Vol. 19 No. 2 **MARCH 2004**

Inside . . .

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 CC-83138301, 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:

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

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 Dominique Alexander 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.*

INSTITUTIONAL CONTROLS: THE CONVERGING WORLDS OF REAL ESTATE AND ENVIRONMENTAL LAW AND THE ROLE OF THE UNIFORM ENVIRONMENTAL COVENANT ACT, Part II

By

Amy L. Edwards*

[Editor's note: The first part of this article was presented in the February 2004 issue of the NEEJ. This portion reviews the ASTM Guidance Document, federal and state initiatives on institutional controls, and the NCCUSL effort and presents some transactional and enforcement issues that are presented by the developments that the author has discussed.]

IV. The ASTM Guidance Document

Recognizing that risk-based corrective action is not likely to succeed unless all parties have confidence in the viability and reliability of institutional controls, the ASTM authorized efforts beginning in 1997 to develop a Standard Guide regarding institutional controls. The active members of the drafting committee included representatives of the EPA, DOD, NRC, DOE, several states (particularly Oregon, Wisconsin, Massachusetts, and Virginia), industry, environmental attorneys, and consultants. These efforts culminated with approval of the Standard Guide on the Use of Activity and Use Limitations, Including Institutional and Engineering Controls (ASTM E 2091 or the Standard Guide) in April of 2000.

While not binding, ASTM E 2091 describes the existing types of institutional controls and provides a framework for analyzing which tools are most appropriate in a given cleanup situation. It also outlines a process for implementing these controls during the environmental cleanup process. ASTM E 2091 emphasizes the importance of evaluating the feasibility and appropriateness of potentially applicable institutional controls at many different points during the risk-based corrective action process. It also states that institutional controls should be considered to be an integral part of the remedial action process and should be documented in the Record of Decision or similar document governing the cleanup. The Standard Guide cautions that institutional controls will likely be necessary as long as residual contamination is present above levels that are unsafe for unrestricted use.

ASTM E 2091 describes eight overall objectives to be achieved by institutional controls:

- To eliminate potential pathways of exposure to residual contamination.
- To identify exposure assumptions that should form the basis for each institutional control.
- To provide notice of the existence of the institutional control to interested parties, such as lenders, prospective purchasers, utilities, and the like.
- To identify the performance objectives and goals of each institutional control.
- To identify the activities and uses which are permissible on the site.
- To describe the activities and uses which should not occur in the future on the site (absent additional cleanup).
- To specify long-term performance standards.
- To specify long-term stewardship objectives and who will be responsible for conducting and paying for those activities.

The Standard Guide provides diagrams explaining how this framework for analysis should work in actual practice. For example, if the property owner is dealing

---

* Amy Edwards is a partner in Holland & Knight, LLP. She would like to thank two individuals at Holland & Knight for their assistance in preparing this article, law students Allison Feierabend and Consuelo Hernandez. The author can be reached at aeedwards@hklaw.com

with a contaminated site that has metals and volatile organic compounds (VOCs) in the soils, and semi-volatile organic compounds (semi-VOCs) in the ground water, the property owner would need to examine (1) each chemical of concern, (2) each potentially complete exposure pathway, and (3) each potential receptor, to determine which institutional controls (or series of institutional controls) would need to be put in place to prevent unacceptable exposures to the residual contaminants. The owner would begin by examining the metals in the soils and determining the potential pathways of exposure (inhalation, dermal exposure, or ingestion) and the potential receptors (construction workers, office workers, residential users, or children in day care). The property owner would then need to determine which tools were potentially available in that jurisdiction to "cut off" those exposures pathways. Could a municipal ordinance be imposed to prohibit excavation without a city permit? Could a permit or order be issued that would prohibit all excavation unless the applicant obtains prior environmental agency approval? Does the state have a statute that allows the property owner to record either a deed notice or a deed restriction on the site? If that state does not have a statute, is the state's property law supportive of restrictive covenants between the property owner and the state agency, or the property owner and a third party? Would it make sense to post signs or fences around the site advising the public not to dig on the site?

A similar analysis would then need to be conducted for the VOCs in the soils, and then for the semi-VOCs in the ground water.

Upon completion of this preliminary analysis, the ASTM Standard Guide then recommends that the user apply various screening and balancing criteria to determine which institutional control works "best" for each contaminant, each exposure pathway, and each potential receptor. The suggested screening criteria are effectiveness, amenability to integration with property redevelopment plans, implementability, technical practicability, and cost prohibitiveness. The suggested balancing criteria include long-term reliability and durability, acceptability to stakeholders, and cost effectiveness.

ASTM E 2091 describes the types of institutional controls that are currently available and describes their relative strengths and weaknesses. The Standard Guide also discusses "best practices" and the types of concerns that the practitioner should examine when deciding what type of institutional control might be appropriate and what types of implementation issues should be examined.

Finally, in the appendix, the ASTM Standard Guide describes other issues that might be relevant, including the role of financial risk allocation mechanisms (such as environmental insurance), transactional issues (such as the need to obtain the property owner's consent prior to recording a deed restriction in the chain of title, and the need to clarify whether the landlord or tenant, or both, have primary responsibility for implementing and maintaining an institutional control), potential stigma issues, and potential takings claims.

V. Federal and State Initiatives on Institutional Controls

A. *Federal Initiatives*

Recognizing that more guidance was needed in this area, the EPA has issued a guidance document and has held a series of internal workshops in order to improve the level of understanding and consistency of decision-making that involves implementing institutional controls at contaminated sites. The "Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Sites" (the Site Manager's Guide), issued in September of 2000, provides definitions, describes the types of institutional controls that are available, explains a process for evaluating institutional controls, and describes the site manager's role after the institutional controls have been selected. The Site Manager's Guide also includes a matrix listing the types of institutional controls, as well as the relative benefits, limitations, and enforcement issues associated with each type of control.

EPA held numerous internal workshops during 2001 to identify common and recurrent issues such as training, documentation of institutional controls, life cycle costs, and tracking mechanisms. The EPA is planning to issue other guidance documents shortly, including a Guide to Implementing, Monitoring and Enforcing Institutional Controls,[1] a Guide on Tracking Systems, and a Guide on Life Cycle Costs. Finally, EPA is funding numerous pilot studies to evaluate other mechanisms for implementing, monitoring and enforcing institutional controls.[2]

The Department of Defense has also issued a series of guidance documents relating to institutional controls. The Department acknowledges the important role that institutional controls play in the cleanup of active and closed military facilities, but has taken the position that obligations relating to institutional controls should not be incorporated into legally-binding documents.[3]

The Department of Energy (DOE) has taken an active role in evaluating the effectiveness of institutional controls at closed DOE sites because of the long-term stewardship needs associated with these facilities. DOE established an Office of Long-Term Stewardship and issued a Final Long-Term Stewardship Study in October of 2001. The report was prepared to comply with the terms of a settlement agreement in *Natural Resources Defense Council v. Richardson*. DOE claims to have taken steps to institutionalize sound decision-making with regard to the implementation, maintenance and enforcement of institutional controls, including the following:

- Assigning responsibility for long-term stewardship to program offices with landlord responsibilities at each site;
- Managing the long-term stewardship information center;
- Providing training to DOE contractors and staff;
- Developing guidance to comply with long-term stewardship requirements;
- Preparing guidance on the development of site specific long-term stewardship plans and performance objectives;
- Developing guidance to address coordination between DOE and local land use planning officials;
- Revising the Life Cycle Asset Management process to account financially for long-term stewardship costs.

B. *State Initiatives*

Many states have promulgated new statutes or regulations to improve their ability to implement reliable and enforceable institutional controls. One key example is the statute promulgated by the state of Colorado in April of 2001. S.B. 1-145, which became effective on July 1, 2001, created a statutory environmental covenant that is directly enforceable by the Colorado Department of Public Health and the Environment. This covenant runs with the land and is enforceable against subsequent owners and tenants. The Department has taken the position that its statute creates a regulatory interest that runs with the land, rather than a property interest. Local ordinances may be used, particularly where there are off-site plumes of contamination, if the local government and the Department enter into an intergovernmental agreement and the ordinance imposes the relevant use restriction. The Colorado statute requires that notice of the covenant be given to all persons holding an interest of record and all persons known to have an unrecorded interest. The Department may enforce the covenant by issuing an administrative order requesting compliance or by filing a suit for injunctive relief, and any other person with an interest in the covenant may also sue for injunctive relief.

Massachusetts has a comprehensive program that takes a slightly different approach. In 1983, it enacted Chapter 21E of the Massachusetts General

Laws, which created three different types of institutional controls: (1) a Grant of Environmental Restriction, which conveys a limited property interest to the state; (2) a Notice of Activity and Use Limitation (AUL), which is a deed notice rather than a legally enforceable contract or the conveyance of a limited property right to the state; and (3) environmental restrictions imposed by the state. The Notices of AULs have been used most commonly in Massachusetts because they are easy to implement, require no prior agency approval, and no subordination agreements. Both the Grant and the Notice must be filed in the Registry or with the Land Court. The Notice cannot be used to impose restrictions on ground water, but a Grant can.

California also has a comprehensive program that takes yet another approach. California has four distinct authorities that allow its state environmental agency to enter into institutional controls, plus some overarching general authority for institutional controls. The Health and Safety Code Division 20, Chapter 6.8, section 25355.5(a)(1)(c) authorizes the California Department of Toxic Substances Control (DTSC) to enter into land covenants that run with the land. Health and Safety Code Division 20, Chapter 6.5, section 25202.5, authorizes DTSC to require a property owner to record covenants imposing institutional controls as a condition of a permit or interim status. Another section of this chapter, Article 11, allows an area to be designated a hazardous waste property or a border zone property through a formal process. Alternatively, DTSC and the property owner may enter into a covenant pursuant to section 25222.1. In addition, Health and Safety Code Division 20, Chapter 6.85, provides that institutional controls may be established at sites going through the state's Expedited Remedial Action Reform Act. Finally, California also relies on Civil Code section 1471 to justify its imposition of institutional controls on contaminated sites. This code section generally provides that a property owner may enter into a covenant agreeing to refrain from doing certain acts on his land, and thereby bind future owners, if the instrument containing the covenant is labeled "Environmental Restriction" and recorded in the local land records.

