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## *Inside . . .*

### LEAD ARTICLE

- 3 “Idlers, Turn off Your Engines”: New York’s Enforcement of Engine Idling Restrictions  
*By Tom Congdon and Lemuel M. Srolovic*

### DECISIONS

#### Air

- 12 Portion of Arizona’s SIP Remanded to EPA: *Martha Vigil v. Michael O. Leavitt*

#### APA

- 16 Agency’s Alleged Failure to Act Not Remediable Under APA: *Norton v. Southern Utah Wilderness Alliance*

#### CERCLA

- 18 RCRA Direct Action Statute Cannot Be Used to Pursue CERCLA Claim: *South Carolina Department of Health and Environmental Control v. Commerce and Industry Insurance Company*

#### FOIA

- 20 Documents Protected by Deliberative Process Privilege: *Enviro Tech International, Inc. v. U.S. Environmental Protection Agency*

#### Natural Resources

- 22 NRD Claim Not Subject to Osage Allotment Act Arbitration: *Don Quarles v. United States*

#### Sentencing Guidelines

- 23 Jury Must Make Finding of Additional Facts that Increase Sentence: *Blakely v. Washington*

#### Wilderness Act

- 25 Park Service Violated Wilderness Act on Cumberland Island: *Wilderness Watch v. Fran P. Mainella*

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<b>CIVIL PROCEEDINGS</b>	26
<b>CRIMINAL PROSECUTIONS</b>	27
<b>UPDATE</b>	29

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**“IDLERS, TURN OFF YOUR  
ENGINES”:  
NEW YORK’S ENFORCEMENT OF  
ENGINE IDLING RESTRICTIONS**

By

**Tom Congdon and Lemuel M. Srolovic\***

**Introduction**

Motor vehicles are one of the largest sources of air pollution threatening public health and the environment, accounting for approximately sixty-two percent of total carbon monoxide (CO), twenty-seven percent of volatile organic compounds (VOCs), and thirty-seven percent of nitrogen oxides (NO<sub>x</sub>) emissions in the United States.<sup>1</sup> Motor vehicles are also a leading contributor to global warming, accounting for twenty-five percent of total carbon dioxide (CO<sub>2</sub>) emissions nationwide.<sup>2</sup>

The localized air quality impacts of motor vehicles are greatest in congested urban areas. In those areas, emissions from diesel engines are of particular concern, as they are among the largest sources of smog-forming NO<sub>x</sub> and VOC emissions, and fine particulate matter (PM<sub>2.5</sub>) emissions, all of which contribute to respiratory disease. Diesel exhaust has been linked to premature death, cardiovascular disease, chronic bronchitis, asthma attacks, allergies, impaired immune system function, and shortness of breath, and has been classified by U.S. EPA as a probable human carcinogen.<sup>3</sup> Practically every resident of an urban area has also experienced the im-

mediate discomfort of being enveloped in a cloud of soot and odor from a passing or idling diesel truck or bus.

State and local agencies have few tools at their disposal to address mobile source pollution since emission standards are set by the federal government.<sup>4</sup> However, twenty-three states and municipalities, including New York State and New York City, have laws that limit the amount of time a vehicle may idle when not in traffic.<sup>5</sup> With effective enforcement of idling laws, air emissions, noise pollution, exhaust odor and fuel consumption can be significantly reduced.

In 2001, the New York State Attorney General’s Office (NYAG) began an anti-idling enforcement initiative aimed at reducing unnecessary air and noise pollution from illegally idling buses and trucks. To date, the NYAG has reached ten agreements with operators of large fleets of buses and trucks (representing nearly 8,000 heavy duty vehicles) and two agreements with terminal market facilities that host hundreds of long-haul trucks every day. As far as we can determine, this is the first broad idling enforcement initiative ever taken. This article provides an overview of idling and describes New York’s enforcement experience

**Who’s Idling?**

In the United States, there are at least 500,000 long-haul tractor trailer trucks,<sup>6</sup> 600,000 school buses, and 140,000 commercial buses.<sup>7</sup> There are another two million “heavy-heavy duty trucks” (a gross vehicle weight of 26,001 pounds or more) in the U.S. that are used for more local shipments.<sup>8</sup> All but a very small percentage of these vehicles are diesel powered.

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Each of these vehicle groups has different idling trends and unique impacts. Long-haul trucks are the biggest culprits, idling 8 to 10 hours per day, over 300 days per year.<sup>9</sup> They are most often found idling at truck stops and highway rest areas, where drivers park for mandatory rest, and at terminal points where they wait to unload. The drivers idle their engines in order to control temperature in their sleeper cabs, provide electricity for appliances, keep the engine warm for easier start-up in cold weather, and because idling is an ingrained habit in the industry.

EPA estimates that school buses idle 1.5 hours per day.<sup>10</sup> Idling occurs in front of schools while buses are queued and waiting to load or unload, in bus yards which are often located in residential neighborhoods, and on streets between morning drop-off and afternoon pick-up. School bus drivers may idle to maintain desired cabin temperature, to de-frost windows and steps, or because the driver is concerned about re-starting the engine. Much of the school bus idling observed during the NYAG's investigations, however, was completely unjustifiable, and was the product of bad idling habits.<sup>11</sup>

Idling data does not exist for commercial buses (*i.e.*, city-to-city buses, tour buses, and charter buses) or delivery trucks, but the NYAG's investigation uncovered that these vehicles are also persistent idlers. Commercial buses often idle at bus stations, bus lots, and along their routes. Local delivery trucks often idle while drivers make deliveries.

Because of the large number of idling vehicles and because heavy duty diesel engines have high emission rates, diesel engine idling is a significant source of air pollution nationwide. We estimate that idling heavy duty diesel vehicles annually emit 147,004 tons of NO<sub>x</sub>, 245,265 tons of CO, 32,667 tons of VOCs, 6,716 tons of particulate matter PM<sub>10</sub> (most of which is in the form of PM<sub>2.5</sub>), and almost 27 million tons of CO<sub>2</sub>. (See Table 1, p. 6.)

Motor vehicle emissions—and emissions from idling in particular—have significant localized impacts in urban areas. There is a greater concentration of vehicles on the streets in these areas, as well as a greater concentration of fleet parking lots and depots. Of course, these areas are also more densely populated and more people are exposed to the emissions. In addition, unlike factory emissions, truck and bus exhaust is emitted directly at the level where people breathe. In New York City, it is not uncommon to encounter buses or delivery trucks idling in front of schools and residential buildings or for large fleet parking lots to be located in the middle of residential neighborhoods. Many of the city's bus depots, parking lots, and terminal markets are located in low-income communities of color.

## Idling Impacts

### *Human Health*

EPA has identified forty chemicals in diesel exhaust that are listed as hazardous air pollutants under the Clean Air Act. As noted above, diesel vehicles also emit significant amounts of particulate matter and NO<sub>x</sub>. This "toxic soup" in diesel exhaust has been associated with premature mortality, cancer, asthma attacks, decreased lung function, cardiovascular disease, chronic bronchitis, allergies, impaired immune system function and shortness of breath.<sup>12</sup>

Over ninety percent of diesel exhaust particles have diameters less than 2.5 microns (PM<sub>2.5</sub>) which are so fine that they are able to penetrate deeply within the lung, where they cannot be expelled. Fine particle pollution can decrease lung function and trigger asthma attacks and is therefore particularly harmful in congested urban areas where asthma rates tend to be higher than national averages. Because of the health impacts associated with PM<sub>2.5</sub>, EPA promulgated a new National Ambient Air Quality Standard (NAAQS) for this pollutant in 1997 and has prelimi-

narily designated 243 counties, with a population of nearly 100 million people, in non-attainment of the new NAAQS for PM<sub>2.5</sub>.<sup>13</sup>

Children are more vulnerable to harmful impacts of air pollution because their respiratory systems are not fully developed, causing them to breathe more rapidly than adults and to have, pound for pound, greater exposure to pollutants in the air. Diesel exhaust from idling school buses is therefore of particular concern because it accumulates in and around the buses in which children ride, fouling the air they breathe. For example, a recent study discovered that children riding on school buses are exposed to levels of diesel exhaust pollutants inside the buses that are five to fifteen times higher than the levels outside, an increase that was found to be directly related to idling.<sup>14</sup>

### *Wasting Fuel*

An idling heavy duty diesel engine consumes approximately one gallon of fuel per hour.<sup>15</sup> Even when idling is used for some purpose, such as heating or cooling truck cabs, much of this fuel is completely wasted. Idling large diesel engines that are designed to operate at maximum efficiency when pulling heavy loads at highway speed is a grossly inefficient way to power auxiliary functions in a truck cab. Between eighty-five and ninety-four percent of the energy in the diesel fuel is wasted as heat and atmospheric pollution when long-haul trucks idle.<sup>16</sup> We estimate that diesel bus and truck idling consumes approximately 2.4 billion gallons of diesel fuel per year, or about 56 million barrels. (See Table 2, p. 6.) This is equivalent to about 8.4 percent of the U.S. Strategic Petroleum Reserve's current inventory of 666 million barrels of oil.

### **Alternatives to Idling**

In many instances, idling is completely unnecessary and the best alternative is to simply turn off the engine. However, there are instances where drivers need a power source for climate control, appliances, and other devices. Auxiliary power units, or small diesel generators, can be used to provide 110-volt power for climate control systems, block heaters, refrigerators, televisions, computers, and microwaves, all of which can be found in today's long-haul trucks. Auxiliary generators burn diesel fuel, but use eighty to ninety percent less fuel per hour than an idling truck engine. Inverters (devices that convert DC power to AC power) can also be used in conjunction with multiple batteries to power AC appliances and devices. Direct-fired heaters, and other low-tech alternatives like electric blankets, have been used by fuel-conscious drivers for years.

