The first two years of the Trump administration have proven to be tumultuous, and the area of environmental regulation is no different, as the administration has sought to rollback or overturn over fifty environmental rules over the course of the first eleven months of the administration.[i] This rollback has heightened the need for environmental class actions arising out of toxic exposures to both protect communities from polluters and act as a deterrent, encouraging companies to take adequate measures to avoid polluting their communities.[ii] In considering the current administration's apparent goal of undermining institutional environmental protections for communities, and in considering the real benefits our environmental class actions have had for communities which otherwise would have been left with no real means of redressing pollution, it is apparent that trial lawyers must step into the void to protect our communities from polluters through the class action device.

In order to appropriately prosecute these cases it is important to keep in mind the types of damages which lend themselves to class treatment on behalf of communities and municipalities, including claims for damages arising out of the diminution of property values, medical monitoring expenses and loss of the quality of life.[iii] Municipalities or other public entities may also pursue claims arising out of economic costs incurred in remediating pollution. While each of these claims may be viable based on your jurisdiction, it is extremely important to properly investigate a case before filing, and draft the complaint to maximize the chances of being able to pursue claims as a class.

Diminution of Property Value

A claim alleging damages arising out of the diminution of property value "the difference between the value of the land before the harm and the value after the harm, or at [plaintiff's] election in an appropriate case, the cost of restoration that has been or may be reasonably

incurred." [iv] The claim of diminution of property value recognizes that stigma which attaches to property once it is discovered that the property is contaminated.[v]

In order to pursue diminution damages on a class wide basis it will often be necessary to retain experts who can opine as to the scope of contamination. An expert will also be necessary to testify as to the real estate market and the effect that the contamination or the discovery of the contamination, had on the market value of the properties in the class area. Often, the diminution of damages claim is linked to a study or other publicity which highlights the contamination of a geographical area by a polluter. For example, The Supreme Court of New York recently certified a class for diminution of property value claims related to a Coke refining facility which spewed ash into the air, polluting the town of Tonawanda, based on the results of an Air Quality Study and Health Effect Study conducted on the town.[vi]

Medical Monitoring

Medical Monitoring damages represent the costs of expenses to be incurred by a victim of toxic exposure for medical testing to monitor for the warning signs of disease related to the exposure. There is a split between states which permit medical monitoring charges regardless of whether an injury has been suffered[vii] and those which require a physical injury to person or property in order to pursue a claim for medical monitoring damages.[viii]

These claims will necessitate expert testimony to substantiate the quantity of exposure, the increased risk at which class members have been placed by the exposure, and the benefits of testing/early detection for class members. In cases involving successful monitoring claims, monies can be distributed into a court appointed trust to pay for monitoring costs, or presented to class members as a lump sum to defray future medical expenses class members are expected to incur in the future. It is also important for Plaintiffs lawyers pursuing certification for medical

monitoring classes to focus the Court on the fact that medical monitoring is an exercise of the Court's equitable powers, and therefore certification should be granted as an injunctive class, under a State's ancillary to rule *F.R.C.P.* 23(b)(2) as opposed to a monetary damages class under the ancillary to rule *F.R.C.P.* 23(b)(3).[ix]

Loss of Quality of Life

An element of damages which may also be pursued on a class-wide basis for environmental contamination is loss of quality of life, including damages for "inconveniences, aggravation, and unnecessary expenditures of time and effort...as well as other disruption in [plaintiffs'] lives."[x] These claims are largely limited to plaintiffs occupying contaminated properties (even if those plaintiffs do not own the property, i.e. renters); and non-occupying owners will likely be barred from making claims for damages arising out of the loss of quality of life.[xi]

Conclusion

As the Federal Government moves to shed its responsibilities as a proponent for the cleanup and remediation of environmental contamination, local governments and individuals will likely need to seek redress for contamination on their own. These claims may be prohibitively difficult and expensive to bring as individual claims, and by necessity a number of them will require the class action device. In bringing these classes it is important to focus on the damages model which will maintain class cohesiveness. This question is one which must be considered before the case is filed and the claim should be and which present both liability and damages issues which at times require the

[i] *See* Nadja Popovich and Livia Albeck-Ripka, *52 Environmental Rules On the Way Out Under Trump*, N.Y. Times, updated Oct. 6, 2017 (available at:

https://www.nytimes.com/interactive/2017/10/05/climate/trump-environment-rules-reversed.html) (last accessed October 30, 2017).

[ii] While of course cases may be pursued on behalf of individuals or for business whose property has been contaminated, the damages involved in "one-off" litigation often fail to amount to enough to serve to deter bad actors who pollute, and may not be sufficient to warrant the costs of the experts necessary to prove liability.

