

## *Inside . . .*

### FEATURE ARTICLE

- 3 Joint State/Federal Cooperation in Environmental Enforcement:  
The Promise and Potential Problems  
*By Robert J. Kinney*

### DECISIONS

#### All Writs Act

- 6 All Writs Act Authorizes Court to Bind Nonparty:  
*United States v. City of Detroit*

#### Attorney's Fees

- 9 Court Denies Attorney's Fees to Citizen Plaintiff Under CWA:  
*Amigos Bravos and New Mexico Citizens for Clean Air and  
Water v. Environmental Protection Agency*
- 10 Attorney's Fees May Be Awarded in CAA Case Under Cayalyst  
Theory: *Sierra Club v. Environmental Protection Agency*

#### CERCLA

- 12 Settlement with City Gives Party Contribution Protection:  
*City of Springfield v. Rexnord Corporation*

#### ESA

- 13 Court Upholds Constitutionality of ESA:  
*Rancho Viejo, LLC v. Gale Norton*

#### Trespass/Nuisance

- 16 Colorado Supreme Court Holds Unabated Hazardous Waste  
Migration Is Continuous Tort: *Robert N. Hoery v. United States*

#### Water

- 17 Court Upholds Constitutionality of EPA's Regulation of Storm  
Water: *City of Abilene and City of Irving v. U.S. Environmental  
Protection Agency*

<b>CIVIL PROCEEDINGS</b>	19
<b>CRIMINAL PROSECUTIONS</b>	19
<b>UPDATE</b>	21

The **NATIONAL ENVIRONMENTAL ENFORCEMENT JOURNAL** is published eleven times per year by the National Association of Attorneys General, with the support of the Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, reporting recent developments in environmental enforcement. The **Journal** is funded, in part, by the Environmental Protection Agency under grant number X-825626, administered by the Office of Enforcement and Compliance Assurance. The contents of this document do not necessarily reflect the views and policies of the Environmental Protection Agency nor of the National Association of Attorneys General nor does mention of trade names or commercial products constitute endorsement or recommendation for use. Unsolicited articles, inquiries on editorial content, and subscription requests should be addressed to:

**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

The annual subscription rate is \$195; government/nonprofit organization/academic library rate, \$95. For information on obtaining copies of other materials reported in the **Journal**, contact Sharon Lee at (202) 326-6045. For subscription and billing information, call the subscription clerk at (202) 326-6030. Articles appearing in this journal are indexed in *Environmental Periodicals Bibliography*.

**Bill Lockyer**  
Attorney General of California  
President, National Association of Attorneys General

**Lawrence Wasden**  
Attorney General of Idaho  
Chair, Environment Committee

**Lynne M. Ross**  
Executive Director

**Robert J. Kinney**  
Chief Counsel for Environment

**Paula Cotter**  
Senior Environment Project Counsel

**Sharon Lee**  
Environment Project Assistant

**Joint State/Federal Cooperation in  
Environmental Enforcement:  
The Promise and Potential Problems**

By

**Robert J. Kinney\***

In a joint press statement issued on March 20, 2003, the National Association of Attorneys General (NAAG) and the Environment and Natural Resources Division (ENRD) of the U.S. Department of Justice (DOJ) released a document titled *Guidelines for Joint State/Federal Civil Environmental Enforcement Litigation*.<sup>1</sup> As the press release noted, the document was the product of more than a year of collaboration, drafting, and redrafting by a small workgroup of trial attorneys from several state Attorneys General offices and from various sections within the ENRD, particularly the Environmental Enforcement Section. Senior attorneys from U.S. EPA's Office of Enforcement and Compliance Assurance also took part in the development of the *Guidelines*.

Of particular note, the release of the *Guidelines* followed closely an announcement by U.S. Attorney General John Ashcroft which stressed, among other priorities, DOJ's goal of promoting cooperation with states in environmental enforcement cases. ENRD Assistant Attorney General Tom Sansonetti and NAAG President, Oklahoma Attorney General Drew Edmondson, took this thought further by noting, respectively, the importance and value of the federal and state governments working together in environmental enforcement and the benefit of cooperative enforcement in leading to more effective and comprehensive settlement agreements with environmental law violators.<sup>2</sup>

---

\*Mr. Kinney is Chief Counsel and Project Director for the Environment Project of the National Association of Attorneys General. He was a member of the state/federal workgroup that developed the guidelines discussed in this article. The views expressed are solely those of the author and do not necessarily reflect the opinion of the National Association of Attorneys General or any Attorneys General office.

The development of the *Guidelines* is one important step in enhancing a growing relationship of mutual respect and assistance between environmental enforcement personnel of the federal government and the states. The assumptions, as well as experiences, that underlay the development of the *Guidelines* underscore the benefits of joint enforcement activity; however, the benefit to both sovereigns and to the environment of joint enforcement activity also carries with it certain risks for the governmental parties involved.

At the outset, the document notes a number of truths. It begins by affirmatively stating that “[i]t is the policy of the U.S. Department of Justice, Environment and Natural Resources Division (ENRD), to work cooperatively with states in enforcing environmental laws.”<sup>3</sup> What “work cooperatively” means in this context is, perhaps, open to some discussion, but it is fair to say that what the drafters *wanted* it to mean is that, to the extent it is prudent and possible, the ENRD and state attorneys general should collaborate and discuss potential cases that arise to determine whether, and to what extent, the action should be pursued jointly. The *Guidelines* go on to note that they “reflect the commitment of ENRD and state Attorneys General to strong coordinated and collaborative environmental enforcement programs.”<sup>4</sup> The lengthy footnote that follows states the premise that ENRD will take the lead federal role in civil environmental litigation, in cooperation with the EPA, and describing in some detail how different kinds of litigation within ENRD will be assigned. The note also discusses the potential role in environmental litigation of the ninety-four United States Attorneys offices.<sup>5</sup>

Thus, this first truth reveals both a promise — work cooperatively — and indirectly, a conundrum — with whom, if you are the state Attorney General, do you work cooperatively: ENRD or the AUSA? To be fair, it is not always clear on the state side which governmental entity has the lead between the Attorney General's office and a state regulatory program office. Revealed here as well is an unstated premise — joint litigation with sovereigns can be complicated, particularly given the potential number of actors in-

volved. The *Guidelines* recognize this complication in suggesting that “[a]s a general matter, ENRD and state trial attorneys should integrate U.S. Attorneys offices and EPA regional offices into their collaborative efforts wherever appropriate,”<sup>6</sup> and by noting that “most U.S. Environmental Protection Agency (EPA) Regional offices and their state counterparts conduct regular conferences to keep one another apprized of violations and planned and potential enforcement actions.”<sup>7</sup>

A second truth worth mentioning here is the *Guidelines*’ recognition that “enforcement by a single sovereign is the most common means of enforcing civil environmental laws.” This implies that, while desirable in appropriate instances, joint enforcement by a state and the federal government will be relatively rare. This is neither a good nor bad situation, but a recognition of current realities and a reflection of the existing paradigm of modern environmental law — a paradigm the *Guidelines* recognize when noting that “[t]he federal government and the states share common goals of, and overlapping authorities for, protecting the environment. This fact is reflected in many of the federal environmental statutes which are premised on cooperative federalism.”<sup>8</sup>

By its terms, “cooperative federalism” implies a mutually beneficial relationship between the enforcing sovereigns, and the *Guidelines* support this theme by noting that “[j]oint enforcement can bring to the table both local and national perspectives” and that it “can lead to synergy and an efficient allocation of litigation resources. . . .”<sup>9</sup> The *Guidelines* point out that “[j]oint enforcement can be helpful when a case is large and complex, involves multi-state facilities or national issues, or involves claims under several environmental statutes when federal and state resources and authority can complement each other.”<sup>10</sup>

This is perhaps the grandest promise of the *Guidelines* and, while empirical evidence of its truth may be hard to come by, anecdotal evidence appears to be strong.

