

Inside . . .

FEATURE ARTICLE

- 3 Institutional Controls: The Converging Worlds of Real Estate and Environmental Law and the Role of the Uniform Environmental Covenant Act, Part I
By Amy L. Edwards

DECISIONS

Attorney Fees

- 10 Expert Witness Fee for Monitoring Consent Decree
Approved: *Sierra Club v. John Hankinson*

- 11 Award of Attorney Fees Reversed: *Sierra Club v. City of Little Rock*

CERCLA

- 13 Substantial Continuity Test No Longer Viable After *Bestfoods: New York v. National Services Industries, Inc.*

- 14 CERCLA Does Not Apply Extraterritorially: *Arc Ecology v. U.S. Department of the Air Force*

Jurisdiction

- 15 Federal Court Has No Jurisdiction Over Contract Dispute Regarding Wastewater Treatment Plant: *Templeton Board of Sewer Commissioners v. American Tissue Mills of Massachusetts, Inc.*

OPA

- 16 Court Discusses Jurisdictional Reach of OPA: *United States v. James Hamilton Needham*

RCRA

- 18 Court Largely Upholds EPA's New Fertilizer Rule: *Safe Foods and Fertilizer v. Environmental Protection Agency*

Water	19	Citizen Suit Under CWA Concerning Pesticide Used in Accordance With FIFRA May Proceed: <i>No Spray Coalition v. City of New York</i>
Wetlands	20	Environmental Appeals Board Upholds ALJ Finding That Deep Ripping Violated CWA: <i>In re Ray & Jeanette Veldhuis</i>
Work Product	22	Documents Are Protected by Work Product Doctrine: <i>In re Grand Jury Subpoena</i>
CIVIL PROCEEDINGS	24	
CRIMINAL PROSECUTIONS	25	

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Institutional Controls: The Converging Worlds of Real Estate and Environmental Law and the Role of the Uniform Environmental Covenant Act, Part I

By Amy L. Edwards*

[Editor's note: This article will be presented in two parts. Part I provides an overview of the topic, defines institutional controls, and discusses the role played by the recent Brownfields Amendment.]

I. INTRODUCTION

The recent enactment of the Small Business Liability Relief and Brownfields Revitalization Act (the Brownfields Amendments or the Act)¹ has highlighted the critical role of institutional controls² in the cleanup of brownfields and other environmentally impaired sites.³ This role is evident in several important sections of the Act: section 221 (the “contiguous landowner” defense),⁴ section 222 (the “*bona fide* prospective purchaser” defense),⁵ and section 223 (the “innocent landowner” defense).⁶ Each of these sections provides that a party will have a defense to the strict, joint and several liability scheme of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) if that party can establish that it “is in compliance with any land use restrictions established or relied on in connection with the response action at a vessel or facility” and that it did not “impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a response action.”⁷ In addition, the Brownfields Amendments amended sections 128(b) and (c) of CERCLA to provide that sites being remediated pursuant to a state response program⁸ may rely on institutional controls as part of the remedy and to require those states to maintain regis-

tries of brownfields sites describing, *inter alia*, those that rely on institutional controls because they have not been cleaned up to an “unrestricted use” level.⁹

Institutional controls have been used for years, but scant attention has been paid to whether they have worked as intended.¹⁰ An increasing number of studies has been issued over the past several years highlighting the deficiencies in prior implementation and use of institutional controls. These deficiencies generally fall into one or more of the following categories: implementation, enforcement, notice, or long-term stewardship. All of the pieces need to be able to work together: There must be mechanisms for easily establishing the institutional control; there must be mechanisms for enforcing the control; interested parties must have the ability to obtain notice of the existence of the institutional control; and mechanisms must be established to ensure that the institutional control will be maintained as long as it is needed.

As a result of the recent studies, the Environmental Protection Agency (EPA), the Department of Defense (DOD), the Department of Energy (DOE), and various state environmental agencies have issued guidance and regulations to improve past practices. A leading standards setting organization, ASTM International (formerly, the American Society for Testing and Materials) (ASTM), has also issued a comprehensive guidance document — the Standard Guide for Use of Activity and Use Limitations, Including Institutional and Engineering Controls (E 2091-00) (ASTM E 2091 or the Standard Guide) — to explain the relationship between institutional controls and risk-based corrective action and the process for evaluating which institutional control (or series of controls) is most effective in eliminating a potentially complete exposure pathway.¹¹

One of the major obstacles to establishing reliable institutional controls has been the lack of federal or state laws that would facilitate the implementation of these controls. After convening a study group to determine whether a model state law would be helpful, the National Conference of Commissioners on Uniform State Laws (NCCUSL) issued a report, acknowledging that

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a uniform model state law on environmental covenants could eliminate some of the common law impediments that have hampered efforts to establish enforceable and reliable institutional controls.¹² This effort has benefited from the input of real estate and environmental practitioners who are experts in this field.

Improving stakeholders' confidence in the reliability and enforceability of institutional controls is critical to the long-term success of efforts to bring brownfield sites back into productive reuse. Brownfields are sites where expansion, redevelopment, or reuse of the site is complicated by the presence or potential presence of a hazardous substance, pollutant or contaminant.¹³ Various sources have estimated that there are somewhere between 400,000 and 1,000,000 brownfield sites in the United States.¹⁴ A diverse group of stakeholders, including federal, state and local regulators, potentially responsible parties, developers, lenders, and the community all have a strong interest in bringing these sites back into productive use. Improving stakeholders' confidence in the long-term reliability and enforceability of institutional controls is critical to accomplishing this goal.

The brownfields movement officially began in the mid 1990s when EPA promulgated its Brownfields Agenda and started providing grants to cities to encourage the redevelopment and reuse of abandoned or underutilized sites. The brownfields movement was, in part, a response to efforts by various states to create their own cleanup programs for less contaminated sites. These less contaminated sites tended to slip through the cracks because they were not hazardous enough to merit federal Superfund attention, yet dirty enough to be stigmatized by potential environmental liabilities. Because of the specter of "strict, joint and several liability" under CERCLA, developers and their banks were unwilling to invest in these potentially contaminated sites. In turn, this fear had the unintended consequence of driving businesses and jobs away from the nation's urban core.¹⁵ Recognizing that this unintended consequence was occurring and hoping to counteract these liability concerns, the nation's governors and mayors began to promote the adoption of state voluntary cleanup or brownfields programs

(VCPs).¹⁶ These state programs have successfully facilitated the redevelopment and reuse of environmentally impaired properties by:

- Establishing clearer cleanup requirements;
- Providing some limitations on liability;
- Creating financial incentives for redevelopment;
- Streamlining the governmental review process; and
- Providing clear documentation when sufficient cleanup has been conducted.

Most of the states have utilized institutional controls as one component of their VCP program. The states have generally incorporated risk-based cleanup principles into their VCPs, thereby allowing residual contamination to remain in place as long as those chemicals do not present an unacceptable risk to human health or the environment.¹⁷ Risk-based assessment methods examine the sources of contamination, the pathways of exposure (*e.g.*, soil, surface water, ground water, and air), and human or ecological receptors (*e.g.*, office workers, construction workers, residents, children, waterways, and endangered species) to develop an appropriate remedial action plan (RAP). The RAP should examine whether any institutional controls are needed to eliminate or minimize potential exposures to residual contamination on the site. The RAP should also evaluate whether institutional controls are needed to prevent activities that might otherwise interfere with the effectiveness of the response action,¹⁸ thus ensuring maintenance of a condition of "acceptable risk" or "no significant risk" to human health and the environment.¹⁹ Many states have used No Further Action letters or Certificates of Completion to let the parties who are conducting the cleanup know that they have successfully completed the VCP process.²⁰

Because viable institutional controls raise issues relating to both real estate and environmental law, the proper implementation of institutional controls requires the cooperation and understanding of both real estate and environmental practitioners. Real estate practitioners need to understand and be willing to incorpo-

rate assumptions about risk and potential exposure into legally-binding instruments, so that future users of these sites are not inadvertently harmed by residual contamination. Environmental practitioners need to understand fundamental principles of real property, including what can and cannot be recorded in the land records, and whether common law principles may undermine the protections they are trying to achieve from a cleanup perspective.

Further guidance is likely to be developed as more and more practitioners have experience with the practical realities of blending real estate and environmental issues in order to facilitate the redevelopment and reuse of brownfields and other environmentally impaired sites.

II. DEFINING INSTITUTIONAL CONTROLS AND THEIR ROLE IN THE BROWNFIELDS MOVEMENT

Institutional controls, which are also sometimes referred to as Land Use Controls (LUCs)²¹ or Activity and Use Limitations (AULs),²² are:

[L]egal or physical restrictions or limitations on the use of, or access to, a site or facility to eliminate or minimize potential exposures to chemicals of concern, or to prevent activities that could interfere with the effectiveness of a response action, to ensure maintenance of a condition of "acceptable risk" or "no significant risk" to human health and the environment.²³

A. *Types of Institutional Controls*

The term institutional controls generally encompasses five different types of controls: proprietary controls, state and local government controls, statutory enforcement tools, informational devices, and engineering or access controls. Each of these tools offers different strengths and weaknesses. The relative strengths and weaknesses of each type of control are described in EPA's Fact Sheet entitled *Institutional Controls: A*

*Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups.*²⁴

1. Proprietary Controls

Proprietary controls are based upon the common law in each state and involve traditional property law. The method for creating and enforcing proprietary controls may vary depending upon the property law of each state.²⁵ Proprietary controls must be created using certain legal formalities, such as a writing, an intention by the original parties to place the restriction upon the land, horizontal and vertical privity of estate, and the requirement that the restriction "touch and concern" the land.²⁶ Some states refer to proprietary controls as "deed restrictions" (e.g., restrictive covenants, equitable servitudes, and easements), but this phrase is not a legal term of art.²⁷ These controls raise unique enforcement issues because third parties (including federal and state environmental protection agencies) typically do not have a direct right to enforce these controls.

