



National Association  
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Published by the  
NATIONAL ASSOCIATION  
OF ATTORNEYS GENERAL  
with the cooperation  
and support of the  
OFFICE OF ENFORCEMENT AND  
COMPLIANCE ASSURANCE of the  
U.S. ENVIRONMENTAL PROTECTION AGENCY

# NATIONAL ENVIRONMENTAL ENFORCEMENT JOURNAL

Vol. 19 No. 5

JUNE 2004

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*Editor's Note: The lead article originally scheduled for the June issue of the National Environmental Enforcement Journal was withdrawn by its author prior to publication. We apologize for any disappointment this may cause our readers.*

The **NATIONAL ENVIRONMENTAL ENFORCEMENT JOURNAL** is published eleven times per year by the National Association of Attorneys General, with the support of the Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, reporting recent developments in environmental enforcement. The **Journal** is funded, in part, by the Environmental Protection Agency under grant number X-825626, administered by the Office of Enforcement and Compliance Assurance. The contents of this document do not necessarily reflect the views and policies of the Environmental Protection Agency nor of the National Association of Attorneys General nor does mention of trade names or commercial products constitute endorsement or recommendation for use. Unsolicited articles, inquiries on editorial content, and subscription requests should be addressed to:

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The annual subscription rate is \$195; government/nonprofit organization/academic library rate, \$95. For information on obtaining copies of other materials reported in the **Journal**, contact Sharon Lee at (202) 326-6045. For subscription and billing information, call the subscription clerk at (202) 326-6030. Articles appearing in this journal are indexed in *Environmental Periodicals Bibliography*.

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## DECISIONS

## Air

**New York's Ozone Plan Withstands Challenge: *Environmental Defense v. U.S. Environmental Protection Agency*, No. 02-4107 (2d Cir. May 19, 2004)****Background**

The greater New York City metropolitan area, which includes portions of New York, Connecticut, and New Jersey, is a severe ozone nonattainment area. In 1998, New York issued a revised plan for one-hour ozone attainment by the year 2007. Its attainment demonstration used the Urban Airshed Model, a U.S. EPA-approved photochemical grid model, to predict the concentration of ozone levels in 2007. The computer model yielded ozone levels which exceed the maximum permissible level of 124 parts per billion (ppb). The state, believing that the model contained inaccuracies that tended to yield high results, used weight of the evidence (WOE) analysis to adjust the high test results, an analysis viewed by EPA to be helpful and permissible when addressing photochemical grid modeling. This analysis evaluates all available data to determine the reasonableness of the modeled results. After applying its supplementary analysis, New York concluded that the adjusted results were in the range of 118 to 122 ppb. EPA's own WOE analysis yielded a 129 ppb result.

The state and EPA offered various reasons for the model's high results. First, the model does not show the design value, the fourth highest reading during a three-year period. This is the value that is the determinant of whether attainment has been achieved because achievement of the ozone standard is measured by the design value; the model, instead, gives peak values. Second, EPA and the state contended that the model's results were inconsistent with other evidence. The model predicted nearly equivalent results in 2007 as the results actually measured during 1995 to 1998. However, several emission control strategies were implemented after 1999 that should have

been reflected in the model's results but the predicted values did not decrease. Since there is limited data on how accurate this model is in predicting ozone, both the state and EPA felt that the WOE analysis was warranted.

Since the agency's analysis still predicted an ozone level higher than the air quality standards, New York offered a commitment to adopt and submit additional control measures by October 31, 2001. These measures included reducing emission of ozone precursors through the adoption of six emission reduction rules recommended by the Ozone Transport Commission. Although the original deadline for promulgating the rules was not met, the state continued to update EPA on its progress in promulgating the regulations incorporating the reduction measures, and both the state and the agency contend that this delay will not prevent New York from attaining the ozone standard by 2007.

EPA approved New York's plan in February 2002. The petitioner challenged the approval on various grounds. First, it argued that the WOE analysis did not supplement, but instead supplanted, the model. It also argued that the WOE analysis was derived without following the necessary notice and comment procedure. It further noted that the agency's analysis, which calculated emissions necessary to redress ozone levels from 129 to 124 ppb, assumed a linear relationship between reductions and an ozone decrease. According to the petitioner, this analysis violates the agency's rule prohibiting "proportional (rollback/forward) modeling." 40 C.F.R. pt. 61 app. W § 6.2.1.e (2002).

The petitioner also attacked EPA's approval because the state's rules had not yet been promulgated by February 2002. Finally, the petitioner argued that EPA's approval circumvents the Clean Air Act's (CAA's) schedule for submitting state plans and thus impermissibly and indefinitely extends the statutory deadline.

## Holding

According to the court, EPA's interpretation of the CAA and its own regulation is entitled to *Chevron* deference. The court's standard for reviewing EPA's action in approving New York's plan is, thus, the "arbitrary and capricious" standard.

EPA contended that the petitioner should be collaterally estopped from pursuing several of its arguments because it was on the losing side of a recent Fifth Circuit decision, *BCCA Appeal Group v. EPA*, 355 F.3d 817 (2003). In that case, Texas applied WOE analysis and offered enforceable commitments to close the gap between predicted results and the applicable air quality standards. The court upheld the agency's approval of the Texas plan. The court noted, however, that there are several significant factual distinctions between this case and *BCCA*; collateral estoppel is only appropriate where the essential facts of two cases are alike. Nor is collateral estoppel appropriate where the legal issues may be similar but the public interest is implicated to the extent that it is in this case.

The court then turned to the substance of the petitioner's argument. The court first looked at the language of the statute. The CAA requires that an attainment demonstration be "based on photochemical grid modeling." 42 U.S.C. § 7511a(c)(2)(A). The plain meaning of "based on" is "having as the foundation" or "arising from." See *McDaniel v. Chevron Corporation*, 203 F.3d 1099, 1111 (9th Cir. 2000). Other courts examining the phrase have found it ambiguous and this court agreed.

Although the photochemical grid analysis is the best method available of predicting ozone concentrations, there are many inaccuracies in it, which EPA has identified. Since the model has problems, EPA has issued guidance detailing the appropriate steps a state may take to address those inaccuracies including the WOE analysis. The agency's position is that, even with the supplemental analysis, the photochemical grid modeling constitutes the principal component of the entire analysis process. On the record, it was clear to the

court that EPA correctly concluded that the use of WOE analysis was appropriate and did not violate the CAA requirement that the attainment demonstration be based on the model.

The supplemental analysis performed by EPA and DEC used a percentage called the Relative Reduction Factor. This factor is calculated by using various base years and then calculating the percentage of peak ozone reductions from the base year to the model's predictions for the attainment year. This analysis addresses the uncertainty in the grid model's projections. The court was satisfied that EPA's approach was consistent with the statutory language because grid modeling formed the "foundation and principal component of the attainment demonstration." Slip op. at 22. EPA has given a rational reason why WOE was appropriate; the record supports EPA's conclusion and the conclusion was based on a reasonable interpretation of the CAA.