Despite the fuel savings that can be achieved by using these technologies instead of idling truck and bus engines, market barriers have prevented their widespread use. The systems add weight to the vehicles, and their capital costs may be significant. Another option for drivers, and one that appears to be gaining momentum, involves outfitting truck stops and rest areas with electrical hookups in each parking spot. IdleAire Technologies has developed a sophisticated electrification bay, offering drivers a module that fits in a truck cab's window and provides heating and cooling, internet access, television, and 110-volt AC power. Use of the IdleAire units is priced so that it is cheaper per hour than idling (approximately \$1.25 per hour). With state and federal subsidies, IdleAire has developed 1,000 units at 16 sites nationwide, including a 28-unit site in the Bronx, New York.

**Table 1. Estimated annual emissions caused by idling vehicles in the U.S. <sup>a</sup>**

Vehicle Type	Annual Idling Time Per Truck (hrs) <sup>b</sup>	VOC (tons/year)	CO (tons/year)	NO <sub>x</sub> (tons/year)	PM10 (tons/year)	CO <sub>2</sub> (tons/year)
<b>500,000 Long Haul Trucks</b>	2,400	16,667	125,135	75,002	3,426	13,752,949
<b>600,000 School Buses</b>	315	2,625	19,709	11,813	540	2,166,089
<b>140,000 Commercial Buses</b>	450	875	6,570	3,938	180	722,030
<b>2,000,000 Other Trucks</b>	450	12,500	93,851	56,251	2,570	10,314,712
<b>Total Annual Emissions</b>		<b>32,667</b>	<b>245,265</b>	<b>147,004</b>	<b>6,716</b>	<b>26,955,780</b>

a. Source for Idling emission factors: EPA Mobile 5b and Part 5, (VOC: 12.6 g/h; CO: 94.6 g/h; NO<sub>x</sub>: 56.7 g/h; PM10: 2.59 g/h). Source for CO<sub>2</sub> emission factor: Argonne National Laboratory Transportation Technology R&D Center, *Analysis of Technology Options to Reduce the Fuel Consumption of Idling Trucks*, June 2000 (10,397 g/h).

b. Idling time assumptions: long-haul trucks - 8 hours per day, 300 days per year; school buses - 1.5 hours per day for 210 days per year; commercial buses and delivery trucks - 1.5 hours per day for 300 days per year.

**Table 2. Fuel Consumption by Idling Trucks and Buses. <sup>a</sup>**

Vehicle Type	Annual Idling Time/Vehicle	Fuel Consumption (gallons)
500,000 long haul trucks	2400 hours	1,200,000,000
600,000 school buses	315 hours	189,000,000
140,000 commercial buses	450 hours	63,000,000
2,000,000 other heavy duty	450 hours	900,000,000
<b>Total</b>		<b>2,352,000,000</b>

a. Assumes same idling times as Table 1 and 1 gallon/hour fuel consumption rate at idle.

### The New York AG's Idling Enforcement Initiative

Under New York State law, heavy duty trucks and buses may not idle for more than five consecutive minutes.<sup>17</sup> There are exceptions to the law, including when the engine is powering an auxiliary function such as loading or unloading cargo, or mixing concrete; when running the engine is required for maintenance; or when fire, police, utility or other vehicles are performing emergency services. Penalties for violating the state idling law may range from \$250 to \$15,000.

The New York City idling law is more stringent. Under the city law, no vehicle may idle for more than three consecutive minutes, unless the engine is powering a loading, unloading or processing device or when the vehicle is a legally authorized emergency vehicle.<sup>18</sup> Penalties for violating the city law range from \$250 to \$875.

The state and city laws are traditionally enforced by the state Department of Environmental Conservation and the city Department of Environmental Protection, respectively. Officers from these agencies investigate illegal idling, usually in response to citizen complaints, and issue tickets to drivers observed to be idling in excess of the time limits. Given the widespread prevalence of idling in New York, however, limited ticket writing by a handful of officers is not sufficient to bring the busing and trucking industry into compliance with the idling laws.

Using the Attorney General's general authority under the New York Executive Law to commence legal action where there is repeated or persistent illegality in carrying on or conducting business in New York, the NYAG's office investigated several bus and truck fleets, and two terminal market facilities, be-

lieved to be violating the state or city idling laws.<sup>19</sup> The investigations included reviewing state and city records of idling violations and sending investigators onto the streets to identify fleets with persistent idling violations. Those observations quickly revealed that, while the drivers in some large fleets seldom idle their vehicles at all, the drivers in other fleets persistently idle for long periods of time. As to vehicle types, the investigation found excessive idling by large truck and commercial bus fleets, school bus fleets, and long haul trucks.

To date, the NYAG's office has presented its investigative findings to ten bus and truck fleets and two terminal markets that control hundreds of trucks on their premises. All of these entities cooperated with our investigations and all ultimately entered into out-of-court agreements to settle the NYAG's enforcement claims. The settlement agreements are in the form of Assurances of Discontinuance, a statutory form of agreement under New York State Executive Law § 63(15), which provides that evidence of a violation of such an agreement constitutes *prima facie* proof of violation of the applicable law in any subsequent litigation commenced by the Attorney General.

Since the goal of the idling enforcement initiative is to reduce idling by changing ingrained idling habits, the NYAG's office sought company-wide reforms rather than penalties. Indeed, in its investigations of the various entities, the office gathered only enough evidence to demonstrate a persistent idling problem, rather than amassing evidence of violations over a longer period of time in order to secure large penalties. All ten truck and bus agreements require the fleets to internalize idling control by adopting an idling control policy, training drivers and other staff regarding the policy, to monitor their vehicles for violations, to take appropriate internal disciplinary measures, and

to periodically report to the NYAG's office.<sup>20</sup> In addition, all of the fleets agreed to fund an environmental and community benefit project comprised of planting street trees in residential areas of New York City with sparse tree canopy.<sup>21</sup>

Two sets of agreements, dealing with school bus fleets and the terminal markets, were unique because they addressed the particular impacts of school bus idling and idling long haul trucks in a residential area, and because they encouraged the use of new technologies to reduce emissions.

#### *School Bus Fleets*

Four of the bus companies with whom NYAG reached idling agreements operate yellow school buses for the New York City Department of Education. The four companies operate more than half of the approximately 5,500 school buses that transport New York City public school students. A brief investigation found widespread idling of school buses throughout New York City and found that the buses often idle for long periods of time in front of schools, including when children are waiting nearby to board and when they are loading and unloading. As noted above, children are more susceptible to the health impacts of diesel exhaust exposure so it was essential to curb idling where children are present. Under the agreements, the companies agreed to go beyond the city's three minute idling law and, as a matter of company policy, prohibit idling for more than one minute within one block of a school.

Additionally, three of the four school bus companies agreed as part of their settlements to install diesel exhaust filters on their buses to further reduce emissions. In 2001, New York Power Authority announced that it would provide \$6 million to retrofit 1,000 city school buses with exhaust filters,<sup>22</sup> but until the enforcement action, none of the companies

agreed to take advantage of this funding. The exhaust filters, when combined with the use of ultra-low sulfur diesel fuel, will reduce emissions from the school buses by up to ninety percent.

#### *Hunt's Point Terminal Markets*

Hunt's Point, a mixed use neighborhood in the South Bronx, New York, is a neighborhood that has been significantly impacted by diesel engine idling. It is home to 10,000 residents, several schools, and two of the largest terminal food markets in the country. Hundreds of long haul trucks enter the markets every day to deliver fresh produce and meat from as far away as California and Florida. Unfortunately, many of the trucks have long layovers inside the markets while they wait to unload their shipments. Until recently, these trucks would idle for hours and sometimes days at a time, and the NYAG's office calculated that idling trucks inside the markets were annually emitting approximately 38 tons of NOx, 36 tons of CO, 10 tons of VOCs and 1,400 pounds of particulate matter. These emission levels are comparable to the most highly polluting stationary sources in the Bronx. But, unlike stationary sources with high smoke stacks that disperse pollutants over a large area, these emissions are at or near ground level and much of the pollution stays within the local community. The operative idling control law applicable to the terminal markets is a provision of the state idling law that makes it applicable to anyone who has control over the operation of trucks or buses on land they own or lease, as is the case with the Hunt's Point markets.

The first idling control agreement was reached with the Hunt's Point Produce Market. At any given time, there may be 500 or more diesel powered trucks inside that market. During a brief investigation in the fall of 2002, the NYAG's office documented seventy-one instances of illegal idling.

The key to effectively controlling idling within this sprawling market was to use the market's internal security force, which already enforced speed limits, parking, and other traffic rules. In the settlement agreement, the market agreed to hire four full-time peace officers who were then deputized by the city Department of Environmental Protection to issue idling summonses under the city idling law within the market. The market also agreed to educate drivers about the state and city idling laws using brochures, signs and other means inside the market, and to implement a \$105,000 community benefit project outside the market.

After the produce market, the focus turned to the meat market, which is considerably smaller but, nevertheless, may have 300 or more trucks coming or going on any given day. While there is rarely good reason to idle, there was absolutely no excuse at the meat market. In 2001, the meat market partnered with IdleAire Technologies and the New York Power Authority to install 28 IdleAire electrification bays that drivers could use to heat or cool their cabs, run electrical appliances, watch movies, and connect to the internet or phone service.

The investigation of idling within the meat market quickly showed that the IdleAire electrification bays were being utilized infrequently. Due to different market and delivery conditions, long haul trucks did not stay within the meat market for as long as trucks delivering produce to the produce market and, therefore, did not choose to use the electrification bays. But the produce market trucks, now receiving tickets for idling and therefore presumably more inclined to look for alternatives to idling, did not use the IdleAire bays either because each market charged a significant entry fee (about \$25). This access problem was addressed in the settlement agreement with the meat market with a provision that the meat market would waive its entrance fee for produce trucks wishing to enter the meat market to use the IdleAire electrification bays.