2. State and Local Government Controls

The second category of institutional controls is governmental controls (state and local), including zoning and variances, building permits, well drilling prohibitions, and water and well use advisories.²⁸ Governmental controls may be enforced by a governmental agency in a court action when there has been a violation of the control or when the agency can establish that there is an "imminent and substantial endangerment."²⁹

3. Statutory Enforcement Tools

The third category of controls is statutory enforcement tools. Statutory enforcement tools include orders used by federal and state regulatory programs, consent decrees that may specify activities prohibited at a particular property, and permits that specify permitted and prohibited activities and uses on a property.³⁰

4. Informational Devices

The fourth category of controls is informational devices, such as the deed notice.³¹ Informational devices are designed to ensure that, before concluding a real estate transaction, the parties are made aware of the environmental conditions on the property (chemical releases, restrictions on use, access, and development).³² Generally accepted types of notice that qualify as informational devices include record notice (in land records), direct or actual notice, and notice to a government authority, registry act requirements (requiring states to maintain a database of sites relying on institutional controls), and transfer act requirements.³³ Some states have other notice requirements as part of their VCP.³⁴

5. Engineering and Access Controls

Engineering and access controls are another type of institutional control. In most cleanups involving brownfields sites, some amount of contamination is left behind. As a result, the site frequently must be paved or capped, or a slurry wall constructed, or a ground water treatment system operated, or a portion of the site fenced, in order to sever potentially complete exposure pathways. These mechanisms are frequently referred to as engineering controls. The engineering controls usually need to be inspected and maintained by someone, and these affirmative obligations are frequently incorporated into the legal instrument that describes the restrictions and affirmative obligations that apply to the site. Access agreements are also generally needed by the regulatory agency, the potentially responsible party, and any other entity assuming responsibility for inspecting or maintaining the engineering controls over time.

III. ROLE OF THE 2002 BROWNFIELDS AMENDMENTS

The Brownfields Amendments established a number of incentives to promote the reuse and development of brownfields sites and provided various types of liability relief. The Brownfields Amendments were introduced as H.R. 2869, which was a combination of

two earlier bills, H.R. 1831, the "Small Business Liability Protection Act" (which became Title I of P.L. 107-118), and S. 350, the "Brownfields Revitalization and Environmental Restoration Act of 2001" (which became Title II).³⁵ Title I established two types of liability exemptions (for *de micromis*³⁶ disposal and municipal solid waste³⁷) and codified EPA's policy on settlements where there is a limited ability to pay.³⁸

Title II contains three subtitles: Subtitle A covers funding,³⁹ Subtitle B includes three liability exemptions⁴⁰ (contiguous property owners, *bona fide* prospective purchasers, and innocent landowners), and Subtitle C discusses state response programs and additions to the National Priorities List.⁴¹

The Brownfields Amendments altered the definition of "brownfield" slightly. When the term first came into usage in the early 1990s, EPA defined "brownfields" as "abandoned, idled or under-used industrial and commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination."⁴² The Brownfields Amendments offered the following definition instead: "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."⁴³

Nine types of facilities are excluded from the definition of a brownfield, including facilities that are:

- The subject of a planned or ongoing removal action;⁴⁴
- Listed on, or proposed for listing on, the National Priorities List;⁴⁵
- The subject of a unilateral administrative order, a court order, an administrative order on consent, or judicial consent decree;⁴⁶
- Subject to a permit that has been issued by the United States or an authorized State under the Solid Waste Disposal Act, the Federal Water Pollution Control Act, the Toxic Substances Control Act, or the Safe Drinking Water Act;⁴⁷

- Subject to corrective action under § 3004(u) or 3008(h) of the Solid Waste Disposal Act and to which a corrective action permit or order has been issued or modified to require the implementation of corrective measures;⁴⁸
- A land disposal unit with respect to which a closure notification under subtitle C of the Solid Waste Disposal Act has been submitted, and closure requirements have been specified in a closure plan or permit;⁴⁹
- Subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States, except for land held in trust by the United States for an Indian tribe;⁵⁰
- A portion of a facility at which there has been a release of polychlorinated biphenyls, and that is subject to remediation under the Toxic Substances Control Act;⁵¹ or
- A portion of a facility, for which portion, assistance for response activity has been obtained under subtitle I of the Solid Waste Disposal Act from the Leaking Underground Storage Tank Trust Fund established under section 9508 of the Internal Revenue Code of 1986.⁵²

A brownfield site may nonetheless include areas that meet these criteria under the “site-by-site determination” exception.⁵³ Financial incentives are also available for sites that are contaminated by a controlled substance,⁵⁴ by petroleum or a petroleum product,⁵⁵ and are determined to be low risk with no viable responsible party liable for cleanup,⁵⁶ or are mine scarred land.⁵⁷ The inclusion of petroleum and mine scarred land was discussed during the floor debate.⁵⁸ Expanding the law to include these previously excluded sites was intended to allow the cleanup of less hazardous sites than those eligible for inclusion on the National Priorities List under Superfund.⁵⁹

ENDNOTES

1. Small Business Liability Relief and Brownfields Revitalization Act of 2001, Pub. L. No. 107-118, 115 Stat. 2356 (2002) (amending 42 U.S.C. § 9601 (2000)).
2. Institutional controls is used in this article to mean “legal or physical restrictions or limitations on the use of, or access to, a site or facility to eliminate or minimize potential exposures to chemicals of concern or to prevent activities that could interfere with the effectiveness of a response action.” ASTM Standard Guide for Use of Activity and Use Limitations, Including Engineering and Institutional Controls, E 2091-00 [hereinafter ASTM Standard Guide or ASTM E 2091-00]. Institutional controls are also referred to as Activity and Use Limitations (AULs), Land Use Controls (LUCs), or Environmental Covenants or Servitudes. The United States Environmental Protection Agency (EPA) uses a more narrow definition of institutional controls, namely, “non-engineered instruments such as administrative and/or legal controls that minimize the potential for human exposure to contamination by limiting land or resource use.” EPA, INSTITUTIONAL CONTROLS: A SITE MANAGER’S GUIDE TO IDENTIFYING, EVALUATING AND SELECTING INSTITUTIONAL CONTROLS AT SUPERFUND AND RCRA CORRECTIVE ACTION CLEANUPS 2 (2000).
3. Brownfields are defined in the Brownfields Amendments as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” Small Business Liability Relief and Brownfields Revitalization Act § 211(a) (amending 42 U.S.C. § 9601(39)(A) (2000)).
4. *Id.* § 221 (amending 42 U.S.C. § 9607 (q)(1) (2000)).
5. *Id.* § 222 (amending 42 U.S.C. § 9601(40) (2000)).
6. *Id.* § 223 (amending 42 U.S.C. § 9601(35) (2000)).
7. *Id.* § 222 (amending 42 U.S.C. § 9601(40)(F) (2000)).
8. A “state response program” under section 128 is a state voluntary cleanup program that includes (i) a timely survey and inventory of brownfields sites in the state, (ii) oversight and enforcement authorities that are adequate to ensure that a response action will be protective of human health and the environment and will be conducted in accordance with Federal and state law, and will be completed if the person conducting the response action fails to perform, (iii) mechanisms and resources for ensuring adequate public participation, and (iv) mechanisms for approving the cleanup plan and verifying when the response action is complete. Alternatively, a state that has entered into a memorandum of agreement with the EPA will be considered to have a qualifying “state response program.” *Id.* § 128(a) (to be codified at 42 U.S.C. § 9628).
9. *Id.*
10. *See, e.g.*, ENVTL. L. INST., AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY, 2001 UPDATE (2002) (reporting on a study of the long-term stewardship efforts of each state and concluding that many states are not equipped to successfully implement such efforts); ASS’N OF STATE & TERRITORIAL SOLID WASTE MGMT. OFFICIALS, 2002 VOLUNTARY CLEANUP SYMPOSIUM (2002); ENVIRONMENTAL LAW INSTITUTE, THE ROLE OF LOCAL GOV-

ERNMENTS IN LONG-TERM STEWARDSHIP AT DOE FACILITIES (2001) (describing how the Department of Energy plans to rely on local governments to implement elements of its long-term stewardship plans designed to protect the public from remaining risks at three of its contaminated facilities), *available at* <http://www.elistore.org/Data/products/d10.10.pdf> (last visited Feb. 21, 2003) (on file with the Connecticut Law Review); ENVTL. L. INST., PROTECTING PUBLIC HEALTH AT SUPERFUND SITES: CAN INSTITUTIONAL CONTROLS MEET THE CHALLENGE? (1999) (describing the increased use of institutional controls at Superfund sites despite the lack of analysis on the effectiveness of the controls and presenting the results of a case study at four sites where institutional controls were used to prevent risks from exposure to residual hazardous substances), *available at* <http://www.elistore.org/Data/products/d10.01.pdf> (last visited Feb. 21, 2003) (on file with the Connecticut Law Review); INT'L CITY/COUNTY MGMT. ASS'N, BEYOND FENCES: BROWNFIELDS AND THE CHALLENGE OF LAND USE CONTROLS (2000); NAT'L RES. COUNCIL, LONG-TERM INSTITUTIONAL MANAGEMENT OF U.S. DEPARTMENT OF ENERGY LEGACY WASTE SITES (2000) (examining the effectiveness of measures—including institutional controls—that the Department of Energy will rely on for long-term stewardship of hazardous waste sites that cannot be cleaned up sufficiently to allow unrestricted use), *available at* <http://www.nop.edu/openbook/0309071860/html/r1.html> (last visited Feb. 21, 2003) (on file with the Connecticut Law Review); Carl Bauer & Katherine N. Probst, LONG-TERM STEWARDSHIP OF CONTAMINATED SITES: TRUST FUNDS AS MECHANISMS FOR FINANCING AND OVERSIGHT (2000) (examining the effectiveness of various trust fund mechanisms that have been used for financing and oversight of long-term stewardship activities at both private and federal contaminated sites), *available at* http://www.rff.org/disc_papers/PDF_files/0054.pdf (last visited Feb. 21, 2003) (on file with the Connecticut Law Review).

11. ASTM Standard Guide, *supra* note 2, at 1.

12. NAT'L CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, FINAL REPORT OF THE JOINT EDITORIAL BOARD ON REAL PROPERTY ACTS TO THE SCOPE AND PROGRAM COMMITTEE (2001), *available at* http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

13. Small Business Liability Relief and Brownfields Revitalization Act § 211(a) (amending 42 U.S.C. § 9601(39)(A) (2000)).

