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THE GAO REPORT ON ENVIRONMENTAL DISCLOSURE IN SEC FILINGS

On July 14, 2004, the U.S. General Accounting Office (GAO) issued a report on environmental disclosures in reports required by the Securities and Exchange Commission (SEC) from publicly-held companies. The report was in response to a request from Senators Jeffords, Corzine, and Lieberman who asked that the GAO survey key stakeholders to determine their views on how well the SEC has defined the requirements for environmental disclosure, the extent to which disclosure is occurring, the adequacy of the commission's review and enforcement of the disclosure requirements, and on increasing and improving environmental disclosure in SEC reports.

Background

The SEC requires most companies to file, at a minimum, an annual report, a 10-K, and three quarterly reports, 10-Qs. Regulation S-K regulates the type of information companies must include in their reports. Three items are particularly relevant when speaking of environmental disclosures:

- Item 101 requires that companies disclose the material effects of compliance with local, state, and federal environmental regulations on capital expenditures, earnings, and competitive position.
- Item 103 requires the companies describe certain administrative or judicial legal proceedings arising from environmental regulations. Proceedings where the potential amount of the losses exceeds ten percent of the company's assets and potential monetary sanctions of \$100,000 or more where a governmental authority is party to the proceedings must be disclosed.
- Item 303 requires that companies discuss, in an area of the annual report known as

Management's Discussion and Analysis of Financial Condition and Results of Operations, liquidity, capital resources, and results of operations. In this area of the report, any environmental information that could materially affect company operations or finances must be presented.

In 1973, the SEC officially recognized the Financial Accounting Standards Board (FASB) as the standard-setting organization for the securities market; thus, all reports must meet the standards set by the Board. In addition, companies are required to submit audited financial statements with their annual filings. Under the Sarbanes-Oxley Act of 2002,¹ the Public Company Accounting Oversight Board is responsible for issuing standards related to preparation of those audit reports.

The Division of Corporation Finance within the SEC periodically reviews filings and will, if necessary, request additional information, amendments of prior filings, or specific disclosures in future filings via comment letters. In egregious situations, a referral is made to the Division of Enforcement, which may seek sanctions in the case of misrepresentations or omissions. Such sanctions may include barring an individual from serving as an officer in a public corporation and disgorgement of illegal profits.

Views on SEC Disclosure Requirements

As may be expected, the stakeholders contacted by the GAO for this report disagreed on how well the SEC has defined the requirements for environmental disclosure in mandated reports. Investors and researchers tended to agree that the existing regulations allow too much flexibility and are too narrow in scope. Others, such as those who prepare or file reports, opined that the scope of the current regulatory scheme is adequate, commenting that the flexibility inherent in the regulations are necessary in order that individual circumstances may be accommodated.

The standards for disclosure of environmental liabilities in financial statements are no different from those applicable to other information. Under FASB 5, a loss contingency (defined as “an existing condition, situation, or set of circumstances involving uncertainty as to possible [loss] to an enterprise that will ultimately be resolved when one or more future events occur or fail to occur”) should be disclosed (“accrued”) if it is “probable” that an asset has been impaired and the amount is “reasonably estimable.” If a company can determine that the amount falls within a particular dollar range, then the liability is considered “reasonably estimable.” In accordance with accounting principles, companies should disclose their best estimate for a liability; if no estimate is better than others, then the lowest estimate must be disclosed in their financial statements. In that case, a footnote must reveal the potential for additional liability.

SEC regulations require disclosure in mandated reports if information is “material.” Materiality is judged by the standard established by the U.S. Supreme Court in *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988) where the Court held that “an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.” A company must identify any known items that would affect liquidity. A company is encouraged to include forward-looking information, defined as anticipating a future trend or event or a less predictable impact of a known trend or event. SEC guidance states that “a disclosure duty exists where a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrant’s financial condition or results or results of operation.”²²

Stakeholders who thought the regulations and guidance on reporting were too flexible mentioned several concerns. First, there is a variety of opinions as to whether disclosure is required at the time contamination occurs or when a regulatory agency or some other party has taken action to force a cleanup. Second, under the current regulatory regime, it is too easy for a company to decide it has nothing to disclose, that it cannot develop an estimate, or it is easier to

use a known minimum amount rather than developing a best estimate. According to these commentators, companies have developed methods to account for such uncertainties and these calculations should be shared with investors. Third, the decision on materiality seems largely left to the discretion of a company’s officials. Fourth, the regulations should more clearly distinguish between “known information” and “forward-looking information,” which may be less certain but might cause a greater impact. Fifth, the \$100,000 disclosure threshold does not include costs associated with environmental remediation and supplemental environmental projects. Sixth, the regulations do not aggregate the estimated costs of similar potential liabilities, such as multiple sites, when assessing materiality. Seventh, of particular concern to socially responsible investors, companies are not required to disclose information about their environmental assets or performance. Finally, the regulations do not require disclosure of information such as total number of remediation sites, related claims, or associated liabilities.

On the other hand, those stakeholders representing industry, auditors, and others thought that the existing requirements are sufficient for disclosure of material environmental information. According to these commentators, there are clear benchmarks for reporting and preparing filings. Nonfinancial information, such as environmental performance, can be found in other documents, such as press releases and separate reports. Financial analysts noted that environmental information is of less importance than information such as executive compensation in assessing desirability as a potential investment. More information in SEC filings would only burden readers with irrelevant data. Aggregation of similar types of environmental liabilities might distort the actual risks a company faces and it is environmental regulations and market forces that drive companies to comply with environmental laws, not SEC disclosure requirements.

Data Unavailable On Companies' Compliance With Disclosure Requirements

The report details why it is difficult to determine whether companies have disclosed their environmental liabilities in accordance with SEC regulations. Without a close examination of internal company documents, there is no way of knowing what information is potentially subject to disclosure and whether that information is material for that particular party. The flexibility built in the regulation also makes an assessment difficult. Company management must determine whether occurrence of environmental liabilities is "reasonably possible" and the amount "reasonably estimable." A low level of disclosure may mean that the company does not have existing or potential environmental liabilities, has determined that such liabilities are not material, or is not complying with disclosure requirements.

Despite such difficulties, there are studies, which the GAO examined, that indicated that disclosure has increased over time. Some of the studies did purport to show that environmental disclosures were inadequate. However, according to GAO researchers, these studies are impossible to validate because they used criteria that included items not required by SEC or reflected the researchers' own interpretations of SEC reporting requirements and guidance.

The GAO reviewed disclosures by twenty U.S. utility companies that were among the largest emitters of carbon dioxides. These disclosures are not necessarily required because controls do not appear to be imminent at the federal level through ratification of the Kyoto Protocol or through legislation. However, SEC officials have not ruled out such disclosures. Of the companies studied, only one opted to make no disclosure at all. The remaining companies did not attempt to estimate the dollar value of the potential impact. There was also considerable variation as to where the disclosures were located within the various SEC filings. This variability poses a distinct problem for researchers because they must comb through an entire filing to determine if a company has disclosed an environmental liability.

Without more adequate information on the extent of environmental disclosure, the report concluded it was impossible to determine the adequacy of SEC's efforts to monitor and enforce compliance with environmental disclosure. SEC does not maintain a database on the substance of its comment letters, so these cannot be used to identify trends or problems. Furthermore, the coordination between SEC and U.S. EPA has been only sporadic. There is no formal agreement between the agencies to share relevant information. Currently, EPA periodically shares only information on specific, environment-related legal proceedings. SEC uses this information to raise "red flags" — to identify companies that may not be properly disclosing their environmental liabilities. According to the GAO, SEC officials downplayed the need for additional coordination with EPA, maintaining that the information in EPA's Enforcement and Compliance History online database is sufficient for its purpose.