The petitioner also alleged that EPA's supplemental analysis contravenes its own regulations. The Guideline concerning the use of air quality models is found at 40 C.F.R. § 51.112(a)(1). It states that "[t]he adequacy of a control strategy shall be demonstrated by means of applicable air quality models, data bases, and other requirements specified in appendix W of this part." In turn, Appendix W offers broad guidance on the use of grid modeling and includes recommended types of models, a discussion of their uncertainties, and design considerations. 40 C.F.R. pt. 51 app. W § 6.1 (2002). EPA revised the 1991 Guideline in 1996. That revision allowed more flexibility in the testing and recognized the uncertainties in the grid models that had come to light through experience using them. The petitioner argued that the 1991 Guideline could only be changed through notice and comment rulemaking.

EPA contended that the 1991 Guideline was not a rule and the court agreed. Appendix W may only be amended by notice and comment rulemaking. However, the Appendix only refers users to the Guideline "for additional data requirements and procedures for operating this model." In effect, the Guideline is a

“useful manual and may be revised without formal procedures, although lack of such procedures also means that the Guideline has not the independent force of law.” Slip op. at 25. [Editor’s note: The court did not address the state’s argument that the issue was moot since EPA formally amended Appendix W in an April 2003 Federal Register notice. See 68 Fed. Reg. 18,440 (Apr. 15, 2003).]

The petitioner also alleged that EPA’s analysis violated Appendix W’s prohibition against using proportional rollback/forward modeling for evaluating ozone control strategies. 40 C.F.R. pt. 51 app. W § 6.2.1.e. “Rollback” is defined as “[a] simple model that assumes that if emissions from each source . . . are decreased by the same percentage, ambient air quality concentrations decrease proportionately.” *Id.* § 14.0. EPA used a methodology that assumed a linear relationship between emission reductions from sources and a corresponding reduction in ozone concentration when calculating the additional emission reduction needed to reduce levels from 129 to below 124 ppb.

EPA answered that the linear rollback has always had some degree of validity; the prohibition is designed to prohibit linear rollback as the *sole* basis for demonstrating attainment. In its analysis regarding New York’s plan, EPA used rollback based on the modeled test results. It explained its use of linear approximations in its approval by noting that these approximations are helpful when only a small increment of the overall ozone reduction is being addressed and the relationship between precursors and ozone is derived from locally modeled or measured air quality. See Approval and Promulgation of Implementation Plans, New York, 67 Fed. Reg. at 5276–77.

When reviewing an agency’s interpretation of its own regulation, a court uses a highly deferential standard; the agency’s interpretation is controlling unless plainly erroneous or inconsistent with the regulation. The court held that EPA’s interpretation satisfied this standard. Thus, it rejected the petitioner’s argument that EPA had contravened its own regulations when approving New York’s plan.

EPA measures compliance with the standard over a three-year period; if the average number of exceedances over that period of time is greater than one per year, then attainment is not achieved. The petitioner argued that EPA should require a demonstration of attainment in 2005 and 2006, not just in 2007, since, under EPA’s three-year test, three years of data are required. New York argued, however, that requiring a demonstration of attainment earlier than 2007 would run counter to the plain language of the CAA, which sets the attainment date as November 15, 2007. 42 U.S.C. § 7511(a)(1), (2). It further noted that the tension between the statutorily-specified attainment test and the three-year attainment test is resolved by section 181(a)(5) wherein Congress delegated to EPA the authority to grant a state up to two one-year extensions of the attainment deadline, assuming that the state met certain criteria in the attainment year.

The court interpreted the extension provision to permit EPA to both compel attainment by November 15, 2007 and to measure attainment over three years. EPA approves an extension only after a state demonstrates that it warrants one. Therefore, the court rejected the claim that the agency has relaxed the deadline for attainment.

To make up the shortfall in attainment, New York amended its plan to include an enforceable commitment to adopt further controls to reduce VOC and NOx emissions. The controls included adopting six specific regulations based on the Ozone Transfer Commission’s recommendations. Having determined that New York’s entire plan, including the adoption of the six regulations would meet attainment by the statutory deadline, EPA approved the state’s plan.

The petitioners argued that the statute requires that plans must contain “enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), a well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter.” 42 U.S.C. § 7502(c)(1).

The court noted that the essential terms — control measures, means, and techniques — are not defined in the act. Since Congress has not spoken directly to the question of whether New York’s enforceable commitment to promulgate regulations is encompassed within the statutory term, it is appropriate to accord deference to EPA’s interpretation, if that interpretation is reasonable. The court concluded that the breadth of the statutory language made EPA’s decision to treat an enforceable commitment as a means or technique reasonable and was, therefore, upheld.

EPA applies a three-part test to determine whether a state’s commitment is appropriate. The agency asks (1) if the commitment addresses a limited portion of the reductions needed for attainment; (2) whether the state can fulfill it; and (3) whether the commitment is for a reasonable time. In regard to New York’s commitment, the agency answered each of these questions in the affirmative.

The petitioner relied on the holding in *National Resources Defense Council v. Environmental Protection Agency*, 22 F.3d 1125 (D.C. Cir. 1994) (*NRDC*). In that case, the court held that EPA’s acceptance of a plan that contained only a vague, general commitment to meet statutory requirements was inconsistent with the statutory scheme and that EPA’s conditional approval of only vague commitments, without substantive review or a completeness determination, inappropriately circumvented the CAA’s statutory scheme.

According to the court, the *NRDC* decision is not directly relevant to this case. It turned on the interpretation of a different clause of the CAA and is factually distinguishable because, here, EPA did undertake a substantive analysis. New York’s plan does not lack the required substantive elements and its enforceable commitments consist of proposed regulations that are specific, enabling EPA to evaluate their contribution to the plan as a whole. The court determined that it would not second guess EPA’s decision simply because the regulations had not yet been enacted. It held the agency’s approval did not circumvent the submission timetable as the plan did in *NRDC*.

The petitioner argued that EPA’s rules prohibited its limited acceptance of commitments. The court disagreed. The agency’s rules provide that the attainment plan must set forth a “control strategy” for attaining the standard. *See* 40 C.F.R. § 51.111. These measures must then be adopted as rules enforceable by the state agency. The definition of “control strategy” is broad and, by its own terms, not comprehensive. EPA’s determination that New York’s plan satisfies the requirements of a “control strategy” is based on a permissible reading of its regulations. Furthermore, the commitment to adopt rules is itself enforceable as a rule as the Administrative Procedure Act defines it. It was adopted through notice and comment, creates specific rights, imposes specific obligations, and is enforceable against the state. The court was satisfied that the state’s plan was sufficiently detailed and that EPA fulfilled its obligation to assess it.