14. 147 CONG. REC. S3886 (daily ed. Apr. 25, 2001) (statement of Sen. Smith estimating that there are 400,000 to 500,000 brownfield sites); 147 CONG. REC. S3904 (daily ed. Apr. 25, 2001) (statement of Sen. Reid estimating that there are 300,000 brownfield sites); U.S. GEN. ACCT. OFFICE, COMMUNITY DEVELOPMENT: REUSE OF URBAN INDUSTRIAL SITES, 3 (1995), *available at* <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=gao&docid=f:rc95172.pdf> (last visited Feb. 21, 2003) (on file with the Connecticut Law Review); NAT'L ASS'N OF DEV. ORG. RES. FOUND., RECLAIMING RURAL AMERICA'S BROWNFIELDS 4 (1999) [hereinafter RECLAIMING BROWNFIELDS]; *see also* EPA, Press Release, EPA Newsroom: President Signs Legislation to Clean Environment and Create Jobs (reporting that the EPA estimates that there are between 500,000 and 1,000,000 brownfield sites), *available at* http://www.epa.gov/epahome/headline_011102.htm (last visited Feb. 21, 2003) (on file with the Connecticut Law Review).

15. 147 CONG. REC. S3889 (daily ed. Apr. 25, 2001) (letter to Sen. Smith from the National Association of Realtors); 147 CONG. REC. S3892 (daily ed. Apr. 25, 2001) (statement of Sen. Boxer); 147 CONG. REC. S3894 (daily ed. Apr. 25, 2001) (statement of Sen. Levin).

16. U.S. Conference of Mayors (1995); *see* U.S. GEN. ACCT. OFFICE, COMMUNITY DEVELOPMENT: REUSE OF URBAN INDUSTRIAL SITES, *supra* note 14, at 3; *see also* ENVTL. L. INST., AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY, 2001 UPDATE, *supra* note 10.

17. The cleanup goal is generally to achieve a “No Significant Risk” or “No Substantial Hazard” level, which will vary depending upon the types of uses and activities that are expected to occur on site. *See* ASTM Standard Guide, *supra* note 2, at § 5.3.2.1. Risk assessment plays a critical role in the remedial investigation/feasibility study process in determining whether reasonably anticipated future uses and activities will be consistent with this “No Significant Risk” goal.

18. *See id.* § 4.1.6.

19. *See id.* §§ 3.1.2, 4.1.6.

20. *See generally* Charles Bartsch *et al.*, BROWNFIELDS “STATE OF THE STATES”: AN END-OF-SESSION REVIEW OF INITIATIVES AND PROGRAM IMPACTS IN THE 50 STATES (4th ed., 2001) (reporting on the efforts of state public officials to implement brownfield cleanup and redevelopment programs), *available at* http://www.nemw.org/brown_stateof.pdf (last visited Feb. 21, 2003) (on file with the Connecticut Law Review).

21. The Department of Defense defines Land Use Controls as “any physical, legal, and/or administrative mechanism that restricts the use of, or limits access to, real property to prevent exposure to contaminants above permissible levels. LUCs are employed to protect the integrity of the engineering remedy (if present) and human health and the environment after transfer of property.” DEP'T OF DEF., GUIDANCE ON LAND USE CONTROLS ASSOCIATED WITH ENVIRONMENTAL RESTORATION ACTIVITIES FOR PROPERTY PLANNED FOR TRANSFER OUT OF FEDERAL CONTROL 1, *available at* http://www.denix.osd.mil/denix/Public/Library/Cleanup/luc_policyguidance.pdf (last visited Feb. 21, 2003) (on file with the Connecticut Law Review).

22. The terminology AUL is used in both the ASTM Standard Guide and the Massachusetts “mini-Superfund” cleanup program. *See* ASTM Standard Guide, *supra* note 2, at § 3.1.2. The Massachusetts Contingency Plan provides for three different types of institutional controls: A Grant of Environmental Restriction, a Notice of Activity and Use Limitation, or an Environmental Restriction imposed by the state. *See, e.g.*, MASS. REGS. CODE tit. 310, § 40.1070 (2001).

23. ASTM Standard Guide, *supra* note 2, at § 3.1.2. The ASTM definition, which uses the Massachusetts terminology of Activity and Use Limitations, includes both legal (i.e., institutional) and physical (i.e., engineering) controls within its definition because both are important to the ultimate success of the remediation project. Other definitions, including both the EPA and California definitions for institutional controls, do not include physical controls within their definitions. Other organizations, such as ICMA and DOD, use the terminology Land Use Controls, or LUCs, instead.

24. EPA, INSTITUTIONAL CONTROLS: A SITE MANAGER'S GUIDE TO IDENTIFYING, EVALUATING AND SELECTING INSTITUTIONAL CONTROLS AT SUPERFUND AND RCRA CORRECTIVE ACTION CLEANUPS 12-27 (2000) [hereinafter EPA SITE MANAGER'S GUIDE].
25. ASTM Standard Guide, *supra* note 2, at § 3.1.36; EPA SITE MANAGER'S GUIDE, *supra* note 24, at 16–19 (providing the limitations on proprietary controls for brownfield remediation).
26. EPA SITE MANAGER'S GUIDE, *supra* note 24, at 16–19.
27. *Id.* at 2.
28. ASTM Standard Guide, *supra* note 2, at § 6.3; EPA SITE MANAGER'S GUIDE, *supra* note 24, at 12–15.
29. For example, section 106 of the CERCLA allows an enforcement action for “imminent and substantial endangerment to public health, welfare, or the environment.” 42 U.S.C. § 9606(a) (2000). The Resource Conservation and Recovery Act allows for corrective action for unpermitted facilities with “interim status,” 42 U.S.C. § 6928(h) (2000), or “imminent and substantial endangerment,” *id.* § 6973. *See also* ARK. CODE ANN. § 8-7-1104 (Michie Supp. 2001) (stating that “[s]election of a remedial action shall include consideration of . . . [w]hen an imminent and substantial endangerment” is posed).
30. ASTM Standard Guide, *supra* note 2, at § 6.4; EPA SITE MANAGER'S GUIDE, *supra* note 24, at 21–23.
31. ASTM Standard Guide, *supra* note 2, at § 6.5; EPA SITE MANAGER'S GUIDE, *supra* note 24, at 24–27.
32. This may be sufficient for allowing the government to enforce institutional controls against subsequent purchasers in a few states. *See* MASS. REGS. CODE tit. 310, § 40.1071 (2001) (allowing the Department of Environmental Protection to enforce the terms of an Activity and Use Limitation with notice of only the AUL).
33. ASTM Standard Guide, *supra* note 2, at § 6.5.
34. *See, e.g.,* IOWA CODE ANN. §§ 455B.426-455B.432 (West 1997); N.Y. ENVTL. CONSERV. LAW §§ 27–1303, 27–1305, 27–1307 (McKinney Supp. 2003); OR. REV. STAT. ANN. § 465.215 (2001). New York requires a list of all properties used for hazardous substance disposal, or those with any restriction on use or transfer. N.Y. ENVTL. CONSERV. LAW §§ 27–1303 (McKinney Supp. 2003).
35. 147 Cong. Rec. H10,900 (daily ed. Dec. 19, 2001) (statements of Reps. Pallone and Duncan); Walter E. Mugdan, *The Small Business Liability Relief and Brownfields Revitalization Act*, 26 A.L.I.-A.B.A. Bus. L. Course Materials J. 4, 6 (2002).
36. The *de micromis* exemption applies to generators or transporters of hazardous substances who arranged for the disposal, treatment, or transport of less than 110 gallons of liquid materials or 200 pounds of solid materials before Apr. 1, 2001, unless the party could or did significantly contribute to the cost of the response action, failed to comply with an information request or subpoena, impeded the performance of a response action or has been convicted of a criminal violation for the conduct. 42 U.S.C. § 9607(o) (2002). This addition to CERCLA codifies the kinds of settlements that EPA has been granting for many years to very small volume or low toxicity waste contributors under EPA's *de micromis* settlement policy. *See generally id.*; Mugdan, *supra* note 35, at 83. *See also* EPA, *General Policy on Superfund Ability to Pay Determinations* (providing a report on what are appropriate abilities for paying settlements in Superfund cases), available at <http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/genpol-atdept-mem.pdf> (last visited Feb. 21, 2003) (on file with the Connecticut Law Review).
37. The Municipal Solid Waste exemption applies to business entities, averaging not more than 100 full-time individuals or the equivalent during the prior three tax years and qualifying as a “small business concern” (within the meaning given that term in 15 U.S.C. § 631), owners, operators, and lessees of residential property, and non-profit organizations that generate household waste, or the equivalent amount. 42 U.S.C. § 9607(p). The Brownfields Amendments include a definition of “municipal solid waste,” including examples and exclusions. *See id.*
38. A potentially responsible party (PRP) that can demonstrate an inability or a limited ability to pay response costs may enter an expedited settlement to resolve CERCLA liability. 42 U.S.C. § 9622(g). Although a party with a limited ability to pay may be permitted a reduced settlement amount, there are additional conditions regarding waiver, failure to comply and providing information and access, which have some antecedents in EPA policy. *See id.* § 9622(b) (detailing the various agreements between the government and responsible parties regarding limiting liability); *see also* Mugdan, *supra* note 35, at 85; EPA, *Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites*, Feb. 5, 1998, available at <http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/munic-solwst-mem.pdf> (last visited Feb. 21, 2003) (on file with the Connecticut Law Review).
39. *See* The Small Business Liability Relief and Brownfields Revitalization Act § 201 (amending 42 U.S.C. § 9601(39)(A) (2000)).
40. The Small Business Liability Relief and Brownfields Revitalization Act § 201 (amending 42 U.S.C. § 9607 (2000)).
41. The Small Business Liability Relief and Brownfields Revitalization Act § 201 (amending 42 U.S.C. § 9628 (2000)).
42. 147 CONG. REC. S3894 (Apr. 25, 2001) (statement of Sen. Levin); RECLAIMING BROWNFIELDS, *supra* note 14, at 4.
43. 42 U.S.C. § 9601(39)(A) (2000).
44. *Id.* § 9601(39)(B)(i).
45. *Id.* § 9601(39)(B)(ii).
46. *Id.* § 9601(39)(B)(iii).
47. *Id.* § 9601(39)(B)(iv) (citing 42 U.S.C. § 6901 (2000); 33 U.S.C. § 1321 (2000); 15 U.S.C. § 2601 (2000); 42 U.S.C. § 300f (2000)).
48. 42 U.S.C. § 9601(39)(B)(v)(2000) (citing 42 U.S.C. §§ 6924(u), 6928(h) (2000)).

