



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

NATIONAL ENVIRONMENTAL ENFORCEMENT JOURNAL

Vol. 20 No. 3

APRIL 2005

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The **NATIONAL ENVIRONMENTAL ENFORCEMENT JOURNAL** is published eleven times per year by the National Association of Attorneys General, with the support of the Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, reporting recent developments in environmental enforcement. The **Journal** is funded by the Environmental Protection Agency under grant number 83138301, administered by the Office of Enforcement and Compliance Assurance. The contents of this document do not necessarily reflect the views and policies of the Environmental Protection Agency nor of the National Association of Attorneys General nor does mention of trade names or commercial products constitute endorsement or recommendation for use. Unsolicited articles, inquiries on editorial content, and subscription requests should be addressed to:

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

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

William H. Sorrell
Attorney General of Vermont
President, National Association of Attorneys General

Roy Cooper
Attorney General of North Carolina
Chair, Environment Committee

Lynne M. Ross
Executive Director

Paula Cotter
Chief Counsel for Environment

Dominique Alexander
Environment Project Assistant

**PERSONALLY RESPONSIBLE —
PERSONALLY LIABLE: THE
APPLICATION OF THE RCO DOCTRINE
IN STATE CIVIL
ENVIRONMENTAL
ENFORCEMENT ACTIONS**

By

Paula Cotter and Judy McKee*

Environmental cases frequently present a confusing welter of parties — interrelated corporations, successors in interest, individuals acting for subsidiaries and parent corporations, creditors, shareholders, officers, and employees. Similarly, a variety of legal theories have developed under which prosecutors seeking to enforce environmental statutes try to extend liability beyond a single misbehaving corporation. Historically, plaintiffs hoping to hold individuals liable for a corporation's misdeeds had to rely on the common law doctrine of piercing the corporate veil. More recently, in both federal and state courts, the doctrine of the responsible corporate officer (RCO) has been utilized and refined to hold those who have the authority and ability to control a corporation's environmental decisions liable for that company's violations of environmental laws. This article surveys the application of the RCO doctrine as it has developed in the environmental case law of various states.¹

The fundamental proposition behind the responsible corporate officer doctrine is that, if corporate employees have the authority to prevent violations of public welfare statutes, but fail to do so, they may be held

*Paula Cotter is the Environment Counsel for the National Association of Attorneys General (NAAG). She received her law degree from Ohio State University. Judy McKee edits NAAG's *National Environmental Enforcement Journal*. She received her law degree from Washburn University. The views expressed herein do not necessarily reflect the views of the Association nor of any individual Attorney General.

liable despite their lack of personal involvement or knowledge of the violations. The doctrine attempts to balance two goals: accountability for harm to the public and the economic and social benefits associated with doing business in the corporate form. In the context of environmental law, the wording of several major federal statutes has provided a basis for applying the doctrine to "any person" in a variety of criminal situations.² The doctrine has also been applied in a number of state court civil environmental enforcement actions.

Most courts and commentators have found the genesis of the responsible corporate officer (RCO) doctrine in the United States in the U.S. Supreme Court's decision in *United States v. Dotterweich*, 320 U.S. 277 (1943), a case involving a criminal violation of the federal Food, Drug, and Cosmetic Act. However, Noel Wise, in a thoughtful argument for the use of the doctrine in federal civil environmental enforcement,³ has pointed out that the doctrine did not arise *sui generis*, but can be traced to English common law. By the middle of the nineteenth century, some English courts had adopted the concept of strict liability for responsible superiors. Wise identifies three components in those early cases that helped to shape the RCO doctrine: the violation had to injure the general public; the defendant was in a position to prevent or minimize the injury; and no specific knowledge on the part of the defendant as to the occurrence of the violation need to have been shown.⁴

Prior to *Dotterweich*, both federal and state courts had begun to apply the basic notions underlying what would eventually become the RCO doctrine. For instance, in *State v. Burnam*, 128 P. 218 (Wash. 1912), the Supreme Court of Washington upheld the conviction of an officer and manager of a dairy for watering down the milk below the legal standard. The court noted that, where the offense was in violation of a public welfare statute, it required neither criminal intent nor guilty knowledge in order to find guilty a person with practical control of the business, charged with ensuring that legal requirements were met.⁵

The Court in *Dotterweich* set forth the primary elements of the RCO doctrine as it is applied today. These elements include a violation of a public health or welfare legislation, a defendant who holds a responsible position in the corporation who could have, within the scope of his or her position, prevented the violation and failed to do so, and the lack of a requirement for that individual to have personally committed the violation or to have had knowledge of the violation.⁶ These elements were all present, as well, in those very early mid-nineteenth century English cases.

