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

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Dominique Alexander
Environment Project Assistant

**BANKRUPTCY FOR THE
ENVIRONMENTAL LAWYER:
A SHORT PRIMER, PART I**

By

Karen Cordry*

For many governmental lawyers, coming to bankruptcy for the first time is often described as akin to falling down the rabbit hole in Alice in Wonderland. This is particularly true for environmental lawyers, where the paradigm of a lengthy, complex (and expensive) remediation process, which places continuing liability on parties who may not have been associated with a site for years, is at direct odds with the bankruptcy notion of a tidy process to quickly resolves all of a debtor's obligations with no need for full payment of debts. Environmental law deals with obligations that run with the land and with the waste; bankruptcy law focuses on giving debtors a "fresh start." And that emphasis on the fresh start is reinforced by many bankruptcy courts that rely on general principles of the value of reorganizations to inform every discretionary decision in the case. Yet, just as Alice eventually said "You're nothing but a pack of cards," and swept away the whole troupe, so too does the Bankruptcy Code place limits on the degree to which the needs and desires of debtors trump other societal needs and requirements. This article is meant to highlight some of the places where the two systems interact, and to note how and when governments may continue to act to enforce the environmental obligations in nonbankruptcy law despite a bankruptcy filing.

* Karen Cordry is the Bankruptcy Counsel for the National Association of Attorneys General (NAAG). She graduated with Highest Honors from Wayne State University Law School in 1977 and subsequently obtained an L.L.M., again with Highest Honors, from George Washington University in 1987. She worked for the National Labor Relations Board from 1977 until February 1992; since that time, she has been employed at NAAG.

I. Bankruptcy First Principles

The first place for nonbankruptcy lawyers to start is usually with an understanding of the rationale for the emphasis on the "fresh start" principle, particularly for corporate debtors. The need to relieve over-burdened individuals from the soul-crushing weight of bills that cannot be paid and that serve only to disrupt family life is reasonably apparent. On the other hand, it is far less clear why a faceless corporation should be given an exemption from normal legal standards merely because it is insolvent. The answer to that question is based on an economic analysis in the normal course of things, an intact, functioning business will be able to employ more people, pay for more supplies — and, not least importantly, pay more outstanding debt — than will occur if that business is simply liquidated and its concrete assets sold off. Thus, it is not only in the interests of the debtor and its related parties, including suppliers, customers, and employees, for a reorganization to occur, but a successful reorganization is also likely to benefit creditors as well in most cases.

The rub, of course, comes with the reference to a "successful" reorganization. At a minimum, by the terms of the Code, a successful reorganization is one that is not likely to be quickly followed by a further need for bankruptcy assistance. On that measure, the prospects of a company filing in Chapter 11 are only moderately good. The overall rate of plan confirmation for companies filing in Chapter 11 has ranged between twenty-five percent and forty-five percent during the period from 1992 to 2002. (The higher figures, moreover, are skewed by a number of filings where a parent has filed, along with dozens or hundreds of subsidiaries, each under a separate case number. When, as usual, they confirm a single joint plan, that is nevertheless counted as a separate success for each case number.)

In addition, confirmation of a plan is considerably different from actually assuring that the plan is implemented and that the debtor goes on to a successful and healthy future life. According to studies done by Prof. Lynn LoPucki of UCLA Law School, at least seventeen percent of all confirmed plans of public

companies “fail” in the sense of not being in existence five years later, with no further visits to the bankruptcy courts.¹ The failures represent companies such as Montgomery Ward and FAO Schwartz which filed new cases within only a few years (or in FAO Schwartz’s case, only a few months) after confirming their first plan. According to Prof. LoPucki, moreover, the failure rate is substantially higher in the two districts which have the largest number of large corporate Chapter 11 filings — namely, the Southern Districts of New York and Delaware.

Thus, while most large corporate cases do usually arrive at some form of confirmable plan, LoPucki suggests that those two districts may be confirming plans that other districts would look at more skeptically. Thus, the preference of many debtors for those districts cannot be based on the likelihood that their businesses will do better there. Rather, there is some indication that it may be due to factors such as the courts’ willingness to look kindly on large administrative expense claims for professionals and to push cases forward very quickly that may appear to be debtor-friendly, but which, in the long run, may not truly benefit troubled debtors. His critics, conversely, claim that there are likely to be confounding factors that LoPucki has not adequately captured and that, in any event, in these cases the plans are being dictated by negotiations among highly sophisticated parties. In such circumstances, there is no reason for courts to substitute their conclusions for those of the parties.

The debate continues to flourish; suffice it to say that counsel who find their cases pending in New York or Delaware, or other districts that seek to emulate the case-handling techniques in those courts, are likely to face a fast-moving, high-pressure process in which many players are represented by very experienced counsel who expect the cooperation of the court to move the cases forward as quickly as possible. Government players start out with the handicap of their lesser familiarity with the process and compound that problem with the fact that, in many cases, what they want to do will throw a monkey wrench into the smooth progress towards confirmation and discharge. That is not to say that the government should back

down — but it does mean that you should not expect that other parties will welcome you to the party. However, there is much in the Bankruptcy Code that protects your position and it is your job to be familiar with the existing case law so that you can hold your own in the ongoing arguments and hearings. This article will provide a short overview of some of the likely issues. A far more fully developed exposition of these topics will be presented at the annual bankruptcy seminar for government counsel, to be held from Sept. 19–22 this year in Washington, D.C.

II. Bankruptcy Jurisdiction

The Bankruptcy Code is set forth at title 11 of the United States Code; section references will be to that title unless otherwise noted. Some additional relevant legislative language is contained in title 28, dealing with the judiciary. That title provides, at 28 U.S.C. § 151, for the designation of bankruptcy judges (who are not appointed under Article III) as a “unit of the district court to be known as the bankruptcy court.” There is, technically, then, no such thing as a separate bankruptcy court; instead, it is a part of the district court. For purposes of this discussion, though, and noting that the bankruptcy judges usually are physically separated from district court judges and have a separate court clerk system, “bankruptcy court” will be used in this article in the accepted sense as a separate functioning judicial system.

That structure was established in 1984, after the Supreme Court invalidated the original jurisdictional structure in the Code, as passed in 1978. In the *Marathon* case,² the Supreme Court concluded that the original jurisdictional structure vested too much authority in non-Article I judges, who were not adequately made subject to the control of Article III district court judges.³ Thus, the current structure technically provides for cases to be filed in the district court, from whence they are “referred” to the bankruptcy court, under 28 U.S.C. § 157(a). Any such referral can be “withdrawn” in whole or in part by the district court at any time, pursuant to 28 U.S.C. § 157(d). Only “core proceedings,” essentially those that grow out of the Code itself, may result in binding judgments is-

sued directly by the bankruptcy court; in other matters, it only issues recommended decisions and appeals to the district court are heard *de novo*.⁴

While this set of provisions appears to remove considerable authority from bankruptcy judges, in accordance with the Supreme Court's directives, it has little practical effect. First, each district court in the country developed a standard referral order that provides for *all* cases to be automatically referred to the bankruptcy court as soon as they are filed and, in reality, bankruptcy petitions are filed with a separate bankruptcy clerk and assigned to a bankruptcy judge without any intervention by anyone assigned to the district court. This division of authority, though, is significant if you wish to argue for "withdrawal of the reference" of the case or your part of it from the bankruptcy court back to the district court.

Section 157(d) provides that withdrawals may be made for "cause shown" and that the district court *must* do so if "resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." Most courts, though apply that latter provision far more stringently than would seem required by its words. Not unreasonably, they hold that "consideration" requires proof that the federal issue is material and significant to the decision, not merely tangentially relevant to the issues. Many courts, particularly in New York, add other criteria, such as that the issue must be one of first impression or that there must be a conflict between the federal law and the Code, or that it must be one that the bankruptcy court is not qualified to decide.⁵ Thus, while a CERCLA case certainly involves consideration of federal law, if the court concludes that it only requires the application of "settled law" to particular facts, withdrawal will probably be denied. Nevertheless, the possibility of withdrawal should always be carefully investigated at an early stage in the case, since it may allow you to separate your issues from the overall success or failure of the bankruptcy case.⁶

If the case or your proceeding therein are not withdrawn from the bankruptcy court, that court is free to

exercise the full scope of authority specified in 28 U.S.C. § 1334. The district (read bankruptcy courts) are given exclusive jurisdiction in Section 1334(c) over bankruptcy "cases" (i.e., the umbrella bankruptcy petition) and concurrent jurisdiction over all matters "arising in," "arising under," or "related to" the bankruptcy case. A corollary section, 28 U.S.C. § 1452(a), allows for withdrawal of any matters that are at least "related to" a bankruptcy proceeding.⁷ The first two categories (arising in and under) essentially equate to "core proceedings;" the last to a non-core proceeding. The primary difference, as noted, is the bankruptcy court's ability to issue a binding decision versus an advisory opinion to the district court which will hear the matter *de novo* on appeal. It is far more difficult to obtain the withdrawal of core proceedings even in a mandatory withdrawal situation and, for discretionary withdrawal, the non-core status of the matter is one of the most important determinants as to whether the matter can be withdrawn.⁸ In any case, core or non-core, withdrawal motions are rarely granted and, conversely, the removal powers are given wide scope.⁹ Thus, it is very likely that any matter in which a debtor has any involvement will find itself drawn into the bankruptcy courts, and, in most cases, once entwined, the non-debtor party will find it difficult to extricate itself and its litigation. Thus, it is critically important for any regulatory entity to be aware of its rights and responsibilities in bankruptcy cases so as not to be either unduly passive or unlawfully aggressive.