49. *Id.* § 9601(39)(B)(vi) (citing 42 U.S.C. § 6921).
50. *Id.* § 9601(39)(B)(vii) (citing 15 U.S.C. § 2601 (2000)).
51. *Id.* § 9601(39)(B)(viii) (citing 42 U.S.C. § 6991).
52. *Id.* § 9601(39)(B)(ix).
53. *Id.* § 9601(39)(C).
54. *Id.* § 9601(39)(D)(ii)(I) (defining “controlled substance”) (citing 21 U.S.C. § 802 (2000)).
55. *Id.* § 9601 (39)(D)(ii)(II)(aa).
56. *Id.* § 9601(39)(D)(ii)(II)(bb)(AA)–(BB).
57. *Id.* § 9601(39)(D)(ii)(III).
58. *See, e.g.*, 147 CONG. REC. S3893 (daily ed. Apr. 25, 2001) (statement of Sen. Bond), 147 CONG. REC. S3904 (daily ed. Apr. 25, 2001) (statement of Sen. Inhofe), 147 CONG. REC. H10902 (daily ed. Dec. 19, 2001) (statement of Mr. Dooley), 147 CONG. REC. H10903 (daily ed. Dec. 19, 2001) (statements of Sen. Miller and Sen. Cantor).
59. 147 CONG. REC. S3891 (daily ed. Apr. 25, 2001) (statement of Sen. Boxer); *see also* SENATE COMM. ON ENV'T & PUBLIC WORKS, 107TH CONG., REPORT ON BROWNFIELDS REVITALIZATION & ENVIRONMENTAL RESTORATION ACT OF 2001 (Mar. 12, 2001) (submitted by Mr. Smith).

DECISIONS

Attorney Fees

Expert Witness Fee for Monitoring Consent Decree Approved: *Sierra Club et al. v. John Hankinson et al.*, No. 03-11263 (11th Cir. Dec. 5, 2003)

Background

In 1994, various environmental groups brought a lawsuit under the Clean Water Act (CWA) against U.S. EPA to force the agency to update Georgia's water quality limited segments (WQLS) list. The court ordered the agency to complete the total maximum daily load (TMDL) for each impaired body of water in five years. While the appeal was pending, the parties entered into a consent decree requiring that EPA review and update Georgia's WQLS list. A second consent decree was signed the following year setting a timetable for EPA to establish TMDLs for each body of water on Georgia's WQLS list.

Two years later, the agency had submitted a list of proposed TMDLs for 124 water segments, but the state had not incorporated them into its water management plans and neither the state nor the agency had moved to implement them. The Sierra Club moved to reopen the decree and compel further action. Georgia promised to develop implementation plans within nine months. Once those plans were issued, EPA moved to have the motion dismissed as moot, but the court ruled that implementation plans formed part of the consent decree and that EPA had an obligation to ensure that the plans were adequate. On appeal, the Eleventh Circuit held that implementation plans did not fall within the terms of the consent decree. *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1030–32. The district court then awarded attorneys' fees and costs to the plaintiffs under 33 U.S.C. § 1365(d) for their work in monitoring EPA compliance with the consent decree. This included \$30,425.61 for expenses associated with an expert witness who had

assisted in monitoring compliance with the consent decree but who did not testify in any proceeding. EPA appealed.

Holding

EPA argued that the fee-shifting provision in the CWA do not cover a non-testifying expert witness. The statute reads that a court “may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.” 33 U.S.C. § 1365(d). EPA argued that the expert could not have helped the plaintiffs “prevail” since he merely helped to monitor an established consent decree. The court disagreed. The plaintiffs are still “prevailing or substantially prevailing” within the context of monitoring the consent decree.

In *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546 (1986), an environmental group brought a lawsuit under the Clean Air Act against the Commonwealth of Pennsylvania for its failure to establish a vehicle emissions program. The parties entered into a consent decree, but the dispute dragged on because the state legislature and the executive did not take the necessary steps to implement a program. The parties modified the consent decree several times and the court twice found the state in violation of the decree. When the plaintiffs sought attorneys' fees, Pennsylvania argued that the time spent monitoring the consent decree outside of actual litigation was not covered as a cost “of litigation” in any “action brought” pursuant to the statute. 42 U.S.C. § 7604(d). The Supreme Court rejected that argument. It held that Congress intended that the fee-shifting provision encourage “citizen participation in the enforcement of standards and regulations under the Act.” *Id.* at 560. The Court noted that the consent decree “provided detailed instructions as to how the program was to be developed and the specific dates by which these tasks were to be accomplished. Protection of the full scope of relief afforded by the consent decree was thus crucial to safeguard the interests asserted . . .” *Id.* at

558. Just as in *Delaware Valley*, the case at bar also required post-judgment monitoring in order to protect the relief sought by the plaintiffs.

The issue of whether the costs of experts involved only in post-judgment consent decree monitoring are reimbursable is a question of first impression. The court was guided by the *Delaware Valley* decision and the notion that “measures necessary to enforce the remedy ordered by the District Court cannot be divorced from the matters upon which [plaintiffs] prevailed in securing the consent decree.” *Id.* at 559. The Supreme Court, in awarding the costs in *Delaware Valley*, put more weight on the nature of the rights secured in the consent decree and what was needed to secure those rights than on a technical definition of “litigation costs.”

Therefore, the court held that the district court had not abused its discretion by determining that the plaintiffs were entitled to expert witness fees.

Award of Attorney Fees Reversed: *Sierra Club v. City of Little Rock*, No. 03-1160 (8th Cir. Dec. 12, 2003)

Background

The City of Little Rock, Arkansas, operates the Little Rock Sanitary Sewer Collection System under a National Pollutant Discharge Elimination System (NPDES) permit issued by the Arkansas Department of Environmental Quality. The city has delegated the operation of the system to the Little Rock Sanitary Sewer Committee, pursuant to Arkansas statute. The sewer committee has control over the operation and maintenance of the system and over the user revenues. The city retains authority to issue bonds to raise money for the system and to authorize rate increases.

The Sierra Club brought a citizen's suit against the city and the sewer committee. In Count I, it alleged that the defendants had violated the Clean Water Act (CWA) and their respective permits by allowing untreated sewage to enter Arkansas rivers and streams.

The complaint requested relief that included a declaration that the city was in violation of the CWA; an injunction ordering the city to comply with its permit, cease all unlawful discharges, and clean up prior discharges; and civil penalties of up to \$25,000 a day.

The district court granted partial summary judgment to the Sierra Club against the sewer committee, finding that it had violated the CWA by allowing sanitary sewer overflows. The committee and Sierra Club then entered into a settlement agreement to address the sanitary sewer overflows. Sierra Club dismissed the two other counts against the committee pursuant to the settlement agreement.

The Sierra Club pursued its claim against the city following the settlement with the sewer committee. On cross-motions for summary judgment, the court found that the city had technically violated the part of the permit that related to sanitary sewer overflows into the municipal storm sewer system. However, it refused to enter an injunction or order any other remedy against the city.

On a motion for attorney fees against both the committee and the city, the court awarded attorney fees against the committee and granted fifty percent of the fees sought against the city. The city appealed.

Holding

The CWA provides that a court, “in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.” 33 U.S.C. § 1365(d). The court reviewed the legal issue of whether a party is a “prevailing or substantially prevailing party.”

The court found that the city was “technically” in violation of its permit but declined to give any relief that the Sierra Club sought. In denying the injunction, the court noted that there was no evidence that the city would not cooperate with the sewer committee in

carrying out the committee’s obligations under the agreement. The record showed that the city had always complied with the committee’s reasonable requests in the past.

In *Farrar v. Hobby*, 506 U.S. 103 (1992), the Court held that a party prevails by receiving an enforceable judgment or comparable relief through a consent decree or settlement that directly benefits the plaintiff at the time of the judgment or settlement. In later cases, the Court has clarified that a plaintiff must receive some relief on the merits of his claim before he is deemed to have “prevailed.” See *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). The Sierra Club cannot point to any actual relief on the merits as against the city. The court merely received a declaration that the city had violated its permit. In *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988), the Court held that “[a] declaratory judgment . . . will constitute relief . . . if, and only if, it affects the behavior of the defendant toward the plaintiff.” A party has not “prevailed” when it has received only a pronouncement that the defendant has violated the law and has not received an enforceable judgment on the merits. *Pedigo v. P.A.M. Transport, Inc.* 98 F.3d 396, 398 (8th Cir. 1996).

The Sierra Club argued that the city’s subsequent approval of a forty-two percent sewer rate increase, in response to the request by the sewer committee for funding to help fulfill the committee’s obligations under the settlement agreement, constituted the necessary relief. The court disagreed. The city had always cooperated with the sewer committee in the past; the plaintiff could not convince the court that, but for its lawsuit, the city would have not continued that cooperation.

Therefore, the court reversed the district court’s award of attorney’s fees.

CERCLA

Substantial Continuity Test No Longer Viable after *Bestfoods*: *New York v. National Services Industries, Inc.*, No. 02-9227 (2d Cir. Dec. 17, 2003)

Background

New York sued National Service Industries, Inc., under the Comprehensive Environmental Response, Compensation, and Liability Act to recover its remediation costs at the Blydenburg Landfill in Islip, New York. Applying the substantial continuity test for successor liability, the district court granted summary judgment to the state. National Services Industries (NSI) appealed, arguing that, after the Supreme Court's decision in *United States v. Bestfoods*, 524 U.S. 51 (1998), the substantial continuity test cannot be applied to determine successor liability under CERCLA.

