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

By

**Eddie Ringel\***

*[Editor's note: Due to its length, this article will be presented in two parts. This part will provide an introduction to the North American Free Trade Agreement in the context of international trade and the environment and explore the structure of NAFTA. It contains a general discussion of state sovereign immunity in connection with the federal Treaty Power, and an introduction to NAFTA's Chapter 11, including the provisions that set up the substantive bases of disputes under that chapter. Next month's issue will continue the discussion on Chapter 11, including a description of several recent arbitrations, and will then turn to a discussion on the trade-in-goods provisions and the environmental side agreement to NAFTA.]*

**I. Introduction**

The North American Free Trade Agreement (NAFTA) entered into force on January 1, 1994. At its enactment, supporters hailed the agreement as a step toward prosperity and equality among the countries of North America, while opponents warned it would result in a loss of jobs in the United States and the degradation of labor and environmental standards. As NAFTA approaches its tenth anniversary, the debate over its merits and deficiencies continues. One of the factors in that debate is whether the international agreement has abrogated the powers of local government. Of particular concern are the effects the provisions of NAFTA have or may have on the implementation of local environmental legislation.

The Preamble to NAFTA states:

The Government of Canada, the  
Government of the United Mexi-

can States and the Government of the United States of America, resolved to:

STRENGTHEN the special bonds of friendship and cooperation among their nations; CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation; CREATE an expanded and secure market for the goods and services produced in their territories; REDUCE distortions to trade; ESTABLISH clear and mutually advantageous rules governing their trade; ENSURE a predictable commercial framework for business planning and investment; BUILD on their respective rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation; ENHANCE the competitiveness of their firms in global markets; FOSTER creativity and innovation, and promote trade in goods and services that are the subject of intellectual property rights; CREATE new employment opportunities and improve working conditions and living standards in their respective territories;<sup>1</sup>

These provisions set forth the goals of the agreement, however, the preamble goes on to state that each country, in order to:

UNDERTAKE each of the preceding [goals] in a manner consistent with environmental protection and conservation; PRE-

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SERVE their flexibility to safeguard the public welfare; PROMOTE sustainable development; STRENGTHEN the development and enforcement of environmental laws and regulations; and PROTECT, enhance and enforce basic workers' rights; HAVE AGREED as follows:<sup>2</sup>

Thus, NAFTA places limits on how its goals should be achieved. Specifically, the agreement makes clear the proposition that environmental protection and conservation as well as the protection of the public welfare should not to be compromised by the agreement. Such statements suggest local environmental legislation would not conflict with NAFTA as a theoretical matter. In practice, however, the limits expressed in the preamble and similar limits throughout the body of NAFTA may not achieve their theoretical purpose. NAFTA tribunals, through which the treaty is implemented, often do not factor in these limiting provisions during the arbitration process under Chapters 11 and 20. The choice by tribunals to restrict the effect of limiting provisions, combined with the fact that localities are not parties to NAFTA and cannot participate in NAFTA processes, makes it difficult to ensure local concerns regarding NAFTA will be adequately addressed.

## II. The Environment and International Trade Law in General

Many international agreements make reference to environmental issues in the context of trade. The prominence of environmental protections in this arena is a relatively recent development.<sup>3</sup> As a result, a commitment to environmental issues is often made at the surface level of many agreements; however, protecting environmental interests during the actual implementation of those agreements has proven difficult because of the tensions between free trade and environmental protections and the conflicts between their supporters.

In the debate over whether environmental concerns should prevail over free trade provisions, the two sides have become polarized.<sup>4</sup> Those who support free trade dismiss environmental concerns as disguised protectionism,<sup>5</sup> while environmentalists feel free trade will lead to environmental degradation. In reality, the two are not always mutually exclusive. Environmental provisions can help promote trade and trade can be a means of helping the environment.<sup>6</sup> Nonetheless, free traders argue that, without a defensible international norm or benchmark for environmental standards, requiring one certain standard to be followed just reflects a bias toward one's own approach.<sup>7</sup> Free traders also argue that less developed countries will bear a particular burden as compliance will be more costly for them.<sup>8</sup>

Those who support environmental protections fear an international race to the bottom in pursuit of economic gain and point out that such protections are not always costly and inefficient.<sup>9</sup> In fact, they argue that adhering to higher environmental standards may lead to economic gain, such as the creation of better technology that can be exported.<sup>10</sup> Also, concerns about the ability to meet harmonized international standards and unfairness to developing countries can be addressed through providing different stages of compliance.<sup>11</sup> Finally, there may be non-monetary benefits to creating environmental protections.

## III. The Structure of NAFTA

NAFTA's stated objective is to:

- a) [E]liminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
- b) promote conditions of fair competition in the free trade area;
- c) increase substantially investment opportunities in the territories of the Parties;
- d) provide adequate and effective protection and en-

forcement of intellectual property rights in each Party's territory; e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.<sup>12</sup>

The body of NAFTA is divided into eight parts that cover the following areas: 1) Trade in Goods, 2) Technical Barriers to Trade, 3) Government Procurement, 4) Trade in Services, 5) Investment, 6) Intellectual Property, 7) Administrative and Institutional Arrangements, and 8) Exceptions.<sup>13</sup>

There are also two side agreements to NAFTA that address environmental and labor standards. The environmental side agreement, the North American Agreement on Environmental Cooperation (NAAEC), was signed at the same time as NAFTA and seeks to:

[F]oster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations; promote sustainable development based on cooperation and mutually supportive environmental and economic policies; increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna; support the environmental goals and objectives of NAFTA; avoid creating trade distortions

or new trade barriers; strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices; enhance compliance with, and enforcement of, environmental laws and regulations; promote transparency and public participation in the development of environmental laws, regulations and policies; promote economically efficient and effective environmental measures; and promote pollution prevention policies and practices.<sup>14</sup>

#### A. The Environment and NAFTA

A commitment to environmental protection is evident throughout NAFTA. In addition to the side agreement and the preamble excerpted above, the body of NAFTA makes repeated references to the environment.

Article 104, Relation to Environmental and Conservation Agreements, ensures that certain environmental agreements will prevail over NAFTA in the event of a conflict. It states:

1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:
  - a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, . . .
  - b) the Montreal Protocol on Substances that Deplete the Ozone Layer . . .
  - c) the Basel Convention on the Control of Transboundary Movements of

Hazardous Wastes and Their Disposal . . . , or

d) the agreements set out in Annex 104.1, such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

2. The Parties may agree in writing to modify Annex 104.1 to include any amendment to an agreement referred to in paragraph 1, and any other environmental or conservation agreement.<sup>15</sup>

Annex 104.1 adds The Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste and The Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area, to the list of environmental agreements that prevail over NAFTA.<sup>16</sup>

Article 712 ensures that sanitary and phytosanitary measures will not be compromised by the requirements of NAFTA Trade in Goods provisions. It states:

1. Each Party may, in accordance with this Section, adopt, maintain or apply any sanitary or phytosanitary measure necessary for the protection of human, animal or plant life or health in its territory, including

a measure more stringent than an international standard, guideline or recommendation.

2. Notwithstanding any other provision of this Section, each Party may, in protecting human, animal or plant life or health, establish its appropriate levels of protection in accordance with Article 715.

3. Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is:

a) based on scientific principles, taking into account relevant factors including, where appropriate, different geographic conditions;

b) not maintained where there is no longer a scientific basis for it; and

c) based on a risk assessment, as appropriate to the circumstances.

4. Each Party shall ensure that a sanitary or phytosanitary measure that it adopts, maintains or applies does not arbitrarily or unjustifiably discriminate between its goods and like goods of another Party, or between goods of another Party and like goods of any other country, where identical or similar conditions prevail.

5. Each Party shall ensure that any sanitary or phytosanitary measure that it adopts, maintains or applies is applied only to the extent necessary to achieve its appropriate level of protection, taking into account technical and economic feasibility.

