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**The Role of State Attorneys General in  
National Environmental Policy:  
A Report on the Symposium of  
September 20, 2004, at  
Columbia Law School, New York City**

By

**Robert J. Kinney\***

The role of the state attorneys general in shaping national environmental policy has been the subject of increased scrutiny and debate in recent years.<sup>1</sup> The choice between an “active” versus “activist” role for the states’ top law enforcement officers has been raised in at least one current race for state attorney general<sup>2</sup> and formed the backdrop for attorneys general from ten states and from both political parties to meet at Columbia Law School in New York City on September 20, 2004. With an invited group from academia and both the public and private bar, the attorneys general engaged in a dynamic discussion of their roles in defining and shaping national environmental policy in three areas: global warming, ground-water pollution, and natural resource damages recovery.

At first glance, perhaps only one of the three identified topics lends itself intuitively to a “national” policy discussion. Indeed, global warming by its name implicates not just national, but international, policy. This, in many ways, makes it an ideal subject for discussion of the breadth and limits of the role of states’ attorneys general in policy shaping and setting. It also allows for a discussion and analysis of the tools attorneys general have at their disposal to engage in the national environmental policy debate.

\* Robert Kinney was, until August 2004, Chief Counsel and Environment Project Director for the National Association of Attorneys General. Mr. Kinney participated in the planning and development of the “Symposium: The Role of State Attorneys General in National Environmental Policy,” which was held at Columbia Law School in New York City under the auspices of Columbia’s National State Attorney General Program. (See [www.stateag.com](http://www.stateag.com)). Mr. Kinney extends thanks to Kate Barron at Columbia Law School for her assistance in helping him complete this article.

Discussing the attorneys general role first requires an understanding of the issue. “Global warming” is a short-hand term for the climatic changes that have occurred world-wide, particularly since the advent of the industrial revolution, which have led to gradual but measurable increases in temperatures across the globe. Although through the millennia the earth has seen numerous warming and cooling cycles, at no time in global history have the temperature changes been as great as over the past 150 years and particularly the last 30 years.<sup>3</sup> Although a variety of so-called greenhouse gases (GHGs) have contributed to the temperature rise, the primary culprit seems to be carbon dioxide (CO<sub>2</sub>).

Concerned over the threat posed by global warming, a group of environmental organizations petitioned the U.S. Environmental Agency (EPA) to regulate CO<sub>2</sub> and other GHGs from motor vehicles under the Clean Air Act (CAA). In August 2003, EPA issued a memorandum and final rule which stated that CO<sub>2</sub> is not an air pollutant subject to regulation under the federal CAA.<sup>4</sup> The rule, issued in the form of an opinion from EPA’s Office of General Counsel, prompted legal challenges by several state attorneys general.<sup>5</sup>

Subsequently, in July 2004, eight state attorneys general, the City of New York, and several environmental organizations filed unprecedented legal actions against five mid-western utilities alleging, *inter alia*, that the combustion of coal by these facilities and the consequential emissions of CO<sub>2</sub> and other GHGs constitute a public nuisance in the downwind states.<sup>6</sup> The plaintiffs are seeking injunctive relief, asking that the court order the defendant utilities to reduce their emissions of CO<sub>2</sub> and GHGs.

At the symposium, much of the morning’s discussion centered on the use of an old tort theory, nuisance, to address a relatively modern problem. Connecticut Attorney General Richard Blumenthal, one of the parties to the lawsuit, noted that, while there may be many good policy ideas on how to address the problem of

global warming, in the end state attorneys general cannot, by themselves, make new law — they must have sound legal principles upon which to act. The legal principle upon which the eight attorneys general have acted here encompass the most basic tort law — that the actions of the alleged tortfeasors (five utilities) have created a nuisance and unreasonably caused demonstrable harm to the citizens of the plaintiff states. According to General Blumenthal, because attorneys general have the authority to act to redress wrongs inflicted on the general public as guardians of the public trust, a nuisance action which seeks to redress the harm by requiring reductions in CO<sub>2</sub> and GHGs is both appropriate and in the public interest.

As venerable as nuisance theory may be, the pitfalls to such an action are significant, as the panelists explored in the latter half of the discussion. Columbia professor Tom Merrill set the stage with a laundry list of potential concerns, including: standing of the attorneys general to sue and whether CO<sub>2</sub> emissions are covered by the federal common law of nuisance (rather than state nuisance law — noting that the actions were filed in federal court). He also posed the questions as to whether actions to address issues of global warming are committed solely to the discretion of the President of the United States pursuant to his treaty power and the exclusive authority under the Constitution to conduct foreign affairs; whether the alleged nuisance is actionable; and whether the injuries alleged are both actual and redressable.

Two of these issues loomed largest, in Merrill's view: standing of the attorneys general to sue and whether the federal Clean Air Act (CAA) itself preempts the federal common law of nuisance. In regard to standing, a good argument can be made that public officials acting against private defendants need not demonstrate standing to sue, as they stand in the shoes of the public at large and are acting in the public interest and not as individuals. At the same time, it can be argued that such actions to benefit the public should be brought in the court of the public officer (that is, in state court). Therefore, the question of whether the attorneys general must demonstrate standing to sue in federal court

pursuant to the federal common law of nuisance remains open.

Perhaps more critical to the future of the litigation is whether the CAA has preempted the federal common law of nuisance, thus leaving the plaintiffs with only statutory causes of action (seemingly foreclosed by EPA's determination that CO<sub>2</sub> is not an air pollutant subject to CAA regulation). Professor Merrill noted that in the Supreme Court's "Milwaukee" cases, particularly *Milwaukee II*, the Court held that, if actions are governed by the federal common law, then state law is inapplicable; and, if state law can be used, there is no need for federal common law.<sup>7</sup> If, therefore, there is a state law cause of action, suit in federal court should be dismissed for lack of subject matter jurisdiction.

Compounding these potential problems, two panelists raised additional legal and practical arguments. D. Michael Grodhaus, First Assistant Attorney General for the State of Ohio, suggested that, while the case presents interesting "powers and duties" questions, its practical impact and alleged merits are problematic. He questioned, as a practical matter, the selection of the particular defendant utilities, noting that the defendants' companies account for only about ten percent of total U.S. GHG emissions. Further, Grodhaus suggested, the lawsuit would have no impact on the other significant source of GHG emissions globally, the transportation sector. In his view, the issue of CO<sub>2</sub> and GHG emissions is a political question and not really justiciable. Because it is a problem of both national and international scope, it falls within the president's foreign policy authority to address.

Finally, J. Kevin Healy, partner in the law firm Bryan Cave LLP and author of a recent law review article on climate change,<sup>8</sup> while suggesting that the attorneys general lawsuit was inevitable, also suggested several potential problems, not the least of which is the issue of the alleged unreasonableness of defendants' conduct in lawfully burning fossil fuels to produce energy. He questioned how a court might react to arguments that sources in the plaintiffs' states lacked "clean hands" in regard to GHGs. Healy also

suggested that the plaintiff states might have an uphill fight in convincing a court that it should delve into the complexities of the issues surrounding GHGs. Nevertheless, the possibility that the litigation may result in a judicially articulated standard of conduct for industry (in the absence of federal regulation) could, he suggested, be a good thing.

Former New Hampshire Attorney General Peter Heed provided an energetic introduction into the first afternoon panel addressing groundwater pollution. New Hampshire has a strong interest in the issue as a result of pervasive groundwater contamination caused by the fuel additive MTBE (methyl tertiary butyl ether). Originally developed in the 1970s as an octane booster, MTBE was later marketed by its manufacturers as an oxygenate for fuels that would enhance the ability of localities to meet CAA standards for ozone. An unfortunate additional characteristic of MTBE is, however, its high solubility in water. Once MTBE contaminates a water supply, it migrates extremely quickly, which makes it very difficult to remediate and also poses challenges in tracing the source of the contamination. Further, MTBE contamination, even at low levels, can make water unpotable because of MTBE's offensive odor and taste, and, at higher concentrations, may pose human health risks.

Faced with contamination problems in water supplies across the state, in September, 2003, the New Hampshire Attorney General's office filed a nuisance action against twenty-one major oil companies that added MTBE to gasoline products sold in New Hampshire. The complaint, which was filed in Merrimack County Superior Court, alleges that the defendant companies distributed a defective product (MTBE), which they knew posed an unreasonable risk of contamination of groundwater sources.

A contributing factor to the timing of New Hampshire's lawsuit were legislative efforts in the United States Congress to exempt MTBE manufacturers from liability for contamination caused by the chemical. MTBE manufacturers were successful in getting language added to the House version of the Bush Administration's comprehensive energy legislation that

would have provided them liability protection from lawsuits such as that brought by New Hampshire. Many observers credit New Hampshire's lawsuit, and the actions of New Hampshire's two senators and state lawmakers, for scuttling this provision in the Senate.

In commenting on New Hampshire's lawsuit, Professor Thomas McGarity of the University of Texas Law School observed that society needs both a system of federal regulation as well as state common law tools to address environmental contamination like that posed by MTBE. This may be particularly true in cases such as MTBE, where regulatory agencies such as EPA have yet to determine the health- or environmental harm-based risk factors for such chemicals, but where the impact of chemical contamination is nonetheless real.

In defense of the continued applicability of tort law and its use by public interest lawyers like attorneys general, McGarity offered three thoughts for consideration. First, the issue is not just about predictability, but control; second, it is not just efficiency, but fairness; and third, it is not just protection, but also accountability. As to the first, McGarity suggested that, at the federal level, industry has the greatest ability to exert influence over regulatory agencies, which are politically accountable for their decisions. In the case of MTBE, he suggested, industry always had the upper hand in regard to standard-setting because MTBE was an issue that flew below the radar screen of many environmental interest groups (and municipalities, which now face contamination issues). Under the circumstances, control over a process that may be too industry-driven must be found in the courts. Because courts are not politically accountable entities, a measure of control over the influence of industry in regulatory decision-making can be exerted through litigation.

McGarity approached the efficiency/fairness justification from the perspective of cost-benefit analyses, arguing that it is important to look at the effects of the decisions based on cost-benefit beyond the efficiency that such analysis theoretically provides. Cost-benefit analysis presumes that decisions are fair where

there are more “winners” than “losers.” McGarity suggested, however, that this kind of decision making inadequately compensates the “losers” when they are on the short end of the cost-benefit equation — therefore, for the losers to be fairly compensated, lawsuits must remain a viable option.