III. Types of Filings and Basic Concepts

There are three primary types of bankruptcy petitions, set out in Chapters 7, 11, and 13 of the Code.¹⁰ The vast majority of filings are made voluntarily under Section 301, but it is possible for creditors to force debtors involuntarily into bankruptcy under Section 303.

A. Chapter 7

1. Eligibility, Property of the Estate, and Exemptions

Virtually any type of entity can file in Chapter 7.¹¹ Upon filing, an “estate” is created, comprised of the assets of the debtor that will be distributed upon the completion of the case. The definition of property of the estate is set out in Section 541. For businesses, this includes all of the current assets of the business and any earnings during the case. For individuals, wages earned after filing are not included. In addition, section 522 sets out the exemptions that an individual debtor is entitled to claim to remove certain property from the estate. Although the Constitution authorizes Congress to pass “uniform laws of bankruptcy,” the exemption provisions provide that states can set their own exemptions and can decide if debtors may choose between a uniform set of federal exemptions or *must* take state exemptions. As a result of the level of exemptions, and the generally low level of concrete assets held by most debtors, upwards of ninety-five percent of all individual Chapter 7 cases are what are referred to as “no asset” cases, *i.e.*, those where there are no assets available for distribution to creditors. The trustee makes the initial analysis of whether the exceptions have been validly claimed or not, but creditors have a right to object as well. The time limits are short, however, and rigidly enforced; as a rule, if an objection is not raised in the requisite thirty days under section 522(l) and Bankruptcy Rule 4003(b), the exemption will be allowed, even if patently invalid. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 642 (1992). Creditors may well have information about a claimed exemption that the trustee may not know – such as the true value of a home, or the potential liability for a cause of action being asserted against the creditor – so it can be important for them to review the exemptions and either object themselves or provide the relevant information to the trustee.

2. Trustee and Filing Claims

A trustee is appointed at the beginning of each Chapter 7 case to take over all estate assets, to recover any prepetition preferential or fraudulent transfers, to

liquidate the assets, to accept claims in the small portion of asset cases, and to distribute the assets to pay those claims in accordance with the Code’s priorities, which are set in section 726. Creditors are advised not to file claims in no-asset cases, and this is good advice, particularly since the filing of a claim is deemed under the Code to waive state sovereign immunity with respect to some or all counterclaims.¹²

3. Priorities

There are a series of priorities set forth in section 507 of the Code, with the first priority being for the costs of administering the bankruptcy case, and other priorities being accorded, *inter alia*, to employee wages and benefits, domestic support claims, and taxes. There is *no* general priority for environmental claims. That language is supplemented by Section 726 of the Code. It provides for payment of priority claims — whether or not they are timely filed, so long as the claim is received by the time the trustee begins his distribution of the assets. It next provides for payment of timely unsecured claims — and claims that were filed late, but where the creditor did not have notice of the case in time to file a timely claim, but the claim could still be handled in time to permit payment thereof. Next are late claims without such an excuse, then penalty claims, then interest, and last to the debtor. Thus, in Chapter 7 cases, penalty claims are expressly subordinated to compensatory claims.

4. Section 341 Meeting and Filing Dates

After the debtor has filed his, her, or its petition, a meeting with creditors is held, referred to as the section 341 meeting (for the relevant Code section). The meeting itself is not overly important since it is rare that much real information comes out, and it is not set up to be a forum for substantial discovery. Rather, it is critical because many of the dates in the case, such as the dates for objecting to the discharge, or seeking an exception from discharge for a particular debt, are set by the Rules in relationship to the date the section 341 meeting was “first scheduled.” It is important to note that the dates run from that *scheduled* date, *not* from the date the meeting was actually held. Meet-

ings are often postponed for reasons ranging from a snow storm that shuts the court to a recalcitrant debtor's refusal to appear at the meeting or provide information. Those postponements do *not* automatically change the date of other events that are calculated as being so many days after the meeting. Those dates generally can be extended, but the request must be made before the original date expires. Not only do they not move in tandem, with the date the section 341 meeting is actually held, but Rule 9006(b)(3) explicitly bars courts from extending the dates after they have expired, no matter what the cause.¹³

The court clerk will normally send out a notice shortly after the case is filed, giving the date of the Section 341 meeting and the other related dates. It is critically important for any creditor to obtain that notice and to calendar the relevant dates as soon as it is aware that a bankruptcy case has been filed. Since there is only a limited window in which the section 341 meeting is to be scheduled (twenty to forty days after the petition is filed) and the other dates are set mechanically from that date, the courts place a substantial inquiry burden upon creditors once they learn of a Chapter 7 filing to determine the dates to which they need to adhere.

5. Discharge of Debts

The ordinary outcome of a case is a "discharge" of debts. The definition of discharge is set out at section 524. A discharge is not an elimination of the debt, or a determination that it is invalid; rather, it has a precise limited meaning. A discharge voids any judgment to the extent that it determines the debtor's *personal* liability, and enjoins any attempt to collect from a debtor *personally*. This means, for instance, that *in rem* rights that secure the underlying debt are *not* affected, even if that debt is discharged. As an example, the debtor might have a secured loan for \$15,000 on his car, which if repossessed and sold at auction, would leave \$3,000 owing on the debt. When the debtor goes through bankruptcy, the lender can still repossess the car, but can no longer proceed against him to collect a \$3,000 deficiency judgment. Another consequence, for instance, is that, because the debt

still exists, it could be used as a setoff against an attempt by the debtor to collect its own debt from the creditor at a later date.

This broad benefit for debtors is limited in two ways — an "objection" to the debtor's entire discharge may be filed under Section 727, or a creditor may seek to have its particular debt "excepted" from the discharge under Section 523. The first is a global action, the second is decided on a debt-by-debt basis. The difference is between an atom bomb and a rifle shot. Most of the objections to discharge are based on misconduct by the debtor, such as concealing assets, making fraudulent statements, and the like. There are also certain time limits on obtaining repeated discharges in succeeding cases. Finally, and critically for many government cases that are filed against businesses, Section 727(a)(1) provides that there is *no* discharge of debts in Chapter 7 except for individuals. Corporations that are liquidated do not receive a discharge, because if there is no ongoing business, there is no need for a discharge. The legislative history notes that Congress wanted to bar "trafficking in corporate shells" that would occur if corporate debts could be discharged in bankruptcy and then an *alter ego* corporation set up to resume the same business. If an objection is upheld by the court, the debtor receives no discharge at all and all of the debts remain owing after the case to the extent that the distribution of assets has not satisfied them.

Not surprisingly, courts are reluctant to apply this draconian sanction, so it is far more common for a single creditor to seek to have its particular debt excepted from discharge.¹⁴ The grounds for such an exception are set out in section 523. Originally, there were only eight, but the number has now grown to eighteen, and if pending bankruptcy legislation passes, the number will jump again. They include debts for taxes, money obtained by fraud, defalcation by a fiduciary, domestic support claims, willful and malicious injuries, penalties, student loans, and many other less common provisions. Note that, while penalties are not a priority, they are excepted from discharge, so there is something of a trade-off here. Also note that there is no exception for environmental claims, as such.

Four of the exceptions *must* be brought in bankruptcy court during a limited time after the Section 341 meeting. If no exception proceeding is brought, the claims *will* be discharged, despite the eligibility for the exception. One such exception is for property settlements in divorce, but the other three are more relevant for government counsel – section 523(a)(2) (fraud); 523(a)(4) (defalcation or fraud by a fiduciary, embezzlement or larceny); and section 523(a)(6) (willful and malicious injury). There has been some litigation under the last exception for environmental claims, but it is a narrow exception. The Supreme Court held in *Kawaauhau v. Geiger*, 523 U.S. 57 (1998) that the creditor must prove that the act was done with the intent of causing harm, not just that it was done intentionally and that harm resulted. The courts have elaborated on that holding somewhat, by using the alternative formulation that an act done with knowledge of the “substantial certainty” that harm will result is the equivalent of an intention to cause the harm, since one must be deemed to intend the obvious consequences of one’s actions. See, *e.g.*, the discussion in *In re Williams*, 337 F.3d 504, 508–09 (5th Cir. 2003).

Two cases that predate *Geiger*, but which illustrate the point made there are *In re Tinkham*, 59 B.R. 209 (Bankr. D.N.H. 1986), and *In re Berry*, 84 B.R. 717 (Bankr. W.D. Wash. 1987). In the first, the offender had some reason to believe there was a problem with his discharge, but the court did not believe the evidence rose to the level of proving that he dumped the liquids with knowledge that it was “certain or substantially certain” that harm would result. In the second, the individual debtor abandoned its premises leaving behind a number of open, unmarked containers of highly dangerous chemicals that the court found he knew could create a grave hazard if happened upon by the unwary. The Chapter 7 estate sued the debtor personally for the costs of the cleanup of the chemicals and a determination that the costs were non-dischargeable. Although the court used a somewhat lower standard than set in *Geiger* to find that the debt was excepted from discharge, its analysis of the facts suggests that it would have found that the debtor did have the requisite knowledge of the harm created by his actions.

To prove this exception, one must show both that there was an objective certainty of harm and that the debtor had an actual, *i.e.*, subjective, knowledge of that certainty of harm. The most likely scenario in which the state can prove these facts is that the debtor is a repeat offender who has already been confronted with the illegality and harm caused by its conduct. On the other hand, depending on the stringency of a permit proceeding, and the information given to a debtor in granting a permit, one might be able to show intent even on a first offense. If a state, for instance, requires all transporters of toxic chemicals to attend a training program that emphasizes that even minor spills of certain chemicals could cause great harm to the environment, this may be sufficient to except a remediation order against a company from discharge even if there is only one known incident of “midnight dumping.”

