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A Tale of Two Sites: How Insured Fixed-Price Cleanups Expedite Protections, Reduce Costs, and Help the EPA, the SEC and the Public

By

Michael O. Hill*

This article compares two waste oil Superfund sites virtually identical in size and character but vastly different in policy approach and cleanup results. The first site employed an Insured Fixed-Price Cleanup (IFC) and, as a result, was cleaned up in nineteen months, at forty percent below estimated costs and with no litigation. At the second site, where an IFC has not been used, cleanup has been stalled for years, estimates of future cleanup costs rise yearly as the site contamination spreads, and more has already been spent on attorneys' fees and other transaction costs than was required to clean up the IFC Site in its entirety. The IFC Site is now being used as public fields and open space; at the non-IFC Site, no beneficial use is foreseeable for years. At the IFC Site, the cleanup was funded solely by the Potentially Responsible Parties (PRPs) who had sent the waste to the Site; at the non-IFC Site, the public has footed the lion's share of the bill. Finally, at the IFC Site, the PRPs identified and set aside from the start funding and insurance for more than twice the estimated cleanup costs; at the non-IFC Site, the Securities & Exchange Commission (SEC) and public have virtually no assurance that the PRPs have even identified, much less set aside, even half of the government-estimated cleanup costs.

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IFCs are a relatively new tool and any of several reasons might discourage or even prevent their use at a particular site. Still, at sites where IFCs are well-suited, they offer enormous public and private benefits. This article is written to urge policymakers in general — at EPA, the SEC, Congress, and the states — to consider IFCs as a way past existing obstacles to Superfund cleanups. It urges policymakers to enact guidance, regulations, and/or statutes to encourage the use of IFCs as an environmental tool. Three specific regulatory suggestions are outlined at the end.

When an IFC was first proposed five years ago for the IFC Site that is the focus of this article—the Portland Bangor Waste Oil (PBWO) Superfund Site in Wells, Maine—the Wall Street Journal foresaw the use of IFCs as holding the potential to “end the tangle of Superfund litigation” and otherwise provide public benefits.¹ In 2000, immediately following judicial entry of the PBWO settlement, officials from the State of Maine hailed the settlement as “revolutionary.”² Finally, in 2002, following the completion of the PBWO cleanup, the Boston Globe revealed that the Wall Street Journal and the State of Maine's prognoses were on the mark: “The Portland-Bangor Waste Oil site was once one of Maine's most polluted and poisonous eyesores. . . . Today it is a grassy field where the community will host games for children and choose a name for the site from a school contest”³

Five years into their history, IFCs have proven to be an important environmental tool by the results at the PBWO Site and at over 50 other sites. The PBWO Site cleanup was directed by the State of Maine. The non-IFC Site, by contrast, is being led by EPA. Presently, most IFC sites are not federal sites of any kind. This article discusses why policymakers, both state and federal, should encourage IFCs.

I. The Two Sites

A. PBWO. The site where an IFC achieved a timely and cost-effective cleanup—with adequate funds and insurance provided up front—is the Portland Bangor Waste Oil (PBWO) Superfund Site in Wells, Maine.

As set forth more fully in the judicial consent decree entering the *PBWO* settlement, *State of Maine v. U.S. and Settling Nonfederal Defendants*, No. 00-64-B-C (D. Me. May 30, 2000), approximately 3,000 PRPs had allegedly sent their waste oil to the site. The decree was entered on May 30, 2000. Approximately 60% of the PRPs contributed about \$15M, an amount that the Cleanup Contractor (TRC Companies, Inc.) believed was sufficient under an IFC model to complete the cleanup *and* purchase enough insurance and bonding to cover potential costs increases up to \$30M. Nineteen months later—less than 1/5 the average federal cleanup time—the cleanup was done, and less than a year after that, a site-naming contest was held by the local elementary school and a community celebration held on the site's new fields.⁴ Nowhere else in Superfund's twenty-two-year history has a cleanup of this size and complexity been accomplished with such speed and obvious public benefits.⁵

B. *Beede*. By contrast, roughly fifty miles to the west of the *PBWO* cleanup, progress at the Beede Waste Oil Superfund Site (*Beede*) cleanup has languished for years. The majority of the *Beede* site PRPs (as measured by their respective waste volumes) collectively asked EPA to allow the same Cleanup Contractor and Insurer that accomplished the *PBWO* IFC to try an IFC at *Beede*. Whether consciously or not, EPA has discouraged the IFC effort, through refusals to meet, imposition of changing conditions, and in other ways.⁶ In the interim, EPA's mostly-administrative costs have grown to over \$20M, the plumes have spread, and the PRPs have spent millions of dollars on attorneys' fees and other non-cleanup costs, precisely the type of costs that Congress and Presidents have long identified as perhaps the most critical problem in the Superfund Program.

Decades have passed since the regulators were first put on notice of the *Beede* Site's problems, yet cleanup still remains years away and with no identified plans for any beneficial re-use. Whereas an IFC allows all PRPs to settle from the outset, EPA has allowed only the smallest of the *Beede* PRPs to settle (less than

ten percent of the total by waste volume). Moreover, those PRPs who were allowed to settle were required to do so at a price roughly twenty percent more than they could have under an IFC, because EPA's approach does not reflect any of the cost advantages presented by an IFC (discussed in Section III, below). The purpose here is not to "bash" the specific regulators involved at the *Beede* Site. As noted, IFCs are a relatively new tool and common misconceptions about them remain (*see* Section VI, below). Moreover, two EPA Regions (Regions II and IX) have been very receptive to, and have in fact implemented (though the Region IX model is somewhat different from that which is proposed here).⁷ The point of this article is to encourage policymakers in general to consider IFCs where appropriate as a cost-effective and environmentally sound solution.

II. The Mechanics of an Insured Fixed-Price Cleanup (IFC)

The mechanics of an IFC are probably best explained through the use of a hypothetical. Assume a Site (Site X) that has an EPA estimated cleanup cost of \$100M and where the waste came from sixty PRPs, fifty of whom each sent one percent of the waste (and therefore likely qualify as "De Minimis" PRPs under EPA's Policies⁸), and ten of whom each sent five percent of the waste (and therefore are considered "Major" PRPs). In a nutshell, the PRPs transfer into a "Cleanup Account" sufficient funds to accomplish the entire cleanup. The sufficiency of the funds is first triplechecked by three independent entities—the Contractor, the Insurer, and the Government—each of whom has a vested incentive to ensure the adequacy of the funds. (The separate incentives of these three entities to ensure adequacy of funding is explained in Section IV.B). Simultaneously, the PRPs collectively purchase an insurance policy that provides at least twice the estimated costs of the cleanup. Thus, at the \$100M Site X, the PRPs might put \$100M into the Cleanup Account plus pay the Insurer a \$20M premium in order to obtain another \$100M in cleanup costs through insurance. In this way, for \$120M, the PRPs have assured EPA that \$200M in cleanup costs will be available.

In return for the \$20M premium, the Insurer is obligated to EPA to: (1) hold the estimated cleanup costs in the Cleanup Account and pay those funds to the Contractor only as the cleanup is accomplished; and (2) provide another \$100M in cleanup costs if the costs exceed the amount held in the Cleanup Account. The Insurer has every motivation to limit the amount paid to the Contractor (*i.e.*, pay only those costs that are reasonably incurred), because if the \$100M in the Cleanup Account is used up before the cleanup is complete, the Insurer must provide up to another \$100M to complete the cleanup. If the Insurer fails in this, EPA can look to the Major PRPs for completion of the cleanup. In most cases — and under the policy approach advocated in this article — the government gives up nothing under an IFC; it loses no rights with respect to any PRP, and it gains rights with respect to a new and voluntary PRP — the Cleanup Contractor. The Contractor voluntarily becomes a PRP and thus remains entirely subject to the government's control, forever, with respect to the type and adequacy of the cleanup. If the Contractor becomes bankrupt or fails in any other respect, the government still has the balance of the \$100M in the Cleanup Account *plus* another \$100M in Insurance Proceeds. Finally, if the Cleanup Account and Policy are exceeded, then just as the government can do under today's settlement policies, the government can still pursue the Major PRPs.⁹ The *only* PRPs who get a full release are the De Minimis PRPs — the same ones that get full releases under today's policies. Bottom line: The government merely gains a new and voluntary PRP and gives up none of its authority with respect to the pre-existing PRPs. Further details concerning the mechanics can be found in the *PBWO* Consent Decree.¹⁰

III. Public and Private Cost Savings

Under an IFC, cost savings are achieved in at least four significant ways:

1. Lower Premium for Equal Coverage.

Continuing with the \$100M Site X hypothetical, under EPA's Settlement Policy, each individual Major PRP who settled under EPA's current policies would

need \$7.5M to settle with EPA. This number is reached by taking the PRP's five percent share of \$100M to get \$5M and then adding to that number a fifty percent premium to protect EPA in case of cost overruns up to \$200M.¹¹ De Minimis PRPs—who today are eligible to obtain complete releases from EPA with no chance of reopeners—are typically required to pay a one hundred percent premium, thus increasing their one percent contribution (\$1M) to a total contribution of \$2M. Total contributions from all PRPs would be \$175M. By contrast, through the private insurance market, the PRPs could buy insurance that similarly covered cost increases of up to one hundred percent (*i.e.*, up to \$200M), but only pay a fifteen to twenty-five percent premium for that coverage. The government would still have the \$200M in available cleanup funds, but for a total cost of around \$120M. Collective savings would be \$55M, or over thirty percent.