VI. The NCCUSL Effort

The National Conference of Commissioners on Uniform State Laws (NCCUSL) is in the process of drafting a model environmental covenant law that could ultimately be adopted in all fifty states. The draft Uniform Environmental Covenants Act (UECA) would eliminate many of the common law impediments that are undermining regulators' confidence in current tools. More specifically, the draft Act addresses and seeks to eliminate common law impediments to the implementation and enforcement of restrictive covenants, such as the requirement that there be vertical and horizontal privity; that the benefited real estate be "appurtenant;" and that the restriction "touch and concern" the land. In addition, the common law has traditionally frowned upon negative restrictions, as well as upon covenants that impose affirmative obligations (spurious easements). Affirmative obligations are important in the brownfields context, where the regulatory agency might require the property owner or responsible party to inspect an asphalt cap annually or to operate a ground water pump and treat system. Finally, under the common law, most restrictive covenants automatically expire after a set period of time, such as forty or sixty years, unless re-recorded. The draft Act would exempt environmental covenants adopted pursuant to the Act from the Marketable Title Act, thereby eliminating this obstacle. To be exempted, notice of the environmental covenant must be provided by means of visible evidence *(i.e.,* signs or monuments), maps, a land recording system, or similar means.

In addition, any environmental covenant adopted pursuant to the Act could not be extinguished by means of issuance of a tax deed, foreclosure of a tax lien, adverse possession, eminent domain, lack of enforcement, or similar common law doctrines. The covenants would be perpetual unless limited by their terms to a specific duration, or unless modified or terminated in accordance with the draft Act.

The draft Act recognizes that environmental covenants would be adopted as part of an overall environmental response project conducted pursuant to Federal or state

environmental law (*e.g.*, CERCLA, RCRA, or a state voluntary cleanup program) under the direction and supervision of the appropriate environmental regulatory agency. The draft Act would encourage the environmental agency to communicate and cooperate with local governmental agencies who have authority over zoning and land use. If the environmental covenant needs to impose more stringent requirements than those imposed by local land use law, that can be accomplished under the draft Act. The decisions made pursuant to the draft Act would not, however, otherwise displace or preempt local zoning or land use law.

Real estate and environmental practitioners need to be aware of how the draft Act would work in practice. As currently drafted, the following actions would need to occur:

- The holders of all property interests whose interests would be subordinated to the covenant would need to be a signatory to the environmental covenant. Depending upon the nature of the restriction, these interest holders could include the property owner, lessees, utilities, holders of mineral interests, and lenders.

- The regulatory agency could require each party to a covenant to incorporate the terms of the covenant into all leases, licenses, and similar agreements.

- The regulatory agency could require the owner to provide copies of the covenant to any affected local government agency.

- The regulatory agency could require that it be provided with notice of any applications for building permits, proposed changes in land use, or any proposals to excavate, trench, install wells, or use ground water.

- The regulatory agency could require subordination of prior interests in the real estate.

- The property owner would be encouraged to conduct annual inspections and to certify that the environmental covenant is continuing to work as intended.

- The environmental agency could elect to maintain a registry containing the complete text of all environmental covenants adopted pursuant to the Act, as well as any modifications or terminations thereto and any recorded notices.

- The parties would be required to record either a notice of the covenant, or the complete covenant, in the local land records in order for it to be effective.

NCCUSL hopes to present a final draft of the model law to the full Conference for approval in the summer of 2003. The model law would then need to be presented to each state legislature for adoption into law in that state.

VII. Unique Transactional and Enforcement Issues Presented by the Foregoing Developments

In this brave new world, real estate and environmental practitioners need to work closely together to ensure that any institutional controls that are implemented at a contaminated site make sense from both a real estate and environmental perspective. Attorneys need to be aware of the limitations of current tools in many jurisdictions. This Article will briefly describe the types of transactional and enforcement issues that are likely to arise in the foreseeable future:

A. *Transactional Issues*

1. All Appropriate Inquiry[4]

Many attorneys have assumed that existing institutional controls will be detected during routine environmental due diligence, but they are sadly mistaken. The ASTM "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," E 1527-00 (ASTM 1527), specifies that the *owner*, not the consultant, is responsible for providing information relating to title, and institutional controls are considered to be an issue relating to title. The user and the consultant may agree that the consultant

is required to look for this information as part of the standard Phase I report, but the consultant is not required to do so otherwise. Prudent prospective purchasers and their lenders will insist that their consultants look for this information. In addition, to date, federal and state agencies have generally not maintained lists of sites using institutional controls, and consultants have generally not requested this information. In general, no one has examined the land records for evidence of institutional controls, either. This practice is likely to change as parties become more aware of the need to request this information, and as the states develop registries in accordance with section 231(b) of the Brownfields Amendments.[5] However, many state registries are not likely to contain information about sites that were cleaned up prior to 2002 where institutional controls were part of the remedy.

2. Reasonably Anticipated Future Land Use

In determining what type of cleanup is appropriate, it is critically important to understand what types of uses are reasonably likely to occur on the site in the future, and to reflect those assumptions in the institutional controls that are implemented at the site. It is also important that the responsible party and the environmental regulatory agency have early notice of any changes in those assumptions about future land use. The Colorado statute, and the draft UECA law, address this concern by recommending notice from the property owner or the local government of potential changes in zoning or land use law. This approach obviously places substantial new burdens upon both the property owner, the environmental regulatory agency, and the local governmental unit to understand why this information is important and to track it.

3. Evaluation of Best Available Legal Tools for Implementing ICs

Until the uniform model law is adopted, in most jurisdictions, real estate and environmental practitioners will be faced with the need to make the best out of clearly inadequate tools. They will need to carefully examine what tools are currently available to them in their jurisdiction; evaluate the potential exposure pathways and potential receptors for each chemical of concern; and then apply the screening and balancing criteria that are described in the ASTM Standard Guide. They will need to ensure that someone clearly has responsibility for maintaining the selected institutional control over time. If the control is being implemented in a jurisdiction where restrictions on land automatically expire after a given period of time, they will need to establish procedures for making sure that the restriction is re-recorded if needed. They will need to insist that someone involved in the real estate transaction (*e.g.,* the owner, the environmental consultant, the title company, or the lender) takes responsibility for determining whether institutional controls have been placed on a site.

4. Evolving Burdens on Landlords and Tenants

Recent federal, state and private initiatives, including the Colorado statute and the draft UECA law, have recognized the importance of having all parties who should be bound by the restrictions either being an actual party to the covenant or having those obligations incorporated into the lease or related legal instruments. This can be a somewhat contentious issue between landlords and tenants, particularly where some unrelated third party is the entity that is responsible for cleanup. For example, at the Industri-Plex Superfund site in Woburn, Massachusetts, the potentially responsible parties funded a trust to conduct the actual cleanup at the site. The trust entered into a Record of Decision with EPA and the state of Massachusetts where institutional controls were part of the remedy that allowed this Superfund site to be brought back into productive use. Actual implementation of the institutional controls has been contentious because of concerns about who should be ultimately responsible for ensuring that the controls are maintained and enforced over time. In the meantime, the new property owners have been requiring their "innocent" tenants to accept responsibility for inspecting and maintaining the institutional and engineering controls that have been put in place.

5. Recordation Issues

Records of Decisions and similar environmental cleanup documents tend to be voluminous and extremely technical. Existing state programs have some-

times required that these voluminous documents be recorded in the land records, which has not met well with land recording offices. Some states allow a simple notice instrument to be recorded. The draft UECA effort has suggested that a simple notice may be recorded, provided that the complete copy of the environmental covenant is available in the state registry. Whichever of these approaches is taken, it is important that the documentation, either as recorded in the land records or as available in the registry, communicate sufficient information about the sources of exposures, potential pathways of exposure, and likely receptors that future generations will fully understand why the restrictions were required in the first place, what harms were intended to be prevented, and who is most likely to be harmed if the restrictions are not followed.

6. Subordination Issues

An important consideration is whether prior interests, particularly those of a mortgagee, should be subordinated to the institutional control. The concern is that, if the mortgagee exercises its right to foreclose, the mortgagee could eliminate the restriction. The practical consideration is whether a mortgagee is likely to be willing to subordinate its interest and whether it may view the existence of an institutional control as reducing the value of its interest. Some states, such as Colorado and Massachusetts, have recognized this issue either by requiring subordination of prior interests or providing standard forms to accomplish this. The draft UECA encourages the parties and the regulatory agency to consider the need for subordination at a particular site.

7. Marketable Title Act Considerations

Until adoption of the draft UECA as a model law, and its enactment as law within a specific state, practitioners will need to understand any common law impediments within their state that may terminate restrictive covenants after a specified period of time (typically, forty to sixty years). In order to remain viable as long as it is needed, will the institutional control need to be re-recorded after a set period of time? Who will take responsibility to make sure that re-recordation occurs forty or sixty years from now? How will institutional knowledge of this obligation be maintained? Who will be responsible for further cleanup if the institutional control lapses?

B. *Enforcement Issues*

1. All Appropriate Inquiry

The Brownfields Amendments require parties who wish to avail themselves of the innocent landowner, contiguous property owner, or bona fide prospective purchaser defenses to CERCLA liability to conduct "all appropriate inquiry". This requirement has been present in the CERCLA statute since at least 1986, when the Superfund Amendments and Reauthorization Act (SARA) clarified that a potentially responsible party would need to be able to demonstrate that it had "no reason to know" because it had conducted "all appropriate inquiry" in accordance with section 101(35)(B) of CERCLA. In response to questions about what this language meant, the ASTM developed, through a consensus based process, the Standard Practice for Environmental Site Assessments, ASTM E 1527, which has gone through several iterations over the past ten years. It also developed a companion practice known as the Transaction Screen, E 1528.