NSI's predecessor, Serv-All, operated an industrial garment rental service. In June 1978, it arranged for the disposal of several 55-gallon drums of liquid waste containing perchloroethylene, which were deposited at the landfill. In 1988, NSI entered into an asset sale agreement whereby it agreed to purchase Serv-All's receivables, trucks, and the right to use or retire Serv-All's name. NSI used Serv-All's trucks with its name, employed Serv-All's employees, used its letterhead, and took over the telephone number. The district court held that NSI's operations were a substantial continuation of Serv-All's business and, thus, NSI was subject to successor liability at the Blydenburg Landfill.

Holding

In *Bestfoods*, the issue was whether a parent corporation could be held liable under CERCLA for the actions of its subsidiaries. The Court held that CERCLA gives no indication that "the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute. . . . [The] failure of CERCLA to

speaking to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law." *Id.* at 63 (internal citations omitted). The Supreme Court also commented that the district court had entirely disregarded "time-honored common law rule[s]." *Id.* at 70.

The district court in this case followed the Second Circuit's holding in *B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996), when it imposed liability under the substantial continuity rule. In that case, the court noted that the "traditional common law rule states that a corporation acquiring the assets of another corporation only takes on its liabilities if any of the following apply: the successor expressly or impliedly agrees to assume them; the transaction may be viewed as a de facto merger or consolidation; the successor is the 'mere continuation' of the predecessor; the transaction is fraudulent." *Id.* at 519 (internal citation omitted). The court noted that the substantial continuity test has been followed by the Supreme Court in the labor law context. The court adopted that test, reasoning that it was more consistent with CERCLA's goals than the older, common law rule. It is clear, therefore, that, in *Betkoski*, the court was not applying general common law principles but, instead, adopting a special rule for use in CERCLA cases.

New York argued that the substantial continuity test is merely a refined version of the traditional common law rule. The court held, however, that the substantial continuity test is not "a sufficiently well established part of the common law of corporate liability to satisfy *Bestfoods*' dictate that common law must govern." *Id.* at 9-10. The court noted that, even in labor law where the substantial continuity doctrine is well established, many of the cases have not involved asset purchases and, even where the cases have involved asset purchases, the focus is not on successor corporation liability but whether there is a duty to bargain with the workforce that had previously voted to bargain collectively with the predecessor corporation. There are instances where the substantial continuity doctrine has been applied in product liability cases,

but they have dealt with application of state law and not with federal common law. Furthermore, at present, only a few states have adopted the theory.

The court therefore found that the substantial continuity doctrine is not a part of the general federal common law and should not, following the Court's decision in *Bestfoods*, be used to determine whether a corporation is liable for its predecessor's CERCLA liability. Thus, the court vacated the grant of summary judgment and remanded for further proceedings.

CERCLA Does Not Apply Extraterritorially: *Arc Ecology et al. v. U.S. Department of the Air Force et al.*, No. C 02-05651 JW (N.D. Cal. Dec. 3, 2003)

Background

The plaintiffs in this lawsuit are Filipino citizens who live near or travel near property in the Philippines that were former U.S. military bases, Clark Air Force Base and Subic Bay Naval Base. The U.S. government had used these areas as military facilities for nearly one hundred years before they were turned back to the Filipino government in the early nineties. The plaintiffs brought this lawsuit under section 105(d) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The defendants moved to dismiss the claim.

Holding

The court began its examination by noting that CERCLA's legislative history and its language reflect a decidedly domestic focus. The plaintiffs are seeking relief under section 105(d), 42 U.S.C. § 9605(d), under which any one who is or may be affected by a release of a hazardous substance may petition the President to conduct a preliminary assessment of any associated hazards to public health and the environment. In that petition (for federal facilities, the petition is directed to the head of the appropriate federal agency), the petitioner must describe the release, how it affects the petitioner, and the activities where the

release is located and also explain whether "local and state authorities" have been contacted. When determining if a preliminary assessment is appropriate, the agency includes in its consideration whether the release is eligible for response under CERCLA.

Section 105(d) then provides that, if a preliminary assessment indicates that the release or threatened release poses the requisite threat, the President must evaluate the release or threatened release "in accordance with the hazard ranking system" referred to in section 105(a)(8)(A) "to determine the national priority of such release or threatened release." This hazard ranking system is utilized "for determining priorities among releases or threatened releases throughout the United States." 42 U.S.C. § 9604(a)(8)(A). Under section 105(a)(8)(B), the President, in preparing the National Priorities List, must "list as part of the plan national priorities among the known releases or threatened releases throughout the United States." Since the language of the statute speaks only to the United States, it is clear that section 105(d) does not apply to foreign locations.

In *EEOC v. Arabian American Oil Company*, 499 U.S. 244, 248, the Court noted that there is a presumption that a statute applies only within the United States unless it contains clearly-expressed affirmative intention that it applies abroad. The presumption against extraterritoriality serves two purposes: it helps to protect against unintended clashes between our laws and those of other nations that would provoke discord and it reflects that notion that, in legislating, Congress is mainly concerned with domestic affairs.

In CERCLA, there are narrow conditions that allow foreign claimants to assert claims against the Superfund. 42 U.S.C. § 9611(l)(4). These conditions do not exist in this case.

CERCLA's citizen suit provision is modeled, in part, on the Resource Conservation and Recovery Act's (RCRA's) citizen suit provision. In *Amlon Metals, Inc. v. FMC Corporation*, 775 F. Supp. 668 (S.D.N.Y. 1991), the court held that RCRA does not apply to water located in a foreign territory. The court

observed that RCRA “contains a number of provisions designed to limit the statute’s encroachment on state sovereignty, but contains no parallel provisions protecting the sovereignty of other nations.” *Id.* at 676. This is also the case with CERCLA.

Since the court found no plain language supporting applying CERCLA extraterritorially, it granted the defendant’s motion to dismiss the claim.

Jurisdiction

Federal Court Has No Jurisdiction Over Contract Dispute Regarding Wastewater Treatment Plant: *Templeton Board of Sewer Commissioners v. American Tissue Mills of Massachusetts, Inc., et al.*, No. 03-1134 (1st Cir. Dec. 11, 2003)

Background

In March 1974, Templeton, Massachusetts, signed a contract with Baldwinville Products, Inc., under which Templeton agreed to build a wastewater treatment plant and make the plant available to Baldwinville and its owner, Erving Industries, for treatment of their wastewater. The plant was to be built with grant money from the federal and/or state government and the companies would pay the new operating costs of the plant as well as a vast majority of its capital costs. In 1991, American Tissue Mills of Massachusetts, Inc. (ATM) purchased Baldwinville’s operating assets.

In March 1995, U.S. EPA informed Templeton that the Clean Water Act (CWA), 33 U.S.C. § 1284(b)(1), required that the owner implement a user charge system whereby each user of the plant must pay its proportionate share of the cost of maintaining the entire wastewater treatment system based upon the user’s contribution to the total waste flow. It noted that the contract was inconsistent with the user charge system and concluded that the contract must be revised to come into compliance with the CWA.

Templeton filed its initial complaint in federal district court against the defendant in June 1996. It has since filed amended complaints, but Count I has remained

substantially the same. This count seeks a declaration of the parties’ rights, specifically whether ATM must pay a user charge, including payment for other treatment works pursuant to the CWA and the implementing regulations. Jurisdiction was premised upon 28 U.S.C. § 1331, the statute designating federal question jurisdiction.

In October 2002, the defendant filed a motion to dismiss the complaint for lack of subject-matter jurisdiction. The district court granted the motion.

Holding

When determining whether a federal court has jurisdiction, a court must first determine whether the complaint alleges a federal cause of action. If it does not, a court then inquires whether some element of the plaintiff’s claim depends on the resolution of a substantial, disputed question of federal law. Since there is no private right of action under the CWA, as determined by the Supreme Court in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), the court examined whether jurisdiction over this lawsuit is appropriate.

In *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), the Court held that federal question jurisdiction did not lie where the plaintiff alleged a state tort claim and argued that federal law was evidence of the appropriate standard of care. Post-*Merrell Dow* cases have elaborated on the Court’s holding. In *PCS 2000 LP v. Romulus Telecommunications, Inc.*, 148 F.3d 32, 35 (1st Cir. 1983), the court noted that “[u]nless a federal statute bestows a private right of authority, courts ought to presume that Congress did not intend the statute to confer federal jurisdiction.” However, the court also acknowledged that, in the appropriate case when the interpretation of federal law is outcome determinative, jurisdiction can be exercised.

A later case, *Almond v. Capital Properties, Inc.*, 212 F.3d 20 (1st Cir. 2000), relied on the reasoning of a Seventh Circuit opinion, *Price v. Pierce*, 823 F.2d 1114 (1987). In *Price*, a challenge to allocation of

low-income housing, the court held that federal jurisdiction was appropriate because the success of a Department of Housing and Development program depended on courts' developing a uniform principle.

A Fourth Circuit decision, *Ormet Corporation v. Ohio Power Company*, 98 F.3d 799, 807 (4th Cir. 1996), involved a Clean Air Act (CAA) emission allowance issue. The court, in that case, determined that, although the CAA does not confer a private right of action, federal jurisdiction was appropriate for four reasons: to resolve the issue (1) the court had to interpret both the CAA and the contract; (2) the system of freely transferable allowances was critical to the acid rain program; (3) Congress intended that EPA not be burdened with resolving private disputes over allowances; and (4) uniformity was critical to the program's success.

In this case, the district court relied on the Sixth Circuit case of *Board of Trustees of Painesville Township v. City of Painesville*, 200 F.3d 396 (6th Cir. 1999). In Painesville, the city applied to EPA for a grant to expand its wastewater treatment facilities. Although the grant papers indicated that the plaintiffs would have access to the new facilities, the city refused to provide that access. The court concluded that, even if resolution required the interpretation of the CWA, there would still be no jurisdiction because:

[T]he congressional determination that there should be no federal remedy for violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently substantial to confer federal-question jurisdiction.