The final challenge by the petitioner was that EPA impermissibly extended the submission deadline by accepting an enforcement commitment that gives the state time to implement further regulations. However, the commitment was adopted as a final rule and is enforceable as of its adoption. That part of the process is to be concluded in the future does not amount to an extension of the deadline. New York has already begun the process of adopting its additional provisions before the plan was finally approved. [Editor’s note: In fact, while not addressed by the court, New York had already adopted all the regulations prior to the issuance of the opinion.] The court rejected the petitioner’s argument that the only way EPA may adopt a plan that contains commitments is through the CAA’s conditional approval mechanism in section 110(k)(4), 42 U.S.C. § 7410(k)(4). The court agreed this was an option that EPA could have adopted, but it was not its only option. There is nothing in the statute’s language which suggests that, if conditional approval is available, Congress planned that only the one approach could be taken.

The court, therefore, denied the petition for review.

**Power Company's Permit Remanded to EPA:  
Sierra Club v. Mike Leavitt et al., No. 03-10266  
(11th Cir. May 5, 2004)**

**Background**

Oglethorpe Power Corporation applied to the Georgia Environmental Protection Division (EPD) for a preconstruction air permit for a portion of the Wansley Steam-Electric Generating Plant in Heard County, Georgia. The EPD granted the permit over the Sierra Club's objection. A subsequent petition to EPA requesting that it object to EPD's decision was declined. The Sierra Club then appealed directly to the circuit court.

The basis of the Sierra Club's objection can be found in 42 U.S.C. § 7503(a)(3). In that section, the Clean Air Act (CAA) specifies that no preconstruction permit may be issued unless:

[T]he owner or operator of the proposed new or modified source has demonstrated that all major stationary sources owned or operated by such person (or by any entity controlling, controlled by, or under common control with such person) in such State are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under this [Act.]

Georgia has adopted this language in its regulations. See Ga. Comp. R. & Regs. R. 391-3-1-.03(8)(c)3.

**Holding**

The primary issue before the court is whether the statutory language and the Georgia regulation apply to an owner or operator of a *portion* of a noncompliant major stationary source. In this case, it is alleged that Oglethorpe owns two of the four units at Plants Bowen and Scherer; the two non-owned units are alleged to be out of compliance with the CAA.

The court determined that it would not be appropriate to defer to EPA's interpretation of the statute because, in rejecting the Sierra Club's petition, it did not explain how the approval of the permit was in keeping with the language of the statute. Instead, according to the court, EPA implicitly assumed that a major stationary source could be broken into parts with compliance determined individually for purposes of the statute. EPA stated:

[T]he plain language . . . suggests that it aims to ensure that an entity applying for a construction permit demonstrates that all of its major sources in Georgia meet their compliance obligations[.]

. . . .

Oglethorpe Power has admitted it owns portions of only Units 1 and 2 at Plant Scherer. However, the EPA Notice of Violation cited by the Petitioner alleges non-compliance only as to Plant Scherer's Units 3 and 4. It is not clear from the plain language . . . that it requires an owner or operator to make any demonstration as to [noncompliant] facilities it does not own or operate, even if they are located at the same plant site as facilities it does own or operate. . . . Thus, with respect to Plant Scherer, EPA sees no reason to question EPD's determination that all of Oglethorpe Power's facilities in Georgia are in compliance with all applicable requirements.

Order Denying Petition for Objection to Permit at 6.

The court noted that EPA shifted from using the term "major source" to the term "facility" when explaining its reasoning for denying the plaintiff's petition. The statute and the Georgia regulation, however, do not use the term "facility"; they use the term "major stationary source." In both the statute and the Georgia regulation, the term is used twice; it should be given the same meaning in both instances.

The EPA order, however, does not even acknowledge that it is defining the term in two different ways, let alone attempt to justify doing so. Title V of the CAA uses “major stationary source” as the unit by which one measures compliance. It is certainly not clear whether it is appropriate to determine compliance by looking at only a portion of a major stationary source.

For the first time on appeal, EPA offered a post-hoc rationale for the different treatment of the term. It argued that, for permitting purposes, emissions from multiple units or separate sources are to be aggregated and counted as emissions from a single “major stationary source.” However, it argued that the purpose of the statewide compliance rule is entirely different and is designed only to ensure that “an entity that owns or operates one or more Title V sources that are not currently in compliance . . . is not allowed to obtain a permit that authorizes the construction of a new source until its existing sources are . . . compliant.” EPA Brief at 24–25. The court declined to address EPA’s argument. Such a policy issue should not be addressed, at the first instance, through a litigation process but should, instead, be addressed by EPA after considering all relevant factors.

Therefore, the court remanded to the agency for additional investigation and explanation.

## NEPA

**Agency Lacked Discretion to Stop Cross-Border Operations: *Department of Transportation et al. v. Public Citizen et al.*, No. 03-348 (U.S. June 7, 2004)**

### Background

Prior to 1982, motor carriers from Canada and Mexico were able to obtain certification to operate within the United States from the Interstate Commerce Commission. In 1982, Congress put a two-year moratorium on new grants of operating authority and authorized the President to extend, or lift, the moratorium depending on Canadian and Mexican treatment of U.S.

motor carriers. The moratorium on Canadian motor carriers was lifted quickly, but the moratorium on Mexican motor carriers was continued and extended after the initial two-year period was over.

The North American Free Trade Agreement (NAFTA) was signed by the three countries in December 1992. Under that agreement, the United States agreed to phase out the moratorium by January 2000. Concerns about the adequacy of Mexico’s regulation of motor carrier safety issues delayed the lifting of the moratorium. Mexico challenged the United States’ delay under NAFTA’s dispute resolution process. In February 2001, an arbitration panel determined that the United States had breached its obligations under NAFTA. The President then made it clear that he intended to lift the moratorium after new regulations governing grants of operating authority to Mexican motor carriers were issued.

The Federal Motor Carrier Safety Administration (FMCSA) published proposed regulations in May 2001. In December 2001, Congress passed the Department of Transportation and Related Agencies Appropriations Act, 2002, under which no funds could be expended to review or process applications for Mexican carriers to operate in the United States until the FMCSA implemented specified requirements, some of which went beyond those already proposed.

In January 2002, the FMCSA issued an Environmental Assessment (EA) under the National Environmental Policy Act of 1969 (NEPA), which evaluated the environmental impact under three different scenarios dealing with the licensing of Mexican carriers. Each analysis focused on the environmental effects from the increase in the number of roadside inspections of Mexican trucks and buses due to the proposed regulations. The possible increase of inspection-related emissions was offset by the fact that the safety requirements would reduce the number of Mexican trucks operating in the United States. Therefore, the EA concluded that the issuance of the proposed regulations would have no significant impact on the environment.

In March 2002, the FMCSA issued two new interim rules in accordance with the appropriations act, delaying their effective date until May 2002 to allow public comment. The agency relied on its EA to demonstrate compliance with NEPA. The preamble also addressed the Clean Air Act (CAA) and determined it need not perform a CAA conformity review (under which the federal government would ensure conformity with the State Implementation Plan) because any increase in emissions would fall below U.S. EPA's threshold levels needed to trigger such a review.