Finally, McGarity suggested that the regulatory process is so influenced by the industries it regulates that, in many cases, the only way to ensure that agencies are accountable to the public is to force additional transparency via litigation. In regard to MTBE, he noted that two employees of one of the companies producing MTBE had done an early study which demonstrated how quickly MTBE migrated in groundwater. This study was never provided by industry to EPA during the regulatory review process (regarding whether to list MTBE under the Toxic Substances Control Act), and only saw the light of day because of litigation.

In introducing attorney Matt Pawa, whose law firm is representing New Hampshire in its lawsuit against MTBE manufacturers, Peter Heed stressed the unique aspects of New Hampshire’s lawsuit which argues that MTBE is a defective product, and, therefore, the state was obligated, as *parens patriae* for the interests of all its citizens, to pursue the manufacturers of the contaminant, not the sources of the contamination. Not only was there no practical way in which to trace the contamination to its source, but to do so would have involved a multitude of small actions against defendants with little practical ability to remedy the problem. Asserting that MTBE is, and was known by the manufacturers to be, defective, New Hampshire may have given itself its only effective opportunity to address the problem. Pawa then took the participants in the symposium through a detailed look at some of the evidence that has been discovered pursuant to New Hampshire’s lawsuit, particularly regarding company knowledge of MTBE’s solubility and ability to escape contained systems.

Montana Attorney General Mike McGrath’s introductory remarks kicking off the natural resource damages (NRD) panel left the audience tantalized with

his admission that he worked as a young man in the underground mines of Butte, Montana. This, he suggested, makes him unique among attorneys general and particularly well-qualified to discuss the subject. Georgetown Professor Lisa Heinzerling, while admitting that she did not have mining experience, observed that this panel was in remarkable synergy with the previous two panels in that all three were focused on new and “radical” uses of venerable old legal theories and how these theories have been used in interaction with environmental statutes. She suggested that this use of the common law in concert with, or as supplement to, federal statutes presents unique opportunities for states. Use of common law tools is a particularly vibrant form of federalism, as the federal government lacks the ability to act in ways that states can.

This “new public law,” as Heinzerling described it, presents state attorneys general with the ability to use the common law in unique ways. In the context of NRD, the public trust doctrine gives attorneys general the opportunity to address resource recovery in “aspirational,” not merely economic, ways. The purely economic recovery method (*i.e.*, how much the fish/bird/plant may cost in the marketplace) is not merely inadequate, Heinzerling suggested, but fundamentally fails to value the injured or lost resource accurately. The “aspirational” approach, she suggests, goes beyond mere economic recovery for injury to resources and looks at the value that the public places on such resources, both in the context of preservation as well as in the context of putting the resources back in place following the injury. This method is not, she notes, what federal guidelines suggest in regard to NRD recoveries, largely from fear that the numbers would be “unrealistically high.” But, she argues, how does one know that the numbers would be “unrealistic” if the question is never asked? Attorneys general, in their roles as protectors of the public trust, can ask these questions and, she suggests, get recoveries more in line with what the public really values.

The challenges to achieving adequate, and long-term, NRD recoveries were illustrated by Attorney General McGrath in his discussion of the Montana's actions to recover damages in the Clark Fork River area. Montana and the United States have been pursuing NRD recovery in the Clark Fork drainage area, an area of 24,000 square miles, almost since the inception of the Comprehensive Environmental Response, Compensation, and Liability Act in 1980. The contamination in this area, and particularly in the riverine and groundwater systems down-gradient of Butte, Montana, is the historical result of copper mining that had been ongoing near Butte since the middle 1800s. Millions of cubic yards of contaminated sediments, which flowed down the Clark Fork River to its confluence with the Blackfoot River, were dispersed throughout the drainage area. Much of it is trapped behind the Milltown Dam, a wooden structure built in 1908 near Missoula.

Montana sued ARCO, which owns the upstream Butte and Anaconda mine sites, in 1983, seeking restoration and loss-of-use damages. In 1990, Montana enacted its own NRD statute and subsequently sought damages and attorneys fees of \$764 million. A partial settlement for \$215 million in damages was reached following a 1997 trial; however, significant claims remain, including those for groundwater contamination and restoration of significant portions of the Clark Fork River.

From dealing with the practical realities, and pitfalls, of NRD recovery in a big case, Gordon Johnson, Deputy Environment Bureau Chief for New York Attorney General Eliot Spitzer, focused on how to achieve recoveries in small cases. His examples, drawn from New York's experience under the Oil Pollution Act (OPA), illustrated that, in some cases, statutes also provide states with creative ways to recover damages.

Congress enacted the OPA in 1990, following the *Exxon Valdez* oil spill disaster in Alaska. Johnson noted that Congress made sure that damage provisions and the measure of damages provided in the OPA would be very clear, so there would be no am-

biguity as to what state and federal trustees could recover. OPA's recovery provisions are therefore quite expansive. One significant provision in OPA allows states to recover costs that would seek be recoverable in state court. In effect, then, state law is applicable in a federal OPA lawsuit. This broad provision, as well as other components of the OPA, allow recovery for such things as real and personal property damages, lost revenues (*i.e.*, if a beach is closed, and people were charged a fee to use the beach, the lost fee revenue can be recovered), and damages to cover the cost of additional public services, such as fire protection or hazmat protections during a removal action. On the NRD side, New York has used OPA to recover for such things as loss of use of New York Harbor (following an oil barge explosion) and the closure of a beach because of offensive and deleterious odors (the result of a boat sinking and the loss of diesel fuel from the boat).

Johnson noted that courts are open to various methods of calculating NRD, provided that the methodology is plausible. In such cases, the kind of "aspirational" damages that Lisa Heinzerling discussed earlier may, indeed, be recoverable. For example, New York was able to get recovery for piping plover habitat using as its methodology the expenditures that the state and federal government incur to protect the bird, which is a listed endangered species. Calculating these expenditures (and equating them to the value the public places on piping plover protection), New York now has a valuation methodology it can use when plovers or their nesting areas are damaged.

Several questions followed the NRD panel's presentation, with most coalescing around the idea that good projects equal good recoveries — that is, a focus on a project to achieve the goal, rather than on the specific valuation of the resource damaged. A project-based focus allows the parties to get behind an idea and then develop ways to implement the idea and thus allows the creative energies of all parties involved to reach a mutually beneficial solution.

At the end of the day, it seemed clear that the role of state attorneys general in national environmental law policy is both dynamic and evolving. The use of venerable legal principles to advance new ideas and achieve particular goals has, for better or for worse, thrust state attorneys general into national policy debates in an unprecedented manner. That there are risks in these endeavors was made clear, but balancing those risks were the opportunities such actions presented and the potential benefits to be gained by state attorneys general and the citizens of their states in a robust and energetic new chapter in the nation's ongoing federalism experiment.

#### ENDNOTES

1. The two sides in the debate are pithily captured in editorials published in two major newspapers. They were written as comments on the filing of the nuisance case against the five midwest utilities:

*Moving aggressively to compensate for Washington's unwillingness to tackle the threat of global warming. New York, seven other states and New York City filed suit last week against five of the country's largest power companies. Though the suit's legal prospects are unclear, its political implications are not. Once again, the states are asserting their right to remedy environmental problems that the Bush administration and Congress have ignored.*

*A Novel Tactic on Warming*, N.Y. TIMES, July 28, 2004, at A14.

*The main thing this suit might produce is publicity for the people who filed it. Even an amateur lawyer must suspect the suit's legal grounds are weak. . . . Any self-respecting judge will dismiss this suit — and do more. Because the only point is political self-promotion, the judge should require the attorneys general to pay court costs and defendant's costs from their own pockets. There's a name for what the attorneys general are making of themselves, a public nuisance.*

Robert J. Samuelson, *Attorneys General Hot Air*, WASH. POST, Aug. 10, 2004, at A21.

2. Jeff Shields, *Taking Law Into Their Own Hands*, PHILADELPHIA INQUIRER, Oct. 4, 2004, at A1.

3. EPA provides more information on global warming at <<http://yosemite.epa.gov/oar/globalwarming.nsf/content/climate.html>>.

4. 68 Fed. Reg. 52,922–33 (Sept. 8, 2003).

5. Massachusetts *et al.* v. U.S. Environmental Protection Agency, Nos. 03-1361 & -0365 (D.C. Cir. Filed Oct. 23, 2003). Arguments have not yet been scheduled.

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

7. See 451 U.S. 304, 313 n. 7 (1981).

8. J. Kevin Healy, *Climate Change: It's Not Just a Policy Issue for Corporate Counsel - It's a Legal Problem*, 29 COLUM. J. ENVTL. L. 89 (2004).

## DECISIONS

## AIR

**Appeals Court Overturns District Court's Grant of Summary Judgment: *Grand Canyon Trust v. Tucson Electric Power Company*, No. 03-15584 (9th Cir. Sept. 2, 2004)****Background**

In December 1977, Tucson Electric Power Company applied to U.S. EPA for a permit to construct a power plant at Springerville, Arizona, located within the Colorado Plateau. The permit authorized the construction of two coal-fired steam electric generating units, Units 1 and 2. About the time the permit was issued, Congress amended the Clean Air Act (CAA), which required, among other things, that all new sources of air pollution use the best available control technology (BACT). Under EPA regulations, permits that had already been issued were "grandfathered" — and thus not subject to the BACT requirement — if construction commenced by March 19, 1979.

Grand Canyon Trust is a non-profit environmental organization concerned about the preservation of natural resources of the Colorado Plateau. In the spring of 2001, Tucson Electric announced plans to construct two new coal-fired units at Springerville. Under its plan, EPA would not analyze the two new units as free-standing units but would analyze them as part of the plant to ensure that there would be no net increase in emissions. Grand Canyon, concerned about the construction of new coal-fired units, began an independent investigation of the Springerville plant, as did EPA. Grand Canyon concluded that Tucson Power had not, in fact, initiated construction by March 19, 1979, was subject to the BACT requirement, and had, therefore, been operating the plant without a valid permit. It thus brought a citizen enforcement suit under the CAA.

The district court concluded that Tucson Electric had commenced construction in 1978 and granted partial summary judgment in September 2002 to Tucson Elec-

tric. In the meantime, EPA had also come to its own conclusion regarding the validity of the 1977 permit. In February 2002, it sent a letter to the Arizona Department of Environmental Quality, objecting to the company's plan for two new units and opining that Tucson Electric had not commenced construction at Springerville by the required date and was in violation of the Clean Air Act. When the case was orally argued before the appellate court, counsel informed the court that EPA's objection had since been withdrawn.

Tucson Electric brought another motion for summary judgment, arguing that laches barred Grand Canyon's suit in its entirety. The district court granted the motion and dismissed the action. Grand Canyon appealed.