As in the other idling agreements, the meat market also adopted a new market rule that prohibits idling for more than three minutes; implemented an anti-idling education campaign to inform truck drivers of the idling restrictions and the health and environmental effects of diesel exhaust; and began reporting illegal idling to the NYAG and the city Department of Environmental Protection.

### *Education and Outreach*

In conjunction with its idling enforcement, the NYAG's office has also developed and distributed information concerning the adverse human health and environmental effects of diesel engine idling and the idling restrictions under state and city law. The Attorney General sent letters to every school district in the state explaining the idling laws and the dangers of diesel exhaust and requested the school districts to voluntarily adopt no idling policies. A number of school districts around the state have either adopted idling control policies or are in the process of developing them. Working with the American Lung Association of New York State, the NYAG's office prepared and is disseminating a hand bill entitled "*Idling Trucks and Buses — Bad for Your Health—Bad for the Environment — Know the Law.*"<sup>23</sup>

### **Conclusion**

While the reports submitted by the various parties to the idling control agreements suggest that their new idling control policies and practices are dramatically reducing idling, perhaps a better indicator of how effective the idling initiative has been was found in an online trucking newsletter, in which a thirty-four-year employee at the produce market and resident of Hunt's Point was asked to comment on the idling crackdown within the market. He responded that before the idling enforcement, breathing was difficult and that his skin was covered with the grime of diesel exhaust at the end of his day driving a ferry truck

in the market yard. But now, he reported, “[t]he air quality is much better. It’s also much quieter. Normally, I’d have grease on my face. It’s changed a lot.”<sup>24</sup>

### ENDNOTES

<sup>1</sup> U.S. ENVIRONMENTAL PROTECTION AGENCY, NATIONAL EMISSION INVENTORY: AIR POLLUTANT EMISSION TRENDS, 1970-2001 (Aug. 2003).

<sup>2</sup> U.S. ENVIRONMENTAL PROTECTION AGENCY, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990-2002 (Apr. 2004).

<sup>3</sup> U.S. ENVIRONMENTAL PROTECTION AGENCY, HEALTH ASSESSMENT DOCUMENT FOR DIESEL ENGINE EXHAUST (2002).

<sup>4</sup> 42 U.S.C. § 7521 (EPA obligated to create emission standards for new motor vehicles or engines); 42 U.S.C. § 7543 (states and municipalities prohibited from adopting or enforcing standards relating to the control of emissions from new motor vehicles or engines). 42 U.S.C. § 7543(b)(1) allows the state of California to formulate and implement its own emission standards. The federal preemption in this area applies only to new motor vehicles and engines, permitting states to implement and enforce motor vehicle in-use restrictions such as idling limits.

<sup>5</sup> Anti-idling regulations exist in the following states and municipalities: Arizona, California, Colorado (Denver), Connecticut, District of Columbia, Hawaii, Maryland, Massachusetts, Minnesota, Minnesota (St. Cloud), Missouri (St. Louis), Montana (Lewis and Clark County), Nevada, New Hampshire, New Jersey, New York, New York (New York City), Pennsylvania, Pennsylvania (Philadelphia), Texas (Houston/Galveston), Utah (Salt Lake City), Virginia. See U.S. ENVIRONMENTAL PROTECTION AGENCY, SUMMARY OF STATE ANTI-IDLING REGULATIONS (Feb. 2003), available at <epa.gov/otaq/retrofit/documents/s03002.pdf>.

<sup>6</sup> ARGONNE NATIONAL LABORATORY TRANSPORTATION TECHNOLOGY R&D CENTER, ANALYSIS OF TECHNOLOGY OPTIONS TO REDUCE THE FUEL CONSUMPTION OF IDLING TRUCKS (June 2000).

<sup>7</sup> FEDERAL HIGHWAY ADMINISTRATION HIGHWAY STATISTICS 2002, BUS REGISTRATIONS — 2002, available at <<http://www.fhwa.dot.gov/policy/ohim/hs02/mv10.htm>>.

<sup>8</sup> U.S. CENSUS BUREAU, 1997 ECONOMIC CENSUS: VEHICLE INVENTORY AND USE SURVEY, available at <<http://www.census.gov/prod/ec97/97tv-us.pdf>>.

<sup>9</sup> U.S. ENVIRONMENTAL PROTECTION AGENCY, SMARTWAY TRANSPORT PARTNERSHIP, IDLING REDUCTION: EPA’S PLAN, available at <<http://www.epa.gov/smartway/idlingplan.htm>>.

<sup>10</sup> U.S. ENVIRONMENTAL PROTECTION AGENCY, CLEAN DIESEL PROGRAM FACTS AND FIGURES (May 2004), available at <<http://www.epa.gov/cleandiesel/420f04040.htm>>.

<sup>11</sup> Most idling observations were performed during mild spring or fall weather. In some instances, drivers were seen reading newspapers or sleeping while the engines idled.

<sup>12</sup> U.S. ENVIRONMENTAL PROTECTION AGENCY, HEALTH ASSESSMENT DOCUMENT FOR DIESEL ENGINE EXHAUST (2002).

<sup>13</sup> *E.P.A. Identifies 243 Counties That Fail Federal Air Standards*, N.Y. TIMES, June 30, 2004, at A19.

<sup>14</sup> JOHN WARGO PH.D., ENVIRONMENT AND HUMAN HEALTH, INC., CHILDREN’S EXPOSURE TO DIESEL EXHAUST ON SCHOOL BUSES (2002).

<sup>15</sup> ARGONNE NATIONAL LABORATORY TRANSPORTATION TECHNOLOGY R&D CENTER, ANALYSIS OF TECHNOLOGY OPTIONS TO REDUCE THE FUEL CONSUMPTION OF IDLING TRUCKS (June 2000).

<sup>16</sup> IDLEAIRE TECHNOLOGIES CORPORATION, ENERGY IMPLICATIONS OF DIESEL IDLING, *available at* <<http://www.idleaire.com/industry/implications/energy>>.

<sup>17</sup> 6 N.Y. COMP. CODES R. & REGS. § 217-3.2.

<sup>18</sup> N.Y.C. ADMIN. CODE § 24-163.

<sup>19</sup> New York Executive law § 63(12) grants the Attorney General authority to enforce state and local laws whenever any person engages in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business.

<sup>20</sup> The following companies entered into agreements with the NYAG: Frito-Lay, Greyhound Lines, Community Coach, Gray Line New York Tours, Leisure Lines, Suburban Trails, Atlantic Express, Pioneer Bus,

Logan Bus Co., Consolidated Bus Co., Hunt's Point Produce Market, and Hunt's Point Meat Market. In addition to these provisions, the Frito Lay company agreed to post signs on all of their trucks doing business in New York that read: "If this truck idles for more than 3 minutes, please call [company 800 number]." This signage has proven effective to remind drivers to turn off their engines.

<sup>21</sup> Street trees improve urban quality of life degraded by idling vehicles by removing some amount of pollutants from the air, by providing cooling shade in summer, and by providing a noise buffer between the street and residences or businesses.

<sup>22</sup> The New York Power Authority school bus retrofit project was implemented to offset emissions from several small natural gas power plants sited in New York City by the Authority.

<sup>23</sup> The hand bill is available at <<http://www.oag.state.ny.us/environment/environment.html>>.

<sup>24</sup> Sean Kelley, *The Big Turnoff*, E-TRUCKER (MAY 2004), *available at* <<http://www.etrucker.com/apps/news/article.asp?id=43816>>.

## DECISIONS

## Air

**Portion of Arizona's SIP Remanded to EPA:  
*Martha Vigil et al. v. Michael O. Leavitt et al.*,  
No. 02-72424 (9th Cir. May 10, 2004)****Background**

This lawsuit challenges U.S. EPA's approval of Arizona's state implementation plan (SIP) for airborne particulate matter (PM-10) in the metropolitan Phoenix area and its granting the state's request for an extension of the statutory attainment deadline to December 31, 2006.

The court remanded the SIP to EPA on two previous occasions. In the meantime, the agency reclassified Arizona as a serious PM-10 nonattainment area, requiring a new SIP to be submitted within eighteen months. Eventually, EPA adopted its own federal implementation plan, but withdrew it when, in 1999, Arizona submitted a revised SIP with legislation requiring adoption of a rule addressing agricultural sources of PM-10.

In early 2000, Arizona submitted its revised 1999 Serious Area Particulate Plan for PM-10 for Maricopa County. In this plan, the state addresses both annual and the twenty-four hour PM-10 standards. EPA's proposed approval was subsequently submitted for public comment. In October 2001, EPA approved Arizona's general permit rule for control of PM-10 from agricultural sources as satisfying the "reasonably available control measures" standard. In July 2002, EPA issued final approval of Arizona's SIP for the twenty-four hour and annual standards and granted an extension for attaining the standards to December 31, 2006.

This lawsuit objected to EPA's approval on various grounds. First, the petitioners claimed that EPA's approval was arbitrary and capricious in regard to

agricultural emissions control because it failed to include "all feasible measures," specifically the controls currently implemented in the South Coast region of California. The petitioners also disagreed with EPA's decision to approve the plan without requiring Arizona to mandate the use of CARB diesel, a fuel standard adopted by the California Air Resources Board. It also objected to the extension for attainment date granted by EPA.

**Holding**

The standard for review under the Administrative Procedure Act is whether EPA's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A review of an agency's construction of a statute is based on whether "the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

Under the Clean Air Act (CAA), each state classified as a serious area of PM-10 must submit an implementation plan that includes "[p]rovisions to assure that the best available control measures [BACM] for the control of PM-10 shall be implemented" no later than four years after the area is classified as serious. 42 U.S.C. § 713a(b)(1)(B). This is an additional requirement to the statutory mandate that moderate area plans must provide implementation of "reasonably available control measures [RACM] for the control of PM-10." 42 U.S.C. § 7513a(a)(1)(C).