Public Citizen and other environmental interest groups filed for judicial review, arguing that the rules had been promulgated in violation of NEPA and the CAA. The Court of Appeals granted the petitions and set aside the rules. In the meantime, in November 2002, the President lifted the moratorium on qualified Mexican motor carriers.

The Court of Appeals held that the FMCSA was required to consider the environmental effects of the entry of Mexican trucks on the road, not just on inspection related emissions, because the lifting of the moratorium was "reasonably foreseeable at the time the EA was prepared and the decision not to prepare an EIS was made." 316 F.3d 1002 (9th Cir. 2003). The court thus remanded for preparation of a full Environmental Impact Statement (EIS). It also directed the FMCSA to prepare a full CAA conformity determination because of the "illusory distinction between the effects of the regulations themselves and the effects of the presidential rescission of the moratorium on Mexican truck entry." *Id.* at 1030.

The U.S. Supreme Court granted certiorari.

### **Holding**

Under NEPA, the relevant question is whether the increase in cross-border Mexican truck traffic, with the concomitant increase in emissions, is an "effect" of the FMCSA's issuance of its regulations. If it is not the "effect" of an action by FMCSA, then the agency did not violate NEPA. The respondents did not raise any issue concerning the lack of consideration of possible alternatives to the proposed regula-

tions in the EA. Therefore, the respondents have only one complaint — that the EA failed to take into account the environmental effects of increased cross-border operations of Mexican motor carriers.

The respondents argued that, since the only way money can be expended to process or review applications by Mexican motor carriers is by promulgating the mandated regulations, if they were not promulgated, there would be no increased Mexican truck traffic on U.S. roads. Therefore, the promulgation of the regulations "causes" the entry of Mexican trucks. The FMCSA must then take the increased emissions into account in its EA when evaluating whether an EIS is necessary.

The Court pointed out, however, that the FMCSA has no ability to countermand the President's lifting of the moratorium. In fact, under the statute, the FMCSA has no discretion to deny permission for a permit if an applicant is eligible to receive one. The statute states that the FMCSA "shall register a person to provide transportation . . . as a motor carrier if [it] finds that the person is willing and able to comply with" financial responsibility and safety requirements. 49 U.S.C. § 13902(a)(1).

The respondents' case rests on a "but for" causation argument. But such a causal relationship is not sufficient to make an agency responsible for a particular effect under NEPA. Under the Court's holding in *Metropolitan Edison Company v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983), there must be a "reasonably close causal relationship" between the environmental effect and the alleged cause. Furthermore, under NEPA, if the preparation of an EIS would serve "no purpose," there is no requirement for an agency to prepare one. *See Aberdeen & Rockfish Railroad Company v. Students Challenging Regulatory Agency Procedures*, 422 U.S. 289 (1975). Thus, applying the rule of reason, it is clear that the causal connection between the issuance of proposed regulations and Mexican trucks on U.S. roads is not sufficient to make the FMCSA responsible under NEPA to consider the environmental effects of that entry. The statutory purposes of NEPA — that relevant information will be available so that

“a larger audience” might have a role in the decisionmaking process and so that the agency will have the ability to carefully consider detailed information concerning environmental effects — are also not met. The FMCSA would lack the power to act on whatever information might be contained in an EIS; neither would any input from a larger audience have any impact.

The Court, therefore, held that where an agency has no ability to prevent a certain effect because of limited statutory authority, agency action could not be considered the cause under NEPA of that effect. In this case, the President, not the FMCSA, had the authority to authorize (or not authorize) cross-border operations from Mexican trucks. Therefore, the FMCSA’s EA did not have to consider the environmental effects arising from their entry.

Under the CAA, a federal “department, agency, or instrumentality” may not “engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity” that violates an applicable State air-quality implementation plan. 42 U.S.C. § 7506(c)(1). The FMCSA determined that its proposed regulations would not cause emissions to violate a SIP. It did not include in its calculations any emissions attributable to increased traffic from Mexican trucks on U.S. roads. Under the CAA, emissions are “caused by” a Federal action if the “emissions . . . would not . . . occur in the absence of the Federal action.” 40 C.F.R. § 93.152. Both “direct” and “indirect” emissions must be considered. “Direct emissions” are those that “are caused or initiated by the Federal action and occur at the same time and place as the action.” *Id.* “Indirect emissions” are those “caused by the Federal action, but [which] may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable” and are those that the federal agency “can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.” *Id.*

It is arguable that the “but for” analysis of the entry of Mexican trucks satisfies the causation requirement

of the regulation. However, the related emissions are not “direct” because they will not occur at the same time or at the same place as the promulgation of the regulations. Furthermore, the FMCSA cannot control nor maintain control over these emissions so they are not “indirect emissions.” The FMCSA does not have the authority to refuse to register Mexican motor carriers because they might pollute excessively. Thus, the FMCSA did not violate the CAA when it determined it did not have to perform a full conformity determination.

Accordingly, the Court reversed the Ninth Circuit’s decision and remanded the case.

## Water

**Citizen Plaintiff May Have Standing, but Issue Is Moot: *Harry Truman Ailor v. City of Maynardville, Tennessee*, No. 01-6562 (6th Cir. May 17, 2004)**

## Background

The City of Maynardville, Tennessee, operates a sewage treatment plant under a National Pollutant Discharge Elimination System (NPDES) permit, issued under the Clean Water Act (CWA). The state brought an administrative enforcement proceeding against the city in 1993 because of repeated violations of the permit. An agreed upon order was issued on July 1995, assessing a civil penalty and requiring various steps to bring the plant into compliance. The city completed all of the required actions and placed a new wastewater treatment plant on line in November 2000. It spent approximately 1.7 million dollars in upgrading the plant.

In January 1998, the plaintiffs filed suit against the city in state court, alleging that the city’s sewage treatment plant frequently overflows, discharging untreated sewage and other pollutants into Bull Run Creek, along which the plaintiffs own property. In May 2001, the plaintiffs filed suit in federal court under the CWA, the Resource Conservation and Recovery Act, and state law. The lawsuit sought remedial relief, compensatory and punitive damages, and litigation costs.

The city moved for summary judgment, arguing that there was an enforcement action commenced by the state that was diligently prosecuted and that all the terms of the corrective order had been complied with so that the city was not currently in violation of its permit. It also argued that punitive damages are not available under the CWA. The district court granted the motion, holding that the action was moot at the time it was filed. It also held that RCRA would not give any right or remedy not available under the CWA. The plaintiffs then filed a motion to alter or amend the judgment based on the evidence that the city had violated the NPDES permit three times in 2001. These violations were in connection to overflowing manholes, unrelated to the operations of the wastewater treatment plant. The district court denied the motion and the plaintiffs appealed.

