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**Judith E. McKee**  
**Editor, National Environmental Enforcement Journal**  
National Association of Attorneys General  
750 First Street, N.E., Suite 1100, Washington, DC 20002  
Phone: (202) 326-6044 Fax: (202) 408-6982

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**Sharon Lee**  
Environment Project Assistant

**NAFTA AND LOCAL GOVERNMENTS:  
THE EFFECTS OF FREE TRADE ON  
STATE AND LOCAL ENVIRONMENTAL  
LEGISLATION, Part II**

By

**Eddie Ringel\***

*[Editor's note: This is the second part of a two-part article discussing the North American Free Trade Agreement's (NAFTA's) potential effects on state and local legislation. Part I contained a general discussion of state sovereign immunity in connection with the federal Treaty Power and an introduction to the NAFTA's Chapter 11. Part II continues the discussion of Chapter 11, outlines pertinent provisions of the General Agreement on Tariffs and Trade (GATT), discusses the trade in goods provisions and the environmental side agreement to NAFTA, and describes several recent arbitrations.]*

**Article 1114: Environmental Measures**

Article 1114 reads as follows:

1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an en-

couragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view<sup>1</sup> to avoiding any such encouragement.

This language can be read to provide a basis for giving national and sub-national environmental regulation the benefit of the doubt — at least where there is no evidence of discrimination against foreign investors or other obviously unfair or inequitable treatment.<sup>2</sup> However, NAFTA panels have generally refused to apply this section to arbitrations.

**D. Framework for Settling Disputes**

Section B of Chapter 11 (Articles 1115–1138) provides for the arbitration process through which claims may be brought by foreign investors. Article 1118 provides that the disputing parties should first attempt to settle a claim through consultation or negotiation. If this is unsuccessful, the investor may submit a claim for arbitration. NAFTA provides for three types of arbitration schemes for such claims, any one of which can be chosen as long as the parties meet certain requirements.<sup>3</sup> There is a three-year limit on submitting a claim for loss or damages. Arbitration tribunals are to decide issues in accordance with NAFTA, Commission interpretations of NAFTA, and applicable rules of international law.<sup>4</sup> Thus, arbitration tribunals have dealt with both procedural and substantive issues that arise from claims. Decisions of the tribunals may be appealed to the highest court of a state or province of any party.

Many have criticized the arbitration process set forth under Chapter 11 in that, although Chapter 11 claims often deal with public issues, the arbitrations are not open to the public.<sup>5</sup> The process is also closed to state and local governments even though it is their regulations that may be at issue in the dispute.<sup>6</sup> In addition, in the event that a claim is made in U.S. courts

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\*Eddie Ringel is in her third year of law school at the University of Virginia and is currently interning at the Environmental Defender's Office of Western Australia in Perth, Australia. This paper was written as part of a seminar, Constitutional Law in the Public Practice, taught during spring 2003. The author would like to thank Professor Madelyn Wessel for her guidance throughout the writing process.

by the federal government for restitution, state and local public monies could be used to pay for the result of an arbitration in which participation by that state or local entity was forbidden.<sup>7</sup>

### E. Chapter 11 Arbitrations

This section addresses the relevant claims brought under NAFTA's Chapter 11 provisions. Even though these arbitrations do not formally create precedent, tribunals have often referred to findings in previous disputes in making their decisions. Therefore, reviewing these decisions can shed light on how future disputes might be decided.

The majority of claims have invoked, as a basis for claims, either the expropriations limits of Article 1110 or the fair treatment standard of Article 1105. This section deals first and foremost with those claims brought under Article 1110, although most arbitration panels address challenges under a number of articles.

Article 1110 requires full, adequate, and effective compensation for direct and indirect expropriation as well as actions tantamount to expropriation, except when undertaken, (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation.<sup>8</sup> NAFTA, however, fails to define what constitutes an indirect taking or an action tantamount to a taking.<sup>9</sup> Some have suggested that the Article 1110 expropriation provision is modeled on the U.S. Fifth Amendment takings doctrine.<sup>10</sup> Whether or not that was the original intent behind the drafting of the article, Fifth Amendment jurisprudence has not been the basis for panels' takings decisions.<sup>11</sup>

Regulatory takings jurisprudence in the United States recognizes two broad categories of cases. The first is the "relatively rare" situation in which a regulation has deprived the owner of all economically beneficial use of his or her property.<sup>12</sup> If a regulation does not rise to that level, a court will examine a complex of factors under the *Penn Central* doctrine, such as determining whether the claimant has exhausted local domestic remedies available, the investment-backed

expectations of the claimant, and the relevant parcel taken.<sup>13</sup> However, these are not the issues on which arbitration tribunals have focused when a Chapter 11 expropriation claim has been brought. Since the first tribunal decision under Chapter 11, *Ethyl Corporation v. Canada*, it has been recognized that environmental legislation may be an "expropriation" under NAFTA.<sup>14</sup>

In *Azinian et al. v United Mexican States*,<sup>15</sup> the arbitration panel upheld a decision by the Mexican municipality of Naucalpan to terminate a contract to use a landfill. The panel rested its decision on the fact that the claimants failed to show that the domestic court, which had upheld the contract termination, had violated NAFTA in its treatment of the case. The panel noted that a claim for breach of contract does not normally rise to the level of an "expropriation." However, the panel did note that arbitration panels are free to review the rulings of domestic courts where there is a claim of denial of justice or where there is a pretense of form to achieve internationally unlawful ends.

While *Azinian* is an example of a decision that upheld local law, some of the arbitrations that have been decided to date have expanded the idea of regulatory takings and have found that local and state regulations could be expropriations in violation of Article 1110. These claims have involved a wide array of issues. One can loosely group these cases into three overlapping categories — those involving 1) real property, 2) claims to a market share, and 3) non-environmental claims against U.S. court and legislative decisions. One can see from the subject matter how NAFTA arbitration panels have expanded the universe of regulatory takings.

### Real Property

One of the most important arbitrations from the standpoint of municipalities is the *Metalclad v. United Mexican States* arbitration,<sup>16</sup> in which the panel found a compensable taking on the basis of a local land use decision. In this case, the claimant had sought and received a federal permit to build a hazardous waste

landfill on land that it owned, but had not received local permits to do so. Metalclad alleged that federal officials had told them no local permit was necessary; in the arbitration, Mexican officials denied such statements were made. The municipality of Guadalupe denied the permit in December 1995 and, subsequently, the governor of the state of San Luis Potosi issued an Ecological Decree declaring the site a natural preserve for the protection of a rare cactus.

Metalclad argued that it had been harmed by the violation of fair treatment required under Article 1105 of NAFTA and that the municipality's denial of a permit was an expropriation under Article 1110. The tribunal found that the permitting process was not transparent in that Metalclad had not been given a chance to be heard at the permit meeting.

On the expropriation claim, the tribunal found that NAFTA "includes . . . covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State."<sup>17</sup> The tribunal found that an expropriation under NAFTA had occurred for the same reason that it found a violation of Article 1105. In other words, the lack of transparency in the permitting process was also a violation of Article 1110. Underlying the tribunal's holding was its understanding that the municipality had exceeded its authority in denying the permit even though Mexico had argued that the municipality had such authority under Mexican law. In particular, the tribunal also found that the denial of permits by the municipality could not be justified under Article 1114 on environmental grounds because the actions of the Mexican federal government demonstrated that the Mexican authorities were "satisfied that this project was consistent with and sensitive to environmental concerns."<sup>18</sup>

The tribunal also discussed the effect of the subsequent Ecological Decree. It held that the decree itself would constitute an expropriation under NAFTA's Article 1110 and that the tribunal could make this finding without inquiring as to the reasoning behind the issuance of, or the basis for, the decree.<sup>19</sup>

The *Metalclad* panel emphasized that its bases for interpretation of NAFTA were the three NAFTA objectives: transparency in government regulations and activity, the substantial increase in investment opportunities, and the assurance of a predictable commercial framework for investors.<sup>20</sup>

The findings of the tribunal were appealed to the Supreme Court of British Columbia,<sup>21</sup> which disagreed with the tribunal's findings but still held Mexico liable. The court determined that the tribunal's finding that there was a failure of transparency decided a matter beyond the scope of the submission to arbitration. The court, however, upheld the tribunal's finding that the Ecological Decree constituted an expropriation. The court noted that, under the statute authorizing it to review the tribunal's finding, the International Commercial Arbitration Act, it did not have the jurisdiction to review the tribunal's legal definition of expropriation under NAFTA. Thus, it largely upheld the tribunal's award to Metalclad.

This judgment means that "expropriation" under NAFTA is a broader concept than regulatory takings under U.S. law. In *Metalclad*, the tribunal gave little thought to whether Metalclad had reasonable expectations, a requirement under U.S. regulatory takings law.<sup>22</sup> Furthermore, the court's acceptance of the arbitration panel's broad definition of "expropriation" is cause for concern. In contrast, the court did give some deference to localities by finding that local permitting processes do not necessarily have to be transparent or allow participation by investors. Nevertheless, having a transparent system in place may help municipalities avoid claims from foreign investors.

### Market Share

Although the idea of investment was originally linked to physical property in another country, such as a factory, the scope of investment has gradually enlarged to include regulations that affect market share. This trend is reflected in arbitrations under Chapter 11 of NAFTA.

Thus, local decisions to regulate certain chemicals and products will be scrutinized under investment provisions as well as trade-in-good provisions under NAFTA. The practical effect of this may be that state and local governments will have to take extra steps to demonstrate that any such regulations are not disguised attempts to protect domestic markets. There are four main arbitrations that have dealt with the claim that an interest in market share was expropriated in violation of NAFTA: *Ethyl Corporation v. Canada*, *Pope & Talbot v. Canada*, *S.D. Myers v. Canada*, and *Methanex v. United States*.

The *Ethyl* arbitration involved a U.S. company's claim against Canada concerning its federal ban on the sales of the gasoline additive methylcyclopentadienyl manganese tricarbonyl (MMT).<sup>23</sup> The challenged law banned import and inter-provincial trade in MMT.<sup>24</sup> After preliminary tribunal judgments against Canada, the case was settled out of court. The preliminary judgments determined that the ban was protectionist in that it did not really seek to limit MMT, but rather sought to limit the use of foreign MMT. Therefore, the panel determined that the environmental element was not Canada's primary concern when it passed the law. The panel adopted the company's argument that an ostensibly environmental regulation could act as an expropriation. This case makes clear that bans should not distinguish between domestic and foreign sources of the product. Furthermore, when a state or locality wishes to ban a product for health or environmental reasons, it should make sure such reasoning is adequately expressed so as to make evident the primary purpose behind the regulation.