Thirty-two years after *Dotterweich*, the Supreme Court in *United States v. Park*, 421 U.S. 658 (1975), expounded on its holding in *Dotterweich*. The criminal case against the defendant in *Park* stemmed from another violation of the federal Food, Drug, and Cosmetic Act. The judge instructed the jury that an individual would be liable if he “had a responsible relation to the situation, even though he may not have participated personally. The individual is or could be liable . . . even if he did not consciously do wrong.”⁷ The court also instructed that “the issue is . . . whether the defendant, John R. Park, by virtue of his position in the company, had a position of authority and responsibility in the situation out of which these charges arose.”⁸

In upholding the misdemeanor convictions, the Court noted that the act imposed a positive duty on responsible individuals to implement measures that would ensure that violations not occur as well as a duty to seek out and remedy violations. Acknowledging that it was setting a high standard of conduct upon corporate agents, the Court nevertheless found it appropriate to do so for those people who accept high-ranking positions where the business impacts on the health and welfare of the public. It also noted that “Congress has seen fit to enforce the accountability of responsible corporate agents dealing with products which may affect the health of consumers by penal sanctions cast in rigorous terms, and the obligation of the courts is to give them effect so long as they do not violate the Constitution.”⁹

Finally, the Court addressed the level of proof the

government must bring forth in proving its case under the RCO doctrine. It held that, when the government prosecutes a defendant under a public welfare statute with no scienter requirements and misdemeanor penalties, the government meets its burden of proof if it shows that the defendant had the power to prevent the violation but failed to do so. In other words, the government need but show that the individual was a responsible corporate agent in relation to the violation. Once this is shown, the burden shifts to the defendant to show a lack of authority to prevent or correct the violation.

Up to the time of the *Park* decision and for some time thereafter, the RCO doctrine had developed through criminal, not civil, cases. The first case in which a federal court expressly applied the doctrine in a civil case was *United States v. Hodges X-Ray, Inc.*, 759 F.2d 357 (6th Cir. 1985). This case involved a violation of the Radiation Control for Health and Safety Act of 1968.¹⁰ The statute provided that “[i]t shall be unlawful (1) for any manufacturer to not comply with an applicable standard prescribed pursuant to . . . this title.”¹¹ James Hodges, president and principal shareholder of Hodges X-Ray, argued that he was not a “manufacturer.” The appellate court disagreed, noting that “manufacturer” was defined as “any person engaged in the business of manufacturing, assembling, or importing of electronic products.”¹² The Sixth Circuit emphasized the importance of holding corporate officers responsible for their businesses’ violations of public welfare laws and held that the rationale for holding corporate officers criminally responsible, as stated in the *Dotterweich* and *Park* decisions, was even more persuasive where only civil liability was involved and where a finding of liability would lead, at the most, to a civil penalty.

At the state level, the cases using the RCO doctrine to hold corporate officers civilly liable for their companies’ violations of environmental laws have developed in tandem with the federal jurisprudence. One of the earliest state decisions to cite the doctrine is the Minnesota case of *In Matter of Dougherty*, 482 N.W.2d 485 (Minn. Ct. App. 1992). In that case, Paul Dougherty, the principal shareholder of MCM

Industries and its president, appealed an administrative penalty order that had been issued against him and his company by the commissioner of the Minnesota Pollution Control Agency. MCM operated a metal galvanizing business in Minneapolis, Minnesota.

