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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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WETLANDS MITIGATION PRACTICE: MITIGATION AND THE REGULATORY PROCESS

By

Marina Liacouras Phillips*

Introduction

Section 404 of the Clean Water Act[1] prohibits the discharge of dredged or fill material into waters of the United States without a permit issued by the United States Army Corps of Engineers. A premier policy guiding the issuance of these permits is the concept that there should be "no net loss" of wetlands in the United States. On December 16, 2003, the Corps and the United States Environmental Protection Agency (the "EPA") reiterated their commitment to this goal in a joint announcement.[2] This year, in a celebration of Earth Day, April 22, President Bush committed the government to a new policy. He pledged to move beyond the no net loss of wetlands in America to having an overall increase of the country's wetlands over the next five years, starting with the improvement and protection of at least three million acres of wetlands.

The implementation of this policy will be accomplished primarily through a series of agency policies and guidance documents. These policies are a work in progress, constantly under revision to incorporate changes in agency approaches to mitigation as well as advances in the science of wetlands mitigation. This article summarizes the major policy and guidance documents in this area and offers recommendations for compliance with this concept to applicants for wetlands permits.

*Marina Liacouras Phillips is a partner in the real estate section of the law firm of Kaufman & Canoles in Norfolk, Virginia, where she specializes in environmental law and currently serves as the Chair of the Board of Governors of the Virginia State Bar's Environmental Committee. Ms. Phillips as worked both for U.S. EPA and for the Pennsylvania Department of Envrionmental Protection. As a member of the Virginia Department of Envrionmental Quality's Wetlands Technical Advisory Committee, she assisted in drafting Virginia's new wetlands regulations.

The Regulatory Construct

In 1990, the Corps and the EPA entered into a Memorandum of Agreement[3] setting forth the policy that these agencies would use in determining the appropriate mitigation to require in the issuance of a Section 404 permit. This policy established a mitigation decision-making process known as "mitigation sequencing" consisting of the following steps:

1. Avoidance: Adverse impacts are to be avoided and no discharge shall be permitted if there is a practicable alternative with less adverse impact. A permit can only be issued for the least environmentally damaging practicable alternative.

2. Minimize: If impacts cannot be avoided, appropriate and practicable steps to minimize adverse impacts must be taken.

3. Compensation: Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts on waters of the United States.

Mitigation sequencing incorporates the goal of "no net loss" to wetlands in the United States into the wetlands permitting process.

The Corps, EPA, and the state agencies that participate in the Section 404 permitting process, either as part of the federal program or through their own independent permitting program, take mitigation sequencing very seriously. A permittee must satisfy the reviewing authorities that avoidance, then minimization, of wetlands impacts has been accomplished as much as possible before compensation for remaining impacts will even be considered. Compensatory mitigation will only be permitted to offset impacts that cannot be avoided or minimized to the maximum extent practicable.

The mitigation sequencing process frequently raises issues of considerable financial impact to the permit applicant. The development of a sound discussion of

practicable alternatives often involves accountants, real estate agents, and municipal economic development departments, as well as environmental consultants. The process of avoidance and minimization of impacts provides the environmental consultant with an opportunity for creativity, changing project design to maintain the applicant's purpose while reducing impacts to wetlands. At the conclusion of the mitigation sequencing process, the applicant can quantify the remaining unavoidable impacts to wetlands and the mitigation process can begin.

"Appropriate" Compensatory Mitigation

Once the functions and values of the wetlands to be impacted have been characterized and quantified (a complete process in itself that is beyond the scope of this article), the permit applicant must develop a plan for the mitigation of those impacts as a component of the Section 404 permit application. The Corps' Regulatory Guidance Letter No. 02-2[4] sets forth general guidelines for the development of an approved compensatory mitigation plan. Implementation of this process can differ from one part of the country to another as the characteristics of wetlands across the country are taken into consideration.

In an effort to provide more specific guidance for this activity, the EPA's National Health and Environmental Effects Laboratory in Corvallis, Oregon, released a study this past January that evaluates various wetlands assessment methods.[5] This review was based upon four criteria: 1) How well the method measures wetlands condition or quality; 2) how much time the method takes to implement; 3) whether the method included on-site assessment; and 4) whether the results could be verified. EPA plans to use the results of this study as a first step in developing guidance for the assessment of wetland functions and values. Until then, RGL 02-2 remains the primary agency guidance.

The determination of what level of mitigation constitutes "appropriate" mitigation is based upon the values and functions of the aquatic resources that will be impacted. The Corps and EPA recognize that in some cases, a mitigation plan that does not meet the goal of "no net loss" may be approved because "mitigation measures necessary to meet it are not feasible, practicable or would accomplish only inconsequential reductions in impacts."[6] The definition of "practicable" in the 404(b)(1) guidelines states that the term means " available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes."[7] The Corps and EPA Memorandum of Agreement emphasizes that mitigation for unavoidable impacts should be relative to those impacts in terms of cost, technology and logistics. In practice, though, this element of the evaluation of compensatory mitigation is subjective and assessed strictly by the reviewing regulators based primarily on the plan's success in compensating for lost aquatic resource functions and values lost due to the impacts caused by the proposed project.

A variety of Corps and EPA guidance documents provide information to assist the applicant in developing a compensatory mitigation plan. In response to independent critiques of the effectiveness of wetlands mitigation as compensation for authorized impacts to wetlands, the Corps, EPA, and the Departments of Agriculture, Commerce, Interior, and Transportation released the National Wetlands Mitigation Action Plan on December 26, 2002.[8] The Plan includes seventeen tasks that the agencies will complete by 2005 to improve the performance and results of compensatory mitigation. Satisfying one of these tasks, on November 7, 2003, the Corps and EPA issued a "Model Compensatory Mitigation Plan Checklist for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act" (the Checklist),[9] the most recent agency guidance for mitigation planning.

While the primary purpose of the Checklist is to allow applicants and regulators to assess the likelihood of success of a particular compensatory mitigation plan, the Checklist does set forth criteria for the selection and justification of a mitigation site. These criteria echo those established in Regulatory Guidance Letter 2-02 and in the Corps and EPA's 1990 Memorandum

of Agreement. Some of these criteria are discussed below.

When practicable, mitigation must be conducted on the affected site, or in areas adjacent or contiguous to the site, as it is expected that such mitigation will be most likely to generate wetlands with the same functions and values as those that were lost due to the project impacts. This is known as on-site mitigation. When on-site mitigation is not possible, off-site mitigation, preferably in the same watershed, will be accepted. It is important to remember that, if impacts to certain wetlands were eliminated during the avoidance and minimization process, those wetlands cannot be used to compensate for unavoidable impacts except in cases where the applicant enhances wetlands functions and values.

Off-site mitigation may also be accepted if the applicant can demonstrate that it protects functions and values that are more valuable than those on-site. For example, an off-site mitigation location that will result in the protection of wetlands next to a large wetland site that is already protected may be preferable to the protection of numerous small sections of wetlands on the impacted site. Other factors to be considered in choosing between on-site and off-site alternatives include: likelihood for success; ecological sustainability; practicability of long-term monitoring or operation and maintenance; and relative cost of mitigation alternatives.

The closer an off-site mitigation site is to the wetlands being impacted, the greater the likelihood that it will be accepted as compensatory. Corps policy generally requires that the mitigation take place in the same or adjacent watershed. Special consideration is given to watersheds that cross state lines. The Corps has not recognized state lines as a restriction to mitigation site selection, but in the event that a state permit must also be obtained for wetlands impacts, this jurisdictional boundary may come into play.

Similarly, it is preferred that mitigation replace the impacted wetlands with wetlands that have the same characteristics as the impacted wetlands, *e.g.*, forested wetlands for forested wetlands. This is known as "in-kind" mitigation. Acceptable compensation can be "out-of-kind," *e.g.*, scrub-shrub wetlands for forested wetlands, if this type of compensation is practicable and provides more benefit than in-kind compensation. Decisions to allow out-of-kind mitigation are made on a case-by-case basis and are only approved in rare circumstances.

Categories of Compensatory Mitigation Projects

In addition to evaluating the qualities of the mitigation proposed, the regulatory agencies carefully review the method in which the applicant proposes to compensate for lost aquatic resource functions and values. Four types of compensatory mitigation projects are generally accepted:

1. Restoration: Re-establishment or rehabilitation of a former or degraded wetland with the goal of returning it to its historic quality.

2. Enhancement: Improvement of an existing wetland's functions and values.

3. Creation: Development of wetlands on uplands or on a deepwater site.

4. Preservation: Protection of ecologically important wetlands. This may include adjacent uplands that are deemed necessary to protect the quality of adjacent wetlands.