The *Pope & Talbot* arbitration also included a Chapter 11 claim.<sup>25</sup> This case arose out of circumstances surrounding various trade challenges by the United States to Canadian softwood lumber exports. To resolve these issues, the two countries signed the Canadian-U.S. Softwood Lumber Agreement. *Pope & Talbot* claimed that the agreement cut its export quotas disproportionately to other exporters, thereby cut-

ting into its profits. The company claimed that these restrictions amounted to an expropriation of that part of its business. The tribunal disagreed. It noted that Chapter 11 claims include "nondiscriminatory regulation that might be said to fall within an exercise of a state's so-called police power" but that the use of the words "measure tantamount to expropriation" must include a consideration of the magnitude of severity of the effect of the measure.<sup>26</sup> In this case, the panel concluded that the interference with the business activities was not substantial enough to be considered an expropriation.<sup>27</sup>

*S.D. Myers* involved an export ban by Canada that prevented exportation of PCB to the United States during a period of legal change in the United States concerning the importation of the substance.<sup>28</sup> *S. D. Myers* is a U.S. hazardous waste disposal company with disposal facilities in the United States. Canada argued that, because of its corporate structure, *S.D. Myers* did not qualify as a NAFTA investor with an investment. The tribunal held that an otherwise meritorious claim should not be subverted because of corporate structure and that the term "investment" should be read broadly to include such things as making a loan to a related company. Further, it held that *Myers'* market share in Canada constituted an investment.<sup>29</sup> The tribunal found abundant evidence that the export ban was passed to favor Canadian nationals over non-nationals and to protect the Canadian PCB disposal industry from U.S. competition. Nevertheless, the tribunal also stated that regulatory action is not likely to be a legitimate subject of complaint under Chapter 11, but could be considered as such depending upon the substance of the measure.<sup>30</sup> According to the tribunal, the key difference is that "expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference."<sup>31</sup> The parties negotiated an agreement to resolve their difference prior to a final award by the panel.<sup>32</sup>

The *Methanex* case is a direct challenge to a state's ability to regulate to protect the public health of its citizens and its environment.<sup>33</sup> Based on complaints about MTBE contamination in groundwater, which affects the taste and smell of water and may be a

carcinogen, the California legislature passed the MTBE Public Health and Environmental Protection Act of 1997 authorizing the Governor to act by regulation to initiate an administrative process for phasing out MTBE if shown harmful through a scientific study. In 1999, Governor Gray Davis, based on a UC Davis study that found the benefits of MTBE use were outweighed by its costs, acted to ban its use in California. Although Methanex does not make or sell MTBE, it does make methanol, an ingredient in MTBE. Methanex claims that, when the California ban was passed, it lost a major market for its methanol.

After a preliminary ruling by the tribunal on jurisdictional issues,<sup>34</sup> including adopting the United States' position on the meaning of the term "relating to" in Article 1101(1), Methanex resubmitted its complaint, arguing that, in passing the ban, California intended to hurt foreign producers of methanol and to favor domestic producers of another gasoline additive, ethanol.<sup>35</sup> Further pleadings are scheduled for filing in the fall of 2003. A hearing is scheduled for June 2004.

The cautionary tale for states and localities in the *Methanex* filings is that even laws passed for the protection of public health and the environment can be tied up in a lengthy and resource-draining NAFTA procedure. In the words of California Attorney General Bill Lockyer, assisting the United States in defending the law has been "a drain on California's resources."<sup>36</sup>

One positive aspect of the *Methanex* arbitration, however, is that the tribunal determined that it had the *power* to allow the submission of written brief from amici and that it was "minded" to do so. However, it determined that the details of such participation should be left to a later stage of the proceeding.<sup>37</sup> The ability of a local or state government to act as an amicus when its own regulations are at issue would allow at least a small avenue of input in arbitrations from which they are otherwise excluded.

### Non-Environmental Challenges

There are two cases involving legislation significantly different from the legislative bans discussed in the previous section. One case, *Mondev*, involved the Massachusetts Tort Claims Act and the other case, *ADF*, involved federal legislation requiring the use of American steel products.

The *Mondev* case involves local government sovereign immunity. In this case a Canadian company, Mondev, contracted with the City of Boston to buy a parcel of land. When Mondev chose to exercise its option to buy, the value of the land had increased significantly and the City's new mayor refused to sell the property.<sup>38</sup> Mondev brought suit in a United States court. The NAFTA Tribunal upheld the decision by the Massachusetts state court that affirmed the Massachusetts Tort Claims Act granting statutory immunity to the Boston Regional Authority (the party with which Mondev contracted). The tribunal stated that, in the absence of international law that required statutory authorities to be liable for their torts, it could not be found that there was a violation of Article 1105.<sup>39</sup> As a result, Mondev's claims were dismissed in their entirety.<sup>40</sup> However, this case is not as favorable to state and local laws as it may appear. The tribunal pointed out that the Massachusetts Act was in place and many of the events at issue had occurred before NAFTA came into force.<sup>41</sup> In future cases, such arguments may not be available.

In *ADF*, a Canadian steel firm sued the United States after Virginia insisted that its contract with ADF (in connection with building the Springfield I-95 Interchange) required that ADF have the steel fabricated in the United States as part of the "Buy America" rules on government procurement. The tribunal found that Virginia's compliance with the federal act fell under the "procurement by Party" exceptions in Article 1108(7)(a), (8)(b).<sup>42</sup> This decision is relevant to state and local governments that adhere to federal requirements in order to receive funding.

Finally, in the first case brought under Chapter 11 to directly challenge the conduct of a state judicial sys-

tem as a breach of NAFTA, a tribunal panel in *Loewen Group, Inc. v. United States*, recently issued its award in favor of the United States.<sup>43</sup> In that dispute, Loewen, a Canadian company in the funeral business, entered into a contract with a family in Mississippi. A subsequent civil suit led to a Mississippi state trial court jury award of \$500 million against Loewen. The award included emotional and punitive damages; the punitive damages were 200 times greater than any amount that had ever been upheld on appeal. However, in accordance with state law, in order to appeal, Loewen was required to post a bond for 125% of the full amount of the damages. Loewen was financially unable to do so. In its NAFTA pleading, Loewen claimed that the jury finding and damages award were motivated by references in the trial to the foreign ownership of the company.

The panel held that, in principle, judicial wrongs may be the subject of a Chapter Eleven proceeding. It also criticized the Mississippi proceedings. Nonetheless, it determined that:

[A]n intervention on our part would compromise [NAFTA purposes] by obscuring the crucial separation between the international obligations of the State under NAFTA, of which the fair treatment of foreign investors in the judicial sphere is but one aspect, and the much broader domestic responsibilities over every nation towards litigants of whatever origin who appear before its national courts. Subject to explicit international agreement permitting external control or review, these latter responsibilities are for each individual state to regulate according to its own chosen appreciation of the ends of justice. As we have sought to make clear, we find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation.<sup>44</sup>

## V. NAFTA and Trade in Goods

### A. Introduction to Trade in Goods

The Trade in Goods provisions contained in Part II of NAFTA relate to tariffs, quotas, licenses, and sanitary and phytosanitary standards, as well as the harmonization of grade and quality standards. When issues involving Trade in Goods arise, the dispute settlement process outlined in Chapter 20 is used. Chapter 20 incorporates many of the dispute settlement and arbitration provisions of GATT and often allows the complaining parties to choose between the GATT and NAFTA frameworks.<sup>45</sup> There are, however, some limitations on the interchangeability of the GATT and NAFTA; for example, issues arising under Article 104 relating to Environmental and Conservation Agreements must be settled under NAFTA.<sup>46</sup> Other environmental concerns such as those relating to health and safety can be settled under GATT. These disputes, unlike the Chapter 11 disputes addressed above, must be brought by Signatories to the Agreement.

### B. GATT and GATT's Environmental Proceedings

NAFTA incorporates the exceptions outlined in GATT Article XX into its own Trade in Goods provisions. Article 2101 of NAFTA states that:

For purposes of:

- (a) Part Two (Trade in Goods), except to the extent that a provision of that Part applies to services or investment, and
- (b) Part Three (Technical Barriers to Trade), except to the extent that a provision of that Part applies to services, GATT Article XX and its interpretative notes, or any equivalent provision of a successor agreement to which all

Parties are party, are incorporated into and made part of this Agreement.<sup>47</sup>

GATT Article XX creates exceptions for, among other things, those provisions “necessary to protect human, animal or plant life or health” and “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”<sup>48</sup>

Because of NAFTA’s incorporation of GATT, it is useful to consider how Trade in Goods disputes have been treated within the GATT framework. However, although GATT is incorporated into NAFTA, there are also additional protections within NAFTA itself. For example, there is debate about whether provisions in GATT are meant to address the environment in broad or narrow sense since they refer to health and conservation but do not use the word “environment.”<sup>49</sup> Some have argued that the absence of the word “environment” means that the provisions are meant to have a utilitarian purpose, for example making sure a species survives, not for the species’ sake but so that it can be used in the future by humans. Also, subsequent agreements have used language similar to that used in GATT but with the inclusion of the word “environment.” This may suggest that GATT is supposed to be interpreted merely to protect against the effects of environmental degradation, such as human health effects, whereas those agreements that use the word environment (like NAFTA) are intended to specifically protect the environment, not just the effects of environmental degradation. Thus, it is useful to consider GATT proceedings while keeping the potential that NAFTA provides protections beyond those of GATT.

Under GATT, in order for measures connected with environmental goals to be accepted, they must fall into an exception under Article XX; otherwise, such regulations violate GATT on their face.<sup>50</sup> There are a number of disputes under GATT that have addressed environmental measures. In these cases, the main question is whether the regulation at issue is properly characterized as an Article XX exception relating to

protection of human, animal, or plant life. These disputes include: *Herring-Salmon*, *Lobsters*, *Tuna/Dolphin*, *Taxes on Automobiles*, *Reformulated Gasoline*, and *Turtles*.