As an aside, it is worth noting that, given the availability of this less costly means to obtain protection against cost overruns, EPA's demand that PRPs pay fifty to one hundred percent premiums for coverage that could be purchased for far less in the private market is arguably not allowed under Section 107(a) of the statute, since that provision allows EPA to recover only costs that are "necessary." 42 U.S.C. § 9607(a).

2. Increased Efficiencies in the Cleanup.

The next saving comes from the increased efficiencies of a cleanup done by a single PRP instead of a collective effort by tens, hundreds, or even thousands of PRPs. These savings can be from fifteen to forty percent of the total. Even though the Contractor/PRP remains fully under EPA's direction and must perform the cleanup just as (and as long as) EPA dictates, the IFC model (where the cleanup is done by a single-PRP) enables both the Contractor and the EPA to operate far more efficiently than multiple PRPs can under the traditional approach. At the *PBWO* Site, the Cleanup Contractor accomplished a government-estimated \$25M cleanup for less than \$15M. At the *Beede* Site, the same contractor promised to perform the government-estimated \$46M cleanup for \$40M, even while purchasing insurance to cover cost increases up to \$92M.

3. *Private Transaction Costs Avoided.*

The U.S. General Accounting Office (GAO) has estimated that PRPs spend as much as \$1 in litigation and other transaction costs for every \$2 they spend on the actual cleanup.¹² While this estimate was provided in 1994, the author of this article is unaware of any GAO or other government-sanctioned estimates since then. Some improvements have been made, particularly with EPA's increased use of De Minimis settlements and other administrative reforms. Still, the problem remains, more acutely at some sites than others. At the Keystone Landfill in Pennsylvania, collective legal costs were estimated to exceed the original estimate of cleanups costs.¹³ For purposes of this article, the point is that IFCs can be accomplished with *no* litigation, as happened at the PBWO site. While some legal fees will still be incurred (*e.g.*, to negotiate and enter the settlement), they are only a small fraction of what they could be otherwise.

4. *Public Transaction Costs Avoided.*

At the *Beede* Site, EPA has already spent over \$20M, most of it in the form of transaction costs, such as organizing the PRPs. EPA's own cost model states that, Region by Region, EPA spends twenty-nine to fifty-four percent just in indirect costs (rent, administration, and the like).¹⁴ At the PBWO site, these costs were almost entirely avoided, since the government obtained an early settlement for full relief and left it to the Cleanup Contractor to organize the PRPs and then carry on their work. Although the government remains entirely in control of the Contractor, interacting with one Contractor is, of course, far less costly and far more efficient than interacting with hundreds or thousands of PRPs.

IV. IFCs Promote the Policies of EPA and the SEC

IFCs are not only legal—as evidenced by the court's entry of the *PBWO* decree—but they promote existing EPA and SEC policies and goals.

A. *EPA Policies and Goals*

The ways in which IFCs meet EPA's policies and goals of expediting cleanups and the cost savings were discussed above. This section provides a summary of the goals, it cites EPA Guidance documents that state them, and it discusses the manner in which IFCs meet them.

- EPA has an identified goal of preserving the Superfund (unfortunately, the fund will run out of money next month¹⁵) and encouraging private party cleanups.¹⁶ Because IFCs use only private funds (from PRPs), and because IFC cleanups are done by the PRPs (or the Cleanup Contractor as their agent), IFCs advance these two government goals.

- EPA seeks to minimize its own legal and administrative costs and to focus instead on achieving prompt cleanups.¹⁷ IFCs expedite settlements and enable the EPA to interact with just one PRP (the Contractor) instead of multiple pre-existing PRPs.

- Perhaps in recognition of the fact that most Superfund PRPs did not break the law or act irresponsibly in any other way, EPA has a stated policy goal of reducing PRPs' legal and other transaction costs.¹⁸ IFCs advance this goal because they avoid litigation and promote early settlements, and because through an IFC the pre-existing PRPs pass off to the Contractor the task of interacting with the government during the cleanup.

B. *SEC Policies and Goals*

For over three decades, scholars and other entities have urged the SEC to do more to require publicly traded companies to disclose their environmental liabilities.¹⁹ Despite those calls, one EPA report found that seventy-four percent of companies failed to comply with SEC reporting requirements with respect to environmental liabilities.²⁰ A group of foundations and investment managers, concerned about the hidden costs of environmental liabilities and the effect on their portfolios, urged that the SEC enforce more stringently

the environmental disclosure rules, noting that “the environmental accounting loopholes have not been closed.”²¹

Where IFCs are used, they correct this problem. As noted in Section II, before an IFC is implemented, the PRPs must collectively identify how much it will cost to clean up the site *and* insure it against cost overruns. They then collectively set aside those funds by placing the anticipated cleanup costs in a Cleanup Account (more formally called a “commutation” or “experience” account) and also pay the premium for an insurance policy to protect against cost overruns. Thus, under the hypothetical Site X discussed above, the PRPs would at the outset put \$100M into the Cleanup Account and also pay a premium (*e.g.*, \$20M) to obtain insurance to cover costs of up to \$200M. Because the funds required for the Cleanup Account and the policy premium are both funded up front, necessarily the PRPs are identifying and setting aside adequate cleanup funds from the outset.

IFCs also offer an improved method for ensuring that the amount needed for the Cleanup Account is adequately estimated. The amount is not determined solely by the PRPs. As noted above, it is triple-checked by at least three outside entities, each having a vested interest in ensuring that the amount is adequate. First, the Contractor will not agree to take over the cleanup obligations unless it has independently determined that the Cleanup Account has enough funds to pay for it. Second, the Insurer will not agree to insure against cost overruns unless the Insurer is reasonably confident that overruns will not occur. In short, market incentives drive both the Contractor and the Insurer to independently ensure the adequacy of the Cleanup Account. Finally, before an IFC is allowed to proceed, the state or EPA (and often a court) must approve it. That approval will not be given unless the state or EPA (or court) has independently satisfied itself that the Cleanup Account is adequately funded.

Further, the SEC and public are given still greater assurance because, in addition to the Cleanup Account, IFCs have access to insured funding of twice the amount (and sometimes more) of the Cleanup Account.

Finally, in most cases, the SEC and public are given a third layer of protection, which is a full indemnity from the Cleanup Contractor. The degree of protection this third layer offers will depend, of course, on the assets of the Contractor. This article is not suggesting that this third layer of protection is sufficient in itself. The indemnity does, however, add to the protections offered by the separate Cleanup Account and the Insurance, and for this reason it is a net plus for the SEC and the investing public.

V. IFCs Address Government Critiques of the Superfund Program

Findings by the GAO and other government entities over the years show that the problems experienced at the *Beede* Site are neither new nor unique. Many of the problems can be blamed on the structure of the Superfund statute, which was passed hurriedly in December 1980, during the “lame duck” months of the Carter Administration. While much has been done already to improve the Superfund Program, much remains to be done. IFCs are an important tool to overcome many of the problems.

Transaction Costs. As noted above, the GAO has reported that, at Superfund sites, PRPs spend as much as \$1 in litigation and other transaction costs for every \$2 they spend on actual cleanup.²² While some improvement has been made on this number (*e.g.*, the 1995 administrative reforms encouraging *De Minimis* Settlements), IFCs can vastly reduce these transaction costs because they are accomplished from the outset without litigation and because the settlement is offered from the outset to *all* PRPs — small *and* large.

Delay in Cleanup. In 1998, the GAO found that EPA took an average of 9.4 years from the discovery of the contamination to get a site added to the National Priorities List, and another 8 to 10 years to complete the cleanup.²³ The PBWO remedy was completed in less than one-fourth of that time. There are two reasons for this expedition: (1) a single Contractor-PRP can work far more efficiently than a multi-party PRP group; and (2) the Contractor-PRP has a

vested interest in expediting the cleanup in order to expedite its payments (which are held in a “Cleanup Account” and paid out only as the cleanup is accomplished). It is important to remember, however, that since the Contractor becomes a statutory PRP, EPA will always remain in control of the speed and scope of the cleanup.

A common misconception is that EPA might have to sue the Insurer, or step back in and pay for the entire cleanup if the Insurer and the Contractor were to become insolvent. It would not, at least not under the type of IFC that is discussed in this article. That is because all of the Major PRPs would remain liable to the EPA, and thus EPA could look to them if the Insurer and the Contractor were insolvent or otherwise failed in their obligations. In fact, because IFCs accelerate settlements (largely because the PRPs get a better deal for less money, as described in Section III), EPA is in a *better* position with respect to the PRPs because EPA will not need to sue them — the Major PRPs will have already settled and be bound by a Consent Decree.

Measurable Improvement in Reform. In 2000, the GAO reviewed sixty-two EPA administrative reforms and found that forty-two “did not have a fundamental effect,” another six “did not have measures to demonstrate [results],” and another seven had no demonstrated achievements. In all, of sixty-two reforms, only seven had fundamental and measurable effects.²⁴ IFCs have fundamental effects (*e.g.*, lower costs, faster cleanups, greater assurances of funding), all of which are measurable.