Despite numerous attempts over the years to persuade EPA to issue guidance on "all appropriate inquiry" the EPA traditionally resisted these pressures. EPA was directed under section 223(2)(B)(ii) of the Brownfields Amendments to issue regulations defining the standards and practices which will constitute "all appropriate inquiry" by January 11, 2004. Congress provided EPA with some minimal criteria in section 223(2)(B)(iii) of the Brownfields Amendments, including the requirement to:

- Use an environmental professional;
- Interview past and present owners, operators, and occupants;
- Review historical sources of information;
- Search for recorded liens;

- Review Federal, state and local records regarding waste disposal practices, spills, underground storage tanks, and the like;
- Conduct a visual inspection of the facility and adjoining properties;
- Utilize any specialized knowledge;
- Evaluate the relationship between the purchase price and the value of the property;
- Utilize commonly known or reasonably ascertainable information about the property; and
- Consider the degree of obviousness of the likely presence of contamination.

EPA has announced that it is planning to initiate a negotiated rulemaking proceeding shortly to develop a proposed rule.[6]

One question is whether EPA will provide any direction about who has the obligation of discerning whether institutional controls have been placed on a property and whether it will direct the states to maintain this information in a readily retrievable form. As mentioned previously, despite misperceptions to the contrary, this information is not typically being retrieved during a routine ASTM Phase I ESA because the consultant has no affirmative obligation to look for this information. Similarly, title companies are not typically bringing this information to a property owner's or lender's attention because they frequently take exception to all environmental matters. Questions have been raised whether title companies, at a minimum, should be identifying in their title reports institutional controls that clearly restrict real property interests.

2. Who Has the Right to Enforce the Institutional Control

One of the factors that has driven the current efforts to improve the types of available institutional controls and their reliability, has been the regulatory agencies' concerns about who may enforce existing institutional controls. While proprietary controls have the advantage of "running with the land," common law doctrines have frequently prevented regulatory agencies from being a holder of these interests and have therefore deprived them of a direct right to enforce. Federal agencies have been reluctant to rely upon local government controls, such as zoning, because they have no direct right to enforce these controls and have concerns whether local government will have the financial and political ability to enforce the controls. Federal and state agencies have a direct right to enforce permits and orders, but recognize that these controls do not "run with the land" and thus could be inadvertently terminated in the event of a land transfer. The draft UECA would cure many of these concerns by specifying who may be "holders" and granting them a direct right under the statute to enforce the restrictions.

Unless a state has enacted a statute granting it direct rights of enforcement, or until passage of a model environmental covenant law in each state, these concerns will linger. Even innovative concepts like the Guardian Trust[7] will need to battle with this issue until better legislation is adopted in most of the states. The handful of existing state laws do not traditionally give an unrelated third party, such as the Guardian Trust, a direct right to enforce proprietary rights. Moreover, even though some jurisdictions, such as Pennsylvania, might not frown upon an unrelated third party holding a proprietary interest in the first instance, there is no assurance in the case law that the courts would uphold these restrictions upon a transfer of the property. Before the potential usefulness of the Guardian Trust could be evaluated as a potential solution on a nationwide basis, the common law of each jurisdiction would need to be examined to determine the likelihood that the courts in that jurisdiction would allow the restrictions to be enforced by an unrelated third party, such as a trust, holding an easement "in gross," and whether the courts in that jurisdiction would allow the restriction to "run with the land." The law of each jurisdiction would also need to be examined to determine whether restrictions on land automatically expire after a set period of time.

3. Release Reporting

In order to qualify for any of the three defenses to CERCLA liability set forth in the Brownfields Amendments, the party must comply with all legally required release reporting requirements. As practitioners in this field know, release reporting obligations can be a fairly murky area. Many statutes provide that a release must be reported when a specified minimum quantity of a regulated material is released into the environment. As a practical matter, releases are frequently discovered during routine environmental due diligence, without any information about the quantity of material released. Parties hoping to qualify for one of the three CERCLA defenses mentioned above may want to report this condition, regardless of the lack of information about the quantity of material released, in order to preserve their ability to qualify for one of the CERCLA defenses. Property owners, on the other hand, are likely to resist such reporting unless it is unequivocally required out of concern that this purchaser is likely to "walk" and leave them with an open ended investigation or enforcement action. This concern has already arisen in some routine transactions where sellers have been unwilling to allow prospective purchasers to conduct Phase II intrusive work. Under circumstances where the Seller has denied the Purchaser the right to conduct additional due diligence, would the purchaser be considered to have conducted "all appropriate inquiry" under the Brownfields Amendments? Further guidance from EPA, or judicial decisions, will be needed to clarify this issue.

4. Not Impeding the Integrity and Effectiveness of Institutional Controls

Again, in order to qualify for one of the three CERCLA defenses under the Brownfields Amendments, the party must be able to demonstrate, by a preponderance of the evidence, that it has not impeded the integrity and effectiveness of institutional controls. Further EPA guidance is expected on this topic, but has not been issued to date. The agency appears to recognize that this language does not necessarily shift the entire burden for inspecting and maintaining the institutional control onto the new property owner or the contiguous landowner, but it presumably also does not condone ostrich-like behavior by these parties. Prospective purchasers and contiguous landowners will presumably have an obligation to seek out information about institutional controls and to have a clear understanding whether the responsible party, or they as the new or contiguous landowner, will have primary responsibility for complying with these controls. Sophisticated responsible parties are already trying to shift responsibility for complying with these obligations to the new or contiguous property owner. In addition, several of the state programs and the draft UECA law clearly anticipate that prospective purchasers and lessees will be required to assume some of these responsibilities by contract.

5. Continuing Liability of Responsible Parties

For the brownfields movement to succeed, responsible parties need to have firm assurances that they will not be held ultimately responsible for breaches or failures of institutional controls if they have placed legitimate restrictions in place and communicated the existence of those controls to future land owners and users. The Brownfields Amendments do not contain any clear assurances on this issue. Sophisticated responsible parties understand that they should incorporate language into the legal instruments transferring title requiring that they be notified, and their approval obtained in writing, in the event that future users intend to change the land use or to modify or terminate the restriction, although this would not necessarily absolve them of all liability.

6. Who Should be Bound by the Institutional Control?

The draft UECA law places numerous burdens and responsibilities upon the property owner. Who should be considered to be an "holder" is still under discussion. Clearly, anyone whose actions could cause the restrictions to be violated should be bound by the terms of the covenant, either directly or by contract. On the other hand, one doesn't want to encumber real estate transactions unduly by requiring the signature of every holder of every property interest, no matter how small, before changes in land use or zoning can be requested, or before the restrictions can potentially be modified or terminated. A balance needs to be struck between these competing interests.

7. Stigma

The presence of contamination on real property has frequently led to claims that the value of the property has been diminished and that there is "stigma" because of the contamination. Numerous cases have been fought in the court house with mixed results. It is important to recognize that brownfields are not likely to be redeveloped unless owners are allowed to apply risk-based corrective action principles and allow some residual contamination to remain in place. Some experts have argued that there is no stigma to the property if the property is allowed to operate at its highest and best use, and the presence of a reliable and effective institutional control is frequently the tool that is necessary to make this happen.

8. Potential Takings Concerns

Regulatory agencies have expressed some concern that the imposition of institutional controls on contaminated property could be viewed by the property owner as a "takings" without just compensation. Existing case law suggests that this issue does not need to be a concern, provided that the controls are tailored to be no more restrictive than necessary and provided that there is a process for modifying or terminating the controls when they are no longer needed. A governmental regulation will constitute a taking when it does not substantially advance a legitimate state interest, or when it denies the property owner of an economically viable use of his land.[8] Frequently, institutional controls are a necessary tool to facilitate the economically viable use of land where that land has previously been underutilized or abandoned. There may be certain circumstances where just compensation is required in order to compensate a property owner for a restriction on the use of his land.[9] Only time will tell if and when any court will find that the placement of an institutional control on contaminated land constitutes a "takings" that merits "just compensation."

9. Potential Challenges to the Viability of Existing Institutional Controls

In light of the issues that have been examined by the NCCUSL drafting committee as it has developed a model environmental covenant law, one has to question whether institutional controls that have been adopted in the past addressed all of the key real estate and environmental issues and whether they will remain viable and enforceable as long as they may be needed. The draft UECA provides a mechanism for existing institutional controls to "opt in" to the new system. There may be transactional reasons why parties do not want to do so. On the other hand, it would behoove all parties to a loan, lease, or sale to examine carefully the true viability of institutional controls that have been adopted prior to promulgation of the model law in their state. Most state voluntary cleanup programs provide that any liability protections, generally given in the form of a No Further Action letter or Certificate of Satisfactory Completion, are either invalid or subject to a regulatory re-opener if any condition of the NFA letter or Certificate is violated. Frequently, the obligation to implement institutional controls is a clear condition of the NFA letter or the Certificate.

VIII. Conclusion

The success of the brownfields movement will ultimately depend upon whether interested stakeholders believe that institutional controls can be implemented, monitored and enforced as long as they are needed. The success of this movement will also depend upon whether the processes and procedures for implementing institutional controls become too burdensome from a real estate perspective. Finally, the ultimate success of the brownfields movement will depend upon whether responsible parties can become comfortable that, if they cleanup a site to applicable Federal or state requirements, and implement viable institutional controls, they will not be brought back into the "strict, joint and several" liability scheme when some subsequent owner or user of the site blithely ignores the restrictions that have been recorded against the site.

Some progress is being made in addressing these concerns. Central players in the environmental agencies and in industry understand that more thought needs to be given throughout the remedy selection process to selecting, implementing, maintaining and enforcing appropriate institutional controls. Environmental practitioners are beginning to talk with real estate practi-

tioners to be sure that the controls they have in mind make sense from a real property perspective.

ASTM E 2091 and guidance issued by federal and state regulators have helped all stakeholders better understand the types of available tools, how to evaluate the relative effectiveness of those tools, and how those tools may have fallen short of their ultimate performance objectives in the past. These efforts need to be continued and expanded to a broader market, such as the real estate and financial communities. Both ASTM and EPA have initiated training programs, and these types of programs are to be encouraged and expanded.