In the *Herring-Salmon* dispute, Canada initiated a requirement that all Pacific salmon and roe herring caught in Canadian waters had to be unloaded from fishing vessels in British Columbia prior to being exported. The panel found that conservation of the species was not the “primary purpose” of the regulation and, thus, the exception under Article XX of GATT could not be applied.<sup>51</sup> In contrast to the result in *Herring-Salmon*, a U.S. ban on small lobsters that adversely affected Canadian harvesters because lobster mature to a smaller size in colder waters, was upheld. In this case, the *Lobsters* panel accepted that the size requirement was necessary to protect young lobsters and found that the ban fell within the Article XX exceptions.<sup>52</sup>

*Tuna/Dolphin II* involved the Marine Mammal Protection Act and the embargoes it places on intermediary countries which do not ban imports of tuna from countries whose tuna harvesting practices and policies are not comparable to the United States’. The panel concluded that a country cannot impose trade embargoes within their own jurisdictions to secure changes in policies by other countries.<sup>53</sup> Thus, the panel determined that such an embargo was not “necessary” for the protection of animal life or health in the sense of Article XX(b) of GATT since it does not ensure that the hoped for change will occur. Similarly, in *Automobiles*, a tax on gas guzzling vehicles was upheld because it was found to have a legitimate non-protectionist objective. One reason for this holding was that many domestic cars in addition to foreign cars did not meet the standard.<sup>54</sup> This case supports the ability of localities to enact legislation as long as it is not protectionist.

In the *Turtles* and *Reformulated Gasoline* arbitrations, the panels referred to the preambular paragraph (or “chapeau”) of GATT’s Article XX exceptions. In these cases, the arbitrators undertook a two-step process by which they first considered whether a regula-

tion was within the scope of Article XX and, if it were, whether the regulation nonetheless constitutes an arbitrary discrimination, an unjustifiable discrimination, or a disguised restriction.<sup>55</sup> In *Turtles*, the panel held that a scheme to ensure the use of turtle exclusion devices in shrimp trawlers was within the Article XX exception, but did not meet the chapeau requirements because it was unjustified and arbitrary discrimination in the manner it was applied.<sup>56</sup> Thus, laws that have an acknowledged basis in protection of the environment may still be challenged if they are being applied in a manner that would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail or are a disguised restriction on international trade.

#### **VI. North American Agreement on Environmental Cooperation (NAAEC) NAFTA's Environmental Side Agreement**

The North American Agreement on Environmental Cooperation (NAAEC), the NAFTA side agreement designed to address environmental concerns, was adopted at the same time as the NAFTA as a result of concerns over the disparity between environmental protection in the developed countries of Canada and the U.S. and the less developed nation of Mexico. Many in the United States feared a migration of jobs and polluting industries to Mexico where, even though environmental laws comparable to those in the United States may exist, there is not an equal emphasis on enforcement.<sup>57</sup> Others feared a race to the bottom in which the United States might begin to relax its own environmental protections. Part III of the NAAEC establishes the Commission for Environmental Cooperation (CEC) to oversee three separate bodies, the Council, the Secretariat, and various advisory committees. The Council is made up of a cabinet level representative from each Party that is intended to help attain the environmental goals of NAFTA by receiving input from NGOs, dealing with concerns over failures to enforce environmental laws, regularly assessing the environmental affects of NAFTA, and helping parties resolve environmental disputes.<sup>58</sup> The

Secretariat serves as the administrative arm of the CEC and is expected to act independently of the parties in creating annual reports and conducting research studies.<sup>59</sup>

The significance of the CEC with respect to local concerns is that it serves as an avenue through which non-parties may participate in NAFTA. Thus, although the NAAEC does not "transcend the state-centric paradigm of international law," it does acknowledge in important ways the stakes that non-parties have in the process of monitoring and enforcing NAAEC legal obligations.<sup>60</sup> The NAAEC also provides that "The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law."<sup>61</sup> Thus, individuals can ensure that governments are adhering to their environmental laws.

In 1995, the CEC created the North American Fund for Environmental Cooperation (NAFEC). This fund provides grants to community-based projects that promote the goals and objectives of the CEC. In order to receive funding the projects should 1) be community based, involving stakeholders within a clearly-defined community who actively participate in the design and implementation of the project; 2) be responsive to a specific issue or problem and lead to concrete results; 3) reflect cooperative and equitable partnerships between or among organizations from different sectors and/or countries within North America; 4) meet the objectives of the CEC (by complementing the current CEC program); 5) strengthen and build the capacities of local people, organizations and institutions; 6) emphasize sustainability; link environmental, social and economic issues; and 7) leverage additional support, but are unlikely to obtain full funding from other sources. Thus, this program provides a means through which local concerns can be addressed through an official mechanism. Although this scheme is aimed primarily at NGOs, there is potential for local governments to become involved by participating with an NGO on an approved local project.

## VII. Conclusion

It is true that NAFTA has serious implications for local and state governments. However, the agreement does not necessarily eliminate the power of local governments to enact environmental legislation. Rather, NAFTA constrains this function because its arbitration panels generally impose stricter standards than those used in U.S. courts. As a result, in order to avoid claims under NAFTA, states and localities will have to be aware of the effects their regulations may have on international parties, even if such effects are unintended. Unfortunately, with California's experience in mind, the effect of these stricter requirements under NAFTA could be that state legislatures and local councils will become increasingly reluctant to enact their own local laws to protect the environment.

To overcome the chilling and other adverse affects of NAFTA on local and state governments, academics as well as politicians have proposed various changes to the agreement. In Congress, concerns that foreign investors may receive better treatment than American citizens as a result of the NAFTA's Chapter 11 protections have led members to seek clarification of the investment protections and general exceptions for health and environmental laws.<sup>62</sup> In addition, academics have also suggested various modifications that would limit the reach of Chapter 11, including a prohibition on bringing an expropriation claim based on any non-discriminatory environmental regulation, implementing a pre-screening process for expropriation claims, and making the dispute settlement procedures more transparent.<sup>63</sup> Such changes may help ensure that state and local environmental legislation will be able to flourish in conjunction with the expansion of free trade throughout North America, South America, and around the globe.

### ENDNOTES

1. NAFTA, Art. 1114, 32 I.L.M. 642.
2. David Gantz, *Global Trade Issues in the New Millennium*, 33 GEO. WASH. INT'L L. REV. 651, 691 (2001).
3. NAFTA, Art. 1120, 32 I.L.M. 643.
4. NAFTA, Art. 1131, 32 I.L.M. 645.
5. PUBLIC CITIZEN & FRIENDS OF THE EARTH, EXECUTIVE SUMMARY, NAFTA CHAPTER 11 INVESTOR-TO-STATE CASES: BANKRUPTING DEMOCRACY, LESSONS FOR FAST TRACK AND THE FREE TRADE AREA OF THE AMERICAS v (2001).
6. *Id.*
7. *Id.*
8. NAFTA, Art. 1110(1), 32 I.L.M. 641.
9. See Vicki Been, *NAFTA's Investment Protections and the Division of Authority for Land Use and Environmental Controls*, 32 ENVTL. L. REP. 11001 (Sept. 2002).
10. See Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 43 (Apr. 2003).
11. *Id.* at 59.
12. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
13. *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978).
14. *Ethyl Corporation v. Canada* (June 24, 1998), available at <[www.naftaclaims.com](http://www.naftaclaims.com)>, last visited July 18, 2003. The tribunal specifically held that Chapter 11 was not to be construed on the principle of avoiding restrictions on sovereignty. That arbitration ended with Canada's agreeing to withdraw the legislation which had been the basis of the claim.
15. No. ARB(AF)/97/2 (Nov. 1, 1999), available at <[www.naftaclaims.com](http://www.naftaclaims.com)>, last visited July 18, 2003.
16. *Metalclad Corporation v. United Mexican States*, No. ARB(AF)/97/1 (Aug. 30, 2000), available at <[www.naftaclaims.com](http://www.naftaclaims.com)>, last visited July 18, 2003.
17. *Id.* ¶ 103.
18. *Id.* ¶ 98.
19. *Id.* ¶ 110.
20. *Id.* ¶¶ 70–71, 75.
21. *United Mexican States v. Metalclad Corporation*, 2001 BCSC 1529 (2001), available at <[www.naftaclaims.com](http://www.naftaclaims.com)>, last visited July 21, 2003. The court's opinion set out several interesting facts that were not clearly outlined in the tribunal's findings. The site is owned by a company incorporated under Mexican law, Coterin. The site and Coterin, initially owned by Mexican nationals, were sold to a subsidiary of Metalclad in 1993, after the Mexican government had ordered the closure of a hazardous waste transfer station owned by Coterin. The sale of Coterin to Metalclad was conditioned on a municipal permit being issued to Coterin for a hazardous waste landfill at the site or Coterin's

receiving a court order that a municipal permit was not required. Neither condition was met before consummation of the sale agreement.

22. See *Been and Beauvais supra* note 10, at 69.

23. *Ethyl Corp. v. Government of Canada*, Award on Jurisdiction, *supra* note 14, 38 I.L.M. 708.

24. See Julie Soloway, *Environmental Trade Barriers under NAFTA*, 8 MINN. J. GLOBAL TRADE 55 (1999).

25. *Pope & Talbot v. Canada*, Award on Measures Relating to Investment (Jan. 26, 2000), available at <[www.naftaclaims.com](http://www.naftaclaims.com)>, last visited July 22, 2003.

26. *Id.* ¶¶ 96, 104.

27. *Id.* ¶ 96.

28. *S.D. Myers, Inc. v. Government of Canada*, Award, 40 I.L.M. 1408 (2001), available at <[www.naftaclaims.com](http://www.naftaclaims.com)>, last visited July 22, 2003.

29. *Id.* ¶ 232.

30. *Id.* ¶¶ 281, 283.

31. *Id.* ¶ 282. The tribunal also noted that the purpose and effect of a measure must be considered (¶ 285), putting it somewhat at odds with the *Metalclad* tribunal. Of particular significance to environmentalists, the tribunal also discussed the ban in connection with two treaties: the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal and the Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Wastes. The tribunal concluded that the free trade principles of NAFTA should be read into the interpretation of the treaties (¶¶ 205–16).

32. This arbitration also acted as a lobbying effort against Canada to withdraw the ban. In negotiations after the initial panel determination, Canada did withdraw the ban and also paid Ethyl \$13 million in lost profits and for costs.