In early 1990, inspectors from the agency, acting on a citizen's complaint, found large pools of liquid on the floor of a room at MCM where acid baths were used to clean metal. The liquid, when tested, was found to be highly acidic, with a pH of zero. There was also an unlabelled container of waste, which an employee identified as paint related. The inspectors further found that the hazardous waste emergency contingency plan needed to be updated. When Dougherty was informed of these problems, he told the inspectors that a malfunctioning ventilation system caused acid to condense and pool on the floor and that the problem would be eliminated by April 1990 when a new ventilation system would be installed. A second investigation in late June 1990 revealed that none of the three problems found in the earlier visit had been remedied.

In September 1990, an administrative penalty was levied against both MCM and Dougherty under Minnesota's hazardous waste laws. After an administrative hearing, the commissioner issued an amended order, which stated the liability of both MCM and Dougherty, but did reduce the penalty nearly \$3,000. The primary issue in the appeal to the Minnesota Court of Appeals was whether Dougherty could be held personally liable for the violations.

The court began its discussion by noting that a corporate officer may be held liable for violations in which that officer personally participates. However, in this case there was insufficient evidence that Dougherty directly participated in the violations at issue. The court commented, however, that the commissioner found Dougherty liable under the RCO doctrine, citing both the *Park* and *Dotterweich* decisions. The court agreed, holding that the doctrine applied to the state law and regulations in the case and that Dougherty was liable under that doctrine. It noted that Minnesota's hazardous waste laws constitute a

public welfare statute and that the violations alleged are strict liability offenses. The court noted the appropriateness of the application of the RCO doctrine in environmental cases by quoting a 1986 decision from the Eighth Circuit:

Imposing liability upon only the corporation, but not those corporate officers and employees who actually make corporate decisions, would be inconsistent with [the legislature's] intent to impose liability upon the persons who are involved in the handling and disposal of hazardous substances.¹³

Responding to Dougherty's attempt to distinguish the federal cases by pointing out that these were criminal, not civil cases, the court cited *Hodges*' point that the rationale for holding corporate officers responsible criminally is even more persuasive where civil liability is imposed.

The court noted that Dougherty was responsible as the president and primary emergency coordinator. The violations were within his sphere of influence and involvement and he failed to prevent the violations and take any corrective actions once the violations had occurred.

Dougherty contended there should be no liability because there was insufficient evidence to pierce the corporate veil. The court noted, however, that Dougherty was not being held liable merely because of his status as a stockholder or officer of the corporation, but because of his responsibility in the matter as a corporate officer. Finally, his argument that he was not a "person" under the statute because the definition did not include "corporate officer" nor "shareholder" was dismissed by the court. The definition of "person" in the statute begins "[a]ny human being . . ." The court noted it was a singularly encompassing definition that clearly embraced Dougherty within its context.

Missouri's Court of Appeals applied the RCO doc-

trine in connection with violations under the state's Hazardous Waste Management Law in its 1992¹⁴ decision in *Missouri ex rel. Webster v. Missouri Resource Recovery, Inc. and Frank E. Hostetter*, 825 S.W.2d 916 (Mo. Ct. App.).¹⁵ It cited the federal decisions that had adopted the RCO doctrine. Noting that it was not bound by the decisions of federal courts, the court nevertheless also found them instructive, particularly on environmental law questions because Missouri's law and regulations must be equal to or more stringent than the federal law and regulations. The court concluded that the general assembly had a broad intent to impose liability on all persons involved in the handling and disposal of hazardous wastes, including officers and directors who actively control or are actively involved in the proscribed activity.

A New Jersey appellate court adopted the doctrine in *New Jersey, Department of Environmental Protection v. Standard Tank Cleaning Group et al.*, 665 A.2d 753 (N.J. Super Ct. App Div. 1995). The trial court had found certain individuals liable for violations of the Standard Tank Cleaning Corporation's violation of its National Pollutant Discharge Elimination System permit that was issued under the state's Water Pollution Control Act. Although the reviewing court returned the case to the trial court because of procedural problems, the court adopted the RCO concept. It noted that the state statute defined "person" for the purpose of an enforcement action as including "any responsible corporate official." The court cited both *Dotterweich* and *Park* and also noted the Tenth Circuit decision in *United States v. Brittain*, 931 F.2d 1413, 1419 (1991), in which the court stated that, in a criminal case, for a responsible corporate officer to be held liable, there would not need to be proof that he had negligently or willfully caused a permit violation. Instead, willfulness or negligence would be imputed because of the officer's position of responsibility. According to the New Jersey court, since the state law was designed to establish a state system to enforce the provisions of the federal Clean Water Act,

it is reasonable to construe the term "responsible corporate official" in the state statute as that term was construed in *Dotterweich*, *Park*, and *Brittain*.¹⁶