The draft model law effort undertaken by NCCUSL will go a long way toward getting past the obstacles presented by the common law in most jurisdictions. Support from all interested stakeholders will be needed to ensure that this model law, once approved, is introduced and enacted in state legislatures.

Finally, various initiatives are underway in the private sector, and federal and state regulators should encourage the development and evolution of these alternative mechanisms. As we have seen from the evolution of environmental database companies since the early 1990s, the financial incentives in the private marketplace can be a very potent mechanism for filling gaps in the regulatory system. The private sector can play a critical role in making sure that institutional controls are properly implemented, monitored and maintained over time. Systems that are being developed at the present time include the Guardian Trust, a non-profit trust that would assume responsibility for monitoring institutional controls; Terradex, an internet-based tracking system that would link critical information about the contaminants and exposure pathways at a site to the local permitting agency; and consultants who specialize in auditing the institutional controls that have been placed on a site. Federal seed money could substantially advance these nascent efforts.

ENDNOTES

1. These fact sheets and related documents should be posted on EPA's IC website when completed. *See* <http://www.epa.gov/superfund/action/ic/index.htm>.

2. Two examples include the Guardian Trust, a section 501(c)(3) organization that would assume responsibility to monitor and enforce institutional controls once they have been implemented at a site, and One Call Systems, where local utilities would coordinate with the state environmental agency to determine whether a restrictive covenant has been placed on a site where intrusive activities are planned.

3. *See*, *e.g.*, INTERIM GUIDANCE ON ENVIRONMENTAL RESTORATION RECORDS OF DECISION (June 4, 2002); U.S. AIR FORCE, POLICY AND GUIDANCE ON REMEDY SELECTION DOCUMENTATION IN RECORDS OF DECISION (Jan. 23, 2002).

4. The current version of ASTM Standard Practice E 1527-00 [hereinafter ASTM E 1527-00] does not address business risk considerations such as institutional controls.

5. *See* 42 U.S.C. § 9628(b)(1)(C)(2000).

6. The EPA announced in a Federal Register notice published March 6, 2003, that it would be initiating a negotiated rulemaking proceeding to develop the regulations about "all appropriate inquiry" that are required under section 223(2)(B) of the Brownfields Amendments. *See* 68 Fed. Reg. 10675 (Mar. 6, 2003). In the meantime, EPA will permit the 1997 version of the ASTM E 1527 to be used as a basis for establishing that "all appropriate inquiry" was conducted. *See* 68 Fed. Reg. 3430-33 (Jan. 24, 2003)

7. The Guardian Trust is a section 501(c)(3) that has received funding from EPA and the State of Pennsylvania to evaluate the potential role of a non-profit trust organization in monitoring and enforcing institutional controls.

8. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

9. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

DECISIONS

Air

EPA Has Authority to Override State's BACT Determination: ***Alaska Department of Environmental Conservation v. Environmental Protection Agency et al.,*** **No. 02-658 (U.S. Jan. 21, 2004)**

Background

This lawsuit involved the Clean Air Act's (CAA) Prevention of Significant Deterioration (PSD) program. Under that program, any major emitting facility in attainment or unclassifiable areas must have a PSD permit prior to construction or modification. Teck Cominco Alaska, Inc., operates a zinc concentrate mine, the Red Dog Mine, approximately one hundred miles north of the Arctic Circle in northwest Alaska. In 1996, it applied for a PSD permit to increase electricity generation through a standby generator in order to expand zinc production.

Under the CAA, a facility receiving a PSD permit must apply best available control technology (BACT) for each pollutant, in this case nitrogen oxide. BACT means:

> [A]n emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for each facility through application of production processes and available methods, systems and techniques . . . . In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to . . . [emission standards for new and existing stationary sources].

42 U.S.C. § 7479(3).

As the permitting authority, the Alaska Department of Environmental Conservation (ADEC) ultimately determined that a "Low NOx" technology qualified as the BACT for the PSD permit. When it issued the final permit, it had already received notice that EPA was concerned that its finding of BACT was not supported by an analysis of alleged adverse economic impacts that Cominco might suffer if it were required to install another technology. This technology, called selective catalytic reduction (SCR), is supposed to reduce nitrogen oxide emissions by ninety percent as opposed to the thirty percent reduction achieved by Low NOx technology. In reply, ADEC noted that requiring SCR for a rural Alaska utility would lead to a twenty percent increase in costs and that requiring SCR would create an adverse effect on the mine's "unique and continuing impact on the economic diversity of th[e] region" and on the venture's "world competitiveness."

EPA then issued an order, under 42 U.S.C. §§ 7413(a)(5) and 7477, prohibiting ADEC from issuing a PSD permit to Cominco "unless ADEC satisfactorily documents why SCR is not BACT" for the generator. Eventually, it issued an order prohibiting Cominco from acting on ADEC's PSD permit but allowing limited summer construction. In July 2003, ADEC granted Cominco a PSD permit with SCR as BACT with the proviso that if the Supreme Court decided in favor of Alaska in this lawsuit, SCR would cease to be BACT.

Alaska appealed EPA's order to the U.S. Court of Appeals for the Ninth Circuit, which held that EPA had properly exercised its discretion in issuing the orders to ADEC under the CAA. The Supreme Court granted certiorari.

Holding

Section 113(5) of the CAA states, in part:

> Whenever, on the basis of any available information, the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the chapter relating to the construction of new sources or the modification of existing sources, the Administrator may—(A) issue an order prohibiting the construction or modification of any major stationary source in any area to which such requirement applies; . . .

42 U.S.C. § 7413(5)(A). Section 167 states:

> The Administrator shall, and a State may, take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part, or which is proposed to be constructed in any area designated pursuant to section 7407(d) of this title as attainment or unclassifiable and which is not subject to an implementation plan which meets the requirements of this part.

42 U.S.C. § 7477.

The issue, according to the Court, was whether EPA's oversight role includes ensuring that a state's BACT determination is reasonable in light of the statutory guidelines.

It is clear that, under the CAA, the permitting authority exercises initial responsibility for identifying BACT. The agency reads the statute as giving it the authority to ensure that the state's choice is consistent with the statute. The Court agreed. The statutory definition of BACT requires selection of a technology that results in the "maximum" reduction of a pollutant "achievable for [a] facility" in view of "energy, environmental, and economic impacts, and other costs." 42 U.S.C. § 7479(3). EPA argued that the state's discretion in designating BACT was constrained by CAA's strong normative terms "maximum" and "achievable."

EPA also noted that its oversight authority was essential to restrain interjurisdictional pressures, a congressional concern in passing the CAA. This concern, according to EPA, is reflected in the House Report:

> Without national guidelines for the prevention of significant deterioration a State deciding to protect its clean air resources will face a double threat. The prospect is very real that such a State would lose existing industrial plants to more permissive States. But additionally the State will likely become the target of "economic-environmental blackmail" from new industrial plants that will play one State off against another with threats to locate in whichever State adopts the most permissive pollution controls.

H.R. Rep. No. 95-294, p. 134 (1977).

The Court acknowledged that EPA's interpretation of its authority in this regard does not qualify for *Chevron* deference; nevertheless, the Court accorded EPA's reading of the statute "respect." *See Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler,* 537 U.S. 371, 385 (2003).

ADEC argued that the statutory definition of BACT clearly assigns the permitting authority the determination of which control technology qualifies as "best available." EPA's oversight authority is limited to ensuring that a permit that requires a BACT limita-

tion does, in fact, have one. The Court answered: "We fail to see why Congress, having expressly endorsed an expansive surveillance role for EPA in two independent CAA provisions, would then implicitly preclude the Agency from verifying substantive compliance with the BACT provisions . . . ." Slip op. at 24. However, EPA's role, according to the Court, is limited to ensuring that the BACT determination is based on a reasoned analysis.

ADEC also drew the Court's attention to 42 U.S.C. § 7475(a)(8) where the CAA expressly requires, in a limited number of cases, EPA approval of a state permitting authority's BACT determination before a facility may be constructed. ADEC argued that, if Congress had intended EPA to have the oversight it had exercised in this case, it would have expressly mandated agency approval of all, not just some, BACT determinations. The Court stated that ADEC's argument overlooked the difference between a statutory requirement and a statutory authorization. In this case, Congress gave EPA the authorization to issue a stop order when the agency determines a state's decision is unreasonable.

ADEC also argued that, even assuming EPA has the oversight authority that it exercised in this case, it may be exercised only through state administrative and judicial processes. Should the court deem that EPA may determine that a state's BACT finding is unreasonable, it could come in at any time — even years later — and invalidate a BACT determination. The Court refused to read the "uncommon regime" of requiring a federal agency to enforce federal law solely in state court into the CAA. The Court also was "confident" that EPA would not engage in inequitable conduct in bringing an enforcement action or issuing an order in an untimely manner.

The Court also addressed the argument that the agency gains an unfair advantage because, in allowing it to exercise a stop-construction order, the burden of proof shifts to the state permitting agency. However, the Court held that, whether EPA chooses to issue an order or to initiate a civil action, the production and persuasion burden remains with EPA to show that an agency's BACT determination was unreasonable.

Finally, the Court held that EPA did not act unreasonably in finding that the BACT determination lacked a tenable foundation. The Court applied the Administrative Procedure Act and inquired whether EPA's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Given the facts that ADEC found, the Court held that its acceptance of Low NOx as BACT was unreasonable.

The Court emphasized that ADEC might still revisit the BACT determination. During the permitting process, EPA repeatedly told ADEC that it was open to the agency's preparing an appropriate record supporting its selection of Low NOx as BACT. During oral argument, EPA counsel reaffirmed that the agency would reconsider the matter should such a record be prepared.

[Editor's note: This was a 5–4 decision. J. Kennedy, writing for the dissent, opined that the CAA does not give EPA a broad oversight role to ensure that a state's BACT determination is reasonable. Commenting on EPA's argument that it needs oversight authority to prevent a "race to the bottom," the dissenting opinion stated:

> Whatever the merits of these arguments as a general matter, EPA's distrust of state agencies is inconsistent with the Act's clear mandate that States bear the primary role in controlling pollution and, here, the exclusive role in making BACT determinations. . . . States are more responsive to local conditions and can strike the right balance between preserving environmental quality and advancing competing objectives.
>
> . . . .
>
> The presumption that state agencies are not to be trusted to do their part is unwarranted in another respect: EPA itself said so. As EPA concedes, States, by and large, take their statutory responsibility seriously, and EPA sees no reason to intervene in the vast majority of cases. . . . In light of this concession, EPA and *amici* not only fail to overcome the

> established presumption that States act in good faith, . . . but also admit that their fears about a race to the bottom bear little relation to the real-world experience under the statute.