The terms "reasonably available control measures" and "best available control measures" are not defined by the CAA and EPA has not exercised its general rulemaking authority to define those terms. In 1990, EPA provided its "preliminary views" on BACM and RACM in the form of "advance notice of how EPA generally intends to take action on SIP submissions and to interpret various PM-10 related title 1 provisions." State Implementation Plans for Serious PM-10 Nonattainment Areas, and Attainment Date Waivers for PM-10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implemen-

tation of Title I of the Clean Air Act Amendments of 1990, 50 Fed. Reg. 41,998 (Aug. 16, 1994) (Addendum); State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990, 57 Fed. Reg. 13,498 (Apr. 16, 1992) (General Preamble). EPA announced that these “preliminary interpretations” did not bind the states nor the public as a matter of law.

Because these interpretations are non-binding, *Chevron* deference does not apply to the General Preamble and Addendum. However, they are entitled to *Skidmore* deference because they “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Skidmore v. Swift & Company*, 323 U.S. 134, 140 (1944).

The EPA Administrator may extend the attainment date for a PM-10 serious area under various conditions. These include that attainment by a specified date would be “impracticable,” that the state “has complied with all requirements and commitments pertaining to that area in the implementation plan,” and that the state “demonstrates to the satisfaction of the Administrator that the plan for that area includes the most stringent measures that are included in the implementation plan of any State or are achieved in practice in any State, and can feasibly be implemented in that area.” 42 U.S.C. § 7513(e). This last standard is referred to as “most stringent measures” (MSM).

The court began its analysis by addressing the petitioner’s argument that Arizona’s general permit rule for agricultural PM-10 emissions does not constitute either BACM or MSM and that the California South Coast plan should have been adopted.

Arizona’s general permit rule for agriculture was adopted after an Agricultural Best Management Practices Committee reviewed and evaluated sixty-five management practices in terms of feasibility, costs, energy, and environmental impacts. Of the sixty-five, the committee decided to include thirty-four of the practices in the general permit rule. These were divided among three categories of farm activities speci-

fied in Arizona law. Commercial farmers are required to implement at least one per category. An individual may develop a PM-10 reduction practice not listed in the rule, but that practice must be “proven effective through on-farm demonstration trials” and submitted to the committee for review. ARIZ. ADMIN. CODE § R18-2-611(H).

The petitioners noted that RACM requires “*all* reasonably available control measures.” 42 U.S.C. § 7502(c)(1) (emphasis added). That standard is not met, according to them, when the SIP requires the adoption of only one of the practices per category. According to this argument, since the rule does not satisfy RACM, it cannot satisfy BACM, which requires a stricter standard than RACM. Since all thirty-four of the practices are considered feasible, the petitioners argued that more than one measure must be implemented to satisfy BACM. The court agreed that, if all the measures were put into place, a greater reduction of PM-10 would be achieved. However, the statute does not require the state to reduce its emissions to the maximum extent possible regardless of cost. In the Addendum, EPA has concluded that BACM means:

[T]he maximum degree of emissions reduction of PM-10 and PM-10 precursors from a source . . . which is determined on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, to be achievable for such source through application of production processes and available methods, systems, and techniques for control of each such pollutant.

59 Fed. Reg. at 42,010. The petitioners did not challenge this interpretation of the act. Therefore, the court’s task was to determine whether EPA had properly concluded that Arizona had provided for the maximum degree of emissions reduction in accordance with its interpretation of BACM.

### Arizona's General Permit Rule

Arizona explained that an effective agricultural PM-10 control strategy is dependent on local factors such as "regional climate, wind strength and direction, soil types, [g]rowing season, crop types, cropping systems, moisture conditions, water availability, and relation to urban centers." Air Quality Division, Arizona Department of Environmental Quality, Maricopa County PM<sub>10</sub> Serious Area State Implementation Plan Revision: Agricultural Best Management Practices, Enclosure 3 at 17-18 (June 13, 2001) (BMP Plan). Therefore, each strategy adopted must be based on local circumstances. Although Arizona farmers were encouraged to adopt more than one practice, it would not be reasonable to require more than one because one may be all that is needed for a particular farm.

EPA found that listing options for adoption was acceptable for implementation of BACM and that, as a technical matter, neither it nor the state was in a position to dictate which precise measure would be most appropriate for a given activity in a given locale.

The Arizona committee considered the controls adopted by California's South Coast. It noted that the controls had only been adopted by the South Coast and, thus, their effectiveness and cost had not been widely studied. The committee determined that it was not possible to directly compare Arizona agriculture and California agriculture. EPA accepted these conclusions after a thorough review of Arizona's rule and rationale. The court determined that it could not say that EPA's acceptance of the Arizona agricultural plan as meeting both BACM and RACM was arbitrary and capricious.

The MSM inquiry requires a comparison with the controls established by other states. EPA has defined MSM as "the maximum degree of emission reduction that has been required or achieved from a source or source category in other SIPs or in practice in other states and can be feasibly implemented in the area." 66 Fed. Reg. at 50,282. The petitioners argued that the Arizona plan fails to meet MSM in two respects: it doesn't require the adoption of as many manage-

ment practices as does the South Coast Air Quality Management District (SCAQMD) and it does not require that there be no tilling on high wind days as does the SCAQMD.

There are two questions that must be asked in analyzing this challenge. First, are SCAQMD's requirements more stringent than Arizona's? If so, must Arizona adopt those requirements to satisfy the MSM standard?

EPA did find that the SCAQMD's requirements are "likely to be more stringent than [Arizona's] general permit rule." 67 Fed. Reg. at 48,730. However, EPA found that those requirements were not feasible for Arizona for a variety of reasons. Irrigation methods are different, as are Arizona's topography, soil conditions, and crops. In addition, wind conditions are quite different from those in the Coachella Valley, making the benefits of a no-tilling requirement minimal. The court concluded that EPA's approval was neither arbitrary nor capricious.

### CARB Diesel

In 1993, the California Air Resources Board (CARB) required the use of diesel meeting specified emissions requirements. The petitioners contended that Arizona should have similarly required the use of the CARB diesel. Arizona's plan considered diesel emissions in two source categories: on-road exhaust and non-road exhaust. The petitioners argued that EPA should have required that Arizona address diesel emissions as its own source category. EPA did suggest that such a separate categorization would have been helpful. However, according to the court, it was not arbitrary and capricious for EPA to approve Arizona's listing of the broader categories. Even if Arizona had classified diesel emissions as a significant source category by itself, that classification would not reveal whether the state would have had to adopt CARB diesel as BACM.

Arizona addressed diesel emissions in a number of ways, including requiring annual and random testing, establishing a limit on sulfur content, adopting stan-

dards for some diesel emissions regarding non-road emissions, and mandating that pre-1988 heavy-duty diesel-powered vehicles meet 1988 federal emission standards. It did not adopt the use of CARB diesel because it determined that “it was not technologically and economically feasible to implement” at this time. There was a concern about supplies and the cost.

EPA made no explicit comments on Arizona’s discussion concerning cost of CARB diesel as BACM. With respect to on-road emissions, EPA concluded that Arizona’s plan was “one of the nation’s most comprehensive programs.” 67 Fed. Reg. at 48,725. With regard to non-road emissions, the agency found that Arizona had evaluated “a comprehensive set of potential measures for nonroad engines.” 66 Fed. Reg. at 50,260.

The court was puzzled, however, by the agency’s silence regarding CARB diesel as BACM. EPA did explain why CARB diesel was not MSM and there is a cross-reference to the MSM discussion when BACM is discussed. CARB diesel as MSM was rejected on the basis that it would not advance attainment. However, EPA has stated that the BACM analysis should generally be conducted independent of attainment. Therefore, the court concluded that EPA’s approval of the rejection of CARB diesel under the BACM standard was arbitrary and capricious. The court emphasized that it had not concluded that it would be arbitrary and capricious for EPA to reject CARB diesel as BACM in Arizona. There could be good reasons for that decision. However, since the court could not discern that reason, it remanded to the agency for further consideration.

EPA did set out its reasoning for approving the rejection of CARB diesel as MSM. However, because the court was remanding the decision concerning CARB diesel as BACM, it also remanded for further consideration of whether CARB diesel satisfies MSM as well because “any determination EPA makes about CARB diesel under the BACM standard may inform its judgment under the MSM standard.” Slip op. at 33.

### Extension of Attainment Deadline

The petitioners claimed that EPA abused its discretion when it granted Arizona a five-year extension under 42 U.S.C. § 7513(e). One of the statutory requirements for extending the deadline is “if attainment by . . . [December 31, 2001] would be impracticable, [and] the State has complied with all requirements and commitments pertaining to that area in the implementation plan.” *Id.* The petitioners argued that neither of these conditions was fulfilled. As for the first, they argued that Arizona is very close to attaining the annual standard; rather than extend the deadline, EPA should have determined whether attainment would be practicable if the state adopted CARB diesel and other agricultural controls.

The court was not convinced. EPA interprets this requirement of demonstrating impracticability of attainment by the deadline to mean that “the implementation of BACM on significant . . . source categories will not bring the area into attainment by December 31, 2001.” 66 Fed. Reg. at 50,282. The court found this a permissible interpretation of the statute. The state must only include the best practicable measures — not every possible measure — in its showing. Once a state satisfies the BACM standard, it has demonstrated that the controls that it has adopted are the best practicable. The court thus rejected the petitioners’ attempt “to bootstrap a new BACM determination into the impracticability showing.” Slip op. at 34.

According to the petitioners, Arizona has not met the second condition for an extension — that a state is in compliance with the requirements of the CAA. It cited Arizona’s failure to meet prior implementation deadlines. The court found that the petitioners’ interpretation of section 2513(e) to require both past and present compliance with the CAA to be unreasonable. The requirement that a state be in compliance reaches only to the requirements and commitments in the implementation plan, not to the entire CAA. However, because the court remanded to determine the

CARB diesel issue and section 7513(e) requires satisfaction of the MSM standard, Arizona's eligibility for the extension may be implicated on remand. Thus, subject to the MSM issue, the court did not find that EPA had abused its discretion regarding the extension.