Take, for example, the recently announced settlement with the agri-business giant, Archer Daniels Midland Company (ADM), which involved the United States, eleven states, and three counties.<sup>11</sup> The case against ADM was initially begun by the State of Illinois in 1999 for violations of the Prevention of Significant Deterioration (PSD) air quality control program. In March, 2001, ADM approached EPA to open discussions on resolving the compliance concerns of Illinois, the federal government, and the other states and counties. The settlement announced will cover operations at fifty-two plants in sixteen states and will cost ADM an estimated \$340 million over ten years. The settlement will reduce emissions of a variety of hazardous and other air pollutants by an estimated 63,000 tons per year. In addition, ADM will shut down a number of old emissions units and accept emission limitations on many others. ADM has also agreed to pay a civil penalty of \$4.6 million to be split among the settling parties and to initiate supplemental environmental projects estimated to cost \$6.3 million.

One could arguably assert that such a comprehensive settlement initiated by a defendant is not the best example of state/federal coordination, but to do so would miss an important point. It is significant to note that the little over two years between ADM’s letter of commitment to negotiate in March 2001<sup>12</sup> and the announced settlement of the action in April 2003 is a remarkably short time for a settlement of such scope and magnitude, involving so many parties. One of the potential pitfalls of any multi-party litigation is getting past the parochial interests of each party toward the goal of a comprehensive settlement. Effective communication among the parties is clearly one key to avoiding such pitfalls. The *Guidelines* recommend:

[O]n-going collaboration and communication among federal and state environmental enforcement personnel in order to help ensure effective and efficient enforcement, avoid duplication of effort, reduce opportunities for state/federal conflict, and promote effective use of state and federal environmental resources.<sup>13</sup>

That counsel for each of the governmental parties in the ADM case were able to reach agreement among themselves in a relatively short twenty-five-month period clearly demonstrates that communications among the plaintiffs were frequent, candid, and ultimately productive. Moreover, it is useful to consider, as the *Guidelines* suggest, the inefficiency of one possible alternative — a host of disparate lawsuits in multiple jurisdictions, with the prospect of inconsistent results from one jurisdiction to another, and the specter of expensive and drawn-out litigation.

Joint litigation can have important ramifications even when the initial violations are intrastate in nature. In January 2003, the State of Washington and EPA announced comprehensive civil/criminal settlements against Olympic Pipeline Company and Shell Pipeline Company, LP, for environmental violations resulting from the rupture of a gasoline pipeline and subsequent explosion in which three people — one eighteen-year old young man and two ten-year old boys — were killed.<sup>14</sup> The rupture also spilled 230,000 gallons of gasoline into Whatcom Creek, destroying or seriously damaging a wide variety of aquatic resources and killing over 100,000 fish.

Following the rupture, the state and federal investigators from a variety of agencies coordinated on-site response to the spill. Soon after the spill, counsel for the Washington Attorney General's office initiated early discussions with EPA Region 10 officials and personnel in the Department of Justice. An important reason for these early discussions was the recognition by the state of the overlapping state and federal jurisdictions as well as the potential for competing legal actions.

As a result of the close cooperation of the state and DOJ, settlement of this case will result in improvements in pipeline safety outside of the state's borders. Shell Pipeline is required by the settlement to spend an estimated \$62 million on a five-year program of state-of-the-art spill prevention work on 2,100 miles of pipeline in seven states. Olympic will be required to spend at least \$15 million on a spill prevention program over the entire 400-mile length of its pipe-

line in Washington and Oregon. Civil penalties and criminal fines against the two companies total \$36 million.

The settlement in this case highlights another important consideration regarding joint litigation described in the *Guidelines*.

It can fill potential legal gaps or clarify important questions of law under state authorized environmental programs. In addition, when the case is an especially high priority matter, when long term oversight requires continued shared roles, or when factual development requires intensive investigation or shared resources of client agencies, the combined resources and experience of state and federal litigators can be invaluable.<sup>15</sup>

The *Guidelines* do not purport to break new ground. In fact, much of what is in the *Guidelines* is common-sense advice, based upon the shared experiences of state and federal environmental litigators. These shared experiences and intuitive advice can be particularly helpful when enforcement officials who have not been involved in a joint enforcement effort are involved in litigation which lends itself to joint enforcement. It was the intent of the drafters that the existence of written guidelines would encourage more cooperative and collaborative enforcement between the states and the federal government. The collaborative effort involved in the drafting of the document itself is illustrative of how working together can build bridges of understanding and respect. The *Guidelines*, therefore, constitute a useful jumping off point when considering joint litigation and, it is hoped, will become a well-used and dog-eared reference for states and the federal government alike.

#### ENDNOTES

1. The *Guidelines* are available on NAAG's website at <<http://www.naag.org>>, clicking on "Environment."
2. See <[http://www.usdoj.gov/opa/pr/2003/March/03\\_enrd\\_166.htm](http://www.usdoj.gov/opa/pr/2003/March/03_enrd_166.htm)>

3. National Association of Attorneys General and U.S. Department of Justice, *Guidelines for Joint State/Federal Civil Environmental Enforcement Litigation* (2003), at 1 (hereinafter *Guidelines*).

4. *Id.*

5. *Id.* n.2.

6. *Id.*

7. *Id.* at 2.

8. *Id.* See, e.g., Clean Water Act, 33 U.S.C. § 1251(b) (Congressional recognition, preservation, and protection of primary responsibilities and rights of states), § 1319 (a) (State enforcement), § 1342(b) (delegation of National Pollutant Discharge Elimination System to state); Clean Air Act, 42 U.S.C. § 7410 (State Implementation Plans), § 7413 (Federal enforcement), § 7416 (retention of state authority); Resource Conservation Recovery Act, 42 U.S.C. § 6926 (authorized state hazardous waste programs), § 6928 (federal enforcement).

9. *Guidelines* at 2.

10. *Id.* at 2–3.

11. *United States et al. v. Archer Daniels Midland Company*, Civ. No. 03-2066 (C.D. Ill.) (consent decree lodged Apr. 9, 2003). The states involved were Arkansas, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Carolina, and Texas. Also parties were the Counties of Linn and Polk in Iowa and Lancaster County, Nebraska.

12. See *Guidelines* at 5.

13. *Id.* at 3.

14. *United States v. Shell Pipeline Company LP, fka Equilon Pipeline Company LLC, and Olympic Pipeline Company*, No. CV02-1778R (W.D. Wash.) (filed Jan. 17, 2003).

15. *Guidelines* at 3.