**Holding**

As a preliminary matter, Tucson Electric asserted that the district court did not have subject matter jurisdiction because this lawsuit was, in essence, a review of an EPA decision that the plant's permit is valid (because there has been no court challenge to it by the federal government). Under the CAA, a review of an EPA ruling must be in a federal court of appeal. The court held, however, that this challenge is actually a citizen enforcement action for alleged violations of the act. Those lawsuits may be brought in district court.

The court vacated the district court's order granting partial summary judgment on the "commence construction" issue even though there has evidently been a withdrawal of the EPA objection at this time. The date when construction was commenced is vital to the determination of this suit. The EPA objection might have been a factor in the district court's decision if it had known about it. The court remanded so that the lower court could reconsider the motion for partial summary judgment in light of any evidence properly presented by the parties.

Grand Canyon argued that laches should not have been invoked against it because, as a private attorney general prosecuting a citizen enforcement suit, it stands in the shoes of the government and laches may

not be invoked against the government. The court assumed, without deciding, that laches is available as a defense in a citizen enforcement action under the CAA. Nonetheless, it vacated the district court's holding on that issue because it noted that laches is not solely concerned with timing but is, instead, primarily concerned with prejudice. If there is a lengthy delay, even if unexcused, which does not result in prejudice, then imposing laches is not appropriate.

There are two primary forms of prejudice that can be caused by delay —evidentiary and expectations-based. Evidentiary prejudice can occur because evidence has been lost because of the delay. Expectations-based prejudice exists when a defendant suffered consequences or took actions that would not have otherwise been suffered or taken if the plaintiff had not delayed in bringing suit. In this case, Tucson Electric has made no claim that evidence has been lost because of the delay. Thus, the prejudice alleged is expectations-based. The district court found that Tucson Electric would now have to replace the originally installed emissions-control equipment at a cost of up to \$300 million. In addition, if the permit is deemed invalid, the company's penalty would be greatly increased over that which would have occurred had suit been brought earlier.

The appellate court held, as a matter of law, that neither the prospect of greatly increased fines nor the need to replace equipment is the type of expectations-based prejudice that the laches doctrine requires. It noted that, if the permit is deemed invalid, Tucson Electric has actually benefited by the delay because it has not had to expend the money to purchase the BACT that would have been required of it. As to the civil penalties, there may be a statute of limitations defense available and the district court can determine whether the imposition of a civil fine from the date of the operation of the plant is inequitable. The district court has the authority to determine what equity would require in the imposition of fines.

The court thus vacated the partial summary judgment and reversed the final summary judgment based on laches and remanded the case to the district court.

## CERCLA

### War Contract Applies to Future CERCLA Claims: *Ford Motor Company v. United States*, No. 03-5092 (Fed. Cir. Aug. 10, 2004)

#### Background

Ford Motor Company entered into a contract with the federal government during World War II to manufacture B-24 bomber airplanes and spare parts. After the war ended, the parties entered into a Termination Agreement which ended the contract. In 1988, the Michigan Department of Natural Resources and U.S. EPA notified Ford and six other entities, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), of their obligations to perform cleanup at the site of the former plant. Ford's contribution was due solely to the waste and effluent produced during performance of the contract with the federal government. The parties entered into a consent judgment of liability and the allocation was resolved by binding arbitration in November 1997. Ford was assigned 9.763% of the total. The issue in this lawsuit is whether the federal government must reimburse Ford for those costs, which the company estimates to be around \$7.2 million.

In March 1999, Ford filed this lawsuit in the Court of Federal Claims, which granted summary judgment to the government on the issue of their obligation under the contract to pay Ford's share of the damages and on Ford's takings claim. Ford appealed. Among the issues on appeal was whether the termination agreement provision that reserved unknown claims from the general release preserved Ford's claim for payment from the federal government for obligations arising under CERCLA.

#### Holding

The parties agreed that the Contract Settlement Act of 1944 (CSA), 41 U.S.C. § 113, governs Ford's claim. The lower court determined this not to be the case, but the appellate court agreed that the termination agreement between the parties should be con-

strued in the context of the CSA. The CSA defined “termination claim” as:

[A]ny claim or demand by a war contractor for fair compensation for the termination of any war contract and any other claim under a terminated war contract, which regulations prescribed under this chapter authorize to be asserted and settled in connection with any termination settlement.

41 U.S.C. § 103(h).

The agreement between Ford and the federal government provided for recovery of:

(4) Claims of the Contractor against the Government which are based upon responsibility of the Contractor to Third parties . . . and which involve costs reimbursable under the Contract . . . but which are not now known to the Officers, Directors, or other personnel of the Contractor whose duties include the acquisition of such knowledge.

The Court of Federal Claims held that the provision in the termination agreement was limited to liability that existed at the termination of the contract or “in close temporal proximity to contract performance.” It determined that, since the CERCLA liability did not exist and was not contemplated at the time of termination, it would not have been preserved in the termination agreement. The government contended that the termination agreement applied only to already-existing claims that were unknown at the time the agreement was signed.

In answer, Ford argued that the CSA did not set a period of limitation. It noted the decision in *United States Rubber Company v. United States*, 160 F. Supp. 492 (Ct. Cl. 1958), in which the court held that the government’s liability was “not diluted by the intervention of time.” *Id.* at 499–500. Furthermore, in

*E.I. DuPont de Nemours & Company v. United States*, 365 F.3d 1367 (Fed. Cir. 2004), the court held that the indemnity provision, which provided that “the Government shall hold [DuPont] harmless against any loss, expenses . . . or damage of any kind whatsoever arising out of or in connection with the performance of the work under this Title . . .” included indemnification for a later-arising CERCLA claim.

The government cited the holding in *Chrysler Corporation v. Ford Motor Company*, 972 F. Supp. 1097 (E.D. Mich. 1997). However, the clause in that case read that the assumption of liability was limited to claims “existing on the closing date” of the sale of the land. The court there found that the mutual understanding was to provide only for known claims. The termination agreement in this case, in contrast, specifically refers to unknown costs. According to the court, “[t]he passage of time did not negate Ford’s liability and does not defeat the government’s obligation of reimbursement.” Slip op. at 11. In *Houdaille Industries, Inc. v. United States*, 151 F. Supp. 298, 312 (Ct. Cl. 1957), the court held that:

[S]o long as the expenditure arose on account of the contractor’s performance under the contract, and the expenditure is not otherwise excluded from payment by other provisions, the mere fact that liability cannot be determined until after the termination or completion date of the contract is no reason to penalize the contractor to the extent of its subsequent payments which are attributable to the Government contract.

The court concluded that Ford’s claim was not barred because of the time lapse nor because the liability did not arise until after the enactment of CERCLA. It, thus, reversed and remanded.

[Editor’s note: This was a 2-1 decision with the dissenting judge noting that, under the termination agreement, the government’s liability is limited to those costs that were reimbursable under the war contract but not known at the

time of the termination agreement. The war contract requires payment of “loss or destruction of or damage to property as may arise out of or in connection with the performance of the work under this contract.” This language fails, according to the dissent, to transfer responsibility for CERCLA costs because it is not broad enough to include any and all environmental liability. According to the dissent, caselaw has established that, if there is limiting language in the indemnity (as there is in the termination agreement), then there must be a specific provision for CERCLA costs for these to be covered.]

**Court Affirms CERCLA Judgment: *Rohm and Haas Company v. Daniel J. Capuano Jr. et al.*, No. 03-2143 (1st Cir. Aug. 18, 2004)**

**Background**

In 1977, Daniel and Jack Capuano, hazardous waste haulers, approached Warren Picillo about using a portion of his pig farm, in Coventry, Rhode Island, as a dump for drummed and bulk waste. Later that year, after thousands of barrels of hazardous waste were deposited there, a large explosion occurred and a fire resulted that lasted several days. When Rhode Island investigators visited the site, they discovered pits and trenches filled with liquid wastes. The federal and state governments began a clean-up process under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Rhode Island brought a CERCLA action against thirty-five defendants, eventually settling with twenty of them. The Capuanos agreed to pay the state \$500,000. Rohm and Haas (R&H), which generated forty-nine of the 10,000 drums of waste at the Picillo site, were among those who did not settle. The court found R&H and two other companies jointly and severally liable for un-reimbursed costs of nearly \$1 million and for “all future costs of removal or remedial action incurred by the state . . . includ[ing] any costs associated with the removal of contaminated soil piles.” *O’Neil v. Picillo*, 682 F. Supp. 706, 731 (D.R.I. 1988).

The federal government also sought reimbursement for its costs associated with soil cleanup at the site. The Capuanos settled for \$1.5 million. In 1989, the

federal government filed a section 107 claim against R&H and another company, American Cyanamid. A judgment was entered against the two companies for nearly \$3.5 million plus interest. *See United States v. American Cyanamid Company*, 786 F. Supp. 152, 165 (D.R.I. 1992).

In September 1993, the United States issued a “special notice letter” to twenty potentially responsible parties (PRPs), including R&H and the Capuanos, demanding that they implement a groundwater remedy and reimburse U.S. EPA for costs related to the Remedial Investigation and Feasibility Study with respect to groundwater at the site. Two groups of PRPs made settlement offers. R&H was a part of one group and began incurring clean-up costs in late 1994. The Capuanos did not join either settlement group. R&H was expelled from the settlement group in March 1995 because it could not agree with the other members of the group as to its contribution. That group settled with the United States. In October 1998, R&H entered into a consent decree with the United States to pay \$4.35 million to compensate the government for its direct response costs, \$110,000 towards oversight costs, and \$69,000 towards natural resource damage.

In April 1995, R&H instituted a section 113 action to recover past and future response costs related to groundwater cleanup, naming fifty-two PRPs, including the Capuanos, in the U.S. District Court for the District of New Jersey. The court entered a dismissal as to the Capuanos on personal jurisdiction and venue grounds. It transferred R&H’s claims against the Capuanos to the District Court of Rhode Island.

The district court entered a judgment against the Capuanos for a little over \$3 million. They appealed.

**Holding**

The Capuanos asserted various affirmative defenses, including the statute of limitations. CERCLA contains a three-year statute of limitations for contribution actions. An action can not be brought more than three years after “(A) the date of judgment in any action under this Act for recovery of such costs or

damages, or (B) the date of an administrative order under section 122(g) . . . or 122(h) . . . or entry of a judicially approved settlement with respect to such costs or damages.” 42 U.S.C. § 9613(g)(3). The Capuanos contended that R&H’s contribution action is time-barred because a judgment was entered against R&H for past and future costs of remediation at the Picillo site on April 20, 1988. The Capuanos noted that the statute speaks in terms of judgment in *any* action under CERCLA. They also argued that an adjudged liable PRP should not be able to split up its contribution claims into several successive lawsuits as the cleanup continues.