Restoration of former wetlands is preferable to the regulators, as it has the greatest likelihood of success of the four types and thus most reliably ensures the satisfaction of the "no net loss" policy. The remaining options provide less satisfaction of that policy, with preservation actually providing no gain in wetland acres or functions and values. Accordingly, it is viewed by regulators as the least preferable option of compensation and is often only accepted in conjunction with one of the other methods in an effort to maintain no net loss of wetlands.

The guiding factor in the selection of a mitigation is the "no net loss" policy. At this time, the primary standard for assuring the protection of wetlands functions and values applies acreage ratios to wetlands impacts. Although the Memorandum of Agreement requires that mitigation for unavoidable impacts should provide a one for one functional replacement in order to ensure that there is no net loss of wetlands, this ratio is frequently changed. For example, when the replacement wetlands are of a different function and value than the impacted wetlands, the ratio of impacted to replacement wetlands has been adjusted accordingly. In cases in which the agency determines that replacement plans may not be completely successful, ratios greater than one to one have been imposed. Increased ratios are often imposed when regulators need to account for the temporal loss of wetlands.

Some jurisdictions accept a one acre to one acre compensation scheme when wetlands will either be created or restored. Some jurisdictions impose stricter ratios measured in acres for wetlands creation or restoration depending on the type of wetland impacted, such as the following:[10]

1. Forested wetlands: 2:1
2. Scrub/shrub wetlands: 1.5:1
3. Emergent wetlands: 1:1
4. Streams: 1:1 (measured in linear feet)

Some jurisdictions impose additional criteria through location-specific policies or guidance (*e.g.,* compensation must be in the same watershed and/or the same state).

A typical ratio for enhanced wetlands is 3:1 acre of impact. Preservation is generally accepted at the ratio of 10:1 acre of impacted wetlands. Regulators will accept combinations of these mitigation methods depending upon what is practicable for a particular project. Note that this can become a calculation qualified for an SAT question.

The ratios described above are typically used in the course of standard Clean Water Act permitting. In the event that mitigation is being proffered as an element of settlement of an enforcement action, including one that contemplates the issuance of an "after-the-fact" permit, a stricter mitigation requirement is often imposed as part of the penalty for the violation.

Options for Compensatory Mitigation

Once the details of mitigation required to compensate for a project's unavoidable impacts have been determined, the applicant has several options for satisfying the mitigation requirement. The applicant can undertake the implementation of a mitigation plan on its own, or through a consultant. This would entail purchasing property and carrying out the mitigation plan. A common example of this option is the purchase of farmed land that qualifies as "prior converted cropland" and restoration of its former wetlands functions and values. Although preferred by the regulatory agencies, this option carries considerable responsibility for the success of the mitigation. Financial assurance for the success of the mitigation must be provided and long-term monitoring is often required to confirm that success.

Alternatively, when mitigation on-site or close by is not available, an applicant can purchase "credits" in an approved wetland mitigation bank. The value of the bank's credits is determined by the Corps in the approval process. The bank's sponsor has the responsibility for the success of the bank and for ensuring that the land will be preserved in perpetuity.

Finally, applicants can contribute to a fund, known as an "in-lieu fee" program, in an amount that compensates for the impacted wetlands.[11] Such funds are usually managed by a public natural resources agency or a non-profit organization and are used by the manager to create or restore wetland resources on other parcels of land. The moneys paid into such funds must be used by the fund sponsor for wetlands mitigation projects. They cannot be used for non-mitigation programs such as education. This option is least preferred by the regulators as it does not provide immediate compensation for the lost wetlands' functions and values.

Conclusion

Since the details of a compensatory mitigation program are specific to each individual project, it is important that permit seekers be familiar with the various applicable guidance documents and maintain close contact with the applicable regulators through each step of the permitting process. The wetlands mitigation program is the key to achieving the "no net loss" goal and reaching the President's new goal of enhancing the health and increasing the acreage of our country's wetlands.

ENDNOTES

[1] 33 U.S.C. § 1344.

[2] U.S. Army Corps of Engineers Regulatory Branch and U.S. Environmental Protection Agency Press Release.

[3] Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency, The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, February 6, 1990, signed by Robert W. Page and LaJuna S. Wilcher.

[4] U.S. Army Corps of Engineers Regulatory Guidance Letter No. 02-2, December 24, 2002.

[5] "Review of Rapid Methods for Assessing Wetland Condition," USEPA, National Health and Environmental Effects Laboratory, Corvallis, OR, EPA/620/R-04/009, January 2004.

[6] Memorandum of Agreement, *supra* at Section II.B.

[7] 40 C.F.R. 230.3 (q).

[8] National Wetlands Mitigation Action Plan, December 24, 2002, signed by Les Brownlee, Department of the Army (Civil Works); G. Tracy Mehan, US Environmental Protection Agency; Scott B. Gudes, Department of Commerce; Lynn Scarlett, Department of the Interior; Mark E. Rey, Department of Agriculture; and George E. Schoener, Department of Transportation.

[9] U.S. Army Corps of Engineers Regulatory Branch and U.S. Environmental Protection Agency Wetlands and Aquatic Resources Regulatory Branch Memorandum to the Field, November 7, 2003, signed by Michael B. White and John W. Meagher.

[10] Statement of Findings, Norfolk District Corps — DEQ Wetlands Mitigation Recommendations, J. Robert Hume, III, July 2004.

[11] Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, October 2000, signed by Michael L. Davis, Department of the Army; Robert H. Wayland, EPA; Jamie Clark, U.S. Fish and Wildlife Service; and Scott B. Gudes, Department of Commerce.

DECISIONS

Air

Maintenance Plan Not Required to Use Photochemical Grid Modeling: *Sierra Club v. Environmental Protection Agency,* Nos. 03-2839 & 03-3329 (7th Cir. July 6, 2004)

Background

The St. Louis metropolitan area did not meet attainment for allowable levels of ozone pollution by the November 15, 1996, deadline. Nevertheless, U.S. EPA determined that it was making satisfactory progress and did not reclassify the area as a "serious" nonattainment area. The court determined that the agency's decision was unlawful in *Sierra Club v. EPA,* 311 F.3d 853 (7th Cir. 2002). While those proceedings were underway, St. Louis met the ozone standards and asked EPA for a formal decision that the area was in compliance with the ozone standards. EPA made the requisite findings in 2003, noting that the St. Louis Metro Area had satisfied the five criteria listed in 42 U.S.C. § 7404(d)(3)(E) for designating an area in compliance. *See* 68 Fed. Reg. 25,418, 25,442 (May 12, 2003).

The Sierra Club challenged that decision. It argued that St. Louis did not have a proper "applicable implementation plan" for the area under section 7410(k) and that the area's maintenance plan did not meet all requirements of section 7505a of the Clean Air Act (CAA).

Holding

A maintenance plan acts as an amendment to the local implementation plan. Regarding state implementation plans, sections 7511a(c)(2)(A), and (j)(1) require both multi-state areas (as is St. Louis) and serious nonattainment areas to "use photochemical grid modeling or any other analytical method determined [by EPA] . . . to be at least as effective." Neither Missouri nor Illinois has promised to use photochemical grid modeling as part of their maintenance efforts. The Sierra Club argued that, until EPA makes a formal determination that some other modeling system is "at least as effective," then photochemical grid modeling is required under the statute.

EPA argued that section 7511a deals with *pre-attainment* requirements, not with maintenance plan requirements. Therefore, an area does not need to use photochemical grid modeling as part of a maintenance plan simply because the statute treats maintenance plans as amendments to local implementation plans. The court noted that, although this is not the only reading of the statute, EPA's reading requires *Chevron* deference and has been approved by the Sixth Circuit in *Wall v. EPA,* 265 F.3d 426, 436 (2001). The court found "no reason to create a conflict." Slip op. at 5.

The court was also not persuaded by the Sierra Club's argument that the maintenance plans fail because they do not describe all contingency measures that may be applied if problems arise. It found that the CAA does not call for any particular degree of precision once attainment has been achieved. That Missouri and Illinois have reserved some discretion about methods to use in the future to attack ozone does not jeopardize the viability of their maintenance plans.

The Sierra Club argued that, since St. Louis was designated "serious" for nonattainment because it missed its compliance date, it must use control measures appropriate to a serious nonattainment area in order to be designated an attainment area. EPA contended that the requirement that the Administrator fully approve the "applicable" implementation plan only means that the area must continue to do what it has already done to meet attainment and nothing more. Although the court noted that both interpretations of the statute are reasonable, EPA's interpretation is entitled to *Chevron* deference. The court also considered that it would be odd for the CAA to require additional steps to achieve reduction in ozone when those steps are not necessary.