Id. at 400 (quoting *Merrell Dow*, 578 U.S. at 814 (internal quotation omitted)).

The First Circuit agreed with the district court's determination that jurisdiction in this case is not available. At its core, this complaint is founded on the

alleged breach of a contract. Simply because a court may have to interpret federal regulations does not mean that federal jurisdiction exists. The *Ormet* court stated that "the determination of whether a federal issue is sufficiently substantial should be informed by a sensitive judgment about whether the existence of federal judicial power is both appropriate and pragmatic" and that "at bottom, we must determine whether the dispute is one that Congress intended federal courts to resolve." *Ormet*, 98 F.3d at 807. There is no indication that Congress intended the CWA and its regulations to confer federal question jurisdiction in this type of case. In this case, application and interpretation of the CWA and EPA guidelines do not rise to a *substantial* question of federal law. The court, thus, affirmed the district court's holding that subject matter jurisdiction does not exist.

OPA

Court Discusses Jurisdictional Reach of OPA: *United States v. James Hamilton Needham et al.*, No. 02-30217 (5th Cir. Dec. 16, 2003)

Background

In January 1995, the Louisiana Department of Environmental Quality received a complaint of an oil spill in LaFource Parish, Louisiana. The spill occurred when a Needham Resources, Inc., (NRI) employee pumped oil from a containment basin into an adjacent drainage ditch. NRI, owned solely by James Hamilton Needham, initially hired a private contractor to perform cleanup, but ran out of money to finish the job. U.S. EPA and the Coast Guard then assumed responsibility for the clean-up effort, funded by the Oil Spill Liability Act.

In February 1999, the Needhams filed a Chapter 11 bankruptcy petition, which subsequently became a Chapter 7 proceeding. The next day, the federal government sued the Needhams and NRI to recover its clean-up costs under the Oil Pollution Act (OPA). The action was stayed pending resolution of the bankruptcy court's dispute over the government's proof of claim against the Needhams. At the evidentiary

hearing, the parties submitted a five-page written stipulation, which, among other things, agreed that the oil spilled into Bayou Cutoff and then into Bayou Folse. Bayou Folse flows directly into the Company Canal, an industrial waterway that eventually flows into the Gulf of Mexico.

The bankruptcy court found that “neither the drainage ditch nor Bayou Cutoff are navigable waters nor are they sufficiently adjacent to the navigable waters to support an extension of the OPA.” *In re Needham*, 279 B.R. 515, 519 (Bankr. W.D. La. 2001). The court, thus, sustained the Needhams’ objection to the United States’ proof of claim. The district court affirmed. The government appealed, arguing that the oil spilled into navigable-in-fact waters or into waters adjacent to an open body of navigable water.

Holding

The OPA imposes strict liability upon parties that discharge oil into “navigable waters,” jurisdiction that is co-extensive with that of the Clean Water Act. In *Rice v. Harken Exploration Company*, 250 F.3d 264 (5th Cir. 2001), the Fifth Circuit noted that neither the OPA nor the CWA extends federal regulation to the outermost limits of the Commerce Clause. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 511 U.S. 159, 168, the Court emphasized that isolated bodies of water were neither navigable-in-fact nor adjacent to open water when it held that these water bodies were not covered by the CWA.

Despite the holding in *SWANCC*, the government urged the court to approve its regulatory definition of “navigable waters.” This definition includes “tributaries” of navigable-in-fact waters within its definition. 40 C.F.R. § 300.5 (2003). The government contended that this definition covers all waters that have any hydrological connection with “navigable water” except for groundwater. Two recent circuit court decisions evidently adopted this view. See *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003) (CWA covers wetlands “adjacent to, and [that] drain into, a roadside ditch whose waters eventually

flow into the navigable Wicomico River and Chesapeake Bay); *United States v. Rapanos*, 339 F.3d 447, 559 (6th Cir. 2003) (CWA covers wetlands flowing into a man-made drain, flowing into a creek, and then flowing into a navigable river).

The court held, however, that this interpretation could not be sustained under the *SWANCC* holding:

The CWA and the OPA are not so broad as to permit the federal government to impose regulations over ‘tributaries’ that are neither themselves navigable nor truly adjacent to navigable waters. See *Rice*, 250 F.3d at 269. Consequently, in this circuit[,] the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under *SWANCC* “a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water.

Slip op. at 8.

With those parameters in mind, the court examined the district court’s findings of fact and found that there was error. The court ruled that neither the drainage ditch nor Bayou Cutoff was navigable-in-fact and that the Gulf of Mexico was the only open body of navigable water in the vicinity of the spill. The parties’ stipulation of fact included that oil was discharged into Bayou Folse. The court’s proper inquiry, then, was Bayou Folse is navigable-in-fact or adjacent to an open body of navigable water. To the court, the clear answer was in the affirmative. Bayou Folse flows into the Company Canal, which falls within the definition of navigable water. It is an inland waterway that supports commerce, is unobstructed, and is traversed on a consistent basis. Therefore, it is navigable in fact.

Since the court held that the OPA applies to the spill at issue, it reversed and remanded.

RCRA

Court Largely Upholds EPA's New Fertilizer Rule: *Safe Foods and Fertilizer et al. v. Environmental Protection Agency*, No. 02-1326 (D.C. Cir. Dec. 9, 2003)

Background

This is a challenge to EPA's rule concerning recycled materials used to make zinc fertilizers and the fertilizers themselves. See Proposed Rule, 65 Fed. Reg. 70,954, 70956/2-3 (Nov. 28, 2000). The rule exempts the feedstocks for these fertilizers if they are not speculatively accumulated and meet certain storage, record-keeping, and notice requirements. It also exempts the fertilizers themselves if the manufacturers meet certain testing and record-keeping requirements and if the fertilizers meet certain maximum concentration levels for lead, arsenic, cadmium, chromium, mercury, and dioxins. Those feedstocks that do not meet the requirements would be subject to regular Subtitle C regulation; non-compliant fertilizer would be subject to the Land Disposal Restriction treatment.

The petitioners filed a challenge, attacking the new exemptions as contrary to RCRA's plain meaning and unreasonable. They also challenge the 1988 rule allowing fertilizers to comply with the Resource Conservation and Recovery Act (RCRA) by satisfying the LDRs for each hazardous waste.

Holding

EPA attacked on jurisdictional grounds the challenge to allowing fertilizers to satisfy RCRA by meeting LDR standards. It argued that the challenge was barred by the requirement that petitions for review of RCRA rules be filed within ninety days of promulgation. The court agreed. It found that EPA did not reopen the LDR standards when it requested comments to compare the regulatory status quo with the proposed alternatives.

EPA's new rule provides protection to the recycled materials in fertilizer by determining that, once the specified conditions are met, these materials are not "discarded" material. The petitioners argued that the plain meaning of RCRA requires that such materials be considered "discarded." First, they pointed out that the D.C. Circuit's own jurisprudence holds that recycled material destined for immediate reuse within an ongoing industrial process is never considered "discarded," but that material that is transferred to another firm or industry for subsequent recycling must always be viewed as "discarded" material.

The court stated that petitioners had misread their cases. The court has held that the term "discarded" does not include materials that "are destined for beneficial reuse or recycling in a continuous process by the generating industry itself." *American Mining Congress v. EPA*, 824 F.2d 1177, 1186 (D.C. Cir. 1987). The court has also held that materials destined for future recycling by another industry may be considered "discarded." See *American Petroleum Institute v. EPA*, 906 F.2d 729, 740-41 (D.C. Cir. 1990). However, the court has never held that the material to be recycled in another industry must be deemed to be "discarded" under RCRA.

The petitioners' reading of the statute is that RCRA's definition of solid waste as "any garbage, refuse, sludge from . . . [an] air pollution control facility and any other discarded material" includes K061 sludge, which is used in the fertilizer in question. EPA's new rule includes K061 sludge, produced by air pollution control facilities. The court agreed that the petitioners' reading of the statute is plausible. EPA reads the phrase "other discarded materials" to mean that the listed materials are solid waste only if they are also "discarded." This reading is also plausible. Whether this reading is reasonable and consistent with the statutory purpose of RCRA depends upon EPA's reasons for finding that the materials involved should not be deemed "discarded" so long as they meet the conditions. EPA's answer is that market participants in the recycled fertilizer business treat the products more like valuable products and that the fertilizers derived

from these recycled feedstocks are chemically indistinguishable from similar commercial products made from virgin materials.

The court noted that this is an issue of first impression—whether the “identity principle” (that the recycled fertilizers are identical to non-recycled fertilizers) coupled with market valuation and management practices is a reasonable tool for distinguishing products from wastes. The court held that it was. The petitioners argued, however, even if this principle could justify exclusion for certain materials from RCRA regulation, “identity” is missing in this situation. They pointed out that EPA set metal contaminant limits higher (sometimes considerably so) than the highest level found in the virgin commercial fertilizer samples it used as the basis for comparison.

The court determined that it was not necessary to require literal identity so long as the differences are “so slight as to be substantively meaningless.” Slip op. at 9. In this case, the differences between EPA’s criteria and the contaminant concentrations found in virgin fertilizers are not great when one considers the issue against the perspective of the standard needed to protect human health and the environment. The four metal contaminants must be in concentrations between 20 and 227 times the EPA ceilings to pose a danger.

In considering the level for dioxin, EPA based a comparison on the average background dioxin concentration in soil instead of that found in virgin fertilizer. EPA set a limit of 8 parts per trillion, similar to that background concentration. EPA acknowledged that virgin fertilizers generally have much lower dioxin concentrations, but observed that dioxin did not pose a risk at the low concentrations in ordinary soil. The court did not find this approach unreasonable.

The court did note, however, that, insofar as the chromium concentration levels are concerned, EPA proposed a threshold that is far in excess of the commercial sample median. EPA has not presented evidence

to indicate that these differences are trivial from a health and environment perspective, so the court could not affirm these levels on the “identity” principle. The court, therefore, remanded that portion of the rule to the agency for an explanation as to how the difference in these levels are irrelevant in light of the possible effects on human health and the environment. Except for this issue, the petition for review of the rule was denied.