The court reviewed the declaratory judgment in *O’Neil* and concluded that it did not trigger the statute of limitations for the groundwater cleanup. According to the court, being held jointly and severally liable for all future costs of removal or remedial action is not a judgment for the *recovery* of such costs. Section 133(g)(2), 42 U.S.C. § 9613(g)(2), states that, in an action for recovery of costs, “the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to *recover* further response costs or damages” (emphasis added). The *O’Neil* judgment was an *initial* action for only the recovery of costs associated with soil remediation. The declaratory judgment as to liability for future response costs is binding on any subsequent actions to recover response costs or damages, but it is not itself a judgment for the recovery of those costs.

However, the *O’Neil* judgment was a judgment for the recovery of response costs for soil remediation. The Capuanos argued that this is sufficient to trigger the running of the limitations statute. The court turned to the language of the statute for guidance. Section 113(g)(3) states that no action can be brought more than three years after “(A) the date of judgment in any action . . . for recovery of *such* costs or damages” (emphasis added). The statute can be interpreted to mean that “such costs or damages” refers to *any* response costs or that it refers to the costs or damages contained in the “judgment” mentioned in subparagraph (A).

The court noted that other subsections in section 113(g)(3) use the word “such” to limit and identify a word within the same sentence. Therefore, it interpreted the term “such costs” to refer to the judgment mentioned earlier in the sentence. Furthermore, the court has interpreted the contribution section of CERCLA to allow a PRP to seek a declaratory judgment of liability and then to seek contribution from other PRPs in phases as it incurs costs beyond its pro rata share. The court concluded that the *O’Neil* judgment triggered the statute of limitations for contribution claims for soil remediation, not for those relating to groundwater remediation. The court found that this interpretation also comports with CERCLA’s legislative history.

The Capuanos also argued that *res judicata* defeated R&H’s claim for contribution, noting that R&H failed to seek contribution from them in *American Cyanamid Company and Rohm & Haas v. King Industries, Inc., et al.*, 814 F. Supp. 215 (D.R.I. 1993), the case in which R&H sought contribution from other PRPs for soil remediation. In this case, R&H settled with most of the parties and entered dismissals, some with prejudice. The Capuanos argued that the dismissals with prejudice were judgments on the merits and, thus, the doctrine of *res judicata* should apply because there was sufficient identity between the causes of action and sufficient identity between the parties in the two suits.

The court disagreed. First, a dismissal with prejudice contained in a consent decree is not a ruling on the merits so that claim preclusion would apply to others. Second, the Capuanos were not defendants in the *King Industries* case and could not have been defendants because they received contribution immunity for claims relating to the soil remediation. Therefore, the dismissal agreements do not have a *res judicata* effect as to the Capuanos.

The court also held that the Capuanos’ claim that the “two dismissal” rule should preclude this lawsuit was without merit. Fed. Rule of Civil Procedure 41(a)(1) states that “an action may be dismissed by the plaintiff without order of court . . . [and] the dismissal is

without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed . . . an action based on or including the same claim. R&H dismissed two cases: the *King Industries* case when settlement agreements were reached and a 1995 contribution lawsuit against the Capuanos. The “two dismissal” rule is not applicable “unless the defendants are the same or substantially the same or in privity in both actions.” 5 Moore’s Federal Practice §41.04 (2d ed. 1996). The Capuanos were not defendants in *King Industries*, nor were they in privity with the defendants in *King Industries*.

Among the other issues on appeal was whether the district court abused its discretion by applying the *pro tanto* approach for allocating response costs. The court concluded that R&H had paid the United States \$4,636,725 for groundwater related clean-up costs. It received \$382,807 in settlements, so the net paid by R&H was \$4,253,918. The district court multiplied the total estimated cost of the cleanup (\$49.6 million) by 3.23% — R&H’s share as determined by the district court — and calculated that R&H’s share of the total liability was \$1,602,080. The court then deducted that amount from the \$4,253,918, leaving a judgment against the Capuanos for the amount R&H paid over its fair share, \$2,651,838.

The Capuanos claimed that the district court should have used the pro rata approach by determining each settling PRP’s share of liability rather than deducting the monetary amount of the settlements from R&H’s costs. The court noted that CERCLA does not instruct a court how a settlement agreement between two private parties affects the contribution liability of non-settling parties. The statute instructs that a court “allocate response costs among liable parties using such equitable factors as the court determines are appropriate.” 42 U.S.C. § 9613(f)(1). The appellate court read that provision as giving the district court discretion as to the most equitable method of accounting for settling parties.

Courts have taken both approaches. Some courts have followed the pro rata method of the Uniform Comparative Fault Act. Others have used the pro tanto approach of the district court in this case as reflected in the Uniform Contribution Among Tortfeasors Act. The court noted

that both of these approaches have disadvantages and advantages. The pro rata, or claim reduction, approach has the benefit of ensuring, at least in theory, that damages are apportioned equitably among the liable parties. It does require, however, that a court determine the responsibility of each party who has settled and those still involved in the litigation. The pro tanto approach, on the other hand, may mean that a non-settling party will pay more than its fair share of the liability if settling parties have paid less than their equitable shares. However, the pro tanto approach is easier to administer and it is the approach CERCLA has adopted when there is a settlement between a person and the United States or a state.

The court opined that it might be wise to mandate one approach over the other, but it declined to do so “at this juncture.” A district court has discretion to allocate response costs and, in this case, it did not abuse its discretion.

The court affirmed the district court’s judgment.

**Court Upholds \$1,908,000 Civil Fine for Failure to Respond to Information Request: *United States v. William M. Gurley*, No. 03-5132 (6th Cir. Sept. 21, 2004)**

**Background**

William Gurley is the president and majority stockholder in Gurley Refining Company (GRC). In February 1992, U.S. EPA, pursuant to its authority under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), issued a general notice letter and information request to the defendant concerning the contamination of a landfill near South Eighth Street in West Memphis, Arkansas. The request elicited information regarding Gurley’s knowledge of his assets, generators of material disposed of at the site, site operations, and the structure of GRC.

Gurley responded by notifying EPA that it should be directing its request to GRC. Eventually, the federal government filed this action and Gurley provided some information. He did not, however, provide any infor-

mation regarding his financial condition and ignored six questions that EPA had asked in a subsequent information request.

After a delay because of Gurley's filing for personal bankruptcy, the court granted the federal government's petition and imposed penalties in the amount of \$1,908,000. Gurley appealed.

### **Holding**

Gurley claimed that the EPA request was not valid because it was not reasonable. There are three requirements for reasonableness in regard to information requests: whether there has been reasonable notice; whether the scope of the request was narrowly drawn to conform to the statute; and whether the answers would facilitate EPA's investigation and cleanup of the site involved. *United States v. Pretty Products, Inc.*, 780 F. Supp. 1488, 1506 (S.D. Ohio 1991). Gurley did not dispute that the first two items were applicable to the request in question. However, as to the third factor, he pointed out that he had given deposition testimony to EPA in January 1989 in which he provided all of the relevant information. However, the deposition was concerned with another site and specific objections were lodged to any questions related to the South 8th Street site. Furthermore, Gurley refused to disclose any personal financial data at the deposition.

Gurley also argued that, even if the information request was valid at the time it was issued, it is no longer valid because the response was no longer needed by the agency. However, he did not cite to any authority that would excuse a party from liability for failure to respond simply because he delayed so long that the response was no longer useful to the agency.

Gurley also argued that the district court abused its discretion by ordering him to pay a \$1,908,000 civil penalty. The appellate court disagreed. The district court properly addressed each of the factors that is routinely considered before arriving at its penalty. The court also rejected Gurley's argument that the imposition of civil penalties violated the Excessive Fines

and Due Process clauses of the U.S. Constitution. With the statutory maximum of \$25,000 per day in potential civil penalties, the fine could have been millions of dollars. Instead, it was only a fraction of that. A rational basis existed for penalizing him; he purposefully ignored EPA's information requests over a long period of time.

The court affirmed the judgment of the district court.

**CERCLA Does Not Preempt Statute of Repose for Products Liability Suits: *Burlington Northern & Santa Fe Railway Company v. Poole Chemical Company et al.*, No. 5:04-CV-047-C (N.D. Tex. Aug. 27, 2004)**

### **Background**

Poole Chemical Company, Inc., contracted with Skinner Tank Company to furnish all labor, transportation, supplies and material to build two tanks. The installation was completed the end of October in 1988. The tanks were warranted against defects for one year. In January 2003, one of the tanks ruptured, spilling up to 300,000 gallons of liquid ammonium polyphosphate on an adjacent right of way owned by the Burlington Northern & Santa Fe Railway Company (BSNF). BSNF sued Poole under several state and federal causes of action, including the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Poole denied liability, claiming the damage was caused by a third party. It sued Skinner in April 2004, alleging several products liability causes of action. One of the issues in this case is whether the fifteen year Texas statute of repose is preempted by CERCLA's statute of limitations.

### **Holding**

Section 16.012(a)(2) of Texas Civil Practice and Remedies Code defines products liability actions as:

[A]ny action against a manufacturer or seller for recovery of damages or other relief for harm allegedly caused by a defective product, whether the

action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories, and whether the relief sought is recovery of damages or any other legal or equitable relief, including a suit for

- (A) injury or damage to or loss of real or personal property;
- (B) personal injury;
- (C) wrongful death;
- (D) economic loss; or
- (E) declaratory, injunctive, or other equitable relief.

Section 16.012 requires such lawsuits to be brought within fifteen years after the date the product was sold. This third-party complaint was not brought until six months after the fifteen-year period had expired and almost fifteen months after the tank ruptured.

Poole's complaint against Skinner contained only state law causes of action in the nature of products liability claims. Although the Ninth Circuit Court of Appeals has held that CERCLA's *discovery* rule applies to state law claims without an accompanying CERCLA claim, other courts have reached the opposite conclusion.

In regard to state statutes of limitations for hazardous substance cases, section 309(a) of CERCLA states:

- (1) Exceptions to State statutes  
In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or

under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

- (2) State law generally applicable  
Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.

42 U.S.C. § 9658(a)(1)(2).

It is clear from the statute that the federally required commencement date (FRCD) preempts a state law accrual rule if that rule would mean accrual would occur earlier than the FRCD. However, the FRCD preempts only a more restrictive law concerning accrual date, not concerning the length of the limitations period. State law still controls the limitations period. In this case, the FRCD would have occurred the date the tank ruptured. Poole had four months after that date to file the lawsuit and still be within the fifteen years of the Texas repose statute.