6. No Party may adopt, maintain or apply any sanitary or phytosanitary measure with a view to, or with the effect of, creating a disguised restriction on trade between the Parties.<sup>17</sup>

Chapter 11, which applies to investment, includes its own environmental safeguards as well. It states:

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 encouragement 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 to avoiding any such encouragement.<sup>18</sup>

These three articles serve as a backdrop, revealing the intent of the agreement to ensure environmental protection will not be compromised by its terms. Although it is clear that the agreement intends to preserve environmental integrity, it remains unclear how such integrity can be maintained in a manner that complies with other requirements of NAFTA and, more specifically, whether it can be maintained through legislation and regulation at the local level. This will be discussed in the examination of NAFTA's Investment and Trade in Goods provisions in next month's *Journal*.

#### **IV. Chapter 11 Investment Provisions**

##### **A. Introduction to Chapter 11**

NAFTA considers open investment an essential part of developing free trade. As a result, it creates protections for investors of one party (hereinafter foreign investors) when operating within the borders of another party. These protections, which are outlined in Chapter 11 of NAFTA, go well beyond the protections given by earlier international trade agreements by providing private foreign investors a claim of action against a host party. This provision permits a private company to sue the host government — be it Canada, Mexico, or the United States — if they perceive that the host nation has treated their investment in a manner that is allegedly inconsistent with NAFTA's provisions. The full effects of this provision have yet to be seen as there have been few disputes brought under Chapter 11. Of those that have been brought, many have yet to be decided.<sup>19</sup> The number of Chapter 11 disputes each year, however, has been increasing<sup>20</sup> and the provision has the potential to have major impacts.

##### **B. Sovereign Immunity**

To understand the implications of Chapter 11's provisions allowing private parties to bring claims against sovereign governments, it is useful to explore the doctrine of sovereign immunity. As a preliminary matter, by signing the agreement, the parties have agreed to avail themselves to Chapter 11 claims that may

progress to arbitration and appeal in national courts, so sovereign immunity on the national level is not an issue. However, states and localities are not parties to NAFTA and therefore have not consented to such claims. Although states cannot be directly named in Chapter 11 claims, their sovereign decisions can be challenged through a claim against the federal government. Certainly, this scheme does not directly conflict with the doctrine of sovereign immunity because the process utilizes a NAFTA tribunal rather than a U.S. court. Nevertheless, the outcomes of arbitrations involving state decisions have the potential to conflict with the doctrine's substance and underlying principles. This is even more evident given the possibility that the federal government could bring follow-up claims against states in federal courts for restitution of damages paid as a result of arbitration.

This section begins by exploring state sovereign immunity from suit in U.S. courts in the context of international treaties. Second, it explores whether such sovereign immunity is, or should be, available in the context of international agreements such as NAFTA, where, unlike in the context of treaties, the Treaty Power of the Constitution<sup>21</sup> does not apply. Third, this section addresses the types of state (and local) decisions that may be at issue in NAFTA arbitrations and attempts to distinguish these from true foreign relations decisions. Finally, it posits that allowing follow-up suits could be considered analogous in substance to suits that are forbidden under the Eleventh Amendment.

The Eleventh Amendment, which applies exclusively to judicial power and not international arbitrations, states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."<sup>22</sup> Although the text confines sovereign immunity to diversity actions brought by individuals, the court has expanded the doctrine to include suits brought by a state's own citizens, federal question cases,<sup>23</sup> and suits brought by foreign governments.<sup>24</sup> Despite these expansions, in the context of international treaties and foreign rela-

tions, the notion of state sovereignty has been interpreted narrowly in light of the Treaty Power vested in the federal government.<sup>25</sup>

The Supreme Court has dealt directly with state sovereignty in the context of international treaties on several occasions. In *Ware v. Hylton*, the Supreme Court struck down a Virginia statute that conflicted with the 1783 Treaty of Paris with Great Britain.<sup>26</sup> In *Hauenstein v. Lynham* the Supreme Court once again established the supremacy of treaties over state law.<sup>27</sup> In *Missouri v. Holland*, Justice Holmes established the extent of the federal power by holding that federalism-based constitutional arguments do not apply to the Treaty Power.<sup>28</sup> There are, however, limits to the reaches of the Treaty Power. The Supreme Court has held that the power cannot be used to cede territory<sup>29</sup> or to deprive citizens of the Sixth Amendment right to a jury trial.<sup>30</sup> It has also been posited that the Treaty Power, like all federal powers, is limited by the Bill of Rights.<sup>31</sup> These limitations on the federal government's Treaty Power reflected a fear that the government would create foreign treaties to enact law in areas that would otherwise be outside of its reach. The fear that the Treaty Power would be abused diminished as the Supreme Court increased the reach of federal power through a more expansive interpretation of the power granted by the Commerce Clause.

The current Court has not addressed the issue of state sovereign immunity with respect to treaties. It is unclear whether, under this Court's federalism jurisprudence, state sovereign immunity might not be granted even in the treaty context.<sup>32</sup> The issue was recently addressed by the District Court of Puerto Rico, which upheld sovereign immunity in the context of treaties by holding that the Eleventh Amendment barred a claim for monetary reimbursement against the Commonwealth.<sup>33</sup>

There are strong arguments in favor of the application of state sovereign immunity in the context of NAFTA, even if it is not available in a treaty situation. NAFTA is a congressional-executive agreement, not a treaty; therefore, the Treaty Power, which is one basis for withholding state sovereign immunity,

does not apply. Since NAFTA is not covered by the mandate of the Treaty Power, it can be argued that state sovereign immunity should be available. Furthermore, because passage of NAFTA bypassed Article 2, section 2 of the Constitution, which requires treaties to be approved by two thirds of the Senate, there is an argument that full approval of the states was never obtained. Instead, NAFTA was passed with only a simple majority in both the House of Representatives and the Senate, a much lower hurdle. As a result, it is unclear that the states have consented to the agreement.

The argument for the applicability of state sovereign immunity is particularly persuasive in those circumstances where a state decision covers a matter of predominantly state concern and where the state is acting as a state rather than as a market participant. These distinctions can also be applied to local governments to the extent localities are granted powers by the state. Thus, it matters whether the state or local government is acting on an issue that is traditionally a matter of state or local concern that happens to affect foreign parties versus those aimed directly at foreign parties. Also, where a state is acting as a state rather than as a market participant there is more support for providing sovereign immunity.<sup>34</sup> To allow states acting in the former capacity to get sovereign immunity protection from the Eleventh Amendment while disallowing such protection for the latter role would be consistent with the goal in international trade of preventing protectionism. For example, a primary reason the investment provisions of Chapter 11 were enacted was due to fears that a situation similar to Mexico's nationalization of the oil industry in the 1930s would arise again.<sup>35</sup> Withholding state sovereign immunity with respect to market participation would allay such fears.

Although claims cannot be brought directly against the state under Chapter 11, there seems to be no legal barrier to the federal government's bringing a follow-up suit against the state in federal courts for reimbursement of damages. Such follow-up suits would be the substantive equivalent of allowing the suit to be brought by the foreign private investor in federal

courts in the first place. If one accepts the argument set forth above that the states did not consent to NAFTA, allowing follow-up suits to be brought against the states conflicts with state sovereign immunity granted under the Eleventh Amendment.

### C. Substantive Bases for Disputes

Section A of Chapter 11 (Articles 1101–1114) contains the substantive provisions under which claims may be brought by private investors. These include such claims as failure to provide equal treatment, failure to provide most favored nation status, failure to meet minimum standards for treatment, and expropriation.