## DECISIONS

### All Writs Act

**All Writs Act Authorizes Court to Bind Nonparty: *United States et al. v. City of Detroit et al.*, No. 01-1277 (6th Cir. May 15, 2003)**

### Background

After a history of Clean Water Act (CWA) violations by the City of Detroit and enforcement actions, including a consent judgment with the United States in 1977 and 1981 and negotiations with the state in 1988 and 2000, the city entered into a consent judgment with the state in the U.S. District Court for the Eastern District of Michigan. This required the city to dredge and dispose of 146,000 cubic yards of sediment from Connor Creek that was contaminated by discharges from the city's sewage treatment plant. U.S. EPA was not a party to the negotiations nor to the consent judgment.

The city planned to dispose of the sediment at the Confined Disposal Facility (CDF) at Pointe Mouillee, a wetlands area on the western shore of Lake Erie. Pointe Mouillee is operated by the U.S. Army Corps of Engineers on bottomland owned by Michigan. The CDF was constructed in 1981 and has a capacity of 18,600,000 cubic yards.

The Corps initially refused to accept the sediment, but entered into negotiations with the city and the state to find a solution for the disposal of the sediment. After the Corps received permission from the state for the use of Pointe Mouillee for the sediment, it required the state to obtain the approval of U.S. EPA and the U.S. Fish and Wildlife Service (FWS) and to agree to hold the federal government harmless from liability arising out of the disposal. The Corps also insisted upon an environmental assessment. The state refused to request permission from EPA and the FWS because it maintained that obtaining these would take too much time.

The time problem arose because the city was going to obtain state funding to construct a thirty-million gallon settling basin at Connor Creek to contain the combined sewer overflow from industrial and sanitary sewage and stormwater runoff. In order for the funding to be approved, the state required the city to show it had found a location to place the dredged sediment.

In October 2000, the state and the city filed a motion seeking an order to show cause why the Corps should not be ordered to accept the Connor Creek sediment. The district court found that the Corps was frustrating the city's consent judgment with the state. In an unpublished decision by a three-judge panel, the Sixth Circuit found that a consent judgment is not a legal obligation authorizing the district court to issue orders under the All Writs Act, 28 U.S.C. § 1651(a), that impose obligations on nonparties. The full court voted to rehear the case en banc.

### Holding

The Corps argued that this suit should have been brought under the Administrative Procedure Act (APA) and that sovereign immunity precluded this action. It argued that the waiver of sovereign immunity in the APA provides only a waiver for non-monetary penalties brought under the APA. The complaint in this case was not brought under the APA and the district court did not rely on the APA in issuing its order.

The court rejected the Corps' argument, noting that it had applied the waiver of sovereign immunity in cases brought under statutes other than the APA. *See, e.g., A.E. Finley & Associates, Inc. v. United States*, 898 F.2d 1165, 1167 (6th Cir. 1990). The jurisprudence from other circuits that have addressed this issue is in accord.

The Corps' argument that the lawsuit should have been brought under the APA was rejected by the majority. It pointed out that the Supreme Court has held that "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Syngenta Crop Protec-*

*tion, Inc. v. Henson*, 123 S. Ct. 366, 369 (2002) (alteration in original) (quoting *Pennsylvania Bureau of Corrections v. United States Marshals Service*, 474 U.S. 34, 43 (1985)). The majority found this argument "overly broad." It noted that the Court in *United States Marshals* determined it would "leave open the question of the availability of the All Writs Act to authorize . . . an order where exceptional circumstances require it." *Marshals Service* at 43.

The court therefore concluded that there should be a remand on the issue of potential applicability of the APA. Should the court determine that the APA should have been used, the court must then determine if this is an "exceptional circumstance" that would render the APA inadequate and, thus, allow the All Writs Act as a means to compel acceptance of the waste material by the Corps.

The court then turned to the issue of whether the All Writs Act could be used as the basis for the court issuing an injunction against the Corps, ordering it to accept the dredged material for disposal. The All Writs Act states that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Supreme Court has stated that the act specifically authorizes a federal court "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in exercise of jurisdiction otherwise obtained." *United States v. New York Telephone Company*, 434 U.S. 159 (1977).

This authority includes the ability to issue orders to nonparties in certain situations. In *New York Telephone*, the Court held that the "power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." *Id.* at 74. However, this authority only

exists when a court is acting to impose obligations pursuant to law, not those pursuant to contract. Thus, only consent judgments that impose obligations pursuant to law can serve as the basis for an injunctive order to a nonparty under the All Writs Act. The question, then, is whether the consent judgment imposed obligations pursuant to law.

The court noted that there is no difference, under the All Writs Act, between a consent judgment and court orders. The consent judgment in this case was reached to resolve the violations of the CWA by the city. The consent judgment operated as broadly as a ruling after a full trial and was a sufficient basis for invoking the All Writs Act.

The Corps alleged that the court had abused its discretion in ordering it to accept the dredged sediment from Connor Creek because the Corps had not frustrated the consent judgment, it was not part of the underlying controversy, the order imposed a substantial burden and may have significant adverse effects on the environment, there was no showing that alternatives did not exist, and the court's order was not "agreeable to the usages and principles of law."

The Corps argued, for instance, that the various deadlines involved could have been relaxed by either the state or the court. The appellate court, however, said that there was no requirement under *New York Telephone* for the parties to seek that type of time extension. The district court was concerned that the city receive funding from the state to avoid ratepayers to incur an estimated \$40,000,000 in additional interest charges. The Corps frustrated the consent judgment when it failed to accept the materials in a timely manner. Furthermore, under *New York Telephone*, the Court's only requirement in regard to writs being issued to third parties is that the third party be not "so far removed from the underlying controversy that its assistance could not be permissibly compelled." *Id.* at 174. In that case, the Court noted the company was in the position to assist law enforcement personnel in placing a pen register on a telephone line, that it has a substantial interest in providing assistance, and the company had regularly installed pen registers.

In this case, the Corps was in a position to assist and it had a substantial interest in ensuring the environmental problems resulting from the city's CWA violations be dealt with in a timely manner. Furthermore, the CDF's sole purpose was to accept dredged materials from local rivers, so it could not be said that the Corps was "so far removed from the underlying controversy that its assistance could not be permissibly compelled." The court also found that compliance with the writ would not impose a substantial burden on the Corps. The Corps failed to point to any evidence in the record that would support its "substantial burden" argument. It would not be subject to additional liability and the city was to pay all the expense.

The Corps argued that it was required to undertake additional NEPA review prior to receiving the dredged material. The district court found that the Corps need not do additional review because of the original CDF agreement. It also noted that the Corps was not legally precluded from accepting the material because its toxicity was below hazardous levels. However, the district court did not review the Corps' determination that additional NEPA review was required under an "arbitrary and capricious" standard. Therefore, the court remanded that portion of the district court's decision so that a review of the Corps' decision could be made under the appropriate standard.