Furthermore, CERCLA does not apply to Skinner. He was not the owner or operator of a facility, an arranger, or a transporter, the category of responsible persons found in section 107(a) of CERCLA. The court noted that section 309(a), 42 U.S.C. § 9607(a), states that that section does not apply to actions brought under section 107. However, the converse is *not* stated. CERCLA does *not* state that nothing in section 107 should apply to section 309(a).

In *Rivas v. Safety-Kleen Corporation*, 119 Ca. Repr.2d 503, 514–15 (Cal. App. 2 Dist. 2002), the court held that section 309 had an impact “beyond actions for recovery of expenses incurred in cleaning up toxic waste sites. It applies by its terms to individual lawsuits for ‘personal injury, or property damages,’ . . . and can be invoked regardless of whether the defendants meet the statutory definition of ‘liable party’ under” 42 U.S.C. § 9607(a). This court disagreed with the California court. It could find no other court that drew the same conclusion regarding the interplay between sections 107 and 309. Therefore, the court found that Poole’s state law claims against a person who does not fall within one of the categories of CERCLA section 107(a) falls outside of CERCLA’s preemption under section 309. It, thus, granted Skinner’s motion for summary judgment.

## FEDERAL FACILITIES

**Navy Did Not Violate NEPA or ESA: *Ground Zero Center for Non-Violent Action et al. v. U.S. Department of Navy*, No. 02-36096 (9th Cir. Sept. 21, 2004)**

### Background

In the early 1970s, Naval Submarine Base Bangor, Washington, was chosen as the first dedicated full support facility within the continental United States for the Trident I missile system. A final Environmental Impact Statement (EIS) was issued in July 1974 and supplemented four times. These documents considered that the base could be upgraded in the future to accommodate a conversion to the sixth generation Trident II system. In 1989, the Navy issued an Environmental Assessment (EA) addressing the potential environmental impact of the final upgrade plan because that plan varied from the assumptions made in the 1974 EIS and its supplements. The Navy then issued a Finding of No Significant Impact.

The Navy planned to start construction in 1989, but the end of the Cold War prompted a domestic debate on the necessary scope of the Fleet Ballistic Missile system. After a review, in 1994, President Clinton

ordered the program to proceed, but at a reduced scale. The Navy concluded that the environmental impacts of a reduced version of the program were consistent with its 1989 EA and, thus, determined no further assessment was necessary.

In March 1999, the National Marine Fisheries Service listed as endangered two fish species found in the vicinity of the Bangor base, the Hood Canal Summer Run Chum Salmon and the Puget Sound Chinook Salmon. The Navy reanalyzed the potential effects of its program on those species and determined there would be no adverse effects. It forwarded its report to the NMFS, but did not receive a response. The Navy determined it did not need to prepare any NEPA documentation concerning the listing.

In June 2001, Ground Zero and other environmental interest groups filed a lawsuit alleging that the Navy violated the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA), seeking injunctive relief against the Navy’s program. The plaintiffs argued, *inter alia*, that NEPA requires the Navy to issue a new or supplemental EIS assessing the environmental risk of an accidental explosion of both a conventionally armed and a nuclear Trident II missile. They also contended that the Navy violated the ESA by failing to consult with the NMFS about the potential effect of an accidental Trident II explosion on the threatened species. The district court granted the Navy summary judgment.

### Holding

The Navy’s threshold defense is that the decision to deploy Trident II missiles to Bangor and to implement the program to adapt the facilities to handle them was a presidential directive and NEPA does not apply to presidential action. The Navy’s argument relies primarily on Presidential Decision Directive Number 30, a largely classified document. Although the court could review the document if it thought necessary, in this case the record contains unchallenged statements of two persons intimately familiar with the Trident II program which unequivocally supports the Navy’s position. The plaintiffs offered no evidence to counter

that position. The court noted:

When the President as Commander-in-Chief makes a presidential decision to deploy a weapons system at a particular military installation, the military must follow the President's order and has no ability to disregard it. Accordingly there is no agency decision regarding the President's military directive suitable for review under NEPA.

Slip op. at 13.

Nevertheless, Ground Zero argued that the Navy retained some discretion over the implementation at Bangor of the President's directive. The Navy agreed that it had discretion over the siting and modification of facilities and practical decision such as routine loading and unloading of the missiles from submarines. The question is whether the Navy complied with the NEPA requirements in regard to these issues.

NEPA implementing regulations require that federal agencies examine the "reasonably foreseeable" environmental effects of their proposed actions. 40 C.F.R. §§ 1502.16, 1508.8(b). The Ninth Circuit has held that an EIS does not need to "discuss remote and highly speculative consequences." *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974). The Navy studied the risk of an explosive accident occurring during loading and unloading operations and determined the risk was less than one in one million and the risk of an explosion occurring was between one in one hundred million and one in one trillion. Such remote possibilities do not require environmental evaluation.

Ground Zero's expert concluded that the Navy's risk calculations were "unbelievable," but the declaration was unsupported by analysis or documentation. Nevertheless, Ground Zero argued that, because the Navy incorporated this risk into its planning of the Bangor's base layout, it must then examine it for its environmental impact. The court disagreed. The Department of

Defense (DoD) regulations that govern base plannings have different aims and standards than NEPA. These regulations require that a base must be set up to maximize protection to personnel, property, and the environment surrounding the base. The Navy may have determined that this requires incorporating even remote possibilities into its planning. However, DoD base planning regulations do not affect NEPA's requirement that only reasonably foreseeable risks be assessed.

Ground Zero also contended that 40 C.F.R. § 1502.22 required that the risk of accident and explosion be assessed in the EA. This regulation requires that agencies discuss "reasonably foreseeable significant adverse effects" where "there is incomplete or unavailable information." "Reasonably foreseeable" in this regulation includes "impacts with catastrophic consequences, even if their probability of occurrence is low." The court held, however, that this regulation was inapplicable because it applies only where there is incomplete or unavailable information. The Navy made a detailed study of the risk of an accidental explosion; therefore, there was no "incomplete or unavailable information."

The plaintiffs also argued that the Navy had violated the ESA because it had failed to consult with the NMFS. The ESA requires such consultation if the agency "has reason to believe that an endangered species or a threatened species may be present in the area" of the proposed action and "implementation of such action will likely affect such species." 16 U.S.C. § 1536(a)(3). The court noted, however, that the requirement only applies to actions "in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03. There was no discretion in the Navy's siting of the Trident II missiles at Bangor. The small discretion the Navy did have in carrying out the Trident II missile program did not implicate the ESA consultation process because the likelihood of jeopardy was too remote.

Thus, the court affirmed the district court's grant of summary judgment.

## NEPA

***Red Judicata Bars Environmental Group From Bringing Claim: Headwaters, Inc. et al. v. U.S. Forest Service, No. 01-35898 (9th Cir. Sept. 8, 2004)*****Background**

Two environmental interest groups filed a lawsuit against the U.S. Forest Service, seeking declaratory and injunctive relief and alleging violations of the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), and the Administrative Procedures Act (APA), in regard to the Rogue River National Forest. Prior to this lawsuit being filed, six environmental groups and two individuals filed suit against the Forest Service, alleging that various timber sales, including those in the Beaver-Newt and Silver Fork areas in the Rogue River National Forest, were violative of NEPA, NFMA, and the APA. This lawsuit was dismissed with prejudice in December 1999, pursuant to a settlement agreement entered into with the parties. *American Lands Alliance v. Williams*, No. 99-697-AA (D. Or. 1999).

In February 2001, Klamath-Siskiyou Wildlands Center, which had been a plaintiff in the original suit, filed another lawsuit against the Forest Service, containing the same allegations as the previous suit. The Forest Service moved for judgment on the pleadings based upon *res judicata*. The plaintiff argued, however, that the court should grant relief from the earlier judgment pursuant to Federal Rule of Procedure 60(b), alleging that the attorney in the earlier lawsuit did not have authority to enter into the settlement agreement. The judge granted the Forest Service's motion and dismissed the lawsuit; Klamath-Siskiyou did not appeal that judgment.

Three days after the lawsuit was dismissed, the attorney who had filed the Klamath-Siskiyou lawsuit filed what the court characterized as a "virtually identical"

lawsuit on behalf of Headwaters, Inc., using much of the same language verbatim. The district court judge *sua sponte* dismissed the new complaint with prejudice on *res judicata* grounds. The plaintiffs appealed.

**Holding**

The elements necessary to establish *res judicata* are an identity of claims, a final judgment on the merits, and privity between the parties. In examining the first of these criteria, the court noted that it considers:

- (1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;
  - (2) whether substantially the same evidence is presented in the two actions;
  - (3) whether the two suits involve infringement of the same right; and
  - (4) whether the two suits arise out of the same transactional nucleus of facts.
- The last of these criteria is the most important.

*Constantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982) (internal citations omitted).

The *Headwaters* lawsuit clearly contains an identity of claims with the *American Lands* case and the lawsuit brought by Klamath-Siskiyou. They all allege an infringement of the same right and arise out of the same nucleus of facts. If this court were to rule on the present claims, it would have an effect on the prior judgment in the *American Lands* litigation. Therefore, there exists an identity of claims.

A final judgment on the merits includes a dismissal of an action with prejudice, as occurred in this situation. Finally, as to privity, the court noted that privity can be established in a number of ways, including a substantial identity between the party and a nonparty. In

*Stratosphere Litigation L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1142 n.3 (9th Cir. 2002), the court stated that “privity between parties exists when a party is so identified an interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved.” In this case, the stated interests are exactly the same. The court noted that in a public case, such as this, the number of plaintiffs with standing might be innumerable. Judicial economy and concerns about costs to the defendant are particularly important in these cases. The court also noted that, although a finding of privity is not appropriate simply because the same attorney represented parties in prior and subsequent proceedings, in this case a tactical decision was “made to manipulate the court’s decision and avoid the preclusive effect of a prior judgment.” Slip op. at 10.

In view of its holding, the court affirmed the district court’s decision.

[Editor’s note: This was a 2-1 decision. J. Berzon wrote a lengthy dissent, noting that “deep-rooted historical tradition that everyone should have his own day in court.” She stated that “[t]o conclude that the present plaintiffs are bound by an unlitigated judgment, entered by organizations entirely independent of them except for a common lawyer, is simply unprecedented.” Slip op. at 2. She opined that *stare decisis* was all the protection needed by the Forest Service and argued that the Forest Service, in the original suit, could have avoided successive repeat litigation of the same public interest by bringing a declaratory judgment against the class that the plaintiff is thought to represent, thereby invoking class action protections.]