#### Article 1139: Definitions

NAFTA's Chapter 11 contains unusually broad definitions.<sup>36</sup> The "measures" prohibited by Chapter 11 can include "any law, regulation, procedure, requirement, or practice."<sup>37</sup> Thus, the provision covers practically all acts of government, ranging from lawmaking to zoning and perhaps even extending to court decisions.<sup>38</sup> The meaning of "investment" is also given a broad definition that includes "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes, . . . interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory."<sup>39</sup> The term "investment" has also been interpreted to include actions as minimal as holding a bond or simply having a market share.<sup>40</sup> As a result of these broad definitions, investors need only meet a very low threshold to be able to invoke the protections of Chapter 11.<sup>41</sup>

### Article 1101: Scope and Coverage

Article 1101 states that the provisions in NAFTA's investment chapter apply to foreign investors and their investments. This section, however, makes it clear that:

Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this chapter.<sup>42</sup>

Many of the services listed in this section are carried out by subunits of the parties. Some are primarily undertaken by the states and some by local governments. Taking this into consideration it would seem that this section in effect provides some protection for subunits of parties, whether they are state or local, as long as they carry out these services and functions in a manner not inconsistent with this Chapter. This last phrase, "not inconsistent with this chapter," however, leaves open the door for arbitration panels to override the decisions made in areas otherwise exempted from Chapter 11.

### Article 1102: Equal Treatment

Articles 1102(1) and 1102(2) ensure that foreign investors and their investments will be given "no less favorable treatment" than is given to the domestic investors of the Party in which they operate. It states:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the estab-

lishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.<sup>43</sup>

Article 1102(3) specifically extends the requirements to states and provinces by stating:

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.<sup>44</sup>

The inclusion of a provision specifically targeting states is significant in that it imposes requirements on governments that are not parties to the agreement and recognizes that subunits are responsible for creating many of the legal regimes that affect investors of NAFTA parties.

**Article 1103: Most Favored Nation Status**

Article 1103 requires that parties give foreign investors of parties no less favorable treatment than is given to foreign investors from other party or non-party nations. It states:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.<sup>45</sup>

Article 1104 requires that “Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.”<sup>46</sup>

**Article 1105: Minimum Standards**

Article 1105 sets forth a minimum standard of treatment to ensure that a Party cannot justify treating foreign investors poorly just because it treats all investors poorly. It provides that:

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.<sup>47</sup>

This Article has been used as a basis for Chapter 11 claims in many of the arbitrations, which will be discussed in next month’s article.

**Article 1106: Performance Requirements**

Article 1106(2) states that a measure by a party that requires an investor to use a technology to meet generally applicable health, safety, or environmental requirements shall not be construed to be inconsistent with provisions in NAFTA that prohibit requiring the transfer of technology, a production process, or other proprietary knowledge to a person in its territory. Article 1106(2) also states that Articles 1102 and 1103 apply to such measures, which reflects an effort to ensure that any measures set forth by host parties requiring the use of certain technology will be administered fairly and will be “generally applicable” to all investors.

Perhaps even more protective of environmental measures is Art. 1106(6), which states:

Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3(a) or (b)<sup>48</sup> shall be construed to prevent any party from adopting or maintaining measures, including environmental measures:

- (a) necessary to secure compliance with laws and regulations that are not inconsistent with the provision of this Agreement;
- (b) necessary to protect human, animal, or plant life or health; or
- (c) necessary for the conservation of living or non-living exhaustible natural resources.<sup>49</sup>

#### **Article 1108: Exceptions**

Article 1108 provides for a number of exceptions to the requirements of Chapter 11. It exempts:

- (a) [A]ny existing non-conforming measure that is maintained by
  - (i) a Party at the federal level. . .
  - (ii) a state or province, for two years after the date of entry into force of this Agreement . . .
  - (iii) a local government;
- (b) the continuation or prompt renewal of any non-conforming measure referred to in sub-

paragraph (a); or  
 (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 1102, 1103, 1106 and 1107.<sup>50</sup>

Thus, this section ensures that local laws that existed prior to the enactment of NAFTA that conflict with Chapter 11, as well as any amendments to these measures that do not decrease compliance, will be able to remain in effect.

#### **Article 1110: Expropriation**

Article 1110 addresses expropriation and compensation by the Parties. Article 1110(1) states that:

No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”), except:

- (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>51</sup>

This provision will be discussed in more detail next month in the section which will discuss Chapter 11 arbitrations.

**Article 1114: Environmental Measures**

Article 1114, excerpted above, 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>52</sup> At least one panel, however, refused to apply this section, preventing it from having any effect.<sup>53</sup>

**ENDNOTES**

1. North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289, 297 (1993) [hereinafter NAFTA].
2. *Id.*
3. See MICHAEL TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 395 (2d ed. 1999) [hereinafter TREBILCOCK].
4. See DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 1139 (2d ed. 2002). [hereinafter HUNTER].
5. See TREBILCOCK, *supra* note 3, at 395.
6. See ALAN RUGMAN ET AL., *ENVIRONMENTAL REGULATIONS AND CORPORATE STRATEGY: A NAFTA PERSPECTIVE* (1999) [hereinafter RUGMAN].
7. TREBILCOCK, *supra* note 3, at 396.
8. *Id.*
9. See HUNTER, *supra* note 4, at 1140.
10. See RUGMAN, *supra* note 6.
11. TREBILCOCK, *supra* note 3, at 396.
12. NAFTA Art. 102(1), 32 I.L.M. at 297.
13. NAFTA Table of Contents 32 I.L.M. at 296, 605.
14. NAAEC Art. 1 (a) – (j), 32 I.L.M. at 1483.
15. NAFTA, Art. 104, 32 I.L.M. at 297.
16. NAFTA, Annex 104.1, 32 I.L.M. at 298.
17. NAFTA, Art. 712, 32 I.L.M. at 377.
18. NAFTA, Art. 1114, 32 I.L.M. at 639.
19. See generally <<http://www.naftaclaims.com>> (providing documents from decided and ongoing Chapter 11 disputes).
20. *Id.*
21. “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.” U.S. CONST. art. VI § 2.
22. U.S. CONST. amend. XI.
23. Cory Eichorn, *Eleventh Amendment Immunity Jurisprudence in an Era of Globalization: The Tension Between State Sovereign Rights and Federal Treaty Obligations*, 32 U. MIAMI INTER-AM. L. REV. 523, 526 (2001) citing *Hans v. Louisiana*, 134 U.S. 1 (1890).
24. Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 433 (Apr. 2003) citing *Principality of Monaco v. Mississippi*, 292 U.S. 313, 330 (1934).
25. See *infra* notes 27–29.
26. Thomas Healy, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1729 (Nov. 1998), citing 3 Dall. 199 (1796).
27. *Id.* at 1729 citing *Hauenstein v. Lynham*, 100 U.S. 483 (1879) (holding that treaty provision concerning aliens’ inheritance rights prevails over inconsistent state law setting a limitation period for inheritance by aliens).
28. Carlos Manuel Vazquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT’L L. 713, 719 (2002) citing *Missouri v. Holland*, 252 U.S. 416, 432 (1920).
29. Healy, *supra* note 26, at 731.
30. *Id.*
31. *Id.* at 732.
32. See, e.g., *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) (per curiam), where the court stated that a suit against a state by a foreign government is probably in contravention of Eleventh Amendment principles. See also Swaine, *supra* note 24, at 437.
33. *Ibera Lineas Areas De Espana v. Velez-Silvia*, 59 F. Supp.2d 266 (D.P.R. 1999). See Eichhorn, *supra* note 23, at 537.
34. See *id.* at 538.
35. Steve Louthan, *A Brave New Lochner Era? The Constitutionality of NAFTA Chapter 11*, 34 VAND. J. TRANSNAT’L L. 1443, 1449 (2001).

36. AARON COSBEY, NAFTA'S CHAPTER 11 AND THE ENVIRONMENT: DISCUSSION PAPER FOR A PUBLIC WORKSHOP OF THE JOINT PUBLIC ADVISORY COMMITTEE OF THE COMMISSION FOR ENVIRONMENTAL CO-OPERATION OF NORTH AMERICA 1 (Mar. 3, 2003).

37. *Id.*

38. *Id.*

39. NAFTA, Art. 1139, 32 I.L.M. at 647.

40. COSBEY, *supra* note 36, at 2.

41. 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).