33. *Methanex v. United States*, Re-Submitted Amended Statement of Claim (Nov. 5, 2002).

34. *Id.*, Preliminary Award on Jurisdiction and Admissibility (Aug. 7, 2002).

35. *Id.*, Amended Statement of Claim (Nov. 30, 2002). The panel held that the “relating to” language means “something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them.” *Id.* ¶ 147.

36. Bill Lockyer, *When State Governments Need an International Law Section*, ENVTL. F., July/August 2003 at 32. In the article, he also expresses his frustration that his own lawyers “cannot even directly litigate the case” and goes on to say:

The Methanex case is a cautionary tale for state and local governments. It shows viv-

idly the vulnerability of state and local regulations adopted with a solid scientific basis and no intent to affect foreign trade, to a claim under NAFTA — or, potentially, under GATT or World Trade Organization agreements — that siphons off critical state resources to defend, can’t even be defended directly by the government that enacts it, and may ultimately result in federal preemption of the regulation.

*Id.*

37. *Id.* Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae” (Jan. 15, 2001).

38. *Mondev International Ltd. v. United States*, Award, 42 I.L.M. 85, 93 (2003), available at <[www.naftaclaims.com](http://www.naftaclaims.com)>, last visited July 21, 2003.

39. *Id.* at 99.

40. *Id.* at 115.

41. *Id.*

42. *ADF Group, Inc. v. United States*, No ARB(AF)/00/1, Award (Jan. 9, 2003), available at <[www.naftaclaims.com](http://www.naftaclaims.com)>, last visited July 22, 2003.

43. *Loewen Group, Inc. and Raymond Loewen v. United States*, No. ARB(AF)/98/3, Final Award (June 26, 2003), available at <[www.naftaclaims.com](http://www.naftaclaims.com)>, last visited July 23, 2003.

44. *Id.* ¶ 242.

45. NAFTA, Art. 20, 32 I.L.M. 693.

46. *Id.*

47. NAFTA, Art. 2101, 32 I.L.M. at 699.

48. General Agreement of Tariffs and Trade, Oct. 3, 1947, 55 U.N.T.S. 194.

49. MICHAEL TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 398 (2d ed. 1999)[hereinafter TREBILCOCK].

50. *Id.* at 397.

51. Report of the Panel, *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon*, Nov. 20, 1987, GATT B.I.S.D. 35 Supp. 98 (1988).

52. U.S.-Canada Free Trade Agreement Binational Panel Review, *In the Matter of Lobsters from Canada*, May 25, 1990, available at 1990 FTAPD Lexis 11.

53. Dispute Settlement Panel Report on United States Restrictions on the Import of Tuna, 33 I.L.M. 839 (1994).

54. Dispute Settlement Panel Report on United States Taxes on Automobiles, 33 I.L.M. 1397 (1994).

55. TREBILCOCK, *supra* note 49, at 416.

56. *Id.*

57. See, GARY HUFBAUER ET AL., NAFTA AND THE ENVIRONMENT SEVEN YEARS LATER (2000).

58. JOSEPH MCKINNEY, CREATED FROM NAFTA, THE STRUCTURE, FUNCTION, AND SIGNIFICANCE OF THE TREATY'S RELATED INSTITUTIONS 93 (2000).

59. *Id.*

60. TREBILCOCK, *supra* note 49, at 437.

61. NAAEC, Art. 14, 32 I.L.M 1487.

62. PUBLIC CITIZEN, *supra* note 5, at 39 (no such legislation has successfully passed through Congress although even members who supported NAFTA in the past have voiced concerns over Chapter 11).

63. See, Lauren Godshall, *In the Cold Shadow of Metalclad: The Potential for Change to NAFTA's Chapter Eleven*, 11 N.Y.U. ENVTL. L. J. 264 (2002).

## DECISIONS

### Air

#### **EPA Abused Discretion in Denying Waiver: *Gray Davis et al. v. U.S. EPA*, No. 01-71356 (9th Cir. July 17, 2003)**

#### **Background**

As part of the 1990 amendments to the Clean Air Act (CAA), Congress established the reformulated gasoline program (RFG). The RFG program requires that only RFG containing at least two percent oxygen by weight be used in certain non-attainment areas. 42 U.S.C. § 7545(k)(2)(B). Ethanol and methyl tertiary butyl ether (MTBE) are the primary choice of oxygenates to reach this percentage. The CAA authorizes EPA to waive the oxygen content requirement if there is a determination "that compliance with such requirement would prevent or interfere with the attainment by the area of a national primary ambient air quality standard." 42 U.S.C. § 7545(k)(2)(B).

California banned the use of MTBE because of its determination that it was threatening groundwater and drinking supplies. Ethanol supplies were not sufficient to oxygenate the gasoline supplies without economic consequences, and studies by the California Air Resources Board (CARB) determined that the two percent oxygen mandate using ethanol would prevent or interfere with the state's attainment of the federal ozone and particulate matter National Ambient Air Quality Standards (NAAQS).

The Governor of California then wrote to EPA in April 1999, requesting a waiver pursuant to the CAA. While EPA studied the request, the state supplied requested additional information, demonstrating that a grant of the state's request would result in a reduction of 2,920 tons of nitrogen oxide (NO<sub>x</sub>) reduction annually. Reduction in NO<sub>x</sub> emissions is part of California's implementation plan to attain the national ozone standard and an important part of the state's program to attain the NAAQS for particulate matter (PM).

In June 2001, EPA denied California's request for a waiver. EPA disagreed with CARB's documentation on critical technical issues, finding that the state had not clearly demonstrated the impact of a waiver on achieving NAAQS for ozone. EPA determined that "unless, at a minimum, it has been demonstrated that granting a waiver would aid in attaining at least one NAAQS, and would not hinder attainment for any other NAAQS," the waiver could not be granted. The letter also stated that, because EPA was denying the request based upon "uncertainty associated with the effect of a waiver on ozone," it was not necessary to "decide whether the expected reduction in NO<sub>x</sub> from a waiver and the associated reduction in PM" would support a determination of interference with the PM NAAQS.

California petitioned for a review of EPA's denial.

### **Holding**

As a preliminary matter, the court addressed EPA's argument that California lacked standing to bring this appeal. According to EPA, California sued in a purely *parens patriae* capacity and, thus, did not have standing. The court disagreed. In bringing this lawsuit, California was protecting its own interests. If it fails to comply with various implementation plan requirements, the state could face various federal enforcement remedies and also stand to lose millions in federal highway funds. Furthermore, the Governor and CARB, acting in their official capacities, have a proprietary interest in the land, air, and water of the state. This interest is sufficiently concrete to give them standing.

The court then addressed the issue of whether EPA abused its discretion in denying the state's waiver request. First, California argued that EPA's standard for granting a waiver was wrong. According to the state, the statute does not require that the state "clearly demonstrate" the effects that a waiver would have on NAAQS and, yet, that is the standard that the agency used.

The statute is silent as to the evidentiary standard the agency should use in determining whether it should grant a waiver. Therefore, if the agency's interpretation is a permissible construction of the statute, *Chevron* deference would require that the court accept it. EPA based its evidentiary standard on the CAA legislative history. The Conference Report indicated that "waiver of the oxygen requirements by petition must be the exception rather than the rule" and that applicants must "demonstrate that they are trying to comply with [the oxygen content] provision within their capabilities." 136 Cong. Rec. §§ 3504, 3522 (1990).

California also argued that EPA should have given more deference to California's request for a waiver because of its special statutory authority to prescribe fuel additives for emission control, see 42 U.S.C. § 7545(c)(4)(B) and, because in a different waiver provision (section 7543(b)), EPA merely determines whether a state has acted arbitrarily or capriciously. The court stated, however, that the statutory provisions that California cited are different and involve issues that are readily distinguishable from the one presented in the appeal. The statute affords broad discretion to the EPA in determining whether to grant a waiver. Therefore, EPA's interpretation of the waiver provision as to the evidentiary standard to be used is reasonable.

California argued that EPA's research concerning the effect of oxygenated fuel on California's ozone levels was technically flawed. Unless EPA acted arbitrarily or capriciously or abused its discretion, however, the court must defer to its actions. The court's review of EPA's study and scientific methodology found that EPA had not acted arbitrarily and capriciously.

California's third argument was that EPA had abused its discretion by refusing to evaluate the effect that the requested waiver would have on the state's efforts to comply with the PM NAAQS. The court agreed with the state. The statute does not state exactly how EPA should resolve situations involving NAAQS when a waiver might aid in attaining one standard but could impede compliance with another.

Again, the question before the court then would be whether EPA's construction of the statute is correct—that is, does the statute allow EPA to ignore possible harm to a nonattainment area in making its waiver determination.

The waiver provision specifically requires EPA to consider interference with the attainment of an NAAQS. CARB's research indicated that, without a waiver, NO<sub>x</sub> emissions would not be reduced, resulting in an interference with attainment of the PM NAAQS. EPA's own model showed a decrease in NO<sub>x</sub> should a waiver be granted. The court held that, by ignoring this evidence, "EPA refused to make the statutorily-directed determination whether denial of the State's waiver request would interfere with attainment of a NAAQS."

EPA answered by stating that the statute does not require the agency to assess the effect on all NAAQS of a waiver. However, in this case, both CARB's and EPA's research demonstrated that the oxygen requirement interfered with attainment of the PM standards. When the agency has relevant information suggesting a threat to attainment, then it must assess the impact on the potentially affected NAAQS.

According to the court, EPA's logic would dictate that a waiver that would have a negative impact on attainment in one area could never be granted even if its positive effect in another area would bring significant advancements. The court deemed that this interpretation "stands at odds" with the CAA's goal of protecting and enhancing the quality of the nation's air resources. Furthermore, it undermines the sole purpose of the RFG program — to reduce air pollution.

In this situation — where the evidence of the effects on one NAAQS was merely uncertain, not negative — EPA's approach is particularly contrary to the goal of the CAA. The court concluded that it could not support an interpretation of the statute "that permits the EPA to end its consideration of a waiver application as soon as it meets with evidence supporting an uncertain outcome with regard to one NAAQS, especially where evidence of a benefit to air quality with regard to another NAAQS is clearly present." Slip op. at 19. Therefore, the court held that EPA had abused its discretion when it refused to evaluate the effect of the requested waiver on the state's efforts to comply with the PM NAAQS.