The SEC has taken steps to increase its ability to analyze the results of its monitoring process. It has established a new Office of Disclosure Standards. As a part of this effort, the SEC has required all its reviewers to prepare a closing memorandum listing all the documents reviewed, a summary of the major issues raised, and how these were resolved. The SEC is still studying how it might organize and use these data.

Suggested Changes to SEC Regulations

The experts that GAO researchers contacted generally agreed with the concerns offered by the non-industry related shareholders concerning adequacy of disclosure regulations. The experts identified a few shareholder lawsuits alleging inadequate disclosure, but noted that courts have not ruled on whether the alleged failure caused financial harm to the plaintiffs.

Among the suggestions offered, some suggested that the SEC or FASB clarify terms such as "probable," "reasonably possible," and "remote" in connection with the occurrence of environmental liabilities and give more clarification on the issue of materiality. A few

suggested that the accounting and disclosure procedures for unasserted but enforceable claims be clarified. Another suggestion was that the SEC issue guidance clarifying when certain potential environmental issues should be disclosed, citing particularly greenhouse gas emissions and global climate change issues. A few of the experts said that the SEC should require information on environmental performance or issue guidance stating that this type of information might be considered material by investors. Some believe that the SEC should include supplemental environmental projects in the definition of monetary sanctions and issue guidance requiring that companies aggregate estimated costs for similar liabilities in determining materiality. Better monitoring by the SEC, closer coordination and communication with EPA, and targeted enforcement actions to increase environmental disclosure were also mentioned as means to increase environmental disclosures in SEC filings. Many of the experts consulted also commented that nonregulatory approaches, such as encouraging secondary markets to require environmental information in their assessments, would increase disclosure.

The GAO report concluded that, without more compelling evidence that the disclosure of environmental information is inadequate, it is difficult to assess the need for change from the current regime. However, it did suggest that the SEC should ensure it has the information it needs to allocate oversight resources and to determine the need for additional guidance. It also suggested that the SEC should consider making comment letters and company responses available on an electronic database. Finally, it noted that it only makes sense for the SEC to ensure that its staff is taking advantage of relevant information available from EPA. Thus, it recommended these specific actions:

- The SEC ensure that key information is electronically tracked and organized to facilitate its analysis across multiple filings.
- The SEC explore the creation of a searchable database of SEC comment letters and company responses available to the public.

- The SEC Chairman and the EPA Administrator explore opportunities to take better advantage of EPA data, examining ways to improve its usefulness to the SEC.

The complete report is available at <http://www.gao.gov/highlights/d04808high.pdf>.

ENDNOTES

1. The Sarbanes-Oxley Act encourages greater disclosure of all contingent liabilities, including environmental ones, because it requires that CEOs and CFOs certify disclosures and imposes penalties for false certifications. It also requires more frequent review by the SEC of company filings and authorizes an increase in SEC funding that will be partially used to hire additional professional support staff to strengthen SEC's disclosure and fraud prevention programs.
2. 54 Fed. Reg. 22427, 22430 (1989).

DECISIONS

Air

Court Vacates CAA Rule and Remands to Agency: *Honeywell International, Inc. v. Environmental Protection Agency*, No. 02-1294 (D.C. Cir. July 23, 2004)

Background

Honeywell International manufactures a product designated HFC-245fa. This is a non-ozone depleting hydrofluorocarbon that EPA has listed as an acceptable substitute for HCFC-141b for all foam uses. Honeywell challenged a final rule authorizing as substitutes for HCFC-141b the use of two ozone-depleting chemicals — HCFC-22 and HCFC-142b. It alleged, *inter alia*, that EPA improperly considered potential economic impact when rendering its final decision on HCFC-22 and HCFC-142b.

This rule was promulgated as a result of ATOFINA Chemical, Inc.'s petition, that these chemicals be approved as acceptable substitutes for HCFC-141b. EPA's first proposed rulemaking listed the products as unacceptable in all foam applications and delisting two other chemicals as well, including HCFC-141b, in effect denying ATOFINA's petition. After receiving comments, EPA issued a final rule which deferred reaching a decision on whether it would permit continued use of HCFC-141b. It abandoned its proposal to limit existing use of HCFC-22 and HCFC-142b and allowed existing users of these chemicals to continue to use them. The agency noted that "there would be a significant impact on small business" if EPA proceeded as it had originally proposed because switching to alternatives "would be difficult and prohibitively costly." 67 Fed. Reg. 47,706–09 (July 22, 2002).

Holding

The court first addressed EPA's contention that Honeywell lacked standing to bring the lawsuit. Honeywell pointed to loss of sales of HCFC-245fa. EPA contended that Honeywell would suffer no in-

jury in fact from having the chemicals listed as acceptable because the rule permits their use only by parties who are not potential purchasers of Honeywell's product. The court concluded that this assumption is not justified on the record. EPA also argued that Honeywell would suffer no injury because customers might opt to purchase Honeywell's product. However, EPA did not counter Honeywell's evidence that it would suffer from economic loss. Thus, the court concluded that Honeywell would suffer an injury that was fairly traceable to EPA's promulgation of the rule being challenged, giving the company standing to bring this lawsuit.

Honeywell claimed that section 612(c) of the CAA, 42 U.S.C. § 7971k(c), does not permit EPA to consider economic factors in the approval process. EPA justified its rule by noting that the use of the two substitutes, HCFC-22 and HCFC-142b, was widespread because there were diverse commercial applications for the foams, each with unique "technical considerations." EPA argued that these "technical constraints" were the reason behind the rule, not economic considerations.

The court noted, however, that economic feasibility is part of technical feasibility. The implication behind EPA's justification is that economic factors caused companies to be "locked in" to using particular chemicals in the manufacturing process even though non-ozone depleting alternatives are available and have been utilized successfully on a limited basis. EPA also argued that it was necessary to "level the playing field for small businesses" because these businesses might face "constraints associated with cost and timing of transitioning to alternatives." 67 Fed. Reg. at 47,714. These are economic factors even if EPA characterizes them as "performance" or "technical" factors.

The court held that EPA's reliance on economic constraints requires reversal of its rule. At oral argument, EPA's counsel suggested that the statute allows EPA to consider costs. However, the agency has not offered that construction of the statute prior to oral argument. Therefore, the court could not con-

sider that rationale because the argument was not properly before it.

The court then addressed the issue of the proper remedy to correct the agency's error. It read the judicial review provisions of the CAA to only authorize it to vacate, rather than merely remanding, for the type of challenge that Honeywell brought; the statute states that the court "may reverse" any action that is found to be "in excess of statutory jurisdiction, authority, or limitations . . ." 42 U.S.C. § 7907(d)(9)(c). It recognized that there is circuit precedent for the authority of the court to remand without vacating. See *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 758 (D.C. Cir. 2002). However, the only case holding that remand is proper under the CAA is *Davis County Solid Waste Management v. EPA*, 108 F.3d 1454 (D.C. Cir. 1997). Since there was no analysis in *Davis* of the actual language of section 307(d)(9)(c), the court deemed the decision was not binding on this issue.

The court therefore vacated the rule with respect to the limited use of HCFC-22 and HCFC-142b and remanded to EPA.