## TAKINGS

### **Court Holds No Compensable Taking Occurred: *Appolo Fuels, Inc. v. United States*, No. 03-5088 (Fed. Cir. Aug. 30, 2004)**

#### **Background**

Appolo Fuels, a Kentucky corporation, began purchasing mining rights and land in the Fern Lake watershed in the late 1980s. The area is situated on the Tennessee-Kentucky border. It purchased mining rights in 2,600 acres (lease 5A) and then, several years later, purchased in fee simple 600 acres immediately surrounding Fern Lake in Tennessee. It applied in early 1994 for a permit under the Surface Mining Control and Reclamation Act (SMCRA) to mine 214 acres on its leased land in Tennessee. The City of Middlesboro, Kentucky, and the National Parks and Conservation Association filed a petition with the Office of Surface Mining Reclamation and Enforcement (OSM) to have the land designated unsuitable for mining (a LUM petition). At the time the petition was filed, the lease and 367 acres of Appolo’s 600-acre land holding were the only property Appolo owned within the petition area. Subsequently, Appolo acquired a lease to approximately 3,200 acres adjacent to the land covered by lease 5A. About 2,300 acres was in the LUM petition area.

Under SMCRA, the LUM procedure should be completed approximately one year after giving notice of the filing of the petition. Approximately two and one-half years after the filing of the LUM petition in this case, the OSM determined that the entire petition area was unsuitable for all surface coal mining operations because mining there would impair the water quality of Fern Lake, the only domestic water supply of that quality for Middlesboro.

Appolo later acquired two more leases containing mining rights within the petition area. It also filed suit with the Court of Federal Claims, alleging that the LUM decision constituted a regulatory taking of Appolo’s mining interests and that the OSM delay in issuing its decision constituted a temporary taking.

The Court of Federal Claims entered summary judgment in favor of the government and this appeal followed.

### Holding

In determining whether a categorical taking has occurred, a court must first determine the extent of the parcel that will serve as the “denominator” in the taking formula. Supreme Court jurisprudence holds that, with respect to both categorical and partial takings, the analysis must be applied to the “parcel as a whole.” *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130–31 (1978). The “parcel as a whole” in this case was defined as leases 5A and 14A. Since neither lease falls entirely within the LUM petition area, Appolo did not lose all economically viable use of those leases. Therefore, there could be no categorical regulatory taking.

The court then turned to the question of whether there had been a partial regulatory taking. Under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), a government may defend against liability by claiming that the regulated activity constituted a state law nuisance. Appolo argued, however, that the Court of Federal Claims mistakenly held that OSM’s LUM decision established existence of a nuisance under Tennessee common law. It contended that the Court of Federal Claims was required to determine de novo whether surface mining in the LUM area would have constituted a nuisance under Tennessee law. The court determined it was not necessary to address this argument because it concluded that there was no taking under the *Penn Central* analysis.

The *Penn Central* analysis requires a court to consider in terms of the parcel as a whole: (1) “the economic impact of the regulation on the claimant”; (2) “the extent to which the regulation has interfered with distinct investment-backed expectations”; and (3) “the character of the governmental action.” *Penn Central*, 438 U.S. at 124. The court accepted Appolo’s claim that it lost seventy-eight percent of lease 5A’s value and ninety-two percent of 14A’s value.

First, the court determined the appropriate date for assessing Appolo’s investment-backed expectations, addressing the issue of whether the enactment of SMCRA in 1977, before the acquisition of the leases, defeats those expectations. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Supreme Court held that a takings claim “is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction.” *Id.* at 630. In Justice O’Connor’s concurring opinion, she noted, however, that “the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.” *Id.* at 633. Therefore, Appolo’s reasonable investment-backed expectations are deemed to have been shaped by the regulatory regime in place at the date it purchased the leases.

In *Commonwealth Edison Company v. United States*, 271 F.3d 1327 (Fed. Cir. 2001), this court found three factors relevant to determine the reasonableness of a party’s expectations: (1) Was the plaintiff operating in a highly regulated industry; (2) was the plaintiff aware when it purchased the property in question of the problem that precipitated the regulation; and (3) should the plaintiff have reasonably anticipated the possibility of the regulation in light of the regulatory environment at the time of purchase. *Id.* at 1348. A consideration of these factors demonstrates that Appolo’s expectations were not reasonable.

First, the coal mining industry is a highly regulated industry. Second, there is nothing that demonstrated that Appolo was unaware of the problems in the industry and the fact that surface mining was a potentially environmentally hazardous activity. Third, at the time Appolo purchased the leases, it could have anticipated the possibility of a LUM decision. Appolo argued, however, that, with its years of experience in the industry, it believed that a LUM petition would not be filed and, if filed, would not be granted. It contended that whether the prospect of such a petition being filed and being successful should have been a question of fact for trial.

The court disagreed. It held that such a factual hearing was not required because an examination of the

legal regime existing at the time of the acquisition establishes the absence of reasonable expectations.

The court next looked at the character of OSM's decision to declare the Tennessee portion of the Little Yellow Creek watershed unsuitable for mining. The OSM concluded that surface mining in that area would significantly impair the water quality of Fern Lake, a water supply source. This is an exercise of police power directed towards protecting the health, safety, and welfare of the communities surrounding the lake. This is the type of government action that has normally been regarded as not requiring compensation. Thus, the court concluded that Appolo's lack of reasonable investment-backed expectations coupled with governmental action designed to protect health and safety outweigh the economic injury. Therefore, it affirmed the rejection of Appolo's partially regulatory takings claim.

Finally, the court addressed Appolo's final claim for a temporary taking. OSM delayed eighteen months beyond the year and a day granted by the statute to deny Appolo's permit. Delay in the permitting process does not give rise to a takings liability unless the delay is extraordinary. *Boise Cascade Corporation v. United States*, 296 F.3d 1339, 1352 (Fed. Cir. 2002). Furthermore, where a permanent restriction does not constitute a compensable regulatory taking, it would be strange to hold that a temporary taking occurred pending the outcome of the decisionmaking process.

The court, therefore, affirmed the lower court's grant of summary judgment in favor of the government.

### **Court Dismisses Takings Case on Eleventh Amendment Grounds: *DLX, Inc. v. Commonwealth of Kentucky et al.*, No. 03-5528 (6th Cir. Aug. 26, 2004)**

#### **Background**

DLX, Inc., is the holder of mineral rights in certain land which includes the Lilley Cornett Woods (the Woods), a tract of land owned by the state and maintained by Eastern Kentucky University as a wildlife refuge and research facility. This area is a National Natural Landmark, described by the National Park Service as "[p]robably the only surviving virgin tract of any size in the Cumberland Mountains section of the mixed mesophytic forest, which is characterized by a great variety of tree species." *National Registry of Natural Landmarks*, <http://www.nature.nps.gov/nnl/Registry/USA-Map/States?Kentucky/nnl/lcw/index.htm>.

DLX applied for an amendment of its existing permit to mine coal to the Kentucky Natural Resources and Environmental Protection Cabinet because the only remaining coal is either under the Woods or can be accessed only through the land under the Woods. It made five submittals with different plans. All of the plans were deemed insufficient because the vertical cover (the distance from mining to the surface) was deemed inadequate to minimize the impact to the hydrologic balance of the Woods.

Kentucky law allows an applicant to seek judicial review of a final order. However, instead, DLX filed a state court takings claim, asserting that the denial of a permit to mine under the Woods constituted a regulatory taking in violation of the Kentucky constitution. In the state court proceeding, DLX expressly made an *England* reservation of its federal claims. Such a reservation, taken from the decision in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415 (1964), is based on the doctrine of that case where the Court noted that "[t]here are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can

be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims."

The state trial court dismissed for lack of ripeness; an intermediate court reversed. The Kentucky Supreme Court determined that the plaintiff had failed to exhaust its administrative remedies because it had not appealed the final order of denial prior to filing a takings claim. DLX then filed in federal district court, alleging a violation of the Fifth Amendment, actionable under 42 U.S.C. § 1983. The district court dismissed the case on the basis of ripeness and the *Rooker-Feldman* doctrine. DLX appealed.

### Holding

Under the *Rooker-Feldman* doctrine, a party cannot appeal a state court decision to a federal district court but must, instead, petition for a writ of certiorari from the U.S. Supreme Court. Two categories of cases are barred by this doctrine. First, if a litigant is requesting that the federal court engage in appellate review of state court proceedings, the doctrine applies. The second category of cases is those which allege an injury that predates a state-court determination but presents issues inextricably bound with the claims asserted in the state court proceeding. This circuit has stated that:

The federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

*Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386, 390 (6th Cir. 2002).

DLX's claim involves an alleged injury that predates the state-court proceedings. However, it was not necessary for the federal district court to determine that the state court was wrong in order to provide relief to DLX. The state court decision was based on the failure to DLX to exhaust its administrative remedies, a necessary component of a state constitutional taking under Kentucky law. Administrative exhaustion is *not* a component of a federal takings claim, so the district court could have concluded that DLX had suffered a regulatory taking of its property. Therefore, *Rooker-Feldman* is not applicable to this case.

Under *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), there are two requirements for ripeness in a federal regulatory takings claim. A plaintiff must first show that a decision-making body has come to a "final decision." This is called prong one ripeness. The district court evidently relied on prong two ripeness. This requires that a plaintiff seek compensation through the procedures that a state has provided for doing so. However, this is not a requirement that a plaintiff exhaust review procedures. This is merely a requirement that a claim be made for just compensation.

Kentucky argued, however, that an exhaustion requirement still applies. The court, however, cited "clear Supreme Court precedent" that exhaustion is not required in a section 1983 case, including takings claims. The district court evidently held that, because the state court action was dismissed for lack of jurisdiction, DLX had not yet been denied just compensation. The court pointed out, however, that even though the state court decision was not on the merits, there is, nonetheless, no further remedy in state court that DLX may seek. The time for appealing the decision denying the permit application has long since past. Thus, the court disagreed that DLX had not satisfied prong two ripeness.

Kentucky also contended that DLX had not met the prong one ripeness requirement under *Williamson County* because the company had not demonstrated that a final decision had been made on the permit. This issue involves the vertical cover required. DLX

asserted that the cabinet would require a 250-foot vertical cover, which would not be economically feasible. The state, however, argued that a depth lower than 250 feet might be acceptable if DLX provided data that would show that a less than 250 foot vertical cover would preserve the hydrological balance of the Woods.

The court noted that resolution of the question requires a factual inquiry on which the district court did not make a finding. To deny jurisdiction based on a factual attack would be inappropriate without further proceedings in the district court.

Kentucky argued that the federal claim is barred by claim preclusion. Under federal law, a takings claim must first be filed in state court, as DLX did. Kentucky law applies *res judicata* to bar both asserted claims but also claims which should have been raised in the prior litigation. Since the state court could have adjudicated DLX's federal takings claim, the state asserted that its claim is barred. Courts have acknowledged that the problem of *res judicata* might, in fact, completely bar a plaintiff from the federal courts because of the *Williamson County* ripeness requirement.