The court, thus, denied the Sierra Club's petitions for review.

Nuclear Power/Radioactive Waste

Court Vacates EPA's Yucca Mountain's 10,000-Year Regulation: *Nuclear Energy Institute, Inc. v. Environmental Protection Agency,* No. 01-1258 (D.C. Cir. July 9, 2004)

Background

This lawsuit, consolidated with a number of others, involves the selection of Yucca Mountain, Nevada, as the site for the repository for the country's high-level nuclear waste consisting of spent nuclear fuel from commercial nuclear power plants and waste from the country's nuclear weapons program. The various petitioners brought a multitude of challenges involving the site. The first set of challenges, brought primarily by the State of Nevada and environmental petitioners, involves EPA's rule governing public health and safety standards at Yucca Mountain. The second involves the Nuclear Regulatory Commission's (NRC) actions concerning the site. The third deals, *inter alia,* with Nevada's constitutional challenge to the site designation process.

Congress enacted the Nuclear Waste Policy Act (NWPA) in 1982 in response to concerns about the growing quantities of radioactive waste. The statute established the Nuclear Waste Fund to finance the creation and operation of geologic repositories to house nuclear waste. Under the act, nuclear energy producers were to pay assessments into the fund based on the amount of electricity they generate. Congress delegated responsibility to the Department of Energy

with the selection, design, and ultimate operation of the repository. Under the act, U.S. EPA was given the responsibility to establish standards for protecting the environment from releases of radioactive materials and the Nuclear Regulatory Commission (NRC), the responsibility for licensing a DOE-proposed repository.

Under the NWPA, DOE was to nominate five sites that met the guidelines that were to be established. Ultimately, three sites were then to be forwarded to the President for consideration. Those sites approved by the President were then to undergo a site-characterization process. The President was also directed to notify Congress of his approval. A state that had an approved site within its boundaries could then submit a "notice of disapproval" to Congress. For that site to continue to be considered by DOE, Congress would have to pass a joint resolution overriding the state's disapproval and affirmatively approving that site.

In 1984, DOE recommended three sites to the President: Deaf Smith County, Texas; Hanford, Washington; and Yucca Mountain, Nevada. In 1987, because of the costs and time entailed in conducing site characterization, Congress directed, through the Nuclear Waste Policy Amendments Act, that the nation's nuclear waste program focus exclusively on Yucca Mountain, Nevada. In 1992, Congress passed the Energy Policy Act that required EPA to promulgate, based on the recommendations of the National Academy of Sciences, site-specific standards for Yucca Mountain and then ordered the NRC to bring its technical requirements and criteria into conformity with EPA's rule. In response, EPA issued 40 C.F.R. part 197, which established health and safety standards requiring DOE to limit radiation releases from the repository for 10,000 years. NRC issued its licensing standards in 10 C.F.R. part 63.

Challenges to EPA's Rule

The Energy Policy Act instructed that:

> The Administrator shall, based upon and consistent with the findings and recommendations of the National Academy of Sciences, promulgate, by rule, public health and safety standards for protection of the public from releases from radioactive materials stored or disposed of in the repository at the Yucca Mountain site. Such standards shall prescribe the maximum annual effective dose equivalent to individual members of the public from releases to the accessible environment from radioactive materials stored or disposed of in the repository. The standards shall be promulgated not later than 1 year after the Administrator receives the findings and recommendations of the National Academy of Science . . . and shall be the only such standards applicable to the Yucca Mountain site.

Energy Policy Act section 801(a)(1).

EPA's rule provides three standards: an individual protection standard that requires the DOE to show that, for 10,000 years, an individual living adjacent to the site will receive no more than 150 microsieverts of radiation annually from the disposal site; a standard that would require DOE to show, among other things, a reasonable expectation (again, for 10,000 years) that there will be no more than a specified dose of radiation even if humans drill into a waste package; and a groundwater protection standard (once again for 10,000 years) that groundwater outside the controlled area will not receive excessive radiation.

Nevada and the environmental petitioners argued, *inter alia,* that the 10,000-year standard violated the Energy Policy Act because it was not based on the findings and recommendations of the National Acad-

emy of Sciences (NAS). It pointed out the the NAS's 1995 report, titled "Technical Bases for Yucca Mountain Standards," found "no scientific basis for limiting the time period of the individual-risk standard to 10,000 years or any other value." *Id.* at 55. The NAS recommended that "compliance assessment be conducted for the time when the greatest risk occurs, within the limits imposed by the long-term stability of the geologic environment." *Id.* at 6. The report concluded that peak radiation risks might be tens to hundreds of thousands of years after disposal, or perhaps even further into the future. *Id.* at 2.

When EPA promulgated its rule, it acknowledged that the NAS had found it scientifically possible to predict repository performance for approximately one million years and had recommended that the compliance period cover the time when the greatest risk of radiation exposure might occur. However, the agency explained:

> Despite NAS's recommendation, we conclude that there is still considerable uncertainty as to whether current modeling capability allows development of computer models that will provide sufficiently meaningful and reliable projections over a time frame up to tens-of-thousands to hundreds-of thousands of years. Simply because such models can provide projections for those time periods does not mean those projections are meaningful and reliable enough to establish a rational basis for regulatory decision-making.

55 Fed. Reg. at 32,097.

The agency also noted that it had considered policy and technical factors that NAS did not fully address. First, EPA noted that it uses 10,000 years for programs involving the disposal of other long-lived hazardous materials. Second, consistency is important and EPA's generally applicable nuclear waste disposal standard uses a 10,000-year time frame. Third, many international geologic disposal programs use the 10,000-year time frame. Fourth, setting the standard at the peak dose time "could lead to a period of regulation that has never been implemented in a national or international radiation regulatory program" and focusing on 10,000 years places more emphasis on features that humans can control, such as design. *Id.* at 32,098. Finally, projecting human exposure levels over such long periods of time involves great uncertainty.

EPA also interpreted its mandate under the Energy Protection Act as using the NAS report as a starting point for rulemaking — using it as guidance — but not requiring EPA to absolutely follow the NAS report.

Using the two-part test of *Chevron U.S.A.,Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), the court first concluded that the statute was not free of ambiguity in its mandate that EPA issue standards "based upon and consistent with the findings and recommendations of the national Academy of Sciences." It noted that recent case law, such as its own decision in *Sierra Club v. EPA,* 356 F.3d 296, 305–06 (2004), held that "based on" does not necessarily mean "rest solely on." Given the statute's ambiguity, then, the court looked at whether EPA's 10,000-year compliance period was a reasonable interpretation of the statute.

The court concluded it was not. It characterized the agency's actions as "unabashedly" rejecting the NAS's findings and, instead, promulgating a dramatically different standard, one which the NAS had rejected. It concluded, as it had in *Natural Resources Defense Council, Inc. v. Daley,* 209 F.3d 747, 753 (D.C. Cir. 2000), that "this case presents a situation in which the [agency's action] so completely diverges from any realistic meaning of the [statute] that it cannot survive scrutiny under *Chevron* Step Two." EPA's 10,000-year standard deviates "dramatically" from the NAS's finding and the NAS unequivocally recommended a standard geared to the time when radiation doses reach their peak.

Therefore, the court held that EPA's compliance period violates section 801 of the Energy Policy Act.

Challenges to NRC Actions

Nevada, Clark County, and the City of Las Vegas challenged two NRC actions. First, they challenged the requirements and criteria that the NRC promulgated in part 63 of its regulations for licensing the Yucca Mountain depository. Nevada also petitioned for review of the NRC's denial of its petition for rulemaking seeking various amendments regarding the geologic makeup as providing the "primary" barrier for isolating radioactive waste from the human environment.

Nevada and its political subdivisions challenged part 63 on several grounds. First, they claimed that the NRC violated the NWPA by permitting the licensing of a repository that does not isolate waste primarily by geologic means and does not provide multiple barriers to prevent the escape of radiation. They also claimed that the NRC violated the Energy Policy Act by failing to require that the repository comply with EPA's part 197. Finally, it claimed that the NRC violated the Administrative Procedure Act (APA) by adopting a "lax" "reasonable expectation" standard of proof for assessing Yucca Mountain's ultimate performance.

The petitioners argued that various provisions of the NWPA demonstrate that Congress intended the geologic features of the repository to act as the primary barrier for isolating waste from the human environment. Therefore, Nevada maintained that NRC's licensing criteria must also require that geologic features serve as the primary means for isolating waste. The court analyzed Nevada's challenge under the two-part *Chevron* test.