Bill Protecting Farmers Burning Their Fields Deemed Constitutional: *Lawrence Moon Jr. et al. v. North Idaho Farmers Association et al.*, No. 29896-29901 (Idaho Aug. 2, 2004)

Background

The plaintiffs brought a lawsuit seeking to enjoin farmers in northern Idaho from burning their Kentucky bluegrass fields. The district court granted a preliminary injunction, but the Idaho Supreme Court held that the injunction exceeded the district court's jurisdiction in some respects. The district court granted the plaintiffs' request for certification as a class and granted them leave to amend their complaint and assert a punitive damage claim.

In the spring of 2003, the Idaho legislature passed a measure, HB 391, amending the Smoke Management and Crop Residue Disposal Act of 1999. It effectively extinguished liability for Idaho grass farmers who

burn in compliance with its provisions. It specifically stated that drop burning conducted in accordance with Idaho law would not constitute a "private or public nuisance or constitute trespass." IDAHO CODE § 22-4803A(6).

The plaintiffs argued that HB 391 was unconstitutional. The district court agreed, holding that it effected an unconstitutional taking of property without prior compensation and imposed a limitation that was not in the interests of the common welfare and thus violative of Article I, § 1 of the Idaho Constitution. The district court also held that it constituted a "local or special law" in violation of Article III, § 19 of the state constitution.

Subsequently the district judge was disqualified and another judge appointed to take over the case. The district court granted the defendants' motion to stay further proceedings until the Idaho Supreme Court determined the motion for a permissive appeal of the interlocutory order. The Idaho Supreme Court granted the motion for permissive appeal.

Holding

The plaintiffs argued that the immunity provision of HB 391 results in a taking of private property without just compensation by depriving them of their common law right to bring a nuisance action and/or a trespass action. The court noted that the alleged taking is not a physical taking, but is, instead, in the nature of a regulatory taking. However, it is not a permanent deprivation of property; the burning complained of is merely an interruption of the use of one's property. The district court's interpretation of Idaho law on this issue—that compensation is due even if the taking is intermittent—is inaccurate.

The district court also concluded that the right to maintain a nuisance is an easement, adopting the Restatement of Property provision which provides that "[a]n affirmative easement entitles the owner thereof to use the land subject to the easement by doing acts which, were it not for the easement, he would not be privileged to do." RESTATEMENT OF PROPERTY § 451m at

2919 (1944). However, Idaho has not recognized the right to maintain a nuisance as an easement and the court declined the plaintiff's invitation to adopt the Restatement provision as Idaho law. The court has held in the past that the legislature can abolish common law causes of action entirely or impose statutes of limitation without violating Article I, § 18. Therefore, the court held that the immunity provision does not constitute an unconstitutional taking under either the state or federal constitution.

The plaintiffs' challenge to the statute is a facial challenge; therefore, they must show that under no circumstances could the statute be valid. The district court disagreed with the legislature's findings and made an independent finding that Kentucky bluegrass can be grown without burning. The court then determined that the limitation imposed by the statute was not "in the interests of the common welfare." The plaintiffs failed to provide a factual foundation that contravened the legislative findings. Therefore, the presumption of constitutionality must prevail.

The district court also held that HB 391 was a local or special law in violation of Article III, § 19 of the Idaho Constitution, which provides "[t]he legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . for limitation of civil or criminal actions." Under Idaho law, a law is "not special when it treats all persons in similar situations alike." *Sun Valley Company v. City of Sun Valley*, 708 P.2d 147, 152 (1985). Similarly, a law is not local when it applies equally to all areas of the state. In *Jones v. Power County*, 150 P. 35 (1915), the court noted that the true test is whether the classification is capricious, unreasonable, or arbitrary.

Most of the provisions apply to all agricultural field burning statewide. However, there are additional requirements that farmers in the ten northern counties must register each field each year that burning is conducted and obtain authorization before burning. Other provisions require heightened scrutiny in those ten counties to ensure that there is compliance with the general conditions in anticipation of burning. The supreme court also held that the provision that states

that "[n]othing in this chapter shall be construed to create a private cause of action against any person who engages in or allows crop residue burning of a field or fields required to be registered . . ." applies equally to all crop residue burners. Thus, despite some particularized reference to ten counties, the statute applies to all counties and to all agricultural burning throughout the state. Since the statute applies across the state, it is not a local or special law.

The court, therefore, reversed the district court, finding the statute constitutional.

Eminent Domain

Proposed Condemnation Unconstitutional Under Michigan's Constitution: *County of Wayne v. Edward Hathcock et al.*, Nos. 124070 et al. (Mich. July 30, 2004)

Background

Wayne County, Michigan, undertook a \$2 billion construction program at Detroit's Metropolitan Airport. To alleviate the concerns of neighbors concerning noise from increased air traffic, the county began a program of purchasing neighboring properties through a voluntary sales program. The effort was partially funded by a \$21 million grant from the Federal Aviation Administration. The county eventually purchased five hundred acres scattered throughout an area south of the airport.

The county's agreement with the FAA provided that all properties purchased through the noise abatement program were to be put to economically productive use. To fulfill this promise, the county decided to construct a large business and technology park with a conference center, hotel, and recreational facility, called the Pinnacle Project. The project was intended to invigorate the struggling economy of southeastern Michigan. The condemned properties would eventually be transferred to private parties.

To acquire the additional land required, the county again entered into voluntary purchase agreements with

owners, acquiring an additional five hundred acres. Convinced that the remaining land could not be acquired through negotiation, the county adopted a resolution of necessity authorizing the acquisition of the remaining three hundred acres required. After the appraisal process, the county made written offers; twenty-seven property owners accepted the offer. The county brought a condemnation proceeding against the remaining landowners.

Among the issues in the lower courts was whether the condemnations were authorized by state law and, if so, whether they were constitutional. Both the trial court and the court of appeals held for the county and the landowners appealed. Instrumental in both courts' decisions concerning the constitutionality of this action was the Michigan Supreme Court's decision in *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (1981).

Holding

The court first discussed whether the county lacked statutory authority to condemn the defendants' properties. The issue here was whether the proposed condemnation were "necessary for public purposes," whether the purposes were "within the scope of the county's powers," and whether the takings are "for the use or benefit of the public . . ." MICH. COMP. LAWS § 213.23. The court concluded that the county is authorized under statute to exercise the power of eminent domain, subject to constitutional and statutory limitations and that the condemnation fell within the definition of "public purpose." It also found that the condemnation was "necessary" in order for the county to fulfill the stated purposes of building a business and technical park. There is also ample evidence in the record that the Pinnacle Project would benefit the public through increased jobs and additional tax revenues. Therefore, the court concluded that the condemnations sought by the county were consistent with the statute and that the statute is a separate and independent grant of eminent domain

authority to public corporations such as the county. The remaining issue was whether the condemnations were constitutional under the Michigan Constitution.

Article 10, section 2 of the state's 1963 Constitution provides that "[p]rivate property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." The defendants argued that the proposed condemnations are not "for public use" under the constitution's definition of that term.

The court noted that the definition of "public use" must be determined by examining what the text's original meaning was at the time of the constitution's ratification in 1963. If a term is a legal term of art, as is "public use," then caselaw interpreting that term must be examined to determine the "common understanding" of what that term meant to those sophisticated in the law at the time of the constitution's ratification. Thus, the court posed the question: "[A]re the condemnation of defendants' properties and the subsequent transfer of those properties to private entities pursuant to the Pinnacle Project consistent with the common understanding of 'public use' at ratification?"

In 1963, it was well established that "public use" did not pose an absolute bar against the transfer of condemned property to private entities. However, it was also well established that the transfer could not be to private entities for private use. The transfer of condemned property is a "public use" if it possesses one of three characteristics: (1) Public necessity of the extreme sort otherwise impracticable, such as building highways, railroads and other instrumentalities of commerce; (2) when the private entity remains accountable to the public for the use of that property; and (3) when the selection of the land to be condemned is based on public concern, such as condemnation of blighted housing. The Pinnacle Project does not possess any one of these characteristics.