Dissent at 5–6.

The safeguard provided in the CAA to ensure that capricious BACT decisions do not occur, according to the dissent, is review through the state's administration and judicial processes. Contrary to the majority's view that it would be "unusual" for Congress to require a federal agency to enforce federal law through state procedures, the dissent noted that the CAA itself requires states to set up an administrative process so that any "interested party," including "representatives of the Administrator" may submit comments on issues such as "control technology requirements." 42 U.S.C. § 7475(a)(2). EPA did not follow that procedure in this case but, instead, after the comment period ended, sought to overturn Alaska's BACT decision. According to the dissent, "[r]equiring EPA to seek administrative and judicial review of a State's BACT determination, instead of allowing it to be overturned by fiat, avoids the anomaly of shifting the burden of pleading and of initiating litigation from EPA to the State." Dissent at 9. In regard to shifting the burden, the dissent commented that there is "little authority" for the Court's holding that EPA will still retain the burden of persuasion and production. The dissent also expressed concern that the Court's holding decisions by state courts would be subject to being overturned by a federal agency.]

CERCLA

Statute of Limitations Accrues When Remedial Action Plan Is Adopted: *California v. Neville Chemical Company,* No. 02-56506 (9th Cir. Feb. 10, 2004)

Background

Neville Chemical Company manufactured various chemical compounds for use at a facility in Santa Fe Springs, California. Subsequent investigations revealed soil and groundwater contamination at the facility. In 1986, the California Department of Toxic Substances Control issued a Remedial Action order, directing Neville to begin cleaning the site, initiate a remedial investigation and feasibility study, submit a draft remedial action plan, and implement that plan. In September 1989, the department told Neville of its obligation to pay an activity fee, as part of the cost of overseeing Neville's compliance. At that time, the department's policy was that a cooperative polluter's payment to California was limited to reimbursing the state for direct expenses. In 1992, this policy changed to one which required recovery of all the state's cleanup oversight expenses.

Between 1991 and 1994, Neville submitted a series of proposals and, in January 1993, the department directed Neville to implement the extraction and treatment system to treat the groundwater. However, the department declined to adopt the proposal as final, preferring to wait to see if the process was effective. It clearly indicated that the groundwater removal action might be included as part of the final Remedial Action, but could not yet be considered as such. Neville began to excavate three extraction wells in April 1994. In May 1995, the department approved the final remedial action plan (RAP). The groundwater containment and treatment system designed as a part of the interim removal action became a part of the RAP.

The state then brought a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) action to recover its oversight expenses in September 2000. Neville moved for summary judgment, arguing that the six year statute of limitations had expired. The district court denied the motion and entered judgment for the state. Neville appealed.

Holding

Section 113(g)(2) of CERCLA provides that the "initiation of physical on-site construction of the remedial action" triggers the statute of limitations. "Remedial action" is defined as:

> [T]hose actions *consistent with permanent remedy taken instead of or in addition to removal actions* in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate

> to cause substantial danger to present or future public health or welfare or the environment. . . .

42 U.S.C. § 9601(24) (emphasis added). "Removal" is defined as:

> [T]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary [sic] taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or the environment, which may otherwise result from a release or threat of release. . . .

42 U.S.C. § 9601(23).

It is clear that a particular activity could be classified as a temporary or "removal" action and as a type of "remedial action," depending on the circumstances of each case.

Neville contended that the excavation of the wells triggered the beginning of the limitations period. However, unless the excavation was "consistent with a permanent remedy," it was not a remedial action and, thus, not a trigger for the limitations period to begin. There was no activity undertaken as part of a permanent remedy until California adopted the RAP. Until that time, the state could not bring an action to recover its costs. When the excavation wells were dug, it was not known whether they would be a part of the final permanent remedy.

The court's conclusion that no action can be "remedial" until a final RAP is in place is consistent with the results reached by (if not the reasoning of) every other court of appeals that has considered this matter. In *Geraghty & Miller, Inc. v. Conoco, Inc.,* 234 F.3d 917, 927 (5th Cir. 2000), the court held that the installation of monitoring wells did not trigger the statute of limitations because it occurred before the government agency had issued its final approval of the remedial plan. The court in *United States v. Navistar International Transportation Corporation*, 152 F.3d 702, 712 (7th Cir. 1998), rejected a bright-line rule in which the final remedial design had to be approved before an action undertaken could be considered remedial. Nonetheless, the activity at issue had occurred after the final remedial action plan was chosen. Finally, the Tenth Circuit in *Colorado v. Sunoco, Inc.,* 337 F.3d 1233 (2003), had to classify activities taking place after EPA chose its permanent remedy as either "remedial" or "removal" actions by resorting to the descriptive aspects of the activities in question. The Ninth Circuit determined that if it had been faced with the same facts, it would have approached the issue in the same manner as the Tenth Circuit.

Since California brought suit within six years after the final remedial action was approved on May 8, 1995, the action was not barred by the statute of limitations.

CERCLA Does Not Provide Alternative Route to Rule 60(b) For Reopening Allocation Awards: *Kalamazoo River Study Group v. Rockwell International Corporation and Eaton Corporation,* Nos. 01-2453, 02-2192 (6th Cir. Jan. 14, 2004)

Background

This appeal involves the allocation of investigation and remediation costs involving the contamination by polychlorinated biphenyls (PCBs) of the Kalamazoo River in Michigan. The plaintiff, the Kalamazoo River Study Group (KRSG), is a consortium of former paper-mill owners whose facilities were, at least, partially responsible for the contamination. In June 2000, the district court found that Rockwell International Corporation was liable for some of the PCB contamination but that its contribution was very minimal in com-

parison to those of the KRSG and ruled that Rockwell was not liable for any investigation costs. The KRSG appealed that order, but it was affirmed by the circuit court in its holding that the district court had broad discretion to allocate the remedial investigation costs. *See Kalamazoo River Study Group v. Rockwell International Corporation,* 274 F.3d 1043 (6th Cir. 2001).

In 2000 and 2001, U.S. EPA discovered that the Rockwell facility had dramatically higher PCB levels than Rockwell had previously disclosed both to the agency and in its defense of the KRSG lawsuit. In some instances, the new PCB levels were more than one hundred times the previously reported levels. The agency reported that one PCB plume was then entering the Kalamazoo River and another was migrating towards the river. The KRSG brought a motion to reopen the district court's allocation order on September 21, 2001. The district court treated the motion as a Rule 60(b)(2) motion. Since it was brought three months after the limitations period for a Rule 60(b)(2) motion, the district court denied it. The KRSG appealed, arguing, *inter alia,* that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides an equitable basis for reopening an allocation order in the face of changed circumstances.

Holding

The KRSG argued that CERCLA allocation orders are subject to revision when the equities underlying the decision shift. The court disagreed. Although it is certainly true that CERCLA's contribution provision is guided by principles of equity, there is nothing in the statute that suggests that allocation decisions are exempt from the requirement that motions to alter judgments must be brought under Rule 60(b). In fact, the statute explicitly states that all claims "shall be brought in accordance with . . . the Federal Rules of Civil Procedure." 42 U.S.C. § 9613(f).

Basically, the KRSG's argument is that, because the district court relies on equitable factors in making an allocation decision, such a decision can always be changed if the underlying equities change. However, other decisions based on equitable factors, such as specific performance, are not subject to future revisions. The two decisions relied on by the KRSG did not persuade the court. In *Acushnet Company v. Coaters, Inc.,* 972 F. Supp. 41 (D. Mass. 1997), the district court issued a provisional judgment because it found insufficient evidence which prevented it from assessing "equitable shares of legal responsibility with the degree of confidence implicit in findings made on a preponderance of the evidence." *Id.* at 71. The court's order specifically stated that "[e]ither party may file with the court, when good cause to do so has developed factually, a motion supported by a showing of a material change in circumstances that justifies a change in the allocation of shares among the parties." *Id.* at 69.

The KRSG also cited the decision in *PMC, Inc. v. Sherwin-Williams Company,* 151 F.3d 610 (7th Cir. 1998). In that case, the court had determined that Sherwin Williams was liable for one hundred percent of the costs of cleaning up a hazardous waste site. Sherwin-Williams had sought contribution from PMC because it had dumped waste at the site after it had acquired the site from Sherwin-Williams. In that case, the court recognized that PMC might be liable for some future clean-up costs should it be ordered to clean up waste other than that which Sherwin-Williams deposited. Nonetheless, the Seventh Circuit held that the district court did not abuse its discretion in determining that PMC did not owe Sherwin Williams any contribution for its already incurred costs. The court noted that the allocation was proper but that "cooperativeness in doing the actual clean-up is a relevant equitable factor that cannot be evaluated until the clean up is complete . . . [b]ut this concern can be accommodated . . . by allowing the district court to make an all-at-once determination subject to the court's revisiting the issue should a failure of cooperation or some other unforeseen circumstance made adherence to the original determination inequitable." *Id.* at 616.

Neither of these cases supports the KRSG position that allocation decisions in CERCLA are inherently subject to change. Rather, they demonstrate that

courts have the power to fashion relief subject to future change and that the courts have broad equitable powers. The Seventh Circuit's statement in dicta in the *PMC* decision did not establish a rule that all allocation decisions are subject to revisions. Moreover, in that same decision, the circuit court affirmed the decision not to alter the allocation despite new evidence when the district court concluded that any contribution PMC may have made to the contamination was negligible.

In this case, the district court did not mention that its order was provisional or that there was a possibility of potential alterations in the future. Furthermore, the court could find nothing in CERCLA which could be used as an independent basis for revisiting the allocation decision. Thus, it affirmed the district court's denial of the KRSG's motion to reopen the allocation decision.