In examining the NWPA's language, the court concluded that Congress specifically directed the NRC to issue requirements and criteria that "provide for the use of a system of multiple barriers in the design of the repository." 42 U.S.C. § 10141(b)(1)(B). Neither does the statute say anything about the role the repository's geologic composition must provide in the system of multiple barriers. The statute does provide certain restrictions but none of them specify how the requirements and criteria "shall provide for the use of a system of multiple barriers in the design of the repository" or the role that any particular barrier must play in this system. *Id.* According to the court, the statutory sections relied on by Nevada speak to the actions taken by DOE, not NRC. Thus, the court concluded that the NRC's "requirements and criteria" to license a nuclear waste repository "reasonably and permissibly" implement section 121 of the NWPA. Slip op. at 39.

The court next addressed Nevada's claim that the NWPA required that the NRC include specific requirements for barriers to provide protection substantially independent of other barriers. The court noted that Congress did not address this precise issue in the NWPA. However, it concluded that the NRC's interpretation of section 121 is based on a permissible construction that the statute does not require barrier-by-barrier performance assessment. It rejected Nevada's challenge that the NRC should not have abandoned its older "defense-in-depth" philosophy in favor of a total system performance assessment. It pointed out that the NRC had set out its rationale for adopting a total system performance assessment, noting advances in knowledge and advances in performance assessment technology. Accordingly, the court concluded that the NRC acted neither arbitrarily nor capriciously in adopting the overall performance approach.

Nevada also argued that the NRC violated both the NWPA and Energy Policy Act by permitting construction at Yucca Mountain without determining that the repository will comply with EPA standards. Since Nevada failed to raise the claim before the NRC, the court held that it had waived the issue.

Concerning the state's challenge to NRC's use of the 10,000-year standard, the court noted that the Energy Policy Act requires NRC to maintain licensing criteria consistent with the public health and safety standards promulgated by EPA. Since it had already held that EPA's selection of a 10,000-year period for as-

sessing compliance violated the Energy Policy Act, the court also vacated NRC's identical compliance period and directed the agency to reconsider the period on remand once EPA has complied with the court's opinion.

Constitutional Challenge

Nevada challenged the congressional resolution that approved the Yucca Mountain site for development and authorized DOE to seek a license to construct and operate a repository there on constitutional grounds. The court noted that the primary constitutional provision applying to this case is Article IV. Section 3 states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. Art. IV, § 3, cl. 2. The court's rule in reviewing Congress' exercise of its power of federal lands is narrow, limited to determining whether the resolution is a needful regulation respecting the public lands. However, even without limited review, a court must keep in mind that "determinations under the Property Clause are entrusted primarily to the judgment of Congress." *Kleppe v. New Mexico,* 426 U.S. 529, 536.

The court easily found a rational relationship between Congress' stated purpose — the development of a safe geological repository for the nation's radioactive waste — and its decision to approve the Yucca site. Nevada argued that the Constitution requires Congress to choose a site that will impose a unique burden on a particular state on the basis of "facially neutral criteria that are applicable nationwide." Slip op. at 48. According to Nevada, this standard was violated because Congress chose the Yucca Mountain site based on site-suitability criteria that is only applicable to Yucca. Nevada based its "equal treatment" claim on principles of federalism inherent in the Constitution as a whole, not on any particular constitutional provision. For support, Nevada cited the Court's decision in *South Carolina v. Baker,* 485 U.S. 505, 512 (1988), in which the Court suggested "the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment." The Court noted this might occur when a state "was singled out in a way that left it politically isolated and powerless." *Id.* According to Nevada, this is what has happened in the Yucca Mountain siting resolution.

The Court disagreed. It commented that the decision in *Baker* referred to congressional regulation of *state* activities. The resolution does not commandeer the state legislative process or state officials so as to violate the Tenth Amendment. It merely prescribes the use of a particular piece of federal property. Furthermore, *Baker* applies to defects in the *political process*. Nevada's claim goes to the substantive basis of congressional legislation over federal property. The *Baker* Court clearly stated that "nothing in . . . the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation. Where, as here, the national political process did not operate in a defective manner, the Tenth Amendment is not implicated." *Id.* at 513.

The court concluded that Nevada's "equal treatment" requirement has no roots in Supreme Court precedent or the history of the Constitution. The court, thus, rejected Nevada's constitutional challenge to the resolution.

Outer Continental Shelf

No State Permit Required for Structure in Nantucket Sound: *Ten Taxpayer Citizens Group et al. v. Cape Wind Associates, LLC,* No. 03-2323 (1st Cir. June 28, 2004)

Background

Cape Wind seeks to construct a commercial windmill farm on Horseshoe Shoals, in Nantucket Sound, more than three miles offshore. The proposed farm, as presently envisioned would include some 130 industrial wind turbines, each 470 feet tall, spreading across 28 square miles. In order to construct the wind farm, Cape Wind needs meteorological and oceanographic data concerning conditions on Horseshoe Shoals.

Thus, it announced in late 2001 that it planned to build a "scientific measurement device station" (SMDS) on the shoals to collect data for five years.

In August 2002, the U.S. Army Corps of Engineers issued a permit to Cape Wind under section 10 of the Rivers and Harbors Act of 1899 for construction of the SMDS. Cape Wind did not seek a permit from Massachusetts.

Various taxpayer groups filed an action in state court contending that Cape Wind could not build the SMDS without regulatory approval from Massachusetts. Cape Wind removed to federal court, asserting federal jurisdiction. The federal district court denied the motion to remand. The court then granted Cape Wind's motion to dismiss. The court concluded that the federal government had sole authority over the SMDS on Horseshoe Shoals. The plaintiffs appealed.

Holding

In a series of cases, beginning in 1947, the U.S. Supreme Court established that the United States enjoys exclusive title in the lands underlying the sea, notwithstanding an individual state's historical claims to the waters off its coasts. This rule was somewhat modified by the Submerged Lands Act (SLA), 43 U.S.C. § 1301 *et seq.,* which granted to the states, with certain exceptions, full title to the seabed within three geographical miles of their shores. Congress then enacted the Outer Continental Shelf Lands Act of 1953 (OCSLA), 43 U.S.C. § 1331 *et seq*., the major purpose of which was to specify that federal law governs the outer continent shelf, defined as all submerged lands under U.S. sovereign control lying seaward of the three-mile boundary. In *United States v. Maine,* 420 U.S. 515 (1975), the Court held that the OCSLA had emphatically defined that the United States has paramount rights to the seabed beyond the three-mile limit. *Id.* at 526.

In 1976, Congress enacted the Magnuson (now Magnuson-Stevens) Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.,* which created a "national framework" for conserving and managing marine fisheries. The federal government kept jurisdiction over fishery management, fish, and fishery resources in the outer continental shelf waters making up the United States' "exclusive economic zone," which extends 200 miles seaward from the coastline. The act also ceded jurisdiction to the states to regulate fishing activities within their borders, including within the three-mile SLA border.

Nantucket Sound presents a special case. It is almost completely enclosed by Massachusetts' territorial sea. At the eastern end, a one-mile wide channel connects it to open ocean. However, the Sound's central portion, including Horseshoe Shoals, is more than three miles from the coast. Massachusetts' claim that all of Nantucket Sound, including the shoals, was within Massachusetts' territorial jurisdiction was rejected by the Supreme Court in *United States v. Maine,* 475 U.S. 89 (1986). Therefore, it is incontrovertible that Horseshoe Shoals is on the outer continental shelf under federal jurisdiction.

While that case was before the Court, Congress passed a bill defining all of Nantucket Sound to be within the "jurisdiction and authority" of Massachusetts "[f]or the purposes of" the Magnuson-Stevens Act. In *Davrod Corporation v. Coates,* 971 F.2d 778, 786 (1st Cir. 1992), the First Circuit held that the statute confirmed Massachusetts' power to regulate the length of fishing vessels in Nantucket Sound. The plaintiffs in this lawsuit contended that Massachusetts also has the power to regulate the construction of the SDMS because it has the potential to affect fishing and fish habitats.

The first issue the court addressed was whether federal question jurisdiction existed. The court noted that Congress has explicitly incorporated state law as federal law as to the outer continental shelf:

> To the extent they are applicable and not inconsistent with this subchapter . . . , the civil and criminal laws of each adjacent State, now in effect or hereinafter adopted . . . are declared to be the law of the United States for

> that portion of the subsoil and seabed of the outer Continental Shelf . . . . All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States.

42 U.S.C. § 1333(a)(2).

Since the SMDS is on the "subsoil and seabed of the outer Continental Shelf" in territory adjacent to Massachusetts, all Massachusetts statutes or regulations in this case would be treated as federal law to the extent they apply on Horseshoe Shoals. Therefore, although the plaintiffs' claims are premised on Massachusetts law, that law becomes federal law so that a federal question appears on the face of the complaint.