## Attorney's Fees

[Editor's note: The following two cases deal with the awarding of attorney's fees under two environmental statutes, the Clean Water Act and the Clean Air Act. The standards for the awards of fees under these statutes are somewhat different, but it is arguable that the Clean Water Act case, *Amigos Bravos v. EPA*, imposes a somewhat stricter standard under the catalyst theory than was imposed by the D.C. Circuit in the Clean Air Act case. The Tenth Circuit, however, did not discuss whether the catalyst theory was the appropriate analytical tool to use following the Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Services*, 532 U.S. 598 (2001). In an earlier decision, *Biological Diversity v. Norton*, 262 F.3d 1088, 1080 n.2 (10th Cir. 2001), that circuit stated that the catalyst theory was still available under statutes using the "as appropriate" language. In the mix is a recent decision by the Ninth Circuit in *Stella Kasza et al. v. Whitman*, No. 00-16378 (9th Cir. Apr. 14, 2003), in which, with very little discussion, the court held that the catalyst theory was no longer viable under *Buckhannon Board & Care Home* decision. That lawsuit was brought under the Resource Conservation and Recovery Act, a statute that uses language similar to the Clean Water Act's in its recovery of fees section.]

### **Court Denies Attorney's Fees to Citizen Plaintiffs Under CWA: *Amigos Bravos and New Mexico Citizens for Clean Air and Water v. Environmental Protection Agency et al.*, No. 02-2030 (10th Cir. Apr. 2, 2003)**

#### **Background**

The plaintiffs brought a citizen suit under the Clean Water Act (CWA) against U.S. EPA and its administrator, alleging that there was a failure to perform a nondiscretionary duty under the statute. The lawsuit involved a permit issued to Molycorp, Inc. Previously, the plaintiffs had maintained that Molycorp's permit should address the discharge of pollutants from its mine's waste rock piles which were seeping into the Red River. An earlier lawsuit against Molycorp concerning the same issue had been dismissed.

After the initial lawsuit filed against Molycorp, EPA undertook a study to determine the extent of pollution, if any, from Molycorp's operation. According to the plaintiff, the study determined that pollution from the waste rock piles was traveling by a groundwater hydrological connection to the Red River.

The lawsuit against EPA asked that either a compliance order be issued against Molycorp or that a civil action be filed against the company. The district court dismissed the lawsuit, holding that the action was barred by the doctrine of collateral estoppel because of the earlier action against Molycorp. The U.S. Court of Appeals for the Tenth Circuit reversed and remanded, holding that the elements of collateral estoppel had not been established. While rehearing was pending, EPA issued Molycorp a permit for the discharges complained of, on the condition that Molycorp would install a seepage interception and management system within two years that would prevent nearly all of the pollutants from the rock piles from being discharged into the river. The court thus determined that the lawsuit was mooted by the government's conduct.

On remand, the court instructed the district court to determine whether the plaintiffs were entitled to recover litigation costs under section 505(d) of the CWA, 33 U.S.C. § 1365(d). This section allows the court to "award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." *Id.* The district court noted that the catalyst theory permits a plaintiff to recover costs if the plaintiff can show that the lawsuit was casually linked to securing the relief obtained and that the defendant's actions were required by law. The trial court determined that the defendants' actions were not mandated by law. The plaintiffs appealed.

#### **Holding**

The plaintiffs alleged that EPA had a non-discretionary duty under section 309(a)(3) of the CWA to take enforcement action against Molycorp for the discharge of pollutants from the waste rock piles. Section 309(a)(3) reads: "Whenever on the basis of any information available to him the Administrator finds that any person is in violation of [effluent limitations] . . . , he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action . . ." 33 U.S.C. § 1319(a)(3).

Although the language of the statute is couched in mandatory language (“he shall”), the weight of authority is that section 309(a)(3) does not impose a mandatory duty. *See, e.g., Sierra Club v. Whitman*, 268 F.3d 898, 900, 902–03 (9th Cir. 2001). This view is in keeping with the Supreme Court’s comment in *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), that it is generally unsuitable for a court to review an agency’s decision to refuse enforcement.

Although the plaintiffs generally acknowledge that there is no duty to make a finding under section 309(a)(3), they argued that, in this case, the Administrator made the requisite finding and that, once a finding is made, the section requires enforcement action. The court disagreed. The word “finds” is not equivalent to the word “knows.” Because a study conducted by an EPA employee concluded that seepages from the waste rock piles were entering the Red River does not mean that the Administrator has “made” a finding. Furthermore, even if such a finding had been made, EPA was not required to take the action that it did in this case : issuing a permit to Molycorp.

In its second count, the plaintiffs asserted that a nondiscretionary duty to enforce could be derived from combining several sections of the CWA: 301(a), 301(e), and 402(a)(1). Section 301(a) states the rule that the “discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a). Section 301(e) provides that “[e]ffluent limitations . . . shall be applied to all point sources of the discharge of pollutants . . . .” 33 U.S.C. § 1311(e). Finally, section 402(a)(1) reads, “[T]he Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section [301(a)].”

The plaintiffs notes that all points sources “shall be” subject to effluent limitations and all discharges “shall be unlawful” in the absence of a permit. They rely on *Natural Resources Defense Council v. Costle*, 568 F.2d 1369, 1375 (D.C. Cir. 1977), for the proposition that EPA does not have the discretion to exempt a known discharger from the mandates of the CWA. The court, noted, however, that Costle does not ad-

dress whether the EPA must take action against a violator and nothing in any of the cited sections requires such action. Therefore, the court concluded that EPA is not required to take enforcement action against all illegal discharges.

The plaintiffs also argued that the court’s decision in *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1475 (10th Cir. 1985), held that a defendant’s conduct was “required by law” for purposes of the catalyst test when it was not a “wholly gratuitous response to an action that in itself was frivolous or groundless.” The court noted that, in general, its jurisprudence has required only that the defendant’s conduct in response to the plaintiff’s suit be “required by law” in order for the plaintiff to be entitled to litigation costs under the catalyst test. The decision in *J & J Anderson* expresses only one example of the type of conduct that may be “required by law.” In this case, there is no doubt that EPA’s response was not legally mandated.

Thus, the court concluded that, even if the catalyst test still applies to attorney fee requests, the plaintiffs are not entitled to recover their fees.

**Attorney’s Fees May Be Awarded in CAA Case Under Catalyst Theory: *Sierra Club et al. v. Environmental Protection Agency*, No. 00-1262 (D.C. Cir. Mar. 18, 2003)**

### Background

The plaintiffs brought a lawsuit against U.S. EPA under the Clean Air Act (CAA), challenging a rule issued by the agency concerning Title V of the CAA. The lawsuit was subsequently settled. When the parties filed to dismiss the lawsuit, the plaintiffs petitioned the court for attorney’s fees. EPA argued that the CAA’s section authorizing fee awards does not authorize the court to award fees when there has been no court-awarded relief as a result of the lawsuit.

## Holding

The CAA authorizes the court to award “costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.” 42 U.S.C. § 7607(f). The court began its discussion by analyzing two Supreme Court cases that discussed award of litigation fees, *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), and *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Services*, 532 U.S. 598 (2001). In *Ruckelshaus*, the Court addressed whether a fee award is appropriately awarded a party who has lost on the merits. *Buckhannon Board & Care* dealt with the award of attorney’s fees under a statute that awarded fees to a prevailing or substantially prevailing party and determined that the catalyst theory was an inappropriate vehicle for determining fee awards under such statutes. Thus, although neither case dealt with the exact issue involved here — whether a plaintiff who is a catalyst in bringing about a satisfactory settlement in a lawsuit under a “whenever appropriate” statute may be awarded attorney’s fees — the reasoning behind those two decisions are dispositive of the issue.