Promoting the “Polluter Pays” Principle. IFCs do not rely on the Superfund, but instead use only PRP funds, thus promoting EPA’s goal of having the “polluter” pay, rather than the taxpaying public. Furthermore, and related to the “delay in cleanup” principle above, by collecting private funds around a settlement structure that encourages the expedition of cleanup, IFCs expedite cleanups. The problem of delays through lack of public funding is even more acute now that the Superfund has run out of virtually all of its money.

EPA’s Inspector General found that shortages in the public funding had led EPA to “slow[] the cleanup of thirty-three highly contaminated hazardous waste sites because of funding shortfalls.”²⁶ A Knight Ridder analysis issued in April of this year found that the number of Superfund cleanups completed in fiscal years 2001 and 2002 fell forty-one percent compared with the annual average for the previous eight years. While not a panacea, IFCs’ private-funding mechanism helps avoid this.

VI. Common Questions or Misconceptions Regarding IFCs

This section briefly addresses common questions and/or misconceptions regarding IFCs and also identifies sites where they are best applied.

1. *What Factors Make a Site a Good Candidate for an IFC?*

The best sites are those where the expected cleanup costs are \$5M or higher. Where costs are below that, the Contractor’s expected margin is not large enough to justify the risks it is taking. Other factors that favor IFCs are (a) a large number of PRPs, or high transaction costs for any other reason, since IFCs reduce or avoid transaction costs; and (b) an outside need for cost certainty—such as a merger, acquisition, or sale—since IFCs provide all sides enormous cost certainty.

2. *Do IFCs Compromise the “Polluter Pays” Principle?*

No. In fact they promote it. IFCs—and the insurance behind them—are entirely funded by PRPs. IFCs reduce the government’s (and thus the public’s) costs.

3. *Can IFCs Be Done Under Today’s Regulatory Framework?*

Yes. IFCs can and already have been accomplished, both at the state and federal level. Yet for reasons that are not always clear, IFCs have not been used as much as they could have.

4. *Does the Government Still Determine the Cleanup Parameters?*

Yes. As noted, the government loses no rights. An IFC merely adds a PRP—albeit a voluntary and well-funded PRP. The government tells the Contractor/PRP what the cleanup should be, and when and whether the cleanup is done.

5. *Will the Government Have to Sue an Insurance Company?*

No. As noted above, the government loses no rights under an IFC. Just as happens under settlements today, under an IFC the government reserves the right to sue all Major PRPs. EPA has expressly insisted on that right, and PRPs have agreed to it. At the same time, to provide the PRPs with increased certainty and to avoid transaction costs, two EPA Regions have said that they will look first to the Contractor/PRP (as funded by the Insurer). If the Contractor fails to meet its obligations, the government can pursue the PRPs.

VII. Regulatory Suggestions

As noted, IFCs are already allowable by law, and they promote public policy, both environmental and financial. What's needed is something to encourage their broader use, particularly at federal sites. Three possible policy tools are (1) a policy presumption favoring the consideration of IFCs; (2) specific numeric goals to encourage the use of IFCs within a stated time frame; and (3) creation and implementation of Guidance.

1. *Policy Presumption.* Under EPA's current settlement policies, Regions are guided to use specific settlement premiums as *presumptive* starting points: one hundred percent premium when the PRPs obtain a full release, and fifty percent when the PRPs obtain a release that is subject to "re-openers" (e.g., if the remedy fails). See Section III(1), above. While the Regions are not firmly bound by these presumptions, where the presumptions are departed from, the Regions are directed to explain the departure in writing.²⁶ The same approach could be used for IFCs. Whereas they should not be required at every site,

given the many public benefits that IFCs can bring, policymakers could reasonably ask that they be considered.

2. *Numeric Goals.* In the mid-1990's when EPA began implementing its Brownfield initiative—designed to convert contaminated and abandoned, idled, or underused industrial and commercial sites to productive use—it set specific numeric goals, with deadlines. Specifically, EPA challenged itself to implement fifty Brownfield cleanups within the first two years.²⁷

Policymakers should set similar numeric goals in the IFC context. Even a far more modest goal would be an enormous help. Specifically, EPA Headquarters and the SEC could challenge each of the ten EPA Regions to implement at least one IFC within the next eighteen months (or by the end of 2004). In case some Regions miss this target, EPA Headquarters could challenge itself to ensure that a missed Region's target is made up by an additional IFC elsewhere, so the public is assured of at least ten IFCs nationwide by the end of 2004.

3. *Creation and Implementation of Guidance.* Finally, when EPA began implementing its Brownfield initiative, it expressly identified as a goal for the year 1995 the development of new Guidance.²⁸ The danger of identifying this regulatory step is that the Guidance could take months or even years to create, and so this step, taken alone, could actually postpone the use of IFCs. However, if as it did with Brownfields, EPA combines this step with a concurrent step of identifying a numeric goal, then in the long run this step will likely facilitate the widespread use of IFCs where they are appropriate.

Conclusion

With now over five years of hindsight, the 1998 Wall Street Journal has been proven right. IFCs do end the tangle of Superfund litigation; they can reduce costs to the public and the PRPs; they can expedite cleanups; and they can provide unique and presently unavailable assurances to the SEC. Given the enormous and demonstrated policy benefits, EPA and the SEC should take active steps to promote the use of IFCs.

ENDNOTES

¹ John J. Fialka, *Experiment May Point the Way to Ending Tangle of Superfund Litigation Around U.S. Superfund Law*, WALL ST. J., Apr. 29, 1998, at A-24.

² BNA DAILY ENV'T REP., June 8, 2000, at A-6.

³ David Arnold, *Speedy Dump Site Cleanup Celebrated*, B. GLOBE, Oct. 26, 2002, at B-3.

⁴ *Id.*

⁵ Further information concerning the *PBWO* settlement can be found in the decree reflecting the settlement and implementing the cleanup, cited above.

⁶ Further information concerning these obstacles can be found in the April and May 2002 correspondence found at <www.beedesettlement.com>, last visited August 25, 2003.

⁷ The Region II IFC obtained court approval in June 2003, one month after the initial publication of this article. *United States v. Mattiace Industries*, No. 03-CV-1101 (E.D.N.Y. June 16, 2003). Consistent with the policy model discussed in this article, the Major PRPs in *Mattiace* were not given full cash-outs. Thus, EPA retains the right to pursue the major PRPs directly if the contractor fails in its obligations or the insurance policy proves inadequate.

⁸ Although this rule may vary (*e.g.*, depending on the toxicity of one's waste), the median cut-off for De Minimis status is one percent. U.S. EPA, *Streamlined Approach for Settlements With De Minimis Waste Contributors Under CERCLA Section 122(g)(1)(A)*, OSWER Dir. #9834.7-1D (July 30, 1993).

⁹ For reasons that were unique to that case, the *PBWO* decree provided a full release to the Major PRPs as well as the De Minimis PRPs. The full release to the Majors was required to obtain the participation of enough of them to accomplish the cleanup; the state agreed to this requirement for the reasons stated in Dennis Harnish's comments following this article. As noted above in note 7, at *Mattiace* (and at virtually every other IFC site), a full release to the Majors has not been required.

¹⁰ *State of Maine v. U.S. and Settling Nonfederal Defendants*, No. 00-64-B-C (D. Me. May 30, 2000).

¹¹ *See, e.g.*, U.S. EPA, *Standardizing The De Minimis Premium* (July 7, 1995) (noting "presumptive premium figures" of "100 percent for a settlement without a cost reopener and 50 percent for a settlement with a cost reopener").

¹² GAO, *Superfund Legal Expenses for Cleanup-Related Activities of Major U.S. Corporations*, GAO/RCED-95-46, at 1 (Dec. 1994).

¹³ BNA DAILY ENV'T REP., Oct. 22, 1999, at B-1.

¹⁴ EPA Guidance, *Accounting for Indirect Costs Associated With Superfund Site-Specific Activities* (May 26, 2000).

¹⁵ *See* Eric Pianin, *Superfund to Run Out of Money*, GAO Says, WASH. POST, Sept. 3, 2003, at A15 (The Superfund "trust

fund . . . will run out of money next month . . . according to a new General Accounting Office study.").

¹⁶ EPA, *Interim CERCLA Settlement Policy*, OSWER Dir. 9835.0, at *5 (Dec. 5, 1984) ("[i]n many circumstances, cleanups can be started more quickly when private parties do the work themselves, rather than provide money to the Fund. It is therefore preferable for private parties to conduct cleanups themselves."); *see also* EPA, *Addendum to The "Interim CERCLA Settlement Policy" Issued on December 5, 1984*, at *3 (Sept. 30, 1997) ("EPA should provide strong incentive for parties to conduct cleanups rather than wait until EPA pursues cost recovery claims."). [Please note that asterisked cites are to Policy pages as the documents appear on EPA's website].

¹⁷ *See Interim CERCLA Settlement Policy*, at *7 ("[s]ubstantial resources should not be invested in negotiations with de minimis contributors, in light of the limited costs that may be recovered, the time needed to prepare the necessary legal documents, the need for Headquarters review, potential res judicata effects, and other effects . . .").