Non-Polluting PRP Must Recover Under Section 113: *Western Properties Service Corporation v. Shell Oil Company et al.,* No. 01-55676 (9th Cir. Feb. 13, 2004)

Background

The property involved in this lawsuit is in Riverside County, California. During the early 1940s, the then landowner allowed acid tar — a waste from the production of aviation fuel —to be dumped into a gravel pit on the property. The property was eventually sold to Western Properties which had knowledge of the pollution. In 1986, the California Department of Health Services ordered Western Properties to conduct an environmental response. The response cost Western Properties $5 million.

In 1994, Western Properties filed a complaint under sections 107 and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) against several oil companies. In May 2000, the trial court found that the plaintiff had incurred over $5 million in costs and imposed one hundred percent of these costs on the oil companies jointly and severally. The oil companies appealed.

Holding

The oil companies cited the Fifth Circuit's decision in *Aviall Services, Inc. v. Cooper Industries, Inc.,* 263 F.3d 134 (5th Cir. 2001), in their argument that the court lacked jurisdiction to award damages for remediation because there was no prior civil action against Western Properties pursuant to sections 106 or 107(a) of CERCLA. However, the court held that this case is distinguishable because, unlike the plaintiffs in *Aviall,* the plaintiffs here brought both a section 107(a) action and a 113(f)(1) action.

In the decision in *Pinal Creek Group v. Newmont Mining Corporation,* 118 F.3d 1298 (9th Cir. 1997), the Ninth Circuit held that the enactment of CERCLA's section 113 in 1986 did not replace the implicit right to contribution that many courts had already recognized in section 107(a). Instead, the newly-enacted section 113 determined the "contours" of section 107. Thus, section 107 created the right of contribution; section 113 governs and regulates such actions. In this case, not only did the plaintiffs bring their action under both sections, but the defendants also counterclaimed under both sections. Thus, this action was pursued "during . . . [a] civil action under . . . 107(a)." 42 U.S.C. § 9613(f)(1).

The oil companies also argued that the district court erred in granting recovery against them, jointly and severally for all of the clean-up expenses because the plaintiff is a potentially responsible party (PRP) and, thus, must share the loss. The plaintiff maintained, however, that it had not dumped any of the sludge and was, thus, an innocent landowner, citing the Seventh Circuit's decision in *Akzo Coatings, Inc. v. Aigner Corporation,* 30 F.3d 761 (7th Cir. 1994), and its progeny. In that case, the court held that a non-polluting PRP was entitled to full recovery for its clean-up expenses.

Western Properties knew about the acid sludge when it purchased the property. A landowner who buys property with the knowledge that it is contaminated cannot establish the innocent landowner defense to section 107(a) liability. Although the court's analysis

was controlled by its decision in *Pinal Creek,* that decision did not address the issue of whether a non-polluting PRP may sue for full recovery, jointly and severally. The court acknowledged that there is some attraction to applying an *Akzo* exception to the non-polluting landowner. However, the district court has the full authority to exercise its discretion under section 113(f)(1) and allocate a smaller portion — or, perhaps no portion at all — to the non-polluting PRP landowner. Therefore, it is unnecessary to reach that authority into section 107(a) against the clear limitation of section 107(b).

Requiring non-polluting PRP landowners to recover under section 113(f)(1) also eliminates the chance that the plaintiff could benefit above its clean-up costs. If, for instance, the purchaser of contaminated property pays a discounted price for the property because of the contamination, he could then recover his clean-up costs and sell the cleaned-up property to a new purchaser, receiving full value. Requiring the landowner to proceed under the contribution statute would allow the district court to consider the equities and determine if there should be a reduction of the recovery against the polluter.

Because the district court did not use equitable factors in determining the respective liability of each PRP and because it imposed joint and several liability for the amount due, the court remanded the case to the trial court.

RCRA

Plaintiffs Have Standing to Bring RCRA and CAA Suit Against County: *Covington v. Jefferson County et al.,* No. 02-36000 (9th Cir. Feb. 5, 2004)

Background

Michael and Carla Covington own property in Jefferson County, Idaho, that was originally across the street from a gravel pit. In 1995, Jefferson County converted the pit to a non-municipal solid waste landfill for bulky waste. The county has owned and operated the landfill since that time. The landfill was approved and is overseen by the District 7 Health Department (D7HD). Under Idaho law, responsibility for oversight of solid waste facilities is divided between the State Department of Environmental Quality and the District Health Departments.

The Covingtons brought various deficiencies in the operation of the landfill to the attention of officials of the county and the D7HD. Having received little satisfaction from their complaints and after providing notice, they brought a lawsuit against Jefferson County and D7HD under the citizen suit provision of the Resource Conservation and Recovery Act (RCRA) and the Clean Air Act (CAA). After discovery, all parties moved for summary judgment. The trial court ruled that the plaintiffs had standing under RCRA, but not under the CAA. On the merits of the RCRA claims, the district court rejected application of state regulations, granted summary judgment to the county and D7HD on the federal "open dump" criteria, and held that the allegation under 42 U.S.C. § 6924 could not be sustained because that section was merely an enabling statute with no substantive prohibitions.

The Covingtons appealed; D7HD cross-appealed the court's holding on standing under RCRA.

Holding

D7HD argued that the Covington's filed their lawsuit prior to ninety day's elapsing after service of statutory notice. Under RCRA, a sixty-day notice is required prior to filing suit alleging current violations of RCRA, but a ninety-day notice is required for actions alleging contribution to present or past violations of RCRA. 42 U.S.C. § 6972(b)(2)(A). The court pointed out that Congress provided an exception to the ninety-day notice period for "action[s] . . . respecting a violation of subchapter III of this chapter," or, in other words, those claims alleging the presence of, or mishandling of, hazardous waste. 42 U.S.C. § 6972(b)(2)(A). The Covingtons made such a claim, alleging a violation of 42 U.S.C. § 6924. In *Dague v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), *rev'd in part on other grounds*, 505 U.S. 557 (1992), the court held that a subchapter III claim renders the required waiting time after notice before filing suit inapplicable to all of a plaintiff's RCRA claims.

The court found *Dague* to be persuasive and held that the sixty-day and ninety-day waiting period are inapplicable so long as the non-subchapter III claims are related in time or location to any subchapter III claim.

The court then addressed the standing issues. The court agreed with the district court that the Covingtons have standing to pursue their RCRA claims. They alleged sufficient facts to evidence a concrete risk of harm and also sufficient evidence noting that the alleged violations affected their enjoyment of their home and land. Even if the only injuries alleged were threats to their aesthetic and recreational enjoyment of their property, these harms occasioned by RCRA violations would be sufficient to satisfy the injury in fact requirements. Nor is there any problem with the redressability and causation requirements. Despite D7HD's allegation that it is not responsible for enforcement or corrective action, but only oversight of the landfill, the court found that the agency could have suspended operation of the landfill, issued a more stringent conditional use permit, or inspected more rigorously or frequently to ensure compliance.

The district court held that the Covingtons lacked standing to pursue the CAA complaint because there was no evidence of a leak of ozone-depleting substances and no injury to the Covingtons. The appellate court disagreed. The complaint alleged that they observed liquids leaking from junked appliances (white goods) and that the plaintiffs' feared that this leakage would contaminate their property. This is sufficient for injury in fact for the CAA claims. There is also causation. If the landfill had followed CAA procedure by properly removing chlorofluorocarbons (CFCs) from white goods, there would have been no leaks. The Covingtons also alleged procedural irregularities because proper recordkeeping was not done. In a footnote, the court noted that a failure on the part of the disposer to appropriately document that CFCs had been removed leads the court to presume that the white goods leaked CFCs unless and until there is an affirmative demonstration otherwise.

The Covingtons argued that the district court should not have disregarded potentially applicable Idaho regulations on solid waste management when analyzing whether a RCRA violation had occurred. In *Ashoff v. City of Ukiah,* 130 F.3d 409, 411–12 (9th Cir. 1997), the court held that a RCRA citizen suit may be brought for non-compliance with a state-selected standard so long as that standard does not exceed the federal criteria when the state standard has been given legal effect under federal law. The *Ashoff* court also rejected the theory that, once EPA approves a state program, a citizen suit is no longer available under Subtitle C or D. The court then examined the state requirements at issue — Idaho's cover and open burning requirements — and found them no more stringent than the federal regulations. It thus concluded that the district court erred granting summary judgment against the Covingtons on those grounds.

The plaintiffs also claimed that the defendants had violated RCRA's requirement prohibiting the buildup of explosive gases. *See* 40 C.F.R. § 257.3–8. The county and D7HD argued that they could not prove the existence of any explosive gas at the landfill, much

less that the RCRA limit was exceeded. The Covingtons explained that the reason they could not produce such evidence is because there was no monitoring of the landfill property for such gases. The court held that, where a plaintiff has established that a landfill accepts waste that may routinely produce explosive gas and the landfill fails to monitor for such gas, the plaintiff has a rebuttable presumption that the explosive gas requirement has been violated.

The court then examined 42 U.S.C. § 6924 to determine if it is merely an enabling statute. The district court so held, citing *Jones v. Inmont Corporation,* 584 F. Supp. 1425 (S.D. Ohio 1984). However, this decision rested on a version of the statute that has since been expanded. The amendment added substantive provisions, including that "the placement of bulk or noncontainerized liquid hazardous waste . . . in any landfill" was prohibited six months after the amendment was enacted. 42 U.S.C. § 6924(c)(1) (2003). The court, therefore, held that summary judgment for the defendants on this claim was in error.

The court affirmed in part and reversed in part and remanded to the district court.

Sentencing Guidelines

Court Clarifies "Substantial Expenditure Enhancement": *United States v. David Phillips,* No. 02-30035 (9th Cir. Jan. 28, 2004)

Background

David Phillips contracted to purchase land in Montana along the Fred Burr Creek with a view towards subdividing it. In the course of preparing the land for viewing by prospective purchasers, he directed workers to dig twenty ponds throughout the property and then filled these ponds by surreptitiously breaching the creek bank. Downstream property owners with water rights to the creek found that the creek was running dry and was polluted by sediment and mine tailings. Phillips and two co-defendants were subsequently charged with violations of the Clean Water Act (CWA) and conspiracy to violate the CWA. Phillips was found guilty.