In 1999, the Washington State Court of Appeals considered the RCO doctrine in a water pollution case. In *State Department of Ecology v. Lundgren and Ketron Island Enterprises, Inc.*, 971 P.2d 948, the court reviewed a district court's holding that Gary Lundgren, sole owner and officer of Ketron Island Enterprises, could be civilly liable, as well as his corporation, for violating Washington's Water Pollution Control Act. The trial court had upheld the Department of Ecology's determination that Lundgren was personally liable, overruling a contrary finding by the Pollution Control Hearings Board (PCHB).

In discussing the RCO doctrine, the court reviewed the history of the doctrine from *Dotterweich* and *Park* and noted its application on the civil side in federal courts in *United States v. Pollution Abatement Services of Oswego, Inc.*, 763 F.2d 133 (2d Cir. 1985) (violation of the Rivers and Harbors Act); in *New York v. Shore Realty Corporation*, 759 F.2d 1032 (2d Cir. 1985) (violation of the Comprehensive Environmental Response, Compensation, and Liability Act); and in *United States v. Gulf Park Water Company, Inc.*, 972 F. Supp. 1056 (S.D. Miss. 1997) (violation of the Clean Water Act). It noted that the PCHB had found all the facts necessary regarding Lundgren's control of the violating sewage treatment facility necessary to hold him responsible under the RCO doctrine. These included Lundgren informing officials that the treatment facility was not operating, his receipt of the order canceling the facility's NPDES permit and ordering it to cease discharging pollutants, his appeal on behalf of the corporation, his discussions with officials regarding willingness to rectify the situation, and his meeting with affected homeowners to negotiate a settlement. It was clear to the court that Lundgren had exercised hands-on control of the facility's operations. The court, thus, affirmed the trial court's holding, finding that PCHB had erred in not holding Lundgren personally liable under the RCO doctrine.

Dougherty was cited when the Indiana Supreme

Court adopted the RCO doctrine in 2001. In *Commissioner, Indiana Department of Environmental Management v. RLG*, 755 N.E.2d 556 (Ind. 2001), the issue was whether Lawrence Roseman, the sole corporate officer of RLG, Inc., owner and operator of a landfill in Wabash, Indiana, could be held personally liable for violations of the Indiana Environmental Management Act. The court emphasized that it was not Roseman's status as sole shareholder that was determinative of his liability under the RCO doctrine, but it was his direction of and involvement in the running of the landfill, his representation to the state environmental agency that he was the responsible party, and his actual role in the corporation's activities. The court also noted that Indiana law requires a "responsible party" for the permitting of a landfill. Roseman had signed his own name to the permit as the "Applicant/Responsible Party." He also took no steps to correct the violations once these violations became the subject of a court order. Finally, the court restated the dictum that the RCO doctrine is not dependent on piercing of the corporate veil.

The *RLG* decision was cited by the Indiana Court of Appeals when it reversed a grant of summary judgment to a corporate officer by the trial court because of the possible application of the RCO doctrine. *Commissioner, Indiana Department of Environmental Management v. Clifford Roland et al.*, 775 N.E.2d 1188 (2002). The court noted the three requirements for application of the doctrine: (1) The individual must have been in a position of responsibility so as to be able to influence corporate policies and activities; (2) there must be a nexus between the individual's position and the violation at issue so that the individual could have influenced the actions which constituted the violation; and (3) the individual's actions or inactions must have facilitated the violations.¹⁷

The latest state cases applying the RCO doctrine are from Connecticut. In *BEC Corporation et al. v. Department of Environmental Protection*, 775 A.2d 928 (Conn. 2001), the Connecticut Supreme Court applied the RCO doctrine to hold a father and son

liable under the Connecticut water pollution statute for mismanaging an oil storage facility and tank farm.