Courts of appeals have responded to this dilemma in various ways, but no court has held that, where a plaintiff has made an *England* reservation of its federal claims and does not litigate them in state courts, that claim preclusion bars him from a federal court action. The cases cited by Kentucky do not require that claim preclusion apply where the plaintiffs have made a reservation of their federal claims. The court expressly adopted the authority that a party's *England* reservation of a federal takings claim in a state action will be sufficient to defeat claim preclusion in a subsequent federal action.

Kentucky also argued that it is immune from a section 1983 suit under the Eleventh Amendment. The court agreed. It noted that the Supreme Court has stated that just compensation "is, like ordinary money damages, a compensatory remedy . . . [and, thus,] legal relief." *City of Monterey v. Del Monte Dunes*,

526 U.S. 687, 710 (1999). As, such the *Ex Parte Young* exception to Eleventh Amendment immunity does not apply. DLX, however, pointed to dicta in two Supreme Court takings cases, *City of Monterey, id.*, and *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), which commentators have opined leave the question of whether Eleventh Amendment immunity applies in takings cases.

The court concluded, however, that the authorities cited by DLX were concerned primarily with the Fifth Amendment's requirement of just compensation forcing the states to provide a judicial remedy in their own courts. Thus, if DLX had brought a federal claim with its state claim in state court, the Kentucky courts would have had to hear that federal claim and, in so doing, could not have required exhaustion as a prerequisite to the federal claim.

As a final matter, the court commented that the holding in *Alden v. Maine*, 427 U.S. 706 (1999), does not foreclose the requirement that states be susceptible to suit in their own courts on takings claims. The Court held in *Alden* that Congress did not have the power to subject nonconsenting states to private suits for damages in state courts. However, where the obligation arises from the Constitution, not from congressional legislation, the state is required to provide that remedy in its own courts, notwithstanding sovereign immunity.

Since Kentucky enjoys sovereign immunity in the federal courts from the takings claim, the court upheld the dismissal of DLX's complaint for want of jurisdiction.

## WATER

***Res Judicata May Not Bar Citizen Suit: Friends of Milwaukee's Rivers and Lake Michigan Federation v. Milwaukee Metropolitan Sewerage District*, No. 02-C-0270 (7th Cir. Sept. 2, 2004)**

### Background

The Milwaukee Metropolitan Sewerage District (MMSD) and its predecessor organization have occasionally discharged untreated sewage directly into Lake Michigan and Milwaukee's rivers. In 1994, the number of these discharges was reduced after the MMSD expanded capacity through improvements, primarily the "Deep Tunnel" which increased the capacity of the system by temporarily storing untreated sewage during periods of heavy rain. It did not, however, eliminate sanitary sewer overflows (SSOs) or combined sewer overflows (CSOs).

The improvements to the system were mandated by an agreement entered into the State of Wisconsin and the predecessor to MMSD in 1977. The agreement acknowledged more than sixty historic violations of the Clean Water Act (CWA), but did not require the payment of any penalties or fines. Instead, the district was to spend nearly \$2 billion over the next twenty years to improve the system.

When the improvements failed to stop the discharges, the plaintiff sent a notice of intent to bring a citizens' suit under the CWA. Five days later, the state notified MMSD that several of the SSOs were violations of MMSD's permit and the CWA. One day prior to the expiration of the sixty-day notice period, the state and MMSD filed a stipulation with the circuit court, brought as a part of the earlier 1976 litigation. This stipulation, on which neither the plaintiffs nor the public had an opportunity to comment, required MMSD to complete three new deep tunnel projects at a cost of \$907 million. The circuit court judge refused to approve the stipulation.

The state and MMSD then agreed to meet with the plaintiffs to discuss their concerns about the stipulation. At the plaintiffs' request, the state agreed to hold off filing suit against MMSD until March 15, 2002, to allow settlement negotiations to take place. When the negotiations failed, the plaintiff filed suit early on the morning of March 15. The state filed later that day.

While the plaintiffs' lawsuit was pending, the state and MMSD entered a stipulation (2002 stipulation) that settled the state's lawsuit. It was essentially the same as the 2001 stipulation except the compliance time was shortened. MMSD then moved to dismiss the plaintiffs' complaint. The district court found that the state had commenced and diligently prosecuted judicial and administrative actions against MMSD so that there was no subject matter jurisdiction. In the alternative, it ruled that *res judicata* would bar the citizen suit. The plaintiffs appealed.

### Holding

Pursuant to the CWA, citizens may not bring suit "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order." 33 U.S.C. § 1365(a). Furthermore, any violation "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to" the subsection of the CWA that addresses administrative actions "shall not be the subject of a civil penalty action." 33 U.S.C. § 1319(g)(6)(A).

The first issue addressed by the court was whether the state timely commenced and diligently prosecuted a civil or administrative action. The 1976 litigation and the 1977 stipulation were obviously filed before the plaintiffs' suit was filed. However, these enforcement efforts cannot preclude allegations that the 1977 stipulation failed to resolve problems with the system or that the alleged violations occurred because of cir-

cumstances unrelated to those that the 1977 stipulation addressed.

The 2001 stipulation was filed as a part of the 1976 litigation before the sixty-day notice period had expired and before the plaintiffs filed their suit. The court noted that, if the state had chosen to file a new lawsuit at that time, the citizen suit would have been barred. If the 2001 stipulation had been approved, then, again, the plaintiffs' suit would be barred. However, neither of these circumstances occurred. The 2001 stipulation was never approved by the court. The appellate court stated that "[a] judicial action that never resulted in any legally binding agreement to resolve the violations . . . is not a diligent prosecution."

The plaintiffs argued that a timely commenced action must be filed prior to a citizen's suit in order for the state's enforcement action to have preclusive effect. The state countered that it had delayed filing suit at the plaintiffs' behest. Nonetheless, the clear language of the CWA dictates the conclusion that the state's 2002 litigation is not a timely-commenced action that bars the plaintiffs' suit.

The district court found that the state's administrative enforcement actions barred the plaintiffs' lawsuit, referring to meetings between EPA and the Wisconsin Department of Natural Resources, between the state agencies and MMSD, and between all three entities, information requests to MMSD, the issuance of an informal notice of non-compliance to MMSD shortly after the plaintiff's notice of intent to sue was received, and the like. However, none of these occurrences qualify as the "commencement" of an administrative enforcement action. The court held, that with respect to administrative enforcement actions, the commencement of the action is tied in with the "comparability" of the state statute to the federal provisions. Specifically, "commencement" of administrative action occurs at the point when notice and public participation protections become available to the public. Since Wisconsin does not authorize administrative penalty proceedings or fines, there are no administrative enforcement provisions "comparable" to those of the CWA. Therefore, none of the non-judicial actions

taken commenced an administrative action that barred the plaintiffs' lawsuit.

The court then turned to the issue of whether the plaintiffs' lawsuit was barred by *res judicata*. Claim preclusion requires identity between the parties or their privies in the prior and present suits; that the prior litigation must have resulted in a final judgment on the merits, and that there be an identity of the causes of action in the two suits. The plaintiffs did not dispute that the state's lawsuit resulted in a final judgment on the merits, but did challenge whether the other two factors were satisfied.

In analyzing identity of causes of action, the court noted that Wisconsin takes a transactional approach. The plaintiffs argued that their suit is broader and different in scope than the state's suit. However, these differences are swallowed up by the broad scope of the 2002 stipulation. This was intended to be a comprehensive solution to SSOs, addressing the underlying causes of the continuing violations by requiring improvements that will take several years to complete. Thus, any allegations of post-stipulation violations are not separate and distinct causes of action. The court found that there was an identity of causes between the two actions.

The court found differently, however, as to privity of the parties. In the Restatement (Second) of Judgments, there are exceptions to the general rule that an agency enforcement action that culminates in a final judgment will bar an earlier citizen suit. According to the Restatement, "[a] person is not bound by a judgment for or against a party who purports to represent him if . . . [t]he representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent." *Id.* at § 42(1)(3). Thus, in order for the state to be in privity with the plaintiffs, the state's subsequently-filed government action must be a diligent prosecution.

The CWA states that citizens' suits are barred "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the

United States, or a State to require compliance with the standard, limitation, or order.” 33 U.S.C. § 1365(b)(1)(B). Thus, a judgment that is capable of requiring compliance with the CWA and is calculated to do so will bar a citizens’ suit. The district court found that the 2002 stipulation represented diligent prosecution because it was intended by the parties to be a comprehensive solution to CSOs. However, the MMSD itself has admitted that the 2002 stipulation merely accomplishes the eventual *reduction* of overflows, not the complete elimination of them. The court stated that compliance with the act means an *end* to the violations, not merely a reduction in the number or size of them.

Contrary to the district court’s opinion, the court did not feel “confident” that the 2002 stipulation will eliminate the root causes underlying the violations alleged by the plaintiffs. Thus, although the court rejected most of the plaintiffs’ arguments of lack of diligence — including the state’s failure to include penalties in the stipulation — it agreed that the apparent failure of the stipulation to lead to complete compliance with the CWA indicated that the elements of a diligent prosecution were lacking.

Because the court could not state with certainty that the 2002 stipulation is calculated to result in compliance with the act, it remanded for a determination of that issue. Specifically, the district court should “determine whether the systemic inadequacies of MMSD’s sewerage facilities will be sufficiently ameliorated by the proposed remedial projects to result in compliance.” In making this judgment, the court should give some deference to the judgment of the state.

## CIVIL PROCEEDINGS

## Settlements

## AIR

***Michigan v. General Motors Corporation, No. 04-1315-CE (Cir. Ct. Ingham Cty Sept. 30, 2004)***

General Motors Corporation will pay \$92,349 in civil fines to settle charges of air quality violations at its metal castings plant in Saginaw, Michigan. In addition, GM will spend \$113,000 on two environmental projects to reduce mercury pollution and detect the release of mercury.

[For further information, contact Michigan AAG Neil Gordon at (517) 373-7540.]

***United States v. Chevron Phillips Chemical Company, No. 4:04-cv-03814 (S.D. Tex. Sept. 30, 2004)***

The federal government recently filed a complaint alleging that Chevron Phillips and/or its predecessor failed to exercise sufficient care to prevent and address accidental releases of chemicals at the Pasadena, Texas, plastics complex, a plastic resin and specialty chemical manufacturing facility. Two accidental explosions occurred there in 1999 and 2000, which released 1,3 butadiene and other chemicals into the air and caused three deaths and injuries to almost one hundred workers at the facility.