According to the court, the only support for the county's position is its opinion in *Poletown*. In that opinion, a majority of the court concluded that the Detroit Economic Development Corporation's plan to

condemn property in order to convey those properties to a private corporation so that it could construct an assembly plant was constitutional. According to the court, the majority's opinion was a "radical and unabashed departure from the entirety of this Court's pre-1963 eminent domain jurisprudence." Slip op. at 41. First, that court determined that it had limited power to review proposed condemnations because what constitutes a public purpose was a legislative, not a judicial, function. Second, in a departure from its jurisprudence, the court held that a generalized economic benefit was sufficient under the constitution to justify the transfer of condemned property to a private entity. In no other decision had the court ever held that a vague economic benefit stemming from a private profit-making enterprise is a "public use."

The court concluded that the *Poletown* decision should be overruled and that its analysis provided no legitimate support for the condemnations proposed by Wayne County. It also held that, since the decision was in error, it should have retroactive effect, applying it to all pending cases in which a challenge to *Poletown* has been raised and preserved.

The court, therefore, reversed the decision of the lower courts and remanded for entry of an order of summary disposition in the defendants' favor.

Hazardous Waste

Individuals May Be Prosecuted After Company Pays Administrative Fine: *Ex Parte Les Canady et al.*, Nos. 14-03-0559CR *et al.* (Tex. App. July 1, 2004)

Background

The Texas Natural Resource Conservation Commission assessed an administrative penalty against SeaTrax and Emmette Properties for violations of various state environmental and health statutes, including the Texas Water Code. In February 2002, the four appellees, employees of SeaTrax, were individually indicted in two hazardous waste disposal cases involving the same violations for which the compa-

nies had previously paid an administrative fine. The appellees moved for habeas corpus relief which the trial court granted. It determined that the Texas Water Code prohibited the state from pursuing any additional civil or criminal prosecutions if an administrative penalty had been paid for the same violation. The state appealed.

Holding

Section 7.068 of the Texas Water Code provides: "Payment of an administrative penalty under this subchapter is full and complete satisfaction of the violation for which the penalty is assessed and precludes any other civil or criminal penalty for the same violation." The state argued that the court misinterpreted the language of the code provision. According to the state, the code provision relieves only the person paying the penalty from further prosecution for the same violation.

The state's Code Construction Act is incorporated by reference into the Texas Water Code. This statute allows for consideration of extratextual factors regardless of whether the statute is ambiguous on its face. State caselaw, however, limits the use of extratextual factors in interpreting criminal statutes but allows consideration of such factors when parties take polarized positions regarding the interpretation of a statute's text. In this case, the parties have taken such positions. Thus, the court proceeded under the Code Construction Act.

The act allows the court to consider such factors as the object sought to be obtained in the statute, the circumstances of the statute's enactment, the legislative purpose, the common law or former statutory provisions, and the consequences of a particular construction. The provision in question is titled "Violations Relating to Hazardous Waste." It provides that "a person commits an offense if the person, acting intentionally or knowingly with respect to the person's conduct . . . stores, processes, exports, or disposes of, or causes to be stored, processed, exported, or disposed of, any hazardous waste without all permits TEX. WATER CODE ANN. § 7.162(a)(2). "Person" includes

a corporation. Therefore, applying the plain meaning of the statute, it seemed clear to the court that if an individual and a corporation violate the statute, each “person” commits a single violation, resulting in two violations.

In this case, the state has alleged that two corporations and four individuals acted in concert to violate the code provision. Therefore, six violations have occurred, even though each one stems from the same act. Accordingly, it seemed to the court, that payment of an administrative penalty by SeaTrax for its violation would prohibit further prosecution only against SeaTrax. The Penal Code provides that a person is responsible for his own conduct and that each party to an offense may be charged with the commission of the offense. Therefore, this interpretation of the Water Code is consistent with other criminal liability code sections.

The legislative history of the Water Code provided support for the state’s interpretation. Therefore, the court held that an administrative penalty paid under the Water Code bars subsequent prosecutions only for the violation for which the penalty is paid. The appellees committed separate violations under the Water Code. Therefore, the state is not barred from prosecuting them individually.

Intervention

Court Denies Interlocutory Appeal of Denial of State’s Petition to Intervene in EAB Proceeding: *Rhode Island v. U.S. Environmental Protection Agency et al.*, No. 04-1513 (1st Cir. Aug. 3, 2004)

Background

The Brayton Point power plant, operated by USGen New England, Inc., located in Somerset, Massachusetts, discharges into Mount Hope Bay. Part of the bay lies within Rhode Island’s borders. USGen applied for a renewed National Pollutant Discharge Elimination System (NPDES) permit. During the permitting process, Rhode Island played an active role.

Region I handed down a proposed final permit containing a series of new, more stringent conditions. USGen filed a petition for administrative review, requesting an evidentiary hearing. Rhode Island moved for leave to intervene in order to support the proposed permit or, alternatively, for permission to participate as an amicus.

The EAB issued a multi-part order, granting USGen’s petition for review, reserving the decision on whether to hold an evidentiary hearing, and denying Rhode Island’s motion to intervene without prejudice. It granted the state’s permission to participate as amicus. Rhode Island appealed the conditional denial of its motion to intervene and the court set an expedited hearing schedule.

Holding

Rhode Island argued that the appellate court had jurisdiction to hear its appeal based on section 509(b)(1)(F) of the Clean Water Act (CWA), 33 U.S.C. § 1369(b)(1)(F). This section permits “any interested person” to ask a circuit court to review EPA’s action in issuing or denying an NPDES permit. The court noted, however, that the provision applies only when a permit has been issued or denied. In this case, until the EAB review process is complete, no final agency action has occurred that would trigger this section of the statute. Until a permit is actually issued or denied, this section cannot support jurisdiction to hear Rhode Island’s claim.

The second basis for jurisdiction, according to the state, is the collateral order doctrine. Under this doctrine, some orders, although not final in the sense that they do not end the proceedings, should be treated as final and immediately appealable. See *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 546 (1949). In the First Circuit, there has been no definitive answer as to whether the doctrine applies in the administrative context. To answer the question, the court examined three Supreme Court cases: *Cohen, id.*, *Matthews v. Eldridge*, 424 U.S. 310 (1976), and *FTC v. Standard Oil Company*, 449 U.S. 232, 246 (1980). In *Matthews v. Eldridge*, the Court

held that an agency order was a final decision for purposes of judicial review. In that case, the Court stated that “the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable.” 424 U.S. at 331, n.11.

Subsequently, in *FTC v. Standard Oil Company*, the Court, with little discussion, applied the collateral order doctrine to determine the reviewability of an agency order.

Justice Ginsburg’s concurring opinion in *DRG Funding Corporation v. Secretary of HUD*, 76 F.3d 1212, 1220–21 (D.C. Cir.), noted that the signposts erected by the Court concerning the availability of the collateral order doctrine in an administrative proceeding context are reasonably clear. The appellate court in this case agreed. It also could find no overriding policy reason to apply a different rule of finality to review of agency determinations than is applied to judicial proceedings. Furthermore, the circuits that have considered the question have held that the collateral order doctrine applies to judicial review of administrative determinations. See *Osage Tribal Council v. U.S. Department of Labor*, 187 F.3d 1174 (10th Cir. 1999); *Carolina Power & Light Company v. U.S. Department of Labor*, 43 F.3d 912, 916 (4th Cir. 1995); *Jim Walter Research, Inc. v. Federal Mine Safety & Health Review Commission*, 920 F.2d 738, 744 (11th Cir. 1990); *Donovan v. OSHRC*, 713 F.2d 918, 922–23 (2d Cir. 1983); *Donovan v. Oil, Chemical, & Atomic Workers International Union*, 718 F.2d 1341, 1344–45 (5th Cir. 1983); and *Marshall v. OSHRC*, 635 F.2d 544, 548 (6th Cir. 1980).