42. NAFTA, Art. 1101(c)(4), 32 I.L.M. at 639.

43. NAFTA, Art. 1102(1) and 1102(2), 32 I.L.M. at 639.

44. NAFTA, Art. 1102(3), 32 I.L.M. at 639.

45. NAFTA, Art. 1103, 32 I.L.M. at 639.

46. NAFTA, Art. 1104, 32 I.L.M. at 639.

47. NAFTA, Art. 1105, 32 I.L.M. at 639.

48. Provisions 1(b)–(c), and 3(a)–(b), relate to requiring a level or percentage of domestic content, or requiring that investors give preference to domestic goods, services, or providers.

49. NAFTA, Art. 1106, 32 I.L.M. at 640.

50. NAFTA Art. 1108, 32 I.L.M. at 640.

51. NAFTA, Art. 1110(1), 32 I.L.M. at 641.

52. David Gantz, *Global Trade Issues in the New Millennium*, 33 GEO. WASH. INT'L L. REV. 651, 691 (2001).

53. *See* United Mexican States v. Metalclad, 89 B.C.L.R. 3d 359 (2001), available at <<http://www.naftaclaims.com>>

## DECISIONS

### Attorney's Fees

**Court Upholds Denial of Attorney's Fees Under EAJA: *Piedmont Environmental Council v. U.S. Department of Transportation et al.*, No 02-2362 (4th Cir. June 2, 2003)**

### Background

The U.S. Department of Transportation (USDOT) and the Virginia Department of Transportation (VDOT) obtained approval from the Federal Highway Administration to widen Route 29 in Virginia from four to six lanes and to make other improvements to ease congestion on that road. The Piedmont Environmental council filed a nine-count complaint against the agencies and several others, alleging that, in planning the project, the agencies violated the National Environmental Policy Act of 1969 (NEPA). The agencies then engaged in a reevaluation of their environmental impact statements. They concluded that no new significant environmental impacts would result.

The district court held that the agencies had complied with NEPA with respect to eight of the nine counts. With respect to a planned new bypass, however, the court found that the agencies' review of the impacts on surrounding cultural and archaeological resources and a nearby reservoir was inadequate. Piedmont appealed the eight counts on which it lost. In an unpublished decision, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court's decision.

While the case was on appeal, Piedmont filed a petition for attorney's fees under the Equal Access to Justice Act (EAJA), requesting \$493,404.75 in fees. That amount represented the total costs of the litigation minus 10%. The district court held that Piedmont was a "prevailing party," but denied the requested fee. It determined that the issue on which it prevailed was "one small portion" of the overall project, that the court had "erred on the side of caution" in enjoining the bypass project, and that the agencies were substan-

tially justified in the overall position they took in litigation. *Piedmont Environment Council v. U.S. Department of Transportation*, No. Civ.A 3:98CV0004 (W.D. Va. Sep. 30, 2002). Piedmont appealed.

### Holding

In its unpublished opinion, the court noted that it must examine the totality of the circumstances in determining whether attorney's fees should be awarded under the EAJA. That statute states, in part:

[A] court shall award to a prevailing party other than the United States fees and other expenses . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

The Supreme Court has noted that the government's position is "substantially justified" if there is a "genuine dispute . . . or if reasonable people could differ as to the appropriateness of the contested action." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (internal quotation marks, alterations, and citations omitted). Thus, the government may be "substantially justified" even if it loses.

The appellate court's review is based on an "abuse of discretion" standard. In this case, the court reviewed the record and held that the district court had properly identified the governing legal standard and did not abuse its discretion in determining that fees were not available under the EAJA because the government was "substantially justified" in its overall litigation position.

## CERCLA

### State Barred From Recovering Natural Resource Damages: *Montana v. Atlantic Richfield Company*, No. CV-83-317-H-SEH (D. Mont. May 3, 2003)

#### Background

This lawsuit was begun in 1983, stayed for five years while Montana finished its Remedial Investigation and Feasibility Study, and resumed in 1989. The lawsuit was initiated to recover damages for injuries to natural resources in the Clark Fork River Basin, Montana, from mining and mineral processing by ARCO and its predecessors. Some of the state's claims and the defendant's counterclaims were tried and settled through negotiations. However, there remain unresolved claims for injuries to terrestrial resources on about 17.8 square miles of land near Anaconda, Montana, known as Mt. Haggin, Smelter Hill, and Stucky Ridge. These are called the Upland Areas.

The damage to the environment was caused by smelting operations that occurred between 1895 and July 1, 1980. The court found that "[s]ome re-releases of hazardous substances occurred in the Upland Areas both before and after December 11, 1980, as winds redeposited hazardous substances originally deposited on the soil. . . ." and "Montana produced no evidence that natural resources in the Upland Areas suffered new or additional injuries, destruction, or loss as a result of smelter emissions or re-releases of hazardous substances after December 11, 1980." Slip op. at 5. It also found that ARCO had presented evidence that the condition of the natural resources in the Upland Areas had stabilized and improved since July 1980.

#### Holding

The last sentence of subsection (f)(1) of section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) states: "There shall be no recovery under the authority of subparagraph (C) of subsection (a) of this section where such damages and the release of a hazardous substance

from which such damages resulted have occurred wholly before December 11, 1980.” 42 U.S.C. § 9607(f)(1). The court determined that damages accrue or occur when the underlying injury occurs and that there is no evidence of injuries, destruction, or loss occurring after December 11, 1980.

Montana argued that restoration cost damages do not “occur” until either a trustee incurs expenses to restore the resource or restoration costs are quantified by a court, but the court disagreed. If Congress intended the state’s construction of “occur,” then it would not have written the “wholly before” limitation.

The court thus concluded that without proof that there was a loss or injury after December 11, 1980, the essential element of causation required by section 107(f) is missing and, therefore, Montana is not entitled to recover damages from ARCO for restoration costs at the Upland Areas under CERCLA.

The court also found that Montana’s superfund statute is a prospective, not retroactive, statute.

### **Federalism**

**No State Immunity in DOT Preemption Proceeding: *Tennessee v. U.S. Department of Transportation et al.*, No. 01-5373 (6th Cir. Apr. 23, 2003)**

### **Background**

The Hazardous Materials Transportation Act (HMTA), 49 U.S.C. §§ 5101–5127, was passed in 1975 to create a coherent approach to addressing the issues posed by interstate transportation of hazardous material (hazmat). The HMTA contains specific criteria for preemption of state and local laws in section 5125(a) of the act. When the question involves the validity of a state fee imposed on transporters, section 5125(g) specifies that a fee may be imposed only if “fair and used for a purpose related to transporting hazardous material . . . .”

Regulations implementing the act contain specified requirements should an interested individual wish to challenge a state or local hazmat requirement. An application is submitted to the Associate Administrator (AA) of the U.S. Department of Transportation’s (DOT’s) Research and Special Programs Administrator with a copy being served on the state. U.S. DOT then publishes notice of the application in the Federal Register, inviting comments. The AA may conduct a hearing. After considering the application and comments, the AA reaches a determination and issues a written statement setting out relevant facts and law to all involved parties. Upon the motion of a party, that determination is subject to reconsideration. That determination is then published in the Federal Register and is considered a final agency determination on the question of preemption. A judicial review in federal district court may be requested by one of the parties.

In this case, the Association of Waste Hazardous Materials Transporters filed an application in March 1998 seeking a preemption determination concerning the annual fee imposed by Tennessee on interstate hazardous waste transporters under state law. The AA determined that the \$650 fee was preempted, finding that it was not fair and was not used for purposes consistent with the mandate of the HMTA. The state sought review in federal district court, arguing that it was protected by sovereign immunity. The court concluded that the state was not protected from purely administrative action by principles of sovereign immunity. The state appealed, citing the recent decision by the U.S. Supreme Court in *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002).