California also argued that EPA was required to proceed by formal rulemaking in determining whether to grant a waiver. The court disagreed. There is nothing in the statute that would require the formality of the rulemaking procedure in determining whether the agency should grant a waiver. When a statute does not specifically designate procedure, an agency is free to choose the method by which it will proceed. The sections of the CAA cited by California to bolster its argument are not applicable to agency decisions made pursuant to section 7575(k)(2)(B).

Finally, the court addressed California's claim that EPA erred by failing to take into account California's exemption under the CAA to regulate fuel standards without prior EPA approval. Basically, California argued that it is exempt from federal preemption and free to establish its own standard for fuel content. Section 7545(C)(4)(B) of the CAA does authorize California to establish its own controls or prohibitions on fuel. Nonetheless, section 7545(k)(2)(B) requires all fuels in particular areas to meet the oxygen content requirement. The court read the two sections together as permitting California to add requirements, not substitute requirements. The court thus concluded that the oxygen content requirement applies to California.

The court granted the petition for review, vacated EPA's order, and remanded the matter to EPA with instructions to review the waiver request with full consideration of the effects of a waiver on both ozone and the PM NAAQS.

**California's MTBE Ban Not Preempted by CAA: *Oxygenated Fuels Association, Inc. v Davis et al.*, No. 01-17078 (9th Cir. June 4, 2003)**

**Background**

The Clean Air Act (CAA) includes a variety of provisions to reduce the amount of pollution being emitted into the air. One of the goals of the CAA is to reduce air pollution by reducing motor vehicle emissions. Section 211 regulates vehicle fuels and additives to help achieve that goal. Among its provisions are requirements concerning the oxygen content of gasoline in certain areas of the country and at certain times of the year. In order to meet those requirements, gasoline refiners have added oxygenated fuel additives to gasoline, the most common of which are methyl tertiary butyl ether (MTBE) and ethanol.

With the increasing evidence that MTBE caused serious groundwater pollution, the California Air Resources Board decided to ban its use as a fuel additive in California. The Oxygenated Fuels Association (OFA) filed a suit in federal district court seeking to enjoin the ban. Among other things, OFA argued that the ban conflicted with the objectives of the CAA and was, therefore, preempted. The district court ruled that California is expressly exempted from CAA preemption and granted the state's motion to dismiss under Rule 12(b)(6). The district court ruled, in the alternative, that the ban on MTBE is not impliedly preempted by the CAA. OFA appealed.

**Holding**

There are three types of preemption: express preemption, field preemption, and conflict preemption. *English v. General Electric Company*, 496 U.S. 72, 78–79 (1990). Analysis of a preemption issue begins with the presumption that, unless specifically stated otherwise through language or a clear and manifest purpose, Congress did not intend to preempt the historical police powers of the state.

The defendants argued that California's MTBE ban is expressly exempted from preemption by the language of the CAA. In the CAA, "no State (or political subdivision thereof) may prescribe or attempt to enforce, for purposes of motor vehicle emission control, any control or prohibition respecting any characteristic or component of a fuel or fuel additive in a motor vehicle or motor vehicle engine." 42 U.S.C. § 7545(c)(4)(A). In the next statutory subsection, however, the statute specifically states that California "may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive." *Id.* § 7545(c)(4)(B). OFA argued that California is not exempted, in the case of the MTBE ban, because the ban was not put in place "for the purpose of motor vehicle emission control." Rather, the ban was passed to protect groundwater.

As defense, the state argued that, despite the reason for having the ban, it falls within the exemption because it's part of an overall "emissions control regulatory scheme," which, as a whole, has the purpose of emissions control. The court then asked whether the focus of the preemption analysis is the MTBE ban or California's comprehensive emissions regulatory scheme of which just one part is the ban.

The court turned to a U.S. Supreme Court case, *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983), for guidance. In that case the challenge was to California's moratorium on the

construction of nuclear power plants. The Atomic Energy Act contained a preemption provision preserving states' power "to regulate activities for purposes other than protection against radiation hazards." 42 U.S.C. § 201(k). The Court held that Congress had taken "complete control of the safety and 'nuclear' aspects of energy generation." Therefore, whether the moratorium was preempted depended on whether it had a non-safety rationale. To answer that question, the Court did not look at the plant-building moratorium as part of a larger energy control regulation but, rather, analyzed the moratorium as a stand-alone provision. Similarly, in *Department of Treasury v. Fabe*, 508 U.S. 491 (1993), an Ohio statute establishing the priority of creditors' claims when an insurance company liquidated was examined to determine if it was preempted by the federal bankruptcy law. In that case, the Court looked at each individual rule, determining one provision was preempted but another one wasn't.

These cases suggested to the court that it should look at the MTBE ban itself, not at California's overall emissions regulatory scheme. Congress clearly intended to allow California to have latitude in regulating and choosing among fuel additives. However, since the ban was adopted solely for the purpose of protecting ground and drinking water, the court determined that the exemption did not cover the MTBE ban.

OFA argued that the ban is impliedly preempted because it conflicts with the goals of the CAA. It contended that Congress intended to leave to gas producers the choice of which oxygenate to use, that the CAA promotes a goal of "oxygenate neutrality." It pointed to some parts of legislative history to buttress its argument. The court stated that, since it found the text of the statute clear, it was not necessary to look at legislative history. Furthermore, it noted that the history OFA cited was composed primarily of statements of individual legislators. These are of much less weight than committee reports. What the legislative history shows is that Congress intended the federal government to remain neutral concerning additives.

In *Exxon Mobil Corporation v. EPA*, 217 F.3d 1246, 1253 (9th Cir. 2000), the court ruled on a Nevada plan that effectively banned the use of MTBE during the winter months. The plaintiff argued, as OFA did in this case, that the plan violated the CAA's purpose of ensuring oxygenate neutrality. The court rejected Exxon's argument, noting that EPA had concluded that congressional sentiments concerning fuel neutrality were focused on EPA, not on the states.

The court distinguished this case from the Supreme Court's ruling in *Geier v. American Honda Motor Company*, 529 U.S. 861 (2000). In that case, the Court concluded that the Federal Motor Vehicle Safety Standard (FMVSS) preempted an alleged state tort law concerning airbag requirements in automobiles. The Court concluded that the FMVSS intended to provide car manufacturers with a range of choices in devising passive restraint devices. In that case, however, the agency itself had determined the suit was preempted; the Court gave deference to the agency's determination. There was also abundant evidence in the legislative history to prove congressional intent to preempt. In this case, EPA has made no determination as to the preemptive effect of the CAA on the MTBE ban, nor is there evidence in the legislative history to support preemption.

OFA also argued that the ban is preempted because it disrupts the market for gasoline. However OFA offered little evidence that the CAA was intended to promote a smoothly functioning gasoline market and inexpensive gasoline.

Environmental regulation is an area of traditional state concern. There must be clear evidence of congressional intent to preempt laws dealing with such traditional areas of state concern. The court could find no such evidence in this case. Therefore, it concluded that the ban, although not expressly exempted from preemption by the CAA, is also neither expressly or impliedly preempted. It therefore affirmed the judgment of the district court.

**ACO Not Final Agency Action: *Tennessee Valley Authority v. Whitman*, No. 00-16234 (11th Cir. June 24, 2003)**

**Background**

Between 1982 and 1996, the Tennessee Valley Authority (TVA) undertook various projects at its coal-fired plants that involved the replacement of various boiler components. Believing that the projects could be classified as “routine maintenance” under the Clean Air Act (CAA), TVA did not request a permit for any of these projects. EPA took a different view of the matter and determined that the projects triggered New Source Review and New Source Performance Standards requirements. Thus, in November 1999, EPA issued the first of what would be seven Administrative Compliance Orders (ACOs), requiring TVA to identify any modifications that were undertaken without permits, apply for the permits, and enter into a compliance agreement with EPA. In the first half of 2000, EPA and TVA held a series of negotiations, leading to six separate amendments to the ACO. Throughout the negotiations, TVA maintained the position that the projects constituted “routine maintenance”; that there was no increase in emissions traceable to the projects; and that EPA’s change of its definition of “modification” to encompass projects undertaken decades earlier violated the fair notice concepts of Due Process and administrative common law.

Believing that it could not sue TVA in federal court to enforce the ACO, in May 2000, EPA notified TVA that it was going to “reconsider” the ACO and directed TVA to comply in the meantime. TVA petitioned the court for review of EPA’s notice of reconsideration. EPA then decided to “adjudicate” the issue of whether TVA had violated the CAA even though neither the CAA nor EPA’s regulations provides a process to adjudicate an administrative order such as the ACO. The EPA Administrator delegated the “reconsideration” task to the Environmental Appeals Board (EAB). The EAB crafted a procedure wherein the Administrative Law Judge was instructed not to make any findings of facts and conclusions of

law and virtually eliminated any opportunity for TVA to undertake discovery. Furthermore, testimony at the hearing was to be limited, TVA was given only eight weeks’ notice of the hearing, and EPA divulged no information concerning how it had arrived at the conclusion that there were emission increases. Finally, the procedures employed were completely ad hoc.

EAB affirmed most of the six amended ACOs in September 2000, treating the seventh ACO issued as a “final order,” rather than a “compliance order,” as the earlier six ACOs were labeled. In November 2000, TVA petitioned the court for review of the “final” EAB order. The court bifurcated its review, holding first in *Tennessee Valley Authority v. EPA*, 278 F.3d 1185 (11th Cir. 2002), that review of the first six ACOs was moot because the EAB order had rendered those of “no force and effect.” The court also held that TVA possessed independent litigating authority, that the case was justiciable, and that various petitioners had standing. Finally, it held that the EAB order was a reviewable final order.

In this opinion, the court withdrew its earlier holding regarding finality.

**Holding**

Judicial review of any *final* EPA action is available “in the United States Court of Appeals for the appropriate circuit.” 42 U.S.C. § 7607(b). Under Supreme Court jurisprudence, finality is judged by an examination of five factors: “(1) [W]hether the agency action constitutes the agency’s definitive position; 2) whether the action has the status of law or affects the legal rights and obligations of the parties; (3) whether the action will have an immediate impact on the daily operations of the regulated party; (4) whether pure questions of law are involved; and (5) whether pre-enforcement will be efficient.” Slip op. at 22. See *FTC v. Standard Oil of California*, 449 U.S. 232 239–43 (1980). The court commented that, in this case, the second prong was especially important. In *Bennett v. Spear*, 520 U.S. 154 (1997), the Court explained that the second Standard Oil prong is a

mandatory test of finality: “[T]he action must be one by which ‘rights and obligations have been determined,’ or from which ‘legal consequences will flow.’” *Id.* at 177–78.