Water

Citizen Suit Under CWA Concerning Pesticide Used in Accordance with FIFRA May Proceed: *No Spray Coalition, Inc., et al. v. City of New York, et al.*, No. 02-9484 (2d Cir. Dec. 9, 2003)

Background

The plaintiffs brought a citizen suit under the Clean Water Act (CWA) seeking an injunction against the City of New York from spraying insecticide in a manner that pollutes navigable water without a permit. The city was spraying to kill mosquitoes because of an outbreak of West Nile virus. The district court ruled that Congress intended the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) to be the primary scheme governing pesticide use. Since FIFRA does not authorize a citizen suit, the court held FIFRA should prevail over the CWA in this regard.

Holding

The CWA prohibits the “discharge” of “any pollutant” into “navigable waters” without a National Pollutant Discharge Elimination System (NPDES) permit or comparable state permit; the statute’s goal is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). FIFRA is a regulatory statute governing the marketing and use of designated classes of chemicals. Enforcement actions under that statute may be brought only by specified federal or state agencies.

The appellate court held that each statute stands on its own and means what it says. A citizen's suit may not be brought to enforce the provisions of FIFRA; it may be brought to enforce obligations created by the CWA. The district court cautioned that a court should not "read into" a statute remedies that are not there. However, the question in this case is whether to eliminate from the CWA a statutorily provided remedy merely because another statute omits it. The court held there was no reason to do so, stating:

[The district court's] ruling impermissibly modified CWA. CWA expressly permits enforcement by citizen suit. The district court's interpretation disallows enforcement of CWA through a citizen suit unless the alleged violation of CWA also violated FIFRA in a substantial manner. We find no basis for this interpretation of the statute.

Slip op. at 4.

The defendants argued that summary judgment should be affirmed on the basis that, where an alleged violation of the CWA consists of use of pesticides governed by FIFRA, applied in accordance with FIFRA, that use should be deemed conclusively *not* to be in violation of the CWA. The district court did not answer that question and the appellate court determined that this issue should, in the first instance, be addressed by the trial court.

Therefore, the court reversed and remanded the case.

Wetlands

Environmental Appeals Board Upholds ALJ Finding That Deep Ripping Violated CWA: *In re Ray & Jeannette Veldhuis*, CWA Appeal No. 02-08 (EAB Oct. 21, 2003)

Background

Ray and Jeannette Veldhuis purchased property in the early 1990s from Len Van Gaalen in Stanislaus County, California. Van Gaalen had farmed the property in row crops such as barley, oats, and wheat. The respondents ultimately decided to plant almond trees on the property. In November 1995 and in August 1997, three fields on the property were deep ripped in preparation for almond tree planting. The respondents were visited by various officials who determined that vernal pools existed on the fields as well as 15.77 acres of drainage swale wetlands that were tributaries to the San Joaquin and Merced Rivers. The respondents were notified that that must apply for section 404 permits, but neglected to do so before deep ripping the fields. Region IX ultimately filed an administrative complaint against the respondent, charging him with unlawfully discharging dredged or fill material into federally protected waters of the United States.

The Administrative Law Judge (ALJ) found the respondent liable for discharging dredged or fill material into 21.04 acres of wetlands without a Clean Water Act (CWA) permit and assessed an administrative penalty of \$87,930. The respondent filed an appeal, arguing that he was entitled to the "normal farming" exemption of section 404(f) of the CWA, that the ALJ's decision was inconsistent with the holding in *National Mining Association v. U.S. Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), and with the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159 (2001).

Holding

Congress provided in section 404(f)(1) of the CWA that discharges into wetlands from normal farming, silviculture, and ranching activities may occur without a CWA permit. Courts have uniformly held that the exemption should be narrowly construed. However, the exemption must be read in light of section 404(f)(2), the recapture provision, which states:

Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. § 1344(f)(2).

The respondent argued that the previous owner of the property had deep ripped the land in question before the respondent's ripping activity and, therefore, there was no change of use. The board disagreed. The preponderance of the evidence indicates that wetlands existed on the fields prior to the respondent's activity, but not afterwards. It is true that some deep ripping activity occurred prior to respondent's. However, the ALJ determined, and the board agreed, that it was the respondent's deep ripping that destroyed the wetlands. Wetlands existed before the respondent's activities; wetlands no longer exist where the respondent had deep ripped. Thus, the flow or circulation of the waters was, in fact, impaired.

The second question the board addressed is whether the respondent's activities constituted a change in use. There was a change from planting annual row crops to planting almond trees, which take years to establish. However, both activities fall within the term "farming." Neither regulations nor caselaw provide examples comparable to this fact situation of what constitutes a new use. The board, thus, turned to examine the purpose of the legislation to help it make its determination.

The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). Specifically, in regard to wetlands, it is designed to prevent their conversion to dry lands. With his purpose in mind, the board had no trouble concluding that, where there is a major change to the type of crops being grown and that change results in the destruction of wetlands, there is a change in use within the meaning of the statute.

The board did not discuss the issue of whether deep ripping constitutes "normal farming" activities. However, since it found that both requirements of section 404(f)(2) were satisfied, the respondent's activities were subject to the recapture provision.

In the *National Mining Association* case, the D.C. Circuit Court of Appeals held that the Corps of Engineers exceeded its authority when it regulated the "re-deposit" of dredged spoil that fell back off the dredging bucket into waters of the United States. The court said, "the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back." 145 F.3d at 1404. The respondent argued that deep ripping also does not involve any significant addition of material to the site. Since the respondent did not raise this issue below and the ALJ's discussion of the *National Mining Association* case was not an "adverse ruling" from which the appellant may seek redress, the board declined to entertain the issue on appeal.

Finally, the respondent argued that the ALJ erred in holding that the wetlands involved were not isolated wetlands. The ALJ concluded that Region IX had established the adjacency of all the wetlands (save 3.16 acres that the region had withdrawn from the complaint after the decision in *SWANNC* was issued) to tributaries of navigable waters. She held that adjacency was not precluded by the distances involved, the number of tributary connections, the intermittency of these connections, or the fact that some tributaries were manmade. The board agreed, finding that the ALJ had properly judged that the preponderance of the evidence supported her findings.

Work Product

Documents Are Protected by Work Product Doctrine: *In re Grand Jury Subpoena*, No. 03-30102 (9th Cir. Nov. 26, 2003)

Background

In May 2000, U.S. EPA informed Ponderosa Paint Manufacturing, Inc., that it was being investigated for violating federal waste management laws. Ponderosa hired an attorney, John McCreedy, to advise it and to provide a defense to any charges brought by the government. McCreedy, in turn, hired environmental consultant Mark Torf to assist him in preparing a legal defense and as a consultant in Ponderosa's clean-up efforts.

In an attempt to avoid litigation, Ponderosa submitted documents to EPA in response to an Information Request and pursuant to an Administrative Consent Order. Many of these documents were prepared by Torf. EPA considered that Ponderosa had complied with the both the Consent Order and the Information Request.

In March 2002, a grand jury issued a subpoena to Torf for "any and all records relating in any way to any work" regarding "the disposal of waste material . . . from Ponderosa Paint[.]" Torf withheld those documents that he claimed were protected by the work product doctrine. The magistrate judge quashed the subpoena. The district court reversed and held Torf in civil contempt for refusing to produce the documents.

Holding

The work product doctrine protects "from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation." *Admiral Insurance Company v. United States District Court*, 881 F.2d 1486, 1494 (9th Cir. 1989). The doctrine is codified in Federal Rule of Civil Procedure 26(b)(3). The Supreme Court has held that the work product doctrine applies to documents prepared by investigators hired by an attorney, as well as those documents prepared by an attorney, so long as they were, in fact, created in anticipation of litigation. *United States v. Nobles*, 422 U.S.225, 229 (1975). In this case, there is no question that most of the documents were prepared for the single purpose of assisting in providing a defense to the client in anticipation of litigation.

However, some of Torf's documents were also prepared in compliance with the Information Request and the Consent Order. The question, then, is whether these "dual purpose" documents, not prepared solely in anticipation of litigation, are also protected by the work product doctrine.

The court concluded that it should extend the protection, as have other circuits, to such documents. It, thus, adopted the "because of" standard that is set out in the Wright & Miller Federal Practice treatise. See Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 *Federal Practice & Procedure* § 2024 (2d ed. 1994). In *United States v. Adlman*, 134

F.3d 1194 (2d Cir. 1998), the court discussed the “because of” standard and adopted it in discussing whether a document, prepared to evaluate the tax implications of a proposed merger, was protected.

The “because of” standard does not consider whether litigation was a primary or secondary motive behind the creation of the document in question. The totality of the circumstances are examined and protection is afforded if it can be fairly said that the “document was created because of anticipated litigation, and would not have been created in substantially similar form, but for the prospect of litigation.” *Adlman*, 134 F.3d at 1195.

The government argued that the documents would have been prepared in substantially similar form to comply with the Information Request and the Consent Order and, thus, are not protected by the work product doctrine. The government pointed to language in *Adlman* stating that “the ‘because of’ formulation . . . withholds protection from documents . . . that would have been created in essentially similar form irrespective of the litigation.” *Id.* at 1202.

The court noted that whether the work product protection is available cannot be decided simply by looking at one motive that contributed to producing the document in question. Under Wright & Miller’s “because of” formulation, “the nature of the document and the factual situation of the particular case” must be examined to determine whether the protection applies. When two purposes are inextricably intertwined, the analysis is more complicated. To the extent *Adlman* suggests that, when viewed in isolation from the facts of the case, a document could be said to have been created for a non-litigation purpose, the court believed the Seventh Circuit’s view to be the better approach. In two cases, the Seventh Circuit articulated the view that documents prepared because of impending litigation are protected by the work product document even though they were also used for an

“independent” purpose. See *In re Special September 1978 Grand Jury*, 640 F.2d 49 (1980); *United States v. Frederick*, 182 F.3d 496, 501–02 (1999). In *Grand Jury*, the court extended work product protection to materials produced both in anticipation of litigation and for the filing of state-required Board of Elections reports. The protection was appropriate because, by the time the client received the request for the required reports, the client had already received a subpoena from a federal grand jury. In contrast, in *Frederick*, the court denied work product protection for a document prepared for use in preparing tax returns and for use in litigation. The documents in questions were accountants’ worksheets prepared by a lawyer. The client was under investigation at the time, but the court determined that tax return preparation is a readily separable purpose from litigation preparation and the fact that a lawyer, rather than an accountant, prepared the documents did not blur that distinction.