In affirming the decision of an administrative hearing officer upholding an order to abate pollution issued by the state's Department of Environmental Protection, the court ruled that the definition of "person" in the Connecticut water statute reflected legislative intent to include corporate officers. Referring to the *Dougherty* decision and adopting it in part, the court adopted the same three-part test that the Indiana court had adopted in *Roland*. The court also noted that a corporate officer may be liable for pollution caused by his or her inaction as well as from affirmative acts, recognizing the historical link between the statute and the common law of nuisance, under which acts and omissions may both be categorized as tortious. The Connecticut Superior Court applied the *BEC* holding in an unreported 2003 case. In *Rocque v. Joseph Biafore, Jr., et al.*, 2003 Conn. Super LEXIS 1323, the defendants and the corporation they owned and controlled allowed PCBs to contaminate the soil and groundwater. The court held the individuals and an estate liable for violations of the Connecticut water pollution law, imposing both a civil penalty and injunctive relief.

At least two states have seemingly rejected¹⁸ the RCO doctrine in regard to their environmental laws (although not mentioning the doctrine by name), finding that the state must prove more active participation by an individual in the alleged violation than the RCO doctrine requires. For instance, in *Kaites and Johnstown Coal and Coke, Inc. v. Pennsylvania Department of Environmental Resources*, 259 A.2d 1148 (Pa. Commw. Ct. 1987), the state Environmental Hearing Board found that John Kaites, president and chief executive officer of Johnstown Coal and Coke, Inc., was individually responsible for complying with an abatement order requiring the cessation of acidic discharges from a sealed mine. On appeal, the court reversed. It started out by noting that the general rule is that a corporation is regarded as an independent entity even when, as in this case, all the stock is held by one person. Although the court noted that corporate officers are liable for their own torts, there

must have been participation in the tortious activity for liability to attach. The court concluded:

We are cognizant that the statutes here involved [Clean Streams Act and Coal Refuse Disposal Control Act] impose strict liability, without regard to fault, on persons found to be in violation of their provisions. We also realize that nonfeasance, or the failure to act, with regard to a pollutional discharge may be one of the most egregious forms of violating the statutes involved. Despite these observations, however, we do not believe that Petitioner may be held personally liable for violating the statutes absent some positive proof of wrongful conduct.

.....

Absent evidence which would support ‘piercing the corporate veil,’ we do not believe that Pennsylvania law supports the imposition of strict liability on a corporate officer such as Petitioner simply by virtue of his managerial position.

Id. at 1153.

In commenting on the Board’s reliance for its holding on the *Park* decision, the court noted that there was high public interest in abating acid mine discharges into Pennsylvania waters. Nonetheless, the court believed the Pennsylvania law did not support the application of the type of individual liability found in *Park*. It concluded that “under Pennsylvania law, the public interest will not be violated by requiring specific evidence of acts of intentional neglect or misconduct before imposing individual liability on a corporate officer for abating a public nuisance” under the Clean Streams Law and the Coal Refuse Disposal Control

Act. *Id.* at 1154.

Similarly, in *New York v. Leah Markowitz, et al.*, 213 A.D.2d 637 (N.Y. App. Div. 2000), a New York appellate court concluded that a jury charge concerning the basis for imposition of personal liability was overly broad:

If you find that an individual defendant . . . exercised control or managerial authority over a corporate defendant . . . and had the power to prevent a discharge or discharges, you may find that individual defendant liable for a discharge or discharges. It is defendants’ conduct you must examine, not their status[es].

Id. at 642. The court held that, in order to hold a corporate stockholder, or officer, or employee personally liable under the state’s Navigation Law for a discharge (in this case, a discharge of oil from a gasoline station), “that individual must, at a minimum, have been *directly, actively and knowingly involved in the culpable activities or inaction which led to a spill or which allowed a spill to continue unabated.*” *Id.* (emphasis added).