The court then examined whether Congress empowered EPA to issue ACOs with the status of law. Underlying this discussion was the court’s view that an interpretation of the CAA that would give ACOs the status of law would render the statute unconstitutional. It also noted that a “status of law” interpretation would render several statutory provisions “useless or absurd.” Slip op. at 25. For instance, section 303 of the CAA, 42 U.S.C. § 7603, gives EPA special emergency powers when there is an “imminent and substantial endangerment to public health or welfare, or the environment.” *Id.* This section allows EPA to issue an order, lasting for up to sixty days, if immediate recourse to a judicial forum is “impracticable.” However, EPA must sue in district court to secure a permanent injunction. In this section, Congress enabled EPA to issue orders with the status of law, but only for a short period of time and only in cases of “imminent and substantial endangerment.” Furthermore, this section authorizes EPA to act only after it consults with state and local authorities “to confirm the accuracy of the information on which the action proposed to be taken is based.” *Id.*

The court posed this question: Why would Congress limit EPA’s authority to issue an order in emergency situations if it intended an ACO to have the full force and effect of law? In contrast to an order issued under section 303, the ACO, authorized by section 113, 42 U.S.C. § 7413, may be issued “on the basis of any information” that a violation has occurred, is of unlimited duration, and may be issued without going to court even if recourse to a judicial forum is not “impracticable.”

Subsection 113(c)(1) states that a person who knowingly violates an ACO may be punished, after conviction, by a fine or imprisonment for up to five years, or both. Under a literal reading of that provision, a court would not inquire whether an SIP had been violated but would, instead, convict on finding that an ACO

had been issued and that a defendant had not complied with its terms. In contrast, section 113(c)(4), (5) requires, for a criminal conviction, that the government prove that a defendant has negligently or knowingly released hazardous pollutants. Why, the court asked, would EPA ever charge a defendant with a negligent or knowing violation when it could, instead, simply issue an ACO, based upon “any information” and then obtain a conviction upon showing that the defendant was not in compliance with the ACO?

Section 113 provides that ACOs do not take effect until the party has had an opportunity to confer with EPA. 42 U.S.C. § 7413(a)(4). To the court, this provision makes sense if ACOs do not have the status of law. What incentive would EPA have to “confer” if noncompliance with an ACO would trigger civil and/or criminal penalties? On the other hand, if ACOs are deemed to be like complaints, issued to avoid recourse to litigation, then they are the beginning of a bargaining process between the agency and a company. EPA’s own litigating position has been that ACOs lack the status of law and are not subject to pre-enforcement review.

Another argument for considering ACOs as lacking the status of law is that Congress did not make them subject to judicial review and made no provision that would require EPA to create a record to facilitate judicial review. Some have argued that a court can remand to the agency to create a record, but then what would the court be reviewing? The only real inquiry is whether the agency possessed “any information” to issue the ACO. That is a standard far less rigorous than the probable cause standard required for a criminal law setting.

The court found support for its reading that ACOs are not final agency action by a review of the legislative history. In the 1990 amendments, Congress concluded that jurisprudence had already established that ACOs were not final agency action and, thus, determined that no clarifying language was necessary to address that issue.

Despite the many reasons for determining that ACOs do not have the status of law, the court noted that the plain language of the CAA does convey that status. The Supreme Court, in *General Motors Corporation v. United States*, 496 U.S. 530, noted section 113's scheme, and treatises have determined that the failure to comply with an ACO is an independent violation of the CAA. See *Law of Environmental Protection* § 9.22 (Sheldon M. Novick *et al.* eds. 2003).

Under the CAA, then, EPA may make a finding, based on "any information available," that the statute has been violated and issue a compliance order, which, if a defendant ignores, will automatically lead to the imposition of civil and/or criminal penalties. No court has addressed the constitutionality of such a scheme. Courts that have addressed whether pre-enforcement review of ACOs is available fall into one of two categories. Some have recognized that ACOs have the status of law but have not grappled with the constitutional issues that arise from that legal status. The court could find only two cases that have held that judicial review of an order under the CAA or CWA is available prior to an enforcement proceeding.

The other category consists of those courts that have "underappreciated the legal significance of ACOs." There are two subgroups in this category. The first has concluded that a regulated party can attack in a subsequent enforcement proceeding the bases for the agency's finding that it has violated the CAA. See, e.g., *Lloyd A. Fry Roofing Company v. EPA*, 554 F.2d 885, 891 (8th Cir. 1977). These courts made the underlying conduct triggering the issuance of the ACO the issue to be determined, not the noncompliance with the ACO. The second subgroup of courts ignores the statute's penalty provisions. For instance, in *Solar Turbines, Inc. v. Seif*, 879 F.2d 1073, 1081 (3d Cir. 1989), the court stated, "the statute does not identify any adverse consequences from violating a section 167 administrative order [relating to modification of a major emitting facility]." Yet, according to the court, the statute clearly makes the violation of an order a crime under 42 U.S.C. § 7413(c)(1). Similarly, the Eleventh Circuit found that the court in *Southern Pines Associates v. United States*, 912 F.2d 713, 716

(4th Cir. 1990), misread a similar provision of the Clean Water Act when it held that "Congress meant to preclude judicial review of compliance orders under the CWA just as it meant to preclude pre-enforcement review under the CAA and CERCLA." It found that the party to whom a compliance order has been issued is under no "greater threat" from EPA than if civil proceedings are immediately initiated.

The court found that the statutory scheme, under which the government can impose severe penalties without a defendant being entitled to a "full and fair hearing before an impartial tribunal" is repugnant to the Due Process clause. EPA cannot "save" the statute by designing an adjudication process (as it attempted to do in this case) prior to the issuance of an ACO because to do so is to amend the statute. The current statutory scheme "unconstitutionally delegates judicial power to a non-Article III tribunal." Slip op. at 48.

The court concluded that the CAA is unconstitutional to the extent that mere noncompliance with the ACO can be the sole basis for the imposition of penalties. Since that portion of the statute is unconstitutional, ACOs lack the status of law and, thus, do not meet the requirement for finality. Therefore, TVA is free to ignore the ACO without risking penalties for noncompliance with the order. EPA must prove the CAA violation in district court.

[Editor's note: In a filing in *Alaska v. EPA*, the U.S. Department of Justice has asked the Supreme Court to consider the "mistaken" holding in this case. According to DOJ's brief, the jurisdictional issues in the two cases are similar and, thus, the case is ripe for consideration because two circuit courts have reached different conclusions.]

## Hazardous Waste

### Passive Migration Not “Disposal” in State Criminal RCRA Provisions: *People [Colorado] v. Thoro Products Company, Inc., and Richard Ernest Newman*, No. 01SC419 (Colo. May 19, 2003)

#### Background

Thoro Products Company, Inc., and its CEO, Richard E. Newman, were indicted on various state charges in connection with the unpermitted storage and disposal of hazardous waste. An investigation in 1995 of high concentrations of chlorinated solvents in a well one mile from the Thoro facility revealed that, during the time that Thoro acted as a bulk distribution facility for Dow Chemical Company, at least three major spills of chlorinated solvents—and numerous minor spills—occurred at the facility during the 1970s. When a search warrant was executed, officials also discovered numerous drums which, when tested, were found to contain various hazardous solvents.

Several years before Newman became CEO of the company, Thoro stopped handling solvents from Dow. In 1997, Thoro was officially dissolved as a Colorado corporation.

After a two-week trial, Thoro was convicted on three charges: unpermitted disposal of hazardous waste; unpermitted storage of hazardous waste; and criminal mischief. Newman was convicted of unpermitted disposal and unpermitted storage of hazardous waste. During sentencing, the trial court found extraordinary aggravating circumstances and sentenced Newman to consecutive terms of eight and six years.

The Colorado Court of Appeals reversed both the company’s and Newman’s convictions for unpermitted disposal, reasoning that they were barred by the statute of limitations. The state argued that the definition of “disposal” in the statute is broad enough to encompass the passive migration of waste in the soil or groundwater.

The Colorado Supreme Court granted certiorari on the question of whether the passive migration of previously leaked or spilled hazardous solvents constitutes “disposal” under the state criminal statute.

#### Holding

In certain circumstances, a crime continues beyond the point when all its substantive elements are satisfied. However, the court could find no relevant case in which the doctrine of “continuing offenses” had been applied in the criminal setting for unpermitted disposal of hazardous waste. In *Toussie v. United States*, 397 U.S. 112, 115 (1970), the U.S. Supreme Court cautioned that, because of the tension between statutes of limitations and the continuing offense doctrine, courts should apply the doctrine only in limited circumstances. The Court went on to state that unless “the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one,” the Court would not find the doctrine applicable.

The Colorado Supreme Court used the *Toussie* decision as a backdrop for its decision and noted, as a preliminary matter, that the state statute contains no explicit language compelling the conclusion that the legislature intended to treat unpermitted disposal of hazardous waste as a continuing offense. Nonetheless, if the “nature of the crime” is such that the legislature “must assuredly have intended” to treat it as such, then the crime may be deemed a continuing offense. Thus, the court stated, the outcome of the case rests on whether the Colorado General Assembly intended the crime of unpermitted disposal of hazardous materials to include the passive migration of materials earlier spilled.

In determining the meaning of “disposal” in the statute, the first step is to examine the language of the statute. Disposal is defined broadly:

“Disposal” means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any hazardous

waste into or on any land or water so that such hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

COLO. REV. STAT. § 25-15-101(3).

The state argued that the word “leaking” is evidence that the legislature “must assuredly have intended” that “disposal” includes passive migration. The court disagreed. The plain meaning of “leak” is “to enter or escape through a hole, crevice, or other opening.” Webster’s Third New International Dictionary 1285 (1986). The definition connotes movement of substances from a closed container. In this case, the waste was not contained. The legislature could easily include the words “percolating,” “migrating,” or “seeping” if they intended to include passive migration in the definition of “disposal.” The other words in the definition involve affirmative acts: “discharge,” “deposit,” “injection,” “dumping,” “spilling,” and “placing.” “Leaking” may also have an active interpretation, such as the release of solvents from defective hoses and pumps.