## APA

### **Agency's Alleged Failure to Act Not Remediable Under APA: *Norton v. Southern Utah Wilderness Alliance et al.*, No. 03-101 (U.S. June 14, 2004)**

#### **Background**

Nearly half the state of Utah contains federal land administered by the Bureau of Land Management (BLM). The lands are administered under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 *et seq.* This statute establishes a policy in favor of "retaining public lands for multiple use management." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 877 (1990). These uses include "recreation, range, timber, minerals, watershed, wildlife and fish, and [those serving] natural scenic, scientific, and historical values." 43 U.S.C. § 1702(c).

In the Wilderness Act of 1964, 78 Stat. 890, passed prior to the FLPMA, Congress decreed that certain lands should be set aside as wilderness. Pursuant to section 1782 of the FLPMA, the Secretary of the Interior has identified wilderness study areas (WSAs), areas of 5,000 acres or more without roads that possess "wilderness characteristics," as determined in the land inventory mandated by the FLPMA. These lands are subject to study and public comment to evaluate their suitability for designation as wilderness. Two million acres, out of 3.3 million acres in Utah designated for study, have been deemed suitable for wilderness designation. Until Congress acts, the FLPMA provides that "the Secretary shall continue to manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c). This requirement also

pertains to those lands that the Secretary, after study, has determined are unsuitable for a wilderness designation.

In addition to identification of WSAs, the BLM uses a "resource management plan," adopted after notice and comment, as a tool to balance wilderness protection with other uses. Protection of the wilderness has increasingly conflicted with the recreation use of off-road vehicles (ORV), an activity in which an estimated 42 million Americans participate. Use of ORVs has negative environmental consequences, among which are disruption and compaction of soils and harassment of animals.

In 1999, the Southern Utah Wilderness Alliance (SUWA) and other environmental organizations filed a lawsuit against the BLM, its director, and the Secretary of the Interior, seeking declaratory and injunctive relief for the BLM's failure to act to protect Utah public lands from the damage caused by ORVs on that land. The plaintiffs made three claims: (1) the BLM had allowed degradation in certain WSAs, thereby violating its obligation under section 1782 "not to impair the suitability of such areas for preservation as wilderness"; (2) BLM had not implemented certain provisions in its land use plan that relate to ORV use; (3) and BLM had not taken a "hard look" under the National Environmental Policy Act of 1969 (NEPA) as to whether it should undertake a supplemental environmental analysis for those areas in which ORV use had increased. The plaintiffs sued under the Administrative Provision Act's (APA) provision that allows citizens to file a lawsuit to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). The district court dismissed; a divided panel of the Tenth Circuit reversed. It concluded that the BLM's NEPA and nonimpairment obligations were mandatory, nondiscretionary duties, as was its obligation to comply with the land use plan. The Supreme Court granted certiorari.

## Holding

The Court began its discussion by determining what limits the APA places upon judicial review of agency inaction. In those cases where no other statute gives a private right of action, the APA requires that the “agency action” under review must be a final action. “Agency action” is defined to include “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act.*” 5 U.S.C. § 551 (13). Each of these five categories involves circumscribed, discrete agency actions. Therefore, the “equivalent . . . thereof” must also be a discrete agency action and a “denial thereof” must also be a denial of a listed action or of a discrete equivalent.

The only agency action that can be compelled under the APA is action legally required. In this respect, the APA reflects the traditional practice when judicial review was achieved through use of prerogative writs, such as writs of mandamus. Section 706(1) authorizes courts to compel only agency action “unlawfully withheld.” That section only empowers a court to compel an agency “to perform a ministerial or non-discretionary act” or “to take action upon a matter, without directing how it shall act.” Attorney General’s Manual on the Administrative Procedure Act 108 (1947). In sum, a claim under section 706(1) is cognizable only where the plaintiff alleges that an agency failed to take a *discrete* agency action that it is *required to take*.

The Court then looked at each of the respondent’s claims. The first was that the BLM violated its requirement to “continue to manage [WSAs] . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness.” 43 U.S.C. § 1782(c). According to the Court, this section speaks in mandatory terms of the object to be achieved, but it leaves to the agency’s judgment how to achieve it. SUWA argued that the court could simply enter a general order to comply with the nonimpairment mandate without specifying how to comply. The Court

disagreed. The APA limitations, as the traditional limitations upon mandamus, are designed to protect agencies from undue judicial interference with their lawful choices. Courts may not enter general orders compelling general compliance with broad statutory mandates. Allowing such would embroil the judiciary in making day-to-day management decisions for an agency.

The second claim is that the agency did not comply with certain provisions in its land use plans, namely one relating to the 1991 resource management plan for the San Rafael area and one relating to certain aspects of the 1990 ORV implementation plan for the Henry Mountains. These claims are now primarily moot because the actions contemplated have been completed. There remains, in respect to Henry Mountains plan and ORV use, a statement by the BLM, in a general discussion of monitoring and supervision of uses, that “resource damage will be documented and recommendations made for corrective action.” The Court concluded, however, that land use plans are a preliminary step in the process of managing public lands. These plans are not a “final implementation decision on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations.” 43 C.F.R. § 1601.0–5(k) (2003). Generally, a land use plan is a set of priorities, which guides actions but do not, in the normal case, prescribe them. Some plans specifically state that implementation is subject to availability of funds. Although the Henry Mountains plan does not contain that specification, the Court considered it implied. The Court concluded that allowing general enforcement of plan terms would lead to pervasive interference with the BLM’s own ordering of priorities. It therefore held that the agency’s statement that it will conduct “use supervision and monitoring” in designated areas is not a legally binding commitment enforceable under section 706(1).

The final challenge was to the agency’s alleged failure to fulfill certain obligations under NEPA. Supplementation of an original Environmental Impact Statement (EIS) is required when there are “significant new circumstances of information relevant to environmental

concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii). The Court has interpreted this to require an agency to take a “hard look” at new information to assess whether supplementation might be necessary. SUWA argued that the evidence of increased ORV use triggered this “hard look” requirement. The Court disagreed. The “hard look” is only required if there remains major federal action that will occur. Approval of a land use plan is a major federal action; however, once it is approved, there is no ongoing major federal action that would require supplementation of the EIS.

The Court therefore reversed the judgment of the Court of Appeals and remanded for further proceedings.

## CERCLA

**RCRA Direct Action Statute Cannot Be Used to Pursue CERCLA Claim: *South Carolina Department of Health and Environmental Control et al. v. Commerce and Industry Insurance Company et al.*, No. 03-1329 (4th Cir. June 8, 2004)**

### Background

For fourteen years, until the early nineties, Stoller Chemical Company operated a fertilizer manufacturing company in Jericho, South Carolina. The state issued several operating permits to Stoller authorizing it to operate as a hazardous waste facility, regulated under the Resource Conservation and Recovery Act (RCRA). To satisfy the terms of its permits, Stoller provided financial assurances from various insurance companies to ensure the necessary resources to protect others from damages or injuries that might be caused by operation of its facility. These financial assurances specified that they were issued pursuant to RCRA’s requirements.

In March 1992, Stoller ceased operations and filed a Chapter 7 bankruptcy petition in Texas. U.S. EPA inspected its property and determined that there was contamination. EPA and the South Carolina Department of Health and Environmental Control (DHEC) initiated enforcement proceedings against other po-

tentially responsible parties (PRPs), including the owner of the facility prior to Stoller’s purchase of it and certain arrangers and transporters. The PRPs entered into a comprehensive settlement agreement resolving the issue of liability among themselves.

This lawsuit was brought to attempt to cover reimbursement for the parties’ remediation costs from the insurance companies that had provided the RCRA financial assurances. It was brought pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Count one was brought under section 107 of CERCLA and count two was brought under section 113. Count three was brought as a common law restitution action directly against the insurers. In count four, the corporate claimants ask for a declaration that each insurer is obligated to pay for all future damages, losses, and costs incurred in remediating the facility. DHEC seeks a declaration in count five that the insurers must pay all future costs resulting from the facility’s remediation.

The district court held that the claimants could not use the RCRA direct action provision to pursue a remedy under CERCLA and thus dismissed counts one and two. It agreed with the insurers that South Carolina law does not authorize a restitution claim to be asserted directly against insurers. The court declined to exercise jurisdiction over counts four and five because it concluded that Stoller would be a necessary party. It also declined to exercise jurisdiction in the interests of judicial economy. The plaintiffs appealed.

### Holding

The appellants argued that there is nothing in RCRA that precludes their pursuing CERCLA claims on the basis of the RCRA direct action provision. That section states:

In any case where the owner or operator is in bankruptcy . . . , any claim arising from conduct for which evidence of financial responsibility must be provided under [42 U.S.C. § 6924 (RCRA’s financial responsibility pro-

vision)] may be asserted directly against the guarantor providing such evidence of financial responsibility.

42 U.S.C. § 6924(t)(2).

The appellants further argued that the national policy underlying the adoption of RCRA supports use of the RCRA direct action provision in a CERCLA context.

The court began with the language of the statute. It first noted the difference in purpose between RCRA and CERCLA. RCRA is a preventive statute, dealing with hazardous waste before it becomes a problem. CERCLA, on the other hand, is a remedial and curative statute. RCRA does not authorize the prosecution of civil actions seeking the recovery of clean-up costs. It is not designed to compensate those who have undertaken remediation. *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996).