After determining that the collateral order doctrine is applicable in administrative proceedings, the court asked whether Rhode Island’s motion to intervene would qualify as an immediately appealable order under that doctrine. In order to be appealable, the order must “conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.” *Coo-*

pers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). The EAB’s order does not meet that test. Although there is some question of whether the denial of intervention “without prejudice” might still be sufficiently conclusive to meet the first requirement, the order clearly does not meet the third requirement of unreviewability.

An order absolutely denying intervention in a judicial proceeding would not be reviewable. However, a denial of intervention in an EAB proceeding is different. Under the CWA, “any interested person,” whether that person has been a participant in the EAB proceeding, is entitled to judicial review of the final agency action. Assuming that Rhode Island can meet the “any interested person” test — and if it could not, intervention would be inappropriate anyway — it can appeal EPA’s final permitting decision without intervenor status.

The court cited the Supreme Court’s opinion in *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370 (1987), as guiding its decision. In that case, the district court denied a group’s motion to intervene as of right, but granted a motion for permissive intervention. However, it placed restrictions on the group’s ability to conduct discovery and assert new claims for relief. The group immediately appealed. The Supreme Court held that the circumscribed grant of intervention was not an immediately appealable collateral order. The group could appeal the final judgment and, in that process, attack the conditions placed on it by the district court, thus receiving “effective review” of the order. The emphasis on “effective” review is significant, according to the court in this case. Occasionally, an order may be technically subject to review, but the appealing party’s interests may not be capable of being vindicated at the later date. This is not the case here.

The court recognized that postponing the review would not be without the possibility of costs in duplicating proceedings. However, such cost is the “inevitable byproduct” of the finality rule.

The court dismissed, without prejudice, the state’s petition for want of appellate jurisdiction.

Jurisdiction

Environment Agency Does Not Have Jurisdiction Over California Trust: *New Jersey Department of Environmental Protection v. Tect, Inc., et al.*, No. BER-L-3382-02 (Super. Ct. Bergen County July 26, 2004) (Letter opinion)

Background

In this lawsuit, the New Jersey Department of Environmental Protection (DEP) is seeking to recover costs for an environmental cleanup under the state's Spill Compensation and Control Act and also for damages for harm to the state's natural resources. The contaminated site is within two blocks of the New York-New Jersey border and within a mile of several freshwater bodies of water.

The site was initially operated by Alacer Corporation, a New Jersey company. Tect owned and operated the site from 1957 to 1972. Both Tect and Alacer Corporation were under the common ownership and direction of J. Patrick. Tect filed for bankruptcy in March 1972. About the same time, J. Patrick started Alacer Company in California as a sole proprietorship. In April 1972, Alacer Company was folded into Alacer Corporation, a California corporation. Alacer Company NJ is defunct and insolvent.

NJDEP issued a directive to Tect and J. Patrick for cleanup and removal of buried drums at the site in November 2000. J. Patrick refused to comply with that directive. In April 2002, the NJDEP filed this complaint. Prior to the NJDEP directive, J. Patrick created a revocable intervivos trust in California whose sole assets were one million shares of Alacer Corporation (California) stock. J. Patrick died in February 2003. The NJDEP filed a second amended complaint substituting J. Patrick's estate and named as additional defendants the trustees of the trust.

The trustees allege that the complaint should be dismissed against them because they have no contacts with New Jersey, are residents of California, and the res of the trust is located in California.

Holding

In New Jersey, limitations on the exercise of personal jurisdiction over nonresident defendants are coextensive with those of the Due Process Clause of the Fourteenth Amendment. The court must determine whether minimum contacts exist, and, if so, whether the defendants purposely availed themselves of the privilege of conducting activities in the forum state. *Hanson v. Denckla*, 357 U.S. 235, 257. In this case, J. Patrick had substantial contacts with the State of New Jersey as did Alacer Corporation NJ. However, the California trustess have had no contacts with New Jersey.

The state argued that the New Jersey Spill Act establishes jurisdiction. It provides that "[a]ny person who has discharged a hazardous substance, or is in any way responsible for any hazardous substance" is strictly liable for clean up and removal costs. N.J. STAT. ANN. § 58:10-23.11g(c). The analysis of owner and operator liability under the Spill Act and its federal counterpart, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), are essentially the same. Under CERCLA, status as a trustee alone does not trigger liability. Since the California trustees are not "owners or operators," there is no jurisdiction under the Spill Act in New Jersey courts.

Nuclear Power/Radioactive Waste

Utah's Statutes Regarding Transportation and Storage of Spent Nuclear Fuel Are Largely Preempted: *Skull Band of Goshute Indians and Private Fuel Storage, LLC v. Dianne R. Nielson et al.*, No. 02-4149 (10th Cir. Aug. 4, 2004)

Background

Private Fuel Storage (PFS), LLC, is a consortium of utility companies that have come together to seek temporary storage options for spent nuclear fuel (SNF). PFS entered into a lease with the Skull Valley Band to build an SNF storage facility on land owned by the tribe. The Bureau of Indian Affairs conditionally ap-

proved the lease and PFS' application for licensure with the Nuclear Regulatory Commission (NRC) is pending.

Utah officials intervened in the NRC proceeding, arguing that the NRC lacked authority to license the proposed facility. The NRC rejected that argument, concluding that Congress gave the NRC authority in the Atomic Energy Act to license privately-owned, away-from-the-reactor facilities. It further concluded that this authority was not repealed by the passage of the Nuclear Waste Policy Act of 1982. The D.C. Circuit has recently affirmed the NRC's decision in *Bullcreek v. Nuclear Regulatory Commission*, 359 F.3d 536 (D.C. Cir. 2004).

The State of Utah also passed a series of statutes that regulate the storage and transportation of SNF. These statutes may be categorized as (1) amendments to Utah's Radiation Control Act; (2) county planning provisions that require county governments to impose regulations and restrictions on SNF storage; (3) provisions vesting the governor and state legislature with authority to regulate road construction surrounding the proposed SNF construction site; and (4) other provisions, including the requirement of drug and alcohol testing of employees engaged in SNF storage and authorization of litigation to determine water rights in the area.

The district court determined that the fourth category of statutes was not preempted. However, it held that the remaining challenged statutes were preempted by federal law. The state appealed.

Holding

The court began its discussion by noting the general principles of federal preemption. The question of preemption is one of determining congressional intent. Preemption may be implicit, clearly found in Congress' intent to completely occupy the field in a certain area. Preemption will also be found if there is an actual conflict between state law and federal law.

There are a number of federal laws dealing with federal regulation of privately-owned nuclear facilities, beginning with the Atomic Energy Act of 1954 and its amendments, the Price-Anderson Act, the Energy Reorganization Act, and the Nuclear Waste Policy Act. Three Supreme Court cases have dealt with the preemptive effect of these statutes: *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983); *Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238 (1984); and *English v. General Electric Company*, 496 U.S. 72 (1990). *Pacific Gas* teaches that there is field preemption of all nuclear safety issues. However, state regulations that are based on non-safety rationale may fall outside the preempted field. In *Silkwood* and *English*, the court let stand state tort laws and remedies that were not primarily motivated by nuclear safety concerns.