## Holding

In *Federal Maritime Commission*, the Court held that Eleventh Amendment sovereign immunity protected a state agency from suit by a private party seeking monetary damages and injunctive relief for violating the Shipping Act of 1984. The Court concluded that the proceedings before the Federal Maritime Commission and civil litigation were overwhelmingly similar. Since the proceedings were adjudicative in nature, actions against the state were barred by sovereign immunity. The issue in this case is whether the nature of the procedure used by DOT in determining preemption challenges under the HMTA is sufficiently adjudicative to trigger Eleventh Amendment immunity.

The district court noted that the process to make preemption determinations is unique. According to the court, it differs “dramatically” from the one scrutinized by the Court in *Federal Maritime Commission*. It does not mirror federal civil litigation. There are no formal rules of practice or procedure, no requirement for a formal complaint, nor provision for an answer by the state. There is no formal discovery process. There is no requirement for a hearing and, if there is a hearing, there are no rules of evidence or civil procedure and an administrative law judge does not preside.

In *Federal Maritime Commission*, the Court focused on the similar role of the administrative law judge and a federal district court judge — they have absolute immunity from liability for their judicial acts and are “insulated from political influence.” 122 S. Ct. at 1872. In contrast, the AA making the determination in the U.S. DOT procedure is not insulated from political influence but is, instead, a member of the executive branch, charged with the duty of furthering the purpose of the federal legislation at issue.

Furthermore, the nature of the final determination in the U.S. DOT process is far different from the results of civil litigation. The determination does not direct entry of relief against the state, but serves as an administrative interpretation of a federal statute, only prospective in application, and warranting *Chevron* deference in subsequent litigation. The AA possesses no authority to issue an order against the state or to assess a civil penalty.

The state argued that the procedure that allows an aggrieved individual to file a petition for reconsideration is the equivalent of a legal appeal. The court disagreed. It said that such a procedure is normal in agency rule-making proceedings. The ability to file a petition for reconsideration does not change the nature of the U.S. DOT proceeding.

The court thus affirmed the judgment of the district court.

## SDWA

### **Court Rejects Constitutional Attack on SDWA: *Nebraska et al. v. U.S. Environmental Protection Agency*, No. 01-1101 (D.C. Cir. June 20, 2003)**

#### **Background**

U.S. EPA promulgated a final regulation under the Safe Drinking Water Act (SDWA) that set the maximum contaminant level for arsenic in December 2002. The State of Nebraska and the City of Alliance, Nebraska, did not challenge the rule during the administrative rulemaking procedure. Instead, they brought this suit in federal court, challenging the act and the new arsenic rule on constitutional and statutory grounds.

## Holding

The general rule is that, in order to preserve its objections, a party must present its comments to the agency during the rulemaking procedure. *Tex Tin Corporation v. U.S. EPA*, 935 F.2d 1321, 1323 (D.C. Cir. 1991). The court agreed with the petitioners, however, that, with respect to the claims that the SDWA exceeds the federal government's power under the Commerce Clause and violates the Tenth Amendment, the issues were properly before it because agencies normally do not have the jurisdiction to pass on the constitutionality of federal statutes.

However, the constitutional attack on the regulation should have been raised during the rulemaking procedure. It is possible that EPA could have designed a rule in response to the state's arguments or interpreted the act in light of the petitioners' contention. The petitioners pointed to the holding in *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, 1338–39 (D.C. Cir. 1983), to support their claim that the challenge to the regulation is preserved. In that case, the court decided on the merits of an argument, raised for the first time in the court, that two vacancies on the three-member National Mediation Board deprived the board of any authority to render a decision. The court noted, however, that later decisions have limited the holding of this case to challenges to the very composition of an agency. Thus, the court concluded that the petitioners had not preserved their objections to the rule.

Concerning the challenge to the statute itself, the petitioners argued that the SDWA exceeds congressional power because it regulates the intrastate distribution and sale of drinking water. Since this is a facial challenge to the act, the petitioners must show that the act would not be constitutional under any set of circumstances. See *United States v. Salerno*, 481 U.S. 739, 745 (1987). The court determined that that burden had not been sustained.

EPA has collected data that a number of water utilities sell substantial volumes of drinking water across state lines. Each of these sales represents a circumstance in which the SDWA is a valid exercise of Congress' Commerce Clause power.

As to the Tenth Amendment challenge, the court noted that the only issue is whether the act regulates the states in a permissible manner. Since the act only regulates the states in their capacity as public water system owners and does not compel the state to pass legislation or to enforce the federal standards for arsenic, the act comports with the Tenth Amendment.

Therefore, the court denied the petition for judicial review.

## Water Use

**BOR Has Discretion to Divert Water to Protect Endangered Species: *Rio Grande Silvery Minnow et al. v. John W. Keys III et al.*, Nos. 02-2254 et al. (10th Cir. June 12, 2003)**

## Background

This litigation has a complex history involving previous court orders and numerous defendants. The primary issue before the appellate court in this instance was whether the Bureau of Reclamation (BOR) has discretion to reduce deliveries of water to cities and irrigation districts with which it had contracted in order to comply with the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1544.

The species of concern is the silvery minnow. The Secretary of the Interior's delay in designating crucial habitat was the subject of separate litigation; the designation itself spawned litigation. Questions ensued concerning compliance with the National Environmental Policy Act (NEPA). The district court entered numerous orders concerning the substance of the Biological Opinion (BO), finally finding that the supplemental BO was arbitrary and capricious and

ordering the BOR to maintain a minimum flow of 50 cfs at the San Acacia Diversion Dam and to maintain that minimum flow in order to protect the silvery minnow. In paragraph 14 of its order, the court stated:

If necessary to meet flow requirements in 2003, either under the June 29, 2001, Biological Opinion or under a new Biological Opinion resulting from reinitiation of consultation, the Bureau of Reclamation must reduce contract deliveries under the San Juan Chama Project and/or the Middle Rio Grande Project, and/or must restrict diversions by Middle Rio Grande Conservancy District under the Middle Rio Grande Project, consistent with the Bureau of Reclamation's legal authority as determined in the Court's April 19, 2002, Memorandum Opinion and Order.

Civ. No. 99-1320 (D.N.M. Sept. 23, 2002).

The cooler and wetter fall permitted the BOR to meet the flow requirements for the remainder of 2002. The appellate court granted a stay of the order and expedited consideration of the appeal of paragraph 14 of the court's order.

### **Holding**

The first issue before the court was whether the issue was ripe for review. The court determined that the balance of the need for decision against the risks of decision tipped in favor of review: "The importance of the interests at stake — the preservation of an endangered species . . . and the federal agencies' obligation to fulfil existing water contracts as well as the extent of the injury, extinction of the silvery minnow if the drought persists, unless available water is allocated, and the potential harm to water users — outweigh[s] the risk of a premature decision." Slip op. at 20. The court stressed that resolution of the purely legal issue might permit all of the parties to

address the full panoply of long-term planning and water management issues that are implicated by this litigation.

The BOR has entered into various contracts to provide water. Under the San Juan Chama Reclamation Project (SJCP) Act of June 13, 1962, and the Colorado River Storage Project Act of April 11, 1956, for instance, the BOR entered into a contract in 1963 with the City of Albuquerque. This contract contains provisions which state that "[o]n account of drouth or other causes, there may occur at times during any year a shortage in the quantity of water available from the reservoir storage complex for use by the City pursuant to this contract" and "[d]uring periods of scarcity when the actual available water supply may be less than the estimated firm yield, the City shall share in the available water supply in the ratio that allocations above bear to the estimated firm yield." Slip op. at 26–27. Subsequent contracts between the BOR and other New Mexico cities, towns, and water districts incorporated similar language. Later contracts included provisions for compliance with NEPA and other federal laws, including environmental laws such as the Endangered Species Act, the Clean Water Act, and NEPA.