The *Ruckelshaus* Court noted that Congress, when adopting the “when appropriate” standard as opposed to the “prevailing or substantially prevailing” standard, intended to enlarge the universe of those who could be awarded the costs of litigation. In its footnote eight, the Court stated:

Congress found it necessary to explicitly state that the term appropriate “extended” to suits that forced defendants to abandon illegal conduct, although without a formal court order; this was no doubt viewed as a somewhat expansive innovation, since, under then-controlling law, some courts awarded fees only to parties formally prevailing in court. We are unpersuaded by the argument that this same Congress was so sure that “appropriate” also would extend

to the far more novel, costly, and intuitively unsatisfying result of awarding fees to unsuccessful parties that it did not bother to mention the fact. If Congress had intended the far-reaching result urged by respondents, it plainly would have said so, as is demonstrated by Congress’ careful statement that a less sweeping innovation was adopted.

463 U.S. at 686 n.8 (internal citation omitted) (emphasis in original).

EPA urged the court in the instant case to disregard this footnote and its obvious reference to the catalyst theory of fee recovery as dictum and to, instead, focus on the *Ruckelshaus* Court’s use of the canons of construction when interpreting the CAA’s plain language and legislative history. According to the agency, taking this approach would lead the court to conclude that, to be eligible for a fee award, a party must have received some form of court-awarded relief. EPA specifically noted that the *Ruckelshaus* Court concluded that “the term ‘appropriate’ modifies but does not completely reject the traditional rule that a fee claimant must ‘prevail’ before it may recover attorney’s fees” and that “[s]ection 307(f) was meant to expand the class of parties eligible for fee awards from prevailing parties to partially prevailing parties — parties achieving some success, even if not major success.” *Id.* at 686, 687–88 (emphasis in original). Because the Court used the term “prevailing,” EPA urged that the standard adopted by the *Buckhannon* Court concerning “prevailing party” statutes must apply to section 307(f).

The court noted that, even if the language in footnote eight is dictum, the Supreme Court’s dictum generally must be treated as authoritative. *See, e.g., United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997). Furthermore, the court was not convinced that the language was dictum. It noted that the language of the footnote comported with the Court’s statement in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), that “if, as a result

of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.” *Id.* at 67 n.6.

The court, thus, concluded that footnote eight of the *Ruckelshaus* decision controls the issue by interpreting section 307(f) as authorizing fee awards for “suits that forced defendants to abandon illegal conduct, although without a formal court order.” 463 U.S. at 686 n.8.

The Court in *Buckhannon* did not mention its decision in *Ruckelshaus*. The Court has instructed that if “a precedent of [the Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the] Court the prerogative of overruling its own decisions.” *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). In this case, *Ruckelshaus* directly controls. If that decision rests on reasons that were rejected in *Buckhannon*, it is up to the Supreme Court to so state.

The Eleventh Circuit in *Loggerhead Turtle v. County Council*, 307 F.3d 1318 (2002), rejected the notion that *Buckhannon* applied to “whenever appropriate” statutes. In a note in the Tenth Circuit’s *Center for Biological Diversity v. Norton*, 262 F.3d 1088, 1080 n.2 (2001), the court distinguished *Buckhannon* as applying only to “prevailing party” statutes.

The court concluded, using the catalyst theory as articulated by the dissent in *Buckhannon* (532 U.S. at 627–28), that the plaintiffs’ claims in this case were colorable, that the plaintiffs had received some of the benefit sought by the lawsuit, and that the lawsuit was a significant cause of the agency’s action in providing relief. Therefore, the court granted the plaintiffs’ motion for attorney’s fees.

## CERCLA

**Settlement with City Gives Party Contribution Protection: *City of Springfield v. Rexnord Corporation et al.*, No. 99-30106-MAP (D. Mass. Mar. 28, 2003)**

### Background

The City of Springfield, Massachusetts, brought a lawsuit against Rexnord Corporation concerning contamination at a site that had been used by the defendant as a chain belt manufacturing facility for about forty years until 1969. The property was conveyed to the Springfield Redevelopment Authority (SRA), which then conveyed it to the city along with other properties that it had acquired to the north of the property. Earlier tests of the property found that no remediation was necessary.

In the early 1990s, in preparation for building a school on the site, the Massachusetts Department of Environmental Protection (DEP) took soil samples and found that the area was significantly contaminated. The city undertook a site assessment and found contamination by lead, polychlorinated biphenyls, and petroleum products. The city cleaned up the site and filed a suit against Rexnord seeking recovery of costs under both the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and state statutes. Rexnord filed a third party complaint against previous owners of the several other parcels that made up the site. Several of the third party defendants filed counterclaims seeking costs, contribution, and cost recovery.

After trial commenced, the city and Rexnord reached a settlement. The settlement included a covenant not to sue and an assignment of the city’s rights to Rexnord against other persons.

The city and Rexnord then jointly filed a motion to dismiss the third-party counterclaims for contribution, claiming that such suits are barred under the consent agreement and CERCLA.

## Holding

Section 113(f)(2) of CERCLA provides:

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.

42 U.S.C. § 9613(f). The Massachusetts law is similar.

The text of the statute does not expressly include settlements with municipalities or private parties within its ambit of protection. Nonetheless, the court concluded that the “better view of the law” is that the protection does extend to such parties. First, such a conclusion is supported by the intent of CERCLA: to achieve prompt cleanup of hazardous waste sites and fairly allocate the costs of cleanup to those responsible. These goals are best served by encouraging settlements. Thus, courts have interpreted the protection to extend to private parties.

The court noted the First Circuit’s language in *Dedham Water Company v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1986): “CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment. [Courts] are therefore obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purpose.” In *City and County of Denver v. Adolph Coors Company*, 829 F. Supp. 340, 344 (D. Colo. 1993), the court opined that “Congress did not intend for its listing of ‘United States or a State’ in CERCLA § 9613(f)(2) to be exclusive of cities.”

The court, therefore, held that the settlement agreement between the city and Rexnord provides them with the same protection from contribution suits as a state or the federal government would enjoy.

The third party defendants argued that the cases cited by the court were distinguishable because they involved far more complex litigation than did this case. The court noted, however, that there is no “complexity” threshold in any statute or decision. The third party defendants also argued that Rexnord and the city had failed to give proper notice in order to gain the contribution protection. The court agreed that the notice did not comply with technical requirements, but commented the third party defendants had actual notice. Furthermore, the court held that the statute only requires notice from the United States or a state, not from municipalities or settling private parties.

## ESA

**Court Upholds Constitutionality of ESA: *Rancho Viejo, LLC v. Gale Norton et al.*, No. 01-5373 (D.C. Cir. Apr. 1, 2003)**

## Background

Rancho Viejo wishes to build a 380-home residential development on 202 acres in San Diego County, California. Its plans include the use some of some of the acreage including portions of a streambed that would provide fill for the project. The property provides habitat for the arroyo toad, listed as an endangered species under the Endangered Species Act (ESA). After the developer applied for a section 404 discharge permit from the U.S. Army Corps of Engineers, the Corps determined that the project “may affect” the toad population and it sought formal consultation with the Fish and Wildlife Service (FWS).

