLEHEM, N.H.—On a steep, wooded river bank in this northern New Hampshire community, there is a disturbing and discordant sight: a 370-foot-long channel, filled with bright orange muck, works its way down the slope and empties into the otherwise pristine Ammonoosuc River. This unpermitted “drainage channel” is the subject of an NELC Clean Water Act lawsuit, filed against Casella Waste Systems, Inc., and its subsidiary, North Country Environmental Services, on behalf of Community Action Works (formerly Toxics Action Center) and the Conservation Law Foundation (CLF).

The lawsuit originally alleged that the drainage channel is a “point source,” filled with emerging groundwater carrying excessive levels of iron, manganese, 1,4-dioxane (a probable human carcinogen), and other pollutants generated by Casella’s solid waste landfill. The discharge of these pollutants from the drainage channel into the Ammonoosuc is illegal, the suit alleges, because Casella has not applied for or obtained a CWA permit that would regulate it.

Now, a new ruling from the U.S. Supreme Court in the case of County of Maui v. Hawaii Wildlife Fund [see related story on page 2] has potentially broadened the scope of Casella’s liability.

Casella has recently begun claiming that the drainage channel is itself a “water of the United States” protected by the CWA—and that, consequently, it cannot be considered a “point source” of pollution subject to permitting.

In response, NELC attorneys filed a motion on July 15 seeking permission



Leachate from the Casella Waste Systems landfill in Bethlehem, N.H., contaminated the neighboring Ammonoosuc River.

from the court to add an alternative claim for liability in the event that the judge agrees with Casella that the drainage channel is itself a water of the United States.

In that circumstance, under the holding of the Maui case, Casella would still be liable for discharging pollutants from a point source—the landfill—without a permit if, as the new claim alleges, the short stretch of groundwater carrying these pollutants is the “functional equivalent” of a direct discharge from the landfill to the drainage channel (and then to the river). In other words, if a pipe from the landfill to the channel carried the same pollutants, it would need a permit to do so.

A ruling on the motion to amend is expected shortly.

Meanwhile, U.S. District Judge Paul Barbadoro issued a ruling on June 18 that sharply limits the ability of Casella’s attorneys to question witnesses on topics that are irrelevant to the issue of whether Casella has violated the CWA. Such questioning,

the judge ruled, would infringe on the political organizing and free speech rights of Action Works and CLF members and staff—rights that are protected by the First Amendment.

As a result, Casella will not be able to force witnesses to “name names” of Bethlehem residents who have worked to block Casella’s efforts to expand the landfill and keep importing waste into New Hampshire.

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The U.S. Supreme Court reaffirms the scope of the Clean Water Act in a case brought against the County of Maui, HI.

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## Meet Riena Harker, the newest member of the NELC team

Staff



Riena Harker, a 2020 graduate of Bowdoin College, joined NELC in July.

BOSTON—In July, NELC welcomed Riena Harker as our new paralegal and office administrator.

Riena graduated cum laude from Bowdoin College in 2020, where she earned a dual degree in biology and government and legal studies. While in college, she interned for the U.S. Environmental Protection Agency in Washington, D.C., and coordinated a campaign to promote bio-based manufacturing in Maine as an organizer for the Environmental Health Strategy Center. Her proudest accomplishment at Bowdoin was a service-learning trip and a series of seminars that she led to educate her peers about sustainability and food justice in Maine.

Riena is thrilled about the opportunity to join NELC’s work in creating positive environmental change.

“I cannot emphasize enough how sincerely grateful I am that not only did I graduate during the COVID-19 pandemic with a job, but that I also ended up with the best fit I could possibly imagine for my interests and goals,” she said.

### About NELC

The National Environmental Law Center (NELC) is a nonprofit research and litigation center. With the support of our members, we are dedicated to enforcing anti-pollution laws and promoting long-term solutions to the nation’s pressing environmental problems. Visit us online at [www.nelconline.org](http://www.nelconline.org), call us at (800) 841-7299, or email [nelc@nelconline.org](mailto:nelc@nelconline.org).

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