The most common discharge exception, though, that states will be able to utilize is likely to be the one for penalties owed to a governmental unit. Not only is this one far simpler to establish but it does *not* have to be heard before the bankruptcy courts. Instead, it is self-effectuating and simply exists as an implicit limitation on the debtor’s discharge. It can be heard by *any* court, and the creditor need not return to the bankruptcy court for an advance determination of its rights. Instead, the normal scenario would be that the state resumes collecting the penalty after the general discharge is entered; the debtor raises the affirmative defense of the discharge; and the government rebuts that defense by showing that the debt was for a penalty that was excepted from discharge.

A good case illustrating these issues is *Whitehouse v. LaRoche*, 277 F.3d 568 (1st Cir. 2002). Indeed, according to that case, while parties generally cannot create binding stipulations prepetition as to whether a debt fits the definition for a discharge exception under sections 523(a)(2), (4), or (6) — because those sections can *only* be applied by the bankruptcy court — there is no such limitation for the penalty exception. Thus, even though arguments could be raised about whether the debt was really a penalty or just a

disguised form of compensation for the state's costs, the First Circuit said it could simply rely on the parties' stipulation that the debt was a penalty. This is an important consideration for drafting of settlement stipulations.

One final exception of note is section 523(a)(3) — that section provides that a debt that was not listed by the debtor is not discharged if the creditor did not receive notice or actual knowledge of the case in time to file a timely claim or, in the case of exceptions, sections 523(a)(2), (4), or (6) to file a timely discharge determination. When coupled with the section 726 language on giving excusably tardy claims equal priority with timely claims, this essentially ensures that a creditor that does not have notice of the case will not be penalized. Note, though, that there is one very large caveat to this statement — under a close reading of the language, it appears that, in a no-asset case where claims are never filed, there is never a time when it has become too late to file a timely claim. Thus, both on this literal reading and on a “no harm, no foul” analysis, creditors who are not scheduled in a no-asset case are not excepted from the discharge, unless some other discharge application applies. Had the creditor received notice, it still would not have filed a claim, or if it had filed a claim, it would receive nothing. A creditor that did not receive notice would not effectively be in any different position. See *In re Beezley*, 994 F.2d 1433 (9th Cir. 1993), and its progeny.

ENDNOTES

1. Lynn LoPucki and Sara Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a “Race to the Bottom,”* 54 VAND. L. REV. 231 (Mar. 2001).

2. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

3. District courts are, of course, entitled to use non-Article III persons, such as magistrates, to handle portions of a case, but such delegations of authority are required to still leave the ultimate decision-making, in the first instance, in the hands of an Article III judge. When Congress drafted the 1978 Code, however, after a great deal of debate, it decided to allow bankruptcy judges to decide virtually all issues initially, leaving district courts

only involved in an appellate role, which the Supreme Court held was constitutionally insufficient for typical state law proceedings that were only related to the bankruptcy case and that were not based on any bankruptcy-created “public rights.”

4. 28 U.S.C. §§ 157(b), (c).

5. See, e.g., *In re Houbigant, Inc.*, 185 B.R. 680, 685 (S.D.N.Y. 1995) (withdrawal not mandated where issue was not “extraordinarily complicated,” case was not one of first impression, and there was no conflict between Code and other federal law); *In re Chateaugay Corp.*, 2002 WL 484950, p. 5 (S.D.N.Y. Mar 29, 2002) (“straightforward application of federal law to a particular set of facts” does not mandate withdrawal).

6. Withdrawal motions must be made “timely.” Title 28 does not specify a time limit for filing such a motion, but courts generally hold that it must be filed as soon as reasonably possible after the reason to do so appears. This does not mean that it must be done on an emergency basis, but the timing is usually in days or weeks, not months, and it will also be important to act before other actions are taken on the matter to be withdrawn.

7. However, a “civil action by a governmental unit to enforce such governmental unit’s police and regulatory power” is not removable. This is a corollary to the police and regulatory power exception to the automatic stay discussed below.

8. This is, in large part, because the moving party can argue for judicial economy, by suggesting that it makes little sense for the bankruptcy court to hear the matter if the district court must still conduct a *de novo* hearing on the same issues.

9. The case of *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3rd Cir. 1984) stated that the test was “whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. . . . An action is related to bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.” That phrasing has been adopted by virtually all circuits and was cited approvingly by the Supreme Court in *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 and n. 6 (1995). In practice, a number of courts have actually applied the test in a more literal and expansionist fashion than the Third Circuit actually intended in using those words. See discussion in *In re Federal Mogul-Global, Inc.*, 348 F.3d 390 (3rd Cir. 2003). Nevertheless, even in the more limited version espoused by the Third Circuit, this test paints with a very broad brush.

10. In addition to these three Chapters, there are also Chapter 9 petitions involving municipal entities, and Chapter 12 cases for family farmers. There are usually only, at most, a few thousand of the latter cases a year, and they would rarely pose an environmental issue.

11. The eligibility criteria for the various chapters are set out in section 109. Railroads, banks, and insurance companies are not eligible to file in Chapter 7.

12. This “waiver” is set out in section 106 of the Code. There is considerable reason to believe that the Supreme Court’s sovereign immunity cases should invalidate that forced waiver. However, most courts have been very reluctant to do so; as a result, any party seeking to avoid the waiver language in the Code is likely to be embarking on a long litigation road. Plainly, it is best to avoid the issue altogether by not filing claims where there is no need to do so – and filing a claim in a no-asset case is the primary example of that.

13. Interestingly, though, the Supreme Court recently held that, if the debtor itself does not raise the timeliness issue in a timely fashion, it can be held to have waived the issue. The issue is a defense, but one that can be waived if the debtor proceeds too far on the litigation of an issue before raising the timeliness question. *Kontrick v. Ryan*, 124 S.Ct. 906 (2004).

14. This can also be more helpful for a creditor in actually trying to collect its debt. When the discharge is denied, the creditor is left to compete with all of the other parties trying to collect from the debtor’s assets. If the debtor receives a discharge, the relatively few excepted debts no longer have much competition, so it may be far more likely that they can be paid at least in part.

DECISIONS

Air

Court Vacates Conditional Approval of Ozone Plan for D.C. Area: *Sierra Club v. Environmental Protection Agency et al.*, No. 03-1084 (D.C. Cir. Feb. 3, 2004)

Background

Pursuant to its obligation under the Clean Air Act (CAA) to establish National Ambient Air Quality Standards (NAAQS) for levels of pollutants in the air, U.S. EPA adopted a standard for ozone. *See* 40 C.F.R. § 50.9. EPA also classifies areas of the country as “attainment” or “nonattainment” for ozone and other pollutants. Those that are classified as nonattainment areas are subclassified as “marginal,” “moderate,” “serious,” “severe,” or “extreme.” If an area fails to reach attainment by a certain date, EPA must reclassify it to a higher classification. As the classifications increase in severity, the required air quality planning and control requirements increase in stringency.

The CAA requires that each state must adopt and submit for approval a state implementation plan (SIP) that demonstrates how implementation, maintenance, and enforcement of applicable NAAQS will be achieved in each air quality region within the state. States in ozone nonattainment areas must also submit SIPs meeting additional requirements, depending upon the severity of the ozone problem. Each SIP must demonstrate that the area will achieve the standard by the statutory deadline.

For those states with nonattainment areas, the SIP must also provide for implementation “of all reasonably available control measures [RACM] as expeditiously as practicable.” 42 U.S.C. § 7502(c)(1). Where areas within a state are classified as “serious” or “severe,” the SIP must contain a rate of progress (ROP) plan that demonstrates a three percent per year average reduction of baseline emissions for each consecutive three-year period, beginning in 1996, until the applicable attainment deadline. *Id.* at §

7511a(c)(2)(B), (d). Furthermore, the SIP must specify contingency measures that will be undertaken in the event the area does not meet its RPO milestone or attain the NAAQS by the deadline. *Id.* at §§ 7502(c)(9), 7511a(c)(9) & (d).

The D.C. area is made up of several Maryland and Virginia counties and the District of Columbia. EPA classified the area as a “serious” nonattainment area for ozone in 1991. The statutory deadline for achieving ozone attainment for the area was November 15, 1999, and SIPs demonstrating attainment and containing ROPs were due by November 15, 1994. These plans were not submitted until 1997–1998. They were amended and supplemented during 1998–2000. However, the plans did not contain a RACM analysis, ROP plans for post-1999 emission reductions, or contingency measures. Further, they did not show that the area would reach attainment by November 15, 1994. The three jurisdictions, instead, requested that EPA extend the attainment deadline by six years without reclassifying the area as “severe” although such reclassification is required by the CAA. EPA fully approved the SIPs and granted the requests to extend the deadline without reclassifying the area.

The Sierra Club petitioned the court for review, alleging that the agency could not approve the SIPs because they were missing the statutorily-required elements nor could they approve extending the deadline without reclassifying the area. The court agreed, vacated EPA’s approval, and remanded the matter to the agency. *Sierra Club v. EPA*, 294 F.3d 155 (D.C. Cir. 2002) (*Sierra Club I*). In November 2002, the Sierra Club filed a new motion asking that the court enjoin EPA to compel it to reclassify the D.C. area as severe and to take final action, either approving or disapproving the SIPs. In *Sierra Club v. Whitman*, No. 0202235 (D.D.C. Dec. 18, 2002), the court ordered EPA to determine whether the D.C. area had attained the NAAQS for ozone by the statutorily mandated date and, if not, to reclassify the area and to approve or disapprove the SIP by April 17, 2003.