An Illinois appellate court discussed the RCO doctrine in *People ex rel. Madigon v. Cyrus Tang*, 805 N.E.2d 243 (Ill. App. Ct. 2004). In that case, the court, after examining the corporate law governing the activities of the defendant’s scrap auto business, held that the state had failed to establish that the defendant was liable through his affirmative acts as a corporate officer. It dismissed an argument that his liability arose by operation of the RCO doctrine because the theory had not been raised at the trial court level. Thus, although the court did not repudiate the RCO doctrine, Illinois has apparently not yet formally adopted it.

Although the state jurisprudence using the RCO doctrine in civil environmental enforcement is not extensive, it is clear that it has been used by states to ad-

dress environmental violations involving various media. Perhaps the dearth of cases reflects the seeming confusion among federal enforcement personnel whether the doctrine should be applied to civil cases under the Clean Air Act and Clean Water Act, a confusion that stems from those statutes inclusion of responsible corporate officers only in their definitions of “person” in their criminal provisions.¹⁹ States should not consider this a deterrent in pursuing the RCO doctrine in enforcing their own state laws. As the court in *Hodges* noted, the rationale that underlay the decisions in *Dotterweich* and *Park* is even more persuasive when used to find corporate officers civilly liable when their malfeasance or gross inattention causes their corporations to violate environmental laws. The application of the doctrine will not be appropriate in all, or perhaps even the majority, of cases. When it is appropriate, however, state enforcement personnel may want to give serious consideration to arguing that the RCO doctrine should be applied.

ENDNOTES

¹ A thorough review of the RCO doctrine caselaw as it has been applied in a variety of cases may be found at Randy J. Sutton, Annotation, “*Responsible Corporate Officer Doctrine or “Responsible Relationship” of Corporate Officer to Corporate Violation of Law*,” 119 A.L.R.5th 205.

² See, e.g., *United States v. Hong*, 242 F.3d 528 (4th Cir. 200) (noting that for the purposes of section 1319(c) of the Clean Water Act, “person” specifically includes “responsible corporate officer”). The Clean Air Act also defines “person” to include “any responsible corporate officer” for purposes of criminal liability. 42 U.S.C. § 7413(c)(6).

³ Noel Wise, *Personal Liability Promotes Responsible Conduct: Extending the Responsible Corporate Officer Doctrine to Federal Civil Environmental Enforcement Cases*, 21 STAN. ENVTL. L.J. 283 (2002).

⁴ *Id.* at 290.

⁵ Wise cites cases from Colorado, Florida, Maine, Massachusetts, Michigan, Montana, New York, Ohio, Pennsylvania, South Dakota, and Vermont, which were decided between 1904–1921, demonstrating that a multitude of state

courts had adopted an early form of this principle prior to the decision in *Dotterweich*. See *id.* at 320, n.86. At least two of these states, however, have not adopted the RCO doctrine. See discussion in text at 7 *et seq.*

⁶ *United States v. Dotterweich*, 320 U.S. 277, 280–84 (1943).

⁷ *United States v. Park*, 431 U.S. 658, 666 (1975).

⁸ *Id.* at n.6.

⁹ *Id.* at 673.

¹⁰ Now codified under the Federal Food, Drug, and Cosmetic Act at 21 U.S.C. § 360hh–360ss.

¹¹ 42 U.S.C. § 263j(a), now 21 U.S.C. § 360oo(a)(1).

¹² *United States v. Hodges X-Ray, Inc.*, 759 F.2d 357 (6th Cir. 1985), citing 42 U.S.C. § 263c(3), now 21 U.S.C. § 360hh(3).

¹³ *United States v. Northeastern Pharmaceutical & Chemical Company*, 810 F.2d 726, 745 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987).

¹⁴ It should be noted that, in 1991, Wisconsin interpreted its hazardous waste laws to include a corporate officer within the state statutory definition of “operator,” so that an individual could be held personally liable for violations of that law. However, the court did not specifically address the RCO doctrine. See *State v. Rollfink*, 475 N.W.2d 575 (Wis.).