### Holding

The plaintiffs argued that the city did not carry its burden of persuading the court that further violations of its permit were not likely to recur as required under the doctrine of *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 17 (2000). That case held that a defendant's voluntary cessation of a challenged practice does not ordinarily moot a case. Although the district court spoke in term of "mootness," part of its holding implicated standing. The court therefore began by analyzing the standing issues involved.

The differences between standing and mootness were discussed by the Court in depth in *Laidlaw*. Basically, standing involves whether a plaintiff has a viable claim at the time of suit. Mootness addresses whether the plaintiff continues to have an interest in the outcome of the litigation. By the time the plaintiffs' suit was initiated, the plaintiffs essentially no longer had an "injury in fact" that was "actual or imminent" because the relief requested was for wholly past violations. The Court in *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 484 U.S. 49 (1987), emphasized that citizens suits are meant to

supplement rather than to supplant governmental action. It also recognized that standing is conferred by good faith allegations of continuous or intermittent violations. In this case, it is arguable whether the plaintiffs properly alleged continuing violations. However, the court assumed standing, noting that the mootness doctrine evens out the playing field.

The district court stated that there was no evidence that any overflow had occurred since November 2000 at Bull Run Creek. The only reported exceedances occurred shortly after the new wastewater system began operating. At the time of summary judgment in November 2001, the city was fully in compliance with its permit. The plaintiffs did not meet their burden of establishing a realistic prospect that the violations would continue. Unlike in *Laidlaw*, where the plaintiffs instituted the citizen suit prior to any action by a state agency, here the plaintiffs brought suit many years after a compliance order had been issued and after the city had complied with that order. The court stated:

[I]t is the machinations of the citizen-plaintiffs, and not the defendant polluter, that appear to undermine the purposes and goals of the Act. Had Plaintiffs been truly compelled to commence litigation because of federal or state reluctance to solve a serious environmental problem, they would certainly have done so at least by 1998, when they filed suit in state court. Instead, they waited until the final chapter of the state agency proceedings to bring a CWA claim. The only plausible explanation for the timing of their federal suit is the possibility of reasonable costs and attorney fees.

Slip op. at 11.

The court further held that the district court did not err in dismissing the RCRA claim because, under

RCRA, citizens are authorized to bring suit in substantially the same capacity as provided for in the CWA.

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

**Court Holds Maintenance Exception Applicable to Allegations of CWA Violation: *Michael S. June v. Town of Westfield, New York, and Village of Westfield*, No. 03-7723 (2d Cir. June 2, 2004)**

**Background**

In the mid-1990s, a portion of Mt. Baldy Road in Westfield, New York, was in danger of collapse. The embankment on which it was built had eroded to within a few feet of the road, causing a very narrow shoulder that dropped steeply to a gully. The town therefore deposited fill, expanding the embankment and filling in part of the gully. Michael June brought this action in November 2001, alleging that the defendants had violated the Clean Water Act (CWA) by discharging without a permit into the waters of the United States. He also alleged that the defendants discharged storm waters associated with industrial activity from a point source without a permit. Finally, he alleged that the defendants engaged in open dumping of solid waste in violation of the Resource Conservation and Recovery Act (RCRA).

The district court found that the maintenance exemption of 33 U.S.C. 6 1344(f)(1)(B) applied and that both the CWA and RCRA claims were barred because they did not constitute an ongoing violation and granted summary judgment to the defendants. June appealed.

**Holding**

The maintenance exemption of the CWA’s discharge permitting scheme states:

Except as provided [by a paragraph of the statute not relevant to June’s claims], the discharge of dredged or fill material –

....

for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures

....

is not prohibited by or otherwise subject to regulation under this section.

...

33 U.S.C. § 1344(f)(1).

There is a dearth of caselaw addressing the terms “structure” or “transportation structure.” However, the scope of the terms seemed clear to the court. An embankment supporting a road is a “transportation structure.” The provision apparently is intended to permit routine government maintenance of transportation, public water supply, and similar facilities without the time or expense of acquiring a permit. It is true that exemptions to the CWA should be narrowly construed. Nonetheless, the court concluded that the road and the embankment that supported it were a “transportation structure.”

The Corps of Engineers regulation, interpreting the exemption, provides that “[m]aintenance does not include any modification that changes the character, scope, or size of the original fill design.” 33 C.F.R. 6 323.4(a)(2). June asserted that the defendants “dumped several tens of thousands of cubic yards of fill into the overflow tributary.” If this is true, it is possible that the modification changed “the character, scope, or size of the original fill design of the embankment.” However, June did not raise this issue in either the district court or on appeal. Therefore, the court affirmed the district court’s grant of summary judgment on the CWA claims.

The court then looked at June's claims that the defendants had engaged in open dumping of solid waste in violation of RCRA. In *South Roads Associates v. International Business Machines Corporation*, 216 F.3d 251, 257 (2d Cir. 2000), in a lawsuit that was, in relevant part, brought under the same provisions of RCRA, the court concluded that an historical act could not support a claim for violation of 42 U.S.C. § 6945(a). There is no allegation in the lawsuit that the defendants were continuing to engage in open dumping. Therefore, the allegations were of a purely historical act and cannot support a RCRA lawsuit.

**Court Accepts Lab Mistake Defense and Gives Guidance Concerning Calculation of Economic Benefit: *United States v. Allegheny Ludlum Corporation*, No. 02-4346 (3d Cir. Apr. 28, 2004)**

**Background**

Allegheny Ludlum Corporation (ALC) owns five steel manufacturing facilities in western Pennsylvania. Water is used to manufacture the steel and is also used to cool steel-making equipment. In June 1995, the federal government filed a civil complaint alleging that ALC had exceeded its permitted discharges as shown by its Discharge Monitoring Reports (DMRs). The complaint also alleged that discharges from one facility had interfered with the operation of a local water pollution control authority and that ALC had failed to report the violations as required by its permits. The parties filed cross motions for summary judgment. In its ruling on the motions, the district court refused to accept the "laboratory error" defense offered by ALC in which the company wished to offer evidence that the excessive zinc pollutant levels resulted from erroneous laboratory analyses, not from actual exceedances in its discharges. The court thus awarded partial summary judgment to the government on that issue.

A jury trial was held in January 2001. The jury found in favor of ALC on the interference and reporting failure claims, but found in favor of the government on half of the reported violations claims. After the jury trial, the court held a bench trial to determine the

penalty amount. As a part of its penalty determination, the court used a 12.73% interest rate, predicated largely on a calculation of ALC's weighted average cost of capital (WACC). ALC contended that the rate was excessive. The court also counted violations of monthly averages as violations for each day of the month.

ALC appealed, arguing that its lab error defense should have been allowed, that the court used an excessive interest rate, and that the court should not have counted violations of monthly averages as violations for every day of the month.