EPA’s response to the court order is the subject matter of this current action. In January 2003, EPA determined that the D.C. area had not attained the NAAQS by the statutory deadline of November 15, 1999, and, thus, reclassified the area as severe. The statutory by-product of the reclassification was to extend the ozone attainment deadline to no later than November 15, 2005. EPA also extended until March 1, 2004, the deadline for submitting revised SIPs to comply with the requirements for severe nonattainment areas.

EPA also granted conditional approval to the existing SIPs, notwithstanding that they lacked the three elements that the court in *Sierra Club I* identified as being required by the statute: the RACM to be implemented, the ROP plan, and the contingency measures. Its conditional approval was based on letters submitted by the three jurisdictions that expressed commitment to cure the deficiencies and to comply with the additional requirements of the severe area classification by April 17, 2004.

The Sierra Club petitioned for review of EPA’s actions.

Holding

The Sierra Club argued that EPA violated the CAA by conditionally approving the deficient SIPs. EPA responded that section 110(k)(4) of the act specifically provides for conditional approval:

The administrator may approve a plan revision based on a *commitment of the State to adopt specific enforceable measures* by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

42 U.S.C. § 7410(k)(4) (emphasis added). The court concluded that EPA's construction of the conditional approval provision was contrary to clear congressional intent.

There is no dispute that the SIPs did not contain the elements required for full approval. However, EPA argued that the SIPs qualified for conditional approval because they contained other required elements and the letters submitted committed the states to remedy deficiencies within one year. However, these letters contained no specific enforceable measures of any kind. EPA acknowledged that lack, but noted that the states had not yet completed the necessary analyses to select the specific enforceable measures. EPA's position is that the states needed only to commit to adopt specific enforceable measures by a certain date, not specify what those measures will be.

The court concluded that EPA's interpretation of the statutory language was contrary to the statute's plain meaning. The statute requires that the states commit to adopt *specific* enforceable measures, not merely commit to adopt unspecified measures. The statute also requires a commitment to *adopt* measures by a certain date. The letters committed only to adopt the measures *if* adopting were determined to be necessary.

In *Natural Resources Defense Council (NRDC) v. EPA*, 22 F.3d 1125 (D.C. Cir. 1994), the court concluded that EPA's construction of section 110(k)(4), the conditional approval section, was inconsistent with the statute. In that case, EPA gave conditional approval to "committal" SIPs which merely promised to take appropriate, but unidentified, measures in the future. Although the facts in this case are distinguishable from the situation in *NRDC*, the cases are legally indistinguishable. *NRDC* rejected EPA's construction of the statute because it turned conditional approval into a "means of circumventing" SIP deadlines. *Id.* at 1134-35. This is the same case here.

EPA conceded at oral argument that its position was that it could grant conditional approval on a state's

promise to do next year what it was already required to have done by the CAA.

The court also discussed the Sierra Club's contention that the substance of two elements the states did submit as part of their SIPs were faulty. The court concluded that the plaintiff's attack on the insufficiency of the states' attainment demonstration could not be sustained. EPA adjusted the extrapolations of the photochemical grid model because it was concerned about the model's reliability and uncertainty. Only after the agency's adjustments were the SIPs able to demonstrate attainment. Section 182(c)(2)(A) of the CAA requires that the attainment demonstration be "based on photochemical grid modeling or any other analytical method determined by the Administrator. . . ." The term "based on" is ambiguous. The court concluded that EPA's supplemental adjustments appeared well-suited to determining whether the SIPs actually provided for attainment. The court also found that there was a rational connection between the data and the agency's choice. The agency did not act arbitrarily and capriciously.

The Sierra Club also contended that the states' ROP plan was inadequate because it was not based on the updated model. EPA answered that the model used was the only one available when the states originally submitted their plan and resubmitted them as part of the D.C. area SIPs in February 2002. The new model had then been available for only a month. EPA's policy is to not require states that have already submitted SIPs or who submit them shortly after a model is available to revise the SIPs. The court concluded that EPA's policy was not arbitrary or capricious.

Finally, the Sierra Club complained of EPA's "bump-up" action which reclassified the D.C. area from "serious" to "severe" nonattainment and then extended the states' final deadline for submitting SIPs complying with the CAA's requirements for severe areas. Section 183(i) of the CAA gives EPA authority to adjust applicable statutory deadlines when it reclassifies an attainment area. The Sierra Club argued that EPA should have retained the original submission dead-

lines, but EPA contended that this would give the reclassification retroactive effect and that would be both unfair and inconsistent with the agency's past practice. The court had previously rejected the Sierra Club's position in *Sierra Club v. Whitman*, 285 F.3d 63 (D.C. Cir. 2002), and it rejected it once again.

The court, therefore, vacated and remanded EPA's conditional approval action but denied the balance of the petition.

CERCLA

Section 113(h) Does Not Bar Facial Constitutional Challenge to CERCLA's UAO Regime: *General Electric Company v. Environmental Protection Agency*, No. 03-5114 (D.C. Cir. Mar. 2, 2004)

Background

General Electric (GE) Company brought a facial challenge under the Due Process Clause to the unilateral administrative order (UAO) regime of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The district court dismissed the complaint for lack of subject matter jurisdiction under section 113(h) of CERCLA. GE appealed.

Holding

Section 113(h) of CERCLA provides that:

No federal court shall have jurisdiction under Federal law other than under section 1322 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any

order issued under section 9606(a) of this title, in any action except one of the following [exceptions]. . . .

42 U.S.C. § 9613(h).

Since none of the statutory exceptions were relevant to this case, the court looked at whether section 113(h) would prohibit jurisdiction regarding a facial challenge to preclude pre-enforcement review of constitutional challenges.

The court determined that the plain text of section 113(h) does not indicate that Congress intended to preclude such review. Under the section, federal courts are divested from suits that challenge "removal or remedial action selected under" section 104 or that would require the court to "review any order issued under" section 106(a) of CERCLA. The section qualifies what challenges cannot be heard. Thus, GE's facial constitutional challenge does not fit within the plain text of section 113(h).

The en banc court in *Reardon v. United States*, 947 F.2d 1509, 1515 (1st Cir. 1991), came to a similar conclusion. The district court had rejected *Reardon*, finding that it applied only to CERCLA's lien provisions. The appellate court disagreed. The *Reardon* decision turned on the distinction between challenges to EPA's administration of CERCLA and challenges to the statute itself. In addition, the court in *Employers Insurance of Wausau v. Browner*, 52 F.3d 656, 666 (7th Cir. 1995), held that a due process challenge "is not precluded by those [section 113(h)] limitations" because it was "a proper invocation of nonstatutory review." *Id.*

Precedent involving the distinction between facial or "systemic" challenges and those deemed as-applied or particularized also supported the court's reading of the statute. In *Johnson v. Robinson*, 415 U.S. 361, 373-74, for instance, the Court held that a constitutional challenge to a veterans' benefit statute was not barred by a provision prohibiting review of individual veterans' benefits. In *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), the Court con-

cluded that the statute under scrutiny only barred review of “a determination respecting an application” for Special Agricultural Worker (SAW) status. The challenge in the lawsuit was not to a specific determination but, rather, to the way the SAW provision was being administered.

Where other courts have concluded that section 113(h) bars constitutional challenges, they have done so in cases involving specific challenges to EPA orders and actions or they have not focused on the plain text of the statute.

EPA relied on the decision in *Shalala v. Illinois Council on Long Term Care*, 529 U.S. 1 (2000). The court, however, found it unhelpful. First, the text of the statute in question in that case was much broader, prohibiting direct judicial review of any action “to recover on any claim arising under” the Medicare Act. Second, the Court relied upon congressional purpose and its own precedents interpreting the Medicare Act to conclude that review of claims that certain regulations violated the Due Process Clause were barred.

EPA also argued that the court should distinguish *McNary* because the statute under review barred all judicial review of application denials; it did not merely postpone them, as does CERCLA. The court, however, said the agency had pointed to no principle that would make any less relevant a distinction between facial and as-applied constitutional challenges to a statute barring pre-enforcement review of agency actions as opposed to a statute that precludes judicial review altogether.

In order, then, for EPA to prevail, it had to show that “as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it.” *Engine Manufacturers Association v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996). EPA failed to meet this burden.

The district court expressed the concern, repeated by EPA on appeal, that an interpretation allowing a fa-

cial challenge would run counter to the purposes underlying section 113(h). EPA, for instance, argued that GE’s pre-enforcement constitutional challenge is inherently a challenge to a response action because the relief sought would have the effect of interfering with the agency’s ability to issue orders and enforce clean-up operations. The court disagreed. A decision on GE’s due process claim favorable to GE would afford EPA the opportunity to provide due process review at an early stage. A decision rejecting the challenge would remove a later impediment from EPA’s enforcement action. As the First Circuit observed in *Reardon*, the practical considerations usually present in a pre-enforcement review case do not exist in a facial due process claim. The purely legal issue does not depend on any of the information available only after site clean-up is completed and would not result in inconsistent programmatic results. *Reardon* at 1515.

Accordingly, the court held that the district court erred in dismissing GE’s complaint.

NEPA

Court Requires Corps to Prepare EIS: *Ocean Advocates et al. v. U.S. Army Corps of Engineers et al.*, No. 01-36133 (9th Cir. Mar. 15, 2004)

Background

In 1971, BP West Coast Products constructed a refinery in Cherry Point, Washington, to process crude oil from the Alaskan North Slope. Cherry Point is located on the coastline in the Strait of Georgia in northeast Puget Sound. The original permit authorized BP to construct a dock with two platforms — one for unloading crude oil and one for loading the product after refining. Before construction began, BP opted to build only the southern platform, preferring to wait until the refinery reached capacity or the loading and unloading of tankers began to interfere with refinery operations before it built the other platform.