In a settlement filed simultaneously with the consent decree, Chevron Phillips has agreed to follow extensive work practice requirements designed to ensure that the facility is operated in the future in a manner that prevents accidental releases of chemicals. The company will pay a \$1.8 million civil penalty and will perform two Supplemental Environmental Projects at a cost of at least \$1.2 million. The first project requires the company to buy and arrange for the installation of a fuel cell to provide electricity for the operation of Moody Gardens, a non-profit conservation, education, and research institution. The fuel cell will

operate on natural gas or on methane gas extracted from the wastewater sludge generated at Moody Gardens. This project will reduce electricity use from the grid in the Houston/Galveston non-attainment area, resulting in an annual emissions reduction of approximately twenty tons per year of nitrogen oxides. The second project requires Chevron Phillips to purchase hazardous material equipment and provide hazardous materials training to the Pasadena Volunteer Fire Department.

The consent decree is subject to a thirty-day public comment period.

[For further information, contact Richard Gladstein, DOJ, at (202) 514-1711.]

***United States, Georgia, Illinois, Louisiana, and New Jersey v. CITGO Petroleum Corporation, No. 4:04-cv-03883 (S.D. Tex. Oct. 6, 2004)***

Under a settlement reached between CITGO Petroleum and the federal government, Georgia, Illinois, Louisiana, and New Jersey, the oil refining company will pay a \$3.6 million fine and spend \$320 million to cut air pollution from six of its refineries. The settlement is expected to reduce emissions of nitrogen oxide (NOx) by more than 7,184 tons and of sulfur dioxide (SO<sub>2</sub>), by more than 23,250 tons. The agreement will also require reductions of volatile organic compounds and other air pollutants at all CITGO refineries. CITGO's refineries represent nearly five percent of total U.S. refining capacity.

The affected CITGO refineries are in Lemont, Illinois, Lake Charles, Louisiana, Corpus Christi, Texas, Paulsboro, New Jersey, and Savannah, Georgia. CITGO is the refining arm of Venezuelan state oil company Petroleos de Venezuela S.A.

The proposed consent decree is subject to final court approval.

[For further information, contact Nicholas Persampieri, DOJ, at (202) 514-1134.]

***United States, Maryland, and Virginia v. Mirant Mid-Atlantic*, No. 04-1136 (E.D. Va. Sept. 27, 2004)**

In a recently lodged settlement, Mirant Mid-Atlantic has agreed to eliminate nearly 29,000 tons of nitrogen oxide (NO<sub>x</sub>) emissions each year from its coal-fired electricity generating plants in Maryland and Virginia. The settlement resolves federal and state claims that Mirant had violated the NO<sub>x</sub> emissions limitations in its permit for its Potomac River plant in Alexandria, Virginia.

The settlement requires Mirant to install pollution controls on several coal-fired units and cap its annual emissions of NO<sub>x</sub>. Mirant will also pay a \$500,000 penalty, \$250,000 of which will go to Virginia, and spend at least \$1 million to finance nine projects, designed to reduce particulate matter and fugitive dust emissions from the Potomac River plant. The consent decree covers plants in Maryland and Virginia.

The settlement is subject to a thirty-day public comment period.

[For further information, contact Virginia SAAG Carl Josephson at (804) 225-4004.]

#### CERCLA

***United States and New Mexico v. Burlington Northern and Santa Fe Railway Company*, Nos. 04-1102-RBWDS & 04-1101-JHRHS (D.N.M. Sept. 29, 2004)**

Two consent decrees have been entered into that resolve clean-up responsibility at the Atchison, Topeka and Santa Fe (AT&SF) Albuquerque Superfund Site in Albuquerque, New Mexico. AT&SF operated a wood treatment plant there from early in the twentieth century to 1972. The operations resulted in soil and groundwater contamination with creosote and other contaminants and resulted in a plume of dense non-aqueous phase liquid (DNAPL) in the upper zone of the Santa Fe Formation aquifer.

One consent decree requires BNSF to cleanup remaining soil and groundwater contamination, including the DNAPL plume, and to reimburse EPA for past costs of approximately \$320,000 and to pay future costs that will be incurred by EPA and New Mexico in connection with cleanup of the site.

The second consent decree requires BNSF to pay approximately \$1.1 million for migratory bird habitat and groundwater resources injured by the release of the contaminants. Of this amount, about \$400,000 will be used for habitat restoration projects, \$655,000 will be used by New Mexico for groundwater restoration, and the remainder will be paid to reimburse costs incurred to assess the damage to natural resources.

The consent decrees also resolve BNSF's claims that the federal government is partially responsible for site cleanup due to alleged federal control of the facility in aid of the country's efforts during World War I. The United States is paying a total of \$600,000 to resolve those claims.

[For further information, contact Nicholas Persampieri, DOJ, at (202) 514-1134.]

#### NATURAL RESOURCES

***United States and New Jersey v. France Shipmanagement S.A.*, No. 1:04-cv-04807-JHR-JBR (D.N.J. Sept. 30, 2004)**

France Shipmanagement S.A., the operator of the tank vessel, *Anitra*, has agreed to resolve allegations that the ship spilled an estimated 40,000 gallons of oil into the Delaware Bay off the coast of New Jersey in 1996. The spill occurred when the ship was in the process of unloading more than forty million gallons of light crude oil. The leak evidently occurred because of a misalignment of valves. Most of the oil floated to fifty miles of beaches over a two-week period following the spill, impacting several state wildlife management areas, two state parks, and a national wildlife refuge. The beaches impacted by the spill function as breeding and forage areas for local

and migratory shorebirds, including the piping plover, listed by New Jersey as endangered and by the federal government as a threatened species.

Under the consent decree, the company will pay \$1.5 million to natural resource trustees. Of that amount, \$1.25 will fund restoration measures for the birds. The remainder will be used to reimburse investigative costs.

[For further information, contact Brian Donohue, DOJ, at (202) 514-5413.]

#### WATER

***United States v. Explorer Pipeline Company, No. 304-cv-2132 (N.D. Tex. Oct. 1, 2004)***

In a stipulated judgment filed simultaneously with a complaint, the Explorer Pipeline Company will pay a penalty of \$3 million for violation of the Clean Water Act as amended by the Oil Pollution Act of 1990. The violation stemmed from a March 2000 discharge of 13,436 barrels of gasoline containing MTBE from a pipeline owned by Explorer located near Greenville, Texas. The gasoline reached Caddo Creek and East Caddo Creek, tributaries of Lake Tawakoni, a drinking water source for several communities. MTBE was found in the lake.

The stipulated judgment recognized Explorer's thorough and prompt clean-up efforts and the company's subsequent extensive testing and improvement of its pipeline system in compliance with instructions from the Office of Pipeline Safety at the Department of Transportation. Explorer went beyond the requirements and expended approximately \$13 million inspecting and upgrading its pipeline system.

[For further information, contact Paul Schaeffer at (202) 514-1200.]

## CRIMINAL PROSECUTIONS

### Pleas/Convictions

#### WATER

***United States v. Felipe B. Arcolas and Alfredo D. Lozada, No. 04-101-PH (D. Me. Sept. 7, 2004)***

Two chief engineers for the freighter, the *M/V Kent Navigator*, owned and managed by Petraia Maritime Ltd., pled guilty to concealing the overboard dumping of waste oil and using false log books designed to deceive the U.S. Coast Guard. The investigation was launched after the Coast Guard received an anonymous tip that a vessel bound for Portland, Maine, was illegally discharging its waste oil and bilges while at sea. The investigation revealed that the ship's oil water separator had been circumvented.

[For further information, contact AUSA Rick Murphy at (207) 780-3257.]

***United States v. John Hubenka, No. 04CR0004-B (D. Wyo. Sept. 28, 2004)***

John Hubenka, a property owner in Wyoming, was recently convicted by a federal jury of violating the Clean Water Act by constructing three earthen dikes without proper authorization in the Wind River. Hubenka's-- property is located north of the river; the Wind River Indian Reservation of the Eastern Shoshone and Northern Arapaho Tribes is located south of the river.

Investigation revealed that in the spring of 2000, Hubenka conducted and managed dredging and construction activities along the Wind River to construct the dikes. The dikes altered the flow of the river further south so that 300 acres of tribal property once located south of the river is now north of the river.

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

***United States v. Isuzu de Puerto Rico, Inc., and Digno Emérito Estrada-Rivera (D.P.R. Sept. 30, 2004)***

Isuzu de Puerto Rico, Inc., and its Chairman of the Board, Digno Emérito Estrada-Rivera, have pled guilty to a felony charge of violating the Clean Water Act by knowingly discharging a pollutant from a point source into navigable waters of the United States without a permit. Estrada-Rivera allegedly instructed Isuzu de Puerto Rico employees to illegally pump a mixture of water, gasoline, and petroleum products from two underground storage tanks into a storm drain in San Juan, which emptied into the Puerto Nuevo River, the Martín Peña Creek, and the San Juan Harbor.

Estrada-Rivera was involved in negotiations to lease property to a Detroit, Michigan, company. The company required that the defendant remove two underground storage tanks full of water and petroleum products. Instead of paying the approximately \$40,000 to have the tanks properly removed, Isuzu had employees dump the tanks' contents into the storm drain.

[For further information, contact David Lasta, DOJ, at (202) 305-0295.]

## UPDATES

***Kelo et al. v. City of New London:*** The U.S. Supreme Court has agreed to hear a Connecticut takings case that questions how the term "public use" should be defined in an eminent domain proceeding. In the Connecticut case, the city is trying to condemn property to economically revitalize an area. The city plans to sell the neighborhood to be a condemned to a private developer to build offices, a hotel, a health club, a marina, and housing. The Connecticut Supreme Court voted 4 to 3 in favor of the city, holding that increased employment and tax revenues justified the takings in an economically depressed city. In a recent Michigan Supreme Court case, *County of Wayne v. Edmond Hitchcock* (see the September 2004 issue of the *Journal*), the court held that a similar plan by Wayne County was unconstitutional.

***Ohio Valley Environmental Coalition v. William Bulen:*** The Department of Justice has appealed the ruling in the *Ohio Valley* decision in which the court invalidated the Corps' use of Nationwide Permit 21 to approve wetlands fill from mining so long as the environmental consequences were minimal. (See the August 2004 issue of the *Journal*.)

***United States v. Duke Energy:*** The Department of Justice and attorneys from the Southern Environmental Law Center filed briefs on September 3 urging the U.S. Court of Appeals for the Fourth Circuit to overturn a 2003 district court ruling that held that industry standards must be considered in PSD determinations. (See the November 2003 issue of the *Journal*.)