

## CLIENT ALERT

### CERCLA Litigation Watch: First Subsurface Intrusion NPL Site Listing Challenged in D.C. Circuit

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We may soon know whether the U.S. Environmental Protection Agency's (EPA) first attempt to list a site on the National Priorities List (NPL) due to subsurface intrusion will hold up in court. In September 2018, EPA listed two sites – the Rockwell International Wheel & Trim (Rockwell) Site in Grenada, Mississippi, and the Delfasco Forge Site in Grand Prairie, Texas – on the NPL due solely to subsurface intrusion risks. 83 Fed. Reg. 46408 (Sept. 13, 2018). ([More information on those listings can be found here.](#))

While the Delfasco Forge Site's listing did not garner so much as a comment on its proposal, the Rockwell Site's listing received more scrutiny, including comments that on-site mitigation measures were already providing effective remediation. Nevertheless, EPA listed the Site.

The Rockwell Site operator now is challenging the NPL listing. *Meritor v. EPA*, No. 18-1325 (D.C. Cir. filed Dec. 11, 2018). In its statement of issues, Meritor has indicated that it will be challenging as arbitrary and capricious (1) EPA's disregard of the on-site mitigation measures when calculating the Site's Hazard Ranking System score, (2) EPA's scoring of the Site under residential exposure scenarios in lieu of industrial scenarios, and (3) EPA's calculation of the Site's score looking at the entire facility's footprint instead of the smaller portions of the facility where EPA had identified exposure and subsurface contamination areas. Statement of Issues to be Raised, *Meritor v. EPA*, No. 18-1325 (D.C. Cir. filed Jan. 17, 2019).

Briefing is set to occur later this spring, with final briefs due June 12, 2019. If that schedule holds, oral argument may occur in the fall of 2019. Companies with sites under investigation or that may be subject to investigation in the future should monitor the developments in this case, which has the potential to affect future EPA listings.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

**Richard McNeil**

Partner – Orange County

Phone: +1 949.798.1381

Email: [rmcneil@crowell.com](mailto:rmcneil@crowell.com)

**Jennifer A. Giblin**

Senior Counsel – Washington, D.C.

Phone: +1 202.624.2586

Email: [jgiblin@crowell.com](mailto:jgiblin@crowell.com)

**Elizabeth B. Dawson**

Counsel – Washington, D.C.

Phone: +1 202.624.2508

Email: [edawson@crowell.com](mailto:edawson@crowell.com)