¹⁸ *See, e.g.*, 63 Fed. Reg. 24784, 24792 (May 5, 1998).

¹⁹ *E.g.*, Theodore Sonde and Harvey Pitt, *Utilizing Federal Securities Laws To "Clear The Air! Clean The Sky! Wash The Wind!"* 16 How. L.J. 906 (1971); National Research Council, *Innovative Technologies in Toxic Waste Cleanup Need Federal Boost* (1997).

²⁰ *See* EPA, Office of Enforcement and Compliance Assurance, *Enforcement Alter*, vol. 4, no. 3 (Oct. 2001); *see also* The Rose Report, *The Environmental Fiduciary: The Case for Incorporating Environmental Factors Into Investment Management* (Fall 2002).

²¹ David Bank, *Group Urges Enforcing Rules of Environmental Disclosure*, WALL ST. J., Aug. 22, 2002, at B2.

²² GAO, *Superfund: Legal Expenses for Cleanup-Related Activities*, GAO/RCED-95-46 (Dec. 1994).

²³ GAO, *Superfund, Times to Complete Site Listing And Cleanup*, GAO/RCED-98-74 (Feb. 4, 1998).

²⁴ GAO, *Superfund: Extent to Which Most Reforms Have Improved The Program Is Unknown*, GAO/RCED-00-118 (May 2000).

²⁵ Dan Morgan, *Hazardous Waste Site Cleanup Delayed*, EPA Inspector Reports, WASH. POST, July 2, 2002, at A2.

²⁶ *See, e.g.*, EPA Guidance, *Standardizing the De Minimis Premium* (July 7, 1995).

²⁷ Office Of Technology Assessment, Congress of the United States, *State of the State on Brownfields: Programs for Cleanup and Reuse of Contaminated Properties*, OTA-BP-ETI-153, at 25 (June 1995); EPA Guidance, *The Brownfield Economic Redevelopment Initiative*, 9230.0-30, at 13 (Sept. 1995) (setting forth schedule for Brownfield pilots).

²⁸ *Id.* at 25.

FROM THE STATE'S PERSPECTIVE**By****Dennis Harnish***

The Portland Bangor Waste Oil (PBWO) site was created by the mishandling of thousands of gallons of waste oil that had been collected over the years from military and other federal sources, from state and local governmental units, and from literally thousands of Maine businesses and individuals. Although the business did not do a very good job of handling waste oil, it did a far better job of keeping records regarding its nearly 3,000 customers. We obtained these records and then contracted with TechLaw to arrange the information by customer and enter it into a database. We chose TechLaw because it has experience doing similar work for U.S. EPA.

TechLaw used this database to develop an allocation list based upon the gallons of waste oil brought to the site from the premises of each customer. This list disclosed that the federal entities, collectively, had contributed about one third of the waste oil to the site. No other party had contributed as much as one percent. Since the federal government was the only major potentially responsible party (PRP), the notice of potential responsibility sent by the Maine Department of Environmental Protection (DEP) did not result in the creation of a trustee committee comprised of major PRPs. The federal government had already stated that it would pay its fair share of the cleanup costs but would not serve on a cleanup committee. No other PRP considered itself to be a major PRP.

Into this confusing picture entered the environmental contractor, TRC. As Mr. Hill noted, the PBWO site agreement did not exactly fit the model described. The PRPs insisted on "cashing out," *i.e.*, receiving releases

without the usual reopener clauses, upon entering into separate contracts with TRC and paying their allocated share to TRC. The state agreed to this unusual and risky approach for several reasons. With 2,900 PRPs, litigation would have been a nightmare (even if we sued only the federal government under strict and several liability and it brought in thousands of other defendants); there was no committee of major PRPs or any probability that one would be formed; our technical folks were pretty confident about the nature of the remedial action; the agreement called for insurance guaranteeing the cleanup in an amount equal to twice the projected cleanup costs and the state would be able to directly sue the insurance company and was not required to file a reach and apply action. Moreover, as Mr. Hill's article notes, it was very much in the interest of both TRC and the insurer to clean up the site on time and on budget.

In sum, the IFC approach worked at the PBWO Site because the state had built the groundwork for allocating liability among the various PRPs and because the state, TRC, and the insurer were able to accurately estimate the cleanup costs for the site. It also worked because the PRPs were willing to pay for insurance covering twice the projected cleanup costs, and the state was willing to provide full releases to the PRPs because of this added protection.

These supplementary thoughts should not be interpreted as suggesting that either the Maine DEP or the Maine Attorney General do not approve of the IFC approach to cleanups of contaminated sites. This approach worked well at the PBWO Site when traditional approaches failed. Certainly, the IFC approach has the potential to reduce transaction costs and expedite cleanups at other sites throughout the country. It is even more to be desired from a state perspective if the major PRPs remain on the hook until the issuance of a certification of completion, as suggested in Mr. Hill's hypothetical. We would recommend that our sister states and U.S. EPA consider such an approach in an appropriate case.

* Dennis Harnish is an Assistant Attorney General in the Maine Attorney General's Office who represents Maine's Department of Environmental Protection. He negotiated the settlement for the Waste Oil site in Wells, Maine. The views in this article do not necessarily represent those of the Maine Attorney General's Office.

DECISIONS

Air

Power Company Violated NSR Rules: *United States v. Ohio Edison Company et al.*, No. 2:99-CV-1181 (S.D. Ohio Aug. 2003)**Background**

The W.H. Sammis Station, located in Jefferson County, Ohio, is a coal-fired electric generating facility owned by Pennsylvania Power Company, a wholly-owned subsidiary of Ohio Edison, which is, in turn, a wholly-owned subsidiary of FirstEnergy Corporation. The plant consists of seven separate generating units. Beginning in 1984, Ohio Edison undertook eleven projects at the facility costing a total of \$136.4 million.

Under the Clean Air Act (CAA), major emitting facilities must obtain permits prior to making a “modification” of the facility that results in an increase in emissions unless an exemption applies to that activity. U.S. EPA, joined by the Attorneys General of Connecticut, New Jersey, and New York, brought this lawsuit, alleging that Ohio Edison had violated the CAA by undertaking the projects without receiving the required permits. Ohio Edison argued that its work consisted of “routine maintenance, repair, and replacement,” not “modifications” that triggered the permitting requirement. It also argued that it had not received “fair notice” of EPA’s interpretation of the CAA.

The CAA defines “modification” as “any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.” 42 U.S.C. § 7411(a)(4). EPA’s regulations further define “modification”:

[A]ny physical change or operational change to an existing facility which results in an increase in the emission

rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act

....

40 C.F.R. § 60.14(a).

Modifications that consist of “[m]aintenance, repair and replacement which the Administrator determines to be routine for a source category” do not trigger the permitting requirement. 40 C.F.R. § 52.21(b)(2)(iii)(a).

Holding

The primary issue in this case is whether the work performed on the units of the Sammis complex fell within the exception granted by the regulations pertaining to modifications. The primary decision on the scope of the exception is *Wisconsin Electric Power Company v. Reilly*, 893 F.2d 901 (7th Cir. 1990) (en banc) (*WEPCO*). In that case, WEPCO contended that a proposed project to extensively renovate its Port Washington Power Plant and extend its life was not, in the first instance, a “physical change,” and, if so deemed, involved merely “routine maintenance, repair and replacement.” When EPA disagreed, WEPCO appealed. The U.S. Court of Appeals for the Seventh Circuit first noted that deference was to be given to EPA’s construction of its own regulations, especially where, as in this case, the subject is technical and complex. The court easily concluded that WEPCO’s planned project was a “physical change” and, thus, a “modification.”

The more difficult question was whether WEPCO’s proposed project involved “routine maintenance, repair and replacement.” The court again noted its deference to the agency’s interpretation of its regulations. EPA’s position, as expressed in a memorandum from Donald Clay, EPA Acting Assistant Administrator in September 1988, was that a case-by-case determination would be made, looking at the nature, extent, purpose, frequency, and cost of the work. The Seventh Circuit weighed those factors and con-

cluded that WEPCO's proposed projects extended the life of the units and were not simply routine maintenance, repair, or replacement. In reaching its decision, it rejected WEPCO's argument that the court should not consider that the projects would extend the useful life of the units since any replacement project would extend the facility's useful life. The court stated:

While it is certainly true that the repair of deteriorated equipment will contribute to the useful life of any facility, it does not necessarily follow that the repairs in question would extend the *life expectancy* of the facility. The need for some repairs along the line is a given in determining in the first instance the life expectancy of a plant.

Id. at 912 (emphasis in original). The court concluded that the proposed projects were not included in the routine maintenance exclusion.

More recently, in *United States v. Southern Indiana Gas & Electric Company*, 245 F. Supp. 2d 994 (S.D. Ind. 2003), the court stated that the issue was whether EPA's interpretation of the regulation was reasonable:

The Court concludes that the EPA's interpretation of routine maintenance is reasonable and persuasive, and will defer to it in this litigation. Although routine maintenance is not defined in the regulations, the EPA's narrow interpretation is consistent with the plain language of the regulation. The EPA did not exempt "repair, maintenance and replacement;" it exempted, "routine repair, maintenance and replacement." As the Environmental Appeals Board (EAB) observed, "even without a benefit of context,

the use of the word 'routine' puts the reader on notice that irregular or unusual activities may not qualify."