The court began its discussion of the Utah laws under attack by examining the various county planning provisions. Those provisions allow a county to either adopt an ordinance barring the transportation and storage of SNF or requiring it to adopt a comprehensive land use plan containing detailed information regarding the effects of any proposed SNF site upon the health and general welfare of citizens of the state. These laws also prohibit the county from providing services such as fire protection, garbage disposal, water, electricity and law enforcement to SNF facilities within the county.

The court concluded that these provisions address matters of radiological safety and are, thus, preempted. Although a county may avoid addressing radiological safety issues in its land use plan by banning storage of high level nuclear waste within its borders, the alternative is also grounded on safety concerns. Utah officials failed to offer evidence that these provisions are supported by a non-safety rationale.

The county cited *In re Long Island Lighting Company*, LPB-55-12, 21 N.R.C. 644 (1985), as supporting its claim that the ordinance is not preempted. In that case, the NRC's Licensing Board concluded that a New York statute and a county ordinance that pro-

hibited the use of private parties to perform law enforcement functions at nuclear facilities were not preempted by federal law because there was “considerable” evidence that Congress did not want to invade state authority regarding emergency response plans or to force states to take specific planning action. Furthermore, the statute and ordinance had been passed long before the operator of the nuclear facility began emergency planning. There is no similar evidence in this case and the passage of the new laws occurred after the licensing application. The court also rejected Utah’s argument that the planning provisions are not preempted because they involved areas characteristically governed by the states. Supreme Court precedent requires that a court, in a preemption analysis, consider the purpose and effect of the state law at issue. In this case, the state attempted to regulate law enforcement and other similar matters as a means of regulating radiological hazards. Thus, the regulations are preempted by federal law.

Utah amended its Radiation Control Act by adding Part 3, which begins with a prohibition of the transfer, storage, treatment, and disposal of high-level nuclear waste in Utah. If, however, an SNF storage facility receives a license, that license is upheld by court action, and the federal government transports waste to a Utah facility, then the governor may approve the storage of the waste in Utah. It further provides that the storage facilities must be licensed by the Department of Environmental Quality and lists specified requirements that the facility must meet. The amendments impose substantial application and licensing fees, including a payment of at least seventy-five percent of the unfunded projected liability of the project. It further revokes statutory and common-law limited liability for officers, directors, and equity interest owners of companies operating SNF storage facilities.

The court began with the unfunded liability provisions. The state argued that these are designed to fill the gaps of liability coverage established by the Price-Anderson Act, 42 U.S.C. § 2010. The parties disagreed whether, in analyzing this portion of the law, the court should use a field preemption or an actual conflict analysis. However, even under the more lim-

ited inquiry of actual conflict, the court concluded that the unfunded liability provisions are preempted.

The NRC’s Atomic Safety and Licensing Board recognized the potential gaps in the Price-Anderson scheme. Nonetheless, the Board found sufficient the \$200 million nuclear energy liability policy that has been obtained. Since the Licensing Board has itself filled some of the gaps of the regulatory scheme, Utah’s unfunded liability provisions conflict with the objectives of federal law and are, thus, preempted.

The district court determined that the abolition of limited liability was also preempted, noting that this would impose additional costs upon PFS. The appellate court determined that Utah’s abolition of limited liability would frustrate the objectives of federal law. Utah officials conceded that the abolition of limited liability was related to radiological safety concerns. Abolishing limited liability is a “sea change” in the law of corporations; Utah has targeted only the nuclear industry. This statute is not analogous to the statutes that survived preemption in *Silkwood* and *English*. The court, therefore, agreed with the district court that the state law is preempted.

As to the various licensing provisions, the state conceded that some of the regulations would be preempted, but they argued that some were “gap-filling” measures that should be upheld, citing *California Coastal Commission v. Granite Rock Company*, 480 U.S. 572, 598 (1987). However, in that case, the Court was examining state statutes that allegedly were preempted by the Coastal Zone Management Act of 1972, federal land use statutes, and U.S. Forest Service regulations. The Court noted that these statutes and regulations contemplated substantial state and local regulation. That is not the case in the radiological safety arena. The licensing provisions are grounded in safety concerns. Therefore, they are also preempted by federal law.

The road provisions contain four components. First, they require the concurrence of the governor and the legislature to resolve disputes arising out of a request (by an entity engaged in SNF storage and transporta-

tion) to construct a railroad crossing. Second, they designate certain county roads and trails near the Skull Valley Reservation so that the Department of Transportation (DOT) has jurisdiction and control over them. Third, they remove control of the only road permitting access to the proposed facility from the county by designating it a state highway. Fourth, they require the consent of both the governor and the state legislature before the DOT may grant a right of way to a company engaged in the transportation or storage of SNF.

The district court cited evidence that the road provisions were enacted to prevent the transportation and storage of SNF in Utah. The record establishes that these provisions were enacted for reasons of radiological safety. They are, thus, preempted. Reference to the purpose of the statute in question, along with the statute's effect, is the analysis that a court must use under *Pacific Gas, Silkwood*, and *English*. The road provisions "directly and substantially affect decisions regarding radiological safety levels by those operating nuclear facilities." Slip op. at 24.

Finally, the court turned its attention to the licensing provisions. State officials agreed that some portions of the provisions were preempted, but argued that other portions regulate where there are gaps in federal regulation. Unfortunately, there is nothing in the record that specifies which particular provisions of the licensing scheme fill in the gaps.

Therefore, the court affirmed the district court's decision.

Water

CWA Contains No Criminal Penalties for Discharge of Sewage from "Vessel": *United States v. Rush Templeton et al.*, Nos. 02-1284 et al., (8th Cir. July 28, 2004)

Background

Four defendants — Venetian Harbor, Inc., Warren Spielman, Jared Lee Bonbrake, and Rush Templeton — were convicted of knowingly discharging raw sewage in violation of 33 U.S.C. §§ 1311(a) and 1319(c)(2)(A). The discharges occurred from a towboat that was moored on the Mississippi River at a marina near Portage Des Sioux, Missouri. The towboat was being used as a restaurant and bar, the Tavern on the Rand. The towboat on which the restaurant was built, the *Frank C. Rand*, was moored at a marina owned by Venetian Harbor. Spielman was Venetian Harbor's president, and Bonbrake was its vice-president. Templeton leased the *Rand* and operated the Tavern in 1998 and 1999.

The *Rand* was manufactured in 1946 and was used as a tow barge until it fell into disrepair in the late 1980s. In 1994, Spielman purchased the *Rand* on behalf of Venetian Harbor. The company spent almost \$40,000 to clean, replat, and chemically certify the *Rand* while in drydock, after which it was towed to the marina. At the marina, it was moored about fifteen feet from shore, floating on its own, with its smoke stacks intact and radar onboard. The barge's onboard engines could have been rebuilt with sufficient funds. A new sewage system was installed by converting the air tanks to sewage tanks. Two discharge pipes allowed waste haulers to pump out waste. Leaks from the tanks would run down to the bilge which was pumped overboard at least twice. Eventually Bonbrake and Spielman instructed two workers to dump the waste into the river. Templeton also pumped waste into the river.

A superceding indictment charged all the defendants with conspiring to discharge pollutants illegally, in violation of 18 U.S.C. § 371 and knowingly discharging

pollutants in violation of 33 U.S.C. §§ 1311(a) and 1319(c)(2)(A). At the close of the presentation of the evidence, the court denied the appellants' motions for judgment of acquittal and ruled the *Rand* was not a "vessel" as a matter of law. It submitted the question to the jury as a possible affirmative defense. The appellants appealed the court's ruling that *Rand* was not a vessel under the Clean Water Act (CWA).