Examination of the plain language of the statute does not clearly answer the question of whether the legislature intended unpermitted disposal to be a continuing offense. Thus, the court turned to consider legislative purposes and policies underlying the statute.

Traditional sources of legislative history — both state and federal — do not shed light on the issue. Therefore, the parties based their arguments (from their points of view) on the purpose and policy underlying the statute’s provisions.

The state argued that interpreting “disposal” to include passive migration is consistent with the legislature’s intent to ensure protection from illegally-disposed hazardous waste. The respondents argued, however, that interpreting “disposal” to include passive migration thwarts the legislature’s intent to limit criminal pun-

ishment to recent violators of the act. The state argued that eliminating passive migration gives violators an incentive to keep quiet about illegal disposal. The court noted, however, that intentional concealment will still be subject to prosecution, assuming the statute is tolled during the period the violator intentionally concealed his misconduct. Furthermore, even if civil fines or criminal penalties are barred by the statute of limitations, the Department of Public Health and Environment still may require remediation of the site. In addition, the incentive to conceal misdeeds in this case is the same as in any criminal case where a statute of limitations is applicable. According to the court, interpreting “disposal” to include passive migration “eviscerates” the purpose of the five-year statute of limitations that is incorporated in the statute.

The parties urged the court to review federal jurisprudence to determine the meaning of “disposal.” The court noted, however, that none of the cases cited considers the meaning of “disposal” in the context of a criminal statute of limitations. Therefore, the court assigned no significant weight to these decisions.

Under the rule of lenity, ambiguity in the meaning of a criminal statute must be interpreted in favor of the defendant. Although the rule cannot be applied to defeat legislative intent, if the intent — after applying the usual tools for statutory construction — is still obscure, then the rule must be applied to resolve the ambiguity. The court concluded that, since the legislative intent is ambiguous, the respondents did not have notice that failure to remediate contaminated soil and groundwater would constitute a continuing crime. Therefore, using the rule of lenity, the court construed the ambiguity in favor of the respondents.

[Editor’s note: Three judges dissented from the majority opinion. Finding that the Resource Conservation and Recovery Act recognizes disposal as a continuing offense, the dissent concluded that the defendants “initiated a course of conduct that continues to be perpetuated today and may be punished today.”]

**Collateral Source Rule Applicable to Recovery Under State Hazardous Waste Law: *Louisiana Department of Transportation and Development v. Kansas City Southern Railway Co. et al*, No. 02-C-2349 (La. May 20, 2003)**

**Background**

In June 1989, the Louisiana Department of Transportation and Development (DOTD) entered into an agreement with the Federal Highway Administration (FHA) to construct part of I-49 in Shreveport, Louisiana. Under such agreements, the state pays the full cost of construction and then requests reimbursement from FHA for ninety percent of those costs. The state must closely adhere to FHA standards and procedures in the construction project.

During the construction, DOTD discovered environmental contamination; FHA apportioned a share of the highway construction funds to remedy the polluted site. DOTD paid the full cost of the cleanup and was then reimbursed for the ninety percent federal share. DOTD then filed suit against Kansas Southern Railway Company (KCS) to recover the cost of eliminating the pollution, bringing suit under the Louisiana Environmental Quality Act (LEQA). The lawsuit alleged that the railroad was partially responsible for the contamination because of a train derailment that had occurred at or near the site.

DOTD filed a Motion in Limine seeking to withhold from the jury evidence of FHA's participation in the remediation and cited the collateral source rule. It also alleged that its relationship with the FHA was analogous to a partnership and pointed out FHA was paying ninety percent of the attorney's fees to pursue the lawsuit.

The district court granted the defendants' motion for partial summary judgment, finding that DOTD would receive a double recovery if it were allowed to recover the entire clean-up costs. It also held that there was insufficient evidence to indicate a partnership existed. The court also denied DOTD's motion for a

new trial. The intermediate appellate court affirmed the court's grant of partial summary judgment in favor of the defendants.

On appeal, DOTD argued that it is suing the alleged polluter on FHA's behalf and that the collateral source rule prevents KCS from obtaining a reduction of the liability for removal costs.

**Holding**

The court addressed the issue concerning the applicability of the collateral source rule. It noted that the rule is, although of common law origin, a well-established doctrine in Louisiana. Under the rule, an injured plaintiff's tort recovery may not be reduced because of monies received from independent sources. From a public policy standpoint, the reason most often cited for the rule is that a defendant should not gain an advantage from outside benefits provided to the plaintiff. The rule also promotes tort deterrence and accident prevention. Furthermore, without the rule, there would be a disincentive to purchase insurance or for victims to pursue other forms of reimbursement.

DOTD argued that the public policy arguments behind the collateral source rule reinforce the "polluter pays" principle of environmental law. KCS argued, however, that courts have applied the collateral source rule in only limited contexts and further argued that the LEQA is a penal statute to which the collateral source rule should not be applied since penal statutes must be strictly construed.

The court held that the collateral source rule applied in cases arising under the LEQA, at least in those cases where the damaged party is seeking reimbursement only for remediation expenses. It found that the logic supporting application of the collateral source rule is as persuasive when dealing with a defendant polluter under the LEQA as it is to a traditional tortfeasor whose liability arises under other Louisiana statutes.

Since the collateral source rule derives from the common law, the court examined its application and interpretation in other jurisdictions. For instance, in *Town of East Troy v. Soo Line Railroad Company*, 653 F.2d 1123 (7th Cir. 1980), a tank car derailed, spilling 20,000 gallons of phenol into the ground, polluting the town's drinking water supply. The town constructed a centralized deep well public water system, paying for the costs with a \$500,000 Community Development Grant from the U.S. Department of Housing and Urban Development. When the town sued the rail line, the district court awarded damages to the town. On appeal, Soo Line argued that the town had suffered no injury because it had remedied the problem with a federal grant. The U.S. Court of Appeals for the Seventh Circuit held, however, that the collateral source rule applied. It reasoned that double recovery for the plaintiff was preferable to allowing the defendant to escape the consequences of its wrongful act. In *Wheatland Irrigation District v. McGuire*, 562 P.2d 287 (Wyo. 1977), the plaintiff property owners suffered flood damage to their property caused by the rupture of the defendant's irrigation dam. The court held that the collateral source rule should apply to funds the plaintiffs received from the federal government's flood relief program.

The court noted that it seemed that the overwhelming authority supports its holding that the collateral source rule should apply in this case. The focus should not be on whether the plaintiff receives a double recovery. In *Griffin v. The Louisiana Sheriff's Auto Risk Association*, No. 99-2944, 36 (La. App. 1st Cir. June 22, 2001), the court wrote: "[T]he focus of our analysis should be on the nature of the write-offs *vis-à-vis* the tortfeasor, rather than *vis-à-vis* the tort victim . . . . To allow such a reduction in the tortfeasor's liability would indeed be a "windfall"—inuring to the benefit of the tortfeasor! This is precisely what the collateral source rule is designed to prevent."

Finally, the court addressed KCS's argument that the LEQA is penal. It is true that some sections are penal because they provide that polluters are liable for twice their portion of the costs of cleanup. However,

the LEQA section under which DOTD is pursuing this action grants the plaintiff only remediation costs. Therefore, this portion of the statute is not penal.

In conclusion, the court noted that both Louisiana's constitutionally enunciated policy of environmental protection and preservation and the public policy supporting the collateral source rule informed its decision. It emphasized that its holding was narrow, addressing the applicability of the rule to the circumstances of this case.

The court thus reversed and remanded to the district court.

## Water

### **No Appellate Court Jurisdiction in Challenge to TMDLs: *Friends of the Earth v. U.S. EPA et al.*, Nos. 02-1123 & -1124 (D.C. Cir. June 20, 2003)**

## Background

Under the Clean Water Act (CWA), the District of Columbia set a total maximum daily load (TMDL) for dissolved oxygen for the Anacostia River. It was approved by U.S. EPA in December 2001. In March 2002, EPA approved the District's TMDL for turbidity. Friends of the Earth (FOE) petitioned for review of EPA's approval of the two TMDLs. EPA argued that the court lacked original jurisdiction to review its approval of the TMDL limitations.

## Holding

In the Clean Water Act, section 1369(b)(1)(E) outlines specific issues which may be directly reviewed by a circuit court of appeals. FOE argued that review of approval or establishment of TMDLs falls within the scope of section 1369(b)(1)(E): "[A]pproving or promulgating any effluent limitations or other limitation under section 1311, 1312, 1316 or 1345 of this title." FOE further argued that U.S. Supreme Court and D.C. Circuit precedence compel the conclusion that TMDLs are directly reviewable by the circuit court under this section of the CWA.

EPA's authority to approve and establish TMDLs is provided for under section 33 U.S.C. § 1313. This statutory provision is not among those listed in section 1369(b)(1)(E). However, FOE's argument began by citing language from section 1311(b)(1)(C); this subsection requires that there be achieved "not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance . . . required to implement any applicable water quality standard established pursuant to this chapter." FOE asserted that TMDLs are "more stringent limitation[s]" and limitations "necessary to meet water quality standards," and, thus, are limitations under "section 1311" for the purposes of judicial review in the circuit courts. In response, EPA pointed out that all the courts of appeals that have considered this question have held that the listing of specific EPA actions in 33 U.S.C. § 1369(b)(1) precludes direct appellate review of any actions not so listed. For instance, in *Longview Fibre Company v. Rasmussen*, 980 F.2d 1307 (9th Cir. 1992), the court relied on the principle of *expressio unius est exclusio alterius* to conclude that direct appellate review of effluent limitations was unavailable. The court stated that the "specificity and preclusion of section 1369" was indicative of congressional intent "to exclude the unlisted section 1313" from direct appellate review. *Id.* at 1313.

The court noted that some structural aspects of the CWA support the more narrow reading of the statute. First, throughout the statute, there is a clear differentiation between the effluent limitations of section 1311 and the limitations of section 1313. *See, e.g.*, 33 U.S.C. §§ 1341(o)(1), 1326(c). EPA also emphasized that FOE's reading of the statute would yield another anomaly. Under FOE's interpretation, limitations under section 1312 would be considered "effluent limitation[s] or other limitation[s] under section 1311"; yet, Congress expressly provided for original appellate court review of section 1312 actions in subsection 1369(b)(1)(E). FOE's reading would render that reference duplicative. The court concluded that the better reading of the statute would give meaning to the specific reference to section 1312.