Id. at 1009 (citation omitted).

Reviewing the facts involved in the Sammis projects in the light of these decisions, the court concluded that "any physical change" included in the definition of "modification" must be given its plain meaning. Therefore, any physical change that will yield increased emissions, unless covered by the exemption, triggers the permitting process. There is no question that the projects undertaken by the defendant involved "physical change" of the units. The question, then, is whether the exemption is applicable to the projects.

The defendant argued that the court should interpret the exemption broadly. The court concluded that EPA's case-by-case approach is reasonable and consistent with the plain language of the regulation as well as the purpose of the CAA. A narrow interpretation of the exemption is warranted because a broad interpretation would swallow the rule and the CAA's new source review provision. In fact, the CAA itself does not contain an exemption; therefore, a broad interpretation would be in direct conflict with the language of the statute. The court concluded that, when a coal-fired electricity generating plant undertakes activities that are not frequent, come at a great cost, extend the life of the unit, and require the unit to be out of service for a number of months, those activities cannot be considered "routine."

Ohio Edison argued that what is routine should be measured against what is standard for the industry, not what is performed by an individual facility. It pointed out that the regulation states that "[maintenance], repair and replacement which the Administrator determines to be routine for a source category . . ." will not be considered a modification. 40 C.F.R. § 60.14e(1). The court disagreed. EPA clearly interprets the regulation narrowly, requiring a case-by-case determination and the court held that interpretation to be reasonable.

The court carefully examined the following factors: (1) The nature and extent of the activities, including whether work was done by employees or outside contractors, whether funding was through the central office or the plant's budget, and whether the projects were capitalized or expensed; (2) the purpose of the activities, including whether a realized benefit was the extension of the life of the units; (3) the frequency of the activities; and (4) the cost of the activities. The court held that these factors compel the conclusion that the projects did not consist of routine maintenance activities.

The court then turned to examine the calculations used by EPA to determine whether preconstruction review of the modifications would have shown that there would be a "significant net emissions increase of any pollutant subject to regulation under the Act." 40 C.F.R. § 52.21(b)(2)(i). The court noted that the use of the "potential to emit" test would not be legally supportable under the *WEPCO* decision because Sammis was operational at the time the activities were proposed.

To calculate the baseline (pre-construction) emissions, the court noted that two different calculations must be used. For activities prior to July 21, 1992, the calculation should be based on the August 7, 1980, PSD regulations that require the use of the data from twenty-four months immediately preceding the physical change. For activities after July 21, 1992, the court used the 1992 rule or "any 2 consecutive years within the 5 years prior to the proposed change." 57 Fed. Reg. 32,323.

The parties disputed the methodology for calculating post-change emissions. Ohio Edison argued that the court should determine the actual emissions since the physical changes have been made. However, such an approach is not the approach taken by the regulations. The court considered that the rules unambiguously require that the actual post-emissions data cannot be used to determine whether pre-construction review would have shown a significant increase of emissions after construction. Therefore, the court rejected Ohio Edison's approach that would have used

an actual to actual comparison and adopted the government's methodology of "actual to projected future actual" test.

Ohio Edison also argued that the "hours of operation exclusion" applied to its activities. This exemption is contained in 40 C.F.R. § 52.21(b)(2)(iii)(f) and provides that a "physical change or change in the method of operation shall not include . . . [a]n increase in the hours of operation or in the production rate" However, this exemption in the definition of "physical change" applies only if there is no physical construction to the unit itself. This was clearly not the case here.

The court concluded that the government had proven its case by a preponderance of the evidence and that all eleven projects were in violation of the CAA.

Ohio Edison also argued that it did not have fair notice of its obligations under the CAA. Several factors are weighed to determine whether an agency clearly stated its interpretation of the regulation in issue: the plain language of the regulation; public statements by the agency; the consistency of such statements; whether there is confusion within an agency as to the proper interpretation of the regulations in question; and whether the defendant made an inquiry of the agency as to the proper interpretation. In weighing these factors, the court concluded that the language of the regulations was clear and that the defendant was aware of EPA's narrow interpretation of the routine maintenance exemption. It, thus, rejected the defendant's fair notice defense.

The remedy phase of the trial will begin in March 2004.

[Editor's note: In the beginning of its opinion, the court used strong language to criticize EPA's "highly inconsistent" enforcement efforts under the CAA. Subsequent to the release of this decision, EPA announced changes in its regulations relating to "routine maintenance." It remains to be seen how these new regulations may impact the court's decision on remedy. See 40 CFR Parts 51 and 52, available at <www.epa.gov/nsr>.]

CERCLA

PRP Cannot Bring Direct Cost Recovery Action: *Dico, Inc. v. Amoco Oil Company et al.*, No. 02-2989 (8th Cir. Aug. 14, 2003)

Background

In 1974, tests indicated that trichloroethylene (TCE) was coming from underground wells located near property owned by Dico, Inc., and maintained by the Des Moines Water Works. The site was placed on the National Priority List and divided into several operable units. Two units (OU-2/4) were located within Dico's property. Dico conducted two removal actions in accordance with orders issued by EPA. The Customer Group of potentially responsible parties (PRPs) conducted a third removal action. U.S. EPA also incurred costs associated with the removal actions conducted by Dico.

In 1996, EPA confirmed completion of the three removal actions and the Customer Group requested settlement negotiations with the government regarding the costs associated with the clean-up efforts at OU-2/4. EPA prepared a nonbinding preliminary allocation of responsibility under which sixty-one percent of the responsibility was allocated to Dico and thirty-nine percent to the Customer Group collectively. Although invited repeatedly to join in the settlement discussions and also notified that a settlement would provide protection from contribution actions, Dico did not participate in any subsequent settlement conferences. While negotiations were ongoing, Dico brought a cost recovery and contribution action against those in the Customer Group. EPA eventually finalized an agreement with the Customer Group which accorded it protection from a contribution action.

The district court granted summary judgment, dismissing the contribution action because of the settlement agreement with EPA. It also dismissed the cost recovery action, holding that, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), Dico, as a PRP, could bring only a contribution action. Dico appealed the dismissal of its cost recovery claim.

Holding

The court began its discussion by noting that both Dico and the entities within the Customer Group clearly fall within the section 107(a)(1)-(4) definition of a PRP. Under section 107, PRPs are held jointly and severally liable for a cleanup. In the Superfund Amendments and Reauthorization Act, Congress codified the right of contribution between PRPs, a right that courts had previously found through implication under CERCLA. The overwhelming authority among the circuits is that actions among PRPs must be brought as contribution actions, not as cost recovery actions.

Dico, however, argued that the holding in *Key Tronic Corporation v. United States*, 511 U.S. 809 (1994), supported the notion that a cost recovery action is available to PRPs. It noted that the Court described section 107 as "impliedly authoriz[ing] private parties to recover cleanup costs from *other* PRP's." *Id.* at 818 (emphasis added). Dico argued that the Court used "private parties" as being synonymous with PRPs. The court disagreed. *Key Tronic* dealt with whether a PRP could claim attorney's fees in a contribution action brought by another PRP. In that context, it was appropriate for the Court to use the terms "private parties" and "PRPs" together.

Dico also argued that it is not a PRP, and that it is innocent of any wrongdoing. It urged the court to adopt a judicially created "innocent landowner" exception recognized by the Seventh Circuit and various district courts. In *NutraSweet Company v. X-L Engineering Company*, 227 F.3d 776, 784 (7th Cir. 2000), the court held that an innocent landowner who did not contribute to the contamination could bring a direct recovery action. Answering Dico's argument, the court determined it need not decide whether to adopt such an exception because, in an earlier portion of this litigation, *United States v. Dico, Inc.*, 266 F.3d 867, 875 (8th Cir. 2001), the court upheld a finding of the district court that the evidence supported a finding that Dico released TCE on its property.

The court thus affirmed the lower court's grant of summary judgment.

Commerce Clause

Magistrate's Report Recommends Upholding Maine's Mercury Switch Law: *Alliance of Automobile Manufacturers v. Martha Kirkpatrick*, No. 02-149-B-W (D. Me. July 17, 2003)

Background

In 1998, the Maine legislature began a series of legislative enactments to remove mercury-laden goods from Maine's waste stream. A study demonstrated that mercury switches contained in motor vehicles ranked fourth in annual mercury generation in the state because when a car is dismantled, mercury can escape into the environment.

The dismantling and recycling of old automobiles, called the end-of-life vehicle or ELV industry, is handled in Maine by a series of junk and salvage yards, none of which is engaged in shredding or smelting. The shredding and smelting operations are performed at facilities outside of Maine; thus, the mercury in mercury switches would be released outside the state at facilities upwind from Maine, creating the potential for deposits to ultimately reach the state's environment.