The court then examined whether Massachusetts' statutes apply to activities on Horseshoe Shoals and, if they do apply, whether their application to Cape Wind's construction of the SMDS would be inconsistent with other federal law.

The plaintiff asserted that several Massachusetts statutes applied to the SMDS site. However, it is worth noting that Massachusetts has itself rejected the claim that it has jurisdiction to regulate the defendant's activities on Horseshoe Shoals. One of the statutes cited by the plaintiff is chapter 130, which regulates fishing. Section 16 states that "[a]ny occupation under this chapter of tide waters or any work done therein, shall be subject to the pertinent [permitting and licensing] provisions of chapter ninety-one." The issue is what the term "tide waters" embraces. Horseshoe Shoals is factually affected by the tide; the depth of the area varies three feet between high and low tides. However, the court interpreted the terms as concerning developments in harbors or along the shoreline. Even if section 16 should apply, this would merely mean that the SMDS would be subject to the "pertinent provisions" of chapter 91. However, the Massachusetts Department of Environmental Protection's (DEP's) regulations limit the licensing provision to activities in "waterways" and "filled tidelands." Those terms would not apply to Horseshoe Shoals.

The plaintiff also cited the Massachusetts Ocean Sanctuaries Act which expressly provides that Nantucket Sound is within the Cape and Islands Ocean Sanctuary. That statute prohibits, with a few exceptions, "the building of any structure on the seabed" in any ocean sanctuary. The problem is that the Department of Environmental Management (DEM), which is charged with implementing the act, has expressly disclaimed authority over Horseshoe Shoals. Since the DEM has disclaimed regulatory authority, the court held that Cape Wind was not required to seek approval for the project under the Ocean Sanctuaries Act.

Furthermore, even if the DEM were to interpret the act so as to assert jurisdiction over Horseshoe Shoals, under the OCSLA, state laws are not adopted as surrogate federal law to the extent that they are inconsistent with federal law. The court concluded that the OCSLA "leaves no room for states to require licenses or permits for the erection of structures on the seabed on the outer Continental Shelf." If state law were to apply as federal law, this would "effectively grant state governments a veto power over the disposition of the national seabed. That result is fundamentally inconsistent with the OCSLA." Slip op. at 27.

The court also disagreed with the plaintiff that the Magnuson-Stevens Act, enacted after the OCSLA, defined the "body of water commonly known as Nantucket Sound" to be within the "jurisdiction and authority" of Massachusetts. There is nothing in that act that showed congressional intention to alter the rights of the United States in the outer continental shelf.

Therefore, the court affirmed the judgment of the district court.

RCRA

Bluegrass Residue Not RCRA Solid Waste: *Safe Air for Everyone v. Wayne Meyer et al.,* No. 02-35751 (9th Cir. July 1, 2004)

Background

Kentucky bluegrass farmers in Idaho plant their crop in the spring, but it does not flower and produce seed until the summer of the following year. By that time, the plants are fifteen to thirty-six inches tall. To harvest the seed, farmers cut the crop close to the ground, allow it to "cure," and then separate the seed from the straw by a combine. The straw and stubble (the part of the crop left in the ground) are then burned.

Safe Air for Everyone, a non-profit corporation, has as one of its objectives stopping the practice of open burning. It alleges that the smoke resulting from the burning endangers the public because it contains high concentrations of pollutants that can create severe respiratory problems for residents living close to the fields. Safe Air filed a complaint in district court alleging that open burning violated the Resource Conservation and Recovery Act. The district court dismissed Safe Air's complaint, holding that grass residue did not constitute "solid waste" under the Resource Conservation and Recovery Act (RCRA). Safe Air appealed.

Holding

RCRA defines "solid waste" as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations . . . ." 42 U.S.C. § 6903(27). In *American Mining Congress v EPA,* 824 F.2d 1177, 1190 (D.C. Cir 1987), the court opined that Congress intended to extend EPA's authority "only to materials that are truly discarded, disposed of, thrown away, or abandoned." Specifically, the court held that EPA could not regulate materials that "are destined for beneficial reuse or recycling in a continuous process by the generating industry itself." *Id.* at 1193. In *United States v. ILCO,* 966 F.2d 1126 (11th Cir. 1993), the court expanded on the D.C. Circuit's holding by determining that material once discarded may not be exempt from being defined as RCRA solid waste simply because someone finds value in it.

With these decisions in mind, the court asked three questions: Is the material in question "destined for beneficial reuse or recycling in a continuous process by the generating industry itself"? Are the materials actively reused or do they simply have a *potential* for reuse? Are the materials being reused by their original owner as opposed to a salvager or reclaimer?

In the district court, the growers submitted evidence that they reuse grass residue in a continuous process of growing Kentucky bluegrass. There are two primary benefits from the reuse. It returns nutrients to bluegrass fields and facilitates the open burning process, offering critical benefits for bluegrass farmers.

The grower's expert and two growers testified that grass harvest recycles nutrients to the fields, acting as a fertilizer. The defendants also presented evidence that grass residue is an integral component in the open burning process and that open burning has four critical benefits for Kentucky bluegrass farmers. First, it extends the productive life of bluegrasss fields. One of Safe Air's witnesses testified that, in some cases, it increases the life of fields up to twenty years. Second, several witnesses, including one of Safe Air's experts, testified that open burning restores beneficial minerals and fertilizers to bluegrass fields, including phosphorus, potassium, and potash. Third, evidence was presented that suggested that open burning reduces or eliminates insects on the fields, reducing the need to use pesticides. Fourth, testimony was elicited that open burning blackens the soil on fields, maximizing the soil's sunlight absorption to increase crop yield.

Safe Air did not contest that the grass residue provides benefits, but it argued that the primary benefit from open burning is removal of grass residue and that the other benefits are incidental. However, the

court noted that the undisputed evidence showed that the grass residue was reused in a "continuous farming process effectively designed to produce Kentucky bluegrass." Slip op. at 19. Therefore, there is no genuine issue of material fact as to whether grass residue is "discarded material." It is not discarded, abandoned, or given up. Therefore, it does not qualify as solid waste under RCRA.

Returning to its original three questions, the court noted the evidence established that: (1) the grass residue is reused in a continuous process of growing and harvesting Kentucky bluegrass; (2) the grass residue is used to provide nutrients and act as a fire accelerant for open burning; and (3) the grass residue is being reused by farmers who are its original owners. Therefore, it cannot be said to be "discarded."

The court also noted that RCRA's legislative history reinforced its conclusion. Congress was concerned with waste products that were contributing to landfills. The House Report states that "[a]gricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation." H.R. Rep. No. 94-1492, at 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6239.

According to the court, Safe Air did not demonstrate a genuine issue of material fact on the issue of whether grass residue is a "solid waste" under RCRA. Therefore, it affirmed the district court's dismissal of the case.

Wetlands

Court Reaffirms that Waters Hydrologically Connected to Navigable Waters Are Within Purview of CWA: *United States v. John A. Rapanos et al.*, No. 03-1489 (6th Cir. July 26, 2004)

Background

This is a civil action, charging John Rapanos, his wife, and their wholly owned companies with violations of the Clean Water Act (CWA). They government alleged that they illegally discharged fill material into protected wetlands at several sites between 1988 and 1997.

The government also brought criminal charges against Rapanos. He was convicted and sentenced to three years' probation and a fine of $185,000. The conviction was upheld on appeal, but the case was remanded for resentencing. *United States v. Rapanos,* 235 F.3d 256, 261 (6th Cir. 2000). The Supreme Court granted Rapanos' request for a writ of certiorari, vacated, and remanded Sixth Circuit's order in light of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159 (2001) (*SWANCC). Rapanos v. United States,* 533 U.S. 913 (2001). On remand, the district court set aside the conviction, finding that the United States lacked jurisdiction in the light of *SWANCC*. The Sixth Circuit reversed (330 F.3d 447 (6th Cir. 2003)), and the Supreme Court recently denied certiorari.

In the civil case, the district court found that the government has proven that Rapanos had filled fifty-four acres of wetlands protected by the CWA without a permit. Rapanos appealed, arguing, *inter alia*, that the district court erred in finding that the wetlands were adjacent wetlands merely because they had a surface connection to waters of the United States and failed to consider Michigan's definition of "wetland."

Holding

The U.S. Corps of Engineers' interpretation of its jurisdiction under the CWA is found in 33 C.F.R. § 328.3, in which the Corps asserts jurisdiction over "wetlands adjacent to traditional navigable waters." "Adjacent" means "bordering, 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.'" 33 C.F.R. § 328.3(c).