Holding

Under the CWA, "sewage from vessels" is excluded from the definition of a "pollutant." 33 U.S.C. § 1362(6). Therefore, if the *Rand* qualifies as a vessel, the appellants did not violate the criminal provisions of the act.

The definition of a "vessel" in the CWA is identical, in relevant respects, to the definition contained in the general provisions of the U.S. Code. The definition of both new and existing vessels includes "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on the navigable waters." 33 U.S.C. § 1322(a)(1)–(2). Although there is only one case addressing the definition of "vessel" under the CWA, there is an abundance of caselaw analyzing the definition under similarly worded statutes.

In *McCarthy v. The Bark Peking*, 716 F.2d 130, 134 (2d Cir. 1983), the court noted that "[a] craft need not be actually engaged in navigation or commerce in order to come within the definition of 'vessel.' The question is one of residual capacity." Similarly, the First Circuit in *Farrell Ocean Services, Inc. v. United States*, 681 F.2d 91, 93 (1982), held that a "'vessel' is one that is capable of use as a vessel even if not functioning as such at the moment in question." The Fifth Circuit observed in *Burks v. American River Transportation Company*, 679 F.2d 69, 75 (1982), that "[n]o doubt the three men in a tub would also fit within our definition [of a 'vessel' under 1 U.S.C. § 3], and one probably could make a convincing case for Jonah inside the whale."

The government argued that the *Rand* could not be classified as a vessel because its engines did not work,

but the lack of operable engines is not enough to disqualify the *Rand* as a vessel. In *Pleason v. Gulfport Shipbuilding Corporation*, 221 F.2d 621 (5th Cir. 1955), the Fifth Circuit concluded that, even though the *Carol Ann* did not have power, her primary engines and steering apparatus had been removed, and she was moored to a dock with steel cables and ropes, she was plainly a vessel under 1 U.S.C. § 3. The court placed emphasis on the phrase "capable of being used."

The government argued that court should follow the analysis from *West Indies Transport, Inc. et al. v. United States*, 127 F.3d 299 (3d Cir. 1997), the only circuit decision to apply the definition of "vessel" under the CWA. In that case, the court determined that a permanently moored barge was not a vessel under the act. The Third Circuit affirmed the convictions of the defendants for discharging sewage into a bay from the barge because the barge was moored permanently to the shore, was halfway submerged with part of its hull on the bed of the bay, and it could not be moved from its mooring. In contrast, the *Rand* was *not* permanently moored, was floating, and no part of its hull was resting on the river bed so it could be moved easily.

The government also cited the decision in *Katheriner v. UNISEA, Inc.*, 975 F.2d 657 (9th Cir. 1992), for support. In this case, the court was called upon to determine whether a former liberty ship was a "vessel in navigation" under the Jones Act. The UNISEA had been converted into a floating fish processing plant, was permanently moored, had no movement capabilities, no means of navigation, and no independent source of propulsion. The court held that it was not a "vessel in navigation." The *Rand*, however, does not have to qualify as a "vessel in navigation," a less inclusive term than "vessel" under the CWA. Furthermore, the *Rand* was not permanently moored, but attached to two spud poles by eighteen bolts, which were removable. The *Rand* could be towed because she floated on her own. According to the court, this is enough to bestow the status of "vessel" on her.

The *Rand* was "capable of use" as a vessel. The court, thus, rejected the government's argument that

“capable of use” means is “currently being used as.” Caselaw and the statutory language do not support that interpretation.

Thus, the court reversed the convictions of the appellants under the CWA.

CIVIL PROCEEDINGS

New Filings

Air

***Illinois v. PSI Energy and Cinergy Power Generation Services*, No. 940CH-20 (Wabash County Ct. Aug. 9, 2004)**

The Illinois Attorney General’s Office has filed suit against the owners of a coal-fired power plant, seeking to ensure that the company adheres to an agreement to fix malfunctioning equipment at its Owensville, Indiana, plant and pursuing a long-term solution to the problem.

The company agreed this summer to fix malfunctioning equipment and to pay unspecified penalties for sulfur trioxide it released on several occasions. The court has granted the state a preliminary injunction.

[For further information, contact Illinois Environment Counsel Ann Alexander at (312) 814-3772.]

***Missouri v. Leavitt*, No. 4:04-CV-01059JCH (E.D. Mo. Aug. 13, 2004)**

The Missouri Attorney General’s Office has filed a suit, asking that the court require U.S. EPA to review the national ambient air quality standards for lead, as required by the Clean Air Act. The state noted that the same air quality standard has been in place since 1978. The statute requires review every five years; the lead standard was last reviewed in December 1990.

[For further information, contact Missouri AAG Tim Dugan at (573) 751-9802.]

CERCLA

***Pakootas v. Teck Cominco Metals Ltd.*, No. CV-04-0256 (E.D. Wash. July 21, 2004)**

Members of the Confederated Tribes of the Colville Reservation filed a lawsuit against a Canadian company, Teck Cominco Metals, seeking to enforce a U.S. EPA order against the company requiring it to study environmental impacts of its discharge of slag and hazardous substances into the Columbia River and Lake Roosevelt. The State of Washington has filed for intervention status.

The EPA order was issued in December 2003 against the company, based in Vancouver, British Columbia, requiring it to perform a remedial investigation/feasibility study into the effects of its dumping slag and other contaminants into the Columbia River for over one hundred years.

Canada has filed a formal complaint with the U.S. government concerning EPA’s order.

[For further information, contact Washington AAG Steve Thiele at (360) 586-4619.]

Water

***Illinois v. Dave Matthews Band and Stefan Wohl*, No. 04CH13809 (Cir. Ct. Cook County Aug. 24, 2004)**

State prosecutors have filed suit against the Dave Matthews Band and one of its bus drivers, alleging that he dumped eight hundred pounds of liquid human waste from a bus as it was crossing over the Chicago River. The waste was allegedly dumped through the bridge’s metal grating into the river. The waste hit a boat with one hundred people aboard, including the wife of Chicago’s mayor.

The lawsuit requests \$70,000 in civil penalties.

[For further information, contact Illinois Senior AAG Rebecca Burlingham at (312) 814-3776.]

New York and Connecticut v. U.S. EPA and Leavitt, No. 04-4809-AG (2d Cir. Sept. 7, 2004)

New York and Connecticut have filed suit against U.S. EPA, arguing that the agency has failed to set federal guidelines for discharge of industrial pollutants and construction and land development sites as required by the Clean Water Act. States having strict controls, such as New York and Connecticut, are placed at a competitive disadvantage, according to the states' complaint.

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

Northwest Environmental Advocates et al. v. U.S. Environmental Protection Agency, No. CV 03-05760 SI (N.D. Cal.)

New York, Illinois, Michigan, Minnesota, Wisconsin, and Pennsylvania have joined in filing an *amici curiae* brief in a lawsuit brought by various environmental advocacy groups, asking that EPA regulate ballast water discharges under the Clean Water Act.

Additionally, the states of New York, Illinois, Ohio, Michigan, Minnesota, Pennsylvania, and Wisconsin have filed a petition with the U.S. Coast Guard and the Department of Homeland Security requesting that they issue a proposed rule amending regulations concerning mandatory ballast water management for the control of nonindigenous species in the Great Lakes.