In this case, Ponderosa hired McCreedy, who in turn hired Torf, because it learned that the government was investigating it for criminal wrongdoing, a circumstance requiring legal representation. Torf assisted McCreedy in preparing Ponderosa’s defense. It is of no moment that Torf could have been hired directly by Ponderosa. The challenged documents were prepared under the direction of McCreedy, who was providing legal advice to Ponderosa in anticipation of impending litigation. Thus, the court held that, notwithstanding their dual purpose character, the documents fall within the ambit of the work product document.

The government also argued that it has a substantial need for the documents and that it would incur undue hardship obtaining substantially equivalent information. The court disagreed. Ponderosa provided the government with documents pertaining to the sites and government representatives were present at the sites on several occasions.

CIVIL PROCEEDINGS

New Filings

Air

***New York et al. v. U.S. EPA*, No. 03-1380 (D.C. Cir. Dec. 24, 2003)**

In late October, New York, Connecticut, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, Pennsylvania, Rhode Island, Vermont, Wisconsin, the District of Columbia, and a number of cities and towns filed suit against U.S. EPA, challenging the agency's Prevention of Significant Deterioration and Non-attainment New Source Review rule concerning routine maintenance, repair, and replacement. Finding that the petitioners were likely to succeed on the merits and that they may demonstrate the likelihood of irreparable harm, the court granted the motion to stay the rule pending review and ordered an expedited hearing.

[For further information, contact New York AAG Peter Lehner at (212) 416-8450.]

Hazardous Waste

***Florida Department of Environmental Protection v. American International Petroleum Corporation, St. Marks Refinery, Inc., and Seminole Refining Corporation, and James T. Young*, No. 2004-CA-95 (Cir. Ct. Leon County Jan. 15, 2004)**

The State of Florida has filed a lawsuit under state law to recover more than \$12 million in clean-up costs and for natural resource damages from the operators of a now-closed refinery in St. Marks, Florida. The lawsuit also seeks to impose penalties for environmental violations and injunctive relief granting access to a 55-acre portion of the site where entry to the state has been denied.

The complaint alleges that asphalt, pentachlorophenol, and petroleum products were stored at the site for fifty years and that oil lagoons and tar pits have contaminated soils, a nearby river, and wetlands.

[For further information, contact Larry Morgan, Florida DEP, at (850) 245-2242.]

Settlements

Pesticides

***New York v. Dow AgroSciences LLC*, No. 403920/03 (Sup. Ct. N.Y. Cty Dec. 12, 2003)**

A subsidiary of Dow Chemical Company, Dow AgroSciences LLC, has agreed to pay \$2 million in civil penalties to New York to settle allegations that it made misleading safety claims about its pesticide products. The company will also be barred from making future safety claims about its products and requires the company to review its current advertising to ensure safety claims are removed. The penalty is the largest ever obtained in a pesticide enforcement case. Product labeling is not affected by the settlement.

In 1994, the state and Dow reached an agreement that prohibited advertising promoting the safety of Dow's pesticide products. An investigation by the New York Attorney General's Office concluded that the company had failed to abide by that agreement.

[For further information, contact New York AAG Lem Srolovic at (212) 416-8459 or Philip Bein at (518) 474-7178.]

Water***United States v. Board of Commissioners of Hamilton County and City of Cincinnati, No. 1-02-107 (S.D. Ohio Dec. 3, 2003)***

Hamilton County and the City of Cincinnati recently entered into a settlement agreement with the United States and the State of Ohio concerning allegations that the defendants have violated the Clean Water Act (CWA) by discharging raw sewage during rain events. This agreement, combined with a partial consent decree entered into in February 2002, is expected to bring the sewer system into compliance with the CWA.

Cincinnati's combined sewer overflows discharge an estimated six billion gallons of untreated sewage mixed with rainwater each year. Cincinnati residents have had problems with raw sewage backing up into residents' basements, creating a health hazard. The updating of the sewer system is expected to cost more than one billion dollars and should be completed by February 2022.

[For further information, contact Leslie Allen at (202) 514-4114.]

CRIMINAL PROSECUTIONS**Indictments****ESA*****United States v. Marie Selby Botanical Gardens, Inc., and Wesley E. Higgins, No. 03-CR-54 (M.D. Fla. Dec. 18, 2003)***

Charges have been filed against the not-for-profit Marie Selby Botanical Gardens, Sarasota, Florida, and its Director of Systematics, Wesley Higgins, for violating the Endangered Species Act. The charges allege that the defendants smuggled a species of Tropical Lady's Slipper into the United States and later returned it to Peru. The newly-discovered orchid is a

new species of the genus *Phragmipedium*, which is protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The treaty is implemented through the Endangered Species Act.

Marie Selby Botanical Gardens is an educational facility specializing in epiphytes.

[For further information, contact AUSA Michael Runyon at (813) 274-6213 or Elinor Colbourne, DOJ, at (202) 305-0205.]

Water***United States v. Atlantic States Cast Iron Pipe Company et al., No. 3:03-CR-00852 (D.N.J. Dec. 15, 2003)***

In a thirty-five count indictment recently unsealed, Atlantic States Cast Iron Pipe Company, a subsidiary of McWane, Inc., of Birmingham, Alabama, and five of its employees — plant manager John Prisque, maintenance supervisor Jeffrey Maury, engineering and environmental manager Daniel Yadzinski, finishing superintendent Craig Davidson, and former human resource manager Scott Faubert — were charged with a multitude of violations of federal environmental laws as well as maintaining a hazardous workplace which led to the death of an employee.

The indictment alleges that the company used the plant's high-intensity furnace, intended to melt scrap iron to manufacture pipes, to burn waste tires and paint. The company also was charged with discharging fifty to one hundred gallons of petroleum-contaminated wastewater, asphalt paint, and oil-contaminated water into the Delaware River. The individuals indicted allegedly oversaw or approved of these acts to maximize iron pipe production. They are also charged with making false statements to federal and state officials.

[For further information, contact Andrew Goldsmith, DOJ, at (202) 514-5472 or AUSA Norv McAndrews at (609) 989-2190.]

United States v. Knut Sorboe, Peter Solemdal, and Aage Lokkebraten, No. 03-CR-2-00-(S.D. Fla. Dec. 23, 2003)

Three Norwegian nationals have been indicted for alleged violations of the Act to Prevent Pollution from Ships (APPS). The defendants, Chief Engineers Knut Sorboe and Peter Solemdal and First Engineer Aage Lokkebraten, have been indicted for conspiracy to falsify oil record books, dumping oil illegally at sea, and then concealing the illegal discharge. They were serving aboard the Norwegian Cruise Line's (NCL's) *S.S. Norway*. Federal investigators were alerted to the possible criminal activity through a tip from a former NCL engineer. NCL has already pled guilty to violating the APPS and agreed to pay a \$1 million fine and pay \$500,000 for environmental community service projects in south Florida. Under APPS' bounty provision, the person alerting officials to the violation was awarded \$250,000.

[For further information, contact AUSA Tom Watts-FitzGerald at (305) 961-9413 or Richard Udell, U.S. DOJ, at (202) 305-0361.]

Pleas

Eco-Terrorism

United States v. Adam Blackwell, Aaron Linas, and John Wade, Nos 303CR 488, 462 & 463. (E.D. Va. Jan. 13, 2004)

Three men, who identified themselves with the organization Earth Liberation Front, face up to five years in prison for crimes they committed between July and October 2002. They recently pled guilty in federal court to conspiracy to destroying by fire or other explosive device vehicles "or other real or personal property" used in interstate commerce. 18 U.S.C. § 844(i). The crimes, occurring in and around Richmond, Virginia included etching the glass on twenty-five SUVs at a dealership, sabotaging vehicles and homes at construction sites, and defacing the windows of some fast food restaurants.

[For more information, contact AUSA Brian Hood at (804) 819-5400.]

FIFRA

United States v. William Murphy, No. 03-CR-210 (N.D. Ala. Jan. 5, 2004)

William Murphy has pled guilty to twenty-eight counts of counterfeiting and pesticide misbranding charges. The charges included seventeen counts of having violated federal pesticide control laws by selling pesticides that bore labels falsely identifying their brand name, manufacturer, or active ingredients. The remaining charges involve violation of federal trademark protection laws. The mislabeled and adulterated pesticides were sold to municipalities in Alabama and Georgia that used them for mosquito and West Nile Virus control.

Murphy is scheduled for sentencing in March.

[For further information, contact AUSA Robert O. Posey at (205) 244-2001 or Jeremy Korzenik, DOJ, at (202) 305-0325.]

Sentences

Air

***United States v. John Littlehale*, No. NA-03-CR-001-01 (S.D. Ind. Jan. 3, 2004)**

A former vice-president at the Multi-Color Corporation was sentenced to eighteen months in jail, fifty hours of community service and a fine of \$4,000 for making false statements to the Indiana Department of Environmental Management (IDEM).

Multi-Color owns and operates a plant in Scottsburg, Indiana, that makes labels for mass-marketed consumer products such as detergents, softeners, anti-freeze, chewing gum, and food products. Littlehale admitted

that he falsely represented to IDEM officials that a new press was not operating and would not operate before the proper air pollution control devices were installed as required by the Clean Air Act. In fact, the press had been operating for six months prior to making the false statement.

During a reorganization process, the company uncovered and immediately disclosed these violations to IDEM. It was not charged and resolved its liability in a civil settlement where it agreed to pay a fine, perform supplemental environmental projects, and cooperate with the government's investigation.

In a related matter, Roger Taylor, the former plant manager, was sentenced to six months' home detention, five years' probation, and 500 hours community service on his plea that he knew that his supervisor had lied to IDEM officials but had failed to report this to the proper authorities.

[For further information, contact Stacey H. Mitchell, DOJ, at (202) 305-0363.]