In May 2000, the FWS informed Rancho Viejo that a fence it had erected parallel to the bank of the creek interfered with the toad's ability to move from its upland habitat into the creek where it bred, resulting in an illegal take of the species. In August, the FWS issued an opinion that the planned excavation would jeopardize the continued existence of the toad and offered an alternative plan for the development.

Rancho Viejo filed a complaint in the U.S. District Court for the District of Columbia alleging that the listing of the arroyo toad and the application of the ESA in this instance exceeded the federal government's power under the Commerce Clause. Relying on the court's decision in *National Home Builders v. Babbitt (NAHB)*, 130 F.3d 1041 (D.C. Cir. 1997), the district court granted the federal government's motion for summary judgment. Rancho Viejo appealed.

### **Holding**

In *NAHB*, the court held that the take provision of the ESA as applied to a construction project that imperiled the habitat of the Delhi Sands Flower-Loving Fly constituted a valid exercise of Congress' commerce power. In reaching that decision, the court applied the four factors used by the Court in *United States v. Lopez*, 514 U.S. 549 (1995), in determining whether an activity regulated by statute substantially affected interstate commerce. The *NAHB* court concluded that the loss of biodiversity has a substantial effect on our ecosystem and, thus, on interstate commerce, and that the protection of flies regulated and substantially affected commercial development activity, which is plainly interstate. In this decision, the court focused on the second *NAHB* rationale, but stressed that, in doing so, it did not intend to discredit rationales other circuits have used or the first rationale of the *NAHB* court.

The four *Lopez* factors are: (1) Whether the regulated activity has anything to do with commerce or any economic enterprise; (2) whether the statute contains an express jurisdictional element; (3) whether there are express congressional findings concerning the impact on interstate commerce; and (4) whether the relationship between the regulated activity and interstate commerce is too attenuated to be regarded as substantial. In this case, the regulated activity, according to the court, is the construction of a housing development — an activity that is plainly an economic enterprise. Since the court focused on the construction of the housing project as the regulated activity, it was incumbent on Rancho Viejo to demonstrate that its project was without substantial interstate effect. It failed to argue this point; instead, its argument was that the effect on interstate commerce of preserving endangered species is too attenuated to be regarded as substantial.

The court noted that the other two *Lopez* factors were not satisfied, but that this was not fatal to the constitutionality of the statute. Courts may determine independently whether the statute satisfies Commerce Clause requirements and congressional findings merely allow the court to evaluate the legislative judgment that the activity in question substantially affects interstate commerce.

Rancho Viejo argued that the Court's decisions in *United States v. Morrison*, 529 U.S. 598 (2000), and in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001), invalidate the court's conclusion in *NAHB*. It contended that *Morrison* holds that non-economic activity cannot be regulated under the Commerce Clause, no matter its effect on interstate commerce. The court disagreed with this characterization of the decision, but noted that it makes no difference to this case whether the *Morrison* decision may be read that broadly. In this case, the regulated activity is Rancho Viejo's planned commercial development that will result in the taking of the arroyo toad. Similarly, the Court in *SWANCC* instructed that the evaluation should be on "the precise object or activity that, in the aggregate, substantially affects interstate

commerce.” 531 U.S. at 173. Focusing on plaintiff’s construction project, therefore, is the appropriate way to analyze the issue in question.

The court quoted with approval the *NAHB* decision: “It is plain, then, that . . . the Congress contemplated protecting endangered species through regulation of land and its development . . . . Such regulation, apart from the characteristics or range of the specific endangered species involved, has a plain and substantial effect on interstate commerce.” 130 F.3d at 1059 n.12.

The plaintiff asserted that a statute, in order to survive Commerce Clause scrutiny, must be aimed at economic activity and not merely regulate it for some other purpose, as the ESA does. The court disagreed. It is not for courts to make a determination as to what Congress’ primary motivation was in passing legislation:

[D]istilling the true or primary legislative purpose out of the motivations of 435 representatives and 100 senators is inherently problematic. And it is that difficulty that makes the project a dangerous one — dangerous because the indeterminacy of outcome leaves courts open to the charge that they have manipulated the determination of purpose in order to achieve their own policy preferences, and because rejecting a stated congressional purpose as “untrue” reflects considerable disrespect for the pronouncements of a democratically elected branch of government.

Slip op. at 8.

Furthermore, under a long line of cases, the Supreme Court has held that Congress may act under the Commerce Clause to achieve noneconomic ends through the regulation of commercial activity. *See, e.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

The appellant also argued that the ESA bans takings that are not economic in character. It bans the activities of a casual hiker as well as those of a larger commercial developer. The court responded to Rancho Viejo’s argument by quoting the Court in *Lopez* that “where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under the statute is of no consequence. 514 U.S. at 448 (emphasis omitted). Furthermore, this case does not involve a casual hiker, but the regulation of a commercial real estate development.

Lastly, Rancho Viejo noted that *Morrison* articulated the requirement that a distinction be drawn between “what is truly national and what is truly local.” 529 U.S. at 617–18. Building on that statement, the appellant argued that the ESA represents a usurpation of power over local land use decisions. The court disagreed. Drawing on the Fourth Circuit’s decision in *Gibbs v. Babbitt*, 214 F.3d 483, 497 (2000), the court noted that federal protection and regulation of endangered wildlife has traditionally been an area of shared federal and state concern and, thus, does not impermissibly tread on state powers. The *Gibbs* court noted congressional concern that “protection of endangered species is not a matter that can be handled in the absence of coherent national and international policies: the results of a series of unconnected and disorganized policies and programs by various states might well be confusion compounded.” *Id.* at 502.

Since there has been no subsequent jurisprudence that has undermined the precedential authority of *NAHB*, the court concluded that the opinion controlled the decision in this case. Therefore, it affirmed the judgment of the lower court.

## Trespass/Nuisance

### **Colorado Supreme Court Holds Unabated Hazardous Waste Migration Is Continuous Tort: *Robert N. Hoery v. United States*, No. 02SA241 (Colo. Feb. 24, 2003)**

#### **Background**

The plaintiff owns a home in the East Montclair neighborhood of Denver, Colorado. The property has a groundwater well to irrigate the lawn and vegetable gardens. The well is contaminated by trichloroethylene (TCE) which emanates from the former Lowry Air Force Base, seven blocks south of Hoery's property. The United States stopped all operations at Lowry related to the use of TCE in 1994. However, a toxic plume containing TCE continues to enter Hoery's groundwater and soil.

Hoery brought a lawsuit under the Federal Tort Claims Act (FTCA) against the federal government in 1998 alleging, among other things, continuing trespass and nuisance. The district court dismissed the suit, holding that Hoery's claims were time-barred by the two-year statute of limitations under the FTCA. In so holding, the court determined that the claim was one for a permanent tort action. The court also determined that Colorado law would also consider that the wrongful act alleged was a permanent, not a continuing tort. On appeal, the Tenth Circuit reviewed Colorado jurisprudence and then certified two state law questions to the Colorado Supreme Court: Does the continued migration of toxic chemicals from the defendant's property to plaintiff's property constitute continuing trespass and/or nuisance under Colorado law? Does the ongoing presence of those toxic chemicals on plaintiff's property constitute continuing trespass and/or nuisance under Colorado law? The court answered both questions in the affirmative.