**Holding**

The government argued that the Clean Water Act (CWA) establishes a scheme of strict liability. Consistent with this scheme, the court should treat DMRs as admissions that are sufficient to establish liability under the statute and not entertain a lab error defense. The government called the court's attention to the holding in *Sierra Club v. Union Oil Company*, 813 F.2d 1480, 1491-92 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931 (1988), where the court reasoned that, if permittees could impeach their own reported violations by claiming laboratory error, it would "create the perverse result of rewarding permittees for sloppy laboratory practices" and "undermine the efficacy of the self-monitoring program." The government also contended that allowing dischargers to contest their own DMRs would conflict with both the statute and the applicable regulations.

ALC countered the government's arguments by pointing to a number of district court cases that have recognized the availability of the laboratory error defense, either explicitly or implicitly. In *Public Interest Research Group Inc v. Elf Atochem North America, Inc.*, 817 F. Supp. 1164 (D.N.J. 1993), the court held:

[W]hile we agree with the court [in *Connecticut Fund for the Environment, Inc. v. Upjohn Company*, 660 F. Supp. 1397 (D. Conn. 1987)] that it is inconsistent with the structure

and purpose of the Act to allow permit holders to escape liability altogether on the basis of laboratory error, *we find it more accurate, where laboratory error has been shown, to hold a defendant liable for a monitoring violation rather than a discharge violation.*

*Id.* at 1179 (emphasis added).

The court in *Public Interest Research Group, Inc. v. Yates*, 757 F. Supp. 438, 447 (D.N.J. 1991), recognized the laboratory error defense, stating that “DMRs may be deemed admissions when establishing liability in summary judgment motions,” but are not conclusive proof of liability. Like the *Elf Atochem* court, the *Yates* court recognized that there is a heavy burden on the defendant to prove laboratory error, but a showing that there were errors in the tests might defeat a summary judgment motion.

The court in this case found the reasoning of the *Elf Atochem* court persuasive. Neither the CWA nor any regulation makes a DMR report conclusive. Certainly, evidence that the laboratory reports inaccurately reported overages is relevant to show whether a violation occurred. The government argued that strict liability should apply, but a strict liability regime only means that the government does not have to show *mens rea*. It does not mean that ALC may be held liable for violating its permit even if it has not, in fact, done so.

The government’s policy arguments are applicable when a permittee underreports levels of waste and then claims a laboratory error defense. There does not seem to be an equally compelling policy argument when a permittee overreports. In this case, ALC claimed that a contaminated reagent used in the laboratory caused the systematic overreporting of the amount of zinc that was discharged. The court could find no reason to apply strict liability to overreporting errors and could find nothing in the CWA that would indicate this was Congress’ intention.

The government cited *United States v. Pozsgai*, 999 F.2d 719, 725 (3d Cir. 1993), as a case where strict liability was imposed. The court noted, however, that in *Pozsgai*, liability was imposed on an unlawful discharge, not on the mistaken report of a discharge. It is certainly not clear that the CWA imposes a strict liability regime on faulty reporting.

There is a mechanism in the regulations for correcting erroneous DMRs. See 40 C.F.R. § 122.41(1)(8). The regulation was promulgated pursuant to section 308(a) of the CWA, 33 U.S.C. § 1318(a). Section 309 authorizes administrative, civil, and even criminal penalties for violations of section 308. Therefore, the failure to correct an inaccurate DMR is an independent violation of the statute. The very circumstances that would support a laboratory error defense would probably also support the finding of a monitoring violation. Therefore, the court rejected the government’s argument that the statute’s provisions regarding actual discharges can also be used to enforce reporting requirements.

The penalty provision of the CWA states that, in assessing the penalty, the court should consider the following factors:

[T]he seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. § 1319(d).

The district court took into consideration each one of these factors, finding that the economic benefit to ALC was considerable, primarily because it avoided increased staffing at its wastewater treatment plants and delayed a plant upgrade at one facility. The court calculated the economic benefit at \$4,122,335, ultimately doubling that amount to \$8,244,670, and as-

sessed that amount as the final penalty. Imposition of a penalty under the CWA is subject to the exercise of the district court's discretion. However, ALC argued that the economic benefit calculation should be used to "level the economic playing field." See *United States v. Municipal Authority of Union Township*, 150 F.3d 259, 263-64 (3d Cir. 1998) (*Dean Dairy*). The government argued that, instead, penalties are intended to "promote immediate compliance" and "deter future violations" by the defendant in other regulated entities.

The court noted that there are different ways that the economic benefit calculation may be made. However, at its core, it is intended to identify the benefit the violator received by delaying compliance with the CWA. The calculation starts with the costs that were spent or should have been spent to achieve compliance. After that calculation, a court must apply an interest rate to reflect the time value of money. The interest rate used is the focus of ALC's complaint.

The district court derived the interest rate from the proffer of government witnesses. The rate was based on broad averages of the weighted average cost of capital across U.S. capital markets. According to ALC, use of this formulation was an error because ALC had presented evidence of its actual rate of return on capital at the penalty phase — a rate of 5.7%. This evidence was not contested. ALC also argued that there were two other methods by which rates could have been calculated: the statutory interest rate or the risk-free rate, represented by short-term U.S. treasury rates during the relevant time period. The government responded that economic benefit calculation need not be precise and that other courts have approved the use of the WACC when calculating CWA penalties. See, e.g., *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542 (E.D. Va. 1985), *aff'd* 791 F.2d 304 (4th Cir. 1986), *vacated on other grounds*, 484 U.S. 49 (1987).

The court noted that there are two possible approaches to determining economic benefit under section 309. The first is the cost of obtaining capital; the second is the use of the offender's actual return on capital. The

choice of methodology should be left to the sound discretion of the district court. However, in this case, it is not clear that the court was aware of or considered the range of available options. Its calculation relied on values that were not ALC-specific. It is also not clear that a WACC figure based on a company's existing capital structure is the same as a company's current cost of capital. The appropriate measure would be to use ALC's cost of capital in the years in question. The court might also use a return of capital as a measure. The record does not show ALC's financial strength during the years in question. The record did reflect that ALC had a return on capital that was less than half the 12.73% rate used by the district court. The return on capital, according to the appellate court, is a viable means of leveling the playing field along with the marginal or then current cost of capital.

Another problem with the district court's calculation was that the government's experts used the arithmetic mean to come up with the WACC for each of the years from 1990 to 1998. The court questioned the appropriateness of using an average interest rate when year-to-year interest rate estimates are known.

The court was, therefore, unconvinced that the district court's interest rate achieved the goal of "leveling the economic playing field" nor that it had any meaningful connection with ALC's cost of capital or its return on capital. It, therefore, remanded for further proceedings with respect to the interest rate.

ALC also argued that the court did not use the proper figures when determining the cost of compliance. The issue, according to the court, is whether, as a matter of law, the district court must calculate economic benefit using the least costly method of compliance. This issue has evidently not been addressed by any courts of appeals. However, the district courts that have addressed it have held that the calculation should be based on the least costly method of compliance. See, e.g., *Gwaltney of Smithfield*, 611 F. Supp. at 1563 n.25, and *United States v. WCI Steel, Inc.*, 72 F. Supp. 2d 810 (N.D. Ohio 1999). The court found that these decisions were persuasive and held that eco-

conomic benefit analysis should be based on the least costly method of compliance. However, after reviewing the record, it determined that the district court had not failed to use such an approach.