Under the Flood Control Acts of 1948 and 1950, Congress approved the Middle Rio Grande Project (MRGP). Under that act, the BOR developed a comprehensive scheme to improve flood control and irrigation along the middle section of the Rio Grande River Valley. The proposal allocated some money for recreation, fish, and wildlife. Under this plan, the BOR took title to all the property rights — such as reservoirs, canals, dams, and flood-control works — of the Middle Rio Grande Conservancy District, a political subdivision of the State of New Mexico. BOR entered into contracts to secure a supplemental supply of water from the SJCP. Thus, virtually all of the water available under the SJCP is allocated.

Section 7 of the ESA applies when the federal government has discretionary control over or involvement in a project. See 50 C.F.R. § 402.03. Under the BOR view of the situation, the contracts give the agency no discretion; it must deliver project water in the contracted amount. In the agency's view the "on account of drouth or other causes" clause applies only when it is "impossible" for BOR to deliver the contractual water, not to situations when it is unable to do so because it has diverted water to comply with the ESA. The BOR relied on the decision in *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995), to buttress its contention. In that case, the court held that "Congress did not intend for section 7 to apply to an agreement finalized before passage of the ESA where the federal agency currently lacks the discretion to influence private activity for the benefit of the protected species." *Id.* at 1511–12.

Although the BOR argued that the question should be framed more narrowly, the court held that the issue before it was whether the contracts reserve discretion for BOR to comply with the ESA. Among the provisions noted by the court was one that stated that, during periods of scarcity, the non-federal parties would share in the available water. The contracts also specified that water was to be provided for fish and wildlife as a beneficial use. These clauses, taken with the clause that "other causes" might create a need to change an allotment, convinced the court that BOR had the discretion to determine the "available water" to allocate to the contracted parties and to fulfill its obligations under the ESA.

The district court found support for its ruling in three decisions: *O'Neill v. United States*, 50 F.3d 677 (9th Cir. 1995); *Natural Resources Defense Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998); and *Klamath Water Users Protective Association v. Patterson*, 204 F.3d 1206 (9th Cir. 2000). These cases all held that the BOR had discretion to alter the terms of contracts. The court identified three general precepts: first, plain terms govern under general contract law. Second, the contracts, written under the

reclamation laws, envisioned applying subsequent legislation in their interpretation. Third, the plain terms of the water shortage clauses provided discretion to BOR to allocate available water to comply with the ESA.

Therefore, the court held that BOR's discretion to reduce contract deliveries of water for "other causes" includes compliance with the ESA.

Another issue before the court was raised by the State of New Mexico, which intervened to protect its interests as *parens patriae* in allocating and administering state waters. It viewed the lack of native water as causing the harm to the silvery minnow. The state argued that the SJC Project was designed to "provide sufficient water for human needs through times of drought." Slip op. at 43. It viewed the phrase "drouth or other causes" as designed to protect the public purse in the event of lack of natural flows or unforeseen occurrences. The state read the court's decision in *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981), as standing for the proposition that using water from the SJCP for recreation, fish, and wildlife purposes is not a beneficial use under the SJCP Act and state law.

The court disagreed on the state's reading of the *Jicarilla* opinion and held that diversion of SJCP water to prevent jeopardy to the silvery minnow is a beneficial use under both the SJCP Act and New Mexico law. It determined that the district court's order "fully appreciates" New Mexico's "commitment to protecting its water resources and ensuring BOR's duty under the ESA." Slip op. at 46.

**District Court Abused Discretion in Entering Injunction Against Corps: *South Dakota v. Ubbelohde*, Nos. 02-2133SD *et al.* (8th Cir. June 4, 2003)**

**Background**

The Flood Control Act of 1944 charges the U.S. Army Corps of Engineers with responsibility for managing the Missouri River, which travels from Montana to Missouri through seven states. The main purposes of the Flood Control Act were to avoid flooding and to maintain downstream navigation. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512 (1988). The intricacies of how the Corps will manage the river basin are published in the *Missouri River Main Stem Reservoir System Reservoir Regulation Manual*, generally called the Master Manual. The Corps has been revising the manual since the late 1980s. The Manual calls for the Corps to consider, in order: flood control, irrigation, water supply and water-quality requirements, navigation and power, and then recreating, fish, and wildlife. The Manual states the minimum flows to be maintained at different points on the river and methods for deciding the length of the navigation season based upon river flow at various times of the year.

In 2002, the prolonged drought conditions along the river created the necessity for the Corps to make decisions about the allocation of water among the states. Pursuant to its 2002 operating plan, the Corps decided to release water from Lake Oahe in South Dakota to maintain downstream navigation and to maintain the water levels at the other five reservoirs. South Dakota was concerned that lowering the water level at Lake Oahe would reduce the number of rainbow smelt, the prime food source for walleye, a sport fish. In April 2002, the state filed a lawsuit seeking an injunction to stop the Corps from releasing water from Lake Oahe until after the spawning season. After the court issued a temporary restraining order, the Corps announced it would release water from South Dakota's Lake Francis Case. South Dakota requested that the district court issue a preliminary injunction against that planned action as well.

At that point in the litigation, the State of Nebraska and numerous private entities moved to intervene in the case. The court denied the motions. The district court then entered a preliminary injunction requiring the Corps to maintain the water levels at Lake Oahe and Lake Francis Case until after the spawning season.

The Corps then announced its plan to reduce the water level of Lake Sakakawea in North Dakota. North Dakota sought and received a temporary restraining order against that planned reduction in the U.S. District Court for North Dakota.

In the meantime, the State of Nebraska sought a preliminary injunction in the U.S. District Court for Nebraska that would require the Corps to operate the Missouri River in accordance with the Master Manual and the 2002 Annual Operating Plan. The court issued such an injunction, leaving the Corps with a court order to maintain navigation. Eventually, downstream flows were reduced and navigation and other downstream interests suffered. The injunction in North Dakota and South Dakota expired on May 25, 2002; the Nebraska injunction has not expired. The Corps appealed the court orders.

**Holding**

As a preliminary matter, the court discussed whether the expiration of the preliminary injunctions rendered the case moot. The court noted that these cases fall within the "capable of repetition, yet evading review" exception of the mootness doctrine. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). This exception applies when "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again." *Spencer v. Kemna*, 523 U.S. 1, 17 (1998). Full litigation of whether the Corps may release water from a reservoir during the spawning season will never be achieved because of the brevity of the spawning season. The court also noted that

these events are likely to recur. Drought conditions continue along the river; thus, the Corps will be forced to again release water for downstream navigation. Therefore, the court determined the issue was not moot.

The standard for a review of a district court's decision to grant a preliminary injunction is whether the court "clearly erred in its characterization of the facts, made a mistake of law, or abused its discretion in considering the equities." *Brotherhood of Maintenance of Way Employees v. Burlington Northern Rail Road*, 802 F.2d 1016, 1020 (8th Cir. 1986).

The facts of each of these cases are largely undisputed. Clearly, both North Dakota and South Dakota demonstrated that their fish populations would suffer from a decrease of water level in the reservoirs. Nebraska presented evidence that decreased flows would harm many of its citizens. Instead, the dispositive issue in this appeal was the likelihood that each plaintiff would succeed on the merits. Since the plaintiffs challenged agency actions, the review was guided by the Administrative Procedure Act under which district courts are to review actions to determine if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In this case, however, the Corps argued that its actions are not subject to judicial review.

Courts generally presume that Congress intended agency action to be susceptible to judicial review; however, a narrow exception to this presumption exists "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 4100 (1971) (internal quotations omitted). Where the statute gives even minimal guidance to limit agency discretion, however, the exception does not apply. This is not the case here. The Flood Control Act sets up a balance between flood control, navigation, recreation, and other interests and calls on the Corps to balance these interests. Thus, courts can review the Corps' decisions to ensure that it considered each of these inter-

ests before it made a decision. Furthermore, the Master Manual is binding on the Corps because it sets out substantive requirements and its language and context clearly indicate that it was intended to bind the Corps' discretion.