#### **Holding**

The court began by discussing the elements of trespass and nuisance. Quoting from the Restatement and from its own jurisprudence, the court noted that a landowner "who sets in motion a force which, in the usual course of events, will damage property of another is guilty of a trespass on such property." Slip op. at 8. Likewise, a claim for private nuisance is based on a substantial invasion of an individual's interest in the use or enjoyment of his property caused by an intentional or negligent invasion of a person's interest or conduct "so dangerous to life or property and so abnormal or out-of-place in its surroundings as to fall within the principles of strict liability." Slip op. at 9.

A continuing tort is one in which a tortfeasor has placed something on or underneath the plaintiff's land and has failed to remove it. This is also true of a nuisance. If a defendant has caused a physical condition that is harmful in itself, even if the activity which originally caused the condition has ceased, that person is liable to continuing liability for the physical condition. Restatement (Second) of Torts § 834 cmt. 3. For a continuing tort or nuisance, the statute of limitations begins to run only when the defendant abates the nuisance and removes the cause of damage. Colorado jurisprudence has recognized these doctrines and, in *Wilmore v. Chain O'Mines, Inc.*, 96 Colo. 319, 327 (1935), the court applied the continuing nuisance doctrine against a defendant who discharged pollution into a creek used by downstream farms to irrigate land and crops.

Colorado courts have also adopted the concept of permanent trespass and nuisance where the trespass or nuisance would continue indefinitely. These cases have occurred in railroad and irrigation ditch cases, "where the property invasion will and should continue indefinitely because the defendants, with lawful authority, constructed a socially beneficial structure intended to be permanent." Slip op. at 16.

Hoery argued that this case should be decided under the continuing tort/nuisance theory. The United States responded that the initial tortious act, the discharge of the TCE, has stopped and the continued migration and ongoing presence of the chemical represents the damage caused by the original tortious act. It argued that the court should extend the reasoning of the irrigation and railroad cases to the facts alleged in this case.

The court noted that a number of jurisdictions have held that, if contamination remains on the plaintiff's land or if it is continuing to migrate onto his land, the defendant remains liable for a continuing tort even if the original activity causing the contamination has ceased. The court particularly noted that the decision in *Arcade Water District v. United States*, 940 F.2d 1265, 1266 (9th Cir. 1991), was instructive. In that case, the United States operated an army laundry facility for thirty-two years until 1973. The laundry discharged waste residues into the ground. A water well, operated by the Arcade Water District, was located about 2,000 feet from the facility. Tests indicated that the water in the well was contaminated and that contamination from the ground continued to leach into the well. Arcade filed an FTCA suit against the federal government, alleging that the release of laundry wastes constituted a continuing nuisance. The Ninth Circuit determined that, under California law, the allegation that contamination continued to leach into Arcade's well — and an engineer's affidavit stating that he could not say the contamination was permanent — was sufficient to raise the issue that a continuing nuisance was present.

In this case, the TCE pollution remains on Hoery's property and the pollution continues to migrate onto his property on a daily basis. Furthermore, the record indicates that the contamination is not permanent because it is remediable or abatable. There is no social benefit to the contamination; thus, the facts are not in keeping with the facts in the irrigation and railroad cases where the court adopted the permanent tort theory. Public policy favors the discontinuance of both the migration and the ongoing presence of chemicals into Hoery's property and irrigation well. Thus, Colorado law would deem Hoery's complaint to allege a continuing trespass and/or nuisance.

## Water

### **Court Upholds Constitutionality of EPA's Regulation of Storm Water: *City of Abilene and City of Irving v. U.S. Environmental Protection Agency*, No. 01-60895 (5th Cir. Apr. 2, 2003)**

#### **Background**

The Clean Water Act (CWA) requires a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of certain types of storm water into the waters of the United States. 33 U.S.C. § 1362(6). This section authorizes the agency to issue a more flexible permit (management permit) for municipal separate storm sewer systems (MS4s) that prohibits the introduction of non-storm water into the MS4 and establishes management practices.

During the two-step process leading to the issuance of a management permit, cities operating medium-sized MS4s were required to submit proposed storm water management programs that described how they would reduce the discharge of pollutants. The cities of Abilene and Irving, Texas, negotiated with EPA concerning the terms of these programs and then the agency presented the cities with proposed permits containing the conditions. These conditions require Abilene and Irving to develop, implement, and enforce programs to prevent the discharge of pollutants into their MS4s and to implement a public education program regarding proper disposal of pollutants.

The cities filed objections to these conditions. EPA continued to negotiate and also offered the cities the alternative of pursuing numeric end-of-pipe permits which would have required the cities to satisfy specific effluent limitations. The cities declined and submitted revised stormwater management programs (SWMPs), which were incorporated into the final permits. The cities' requests for relief were denied by EPA's Environmental Appeals Board; they then petitioned the U.S. Court of Appeals for the Fifth Circuit for review. They argued that EPA lacks the authority to impose conditions that require the cities to regulate their residents according to federal standards.

In the alternative, they argued that the permits violate the Tenth Amendment by compelling them to administer a federal regulatory scheme. They also alleged that the condition requiring a public education program violated the First Amendment.

### Holding

The cities argued that the CWA does not grant EPA the authority to require a state or municipality to regulate its residents as a condition of receiving a storm water discharge permit and that EPA's interpretation of the statute is not entitled to *Chevron* deference because the interpretation "invokes the outer limits of [federal] power." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001).

Section 402(p) of the CWA provides, in relevant part, that MS4 discharge permits "shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers" and "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator . . . determines appropriate for the control of such pollutants." 33 U.S.C. § 1342(p)(3)(B). According to the court, this language confers broad discretion on EPA to impose pollution control requirements when issuing MS4 permits. Therefore, even if *Chevron* deference is not appropriate, EPA was clearly within its discretion in imposing the challenged conditions in the permits issued the cities.

The cities challenged the permits under the Tenth Amendment arguing that, as the EPA applied the CWA, they violated the Constitution by requiring them to regulate third parties according to federal standards. The Supreme Court has held that, under the Tenth Amendment, the federal government "may not compel" states or localities to implement "by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925, 931 n.15 (1997).

Nonetheless, the federal government may encourage states and localities to implement federal regulatory programs as long as the decision to do so lies within the discretion of the state or local government. So long as the federal government offers an alternative to implementing a federal regulatory program that does not offend the concept of federalism, the fact that the alternative is difficult or expensive does not make the program unconstitutional. *See, e.g., Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 766 (1982).

In this case, the cities were offered a choice between the MS4 permits and a numeric end-of-pipe permit, which would have required compliance with effluent limitations. The cities chose the MS4 permit. Unless, therefore, the choice of the end-of-pipe permit offends the Tenth Amendment, there was nothing unconstitutional about EPA's regulatory activity.

In *Reno v. Condon*, 528 U.S. 141, 150 (2000), the Court held that the federal government may regulate state activities so long as it does not "seek[] to control or influence the manner in which States regulate private parties." The proposed end-of-pipe permits would have required the cities to regulate themselves, not their residents, in meeting the effluent limitations. Since the cities voluntarily chose the MS4 permits over the end-of-pipe permits, the permits do not violate the Tenth Amendment.