[iii] Individuals may also seek relief for personal injuries arising out of toxic exposure, however class certification is rarely granted for personal injury claims, and a consolidation of personal injury type claims is more likely to succeed under the court's permissive joinder rules. The United States Supreme Court, in considering certification of a class for asbestos exposure indicated that factual differences concerning degrees of exposure, injury and specific causation led to a failure to satisfy the predominance prong of *F.R.C.P.* 23(b)(3). *Amchem Products v. Windsor*, 521 U.S. 591, 623-24 (1997)

[iv] Restatement (Second) of Torts § 929(1)(a)

[v] *See e.g. Strawn v. Canuso*, 140 N.J. 43 (1995); *Criscuola v. Power Authority of the State of New York*, 81 N.Y. 2d 649 (1993); *Harley-Davidson Motor Co. v. Springettsbury Twp.*, 633 Pa. 139 (2015)(recognizing 5% "standard" reduction of commercial/industrial property value due to stigma associated with environmental contamination); *Acadian Heritage Realty, Inc. v. City of Lafayette*, 446 So. 2d 375; writ den. 447 So. 2d 1076(1984)(La. App. 3 Cir. 1984)

[vi] *DeLuca, et al. v. Tonawanda Coke Corp., et al.* , Index No. 10280-2010 (Supreme Court Erie County, January 7, 2015)*aff'd* at 134 A.D. 3d 1543 (4th Dep't. 2015) *leave to appeal den*. 137 A.D. 3d 1633(2016).

[vii] *See, e.g. Bower v. Westinghouse Elec. Corp.* 206 W.Va. 133, 141-142 (1999)(In order to assert a claim for medical monitoring damages the plaintiff must prove that (1) he or she has, relative to the general population, been significantly exposed; (2) to a proven hazardous substance; (3) through the tortious conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible.); *Potter v. Firestone Tire & Rubber Co.*, 6 Cal 4th 965, 1008-1009 (1993)(Under California law "the cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is reasonable."); *Hansen v. Mountain Fuel Supply Co.*, 858 P2d 970, 979 (Utah 1993)(To recover medical monitoring damages under Utah law, a plaintiff must prove: (1) exposure (2) to a toxic substance, (3) which exposure was caused by the defendant's negligence, (4) resulting in an increased risk (5) of a serious disease, illness, or injury (6) for which a medical test for early detection exists (7) and for which early detection is beneficial, meaning that a treatment exists that can alter the course of the illness, (8) and which test has been prescribed by a qualified physician according to contemporary scientific principles.); *Redland Soccer Club v. Department of the Army*, 696 A.2d 137, 145 (Pa. 1997)(permitting medical monitoring damages in negligence claims); *Ayers v. Township of Jackson*, 525 A.2d 287, 312 (N.J. 1987); *Sadler v. Pacific Care of Nev.*, 340 P.3d 1264, 1270 (Nev. 2014)("a plaintiff may

state a cause of action for negligence with medical monitoring as the remedy without asserting that he or she has suffered a present *physical* injury.")

[viii] *See, e.g. Henry v. Dow Chemical Co*, 437 Mich. 63 (2005)(Declining to permit recovery of medical monitoring damage s without present physical injury to person or property); La. Civ. Code Ann. Art. 2315(B)(providing "Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease."); *Houston County Health Care Auth. V. Williams*, 961 So.2d 795, 811 (Ala. 2006)(costs of medical monitoring can only be recovered on a claim of "present physical injury.");

[ix] Federal Courts have approved of the characterization of a medical monitoring program as an exercise of the Court's injunctive powers and therefore appropriate for certification under *F.R.C.P.* 23(b)(2). *See Day v. NLO, Inc.*, 144 F.R.D. 330 (S.D.Ohio 1992), *rev'd on other grounds*, 5 F.3d. 154 (6th Cir. 1993); *Yslava v. Hughes Aircraft Co.*, 845 F. Supp 705 (D. Ariz. 1993); *Craft v. Vanderbilt University*, 174 F.R.D. 396 (M.D. Tenn. 1996)(collecting cases); The question in Federal Court is complicated by the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), as recognized by the Third Circuit in *Gates v. Rohm and Haas Co.*, 655 F.3d 255, 264 (3d Cir. 2011)("In light of the Supreme Court's recent decision in [*Dukes*], we question whether the kind of medical monitoring sought here can be certified under *Rule* 23(b)(2) but we do not reach the issue.")

[x] *Ayers*, 525 A.2d at 293; *Scribner v. Summers*, 138 F.3d 471, 474 (2d Cir. 1998)(affirming award for quality of life damages); *Kornoff v. Kingsburg Cotton Oil Co.*, 288 P.2d 507, 513 (Cal. 1955)(Permitting "discomfort and annoyance" damages in case arising out of injury to real property);

[xi] *See Kelly v. CB&I constructors, Inc.*, 179 Cal. App. 4th 442, 458 (Cal. Ct. App. 2009)(collecting cases).