Finally, ALC appealed the court's ruling that all violations of the monthly average parameters of ALC's permits should be counted as violations equal in number to all the days in the monitored month. In ruling on the motion in limine, the court thus excluded evidence that actual exceedences occurred on fewer days.

The appellate court noted that the leading authority in this area is the Fourth Circuit's *Gwaltney* decision:

While the statute does not address directly the matter of monthly average limitations, it does speak in terms of penalties per *day* of violation, rather than penalties per *violation*. This language strongly suggests that where a violation is defined in terms of a time period longer than a day, the maximum penalty assessable for that violation should be defined in terms of the number of days in that time period.

791 F.2d at 314 (footnote omitted).

The court found the *Gwaltney* court's reasoning incomplete. It found "problematic the proposition that the maximum penalty . . . should be thirty times the maximum penalty for the worst daily violation imaginable." Slip op. at 27. Under 33 U.S.C. § 1319(d), a violator is "subjected to a civil penalty not to exceed \$25,000 per day for each violation." Under the reasoning of *Gwaltney*, a violation of the monthly average maximum occurs on every day of the month which could result in a monthly penalty of up to \$775,000.

The court was confident that Congress never thought of this issue when crafting the CWA. The court urged

Congress to amend the statute to clarify its intentions or EPA to promulgate regulations that would give more guidance. To decide the case before it, it held that the district court:

[S]hould take into account the degree to which the polluter's conduct had already been punished by penalties for daily violations and to use the maximum penalty for a daily violation as a basis for comparison. Thus, a district court would not assess a daily penalty of more than \$25,000 as a function of the monthly average violation unless it could say that the permittee's violation of the average monthly maximum was as blameworthy (taking into account the factors enumerated in 33 U.S.C. § 1319(d) including environmental harm) as a daily violation for which the \$25,000 maximum would be appropriate. . . . Since the District Court did not have the benefit of this standard, we must vacate and remand so that it may apply it to reconsider the penalty for monthly average violations.

Slip op. at 28. Furthermore, the penalty calculation should be decided in accordance with the court's holding in *Natural Resources Defense Council, Inc. v. Texaco Refining & Marketing, Inc.*, 2 F.3d 493 (3d Cir. 1993), that there must be excluded from the calculation the days when the facility was not in operation.

The court thus affirmed the judgment on liability, except to those aspects of the claims that are affected by the laboratory error defense and the monthly average violations. It vacated the penalty assessment and remanded for further consideration.

## CIVIL PROCEEDINGS

## Settlements

## Water

***Wisconsin v. Country Fresh Meats, Inc., No. 04CV427 (Cir. Ct. Marathon County May 18, 2004)***

Acting on a citizen's complaint, the Wisconsin Department of Natural Resources discovered that a meat-processing facility had emptied a 50,000 gallon tank that contained wastewater, animal byproducts, chlorine bleach, and ammonia every several weeks for about twenty years into a field and ravine in a wooded area of Hatley, Wisconsin. According to a complaint filed by the Wisconsin Attorney General's Office, the discharge killed vegetation and contaminated groundwater. The company, Country Fresh Meats, Inc., has agreed to pay a \$12,500 fine and clean up the contaminated area, restoring the soil and vegetation.

[For further information, contact Wisconsin AAG Hillary Schwab at (608) 267-7163.]

## CRIMINAL PROSECUTIONS

## Indictments

## Hazardous Waste

***State [New Jersey] v. Paul Brothers, Inc., Thomas D. Paul, and William Marsden, No. 04-04-00058-S (Super. Ct. Gloucester County Apr. 14, 2004)***

According to an indictment, Paul Brothers, Inc., and two company officials knowingly discharged wastewater containing high levels of hydrochloric acid into the ground behind its plant in Newfield, New Jersey. They have been charged with second degree release of hazardous waste and third degree water pollution.

[For further information, contact New Jersey DAG Robert Donovan at (609) 984-4470.]

## Solid Waste

***State [New Jersey] v. German C. Cuadrado and Daniel Estrella, No. 04-05-00086-S (Super Ct. Bergen County May 27, 2004)***

German G. Cuadrado of Allentown, Pennsylvania, has been charged with various crimes in connection with abandoning two trailers of construction waste in New Jersey. Cuadrado is an unlicensed solid waste hauler who contracted with a Morris County, New Jersey, demolition company to remove construction debris from a Hackensack work site. When he was unable to dump the waste, Cuadrado allegedly stole two trailers from a trucking yard, filled them with the waste, and then abandoned them in Carlstadt and Patterson. A co-worker, Daniel E. Estrella, was also charged in connection with the unlawful collection of solid waste.

[For further information, contact New Jersey DAG Betty Rodriguez at (973) 599-5932.]

***State [New Jersey] v. Elton Ren Williams, No. 04-04-00057S (Super Ct. Essex County Apr. 2, 2004)***

In New Jersey's first prosecution under its Solid Waste Crimes Law, enacted in January 2004, Elton Ren Williams has been charged with third degree unlawful transportation and disposal of solid waste, fourth degree unlawful collection of solid waste, and third degree criminal mischief. Prosecutors allege that he collected and then dumped a large volume of tires and debris at a site near Newark Airport and at another site near Elizabeth, New Jersey.

[For further information, contact New Jersey DAG Ed Bonanno at (609) 984-4470.]

**Water*****State [New Jersey] v. Vladimir Smolensky, No. 04-03-0052S (Super. Ct. Essex County Mar. 26, 2004)***

The supervisor of the University of Medicine and Dentistry New Jersey, Newark campus, power plant has been charged with a third degree violation of the state's Water Pollution Control Act. The allegation alleges that he violated the plant's water pollution permit by discharging about 10,000 gallons of acidic waste water into the sewer system in a manner that bypassed the pH treatment system.

[For further information, contact New Jersey DAG Betty Rodriguez at (973) 599-5932.]

***United States v. Olymco, Inc., Alex Sklavenitis, and Nick Koumoutzis, No. 2002R00944 (N.D. Ohio Apr. 28, 2004)***

A Delaware chrome plating corporation doing business in the Canton, Ohio, area, and its owners have been charged with violating the Clean Water Act by knowingly discharging industrial wastewater containing chromium into the Canton public sewer system.

[For further information, contact AUSA Chris Stikkan at (216) 622-3600.]