According to the court, the appellants have ignored this broader context in attempting to read the RCRA direct action provision. They interpret the phrase “any claim” as meaning that RCRA does not restrict the provision to claims arising under RCRA. The court, however, held that the term “any claim” should be read to mean only a claim “arising from conduct for which the insurer provided evidence of financial responsibility.” The court pointed out that the appellants’ interpretation of the RCRA provision would allow a person injured from an automobile accident resulting from the operation of a RCRA facility to bring a direct action under this provision. The court could find nothing in the legislative history of RCRA that Congress intended such an “absurd” result.

Thus, the claims in counts one and two must be assessed as to whether they are claims that arise from conduct for which the insurers were required under RCRA to provide evidence of financial responsibility. South Carolina regulations require financial assurance only to ensure that “all appropriate measures are taken to prevent present and future damage to the public health and safety and to the environment.” S.C. Code § 44-56-60(a)(2). Counts one and two seek reim-

bursement for costs incurred in cleaning up *past* environmental harms. Other provisions require coverage for “present and future” damage to public health, safety, and the environment. There is nothing in the South Carolina regulations that mandates insurance coverage for cost recovery and contribution. Therefore, the court held that the district court had properly ruled that counts one and two failed to state a claim under Federal Rule of Procedure 12(b)(6).

According to the court, in using the RCRA direct action provision, the appellants are attempting to circumvent CERCLA’s direct action provision, which may be used only to assert claims against guarantors providing financial responsibility assurances pursuant to CERCLA. Elementary principles of statutory construction provide that a specific statutory provision controls a more general one. The appellants’ effort to use the more general RCRA provision must, thus, fail; the appellants must rely only on the more narrowly-tailored provision of CERCLA to assert direct claims against insurers.

The appellants claim that the national policy underlying enactment of RCRA supports their use of the RCRA provision. The court found that, to the contrary, the national policy underlying RCRA’s enactment supports the district court’s dismissal of counts one and two. The Supreme Court has observed that RCRA was designed principally to “reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, ‘so as to minimize the present and future threat to human health and the environment,’” rather than “to compensate those who have attended to the remediation of environmental hazards.” *Meghrig*, 516 U.S. at 483 (quoting 42 U.S.C. § 6902(b)). RCRA-mandated insurance provides coverage for occurrences arising from *present* harm and *prospective* threats to public health and the environment.

Turning to count three, the court noted that a direct action against an insurer cannot be maintained under South Carolina law unless there is privity of contract between the claimant and the insurer or there is an

express statutory grant of the right to restitution. There is no privity of contract in this case. It is arguable that the RCRA provision might provide for restitution claim because South Carolina is an authorized state under RCRA. However, because the national policy underlying RCRA suggests that it is not intended to be used for past cleanup of environmental contamination, a cause of action for restitution cannot be maintained for such a claim under state law.

Finally, as to the dismissal of counts four and five, the court noted that the district court possesses broad discretion as to whether to exercise jurisdiction in declaratory judgment proceedings. The appellate court disagreed with the district court, however, that the counts should be dismissed because Stoller was not a party to the proceeding. Under RCRA, the presence of the bankrupt party is not required in a proceeding brought under the direct action provision. Stoller's absence, therefore, was not an adequate basis for the dismissal of counts four and five.

The appellants argued that the court erroneously dismissed on grounds of judicial economy because of its erroneous dismissal of counts one and three. The appellate court's upholding of the lower court's analysis, however, undermined the appellants' argument. The dismissal of counts four and five by the district court was also based on the court's concern about piecemeal litigation and rested on the court's discretion. The appellate court upheld that determination, concluding that the district court did not err in dismissing those counts. Therefore, the court did not address whether a claimant could use the RCRA direct action provision for a declaratory judgment claim for present or prospective environmental harm.

## FOIA

**Documents Protected by Deliberative Process Privilege: *Enviro Tech International, Inc. v. U.S. Environmental Protection Agency*, No. 03-2215 (7th Cir. June 10, 2004)**

### Background

In 1990, Congress passed the Clean Air Act Amendments that established a timetable for phasing out the production and use of the ozone-depleting substances (ODS) (*see* 42 U.S.C. § 7671c-e), an obligation undertaken by the United States when it signed the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. In that legislation, Congress ordered EPA to take the lead in identifying, evaluating, and developing alternatives to ODS. It was also to promulgate rules prohibiting the replacement of ODS with any alternative that posed a danger to human health or the environment so long as EPA had identified a substance that reduced that risk and was currently or potentially available. Finally, EPA was to develop a list of substances that are safe alternatives for specific uses and a separate list of substances that are prohibited for specific uses. Under the legislation, any person may petition EPA to either add a substance or remove a substance from one of the lists. To carry out these directives, EPA established the Significant New Alternatives Policy (SNAP) program.

Enviro Tech markets industrial solvents based on the chemical compound n-propyl bromide (nPB). It filed a petition in 1996 seeking to have nPB identified as an acceptable alternative for ODS. The SNAP program hired a private contractor to review the scientific literature on nPB and to recommend a workplace exposure limit. By January 2002, EPA had not yet issued a proposed rule on use of nPB as an ODS substitute. Enviro Tech served a request under the Freedom of Information Act (FOIA) seeking any documents related to the potential toxicity of nPB and the agency's evaluation of that toxicity. EPA released some documents but withheld thirty-seven on the ground that they fell within the deliberative process exception to FOIA.

Enviro Tech eventually filed a lawsuit seeking judicial review of EPA's decision regarding the documents. The court agreed with EPA that the documents were exempt from disclosure under the deliberative process exception and Enviro Tech appealed. Subsequent to the district court's decision, EPA issued a Notice of Proposed Rulemaking that proposed to list nPB as acceptable for use as, among other things, a solvent and establishing a recommended workplace exposure limit. 68 Fed. Reg. 33,284.

### Holding

Disclosure under FOIA is required unless the material requested is clearly exempt from disclosure under the statute. Exemption 5 exempts from mandatory disclosure communications that are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(a)(4)(B). Thus, any material that a private party could obtain through discovery in litigation with an agency must be disclosed under a FOIA request. Exemption 5 incorporates the civil discovery rule that documents reflecting the deliberative or policy-making processes of agencies are privileged from disclosure. In *Department of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1, 8–9 (2001), the Court noted:

The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government.

The exemption applies to predecisional policy discussions and to factual matters inextricably intertwined with such discussions, but not to purely factual material nor to documents reflecting an agency's final policy decisions.

Enviro Tech argued that, because EPA lacked the statutory authority to regulate workplace exposure limits for nPB, it could not invoke the deliberative process exception. It based its argument on the holding in *Weissman v. C.I.A.*, 565 F.2d 692, 694–96 (D.C. Cir. 1977). In that case, the plaintiff sought to obtain records that the CIA had compiled on him when they were investigating whether he would be useful as an informant regarding far left political groups in the country. The court noted that the statute creating the CIA authorized it to gather intelligence related to national security but expressly provided that the agency was to have no law enforcement authority. Thus, to the extent that the CIA was purporting to be engaging in law enforcement when it monitored the plaintiff's political activities, it was conducting activity that Congress had expressly forbidden it to conduct.

The court did not find *Weissman* applicable. There is nothing in that decision that would apply to EPA's reliance on the deliberative process privilege. The privilege at issue in *Weissman* was focused on an expressly prohibited activity — law enforcement. There is nothing that prohibits EPA or any other agency to formulate policy. While formulating policy within its power to implement, an agency might legitimately consider various alternatives, some within its power to implement and some not. According to the court, "[d]eeming internal discussions unprotected by the deliberative process privilege because, in retrospect, it appears that the agency was considering proposals that were beyond the scope of its authority to implement might well discourage the kind of frank and appropriate policymaking discussions that the privilege was meant to protect and promote." Slip op at 10.

Assuming, *arguendo*, that the scope of an agency's authority places some limits on the deliberate process privilege, the court posited that internal EPA discussions on a policy such as school prayer or discussions on nefarious or illegal activity might not merit the deliberative process exemption. However, that is simply not the case here. EPA has only promulgated a *recommended* limit on work place exposure. The notice expressly defers to OSHA's authority to establish a binding workplace exposure limit. A recom-

mended exposure limit is not so beyond the scope of EPA's authority as to preclude the agency from having internal discussions concerning the exposure limit and having those documents protected under the deliberative process privilege of FOIA.

## Natural Resources

### **NRD Claim Not Subject to Osage Allotment Act Arbitration: *Don Quarles v. United States*, No. 03-5035 (10th Cir. June 16, 2004)**

#### **Background**

Don Quarles owns property and recreates in Osage County, Oklahoma. He brought a lawsuit, along with the Osage Environmental Conservation Foundation, against various oil companies, U.S. EPA, and the Bureau of Indian Affairs (BIA) for natural resource damages from water leaks from oil production that are alleged to have migrated or that will migrate to Skatook Lake, the Arkansas River, and other nearby waters. Quarles alleged various statutory and common law violations under the Comprehensive Environmental Response, Compensation, and Liability Act, the Oil Pollution Act of 1990, and the Clean Water Act for loss of enjoyment of natural resources. His claims against EPA and BIA, including claims under the Federal Tort Claims Act, allege the agencies violated their nondiscretionary duties to assess natural resource damage and BIA violated the Indian Trust Doctrine through its failure to administer federal environmental statutes.

The district court concluded that the Osage Allotment Act of June 28, 1906, required Quarles to submit to arbitration before filing suit for damages resulting from oil and gas operations. It dismissed the lawsuit without prejudice and Quarles appealed.

#### **Holding**

The Osage Allotment Act established a subsurface mineral estate trust, held by the United States as trustee, for the benefit of the Osage Tribe. In 1929, the act was amended. The amendment established a mandatory administrative procedure for surface own-

ers or lessees of Osage Reservation lands to address claims under the act for damages caused by oil or gas extraction on the reservation:

The bona fide owner or lessee of the surface of the land shall be compensated, under rules and regulations prescribed by the Secretary of the Interior in connection with oil and gas mining operations, for any damage that shall accrue after the passage of this Act as a result of the use of such land for oil or gas mining purposes, or out of damages to the lands or crops thereon, occasioned thereby . . . . All claims for damages arising under this section shall be settled by arbitration under rules and regulations to be prescribed by the Secretary of the Interior. . . . Arbitration, or a bona fide offer in writing to arbitrate, shall constitute conditions precedent to the right to sue for damages . . . .