In 1992, BP applied for a permit from the U.S. Army Corps of Engineers to build the northern platform. The

U.S. Fish and Wildlife Service (FWS) expressed concern that the new platform would facilitate an increase in tanker traffic, thus increasing the likelihood of a major oil spill. BP replied that the dock expansion would actually decrease the risk of spills because the new dock would reduce the amount of time tankers spent anchored at sea waiting their turn to dock. The new dock also would contain state of the art oil spill containment equipment.

The Corps granted the permit in March 1996. It issued a Finding of No Significant Impact, largely adopting BP's findings that the project would reduce the chance of oil spills and be further protective because of the technology that was to be incorporated in the new platform.

Ocean Advocates (OA) contacted the Corps in October 1997, requesting that it reopen the permit and requesting a more complete evaluation of the cumulative impacts that the new platform would have. It also asked the Corps to consider whether the permit violated the Magnuson Amendment, 33 U.S.C. § 476. That act regulates permits for oil transport terminals in Puget Sound. The Corps declined.

In July 1999, the Washington State Department of Natural Resources (WSDNR) issued a Screening Level Ecological Risk Assessment (SLERA). The SLERA noted that the number of vessels using the pier would increase from eighteen to thirty-six percent over five years, which would increase the likelihood of an oil spill. It also concluded, however, that the ship traffic would increase whether or not BP built the pier expansion.

OA again contacted the Corps, arguing that its original permit approval was based on inaccurate information, including that the refinery was operating at capacity. It noted that new data suggested that BP had increased its output at the refinery and that the project would promote additional tanker traffic. It again suggested that the permit violated the Magnuson Amendment and requested a full Environmental Impact Statement (EIS).

The Corps asked BP to respond to OA's concern. BP reiterated its position that the additional platform would actually decrease the risk of an oil spill. It also stated that the language of the Magnuson Amendment prohibited permits that "may result in any increase in the volume of *crude* oil capable of being handled at a facility." The northern platform would not violate the Magnuson Amendment because the new platform would handle only *refined* product.

BP then asked for a permit extension. The Corps determined that it would wait to grant the extension pending FWS consultation on whether the project would affect newly listed threatened species. However, it also decided not to issue a public notice or accept public comments on the permit extension request. The WSDNR expressed concern that its earlier SLERA had not considered the cumulative effects of multiple projects on the Cherry Point region and its concern about those impacts on spawning herring and juvenile Chinook.

The Corps granted BP the permit extension in June 2000. The Corps adopted BP's interpretation of the Magnuson Amendment. It also rejected OA's claim that, with the pier extension, the existing portion of the dock could handle more unrefined crude. The court agreed with BP that increased tanker traffic depended on market forces, not on the pier extension.

OA brought this action against the Corps in November 2000 under the Administrative Procedure Act. The district court denied BP's summary judgment motion with respect to claims that OA did not have standing and that laches barred the action. However, it granted summary judgment to the Corps on OA's environmental claims and on the Magnuson Amendment issue. OA appealed. The pier extension has now been built.

Holding

The court reviewed the procedural mechanisms that the National Environmental Policy Act (NEPA) establishes so that federal agencies take a "hard look"

at the potential environmental effects of proposed projects. An EIS must be prepared if “substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.” *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146 (9th Cir. 1998) (internal quotations deleted). It is sufficient only that there be substantial questions whether a project *may* have a significant effect.

“Significant” has two components: context and intensity. *See* 40 C.F.R. § 1508.27. Up to ten factors help inform the “significance” of a project including:

[T]he unique characteristics of the geographic area, including proximity to an ecologically sensitive area; whether the action bears some relationship to other actions with individually insignificant but cumulatively significant impacts; the level of uncertainty of the risk and to what degree it involves unique or unknown risks; and whether the action threatens violation of an environmental law.

Slip op. at 15–16. *See* 40 C.F.R. § 1508.27(b)(3), (5), (7), (10).

The court determined that the Corps had failed to provide the “convincing statement of reasons” explaining why the dock extension would have only a negligible impact on the environment. Furthermore, an EIS was necessitated because OA raised a substantial question as to whether the extension *may* cause *significant* degradation of the environment.

OA does not seek the destruction of the dock extension but, rather, a serious inquiry by the Corps as to the extent to which the platform’s operation would increase vessel traffic. The Corps may impose conditions on the operation of permitted terminals “to satisfy legal requirements or otherwise satisfy the public interest.” 33 C.F.R. § 325.4(a). If, on remand, the Corps determines that the operation of the dock may result in significant degradation of the environment, the Corps could impose appropriate restrictions.

The court then examined the Magnuson Amendment, noting that this was a case of first impression regarding interpretation of that statute. The amendment states that:

[N]o officer, employee, or other official of the Federal Government shall, or shall have authority to, issue, renew, grant, or otherwise approve any permit, license, or other authority for constructing, renovating, modifying, or otherwise altering a terminal, dock, or other facility in, on, or immediately adjacent to, or affecting the navigable waters of Puget Sound, or any other navigable waters in the State of Washington east of Port Angeles, which will or may result in any increase in the volume of crude oil capable of being handled at any such facility (measured as of October 18, 1977), other than oil to be refined for consumption in the State of Washington.

33 U.S.C. § 476(b).

The court noted that “any such facility” refers back to the phrase “terminal, dock, or other facility,” and thus concludes that the term includes the entire terminal or facility. Therefore, courts should look to the capacity of the terminal, not to just the capacity of the refinery. The court then examined whether the Corps violated the amendment by issuing the permit. In order to answer that question, the court looked at whether the new platform could handle crude oil, both as a legal and factual matter.

BP maintained that the new platform cannot handle crude oil. The district court held that the permit allowed for the construction of a “petroleum product loading/unloading facility,” which, by definition, excludes the use of the facility for crude oil because “petroleum product” does not apply to crude oil. According to the district court, the definition of crude oil is that it is oil to be refined. It is not a “product.”

However, the appellate court found that it was not clear whether the parenthetical language “petroleum product loading/unloading facility” is a substantive, legal limitation on the use of the new platform. The court determined that the Corps was not drawing a clear line between a platform that can handle crude oil offloading and one that would be used to load refined petroleum products. Instead, it seems as though the Corps treated the entire dock and its platforms to qualify, generally, as a petroleum product loading/unloading facility.

It is not clear from the record below what would be required to enable the new platform to handle crude oil. The court thus remanded the case to the district court to determine whether it is physically possible for the new platform to handle crude oil today and if it is possible to modify the new platform so that it could handle crude oil without the need for additional permitting. If the answer is “yes” to either of these questions, then the Corps’ permit violates the Magnuson Amendment.

The Corps admitted at oral argument that Congress, in passing the Magnuson Amendment, intended that berthing capacity be included as a determination of the terminal’s capacity. Therefore, in determining whether the permit violated the amendment, the court must also consider how the modifications to the terminal affected berthing capacity. If it finds that the permit increased capacity so that more ships carrying crude oil can arrive and leave the terminal in a given day, then the permit violates the Magnuson Amendment.

The court, therefore, reversed the district court’s denial of OA’s summary judgment motion on NEPA and Magnuson Amendment grounds and remanded the case.

Water

Court Remands Case to District Court for Factual Findings: *South Florida Water Management District v. Miccosukee Tribe of Indians et al.*, No. 02-626 (U.S. Mar. 23, 2004)

Background

In the land between south Florida’s coastal hills and the Everglades, Congress established the Central and South Florida Flood Control Project in 1948. It consists of a number of levees, canals, pumps, and water impoundment areas. Historically, this entire area was part of the Everglades. In the early 1900s, the state began to drain the wetlands so that the areas would be available for cultivation. The canals that were built created their own problems, however, because they lowered the water table, allowing salt water to enter coastal wells and they could not control flooding. The flood control project, constructed by the U.S. Army Corps of Engineers, served to protect the area from flood, to conserve water, and to provide drainage. The operator of the project is the South Florida Water Management District.

The elements of the project that are at issue in this Clean Water Act (CWA) suit are C-11, a canal that collects groundwater and rainwater from south central Broward County; a large pump station, S-9, that pumps water out of the canal when C-11 rises above a set level; a wetland area, WCA-3, about sixty feet away from the canal; and two levees, L-33 and L-37 which, in connection with S-9, artificially separate C-11 from WCA-3. The court noted that, left to nature, the two areas would be a single wetland covered by surface and groundwater flowing southward.

Water pumped from C-11 to WCA-3 contains contaminants including elevated levels of phosphorus which stimulates the growth of algae and plants foreign to the Everglades ecosystem.

The Miccosukee Tribe brought a citizen suit under the CWA alleging that the management district must obtain a National Pollutant Discharge Elimination Sys-

tem (NPDES) permit to operate S-9. The district court granted the tribe's motion for summary judgment, reasoning that an addition of pollutants exists because the two waterbodies are separate with different quality levels. According to the district court, there would be no natural transfer of water from C-11 into the Everglades.

The Court of appeals affirmed, concluding that pollutants were being added to WCA-3 through a point source: "When a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants." 280 F.3d 1364, 1368 (11th Cir. 2002).

The Supreme Court granted certiorari.

Holding

In its brief on the merits, the district argued that an NPDES permit is only needed when a pollutant originates from the point source. This is the question presented in the district's petition for certiorari. However, the district appeared to abandon that argument in its reply brief. The Court rejected the argument, noting that the definition of point source itself makes plain that it need not be the original source of the pollutant. It need only convey a pollutant to navigable waters.