In *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121 (1985), the Court held that Congress sought to define coverage of the CWA broadly in order to protect against pollution "at its source." *Id.* at

133. It, thus, concluded that the definition of the CWA's "waters of the United States" as encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the statute. *Id.* at 135.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001), the Court again faced the issue of the jurisdictional reach of the CWA. In that case, if affirmed its *Riverside Bayview* holding, but held that Congress did not intend that the CWA jurisdiction be extended to isolated, intrastate, non-navigable bodies of water simply because they were occasionally the home for migratory birds.

Courts have struggled with interpreting how *SWANCC* affects CWA jurisdiction. The majority of courts has interpreted *SWANCC* narrowly to hold that the CWA still reaches inland waters that share a hydrological connection with navigable waters. *See, e.g., Treacy v. Newdunn Associates, LLP,* 344 F.3d 407 (4th Cir. 2003); *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003); *United States v. Rueth Development Company,* 335 F.3d 598 (7th Cir. 2003); *Headwaters v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001). On the other hand, a minority of courts has read *SWANCC* broadly to limit the reach of the CWA to navigable waters and non-navigable waters that directly abut navigable waters. *See, e.g., In re Needham,* 354 F.3d 340, 345-46 (5th Cir. 2003); *FD & P Enterprises, Inc. v. U.S. Army Corps of Engineers*, 239 F. Supp.2d 509 (D.N.J. 2003).

This court, in Rapanos' criminal case, agreed with the Fourth Circuit that a hydrological connection is sufficient for CWA jurisdiction to attach. The hydrological connection satisfies the *SWANCC* requirement that a "significant nexus" exist between wetlands and navigable waters. It found that *Chevron* deference to the Corps' definition was appropriate.

In applying this reading of *SWANCC* to Rapanos' civil case, the court found that the district court had correctly held that the three sites involved in this litigation contained a hydrological connection to navigable waters. The appellate court held that those findings were not clearly erroneous.

Michigan has assumed responsibility for the CWA's section 404 permitting program. This gives the state the authority "to render a comprehensive federal/state wetland permit decision with the federal government playing the role of the overseer in the consideration of permit applications." *Michigan Peat v. U.S. Environmental Protection Agency,* 175 F.3d 422 (6th Cir. 1999). The defendants claimed that Michigan's permitting regulations define wetlands differently from federal regulations. Under the state's Geomare-Anderson Wetlands Protection Act, wetlands not contiguous to the Great Lakes, an inland lake or pond, or a river or stream, and less than five acres in size are not subject to the act unless it is certified that the area's preservation is necessary to protect the natural resources of the state. MICH. COMP. LAWS § 324.30301(p)(ii). The defendants argued that it was error for the district court to focus solely on the federal regulations and fail to make findings of fact regarding the five-acre limitation.

The court answered that states may not impose less stringent requirements in its permitting process. Federal regulations specifically state that "[a]ny approved State Program shall, at all times, be conducted in accordance with the requirements of the Act . . . . While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose." 40 C.F.R. § 233.1(d). Furthermore, permitting a state to issue CWA permits does not foreclose federal issuance of CWA permits. (*See Michigan Peat, id.,* a case in which the court found the Corps had ultimate authority to issue permit when the state permit did not address the concerns of the federal government.) The CWA also provides that delegation is not meant to restrict the Corps' authority to enforce the CWA. 33 U.S.C. § 1344(n). The CWA does not contain any language suggesting that state implementation is "in lieu of" federal enforcement. Therefore, any delegation of authority to the state in the CWA does not end a citizen's responsibility to abide by federal laws and regulations.

Finally, the Corps retains the authority to deny a CWA permit even if Michigan is intending to grant one under its delegation of authority. In certifying Michigan's 404 permitting scheme, Michigan's Attorney General wrote that:

> The Water Resources Commission Act governing discharge of pollutants into water of this state includes within its ambit all waters of the State of Michigan. It is, of course, clear that the . . . Wetlands Act excludes from their purview certain lakes having an area of less than 5 acres. Even this problem is, in fact, of no practical matter for a number of reasons. First, it is quite conceivable that a lake under 5 acres would have an affect on interstate commerce so as to imbue it with the distinction of being "water of the United States" and thus subject to the federal permit program.

Therefore, even if a site is not within the ambit of Michigan's state program, it may still be within federal CWA jurisdiction.

The court, thus, affirmed the judgment of the district court.

Corps' Nationwide Permit for Discharges of Dredged and Fill Material from Mining Invalid: *Ohio Valley Environmental Coalition et al. v. William Bulen et al.,* No. 3:03-2281 (S.D. W. Va. July 8, 2004)

Background

Under section 404(a) of the Clean Water Act (CWA), the U.S. Army Corps of Engineers is authorized to issue individual discharge permits for discharges of dredged and fill material. Individual permitting requires a notice and comment procedure and site-specific documentation and analysis. Section 404(e) of the CWA was added to allow the Corps to define categories of discharge activities on a statewide, region-wide, or nationwide basis:

> [T]he Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or nationwide basis for any category of activities involving dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will not have only minimal cumulative adverse effect on the environment. . . .

33 U.S.C. § 1344(e).

In January 2002, the Corps reissued Nationwide Permit (NWP) 21, which authorizes "[d]ischarges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations provided the coal mining activities are authorized by the DOI, Office of Surface Mining, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act." 67 Fed. Reg. at 2081.

Unlike other NWPs, NWP 21 requires that the Corps must approve all NWP 21 projects before they can proceed to construction: "To be authorized by this NWP, the District Engineer must determine that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are minimal both individually and cumulatively and must notify the project sponsor of this determination in writing." *Id.* at 2090. The Corps views the preconstruction authorization requirement as ensuring compliance with the Clean Water Act: "In order to ensure that appropriate mitigation is performed, and that no activities are authorized that result in greater than minimal adverse impacts, either individually or cumulatively, the revised permit also requires not only notification, but also explicit authorization by the Corps before the activity can proceed." *Id.* at 2043.

The plaintiffs, a collection of environmental groups, claimed that NWP does not comply with the CWA in several aspects. The projects in West Virginia that the plaintiffs are asking the court to enjoin will impact approximately 140,000 linear feet of waters.

Holding

The defendants' first challenge to the plaintiffs' lawsuit is that the challenge is not ripe. The defendants argued that no legal consequences flow from the Corps' issuance of NWP 21 because the Corps must still authorize individual projects. The defendants relied on *Lujan v. National Wildlife Federation,* 497 U.S. 871 (1990). The court concluded that reliance on *Lujan* was misplaced. The Court in *Lujan* determined that the program was not an agency action, much less a final agency action. The amorphous "land withdrawal review program" challenged in *Lujan* does not bear a relationship to NWP 21. Issuance of the NWP is unquestionably an agency action. The remaining question is whether the action is a "final" action.

In *National Association of Home Builders v. U.S. Army Corps of Engineers,* 297 F. Supp. 2d 74 (D.D.C. 2003), the court found that the issuance of NWPs was not a final agency action. However, the court did not consider whether the act of issuing an NWP might be final from the perspective of one who seeks to prevent a discharge. The court opined that the Supreme Court's decision in *Ohio Forestry Association, Inc. v. Sierra Club,* 523 U.S. 726 (1998), is more relevant to the case at bar. In that case, the Court formulated the ripeness analysis as a three-part test: a court must consider "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Id.* at 733.

The Court in *Ohio Forestry* determined that the plan in question was not ripe, largely because the plaintiffs could bring their challenge later at a time when the harm would be more imminent and more certain. That is not true of NWP 21. There is no opportunity for affected parties to comment or intervene in the Corps' decision. Therefore, delayed review would, in fact, cause hardship to the plaintiffs. Furthermore, there is no further administrative action that will occur after the issuance of the permit. There is no process for administrative appeal of NWP 21 authorizations. Concerning the third issue, NWP 21 is not an elaborate or technically based process; the substance is simple and whether it complies with the CWA is a purely legal question. Therefore, the court found that the issuance of NWP 21 is ripe for adjudication.

After determining that the plaintiffs have standing, the court also discussed whether mining companies currently holding NWP 21 authorizations are necessary parties to the lawsuit. The court in *Kentuckians for the Commonwealth v. Rivenburgh,* 206 F. Supp. 2d 782 (S.D. W. Va. 2002), *rev'd on other grounds*, 317 F.3rd 425 (4th Cir. 2003), held that the permit holder did not demonstrate that it had a legally protected interest in the permit. Furthermore, in this case, the coal association defendant intervenors are capable of representing the absent coal companies' interest. Thus, there was no need to dismiss the lawsuit for failure to join the individual permit holders.