The Corps argued that the Manual is not binding because it was not promulgated as a rule but merely set out as a policy statement. However, agency statements may be binding upon an agency even without notice-and-comment rulemaking. See, e.g., *Northwest National Bank v. U.S. Department of the Treasury*, 917 F.2d 1111, 1116-17. In this case, the Manual speaks in terms of what "is" to be done and what "will" be done. There is no indication in the text of the Manual that the Corps may ignore its provisions. Furthermore, the Corps' promulgated regulations indicate that the Manual is binding and the Corps' own treatment of the Manual indicates that it is binding. Thus, the court found sufficient law to apply to these cases since the court can assess whether the Corps' actions were in keeping with both the Flood Control Act and the Master Manual.

In the South Dakota case, the state claimed that the Corps had acted arbitrarily and capriciously, that the Corps is judicially estopped from favoring navigation over recreation, and that the Corps must maximize the benefits the river, including fish and wildlife benefits. The court rejected these arguments. It noted that the state's proffered standard — that the Corps must maximize the benefits to all interests — is not appropriate. Under this standard, the Corps' actions would receive no deference and the courts would be called upon to review every decision the Corps made. There is no possible way that, in time of drought, every interest could be maximized.

The estoppel argument is based on previous litigation in Montana. The state maintained that, in settling that litigation, the Corps agreed to give all interests, including recreation, equal consideration in the management of the river. Even assuming that all the elements of estoppel have been met, the court noted that equal consideration does not equate with equal results. There is no evidence that the Corps did *not*

give equal consideration to recreation. That the Corps decided to lower the level of a reservoir is not evidence that it did not give equal consideration to each interest.

In order to counter a challenge to its decisionmaking as arbitrary and capricious, an agency must “articulate a rational connection between the facts found and the choice made.” *Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 288 (1974) (internal quotations omitted). The Corps has done this in this case. Its plan — to lower one reservoir per year during drought conditions — would seemingly allow each reservoir to have a fruitful spawn five years out of six. South Dakota, thus, would not likely succeed on its “arbitrary and capricious” theory. It was therefore not entitled to a preliminary injunction.

In addition to the arguments that South Dakota advanced, North Dakota argued that the Flood Control Act precludes the Corps from favoring navigation over recreation. The court rejected that contention. The act provides little guidance and the evidence that is available indicates that the primary concerns should be flood control and navigation. The Supreme Court seems to have adopted this approach. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 512 (1988). Thus, like its southern neighbor, North Dakota failed to demonstrate that it was likely to succeed on the merits. Therefore, the court should not have issued a preliminary injunction.

In Nebraska, the court ordered the Corps to abide by the Master Manual because it concluded that the Manual binds the Corps. The appellate court found no error to the district court’s conclusion. The Corps argued, however, that it should not be bound by the Manual when unforeseen circumstances arise. The court left such a question to the district court to decide on remand, if necessary.

Therefore, the court concluded that both the orders of the district courts for North Dakota and South Dakota should be reversed and the cases remanded. The Nebraska court’s order was affirmed and the case remanded for further proceedings.

## Wetlands

### **Court Upholds Corps’ Tributary Regulations: *United States v. James S. Deaton*, No. 02-1442 (4th Cir. June 12, 2003)**

#### **Background**

James and Rebecca Deaton own a twelve-acre parcel near Parsonsburg in Wicomico County, Maryland, located on the Delmarva Peninsula. They purchased the property to develop a small (five-lot) residential subdivision. However, much of the property was poorly drained. To remedy this, the Deatons dug a drainage ditch across the property, despite having been informed that they would need a permit from the Corps of Engineers for such work because a large portion of the property contained nontidal wetlands.

The roadside ditch bordering the Deatons’ property drains into a culvert that drains into another ditch that drains into Purdue Creek. Purdue Creek flows into Beaverdam Creek, which, eight miles from the Deatons’ property, empties into the navigable Wicomico River. Twenty-five miles downstream, the Wicomico River flows into the Chesapeake Bay.

The Corps issued a stop-work order to the Deatons and, when negotiations between the parties were unsuccessful, initiated a civil complaint in federal court. The district court determined that the “sidecasting,” which was the basis of the Corps’ complaint, did not constitute the discharge of a pollutant under the Clean Water Act (CWA). The U.S. Court of Appeals for the Fourth Circuit reversed, holding that the CWA’s “definition of discharge as ‘any addition of any pollutant to navigable waters’” encompassed sidecasting in a wetland. *United States v. Deaton*, 209 F.3d 331, 337 (4th Cir. 2000).

A few months after the Fourth Circuit issued its opinion, the U.S. Supreme Court decided *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001). In that case, the Court held that the Corps exceeded its statutory authority under section 404(a) of the CWA when it interpreted the act, in concert with the Migratory Bird Rule, to cover an isolated, intrastate gravel pit. The Deatons filed a motion asking the district court to reconsider the issue of the jurisdictional reach of the CWA as applied to their case. The district court denied the motion for reconsideration, holding that the Deatons' wetlands, which are adjacent to a roadside ditch that is a tributary of navigable water, have a hydrological connection to navigable water; thus, the *SWANCC* holding did not apply to this case. It also held that protection of the wetlands in this case is reasonably related to congressional authority to protect navigable waters as channels of interstate commerce. The Deatons appealed.

### Holding

The Deatons argued that the roadside ditch is not covered by the CWA. They first argued that the Corps' regulation could not survive the threshold analysis that *SWANCC* requires: When "an administrative interpretation of a statute invokes the outer limits of Congress' power," that interpretation is not entitled to *Chevron* deference. *Id.* at 172. The court pointed out that the *SWANCC* language must be read together with the holding in *Rust v. Sullivan*, 500 U.S. 173 (1991). In that case, the Court immediately examined the constitutionality of the regulation in issue because it "did not face the sort of serious constitutional questions" that would lead the Court to assume that Congress did not intend to authorize the issuance of the regulation. *Id.* at 191. Thus, the first issue addressed by this court was whether the constitutional question in this case was "serious enough" to warrant rejection of the Corps' regulation.

Unlike the congressional power to regulate activities with a substantial relation to interstate commerce, the power to regulate *channels* of interstate commerce goes beyond activities that are purely economic in nature. The Deatons argued, however, that congressional authority over navigable waters extends only to protecting or encouraging navigation and the flow of commerce. The court found that interpretation too narrow. Although many cases concerning navigable waters do focus on congressional authority to regulate in aid of navigation, congressional authority over navigable waters is no less expansive than its authority over interstate channels, such as highways, which may be regulated to prevent their "immoral and injurious uses." *Caminetti v. United States*, 242 U.S. 470, 491 (1917).

Since Congress has the power to prevent the use of navigable waters for injurious purposes, it also has the power to regulate nonnavigable waters essential to protecting navigable waters. Any fill material that degrades waters hydrologically connected to navigable waters has the potential to degrade those navigable waters. Although the Deatons argued that the sidestepping of dirt into wetlands adjacent to the roadside ditch is too trivial to affect water quality in navigable waters, the court noted that it is within Congress' power to determine that the aggregate effect of individual instances of discharge justifies regulating the discharge.

The court, thus, determined that the Corps' regulatory interpretation of the CWA's "waters of the United States" does not invoke the "outer limits" of Congress' power or alter the federal-state framework, nor does it present a serious constitutional question so that the court would assume Congress did not intend to authorize such a regulation.

The Deatons argued that, even if Congress could constitutionally regulate the roadside ditch, neither the CWA nor the Corps' regulation extends coverage to the ditch. First, they contended that the roadside ditch is not a "tributary" because it neither meets the definition of a tributary nor is it a tributary of a navigable water since the water flows through several nonnavigable watercourses before it reaches the Wicomico River. Second, they contended that, if the tributary regulation does cover the ditch, then the regulation is an unreasonable interpretation of the CWA.