FOE contended that the Ninth Circuit's decision in *Longview Fibre* should not be followed because of language in the Supreme Court's decision in *Public Utility District No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994) (*PUD No. 1*). That case dealt with whether a state had the authority to condition a water quality certification on a minimum stream flow requirement. The state imposed the requirement to ensure compliance with water quality standards adopted pursuant to section 1313. The Supreme Court concluded that "ensuring compliance with [section 1313] is a proper function of the [section 1341] certification." *Id.* at 712. The Court based its decision on section 1341(d)'s authorization to states to impose limitations to ensure compliance with section 1311. The Court held that "state water quality standards adopted pursuant to [section 1313] are among the 'other limitations' with which a [s]tate may ensure compliance through the [section 1341] certification process." *Id.* at 712-13. In reaching that holding, the Court noted that section 1311 incorporates section 1313 by reference.

Taking that statement from *PUD No. 1*, FOE argued that section 1369(b)(1)(E) references 1311, which incorporates by reference section 1313. Therefore, according to FOE's view, TMDL limitations are within the grant of direct appellate review.

The court declined to take FOE's view of the issue. It rejected the argument that it should depart from firmly established circuit precedent and the plain language of the CWA on the basis of a single isolated sentence. It noted that the Supreme Court backed up its "incorporated by reference" statement with a citation to the legislative history of the 1977 CWA amendments involving section 1341. That history sheds no light on the scope of section 1369(b)(1), enacted in 1972.

The court thus joined with the other circuits in holding that the courts of appeal have original jurisdiction to review only those actions specifically enumerated in 33 U.S.C. § 1369(b)(1).

## CIVIL/ADMINISTRATIVE PROCEEDINGS

## Settlements

## Air

***United States v. Southern Indiana Gas and Electric Company*, No. IP99-1692 (S.D. Ind. June 6, 2003)**

Southern Indiana Gas and Electric Company (SIGECO) has agreed to settle a lawsuit filed by the federal government alleging violations of the New Source Review requirements of the Clean Air Act at its F.B. Culley Station power plant. Under the agreement, SIGECO will undertake various activities designed to reduce air pollution emitting from three electric generating units at the plant by about 10,500 tons per year. The company also has agreed to pay a civil penalty of \$600,000 and spend an additional \$2.5 million to install and operate technology at the plant to reduce sulfuric acid.

[For further information, contact Steve Ellis, DOJ, at (202) 514-3163.]

## Water

***United States v. Icicle Seafoods, Inc.*, No. A03-0142-CV (D. Alaska June 27, 2003)**

A seafood company based in Seattle, Washington, has agreed to settle a Clean Water Act complaint brought against it by the federal government concerning its processing plant in Seward, Alaska. Under the agreement, the company will pay an \$85,000 civil fine and improve its waste handling practices.

In the agreement, Icicle has committed to measures that will prevent the buildup of wastes in Resurrection Bay. It will also render waste parts into fish meal, substantially reducing the amount of waste discharged.

[For further information, contact Regina Belt, DOJ, at (907) 271-3456.]

***United States v. Billabong II Ans*, No. 2:02-771 (D.S.C. July 1, 2003)**

A Norwegian shipping line has agreed to pay more than \$2 million in civil fines in connection with a fuel oil spill off the coast of the South Carolina in January 1999. The spill occurred on the *Star Evivva*, a cargo ship, when a pump system in the engine room malfunctioned, causing 23,096 gallons of heavy fuel oil to be pumped onto the deck and then overboard. The alarm system was malfunctioning at the time of the spill; Billabong knew of the malfunction but did not repair it.

Under terms of the settlement, Billabong will pay \$1.9 million to a wildlife restoration fund, \$95,207 to the Department of the Interior, and \$28,847 to the South Carolina Department of Natural Resources. In addition, in a related criminal sentencing procedure, Billabong will pay \$200,000 to the Oil Spill Liability Trust and \$300,000 to the National Fish and Wildlife Foundation/Savannah-Santee-Pee Conservation Fund.

The captain and chief engineer are under indictment for conspiracy to obstruct justice and making a material false statement to the U.S. government, but they are currently fugitives.

[For further information, contact AUSA Mary Gordon Baker at 843-266-1671.]

## CRIMINAL PROSECUTIONS

## Indictments

## RCRA

***United States v. George C. Singleton*, No. 03-80658 (E.D. Mich. July 9, 2003)**

George C. Singleton of Clinton, Michigan, has been indicted on four counts of violating the Resource Conservation and Recovery Act. According to the indictment, Singleton is the owner of RT Automotive in Ypsilanti, Michigan. In 1998, the indictment alleges, he abandoned a trailer containing seventy drums of

paint wastes containing ignitable materials in an open field in Van Buren Township, Michigan. Two police officers required medical care from exposure to fumes when they approached the trailer.

[For further information, contact AUSA Krishna Dighe at (313) 226-9100.]

### Pleas/Convictions

#### CERCLA

##### ***United States v. Murray C. Verret*, No. 02-219AM3 (M.D. La. June 13, 2003)**

Murray C. Verret of Plaquemine, Louisiana, has been convicted by a federal jury for violating the Comprehensive Environmental Response, Compensation, and Liability Act by failing to immediately report a spill of oil into Bayou Sorrel. He was also convicted on two counts of giving false statements to the U.S. Coast Guard. Verret told the Coast Guard that the oil had leaked from an unknown tank truck loading oil into an unknown vessel that had used his dock. He also denied that he had removed a diesel oil tank from his dock. In reality, oil had leaked from the removed diesel tank into the bayou.

[For further information, contact AUSA Patricia Jones at (225) 389-0443.]

#### FIFRA

##### ***United States v. John T. Frederick*, No. 03-80523 (D. Mich. July 7, 2003)**

John T. Frederick of Warren, Michigan, recently pled guilty to violating the Federal Insecticide, Fungicide, and Rodenticide Act by knowingly violating a Stop Sale and Use Order (SSUO) issued by U.S. EPA.

Frederick does business as New Tech and HAPCO Products, Inc., in Fraser, Michigan. The defendant sold a perchloroethylene-containing product, "Kritter Killer," that the defendant advertised as a rodenticide for killing prairie dogs. EPA issued an SSUO; however, after the issuance of the order, Frederick sold five gallons of Kritter Killer to a man in Wolf Point, Montana.

Under the plea agreement, the defendant will spend nine months in jail. He is also required to place advertisements in trade journals and notify customers that he violated the SSUO and that he will no longer sell perchloroethylene.

[For further information, contact AUSA Krishna Dighe at (313) 226-9100.]

#### Water

##### ***United States v. Sabine Transportation*, No. 0363 (N.D. Iowa July 21, 2003)**

Sabine Transportation of Cedar Rapids, Iowa, has pled guilty to violating the Act to Prevent Pollution from Ships. Sabine operates a fleet of U.S.-flagged ships that carry cargo from the United States to foreign countries. In its plea, Sabine admitted to several violations: discharging diesel fuel-contaminated wheat into the Pacific Ocean from the *S.S. Juneau*; discharging plastic wastes and oily diesel fuel cargo from the *S.S. Trinity* into the Atlantic Ocean and the Gulf of Mexico; and failing to maintain required records and discharging oily waste from the *S.S. Colorado*, *S.S. Guadalupe*, and *S.S. Sea Princess*. Under the plea agreement, Sabine agreed to pay a \$2 million criminal fine and implement an environmental compliance plan. Final disposition awaits sentencing.

[For further information, contact AUSA C.J. Williams at (319) 363-6333.]

***United States v. Tyson Foods, Inc., No. 4:03-CR-00203 (E.D. Mo. June 25, 2003)***

On June 25, Tyson Foods, Inc., pled guilty to twenty felony violations of the Clean Water Act and entered into a plea agreement whereby it will pay \$7.5 million to the federal government and the State of Missouri to settle federal charges against it for illegal discharges at its Sedalia, Missouri, processing plant. Tyson Foods will hire an outside environmental consultant to audit the plant and will implement an improved environmental program based on the audit's findings.

In a separate civil consent judgment, Tyson settled state environmental violations relating to the same discharges.

Every day, the Sedalia plant processes approximately one million pounds of chicken. Between 1996 and 2001, the plant repeatedly discharged untreated or inadequately treated wastewater from the Sedalia plant in violation of its discharge permit.

[For further information on the state suit, contact Missouri AAG William Bryan at (573) 751-8815 or Joe Bindbeutel at (573) 751-8805. For further information on the criminal prosecution, contact AUSA Dan Stewart at (314) 539-2200 or Jeremy Korzenik, DOJ, at (202) 305-0325. ]

**Sentences****Oil Pollution*****Alaska v. Daniel Lewis, No. 4FA-SO1-3111-CR (Super. Ct. June 6, 2003)***

Daniel Lewis was recently sentenced on his conviction involving shooting a hole in the trans-Alaska pipeline, thereby causing a \$285,000 gallon spill. He was sentenced to serve sixteen years' imprisonment and five more years' probation. He was convicted of criminal mischief, assault, oil pollution, misconduct involving a weapon, and drunk driving.

His sentence was enhanced because of his long criminal history and his knowledge that his crimes would harm more than one person.

[For further information, contact Alaska AAG Kevin Burke at (907) 269-6250.]

**UPDATES**

***South Florida Water Management District v. Miccosukee Tribe of Indians, No. 02-626 (U.S. June 27, 2003):*** The U.S. Supreme Court has granted review of the decision of the U.S. Court of Appeals for the Eleventh Circuit that held that the pumping of water by a state water management agency from one water body to another constitutes an addition of a pollutant from a point source. (See the April 2002 issue of the *Journal*.)

***Tennessee et al. v. U.S. Department of Transportation:*** Tennessee has filed a petition for a writ of certiorari, asking that the U.S. Supreme Court review a decision from the U.S. Court of Appeals for the Sixth Circuit which held that a U.S. Department of Transportation decision holding that a state law is preempted is not barred by state sovereign immunity. (See the July 2003 issue of the *Journal*.)