The Court then turned to a consideration of a second argument that was advanced by the government as *amicus curiae*. The government contended that all the water bodies that fall within the CWA's definition of "navigable waters" should be viewed as a unit for purposes of NPDES permitting requirements. The government's argument is based on the definition of a pollutant discharge as "any addition to any pollutant to navigable waters from any point source." According to the government, the absence of the word "any" in front of "navigable waters" is evidence that Congress did not intend for the NPDES program to include transfers between navigable waters. Congress intended

that such pollution would be addressed through local nonpoint source pollution programs.

The Court commented that several NPDES provisions could be read to suggest a view contrary to the unitary waters theory advanced by the government. It also noted that, although the government argued that the Court should give deference to the unitary waters approach because EPA has adopted that view, it did not identify any administrative documents showing that EPA has espoused that view. In fact, former EPA officials argued in an *amicus* brief that the agency once reached the opposite conclusion.

The government and numerous parties who filed *amicus* briefs warned that affirming this case would have significant practical consequences, particularly in the western states. Water supplies often rely on transfers among various water bodies. Construing the CWA to cover such transfers might prove prohibitively expensive and violate congressional instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the CWA. 33 U.S.C. § 1251(g). However, at least one state, Pennsylvania, already interprets the act to cover interbasin water transfers. Furthermore, costs could be controlled by issuing general permits to point sources associated with water distribution programs.

However, the Court declined to resolve that issue because neither the district nor the government raised the unitary waters approach before the court of appeals or in their briefs respecting the petition for certiorari.

The district contended in the district and appellate courts that the C-11 canal and WCA-3 impoundment area are not distinct water bodies but are, instead, two hydrologically indistinguishable parts of a single water body. The government agreed, noting that they "share a unique, intimately related, hydrological association" so that they "can appropriately be viewed, for purposes of Section 402 of the Clean Water Act, as parts of a single body of water." Brief for United States in Opposition 13. The record contains some

information supporting the district's view. The parties disagree how the relationship between the two bodies of water should be viewed. The tribe's counsel focused on the differing ecosystems of the canal and the impoundment basin while the district's counsel focused on the hydrological connection. The district court applied its own test, determining that the bodies were separate because the transfer of water from the canal to WCA-3 would not occur naturally.

The Court did not state its view as to whether the district court's test was adequate. Instead, it noted that there were disputes as to some factual issues which must be resolved. Summary judgment is only appropriate when there are no such unresolved material factual issues. The Court pointed out, for instance that if S-9 were shut down, the area drained by C-11 would quickly flood; flooding might mean that C-11 would no longer be a "distinct body of navigable water." 280 F.3d 1364, 1368 (11th Cir. 2002). The district court did not fully consider this issue. In fact, it later ordered emergency relief from its own injunction against the operation of the pump, admitting that it had not previously understood that shutting down S-9 would "literally ope[n] the flood gates." *Id.* at 1371.

Thus, the Court found that the case should be remanded to further develop the record to resolve the dispute over the validity of the distinction between C-11 and WCA-3.

Replacing Fish Destroyed by Power Plants Not Authorized by CWA: *Riverkeeper, Inc., et al. v. U.S. Environmental Protection Agency*, Nos. 02-4005 *et al.* (2d Cir. Feb. 3, 2004)

Background

In the process of withdrawing water to cool their industrial facilities, power plants and factories trap fish against intake points (impingement) and kill smaller organisms such as plankton, eggs, and larvae (entrainment). In 1972, Congress directed EPA in the Clean Water Act (CWA) to regulate "cooling water intake structures" so as to "minimize adverse environmental impact." 33 U.S.C. § 1326(b). After EPA's first

attempt to issue regulations was remanded on procedural grounds (*see Appalachian Power Company v. Train*, 566 F.2d 451 (4th Cir. 1977)) and environmental groups sued and won a consent decree under which EPA promised to promulgate regulations under specified deadlines (*see Cronin v. Browner*, 898 F. Supp. 1052 (S.D.N.Y. 1995)), the agency issued its first phase of regulations on December 18, 2001. 40 C.F.R. pts. 9, 122–25. The rule applies to new facilities that withdraw more than two million gallons of water per day, using at least twenty-five percent of that water for cooling.

Under that rule, a facility may take one of two "tracks." Track I specifies various capacity and velocity requirements including the use of closed-cycle cooling, the best available technology. Under Track II, a facility may demonstrate that "the technologies employed will reduce the level of adverse environmental impact . . . to a comparable level" to that which would be achieved under Track I. The regulation states that "comparable" can be shown by either demonstrating that a method will yield at least ninety percent of the reduction in impingement mortality and entrainment that Track I would yield or that, considering impacts other than impingement and entrainment, its method will maintain a level of fish and shellfish in a waterbody that is "substantially similar" to the level that a facility would achieve under Track I. Suggested "restoration measures" include restocking killed fish with fish bred at a hatchery and creating alternative habitats to compensate for organism losses.

Finally, there is a variance provision in the regulation. Where "compliance with [a] requirement . . . would result in compliance costs wholly out of proportion to the costs the EPA considered in establishing the requirement at issue or would result in significant adverse impacts" on air quality, water resources, or local energy markets, then the facility may comply with "less stringent" requirements than either Track I's or Track II's. 40 C.F.R. § 125.85.

Track II facilities must also "comply with any more stringent requirements relating to the location, design, construction, and capacity of a cooling water intake

structure or monitoring requirements . . . that . . . are reasonably necessary to comply with any provision of state law” 40 C.F.R. § 125.84(e).

The two tracks are designed to give facilities a choice between a “fast track” that would gain quick EPA approval and a more complicated, but more flexible, permitting process.

The environmental petitioners alleged that the rule conflicts with the CWA in three ways. First, Track II sets a lower standard than Track I and, thus, does not reflect the best technology available. Second, they asserted that the variance provision is precluded by statute. Third, they argued that dry cooling is the best technology available. Industry petitioners filed eight challenges to the rule alleging that it contradicts the statute and that it is not sufficiently flexible, is too vague, and is unsupported by the record.

Holding

The court reviewed the history of the CWA, noting particularly the change in 1972 from a water quality standards approach to a point discharge approach. Under the point discharge program, EPA was to set effluent limitations that would become more stringent over time. Under section 306, EPA is required to set effluent limitations for new sources based on the “best available demonstrated control technology” that achieves the “greatest degree of effluent reduction.” 33 U.S.C. § 306(a)(1). EPA may consider cost when setting standards but decreasing weight should be given to expense where facilities have time to plan ahead to meet the more stringent restrictions.

Section 316(b) states:

Any standard established pursuant to section 301 or section 306 of this Act and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.

33 U.S.C. § 1326(b). Because of the cross-reference to sections 306 and 301, the court looked to those sections for guidance in determining what factors Congress intended that the agency look at to determine “best technology available.” Interestingly, no distinction is made between new and existing structures in section 316(b) and cooling water intake structures are *not* included in the sections dealing specifically with effluents. Thus, although sections 306 and 301 may provide guidance to the agency, the court deemed it appropriate that EPA not include every statutory directive connected to effluents to cooling water intake structures.

Answering the environmental petitioners’ challenge, EPA countered that, although Track I and II must reflect the same standard, ten percent is an acceptable margin of error for measuring reductions in impingement and entrainment. The court noted the difficulty in precisely measuring potential impingement and entrainment with variabilities such as sampling errors and natural fluctuations in animal populations complicating any exact calculations. Since these results can not be measured with the mathematical exactitude that pollutant concentration and velocity and volume of water can be measured, the court felt it reasonable for EPA to make clear in its regulation how much ambiguity is accepted and what is considered a reasonable margin of error in comparing different technologies.

However, the court found the other method of complying with Track II more troubling. Under that approach, a facility may consider “impacts other than impingement mortality and entrainment” provided that “the measures taken will maintain the fish and shellfish in the waterbody at a substantially similar level to that which would be achieved through” the velocity and capacity limits of Track I. 40 C.F.R. § 124.86(c)(2)(ii). Under this approach, a facility may impinge and entrain any number of organisms so long as it takes measures to compensate for those losses.

The court found this approach to be “plainly inconsistent” with the statute. The statute instructs EPA to minimize adverse environmental impact by regulating

the “location, design, construction, and capacity of cooling water intake structures.” Measures such as removing barriers to fish migration, creating buffers to reduce runoff from agricultural lands, and reclaiming abandoned mines to reduce acid mine drainage may be beneficial to the environment but they do not involve the location, design, construction, or the capacity of cooling water intake measures. According to the court, this regulation returns the standard to the pre-1972 approach to water pollution which regulated according to water quality, not effluent standards. One of the difficulties in this approach was that it was nearly impossible to prove that a particular polluter caused the water quality in a waterbody to dip below the standard.

EPA itself recognized this problem in the preamble to the rule: “[U]nlike in the laboratory, where conditions are controlled, a multitude of confounding factors make biological studies very difficult to perform *and make causation, in particular, difficult to determine.*” 66 Fed. Reg. at 65,285. The court noted that the agency’s own findings demonstrate that restoration measures are inconsistent with Congress’ intent that the design of intake structures be directly regulated and based on the best technology available.

There is a provision in the CWA that allows discharge based on the ultimate effect of that discharge. This occurs in section 316(a) which allows EPA to vary the heat pollution standards by considering the receiving waterbody’s ability to dissipate the heat and preserve the wildlife population. That Congress provided a water quality standard to thermal discharges but did not provide the same to the very next subsection of the statute counsels, according to the court, against including restoration measures within the best technology available.