At sentencing, the trial court held that only "known" clean-up expenditures not associated with cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) could be used to determine the appropriateness of enhancement under U.S.S.G. § 2Q1.3(b)(3). This section requires an enhancement if "cleanup required a substantial expenditure." It also determined that the federal government was not a victim in this case and that its costs of investigation were not recoverable under U.S.S.G. § 5E1.1. These were the issues, among others, that were appealed.

Holding

The issue of whether CERCLA-related expenses should be used to enhance a sentence pursuant to U.S.S.G. § 2Q1.3(b)(3) was one of first impression for the Ninth Circuit. The language of the subsection provides: "If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels." There is nothing that would limit clean-up costs to those incurred pursuant to the statute of conviction. The section talks, instead, of cleanup generally. Thus, whether an offense is one against the CWA or the Resource Conservation and Recovery Act (RCRA), for instance, cleanup is generally conducted under CERCLA. This interpretation is consistent with the scheme of federal environmental laws.

In *United States v. Chau,* 293 F.3d 96 (3d Cir. 2002), the court confronted a similar issue. In that case, the defendant was convicted of violating the Clean Air Act. The *Chau* court held that the government need only establish a connection between the clean-up cost and the conduct for which the defendant was convicted in order for the costs to be considered in the analysis under the Sentencing Guidelines.

The court, thus, held that the district court should include all reliable costs of cleanup in its substantial cleanup expenditure analysis.

Under U.S.S.G. § 5E1.1, full restitution, when a statute authorizes such, should be ordered "for the full amount of the victim's loss." The broad language indicates that the government can be a victim for restitution purposes. The Ninth Circuit has adopted a broad view, asking whether the costs were incurred as a "direct and foreseeable result" of the defendant's wrongful conduct. Although criminal investigation costs are not recoverable, other investigation costs may be recoverable. In *United States v. Salcedo-Lopez,* 907 F.2d 97 (9th Cir. 1990), the court held that, when the government loses money as a direct result of the offense, it is entitled to restitution. The question, then, is whether the government incurred expense as a result of the prosecution or of the offense itself. Site investigation costs are recoverable to the same extent, then, that clean-up costs are.

The court thus vacated Phillips' sentence and remanded for re-sentencing.

Water

Regional Guidance Documents Not Final Agency Action: *Pennsylvania Municipal Authorities Association et al. v. Marianne Lamont Horinko et al.,* No. 02-01361 (HHK) (D.D.C. Nov. 20, 2003)

Background

The plaintiffs, representing hundreds of municipalities holding National Pollutant Discharge Elimination System (NPDES) permits, brought this action to challenge various regional guidance documents which they claimed impose restrictions on permitting not mandated by the Clean Water Act (CWA) and in contravention to EPA policy. The defendants moved to dismiss the complaint for lack of subject matter jurisdiction.

Holding

The challenged policy statements involve blending, emergency sanitary sewer overflows discharges, and the application of secondary treatment to emergency overflows. The complaint recites various restrictions on the ability of publicly owned treatment works (POTWs) to manage wet-weather events. The plaintiffs allege that Regions III, IV, and VI prohibit "blending," a practice used when peak wet weather flows exceed the capacity of a treatment unit. Ideally, the combined waters when finally discharged meet the effluent limitations in a given permit. According to the complaint, so long as treatment works meet their effluent limitations, EPA does not dictate the precise process that must be used. Blending, which implicates a practice called "bypass," allows POTWs to route excess flows from floods or excessive rainfalls, around the treatment unit and mix or recombine them with treated waters. Prohibition of "blending" would require prohibitively expensive changes to the design of treatment plants.

The complaint also alleged that, contrary to national EPA rules, Regions III and IV refuse to permit emergency sanitary sewer overflow (SSO) discharges. The plaintiffs argued that the bypass and upset defenses should be available for these emergency discharges, but that the challenged policy subjects them to liability. Finally, the plaintiffs claimed that Regions III and IV, contrary to EPA regulations, mandate secondary treatment for SSO discharges in order for them to be permittable. Although the plaintiffs conceded that EPA regulations require secondary treatment from treatment plants themselves, they maintained that, since sewage overflow points are not part of treatment works, the SSOs are not subject to secondary treatment.

The plaintiffs alleged both prospective harm and real, concrete harm in the case of the prohibition against blending. In some cases, regions have intervened and objected to state-issued permits that allowed blending. Some states have refused to reissue permits and some have included a prohibition against blending in their state-issued permits.

The defendants argued that there was no final agency action complained of and, thus, the challenged documents are not reviewable. The Supreme Court has established a two-prong test to determine whether agency action is final: (1) Does an action mark the "consummation" of the agency's decision making pro-

cess and (2) is the action one by which "rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177–78. The various plaintiffs are in different positions. Some complain of actual harm because there has been permit activity prohibiting blending. Others fear the consequences from the promulgation of the regional guidance documents.

It is clear that national guidance documents can constitute final agency action. *See, e.g., GE v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002). The D.C. Circuit has never addressed the issue of whether regional EPA guidance documents may also be final agency action. Other circuits, however, have addressed the issue. *In American Paper Institute, Inc. v. EPA*, 882 F.2d 287 (7th Cir. 1989), the court held that an EPA regional guidance document on NPDES permits did not constitute final agency action and, thus, was not reviewable. The court stated:

> Every permit holder may proceed under the authority of its existing permit, without regard to Region V's suggestions. If states heed the suggestions to the detriment of paper mills, review is possible in state court. If states propose a course of action inconsistent with Region V's wishes, the Administrator may overrule Region V. If the Administrator adopts Region V's position and a permit is turned down, modified, or rescinded, review will be available in state or federal court. That review, on a full record, will disclose the EPA's final position, as applied to the plant in question.

Id. at 289.

This position has been adopted by the Fourth Circuit in *Appalachian Energy Group v. EPA*, 33 F.3d 319 (1994), and by the Ninth Circuit in *City of San Diego v. Whitman*, 242 F.3d 1097 (2001). A panel of the D.C. Circuit adopted the *American Paper* position in a hazardous waste case, *Hazardous Waste Treatment Council v. Reilly*, 938 F.2d 1390 (1991).

EPA's Delegations Manual states that EPA regional administrators have not been delegated the authority to promulgate rules under the CWA. It also states that the regions do not have the authority to impose rules or standards more restrictive than those promulgated by EPA Headquarters. Thus, regional guidance documents are not final agency action unless and until the EPA Administrator affirmatively adopts them.

Generally, EPA modifications or objections to permits have been considered final agency action. EPA regions have been delegated the responsibility to review and oversee state permitting programs and the discretion whether to object to a permit. Silence by EPA Headquarters of a region's actions validates a state-issued permit or an EPA regional permit veto. Thus, permit denials or modifications by EPA regions satisfy the two-pronged *Spear* test.

The plaintiffs invoked jurisdiction under the Administrative Procedure Act (APA), 5 U.S.C. § 704, which confers jurisdiction on the federal courts solely over matters that involve "final agency action for which there is no other adequate remedy in a court." However, the APA precludes review of *any* agency actions "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Section 1369(b)(1)(F) of the CWA confers exclusive jurisdiction upon the circuit courts of appeals over the Administrator's (or any official exercising authority delegated by the Administrator) "action" in issuing or denying any NPDES permit. 33 U.S. C. § 1369(b)(1)(F).

In *Crown Simpson Pulp Company v. Costle*, 445 U.S. 193 (1980), the Court held that the circuit court had exclusive jurisdiction over a dispute involving an EPA Regional Administrator's objection to a state-issued NPDES permit. In this case, the plaintiffs complained of three types of permitting activity: (1) State-issued permits approving blending to which a region ultimately objected; (2) state regions refusing

to reissue permits; and (3) state regions issuing permits with prohibitions on blending. Under the *Costle* decision, the claims in the first category must be heard in the court of appeals. Where EPA objection to permits occurred more than 120 days prior to the filing of the plaintiffs' claims, the statute of limitations has run.

Costle, however, did not deal with judicial review over state permitting decision on which EPA was silent. However, in *dicta,* the court indicated that silence would not constitute an action that must be heard by a court of appeals. In *Mianus River Preservation Committee v. EPA*, 541 F.2d 899 (2d Cir. 1976), the court held that EPA's silence on state-issued permits was not the type of "action" over which the court of appeals had exclusive jurisdiction. Noting the dearth of case law on point, the court in the case at bar concluded that the court of appeals does not have jurisdiction over claims involving EPA silence on state permitting decisions.

The court examined one further issue — whether the agency's silence is "committed to agency discretion by law" and, thus, not within the jurisdiction of the district court under the APA. The D.C. Circuit held in *District of Columbia v. Schramm*, 631 F.2d 854 (D.C. Cir. 1980), that, while EPA vetoes of state permits were subject to review by the court of appeals, a decision *not* to object to a permit was a subject of agency discretion under the APA. Since *Schramm* is the controlling law in the D.C. Circuit, the court concluded that it must dismiss the plaintiffs' claim involving EPA silence on state denials of NPDES permits and on state issuances of permits banning blending. The proper venue for these challenges must be in state court.

CIVIL PROCEEDINGS

New Filings

Air

***United States v. East Kentucky Power Cooperative,* No. 4-CV-34 (E.D. Ky. Jan. 28, 2004)**

The federal government has filed a lawsuit alleging that a Kentucky utility violated the New Source Review provisions of the Clean Air Act (CAA) by making unpermitted changes at two of its four coal-fired power plants, the H.L. Spurlock and William C. Dale plants. The complaint alleges that the co-op increased its design capacity. According to U.S. EPA, the H.L. Spurlock facility's sulfur dioxide emissions rose from 13,345 tons in 1990 to 38,542 tons in 1999. Sulfur dioxide emissions have since dropped to about 21,000 tons a year. Nitrogen oxide emissions, however, had dropped to about one-third the 1995 level in 2002. Similar increases in sulfur dioxide emissions and decrease in nitrogen oxide emission occurred at the William C. Dale plant. The decreases in nitrogen oxide emissions are due to installation of SCR pollution control devices, a byproduct of EPA's regional CAA trading program to limit smog.