To keep mercury switches from being incinerated in out-of-state smelting operations, the Maine legislature passed a statute prohibiting the Maine ELV industry from sending scrapped automobiles for processing without first removing mercury switches. The only exception was if the facility to which the cars are sent agrees to remove the switches prior to processing the vehicle. It also requires that manufacturers of automobiles that contain mercury switches set up consolidation facilities to receive the switches and pay \$1 for each switch brought to the facility. The statute also prohibits consolidation facilities from being set up at new or used automobile dealerships and requires that the system be set up so that it is not necessary to segregate switches according to manufacturer.

The Alliance of Automobile Manufacturers brought a challenge to the law, alleging, *inter alia*, that it vio-

lated the dormant Commerce Clause. It then moved for summary judgment. In its arguments, the organization admitted it did not know the true costs of the legislation to its members, but estimated start up costs of \$200,000 and annual costs of \$120,000. However, the hard costs on record appear to be roughly \$350, representing the payment of \$2 per switch (\$1 statutory fee and \$1 consolidator fee) for the 175 switches recovered as of the close of the summary judgment record.

Holding

The initial inquiry in a dormant Commerce Clause challenge is whether the challenged statute or regulation facially discriminates against interstate commerce. If facially discriminatory, under the strict scrutiny standard, the statute is invalid unless the state shows that it serves a legitimate local purpose that could otherwise not be accomplished by reasonably nondiscriminatory alternatives. If the statute is *not* facially discriminatory, then the plaintiff has the burden to persuade the court that the statute imposes a burden on interstate commerce that outweighs the putative benefit. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). However, the plaintiff in this lawsuit argued that strict scrutiny should be applied, without regard to the normal inquiry, because it was unsuccessful in lobbying against the statute being passed. In other words, the Alliance contended that, since there are no automobile manufacturing or assembly plants or facilities in Maine, it was unable to influence the political process. The magistrate judge refused to adjust the legal standard based on how much relative influence a plaintiff may have enjoyed with the legislature.

The Alliance complained that the act is "blatantly protectionist and discriminatory" because financial burdens are being placed on its members to subsidize Maine's domestic ELV industry. The court disagreed. Maine has no domestic automobile manufacturers to protect; there is no burden or withholding of any benefit based on in-state versus out-of-state status. Thus, the judge determined that the statute was not invalid *per se*.

In fact, according to the judge, recent Commerce Clause precedence has suggested that claims alleging protectionism are not actionable if they jump across markets. For instance, in *GMC v. Tracy*, 519 U.S. 278, 300 n.12 (1997), a footnote suggests that, even when a challenge is based on a regulation being an indirect burden, a claimant must make a preliminary showing that the challenged law impacts competition in a *particular* market. In this case, the Alliance has completely failed to show that the statute undermines automakers' ability to compete in any market context against any Maine enterprise. The judge concluded that, since the ELV industry in Maine is not competing in any manner or market with Alliance members, it is likely that the defendant is entitled to summary judgment on the Commerce Clause claim. Nevertheless, the judge addressed the *Pike* undue burden test as well.

The Alliance claimed that, in applying the *Pike* test, the court must weigh in every possible burden to its members, including the burden that would arise if other states enacted similar acts, against the benefit to each challenged section of the act — the charge to auto manufacturers, the consolidation facility, protection of dealerships, and the non-segregation of switches. According to this approach, there would be *no* benefit to balance against the burden because the benefit is in those sections of the act that the Alliance is not challenging — the requirement to label vehicles with mercury components and the requirement to remove mercury switches before recycling a vehicle.

The court disagreed. It noted that the case relied on by the Alliance, *Edgar v. MITE Corporation*, 457 U.S. 624 (1982), dealt with a blue sky securities law that had “sweeping extraterritorial effect,” by regulating domestic corporations' securities transactions occurring outside the state. This case is entirely different. If every state were to adopt Maine's approach to the mercury switch problem, the effect would be akin to bottle bills passed by various states. It would not create the type of problems that would arise should states attempt to impose their own regulatory schemes

that would lead to economic isolation or Balkanization, the concern that the Commerce Clause seeks to address.

The *Pike* test includes two propositions. First, health and safety regulations are more defensible than economic regulation. Second, regulations that require an industry to conduct its interstate business in one state are particularly suspect. The Alliance alleged that the challenged statute requires its members to conduct recycling businesses in Maine. However, that is not the case. The statute does not require automobile manufacturers to conduct any business in Maine which it would normally conduct outside the state; nor does it interfere with the passage of goods in interstate commerce. Furthermore, the showing of the burden to the Alliance is not sufficient to demonstrate an “excessive” burden. Thus, the challenge to the consolidation provision does not meet the *Pike* undue burden test.

The court then examined the “bounty” provision, which requires the automobile manufacturers to pay \$1 per switch removed to subsidize the recovery of the mercury. This bounty does not alter competition, nor does it constitute a protectionist tariff. Even if one were to assume that interstate commerce is at stake, it is not unduly burdensome to require manufacturers, which have placed mercury switches in interstate commerce, to pay a reasonable amount to ensure that the mercury does not escape into the environment.

The Alliance claimed that the “protection” of domestic auto dealers implicates the dormant Commerce Clause. However, there is nothing “protective” in this measure. It does not protect Maine dealerships from competition with out-of-state dealerships. It is certainly rationale for the state to limit the number of facilities to streamline state oversight of the mercury handling program. This provision is not excessively burdensome.

Finally, the “non-segregation” provision does not impose an excessive burden on the Alliance's members. The appropriate allocation of costs among manufac-

turers is addressed by the requirement that the dismantlers label individual switches with the vehicle identification number.

The judge also noted that the putative local benefits of the statute are appreciable and that each of the challenged provisions “appears” to have a rational relationship to advancing the mercury remediation effort. The magistrate judge concluded that Maine’s regulatory scheme is consistent with dormant Commerce Clause jurisprudence.

Condemnation

Condemnation Award for Contaminated Property May Preserve Right for State to Recover Cleanup Costs: *Housing Authority v. Suydam Investors, LLC, et al.*, No. A-68/69 (N.J. July 10, 2003)

Background

The Housing Authority of the City of New Brunswick desired to acquire three parcels of land in downtown New Brunswick, owned by Suydam Investors, for a redevelopment project. A Phase I environmental site assessment revealed that underground gasoline tanks had been maintained on the property, structures on the property could contain asbestos and lead paint, a spill of hazardous substances had occurred on an adjoining site, and businesses that typically use hazardous substances had conducted business on the property. Before filing the condemnation action, the authority offered Suydam \$972,000 for the property, the amount determined by the appraiser to represent the highest and best use of the property and not considering any environmental contamination that might exist there. Suydam rejected the offer.

The authority filed its condemnation action, which Suydam did not oppose. The court appointed three commissioners to determine the property’s fair market value and granted Suydam’s motion to withdraw the \$972,000 deposited in court. A Phase II environmental assessment provided cost estimates for asbestos abatement and storage tank removal. The au-

thority moved for permission to amend its complaint to allege the presence of environmental contamination affecting the value of the property, to reserve its right to recover environmental clean-up costs, and to stay the commissioners’ hearing for up to one year pending final resolution of the environmental issues.

The trial court granted the authority’s motion to file an amended complaint and granted a six-month stay so that the environmental investigation could be completed. The court also ordered that, if the environmental issues were not fully adjudicated within six months, the commissioners were to determine the value of the property as if clean and any litigation concerning the environmental issues would be severed from the condemnation action. Finally, it ordered that any compensation exceeding the \$972,000 would be deposited in court pending final resolution of the environmental issues.

Suydam appealed. The appellate court held, *inter alia*, that: 1) Environmental contamination is relevant to determining fair market value and 2) a court may not order a portion of an award to be held because that would constitute an interdicted prejudgment attachment. The New Jersey Supreme Court granted certification.

Holding

This lawsuit involves both the state Eminent Domain Act and the New Jersey Spill Compensation and Control Act as well as the federal Comprehensive Environmental Response, Compensation, and Recovery Act (CERCLA). A governmental entity has immunity under the Spill Act unless the entity itself causes or contributes to the discharge of hazardous substances or if it has acquired “ownership of real property by condemnation or eminent domain where the real property is being remediated in a timely manner at the time of the condemnation or eminent domain action.” N.J. STAT. ANN. § 58:10–23.11g–d(4).

The primary issue is how contaminated property should be valued in a condemnation proceeding. In some jurisdictions, courts have held that contamination is a

property characteristic that necessarily affects values. Other jurisdictions exclude contamination evidence, concerned about the potential of double liability, the involuntary nature of condemnation, and due process concerns. Appellate courts in New Jersey have followed both approaches.

The court noted that there was “no reason” to treat environmental contamination, which could affect the development potential of property, any differently from other physical conditions on the property. However, to the extent that the contamination is subject to cure, it should not be considered an immutable condition of land. It would be fundamentally unfair to pay a landowner a reduced price for the value of the land in a condemnation proceeding and then hold him liable under the New Jersey Spill Compensation and Control Act or similar federal and state statutory enactments for remediation costs. Furthermore, limiting the issues in a condemnation proceeding to valuation of the property without considering the environmental issues promotes speed and efficiency.

Thus, the court held that the contamination issue should be reserved for the cost-recovery action. When property is contaminated, it should be valued as if remediated and that amount placed into a trust-escrow account in court. The condemnor should also reserve its rights to initiate a separate action to recover remediation costs. Therefore, the court reversed the intermediate appellate court’s determination that contamination should be considered in determining the value of the property.