The court also found support for its understanding of congressional intent by noting that Congress rejected a proposed amendment to section 316(b), which EPA argued was necessary, that would have allowed discharges to use restoration measures. EPA argued at that time that the statutory language allowed only one

option, best technology available, and that, therefore, more flexibility was needed.

Thus, the court found that EPA exceeded its authority by allowing compliance with the statute through restoration measures and remanded that portion of the rule to the agency.

Next, the court discussed the environmental petitioners’ objection to the variance portion of the regulation. The court noted that some provisions of the CWA explicitly provide for variances. *See, e.g.*, sections 301(c), (g); 316(a). Section 306, however, does not mention variances from new source performance standards. EPA conceded that it probably would not have authority to allow variances under 306 alone, but noted that the rule was promulgated under *both* sections 306 and 316(b). Since subsection (b) is silent as to variances or, alternatively, since the subsection invokes both sections 301 and 306 without distinguishing between standards applicable to existing facilities and those applicable to new facilities, EPA argued that the statute was ambiguous and that its interpretation was reasonable.

The court agreed. Intake structures are in a class by themselves under the CWA. The court concluded that the variance guides EPA to consider appropriate factors and relax the regulation only insofar as necessary to take into consideration unusual circumstances not considered during the rulemaking.

The last challenge of the environmental petitioners was to the choice EPA made of best available technology, closed-cycle wet cooling. They contended that dry cooling is the best technology for minimizing adverse environmental impacts because it requires the least amount of water. EPA concluded that closed-cycle wet cooling was the “best technology available” because dry cooling costs greater than ten times more a year than closed-cycle wet cooling but reduces water intake by only an additional five percent relative to once-through cooling. Dry cooling also requires more energy, yielding more air emissions. Furthermore, its cost would be a barrier for new, more environmentally friendly facilities to enter the market, the tech-

nology is far less effective in warmer climates and it is not technically feasible for manufacturers and some type of power plants.

The environmental petitioners said that EPA could not consider costs and, even if it could, it had abused its discretion. The court disagreed. The cross-reference to section 306 indicates that EPA may consider factors involved in setting discharge limits when regulating intake structures. Since EPA properly considered these factors, the court's review was deferential to the agency's expertise. The court could not say that EPA's choice of closed-cycle cooling as best technology available was unsupported by the record or that there had been a clear error of judgment.

The court then rejected the industry petitioners' challenge to the rule, finding that it should defer to EPA's judgment and that it exercised that judgment reasonably. It thus denied their petitions in full, granted in the environmental petitioners' petition in part, and remanded to EPA those provisions of the regulation that allow compliance through restoration measures.

[Editor's note: In mid-February, Administrator Mike Leavitt signed a new rule involving water intake rules for existing facilities that also contain restoration measures.]

**NPDES Permit Required for Discharge to Pond:
*Northern California River Watch v. City of
Healdsburg*, No. C 01-04686 (N.D. Cal. Jan. 23,
2004)**

Background

An environmental interest group brought a citizen suit against the City of Healdsburg, alleging that it was violating the Clean Water Act (CWA) by discharging pollutants from its waste treatment facility into a pond formed from an old gravel mining pit. The court granted partial summary judgment in favor of the plaintiff, finding that the city had discharged treated wastewater from a pipe into Basalt Pond without a National Pollutant Discharge Elimination System (NPDES) permit. The question remained whether the pond was within the "navigable waters of the United States."

The Russian River (which all agree is a navigable water of the United States) originates in Mendocino County, California, and runs 110 miles to the Pacific Ocean west of Santa Rosa, California. Before levees and dams were built, the river occasionally overflowed its banks and created natural ponds and wetlands. Today, large storms still overpower the flood controls. For instance, the levee between Basalt Pond and the river was breached twice in 1995 and once in 1997. During a flood in 2002, the water level rose to within a foot of the levee top.

The river and its surrounding area flow over a vast gravel bed that, at places, goes to a depth of sixty feet. Through the bed flows an underground aquifer which provides the principal path for water flowing between Basalt Pond and the Russian River. The pond and the river are separated by a levee. The pond has fifty-eight acres of surface water, fed by the underground aquifer.

The distance between the river's edge and the pond's edge varies from between fifty and several hundred feet. The court noted that virtually the entire perimeter of the pond is now wetlands which support substantial bird, animal, and fish populations, indistinguishable from the rest of the Russian River ecosystem. The recurring breaches of the levee have introduced fish populations from the Russian River to the pond.

The city's secondary waste-treatment plant sits on the north side of the pond, approximately 800 feet from and west of the river. The annual outflow from the sewage plant is sufficient to fill the pond every one to two years but for the draining of the pond into the surrounding aquifer. At least one-fourth of the water in the pond drains into the river. In passing through the pond, the effluent is partially cleansed. However, chloride from the pond makes its way into the river at higher concentrations than those naturally existing in the river.

Because the river and the pond are connected by the aquifer, the river and the pond rise and fall in tandem.

Holding

Under section 404 of the CWA, the term “waters of the United States” includes “wetlands adjacent to” a navigable water. 33 C.F.R. 328.3(a)(7) (2003). The term “wetlands” means:

[T]hose areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Id. at 328.3(b).

The regulations define “adjacent” as meaning:

[B]ordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are “adjacent wetlands.”

Id. at 328.3(c).

The Supreme Court adopted an expansive definition of “wetlands” in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). However, the city argued that, in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), the Court apparently imposed a requirement that there be a surface hydrological connection between a navigable water and the wetlands in question in order for there to be jurisdiction under the CWA.

The court noted that the Ninth Circuit seems not to have read the *SWANCC* decision as so restrictive, however. In *Headwaters, Inc. v. Talent Irrigation*

District, 243 F.3d 526 (9th Cir. 2001), the court seems to have interpreted *SWANCC* as merely invalidating the migratory bird rule. Furthermore, *SWANCC* itself dealt specifically with isolated wetlands, not adjacent wetlands. *SWANCC* reaffirmed that wetlands adjacent to navigable waters was within the purview of the CWA. The Court stated, for instance that “it is . . . plausible . . . that Congress simply wanted to include all waters adjacent to ‘navigable waters’ such as nonnavigable tributaries and streams.” *SWANCC* at 171. Thus, the court read *SWANCC* as recognizing jurisdiction over actually navigable waters, their tributaries, and wetlands adjacent to each.

The court acknowledged that the NPDES program does not fall within section 404 of the CWA. However, EPA’s definition of wetlands for the purpose of the NPDES program mirrors the Corps of Engineers’ definition for purposes of section 404. Therefore, according to the court, it is appropriate to use the Corps’ definition in this NPDES case. Under that definition, it is clear that Basalt Pond and its wetlands are adjacent to the Russian River. The definition clearly states that man-made barriers, such as the levee in this case, that artificially separate the river and the wetlands and pond do not exempt such areas from the reach of the act.

Furthermore, although it is not required, there is a hydrological connection between the pond and the river. Even on the surface, when the levee breaches, the two waterbodies commingle. Finally, the pond, the wetlands, and the river all share the same ecosystem. These areas are “adjacent” and, thus, within the definition of “waters of the United States.”

The city argued, however, that only the sides and surrounding wetlands should be considered “adjacent,” but that the center of the pond should not. Its discharges are to “open water,” not to the “adjacent” wetlands, according to the city. However, its pipe is at the northwest corner of the pond, not in the center. Furthermore, even if the discharge were to the center, the court ruled that the pond was sufficiently small that the entire pond must be considered to be inseparably bound to the wetlands surrounding it.

The court also noted that the pond itself could be considered a “point source, “ directly abutting and discharging into the wetlands.

The city also invoked an exception to the definition of “waters of the United States.” The regulation excludes:

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

33 C.F.R. 328.3(a). The court held, however, that Basalt Pond was *not* “designed to meet the requirements of the CWA.” The pond existed before the CWA. It was not built with sewage disposal in mind. It was the result of digging a pit to remove gravel.

Finally, the court also held that the pond and the subterranean groundwater that flows through it are “tributaries” of the Russian River. The court acknowledged that caselaw was divided as to whether groundwater can satisfy the “tributary” definition under the CWA. The court found persuasive the line of authority represented by the holding in *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Idaho 2001). This case held that the CWA extends federal jurisdiction over groundwaters hydrologically connected to surface waters that are, themselves, navigable waters.

The city also argued that, in a preamble to the 1986 revision of the wetlands regulation, the Corps stated that it usually did not consider “waterfilled depressions created in dry land for the purpose of obtaining fill, sand, or gravel” to be “waters of the United States” until . . . [the] excavation operation is abandoned” 51 Fed. Reg. 41206, 41217 (1986). The city argued that, although the gravel excavation has ceased, the company is continuing to reclaim the pond and, therefore, it has not been abandoned. However, the company that is undertaking the reclamation slurry project at the pond is not the company that undertook

the excavation activities. Instead, the company acquired the property after excavation activities ceased. Although it conducts excavation activities nearby, its activity at Basalt Pond is solely reclamation pursuant to a local order. Therefore, the pond does not fit the exemption criteria.

The Corps of Engineers has refused to assert jurisdiction over Basalt Pond and the city argued that the court should defer to the Corps’ expertise. The court found, however, that the employee who received the plaintiff counsel’s request to assert jurisdiction over the pond was prejudiced against the plaintiff and its counsel. The court found that the employee did not seek regional or national guidance on the request so no investigation preceded the issuance of the letter. No attempt was made to perform a case-by-case analysis nor has any evidence shown that the letter was consistent with other rulings. Therefore, the court found that no deference was due the district office’s refusal to act nor was the letter itself persuasive on the merits.