In determining what a regulation means, a court gives "controlling weight" to an agency's interpretation "unless [it] is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Company*, 325 U.S. 410, 413-14 (1945). Under this approach, a court must first determine if the language of the regulation is ambiguous; if not, it must be given its plain meaning. The court began with the language of the CWA. The act regulates discharges into "navigable waters" and defines "navigable waters" as "waters of the United States," which the Court determined indicated congressional intent to regulate "at least some waters that would not be deemed navigable" under the classic definition of that term. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 133 (1985). The term "waters of the United States," however, is ambiguous because one cannot tell from the definition the extent to which nonnavigable tributaries are covered.

The Corps' regulation defines "waters of the United States" to include tributaries of navigable waters. The word "tributary" itself is ambiguous; there are alternative dictionary definitions. The Corps has always used the word to mean the entire tributary system. That interpretation finds support in the dictionary definition of the word "tributary." It is, thus, not plainly erroneous and is entitled to *Seminole Rock* deference.

Under a *Chevron* inquiry, once a court has determined a statute is ambiguous (as the court did when it examined the phrase "waters of the United States"), the next step is to determine whether the regulation is based on a permissible construction of the CWA. The *SWANCC* Court noted that the Corps "put forth no persuasive evidence that [it] mistook Congress' intent" when it promulgated its first regulations, which reached only to navigable waters, in 1974. Despite this language, the court in the instant case did not read the *SWANCC* decision to hold that the 1974 regulations represent the *only* permissible interpretation of the CWA. To conclude that its current interpretation is reasonable, the court need only determine that it is based on a reasonable construction of the statute.

In *Riverside Bayview*, the Court determined that the Corps' exercise of jurisdiction over an adjacent wetland was reasonable because of the "significant nexus between the wetlands and 'navigable waters.'" *SWANCC* at 167. There is also a nexus between navigable waters and nonnavigable tributaries. Thus, the court determined that the Corps' regulation and its interpretation of that regulation is reasonable and is entitled to deference and upheld the district court's denial of the Deatons' motion for reconsideration.

**CIVIL/ADMINISTRATIVE PROCEEDINGS****New Filings****Air**

***Massachusetts, Connecticut, and Maine v. Christine Whitman*, No. 3:03CV984(PCD) (D. Conn. June 4, 2003)**

The Attorneys General of Connecticut, Maine, and Massachusetts have filed a lawsuit against U.S. EPA, alleging that it unlawfully failed to regulate carbon dioxide emissions. The lawsuit contends that EPA has acknowledged that carbon dioxide is an air pollutant that is subject to regulation under the Clean Air Act (CAA). The states are requesting injunctive relief, asking the court to order EPA to regulate carbon dioxide emissions, considered a significant contributor to global warming.

[For further information, contact Massachusetts AAG Carol Iancu at (617) 727-2200, Connecticut AAG Matt Levine at (860) 808-5250 or Maine AAG Jerry Reid at (207) 626-8545.]

**Settlements****Water**

***In re Sloss Industries Corporation*, No. 03-140-CWP(ADEM June 25, 2003)**

Sloss Industries Corporation, headquartered in Birmingham, Alabama, has agreed to settle allegations that it violated its National Pollutant Discharge Elimination System (NPDES) permit when it discharged cyanide-contaminated water into Five Mile Creek. Under the settlement, the coke manufacturer will pay a civil penalty of \$675,000 and donate 34 acres of land at the headwaters of Shades Creek and 326 acres along Five Mile Creek. The land is appraised at about \$2.6 million.

The company will also plant 25,000 trees along Five Mile Creek and hire a forester to monitor them for four years. A conservation group will develop a plan to protect the entire twenty-five-mile stretch of the creek. The restitution package is among the largest in the history of the Alabama Department of Environmental Management.

[For further information, contact Olivia Rowell, ADEM, at (334) 271-7700.]

**CRIMINAL PROSECUTIONS****Pleas****Air**

***United States v. Jet-Pep, Inc.*, No. CR03-S-127 (N.D. Ala. May 30, 2003)**

Jet-Pep, Inc., a gasoline refiner located in Holly Pond, Alabama, recently pled guilty to violating the Clean Air Act by failing to perform a chemical analysis of the components of its gasoline and then report to U.S. EPA that the tests had been done.

The court has set sentencing for July 30.

[For further information, contact AUSA Robert Posey at (205) 244-2001.]

**Water*****United States v. Biogas Energy, L.P.*, No. CR-3-03-046 (S.D. Ohio June 9, 2003)**

Biogas Energy, L.P., operates a methane gas recovery and recycling plant in Dayton, Ohio. It has pled guilty to two counts of negligently discharging wastewater containing ignitable methane condensate into the Montgomery County sewer system and two counts of negligently discharging without a permit.

A plea agreement calls for Biogas to pay a \$100,000 penalty per count and to pay \$50,000 to the Wellfield Protection Program as a community service to benefit the Children's Water Festival in Dayton.

[For further information, contact AUSA Shiela Lafferty at (513) 684-3150.]

***United States v. Robert Joseph Smith*, No. 3:03-CR-139 (D. Conn. May 19, 2003)**

Robert Joseph Smith of Enfield, Connecticut, has pled guilty to a felony charge of violating the Clean Water Act while he was the department supervisor of a wastewater treatment plant at a factory owned by a subsidiary of Tyco International. He was accused of helping to falsify reports submitted to Connecticut environmental regulators that did not disclose that the plant's wastewater discharges exceeded permitted levels for copper.

His successor at the plant, Anthony Dedalt, pled guilty last year to felony violations of the Clean Water Act. Both men are scheduled to be sentenced in August.

[For further information, contact AUSA Tom Daily at (860) 947-1101.]

***United States v. J. Kevin Vaughn*, No. 5:03CR0200 (N.D. Ohio May 27, 2003)**

J. Kevin Vaughn, Superintendent of the Millersburg, Ohio, wastewater treatment plant, pled guilty to making false statements to Ohio EPA. The defendant admitted that he submitted nineteen monitoring reports that contained eighty false statements concerning the amount of pollution discharged from the plant between February 1998 and August 2000.

[For further information, contact AUSA Ann Rowland at (216) 622-3847.]

**Sentences****Water*****United States v. Andrew Jackson Simmons Jr.*, No. 701-CR-137-F (E.D.N.C. June 2, 2003)**

The president of High Rise Services, Inc., has been sentenced to two years' imprisonment, three years' supervised release, a \$50,000 fine and costs of his prosecution on income tax evasion. Andrew Jackson Simmons Jr. had previously pled guilty to violating the Clean Water Act and to income tax evasion.

High Rise Services is in the business of re-refining used oils into useable products and cleaning storage tanks. Illegal operations at the company led to the discharge of oil into the Cape Fear River. The company's sentencing is scheduled for September 2.

[For further information, contact AUSA Banu Rangarajan at (919) 856-4530.]

## UPDATES

***San Francisco Baykeeper et al. v. Cargill Salt Division et al.*, No. C-96-2161 SI (N.D. Cal. Apr. 30, 2003):** In a remand of this case to the district court in light of the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001), the court held that a pond near a navigable water falls within the jurisdiction of the CWA. The defendants had argued that there was no hydrologic connection between the pond and the nearby Mowry Slough, a tributary to San Francisco Bay. However, there was evidence that water from the Mowry Slough leaked through a berm separating it from the pond during high tides. In a 1998 decision, the district court ruled that the pond was subject to the Clean Water Act because migratory birds used the pond.

***Pronsolino v. Nastri*, No. 02-1186, 71 U.S.L.W. 3772:** The U.S. Supreme Court denied certiorari in this case from the Ninth Circuit that held that the Clean Water Act's TMDL requirement applies to waters polluted by nonpoint sources. See the July 2002 issue of the *Journal*.

***U.S. v. Power Engineering*, No. 02-1086, 71 U.S.L.W. 3694:** The U.S. Supreme Court has denied review of this Tenth Circuit decision which held that U.S. EPA could file an enforcement action under the Resource Conservation and Recovery Act after the state had filed an action to address the same violation. See the October 2002 issue of the *Journal*.