The intermediate appellate court also determined that the housing authority was not entitled to an order withholding a portion of the condemnation award until final remediation costs are determined because this would be a form of pre-judgment attachment, disallowed by the state attachment statute. This ruling makes sense if evidence of contamination is allowed in the condemnation award. However, under the court’s holding that the contamination issue should be considered separately from the amount of the condemnation award, placing a limit on what the landowner may withdraw does not constitute pre-judgment attachment.

The appellate court was concerned that a condemnor might assert frivolous or exaggerated environmental costs. However, the proceeding under state law in which a trial-type hearing can be held if the parties do not agree on the amount to be withdrawn provides a judicial overview of the issues.

The judgment of the appellate court was reversed and the case remanded to the trial court.

[Editor’s note: In a related proceeding, *New Jersey Transit Corporation v. Cat in the Hat, LLC*, No. A-42 (N.J. July 10, 2003), the court affirmed a lower court’s ruling that the final order in the condemnation proceeding may include a reservation of rights clause and the preclusion of defenses such as *res judicata* and collateral estoppel.]

Takings

Statute of Limitations Does Not Begin to Run Until Government’s Action Is of Permanent Nature: *John R. Sand and Gravel Company v. United States*, No. 02-509L (Fed. Cl. June 27, 2003)

Background

John R. Sand and Gravel Company entered into a fifty-year lease for a tract of land in Metamora, Michigan, for mining and selling sand, stone, and gravel. When drums containing hazardous waste were discovered on the property, the Michigan Department of Natural Resources began investigation of the landfill in the northern portion of the leasehold estate. In 1984, U.S. EPA placed the landfill on its National Priority List. By March 1989, EPA had taken some soil samples and installed monitoring wells both within and without the area encompassed by the landfill. Around 1992, EPA began to remove barrels and contaminated material, receiving permission to access the leasehold area from the plaintiff. During the winter of 1992–1993, EPA erected fences in the plaintiff’s plant area, temporarily preventing the plaintiff from operating its machinery and selling finished products to its customers. However, after protests from the plaintiff, EPA relocated its fences and mining and gravel operations were able to continue. Another fence was erected in

1994, depriving the plaintiff of access to its supply pond and stockpile areas. Again, after protests, EPA removed the fence in the summer of 1994. Finally, after the issuance of an administrative order and a court order enjoining the plaintiff from interfering with EPA and its contractors and representatives, a fence was completed that completely excluded the plaintiff from forty-acres of its leasehold estate.

The plaintiff brought a lawsuit, alleging a taking had occurred and requesting compensation. The government responded with a motion for summary judgment stating that the complaint should be dismissed as time-barred.

Holding

The question is whether the plaintiff's claim accrued in 1992 when EPA first installed wells, put up fencing, and began removing hazardous materials or, as the plaintiff argued, when the administrative order became effective in January 1997. In *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419, 432 (1982), the Court defined what constitutes a permanent physical taking and distinguished permanent physical occupations from temporary physical invasions:

The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical invasion is a taking [T]emporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.

Id. at 435 n.12.

Precedence in this court has established that statutes such as CERCLA may effect a *per se* taking where there is a permanent physical occupation, but "the execution of an administrative or court order, although

purporting to allow physical occupation of private property, does not by itself constitute a taking of a compensable property right." *Scogin v. United States*, 33 Fed. Cl. 291. Only when the government's action has effectively extinguished the plaintiff's right to "possess, use, and dispose of" his property interest has a permanent physical taking occurred. *Loretto*, 458 U.S. at 435.

In this case, when the wells were installed on the plaintiff's property, a permanent physical taking of the area covered by the wells occurred. Therefore, the takings claim as to that property is time-barred. However, the court concluded that a permanent physical taking of the remainder of the property did not occur until the plaintiff was physically denied access to its property. When the plaintiff protested the erection of the original fences, the government allowed access to the property and removed the fence shortly thereafter.

The government also argued that the statute of limitations should begin to run when the plaintiff knew of the existence of a claim, relying on the holding in *Coastal Petroleum Company v. United States*, 228 Ct. Cl. 864, 867 (1981). The defendant characterized the holding in that case to be that the statute of limitations begins to run once the plaintiff is on notice that it has a potential claim. In *United States v. Dickinson*, 331 U.S. 745, 748 (1947), the Court held that "when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or premature litigation to ascertain the just compensation for what is really 'taken.'" *Id.* at 749. Later cases have held that a plaintiff must act once the situation has "stabilized," *i.e.*, the permanent nature of a taking is evident and the extent of the damage is reasonably foreseeable. *Boling v. United States*, 220 F.3d 1365, 1371 (Fed. Cir. 2000).

Unlike the cases cited by the defendant, the plaintiff's claim was neither of a permanent nature nor "stabilized" in 1992. There is no showing that the plaintiff was denied its property rights, including access to sand

or gravel, until the end of 1996. Furthermore, the nature of the defendant's activities altered from time to time; fences were erected and then taken down. Wells were installed and then abandoned. Therefore, although the plaintiff appears to have known it had a potential takings claim in 1992–1994, plaintiff had almost continuous access to much of the property and was able to continue mining activities.

The court held that the claim was not time-barred and, except with respect to the monitoring wells still in operation, denied the government's motion for summary judgment.

Wetlands

Court Discusses Effect of SWANCC on Consent Decree: *United States v. Rueth Development Company and Harold G. Rueth*, No. 02-2045 (7th Cir. July 10, 2003)

Background

In 1996, the federal government sued the defendants, alleging that they failed to obtain a permit before discharging dredged or fill material into wetlands in Dyer, Indiana. In an earlier decision, the Seventh Circuit remarked that “nearly all wetlands fall within the jurisdiction of the CWA.” *Rueth v. EPA*, 13 F.3d 227, 230 (1993). The parties eventually entered into a consent decree under which Rueth was to complete wetland restoration and undertake other tasks and pay a \$23,000 civil penalty. When Rueth failed to perform some of the tasks agreed upon, the federal government moved to enforce the stipulated penalties of the consent decree. Rueth then filed a motion for vacatur or modification of the consent decree under Federal Rule of Civil Procedure 9(b)(5), arguing that the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 149 (2001) (*SWANCC*), affected the validity of the consent decree by making Rueth's original activities legal.

The district court determined that *SWANCC* had not affected the validity of the decree because the gov-

ernment had not invoked the Migratory Bird Rule as a basis for its jurisdiction. It also found that the wetlands in question were “adjacent” to navigable waters. The court denied Rueth's Rule 60(b)(5) motion and imposed penalties in excess of \$4 million. After Rueth filed a Rule 59(e) motion, claiming that there was no evidence that the wetlands were adjacent to a navigable waterway, the court vacated that portion of the order. However, it also held that Rueth was not entitled to modification or vacatur because he had waived his right to contest jurisdiction by entering into the consent agreement. Rueth appealed.

Holding

In *SWANCC*, the Supreme Court held that the Corps' exercise of jurisdiction over wetlands under the Migratory Bird Rule was invalid. The Court concluded that there was nothing in the Clean Water Act that indicated Congress intended to extend jurisdictional reach to “ponds that are *not* adjacent to open water.” *Id.* at 168. The government argued that the holding in *SWANCC* should be read to merely strip jurisdiction over isolated, intrastate ponds where the only basis for jurisdiction is that the ponds are used as habitat by migratory birds. On the other hand, Rueth contended that the decision should be read as stripping jurisdiction over all intrastate water bodies based on a nexus to interstate commerce. The court concluded that both positions are partly right. It is true that the *SWANCC* did not expressly make 40 C.F.R. § 230.3(s)(3) illegal — this regulation extends the Corps' jurisdiction to waters that “are or could be used by interstate or foreign travelers for recreational or other purposes,” waters “[f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce,” and waters that “are used or could be used for industrial purposes by industries in interstate commerce.” However, the court commented that Rueth's reading of *SWANCC* “may be the only logical extension of the case.” Slip op. at 8.

However, the effect of *SWANCC* on this case is not the issue because Rueth never chose to litigate the government's claim of adjacency to navigable waters.

Rueth waived his right to litigate the issue when he signed the consent decree. It is of no moment that, when he signed the decree, he concluded that his chances of successfully challenging the jurisdictional issue were not good. In *United States v. Krilich*, 303 F.3d 784 (7th Cir. 2002), this court stated, in regard to a Rule 60(b)(5) motion:

If a party believes that the waters at issue on his own property are not properly subject to the EPA's authority . . . he should not stipulate otherwise. . . . Like most parties that enter into a settlement or plea agreement, [the plaintiff] presumably made a tactical decision that the terms of the Consent Decree were more favorable than the costs or risks of continued litigation. Accordingly, we conclude that *SWANCC* effected no relevant change in decisional law such that the district court should have modified the Consent Decree. Nor does *SWANCC* establish that EPA's entry into and continued enforcement of the Consent Decree are *ultra vires* acts. "To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in . . . litigation."

Id. (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389).

The court affirmed the district court's judgment.