**Pleas****Endangered Species*****United States v. James M. Kovach, No. 8:03-CR-457-T-23TGW (M.D. Fla. June 10, 2004)***

James Kovach of Goldvein, Virginia, has entered a plea of guilty to two misdemeanor counts of violating the Endangered Species Act. The charges arose from his illegal importation of a protected species of orchid from Peru in June 2002. When he entered the country he was carrying over 300 orchids, including at least one species of a previously unidentified species of the

Phargmipedium. All species of this genus are protected under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

Kovach then took the specimens to the Marie Selby Botanical Gardens in Sarasota, Florida, an educational facility specializing in epiphytes. Both the gardens and its Director of Systematics, Wesley Higgins, have been found guilty of violating the Endangered Species Act in connection with these specimens.

[For further information, contact AUSA Michael Runyon at (813) 274-6323 or Elinor Colbourne, DOJ, at (202) 305-0205.]

**Water*****United States v. Balfour Beatty Construction, Inc., No. 2:04-M-27 (E.D.N.C. May 17, 2004)***

A subsidiary of the United Kingdom company Balfour Beatty PLC has pled guilty to violating the Rivers and Harbors Act and the Clean Water Act. In its plea, Balfour Beatty Construction admitted that it had acted without an Army Corps of Engineers permit when it dredged a portion of the Croatan Sound in North Carolina in October 2002 and then deposited spoil into the Sound.

The company's employees temporarily removed a load-out trestle that had been constructed in shallow waters near Manns Harbor as part of the Virginia Dare Memorial Bridge project spanning the Croatan Sound from Manns Harbor to Manteo, North Carolina. They then used backwash from a tugboat propeller to cut a channel next to a bridge trestle in order to get a crane to the site. As a result, 5,500 cubic yards of dredged spoil was expelled from the channel and deposited on 8.2 acres of habitat on the sound bottom.

[For further information, contact AUSA Banu Rangarajan at (919) 856-4530.]

## Sentences

### Air

#### ***United States v. Marc M. Harris, No. 03-20347-CR-COHN (S.D. Fla. May 21, 2004)***

The federal district court in Ft. Lauderdale, Florida, has sentenced Marc Harris to serve seventeen years in prison, pay a federal fine of \$20,324,560, and pay the Internal Revenue Service \$6,588,949 in restitution for his conviction on charges of defrauding the IRS, conspiracy to commit money laundering, and evading federal excise taxes for smuggling chlorofluorocarbon (CFC) refrigerant into the United States.

Testimony at trial indicated that Harris was the mastermind behind the scheme to evade corporate and personal income taxes and excise taxes by setting up fictitious entities, shell companies, and off shore accounts to launder the money from the smuggling enterprise.

[For further information, contact Shelly L. Goldklang, DOJ, at (202) 616-9832.]

### Air (Asbestos)

#### ***New Hampshire v. Kevin Craffey, No. 03S62 & 03S64 (Super. Ct. Coos County May 21, 2004)***

The owner of the Mountain View Grand Resort in Whitefield, New Hampshire, was recently sentenced to two months' jail time and \$150,000 in forfeiture for performing an unlicensed removal of asbestos from the hotel. He was also ordered to pay \$150,000 to the Asbestos Management and Control Fund of the New Hampshire Department of Environmental Services. Craffey, who spent four years and \$20 million to restore the property, admitted that he had failed to obtain permits prior to removing and disposing of the asbestos.

Craffey was also sentenced to complete 150 hours of community service in Coos County and ordered to comply with all other environmental regulations pertaining to the hotel and its property.

Nearly a dozen government agencies participated in the investigation, including U.S. EPA, the Massachusetts State Police, and local police departments.

[For further information, contact New Hampshire SAAG Jennifer Patterson at (603) 271-3679.]

### Endangered Species

#### ***United States v. Mariusz Chomicz, No. 03-CR-20915 (S.D. Fla. May 21, 2004)***

The president of a caviar company in Poland pled guilty and was sentenced to thirty months in prison for his part in a caviar smuggling conspiracy. Mariusz Chomicz admitted that he purchased the caviar on the black market in Poland and then caused couriers to be hired to smuggle the caviar into the United States in suitcases. Once in the country, others arranged to pick up the couriers and put them up in a hotel. The caviar was then sold to a Miami company that used forged U.S. Fish & Wildlife Service import licenses and false invoices. All species of sturgeon are protected under the Convention on International Trade in Endangered Species and, in the United States, under the Endangered Species Act.

Chomicz was arrested at the Newark, New Jersey, airport when he was attempting to leave the country.

[For further information, contact Georgeann Cerese at (202) 305-0225.]

***United States v. Bert E. Jenkins, No. CR035743***  
**(W.D. Wash. May 18, 2004)**

Bert E. Jenkins of Ocean Park, Washington, has been sentenced to six months' home detention and ordered to perform forty hours of community service for violating the Lacey Act, which prohibits the transport of wildlife that was taken in violation of federal law. The green sea turtle is protected under the Endangered Species Act.

Jenkins collected the sea turtle from the beach in February 2001. Before wildlife officials could arrive to collect the turtle and take it for care, Jenkins and another individual took the turtle, shot it in the head with a nail gun and, later, with a .22 caliber rifle. Jenkins then cut the turtle out of its shell, discarded the carcass, and kept the shell.

[For further information, contact AUSA Micki Bruner at (206) 553-7970.]

**Hazardous Waste**

***State [New Jersey] v. David Solow, No. 00-12-00166-S (Super. Ct. Bergen County Feb. 24, 2004)***

David Solow was recently sentenced to serve 180 days in jail and pay \$6,494 in restitution and a \$3,000 fine for abandoning drums of photographic waste material from his defunct photo service business in a public storage facility. Solow will serve five years' probation after he completes his jail sentence.

[For further information, contact New Jersey DAG Robert Brass at (973) 599-5934.]

**Water**

***State [New Jersey] v. Tunnel Barrel and Drum and Anthony Urcioli, Nos. 03-10-01990A & 01991A (Super. Ct. Hudson County Jan. 9, 2004)***

Anthony Urcioli, who owns Tunnel Barrel and Drum Company, and the company have each been sentenced to two year probationary terms and to the payment, jointly and severally, of a \$25,000 fine and \$10,000 in restitution. Urcioli admitted that his employees cleaned out 55-gallon drums containing residual chemicals and flushed the contents into a storm drain that flows into Berry's Creek in the Meadowlands and then into the Hackensack River. Lab analyses showed that the contents of the drums included a variety of toxic chemicals. The restitution will be paid to the Hackensack Riverkeeper, a non-profit organization dedicated to cleaning up the river and restoring its watershed.

[For further information, contact New Jersey DAG Robert Brass at (973) 599-5934.]

***United States v. Terry P. LeBlanc, No. 03-60049***  
**(W.D. La. May 20, 2004)**

Terry LeBlanc was recently sentenced to serve twenty-one months' imprisonment after he was found guilty of illegally filling wetlands. He will also serve twelve months' supervised probation and pay a \$3,000 criminal fine. LeBlanc dumped construction debris and roofing shingles into wetlands located in the Lafayette, Louisiana, area. A subsequent investigation revealed that this was not an isolated incident.

[For further information, contact AUSA Howard Parker at (337) 262-6618.]