Thus, the court ordered the city to take immediate steps to obtain an NPDES permit and enjoined the city from any further discharges into the pond effective April 22, 2004, without such a permit or on such later date as the city can show will be the earliest practicable date.

CIVIL PROCEEDINGS

New Filings

AFO

***Iowa v. Lawrence Handlos*, No. CV0188-51 (Dist. Ct. Audubon County Mar. 12, 2004)**

Iowa has filed a lawsuit against Lawrence Handlos alleging that he violated state water laws and livestock confinement requirements. Handlos owns and operates nine hog confinement feeding operations with a total capacity of 49,600 hogs.

The lawsuit seeks civil penalties of up to \$5,000 per violation. The suit asks the court to order Handlos to remedy the alleged violations, remove animals from most of the sites until he has obtained required construction permits, installed drainage tiles, and complied with other terms sought by the lawsuit.

[For further information, contact Iowa AAG Tim Benton at (515) 281-6637.]

Settlements

AFO

Missouri v. Premium Standard Farms, Inc., No. 02-CV-217927 (Cir. Ct. Jackson County Feb. 17, 2004)

Missouri has entered into an agreement with Premium Standard Farms, Inc., that updates a 1999 court order that required Premium Standard to spend \$25 million to install "next generation" pollution-control technology at its farms in Missouri. Under the new agreement, the company will construct a plant to recycle animal waste into a fertilizer and will install controls at eighty hog barns to control odor from wastes. The company has also agreed to identify up-to-date pollution control technologies to be used at ten other farms and to put these technologies into place prior to July 2010.

The new consent degree postpones the compliance deadline and lifts the \$25 million cap on spending.

[For further information, contact Missouri Deputy Chief Counsel Bill Bryan at (573) 751-8815.]

Air

United States v. J.R. Simplot Company, No. CV-S-04-0162-KJD.PAL (D. Nev. Feb. 12, 2004)

The federal government filed a lawsuit against an Idaho-based company, alleging that it failed to comply with the best available control technology compo-

ment of a State Implementation Plan under the Clean Air Act. The facility dries silica sand in a coal-fired dryer, emitting sulfur dioxide during the process.

Under the settlement, the company will pay a \$525,000 civil penalty and install \$2 million worth of air pollution control equipment.

[For further information, contact AUSA Blaine T. Welsh at (702) 388-6336.]

United States and South Carolina v. South Carolina Public Service Authority (Santee Cooper), No. 2-04-0822-18 (D.S.C. Mar. 16, 2004)

The federal government has entered into a settlement with South Carolina Public Service Authority (Santee Cooper) regarding its violation of the Clean Air Act New Source Review program at several of its plants. The settlement is expected to eliminate annually almost 60,000 tons of harmful pollutants from four of Santee Cooper's existing coal-fired electricity generating plants in South Carolina.

The agreement requires Santee Cooper to install state-of-the-art controls of more than eighty-three percent of its existing total coal-fired megawatt generating capacity. The company will also pay a \$2 million civil penalty, \$700,000 of which will go to South Carolina. It will also spend at least \$4.5 million to finance environmentally-beneficial projects: \$1.25 million for a South Carolina land conservation project; \$1 million for an energy-efficient technologies project; \$1 million for a demand-side management project; \$1 million for a clean diesel school bus project; and \$250,000 to implement an environmental management system.

[For further information, contact Matt Morrison, DOJ, at (202) 514-3932.]

CERCLA***United States and State of Indiana v. Guide Corporation and Crown EG, Inc., No. IPOO-0702-C-Y/F (S.D. Ind. Mar. 1, 2004)***

The federal government has filed a consent decree for public comment with Crown EG, Inc., resolving the company's responsibility for a massive fish kill that occurred in the White River in December 1999 and January 2000, downstream from Indianapolis, Indiana. A separate consent decree, lodged with Guide Corporation, was finalized in September 2001. In a separate criminal action Crown, an Ohio-based environmental consultant, has pled guilty to seven misdemeanor violations of the Clean Water Act.

Under the proposed decree, Crown will be required to pay \$250,000 into a White River Restoration Fund, established by Indiana, to fund fish restocking and river restoration projects.

[For further information, contact William D. Brighton, DOJ, at (202) 514-2244 or Randy Stone, DOJ, at (202) 514-1308.]

Water***United States v. Kanaway Seafoods, Inc., d/b/a Alaska General Seafoods, No. A04-0039 CV (JWS) (D. Alaska Feb. 13, 2004)***

A proposed consent decree has been lodged to settle the government's lawsuit against Kanaway Seafoods, Inc., alleging that the company failed to meet all of its discharge and reporting requirements under its National Pollutant Discharge Elimination System permit. Under the decree, the company will pay a civil penalty of \$110,000 and perform injunctive relief at its Ketchikan, Alaska, facility. This relief includes barging its processing waste during the next two processing seasons to an at-sea discharge location or using

an EPA-approved method of disposal to prevent the discharge of the waste to Tongass Narrows; remediating the seafood waste piles that have accumulated on the seafloor; and preventing eruptions of those piles.

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

CRIMINAL PROSECUTIONS**Indictments****Air*****United States v. Claus Graeter, No. SACR04-60 (C.D. Cal. Mar. 5, 2004)***

Claus Graeter of Somis, California, has been arrested on charges that he conspired to defraud the United States by making false statements under the Clean Air Act. Graeter is the operator of GC Motor Corporation in Oxnard, California. His company imported Mercedes Benz Smart Cars and Gelandewagens, BMW Z28s, Ranger Rovers, and other foreign cars. The charges allege that these vehicles did not meet American emissions or safety standards and that Graeter lied to officials when he said the vehicles were for personal temporary use, would not be resold, and were worth far less than their actual value.

[For further information, contact AUSA Richard Cutler at (714) 338-3500.]

RCRA***United States v. Dennis D. Ellis, Robert Mominee, and Paul Woods, No. CR-040026 (D. Idaho Mar. 10, 2004)***

Three men have been charged with conspiracy to violate the Resource Conservation and Recovery Act and the Hazardous Materials Transportation and Uniform Safety Act by transporting waste without a permit, transporting it to an unpermitted facility, and illegally disposing of the waste. In addition, one of the

men, Robert Mominee of Salem, Oregon, is charged with making a false statement to U.S. EPA agents.

In January 2000, Dennis Ellis sold the Ponderosa Paint Company in Boise, Idaho, to Kelly Moore Paints for \$14 million on the condition that Ellis would dispose of 20,000 gallons of waste paint remaining at the facility. Ellis allegedly hired Mominee and Paul Woods to illegally dispose of the wastes. The indictment alleges that the men took between 3,000 and 4,700 gallons of the paint waste to their Idaho homes and that Woods allegedly burned some waste in an open pit behind his house. After agents searched Woods' property, Mominee allegedly returned the remaining paint to the Ponderosa facility.

[For further information, contact AUSA George Breitsameter at (208) 334-1211]

Water

United States v. Kanubhai Patel, Manhubhai Patel, and Mukesh Patel, No. 04-CR-230 (N.D. Ill. Mar. 4, 2004)

The three owners of a now-closed Illinois electronics part manufacturing firm, New Tech, were recently indicted on charges of conspiracy to violate the Clean Water Act. The indictment alleges that, for approximately four and one-half years, the New Tech facility violated its Clean Water Act discharge permit by discharging higher than permitted concentrations of acidic and caustic wastewater into the local sewer system through a bypass hose. The illegal discharges were allegedly diluted in the sewer system by water from a garden hose placed into a manhole hidden from view by a parked car.

[For further information, contact AUSA Tim Chapman at (312) 353-5300.]

Pleas

Water

Pennsylvania v. York International, No. 106CA2004 (C.P. York County Feb. 26, 2004)

The Pennsylvania Attorney General's Office has entered into a plea agreement with York International regarding the company's failure to inform the Department of Environmental Protection of chemicals it had added to the plant's cooling water, which discharges into the Codorus Creek. York International is the country's largest independent supplier of heating, air conditioning, ventilation, and refrigeration equipment.

Under the plea agreement, the company will pay a \$75,000 fine to the Clean Streams Fund and give \$20,000 to nonprofit charities with interests in the Codorus Creek.

[For further information, contact CDAG Glenn Parno at (717) 787-1340.]

UPDATES

Leavitt v. Tennessee Valley Authority, No. 03-1162, 72 U.S.L.W. 3572: Three questions have been presented in the petition for certiorari filed on February 13. First, did the Eleventh Circuit err when it held that the imposition of sanctions against TVA for not complying with a U.S. EPA order under the Clean Air Act violated TVA's rights under the Due Process Clause? Second, does the dispute between EPA and TVA, two executive-branch agencies, present a justiciable case or controversy? Third, if there is a justiciable case or controversy, does TVA have independent litigating authority to bring a lawsuit over the objections of the Attorney General? (*See* the August 2003 issue of the *Journal* — *TVA v. Whitman.*)

Texas Cities Coalition on Stormwater v. Environmental Protection Agency, No. 03-1125 (U.S. Dec. 15, 2003): A petition for certiorari has been filed asking that the U.S. Supreme Court review the holding from the Ninth Circuit that largely upheld U.S. EPA's rules governing discharges of stormwater from small municipal storm sewer systems and small construction sites. (See the October 2003 issue of the *Journal* — *Environmental Defense Center, Inc. v. EPA.*)

Rancho Viejo LLC v. Norton, No. 03-761, 72 USLW 3549: The Supreme Court has denied review of a Ninth Circuit decision holding that an Endangered Species Act regulation limiting takes of a toad species in one state has a substantial effect on interstate commerce.