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

Settlements/Judgments**Water*****North Dakota Department of Health v. Burlington Northern Santa Fe Railway Company, No. 04-C157 (Dist. Ct. Morton County July 30, 2004)***

In the largest environmental settlement in North Dakota history, the Burlington Northern Santa Fe Railway will pay \$30.25 million to address allegations that it spilled diesel fuel that polluted groundwater below the City of Mandan, North Dakota. Under the agreement, the state has taken over the responsibility for cleanup of the diesel fuel. The railroad will place \$24 million in a trust to pay for the continued cleanup. An additional \$2.5 million will be paid to a supplemental environmental projects trust for projects to address the environmental impacts on the Mandan community. The state will receive \$1 million as a civil penalty and \$500 thousand to reimburse the state's leaking underground storage tank (LUST) fund.

The City of Mandan will receive \$1 million as reimbursement and receive land and buildings valued at \$1.25 million.

[For further information, contact North Dakota AAG Lyle Witham at (701) 328-3640.]

Santa Monica Baykeeper et al. v. City of Los Angeles, No. 01-101-RSWL (C.D. Cal. Aug. 6, 2004)

Under an agreement recently reached, the City of Los Angeles will pay \$1.6 million civil penalty for sewage spills over a number of years. It will also rebuild at least 488 miles of sewer lines, clean 2,800 miles of sewers annually, enhance the program to control restaurant grease discharges, and increase sewage system capacity.

Since 1994, the city has had more than 4,500 sewage spills. The city will spend approximately \$2 billion over the next ten years to repair and upgrade its sewage system.

[For further information, contact Hugh Barroll, EPA Region 9, at (415) 972-3895 or Bob Klotz, DOJ, at (202) 514-5516.]

United States v. Mobil Exploration and Producing U.S., Inc., No. 298CV0220 (D. Utah Aug. 3, 2004)

The federal government recently announced that it had entered into a settlement with Mobil Exploration and Producing U.S., Inc., regarding oil spill on lands leased from the Navajo Nation on the San Juan River in southeast Utah. Under the agreement, Mobil will pay a \$515,000 penalty and spend about \$4.7 million on field operation improvements to reduce spill incidences. In addition, the company has agreed to spend \$327,000 to extend water lines to eighteen Navajo families who have no indoor plumbing nor access to drinking water.

The 1998 lawsuit filed by the government claimed that, between December 1991 and March 1999, approximately 83 spills at Mobil's oil fields reached tributaries of the San Juan River. The Navajo Nation Environmental Protection Agency first brought EPA's attention to the problem in 1996.

[For further information, contact Robert Mullaney, DOJ, (415) 744-6483.]

Wetlands

United States v. Yellowstone Mountain Club, No. CV 04-58-BU-RWA (D. Mont. Aug. 9, 2004)

A settlement has been lodged in federal district court in Montana to resolve federal charges that a resort, the Yellowstone Mountain Club, violated the Clean Water Act by dumping construction debris into streams and federally protected wetlands. The Yellowstone Mountain Club, a 13,000-acre resort near Yellowstone National Park, has agreed to pay \$1.8 million in fines and restore and replace damaged wetlands. This is believed to be the largest settlement in history for such wetland pollution. The resort has also agreed to pay the state Department of Environmental Quality \$231,000 for dumping dredge material into a tributary of the Gallatin River.

The settlement is open to public comment and subject to approval by the court.

[For further information, contact AUSA Leif Johnson at (406) 247-4630.]

CRIMINAL PROSECUTIONS

Pleas

Migratory Bird Act

United States v. Phelps Dodge Morenci, Inc., No. 04-CR-1629 (D. Ariz. Aug. 9, 2004)

Phelps Dodge Morenci, Inc., owner and operator of an open pit copper mine, has pled guilty to a misdemeanor charge of violating the Migratory Bird Treaty Act. Forty-three migratory birds have been found at the mine site. The birds' death was evidently caused by their ingestion of sulfuric acid and copper solutions found in waters on the site.

The company has agreed to pay the maximum fine of \$15,000 and has already taken steps to end the bird

deaths. The company has agreed to donate \$10,000 to one or more federally-licensed bird rehabilitators and to fund a study of possible projects to enhance or create migratory bird habitats within the Gila/Salt/Verde River Ecosystem. Should the study cost less than \$80,000, the company will apply the balance to actually creating or enhancing such habitats.

[For further information, contact Eleanor Colburn, DOJ, at (202) 305-0205.]

Water

United States v. Michael Miller, No. CR 03-499 (C.D. Cal. July 19, 2004)

Michael Miller, the owner of a small furniture stripping and refinishing business in Santa Monica, California, recently pled guilty to a misdemeanor violation of the Clean Water Act and a felony violation of the Resource Conservation and Recovery Act. The charges stemmed from an investigation after a worker went into cardiac arrest and sustained third-degree burns when he was repairing a thirty-six-inch sewer line located in front of Miller's shop.

Miller allegedly removed a seal from a sump that connected the city sewer system and discharged acid-laden wastewater into the sewer. The chemicals caused the worker's burns.

[For further information, contact AUSA William Carter at (213) 894-3547.]

United States v. Andrew Wall Jr. and John Wall, No. CR-04-00170 (C.D. Cal. Aug. 3, 2004)

The former owner and an operator of the now-defunct San Pedro Boat Works have pled guilty to charges that they violated federal environmental laws. Andrew Wall Jr. pled guilty to illegally storing drums of flammable and toxic hazardous waste. His son, John, pled guilty to charges that he illegally discharged

untreated and partially treated sewage into Los Angeles Harbor.

The criminal charges stem from an inspection conducted in 2003 at two berths where the San Pedro Boat Works once operated. The company filed for bankruptcy in 2002.

[For further information, contact AUSA William Carter at (213) 894-3547.]

Sentences

Water

United States v. Sabine Transportation Company, No. CR03-63-LRR (N.D. Iowa Aug. 10, 2004)

Sabine Transportation Company of Cedar Rapids, Iowa, has been sentenced on its admission that it was guilty of dumping waste oil, diesel-contaminated grain, and plastic wastes at sea. The discharges from the *S/S Trinity*, *S/S Juneau*, *S/S Sea Princess*, and *S/S Colorado* were concealed through use of false Oil Record Books.

Sabine was ordered to pay a \$2 million fine and serve three years' probation. Of the total fine, \$1 million was awarded to three former Sabine crew members who reported the crimes to the government.

[For further information, contact AUSA CJ Williams at (319) 363-6333.]

United States v. Tyco Electronics Printed Circuit Group, No. 3:04CR00139AVC (D. Conn. Aug. 18, 2004)

Tyco Electronics has been fined \$6 million for violating the Clean Water Act. It acknowledged that, from 1999 to 2001, in an attempt to avoid slowing down production, several of its employees intentionally bypassed its wastewater treatment systems that resulted in high levels of metals, oil, and chemicals being dumped into public water treatment systems of

Manchester and Stafford, Connecticut. The employees also tampered with samples and made false reports. The company also agreed to pay \$2.7 million to the state Department of Environmental Protection to fund environmental projects and \$500,000 each to Manchester and Stafford to improve their public water treatment facilities. The company will also spend \$300,000 to install equipment at its Stafford facilities to reduce the chemical now used in its waste water treatment process.

In a separate state settlement, the company will pay a \$2 million civil penalty and \$2.4 million to improve its wastewater treatment systems. Part of that money will be used to install sampling “ports” accessible to state DEP staff.

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

UPDATE

The federal government has filed a notice of appeal in *Ohio Valley Environmental Coalition v. Bulen*. The court’s ruling invalidated Nationwide Permit 21, under which the U.S. Army Corps of Engineers may authorize surface mining projects that discharge fill material into streams if the discharges will have only minimal adverse effects on the environment. (See the August 2004 issue of the *Journal*.)