34 Stat. 539, as amended by Act of March 2, 1929, ch. 493, § 2, 41 Stat. 1249.

It was clear to the court that the arbitration requirement only applied to claims arising under section 2 of the Osage Allotment Act. Quarles has raised no claims under that act. Therefore, the court reversed the district court's dismissal of Quarles' amended claim and remanded to the district court for further proceedings.

## Sentencing Guidelines

### Jury Must Make Finding of Additional Facts that Increase Sentence: *Blakely v. Washington*, No. 02-1632 (U.S. June 24, 2004)

#### Background

Ralph Blakely Jr. kidnapped his estranged wife in 1998, driving her from Washington to Montana. He was charged with first-degree kidnapping. Under a plea agreement, he pled guilty to second-degree kidnapping involving domestic violence and the use of a firearm. The Washington criminal statute provides that a class B felony, such as second-degree kidnapping, shall be punished by confinement for not more than ten years. Washington's sentencing guidelines gives a "standard range" of forty-nine to fifty-three months for the offense of second-degree kidnapping with a firearm. A judge may impose a sentence above the standard range if he finds substantial and compelling reasons to do so.

Pursuant to the plea agreement, the state recommended a sentence of from forty-nine to fifty-three months. After hearing a full report of the kidnapping by the defendant's wife, however, the court determined that the defendant had acted with "deliberate cruelty," a statutory ground for an upward departure in domestic violence cases, and sentenced him to ninety months. Blakely objected. The court then conducted a three-day bench trial after which it issued thirty-two findings of fact, concluding that the initial finding of "deliberate cruelty" was accurate and again sentenced Blakely to ninety months.

Blakely appealed, arguing that the sentencing procedure violated his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence. The state court of appeals affirmed and the Washington Supreme Court denied review. The U.S. Supreme Court granted certiorari.

#### Holding

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* involved a New Jersey hate-crime statute that authorized up to a twenty-year sentence if the judge found the crime to have been committed "with a purpose to intimidate . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity." N.J. Stat. Ann. § 2C:44-3(e). In *Ring v. Arizona*, the Court applied *Apprendi* to an Arizona law that authorized imposition of the death penalty if the judge found any one of ten aggravating factors.

In this case, petitioner, Blakeley, was sentenced to thirty-seven months over the statutory fifty-three month maximum because the judge found that he had acted with "deliberate cruelty." That fact was not admitted by the defendant in his plea nor was it found by a jury. The state argued that, since the statutory maximum was ten years for class B felonies, there was no *Apprendi* violation. The Court disagreed. It held that the relevant "statutory maximum" is the sentence a judge may impose without finding any additional facts.

The state argued that *Apprendi* and *Ring* were distinguishable because, in this case, the enumerated grounds for upward departure in the sentencing scheme are illustrative, not exhaustive. The Court found the distinction immaterial. It does not matter whether the enhanced sentence depends on a finding of a specific fact (as in *Apprendi*), the finding of one of several specific facts (as in *Ring*), or the finding of *any* aggravating fact, as is the case at bar. It only matters that the enhanced sentencing depends on a fact that was not found by the jury (or, in this case, admitted by the defendant).

The majority noted that its holding reflects "the need to give intelligible content to the right of jury trial." Slip op. at 9. This right is a fundamental reservation of power in our constitutional scheme. Rejecting the

application of *Apprendi* in this context would require the selection of one of two alternatives. First, the jury need only find whatever facts the legislature chooses to label elements of a crime while the judge may find all those labeled sentencing factors, no matter how they might increase the sentence. This approach would be tantamount to relegating the jury to determine that the defendant at some point did something wrong and allow the judge to make the inquiry into the facts of the crime the state actually seeks to punish. The second alternative is that the legislature may establish legally essential sentencing factors within limits, limits that would be considered crossed when the factor is a “tail which wags the dog of the substantive offense,” *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986), and which must not go too far.

The subjective nature of the second alternative is evident. In the state court, the petitioner argued that the sentence for second-degree kidnapping with deliberate cruelty was essentially the same as first-degree kidnapping, the charge he avoided by pleading guilty to the lesser offense. The state court found that irrelevant. Did the court go too far in imposing a sentence that was seventy percent more severe than the sentencing guidelines provided without the “extreme cruelty” finding? “Too far” is not a yardstick that would guide legal analysis:

Whether the Sixth Amendment incorporates this manipulable standard rather than *Apprendi*'s bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges' intuitive sense of how far is *too far*. We think that claim not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.

Slip op. at 12.

The Court emphasized that, by reversing the state court's judgment, it was not finding determinate sentencing schemes unconstitutional. It was only holding that they must be implemented in a way that respects the Sixth Amendment. *Apprendi* held that every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment. In this case, the state must suffer the “modest inconvenience” of submitting the finding of “extreme cruelty” to a jury rather than to the “lone employee of the State.” Slip op. at 18.

[Editor's note: This was a 5–4 opinion in which the four justices who dissented in *Apprendi* (J. O'Connor, C.J. Rehnquist, J. Breyer, and J. Kennedy) filed dissenting opinions. J. O'Connor opined that the effect of the decision would be greater judicial discretion and less uniformity in sentencing and expressed extreme concern over the practical effects that the decision would have on all criminal sentences imposed under federal and state guidelines since *Apprendi*. J. Kennedy's dissent highlighted his concern that the decision disregarded “the fundamental principle under our constitutional system that different branches of government ‘converse with each other on matters of vital common interest.’” Slip op. at 1 (quoting *Mistretta v. United States*, 488 U.S. 361, 408 (1989)). J. Breyer's lengthy dissent sets out several options which sentencing must take after this decision, “each of which risks either impracticality, unfairness, or harm to the jury trial right the majority purports to strengthen. This circumstance shows that the majority's Sixth Amendment interpretation cannot be right.” Slip op. at 3.]

## Wilderness Act

### Park Service Violated Wilderness Act on Cumberland Island: *Wilderness Watch v. Fran P. Mainella*, No. 03-15346 (11th Cir. June 28, 2004)

#### Background

Cumberland Island, Georgia, the most southern of the barrier islands along the Atlantic Coast, is largely undeveloped. In 1972, Congress declared the island a National Seashore. Some 19,000 acres, including most of the northern three-fifths of the island, have been designated wilderness or potential wilderness areas under the Wilderness Act. Access to the island is by boat.

The U.S. Park Service is responsible for administering the area, which includes several buildings and facilities on the southern end of the island as well as two historical areas on the northern and western coasts. Plum Orchard, a mansion built by Carnegie, lies some two and one-half miles from the wilderness boundary on the west coast. The Settlement, the remnants of an area occupied by freed slaves after the Civil War, lies six miles north of Plum Orchard.

The Wilderness Act severely restricts many activities in areas designated as wilderness. The statute provides:

Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter (including measures required in emergencies involving the health and safety of persons within the area), there shall be no temporary road, no use of motor vehicles, motorized

equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

16 U.S.C. § 1133(c).

An existing one-lane road leads to the historical area; the Park Service continued to use this road to access these sites. There was pressure placed on the Park Service to allow some access to visitors to the historical site on motorized vehicles. Two meetings were convened with interested parties to negotiate the conflict between desire to visit the historical sites and maintaining the wilderness characteristics of the island. In February 1999, the Park Service agreed to allow visitors to accompany employees traveling to the sites. The Park Service reasoned that “piggybacking” tourist visits with employee visits would lead to no net increase in motorized vehicle traffic. Although the Park Service had not previously visited the sites on a regular schedule, it began to offer trips to Plum Orchard three times per week (until it could establish boat service there) and once a month to the Settlement. After two months, the Park Service purchased a fifteen-person van in order to accommodate more visitors.

Wilderness Watch brought a lawsuit challenging the Park Service’s practice. The district court granted the Park Service summary judgment. This appeal followed.

#### Holding

This dispute requires the interpretation of the Wilderness Act’s limitation on motor vehicle use, specifically the meaning of “necessary to meet minimum requirements for the administration of the area.” *Id.* As an initial matter, the court noted its disagreement with the Park Service’s position that preservation of historical structures furthers the goals of the Wilderness Act. It is not the Wilderness Act that imposes the preservation requirement on the Park Service; rather, it is the National Historic Preservation Act (NHPA), 16 U.S.C. § 461 *et seq.* The NHPA requires agen-

cies to “assume responsibility for the preservation of historic properties” they control. *Id.* at § 470h-2(a)(1). Both Plum Orchard and the Settlement area have been listed in the National Register of Historic Places. As opposed to the use of the term in the NHPA, it was clear to the court that the use of the term “historical” in the Wilderness Act refers to natural, rather than man-made, features. Thus, according to the court, “the need to preserve historical structures may not be inferred from the Wilderness Act nor grafted onto its general purpose.” Slip op. at 12.

Although the Park Service’s interpretation of the motor vehicle ban is entitled to *Chevron* deference, the court held that the plain language of the statute contradicts the Park Service position that use of a fifteen-passenger van filled with tourists is “necessary” to meet the “minimum requirements” for administering the area “for the purpose of the [Wilderness Act].” The Park Service argued that these trips do not affect the wilderness any more than would a standard Park Service vehicle with no additional passengers. The service interpreted the number of vehicles to be determinative rather than the number of visitors. However, the court noted that the language in the statute is quite explicit: “No motor vehicle use” except “as necessary.” The same subsection of the statute provides that there shall be “no other form of mechanical transport” beyond what is necessary for administration of the Wilderness Act. A fifteen-passenger van provides more “transport” than does a Park Service vehicle without extra passengers.