The cities also challenged the permit condition for public education on First Amendment grounds. This condition required the cities to deliver messages to the public regarding proper disposal of used motor vehicle oil, household hazardous wastes, and agricultural products. The court held that the same rationale it used to consider the Tenth Amendment challenge is also applicable in this case. The cities had a constitutional alternative to the MS4 permits. In fact, the public education requirement was proposed by the cities themselves and then incorporated into the permits.

The court, thus, upheld the MS4 permits issued to the cities.

## CIVIL PROCEEDINGS

### Settlements

#### Air

***Texas v. Huntsman Petrochemical Corporation, No. CV-301473 (Dist. Ct. Travis County May 13, 2003)***

Under a recently signed settlement, Huntsman Petrochemical Corporation will pay the largest fine yet assessed for violations of the Texas Clean Air Act. The company will pay \$9.45 million over a four-year period. That amount includes \$375,000 in attorneys' fees. Of the total penalty, \$1.57 million will be deferred if Huntsman satisfactorily completes a supplemental environmental project to install and operate air quality monitors at two sites along the facility's property line.

Enforcement officials estimated that the plant released more than sixteen million pounds of volatile organic compounds from its cooling tower from 1994 to 1997. Excessive amounts of nitrogen oxide and carbon monoxide were also released.

[For further information, contact Texas AAG David Preister at (512) 463-2012.]

#### RCRA

***United States and Louisiana v. Marine Shale Processors, Inc., No. CV-90-1240 (W.D. La. Mar. 14, 2003)***

A Louisiana-based waste-handling business and an affiliate have agreed to pay \$5.9 million to settle allegations that it violated federal and state air and waste laws. Marine Shale Processors, Inc., and its affiliate, Recycling Park, Inc., will pay \$3 million for violating the Resource Conservation and Recovery Act (RCRA) and the Louisiana Hazardous Waste Control Act. They will also pay \$1.2 million for Clean Air Act (CAA) violations and an additional \$1.7 million for Clean Water Act violations. The penalties for the RCRA and CAA violations will be split between the State of Louisiana and the federal government.

Marine Shale used a vitrification process to incinerate industrial waste. The remaining inorganic material was at first formed into blocks and then pulverized into aggregate ash that was placed on property owned by Recycling Park.

One of Marine Shale's clients has filed comments, objecting to the entry of the stipulated judgment.

[For further information, contact Chris Radcliffe, Louisiana DEQ, at (225) 765-0236.]

## CRIMINAL PROSECUTIONS

### Indictments

#### Air (Asbestos)

***New Hampshire v. Kevin Craffey & Jose Fonseca, Nos. 03-S-62 et al. & 03-S-70 et al. (Super. Ct. Coos County Mar. 21, 2003)***

Kevin Craffey, a developer and business owner from Duxbury, Massachusetts, and Jose Fonseca of North Dartmouth, were recently indicted on eight felony counts in regard to the redevelopment of a property in Whitefield, New Hampshire. They have been charged with violating state laws and regulations regarding the removal and disposal of asbestos.

Craffey purchased the Mountain View Grand Hotel in Whitefield in 1998. He hired Jose Fonseca as his foreman to undertake interior demolition and refurbishment. The indictment alleges conduct involving knowing endangerment by exposing workers to asbestos hazards, recklessness, and conspiracy charges.

[For further information, contact New Hampshire AAG Geoff Ransome at (603) 271-3679.]

**FIFRA*****United States v. William C. Murphy*, No. CR-03-J-201-M (N.D. Ala. May 5, 2003)**

William C. Murphy of Glencoe, Alabama, was recently charged with selling counterfeit, misbranded, adulterated, and mislabeled pesticides to numerous municipalities in Alabama and Georgia. Operating under the name Sierra Chemical, the defendant is charged with violating the Federal Insecticide, Fungicide, and Rodenticide Act by selling alleged brand-named mosquito-abatement pesticides when, in fact, the ingredients did not match the label. A call from one of the trademark owners to the Alabama Department of Agriculture triggered an investigation that led to the indictment.

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

**Pleas****Lead*****United States v. Kurvin H. Grove*, No. 1:03-CR-60 (M.D. Pa. Apr. 24, 2003)**

Kurvin Grove of York, Pennsylvania, recently pled guilty to criminal obstruction of justice charges involving forging tenants' signatures on lead-based paint hazard forms and submitting the documents to U.S. EPA civil inspectors. The forms are required by the Residential Lead-Based Paint Hazard Reduction Act of 1992. Tenants are supposed to sign the forms indicating they have been notified of any existing lead hazards and return them to the landlord. Grove had been under investigation after the York Bureau of Health discovered that a child living in one of his buildings had elevated levels of blood lead.

[For further information, contact AUSA Bruce Brandler at (717) 221-4482.]

**SDWA*****United States v. Angelito Delos Santos aka Roberto Ramilo*, No. 02-00022 (D.N.M.I. Apr. 25, 2003)**

Roberto Ramilo has pled guilty to conspiracy to defraud with respect to the falsification of bottled water samples. Ramilo, who had been indicted under the name of Angelito Delos Santos, was in the business of supplying and maintaining drinking water filtration equipment to garment factories, bottled water companies, and restaurants on the Island of Saipan. The defendant admitted to tampering with drinking water samples to make it seem that the samples met federal Safe Drinking Water Act standards.

The plea agreement calls for the defendant to spend fifteen months in prison.

[For further information, contact AUSA Patrick Smith at (670) 236-2980.]

**Sentences****Water*****United States v. James Goldman, Melanie Purvis, and George Metts*, No. 02:00563 (D.S.C. May 5, 2003)**

James Goldman, former vice-president and secretary of Tin Products, Inc., Melanie Purvis, former environmental supervisor, and George Metts, former wastewater treatment operator, were each recently sentenced in a case involving illegal wastewater discharges from the Tin Products facility in Lexington, South Carolina. The discharges of tin-based compounds known as "organotins" passed through the sewage treatment plant and entered Red Bank Creek, a tributary of the Congaree River, killing nearly 1,000 fish. The discharges eventually caused the treatment plant to close.

Goldman was sentenced to spend eighteen months in prison and serve one hundred hours of community service. Purvis was sentenced to five months' imprisonment, five months' home detention, and a \$7,500 fine. Metts was sentenced to six months' home detention, five years' probation, and one hundred hours of community service.

Tin Products is now out of business.

[For further information, contact AUSA Bob Jendron at (803) 929-3063.]

## UPDATES

Unpublished Opinions: In August 2000, in a decision by Judge Richard Arnold of the U.S. Court of Appeals for the Eighth Circuit, the court held that it was unconstitutional for courts to bar lawyers from citing unpublished opinions. (*Anastasoff v. United States*, 223 F.3d 898, *vacated on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000). See the October 2000 issue of the *Journal*.) Although the case was later rendered moot, the decision — and the increased electronic availability of these decisions — have prompted renewed discussions concerning the use of unpublished decisions in appellate briefs. Now an advisory committee of the Judicial Conference has proposed a new rule that would remove any prohibition or restriction on the citation of unpublished or non-precedential decisions in federal courts. The D.C. Circuit and the Fourth and Sixth Circuits already permit such citations. Other circuits permit citations but only as persuasive authority.