[For further information, contact Dan Beckhard, DOJ at (202) 616-7921.]

Settlements

Air

***United States v. Buckeye Egg Farm, L.P.,* No. 3:2003CV07681 (N.D. Ohio Feb. 23, 2004)**

The federal government has entered into a comprehensive Clean Air Act settlement with Buckeye Egg Farms, L.P, the largest commercial egg producer in Ohio, under which the company will spend more than $1.6 million to install and test pollution controls to cut air emissions of particulate matter and ammonia from three facilities at Croton, Marseilles, and Mt. Victory,

Ohio. In addition, the company will pay a civil penalty of $880,598.

The company's egg-laying operations have the capacity to house more than 12 million chickens in over 100 barns. Tests indicated that air emissions of particulate matter and ammonia created a significant health hazard.

In July 2003, the State of Ohio revoked Buckeye's operating permits after having cited the company nine times for contempt because of its failure to comply with a state consent order requiring improvements. The company began closing its barns in November. It recently sold its three facilities to Ohio Fresh Eggs LLC, but, under the settlement, Buckeye must bind the purchaser to implement the environmental improvements required under the consent decree and Buckeye remains liable for any violations.

Under the settlement, Buckeye must install a particulate impaction system in each of its barns at the Marseilles and Mt. Victory facilities to capture particulate matter before it is vented to the atmosphere. It will also use enzyme additive products on the manure accumulated in the barns to reduce ammonia emissions by at least fifty percent. These controls are also expected to substantially reduce fly infestations, a subject of state and private litigation against Buckeye.

[For further information, contact Deborah Reyher, DOJ, at (202) 514-4113.]

***United States v. Exelon Mystic LLC,* No. 0410213 (D. Mass. Jan. 29, 2004)**

Exelon Mystic LLC, the owner of the Mystic Station power plant in Everett, Massachusetts, recently entered into a settlement with the federal government to resolve allegations that it violated the Clean Air Act's opacity limits over 6,000 times between June 1998 to November 2003. Most of the violations took place at the three oldest oil-fired units which essentially ceased operations in March 2003.

Under the settlement, Exelon will pay a $1 million fine and spend over $5.1 million on five local environmental projects in the Boston, Massachusetts, area. Among the projects will be the retrofitting of 500 Boston school buses with pollution control equipment and supplying these buses with low-polluting diesel fuel. This project, estimated to cost $3.25 million, will reduce tailpipe emissions from the buses by more than ninety percent. Once completed, Boston will be the first major city in the country to have an entirely retrofitted school bus fleet.

An addition $1.25 million will be spent for pollution control improvements to the commuter rail trains operating out of Boston's North Station rail terminal. Another $250,000 will be used to build a commuter bike path along the Amelia Earhart Dam on the Mystic River which will connect existing bike paths in Everett and Somerville. The rest of the money will be used to restore an acre of urban salt marsh along Mill Creek in Chelsea and to fund an environmental assessment and feasibility study to identify possible restoration activities along the Malden River.

[For further information, contact Peter Flynn, DOJ, at (202) 514-4352.]

CRIMINAL PROSECUTIONS

Indictments

Ocean Dumping

***United States v. Rick D. Stickle et al.,* No. 1:04CR-20072 (S.D. Fla. Feb. 3, 2004)**

The chairman and CEO of Sabine Transportation, Inc., Rick D. Stickle, and five other individuals have been indicted for their role in the dumping of oil-contaminated grain from the *SS Juneau,* a U.S.-flagged vessel, into the waters of the South China Sea in February 1999 and their efforts to impede the U.S. Coast Guard and other authorities from learning of the illegal conduct. Named with Stickle in the indictment are Michael Reeve, president of Sabine; John Karayannides, vice-president of operations, Michael

Krider, port engineer, George McKay, master of the ship, and Philip Hitchens, chief officer.

When the *S.S. Juneau* arrived in Portland, Oregon, at the end of her voyage, crew members alerted Coast Guard personnel that a diesel oil leak into one of the ship's main cargo tanks was discovered while the humanitarian shipment of grain was being off-loaded in Bangladesh in December 1998. Over the course of the following month, company officials and vessel officers allegedly discussed various ways of legally off-loading the cargo. Finding this too expensive, according to the indictment, company officials hid the true nature of the contaminated material and characterized it as merely oily waste. Such liquid waste may be discharged into the ocean after being processed through an oil pollution prevention device on a ship. However, that device cannot deal with solids, such as the oil-contaminated grain. During the first week of February 1999, the ship, while transiting the South China Sea, emptied the contaminated cargo tank and failed to report the discharge to the U.S. Coast Guard, as required by law.

Sabine Transportation, Inc., a Cedar Rapids, Iowa-based company, previously pled guilty to criminal charges which included the conduct underlying the indictment against the six individuals.

[For further information, contact Gregory Linsin, DOJ, at (202) 305-0327 or AUSA Tom Watts Fitzgerald at (305) 961-9413.]

Water

***United States v. John Hubenka,* No. 04CR0004 (D. Wyo. Jan. 14, 2004)**

An indictment filed recently against John Hubenka of Riverton, Wyoming, alleged that he built unpermitted dikes in Wyoming's Wind River in violation of the Clean Water Act. The indictment charges that, between March 1999 and November 1999, Hubenka performed dredging and construction to build three earthen dikes in the river without a proper permit and discharged rock, sand, and other dredge and fill material into the river. His activities caused a change in the river's course that cut off approximately 300 acres of tribal land from the reservation.

[For further information, contact AUSA John Green at (307) 772-2124.]

Pleas

RCRA

***United States v. Rhodia, Inc.,* No. CR0329BUDWM (D. Mont. Jan. 14, 2004)**

The former operator of a phosphorus manufacturing plant in Silver Bow, Montana, recently pled guilty to two felony counts of the Resource Conservation and Recovery Act by illegally storing phosphorus-contaminated waste and sludge. Under the plea agreement, Rhodia agreed to pay a $16.2 million criminal fine, $1.8 million in restitution to the Montana Department of Environmental Quality, clean up pollution at the closed facility, and serve probation for five years or for the duration of the cleanup, whichever is longer.

In its plea, Rhodia admitted that it had illegally stored carbon brick and precipitator dust contaminated with elemental phosphorus waste and elemental phosphorus-contaminated sludge.

[For further information, contact Dan Dooher, DOJ, at (202) 305-0351 or AUSA Kris McLean at (406) 542-8851.]

Sentences

Air

***United States v. Thomas M. Hayes,* No. 02-CR-302 (D.N.J. Feb. 5, 2004)**

Thomas M. Hayes, former vice-president of Saybolt, Inc.'s western hemisphere operations, was recently sentenced to serve fifty-seven months in prison for conspiring to violate the Clean Air Act. Between September 1992 and November 1996, the defendant

and his co-conspirators falsified reformulated gasoline test results from Saybolt's testing facilities in New Jersey and Woburn, Massachusetts. The false results inflated the amount of oxygen that the gasoline actually contained.

[For further information, contact Stacy Mitchell, DOJ, at (202) 305-0363 or AUSA Mike Watson at (973) 645-2700.]

Marine Mammal Protection Act

***United States v. Richard V. North and Rodney D. Watson,* No. 3:03-CR-05690 (W.D. Wash. Feb. 27, 2004)**

Two individuals, Richard V. North and Rodney D. Watson, have been sentenced on their guilty plea to a misdemeanor violation of the marine Mammal Protection Act. They were prosecuted for shooting a sea lion while the two men were fishing for salmon along the Columbia River. The incident was witnessed by several other individuals who were in boats in the area.

The court sentenced Richard North to fifteen days of home detention with electronic monitoring, one hundred hours of community service, a $1,000 fine, and two years' supervised probation. Rodney Watson, who shot at the sea lion but who did not hit it as did his co-defendant, was sentenced to serve seventy-five hours of community service, pay a $1,500 fine, and serve two years' supervised probation. The court also prohibited both men from fishing while accompanied by a firearm during the period of probation.

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

Solid Waste

***Pennsylvania v. Lehigh Valley Recycling, Inc.,* No. 2003-275CRIM (C.P. Lehigh County Feb. 24, 2004)**

A Pennsylvania recycling company has been sentenced to pay a $200,000 fine and $5,000 in investigative fees after its president entered a plea to thirteen counts of unlawful conduct, a third-degree misdemeanor under the state's Solid Waste Management Act. State officials charged that, between 1997 and 2001, the company accepted sludge from thirteen customers without approval from the state. Approval is required to ensure that the sludge is safe.
About ninety percent of the sewage sludge came from New York.

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

UPDATES

***Cooper Industries, Inc. v. Aviall Services, Inc.,* No. 02-1192 (Jan. 9, 2004):** The U.S. Supreme Court has granted review of a Fifth Circuit decision that held that contribution claims under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) may be brought without a preexisting federal or private party suit under section 106 or 107 of CERCLA. (*See* the December 2003/January 2003 issue of the *Journal.*)

***U.S. Environmental Protection Agency v. Tennessee Valley Authority,* No. 03-1162 (U.S. Feb. 13, 2004):** The U.S. Department of Justice has appealed to the U.S. Supreme Court a ruling from the U.S. Court of Appeals for the Eleventh Circuit challenging EPA's pursuit of TVA through administrative procedures. (*See* the August 2003 issue of the *Journal.*)

***EPA v. Sierra Club,* No. 03-509 (U.S. Jan. 12, 2004):** The U.S. Supreme Court declined to review this decision out of the U.S. Court of Appeals for the D.C. Circuit. In that decision, the court ruled that the catalyst theory is a viable basis for awarding attorneys' fees in Clean Air Act (CAA) cases. The CAA contains the "whenever appropriate" language involving the award of attorneys' fees, as do many other environmental statutes. *(See* the June 2003 issue of the *Journal.)*