Furthermore, the overall purpose and structure of the statute argue against the agency’s interpretation. The act focuses on retaining wilderness areas in their natural condition for “use and enjoyment as wilderness.” 16 U.S.C. § 1131(a). It promotes the use of wilderness as providing “opportunities for a primitive and unconfined type of recreation.” *Id.* at § 1131(c). Use of a passenger van is not in keeping with the wilderness experience; either for the visitors inside the van or for the visitor who is enjoying the wilderness and comes across the van making its trek to the historical areas. That is not the type of “use and enjoyment” that the Wilderness Act promotes. The court con-

cluded that Congress “unambiguously prohibited the Park Service” from offering visitors transport in motorized vehicles through the wilderness area to the historical sites. Therefore, it reversed the grant of summary judgment.

## CIVIL PROCEEDINGS

### Settlements

#### Air

#### *United States and Arizona v. Phelps Dodge Sierrita, Inc., No. CV04-312-TUC (D. Ariz. June 21, 2004)*

Phelps Dodge Sierrita, Inc., a mining company, will pay \$1.4 million for violating the federal Clean Air Act under an agreement reached recently with the federal government and the State of Arizona. U.S. EPA estimated that more than 1,000 tons of sulfur dioxide were illegally discharged into the air from the company’s copper mine and ore processing plant near Green Valley, Arizona. The state will receive \$140,000 of the settlement amount.

The complaint alleged that Phelps Dodge operated its ore roasters without required sulfur dioxide monitors and bypassed roaster pollution control equipment frequently in the past decade. As part of the settlement, Phelps Dodge has also agreed to install required air pollution monitors and permanently disconnect the roaster bypass stack.

[For further information, contact Lori Jonas, DOJ, at (202) 514-4080.]

#### CAFO

#### *In re Frey Dairy Farms (Pa. DEP May 24, 2004)*

An administrative consent order has been entered with Frey Dairy Farms of Lancaster, Pennsylvania, under which the farm will pay a civil penalty of \$30,000 for illegally discharging 1.4 million gallons of manure in September 2003. Frey Dairy Farms notified the Penn-

sylvania Department of Environmental Protection in the fall of 2003 that it had pumped the manure from its main storage facility onto a grass field over a five-day period to avoid possible overflow during Hurricane Isabel. Much of the manure ran into Wissler's Run and the Susquehanna River. The consent order also requires a professional engineer to evaluate the farm's manure storage and impoundment systems.

[For further information contact John Repetz, Pennsylvania DEP, at (717) 705-4904.]

### Natural Resources

***Massachusetts v. Holyoke Gas & Electric Department and Holyoke Water Power Company, No. 04-30120-MAP (D. Mass. June 22, 2004)***

Under a proposed agreement lodged for public comment, two Holyoke, Massachusetts, utilities will pay the State of Massachusetts \$500,000 to settle a complaint that coal tar released into the Connecticut River hurt endangered species. The agreement with the city-run Holyoke Gas & Electric Department and privately-owned Holyoke Water Power Company settled lawsuits filed by the commonwealth and the federal government alleging that coal tar released into the river between the 1850s and 1950s polluted the river and hurt population of shortnose sturgeon and other endangered species.

[For further information, contact Massachusetts AAG Matthew Brock at (617) 727-2200.]

### OPA

***United States and Mississippi v. Genesis Energy, Inc., et al., No. 2:04CV217BN (S.D. Miss. June 24, 2004)***

A settlement between the federal government, the State of Mississippi, and Genesis Energy, Inc., Genesis Crude Oil, L.P., and Genesis Pipeline, USA, L.P.,

has been reached under which the companies will pay a \$1 million civil penalty for an oil spill. The spill, discovered in December 1999, discharged 336,000 gallons of crude oil near Soso, Mississippi into a tributary of the Leaf River. The penalty will be split evenly between the United States and the state. The companies will also perform a \$2 million land acquisition and conservation supplemental environmental project within the Leaf River watershed. In addition, Genesis will pay \$110,000 to federal and state natural resource agencies for natural resource damage assessment costs, oversight, and a wood duck nesting project to be completed by the U.S. Fish and Wildlife Service.

[For further information, contact Kelly Riley, Mississippi DEP, at (601) 961-5171 or AUSA H. Colby Lane at (601) 965-4480.]

## CRIMINAL PROSECUTIONS

### Indictments

#### Water

***United States v. Robert Lucas Jr., Robbie Wrigley, and M.E. Thomason Jr., No. 1:04-CR60 (S.D. Miss. June 10, 2004)***

Robert Lucas Jr. of Lucedale, Mississippi, Robbie Lucas Wrigley of Ocean Springs, Mississippi (Robert Lucas' daughter), and M.E. Thompson Jr. of D'Iberville, Mississippi, were recently indicted for violating the Clean Water Act by illegally constructing septic systems and for dredging and filling wetland areas in a 2,630-acre home site development in Vancleave, Mississippi. Additionally, two of Lucas' corporations — Big Hill Acres, Inc., and Consolidated Investments, Inc. — were charged with conspiracy, mail fraud, and aiding and abetting.

The charges allege that the defendants misrepresented

the habitability of the lots and installed septic systems in saturated wetland soils at the Big Hill Acres development despite being warned by the Mississippi Department of Health that they were creating a public health threat. Both U.S. EPA and the Army Corps of Engineers also allegedly advised the defendants that the deteriorating systems could possibly contaminate primary sources of local drinking water.

The Big Hills Acres residents have suffered from seasonal flooding and the discharge of sewage from failing septic systems onto the ground around their homes.

[For further information, contact AUSA Peter Barrett, at (228) 563-1560.]

***United States v. McWane, Inc., et al., No. CR04PT199S (N.D. Ala. May 26, 2004)***

A Delaware corporation headquartered in Birmingham, Alabama, and four individuals who worked there — James Delk, former vice-president and general manager; Charles Robinson, vice-president for environmental affairs; Michael Devine, former plant manager; and Donald Bills, plant engineer — were all indicted on charges of conspiracy to violate the Clean Water Act, making false statements to U.S. EPA, and obstruction of justice.

The charges arise from alleged discharges of process wastewater that exceeded permitted limits of oil and grease into Avondale Creek in Birmingham.

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

### Pleas

#### Air

***United States v. Voss Transportation, Inc., and David Voss, No. 4:04CR340CDP & 4:03CR725CDP (E.D. Mo. June 17, 2004)***

Voss Transportation, Inc., of Cuba, Missouri, recently

pled guilty to conspiracy to violate the Clean Air Act, conspiracy to violate Department of Transportation regulations, and to a negligent violation of the Clean Water Act. David Voss, the company's owner, pled guilty to conspiracy to make a false statement to the government and to violation of the Clean Air Act.

In 2001 and 2002, the Voss Truck Port in Cuba, Missouri, illegally sold conventional gasoline at two Missouri service stations when they were required to sell reformulated gasoline. The truck port also discharged 10,000 gallons of fuel oil into Pleasant Valley Creek and failed to notify the National Response Center about the spill.

[For further information, contact AUSA Ann Rauch at (314) 539-2200.]

#### Asbestos

***United States v. Arthur Hilton, No. 02CR295 (N.D.N.Y. June 30, 2004)***

Arthur Hilton, owner of the Hilton Industrial Park in Rensselaer, New York, has pled guilty to conspiracy to violate the Clean Air Act and the Comprehensive Environmental Response, Compensation, and Liability Act. The indictment alleged that Hilton knowingly hired workers to illegally remove asbestos from buildings in the industrial park. Additionally, Hilton failed to provide U.S. EPA and the National Response Center with notification of the release of asbestos into the environment. The asbestos was dumped at various locations near the New York/Massachusetts border.

[For further information, contact AUSA Craig Benedict at (315) 448-0672.]

#### Water

***United States v. Aluminum Finishing Company, Inc., and Duane Bass, No. 3:04CR203 (D. Conn. June 21, 2004)***

Aluminum Finishing Company, Inc., of Bridgeport,

Connecticut, a metal-finishing company, and its general manager, Duane Bass, have pled guilty to charges of violating the Clean Water Act by repeatedly violating its discharge permit between October 2000 and January 2001. The government alleged that the company discharged wastewater which exceeded its permit levels for pH, chromium, copper, lead, nickel, and zinc. It was supposedly the practice of the company to discharge approximately 8,000 gallons of untreated wastewater on Friday evenings.

[For further information, contact AUSA Brian Spears at (203) 696-3000.]

***United States v. Jarnail Singh, No. 94-75-PH (D. Me. June 16, 2004)***

The chief engineer for a tanker ship has pled guilty for his role in concealing the overboard discharges of oil-contaminated bilge waste from the *M/T Aral Sea*. The discharges were concealed through false log books and deceptive statements to the U.S. Coast Guard. The *M/T Aral Sea* is owned by Harike Shipping, Inc., and operated by Tanker Pacific Management PTE Ltd.

Members of the U.S. Coast Guard's Marine Safety Office discovered waste oil in the overboard piping of the tanker during a routine inspection in Portland, Maine. When Singh was asked about the operation of the ship's oil water separator, he responded that it was working properly and he did not know how the oil got on the overboard piping. Coast Guard officials later learned that, while the vessel was at sea, Singh had directed that fresh water be run through the oil water separator, thereby "tricking" the sensor. This allowed oil in excess of the legal limits to be discharged overboard.

[For further information, contact AUSA David Collins

at (207) 780-3257 or Richard Udell, DOJ, at (202) 305-0361.]

**UPDATE**

***Texas Cities Coalition on Stormwater v. Environmental Protection Agency***, 72 U.S.L.W. 3738 (June 8, 2004): The U.S. Supreme Court has denied certiorari in this Clean Water Act case in which the lower court held that U.S. EPA's Phase II rule regarding stormwater discharges from small municipal storm sewer systems and from small construction sites did not violate the Tenth Amendment.