CIVIL PROCEEDINGS

Settlements

Air

***Massachusetts v. Waters Technologies Corporation*, No. SUCV 2003-03278 (Super. Ct. Suffolk County July 10, 2003)**

Waters Technologies, Inc., has agreed to pay a \$6.5 million penalty to settle charges that it violated state air pollution laws at its Taunton, Massachusetts, facility. The company manufactures chromatography equipment and distributes mass spectrometry instruments. It allegedly violated hazardous waste, air, water, and toxics use reduction laws. According to the state, the company made numerous modifications to its plant and changes in its process without seeking the appropriate air quality permits. The complaint also alleged that the company discharged contaminated industrial wastewater without appropriate permits.

As a part of the settlement, the company will conduct a pilot study to determine whether a biofilter may be satisfactorily substituted for a conventional pollution incinerating system.

[For further information, contact Massachusetts AAG Fred Augenstein at (617) 227-2200.]

***United States v. DuPont de Nemours & Company*, No. 5-03-175 (W.D. Ky. July 31, 2003)**

The federal government has reached a settlement agreement with DuPont in connection with a Clean Air Act violation involving a chemical release from a Louisville, Kentucky, fluoroproducts plant in May 1997. One of the chemicals manufactured at the Louisville facility is 1,1-difluoroethane (DFE), made by combining anhydrous hydrogen fluoride and acetylene in a large reactor. While attempting to clean a blocked valve in the discharge pipeline, workers blew out the valve, resulting in the immediate release of hydrogen fluoride into the ambient air both inside and outside the facility. DuPont was unable to contain the re-

lease for approximately forty minutes, during which virtually all of the contents of the DFE reactor, including approximately 11,500 pounds of hydrogen fluoride, escaped.

The resulting toxic cloud caused the shutting down and evacuation of four nearby chemical manufacturing plants and the issuance of health warnings to nearby residents and school children telling them to remain indoors until the hydrogen fluoride abated.

The settlement calls for DuPont to pay \$550,000 in civil penalties and perform eight Supplemental Environmental Projects (SEPs), including providing emergency response equipment and training for Local Emergency Planning Committees and setting up a website for a community group involved in environmental justice issues. The SEPs are collectively valued at \$552,000. The fine represents the largest settlement in the country for alleged air pollution violations.

[For further information, contact Cheryl Smout, DOJ, at (202) 514-5466.]

United States v. Earthgrains Baking Companies, Inc., et al., No. 4-03-01043 (W.D. Mo. July 31, 2003)

A consent decree has been lodged that settles alleged violations of Title VI of the Clean Air Act (concerning stratospheric ozone) by Earthgrains Baking Companies and its affiliated companies. Earthgrains is now owned by Sara Lee Corporation and has been incorporated into the Sara Lee Bakery Group. At the time of the purchase, Earthgrains was the second largest bakery company in the nation.

The United States' complaint alleged that Earthgrain's large industrial process appliances at fifty-seven of its sixty-seven facilities leaked refrigerants in excess of the thirty-five percent annualized leak rate permitted by relevant regulations and that the company failed to make prompt and proper repairs. More than 300 large refrigerant-containing appliances, several containing 1,000 pounds of refrigerant each, were involved in the investigation.

Under the decree, Earthgrains will pay a \$5.25 million civil penalty and must convert all of its industrial process refrigeration appliances to refrigerant systems that do not deplete the ozone layer at an estimated cost of \$5 million.

The facilities covered by the agreement are located in Alabama, Arizona, California, Colorado, Georgia, Illinois, Iowa, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin.

[For further information, contact Kirk Koester, DOJ, at (202) 514-9009, or Bob Maher, DOJ, at (202) 514-4241.]

CRIMINAL PROSECUTIONS

Indictments

Air

United States v. Carlo Giordano, Allesandro Giordano, and Autodelta USA, No. SACR03-152 (C.D. Cal. July 2, 2003)

Carlo Giordano and his son, Allesandro, were recently arrested in Nashville, Tennessee, on charges filed in California alleging that they and their company, Autodelta USA, illegally sold automobiles in California that violated the federal Clean Air Act and vehicle safety standards.

The charges allege that the defendants illegally imported approximately two dozen post-1995 model year Alfa Romeo automobiles into the United States, falsely claiming that the cars would be for personal use only. Alfa Romeos have not been built to American safety and environmental standards since the 1995 model year. Importation of such vehicles is only allowed for personal use and if the vehicles will be in the country for a limited time.

If convicted on all counts, Autodelta could be sentenced to fines of more than \$5 million. The Giordanos face a maximum penalty of five years' imprisonment on each of the eleven counts of the indictment.

[For further information, contact AUSA Richard Cutler at (213) 894-2434.]

Asbestos

United States v. Aubrey Lewis Ritz aka Lew Ritz, No. CR03160-E-BLW (D. Idaho July 14, 2003)

Real estate developer and hotel owner Lew Ritz was recently charged with eight felony counts of violating the asbestos work practice standards of the Clean Air Act. The indictment alleges that the violations occurred after Ritz became the new owner and operator of the Stardust Motel in Idaho Falls, Idaho. He allegedly hired a crew of uncertified workers to perform removal of asbestos-containing acoustical ceiling during the renovation of the facility from the fall of 2001 through the spring of 2002.

[For further information, contact AUSA Lynne Lamprecht at (208) 334-1211.]

Convictions

Water

United States v. Alexander Lapteff, No. 03-CR-78-ALL (E.D. Va. July 24, 2003)

On July 24, Alexander Lapteff of Nokesville, Virginia, was found guilty of violating the Clean Water Act (CWA) by negligently failing to properly operate and maintain the wastewater treatment facility at the Christchurch School in Christchurch, Virginia. The jury also found Lapteff guilty of making false entries in the facility's log books and making false entries on the discharge monitoring reports.

An investigation revealed, among other violations, that the facility discharged sludge and chlorine into a tributary of the Rappahannock River. A co-defendant,

Kenneth Hinkley, the owner of the company that employed Lapteff, earlier pled guilty to similar violations of the CWA.

[For further information, contact AUSA Olivia Hawkins at (804) 819-5475.]

Sentences

Air

United States v. Jet-Pep, Inc., No. CR-03-S-0127-NE (N.D. Ala. July 30, 2003)

Jet-Pep, Inc., a gasoline refiner in Holly Pond, Alabama, has been sentenced to pay a \$200,000 fine and serve three years' probation for violating the Clean Air Act by failing to perform chemical analyses of the components of its gasoline. It reported to U.S. EPA that the tests had been done.

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

Ocean Dumping

United States v. Ronald Cook, No. CR99-135 (D.D.C. Aug. 27, 2003)

Ronald Cook, 64, was recently sentenced to twenty-four months' imprisonment and three years' supervised release for ordering the dumping of trash bags full of asbestos and renovation debris into the Gulf of Mexico, the Pacific Ocean, and the Caribbean Sea.

"Captain" Cook had been hired to lead a crew performing demolition on an old ferry boat, the *Muskegon Clipper*, as it sailed from San Diego, California, through the Panama Canal to Mobile, Alabama. The boat was to be transformed into a riverboat gambling casino. Crew members photographed the dumping as it was occurring.

Cook is a Canadian citizen from Victoria, British Columbia. He was convicted on three counts of an indictment that charged him with conspiracy and sub-

stantive counts filed under the Ocean Dumping Act and the Act to Prevent Pollution from Ships.

[For further information, contact Mark Kotila, DOJ, at (202) 305-0381.]

SDWA

United States v. Angelito Delos Santos aka Roberto Ramilo, No. 02-00022 (D.N.M.I. July 29, 2003)

Roberto Ramilo of the Island of Saipan in the Commonwealth of Northern Mariana Islands was recently sentenced to fifteen months' imprisonment, three years' of supervised release, and a fine of \$3,000 for his conviction on conspiracy charges to defraud U.S. EPA with respect to the falsification of bottled water samples.

The defendant 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. He tampered with drinking water samples to make it appear as if the samples met federal Safe Drinking Water Act standards.

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

UPDATES

American Forest & Paper Association v. League of Wilderness Defenders, No. 3M10 (U.S. July 28, 2003): The petitioners have filed a motion to intervene in order to file a petition for certiorari requesting that the U.S. Supreme Court review the decision by the U.S. Court of Appeals for the Ninth Circuit in *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (2002) (see the December 2002/January 2003 *Journal*). In that case, the court reversed a decision by the U.S. District Court for the District of Oregon that had granted summary judgment to the U.S. Forest Service, holding that its aerial spraying of national forests to prevent damage to trees did not constitute point source pollution requiring a discharge permit. The Ninth Circuit concluded that the Clean Water Act clearly required permitting.

[Editor's note: On July 11, EPA issued interim guidance regarding the application of a pesticide to U.S. waters in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Under that guidance, application of pesticides to water to control pests and the application of pesticides aerially or otherwise that result in pesticides being deposited in U.S. waters does not require a National Pollutant Discharge Elimination System permit.]

Rancho Viejo, LLC v. Gale Norton et al, No. 0-1-5373 (D.C. Cir. July 22, 2003): The U.S. Court of Appeals for the D.C. Circuit has denied the petition for en banc rehearing in this case. Two judges dissented from the denial of rehearing. (See the June 2003 issue of the *Journal*.)