In determining the substantive issue in the case, the court stated the standard in determining whether an agency has correctly interpreted a statute. The first question is whether Congress has directly spoken to the precise issue at question. In this case, the court noted that Congress' intent was unambiguous when it authorized the nationwide permit program. Both the language and the structure of the CWA are clear. Congress empowered the Corps to issue general permits "for any category of activities . . . if the Secretary determines that the activities in such category . . . will cause only minimal adverse environmental effects. . . ." 33 U.S.C. § 1344(e). The statute further requires the Corps to "set forth the requirements and standards which shall apply to any activity authorized by such general permit." *Id.* In the case of NWP 21, the Corps has not defined a category of activities that will cause only minimal adverse effects or a set of requirements and standards. NWP 21 is, instead,

defined by future Corps analysis and approval. The "category" of activities authorized by NWP 21 is "nothing more than the collection of activities that the Corps determines, during reviews that take place after the issuance of NWP 21, will have minimal effects." Slip op. at 27. NWP 21 imposes a procedure instead of permitting a category of activities.

Section 404(e) of the CWA differs from section 404(a) by the absence of individual review. Subsection (e) was put in place to alleviate some of the burden that would be imposed on the Corps by the expanded jurisdiction of the CWA to cover other than navigable waters. Therefore, to issue a section 404(e) permit that is predicated on post-issuance review and approval of individual projects is antithetical to Congress' purpose: The court stated that "[i]f the Corps cannot define a category of activities that will have minimal effects, absent individual review of each activity, the activities are inappropriate for general permitting." Slip op. at 28. The court found that the legislative history of subsection (e) supports its understanding that NWP 21 violates the CWA.

The court, therefore, enjoined the issuing of authorizations pursuant to NWP 21 in the southern district of West Virginia and ordered the Corps to suspend authorizations for valley fills and surface impoundments on which construction had not commenced by the date of the opinion.

New Jersey Supreme Court Strikes Down Some State Wetlands Rules: *In re Freshwater Wetlands Protection Act Rules,* No. A-91-03 (N.J. July 26, 2004)

Background

New Jersey is one of two states that have received delegation from U.S. EPA to assume responsibility for section 404 permitting under the Clean Water Act. The New Jersey State legislature passed a comprehensive scheme to regulate activities in freshwater wetlands. In several ways, the state law affords greater protection for wetlands than does the CWA. First, there is no jurisdictional restriction as to adjacency of navigable waters. Second, the state law regulates more activities, requiring a permit "to fill, drain, remove any soil, disturb the soil in any way, drive pilings, place obstructions, or destroy plant life which would alter the character of the wetland." N.J. STAT. ANN. § 13:9B–3. Third, the state law mandates buffers around wetlands, called transition areas; the buffer areas are designed to protect wildlife and minimize the impact of development.

Under New Jersey law, transition areas are required for freshwater wetlands of "exceptional resource value" and of "intermediate resource value," but not of "ordinary value." "Exceptional resource value" wetlands are defined as those that "discharge into . . . trout production waters and their tributaries" or provide "habitats for threatened or endangered species." N.J. STAT. ANN. § 13:9B–7a. Wetlands of "ordinary value" are defined as those that "do not exhibit the characteristics [of exceptional resource value] and which are certain isolated wetlands, man-made drainage ditches, swales, or detention facilities. N.J. STAT. ANN. § 13:9B–7c. "Intermediate resource value" wetlands are defined as those that do not qualify as exceptional resource value wetlands and are not ordinary wetlands.

Freshwater wetlands of exceptional resource value require transition areas of not greater than 150 feet nor less than 75 feet. The transition area for a freshwater wetland of intermediate resource value must be no greater than fifty feet nor less than twenty-five feet. N.J. STAT. ANN. 13:9B-16b(1), (2). In September 2001, the New Jersey Department of Environmental Protection (DEP) readopted the rules and adopted some amendments to those rules. One of the rules now challenged concerns the definition and application of a "residential development project" within the wetlands area and the transition area. The rules define a "residential development project" as "the construction of a new structure for residential use and the area within twenty feet of the structure on all sides, measured outward from the outside edge of the foundation of the structure." N.J. Admin. Code title 7 § 7.A–2.2(a)6,7 & 1.4. The effect of this rule is to expand the width of transition areas for wetlands ad-

jacent to structures by an additional twenty feet.

DEP recognized the expansion of the transition area but reasoned that it was inevitable that homeowners' activities would spill from their land either onto a wetland of ordinary value or onto transition areas surrounding other wetlands. DEP considered the cost of policing and eradicating such violations on a case-by-case basis prohibitive.

Under the statute, DEP is required to issue a general permit:

> [F]or an activity in a freshwater wetland which is not a surface water tributary system discharging into an inland lake or pond, or a river or stream, and which would not result in the loss or substantial modification of more than one acre of freshwater wetland, provided that this activity will not take place in a freshwater wetland of exceptional resource value.

N.J. STAT. ANN. § 13:9B-23a.

One of the new rules adopted in September 2001 directed that any activity "authorized under a general permit shall not take place in a vernal habitat . . . or in a transition area adjacent" to a vernal habitat. N.J. ADMIN. CODE tit. 7 § 7A–4.3(b)(16). A vernal habitat is defined by four criteria and, by definition, occurs in an isolated wetland.

The New Jersey Builder's Association argued that the DEP had exceeded its statutory authority in extending the buffer zone and by regulating vernal habitats. The appellate division affirmed the rules and the builder's group appealed.

Holding

The court noted that the legislative history of the act shows that the establishment of the transition areas was the result of a compromise reached between developers and environmentalists. The statute clearly sets forth the dimensions for transition areas. According to the court, although the new rule serves a laudatory purpose, the decision as to whether to provide additional protection is a legislative one. Administrative convenience is not enough to support a regulation that directly conflicts with the governing statute. Therefore, the court held that DEP's attempt to expand the reach of the statute is *ultra vires* and cannot be sustained.

The builders group also argued that the CWA does not apply to most isolated wetlands; therefore, it reasoned, the DEP exceeded the regulatory scope of the CWA by regulating activities in vernal habitats. The DEP responded that it is necessary to regulate activities in vernal habitats because the destruction of such habitats will have more than a minimal impact on the environment. The court noted that the plain and unambiguous language of the statute requires that activities in isolated wetlands neither disturb or destroy more than one acre of freshwater wetland not take place in wetlands of exceptional resource value. There is nothing in the statute that would change the mandate that DEP issue a general permit for areas that the DEP might carve out, such as vernal habitats. The legislature could have made such permits subject to an adverse environmental impact analysis. It did not. The DEP only has the authority to modify or rescind a general permit on an individual basis.

The court thus concluded that DEP's attempt to incorporate a vernal habitat ban on general permits exceeded its statutory authority under the act.

CIVIL/ADMINISTRATIVE PROCEEDINGS

New Filings

Nuisance

***Connecticut et al. v. American Electric Power Company et al.,* No. 04-CV-05669 (S.D.N.Y. July 21, 2004)**

Eight state attorneys general — those from California, Connecticut, Iowa, New Jersey, New York, Rhode Island, Vermont, and Wisconsin — and the City of New York have filed a lawsuit against five utilities and their subsidiary companies ¯ American Electric Power Company, Southern Company, the Tennessee Valley Authority, Xcel Energy, Inc., and Cinergy Corporation ¯ alleging that the companies' discharge of carbon dioxide creates a public nuisance.

Together, the companies own more than 170 coal-fired power plants nationwide and account for nearly 25 percent of carbon dioxide emissions from the utility industry in the United States. The lawsuit asks the court for injunctive relief to order the companies to reduce carbon dioxide emissions at their facilities.

[For further information, contact New York AAG Simon Wynn at (212) 416-8287.]

Water

***Connecticut, Delaware, Massachusetts, New Jersey, New York, Rhode Island. v. U.S. EPA,* No. 04-2010 (1st Cir. filed July 26, 2004)**

Six states have filed a lawsuit that challenges a U.S. EPA rule that they allege fails to protect fish and other aquatic life from being harmed in power plants' intake systems. The challenged rule was finalized on July 9, 2004. The lawsuit claims that the rule fails to conform to the Clean Water Act's best available technology standard because it only requires plants to cut fish mortality by sixty percent from the current levels.

In separate lawsuits, environmental and industry groups have filed challenges to the rule in the Second, Fourth, Fifth, Seventh, and Ninth Courts of Appeals and in the D.C. Circuit. Venue for the challenges will be decided by lottery.

[For further information, contact Rhode Island SAAG Tricia Jedele at (401) 274-4400.]

***Western States Petroleum Association v. California Coastal Commission,* No. CV04-4959 R (SSx) (C.D. Cal. July 7, 2004)**

Western States Petroleum Association, an oil industry group, has sued the California Coastal Commission in federal district court, asking that the court enjoin the state from regulating discharges of wastewater and other pollutants from twenty-two oil platforms outside the three-mile limit of the state's coastal zone. The lawsuit alleges that the state has no authority to regulate in non-state waters; the state's position is that it has the right to regulate oil and gas development in federal zones if there is an impact on state waters.

The state has filed a motion to dismiss, arguing that the federal court has no jurisdiction because of sovereign immunity and Eleventh Amendment considerations.

[For further information, contact SDAG Jamee Patterson at (619) 645-2001.]

Settlements/Orders

Air

***United States and Pennsylvania v. Weyerhaeuser Company,* No. 04-211E (W.D. Pa. July 22, 2004)**

Weyerhaeuser Company has agreed to pay a $900,000 penalty and improve air pollution controls at its kraft pulp and paper mill in Johnsonburg, Pennsylvania, to settle allegations that it violated federal and state air pollution control laws at the mill. The federal and

state complaints alleged that Weyerhaeuser owned two coal-fired power boilers without required upgrades to air pollution control equipment.

The original suit was filed in 1999 against Willamette Industries, Inc., who owned the plant at the time of the modification. Weyerhaeuser merged with Willamette and inherited the liability for the plant.

The settlement, once it is approved by the court, will be divided so that $225,000 will go to the state and the remainder, to the federal government.

[For further information, contact AUSA Bob Eberhart at (412) 644-3500.]

Lead

***United States v. Dominium Management Services, Inc., and Robert Zeman,* No. 04-3088 (D. Minn. July 8, 2004)**

Under two settlement agreements, a property management firm, Dominium Management Services, Inc., and the owner of rental property, Robert Zeman, will pay a $10,000 fine for violating the Residential Lead-Based Paint Hazard Reduction Act of 1992. They will also remove lead paint from rental units (at a cost of up to $1 million) and pay $70,000 to the nonprofit Sustainable Resource Center for lead paint removal.

The defendants failed to warn tenants about lead paint hazards in their rental units.

[For further information, contact AUSA Greg Brooker at (612) 664-5600.]

RCRA

***United States and California v. United Airlines, Inc.,* No. 02-48210 (Bankr. N.D. Ill. July 23, 2004)**

United Airlines, Inc., has agreed to pay an $850,000 civil penalty to resolve its violations of state and federal hazardous waste laws at its San Francisco International Airport facility. According to the complaint, EPA inspectors found widespread violations of hazardous waste regulations, including failure to close containers, improper labeling, and storage of waste for longer than the allowable limits.

The agreement has been approved by the federal bankruptcy court overseeing United's Chapter Eleven petition.

[For further information, contact Valerie Mann, DOJ, at (202) 616-8756.]

Solid Waste

***Iowa v. Bee Rite Tire Disposal, Inc., et al.,* No. 02641 LAC1004233 (Dist. Ct. Marshall County June 17, 2004)**

Bee Rite Tire Disposal, Inc., Michael Trowbridge, and Jerry Yeomans – officers and owners of Bee Rite – have been ordered to pay a $1.5 million civil penalty and remove and properly dispose of tires and all solid waste at tire processing facilities at Rhodes and State Center, Iowa. The complaint, filed by the Iowa Attorney General's Office, alleged that the defendants violated state solid waste laws and regulations at both processing sites, including having more tires than authorized under the terms of their permit and violating fire code requirements. The defendants were also ordered to pay a $10,000 administrative penalty assessed against them by the state Department of Natural Resources in 2001.

[For further information, contact Iowa AAG David Dorff at (515) 281-6710.]

Water

***Wisconsin v. Alliant Energy Corporation and Wisconsin Power & Light Company,* No. 04CV0148 (Cir. Ct. Columbia County July 13, 2004)**

Alliant Energy Corporation and its subsidiary, Wisconsin Power & Light Company, will pay $100,000 to the state to settle a lawsuit alleging that it violated water laws at a power plant near Portage, Wisconsin. The companies will also pay $50,000 in costs and fees to the Wisconsin Environmental Law Advocates, which intervened in the lawsuit.

The state's complaint alleged that the companies had violated its wastewater discharge permit for the Columbia Generation Station. According to the complaint, the company exceeded its effluent limitations on biological oxygen or total suspended solids sixty-two times in a three-year period. Under the settlement, the companies will construct a new sanitary wastewater treatment plant and undertake additional testing and monitoring.

[For further information, contact Wisconsin AAG Lorraine Stoltzfus at (608) 266-9226.]

CRIMINAL PROSECUTIONS

Indictments/Charges

***Alaska v. Greenpeace International, et al.* No. 1KE-S-04-771CR (Dist. Ct. Ketchikan July 22, 2004)**

Alaska has filed misdemeanor charges against Greenpeace International, alleging that its ship, the *Arctic Sunrise,* failed to file an oil spill response plan or have a certificate of financial responsibility. State law requires large nontankers to file these documents five days before entering state waters. The charges were filed against Greenpeace, the ship, and its captain, Arne Sorenson, as well as the ship's agent, Willem Jan Beekman.

State officials ordered the ship to anchor on July 14 until the documents were filed. However, the ship resumed its passage in violation of the order and was stopped again.

The ship was cruising southeast Alaskan waters to protest logging in the Tongass National Forest.

[For further information, contact Alaska AAG Mark Morones at (907) 269-6379.]

Sentences

Endangered Species

***United States v. Manuel G. Arias Silva,* No. 04-20144-CR-Seitz (S.D. Fla. July 27, 2004)**

Manuel G. Arias Silva, a Peruvian national, has been sentenced for his role in a conspiracy to import into the United States protected species of orchids. Silva was sentenced to twenty-one months, with three years' supervised release, and ordered to pay a fine of $5,000. All species of orchids are protected under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

Arias Silva sold several shipments of orchids to George W. Norris, Silva's co-conspirator, between January 1999 and October 2003. Silva would allegedly obtain a CITES permit for the shipment but would include in the shipment specimens of species not included in the CITES permit. Silva would then provide Norris the means of deciphering the false labels and identify the true species of the orchids. One shipment in February 2003 allegedly contained some 1,145 specimens, of which approximately 490 were not authorized for export under the CITES permit.

[For further information, contact AUSA Tom Watts-Fitzgerald at (305) 961-9413 or Elinor Colbourne, DOJ, at (202) 305-0205.]

Ocean Dumping

***United States v. Hoegh Fleet Services A/S,* No. CR03-5765 (W.D. Wash. June 29, 2004)**

A Norwegian shipping company will pay a $3.5 million criminal penalty and serve four years' probation for criminal activity surrounding intentional dumping of waste oil into the ocean. A whistleblower working on board the *M/V Hoegh Minerva* alerted Coast Guard officials to the existence of a pipe used to bypass the ship's oil water separator. The ship's second engineer was sentenced to thirty days' incarceration and two years' supervised release following his guilty plea to falsifying documents and concealing evidence.

The court also approved payment of a $300,000 award to the person who alerted the Coast Guard of the criminal activity.

[For further information, contact AUSA Arlen Storm at (253) 428-3800.]

***United States v. Richard K. Softye,* No. 04-20324-CR-Huck (S.D. Fla. June 29, 2004)**

The former vice-president for operating line compliance at Holland America Line, a former career Coast Guard Officer, was recently sentenced on his guilty plea to falsely reporting that the Holland America Line was implementing its portion of a court-ordered environmental compliance plan (ECP). Richard Softye was ordered to pay a $10,000 fine, serve three years' probation, and perform 450 hours of community service.

The ECP was required of Carnival Corporation, the parent company of Holland America, after it pled guilty to charges that it made false entries in its oil record books. The court also required that Carnival institute an environmental compliance program in all of its lines, including Holland America.

[For further information, contact AUSA Tom Watts-Fitzgerald at (305) 961-9413.]

UPDATE

Blakely v. Washington: On August 2, the Supreme Court granted certiorari in two cases that address the impact of *Blakely v. Washington*. One of the cases, *United States v. Duncan Fanfan,* No. 04-105, was on appeal to the First Circuit. The defendant was sentenced after the decision in *Blakely* was released. In another case, *United States v. Freddie Booker,* No. 04-104, the Seventh Circuit struck down the thirty year sentence the defendant had been given for his conviction for distributing crack cocaine. The court concluded that the holding in *Blakely* made the sentence unconstitutional.

In a recent Ninth Circuit decision, *United States v. Ameline,* No. 02-30326 (9th Cir. July 21, 2004), the court also ruled that *Blakely* bars federal judges from using facts not found at trial to increase sentences.

(For a summary of the *Blakely* decision, *see* the July 2004 issue of the *Journal.*)