¹⁵ Along with allegations of violations of the state hazardous waste management law, the state also alleged the defendants’ liability based on nuisance law. In *New York v. Shore Realty Corporation*, 59 F.2d 1032 (2d Cir. 1985), the court noted that New York law has held that a corporate officer who controls corporate conduct and, thus, is an active individual participant in the conduct of the corporation, is liable for the torts of the corporation, including the maintenance of a nuisance, citing *State v. Ole Olsen, Ltd.*, 324 N.E.2d 668 (N.Y. 1975) and *LaLumia v. Schwartz*, 257 N.Y.S.2d 348, 350 (N.Y. App. Div. 1965). However, as will be discussed, *infra*, New York has evidently not adopted the RCO doctrine in connection with its Navigation Law.

In a nuisance and trespass action brought in North Carolina, the court used language that bore similarities to the

RCO doctrine in finding that a president of a corporation might be held liable for a corporation's misdeeds. It noted that the North Carolina statute provides strict liability for "any person having control over oil or other hazardous substances." The court stated:

By defining "person" to include individuals as well as companies, the legislature provided for individual as well as corporate liability for those who had "control" over the source of the contamination. The evidence that Tompkins arranged the contracts, oversaw the business dealings, and personally participated in the activities surrounding the delivery and sale of gasoline . . . permits a reasonable inference that Tompkins had "control" over the gasoline. . . . sufficient to withstand a motion for summary judgment based on his liability under this statute.

Wilson *et al.* v. McLeod Oil Company, Inc. *et al.*, 398 S.E.2d 586 (N.C. 1990).

¹⁶ Although the state's highest court has not weighed in on the RCO doctrine, this decision has been cited in subsequent administrative proceedings. *See, e.g.*, Department of Environmental Protection and Energy v. Engineered Precision Casting Company *et al.*, 93 N.J.A.R.2d (EPE) 87 (1991).

¹⁷ Commissioner, Indiana Department of Environmental Management v. Roland, 775 N.E.2d 1188, 1194 (Ind. Ct. App. 2002), citing Commissioner, Indiana Department of Environmental Management v. RLG, Inc., 755 N.E.2d 556, 561 (Ind. 2001).

¹⁸ It should be noted, however, that neither the Pennsylvania nor New York decision was from the state's highest court. The Delaware court has also seemingly rejected the RCO doctrine, at least implicitly, in a hazardous waste case. *See* T.V. Spano Building Corporation v. Department of Natural Resources and Environmental Control, 628 A.2d 53 (Del. 1993).

¹⁹ *See supra* note 2. *See also* Wise, *supra* note 3, at 299 *et seq.*

DECISIONS

Air

Court Upholds EPA's Rule Regarding Nevada: *Great Basin Mine Watch v. U.S. Environmental Protection Agency*, No. 03-70231 (9th Cir. Mar. 23, 2005)

Background

The Clean Air Act (CAA) requires that there be established air quality planning areas (baseline areas) that are then assigned one of three labels, depending on the quality of the air—attainment, unclassifiable, or nonattainment. The prevention of significant deterioration (PSD) of air quality program applies to those areas that are labeled unclassifiable or attainment. Area 61 in Nevada is one such area.

The PSD program is designed to maintain the relatively clean air in an area by limiting the total pollution increment per year. The PSD restrictions come into effect when a major stationary source in the area applies for a new construction or major modification permit or for major modification. 40 C.F.R. § 52.21(b)(14)(ii.) Once an application is filed, EPA determines the ambient baseline concentration for the area. *Id.* at § 52.21(b)(13), (14)(ii). The PSD program then places limits on aggregate increases in pollution within the baseline area for both minor and major sources. The PSD program is not triggered until an application is or should be filed.

The smaller a baseline area, the less likely it is that a PSD program has been triggered for that area. The division of one baseline area into two separate areas would have a similar effect. An application filed in one would not trigger the PSD program in the other. Nonetheless, EPA has broad discretion to grant a request from a state to divide an area for which no baseline concentration has been established. The EPA may grant redesignation requests "on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Ad-

ministrator deems appropriate.” 42 U.S.C. § 7407(d)(3)(A). The decision must rely on “sufficient data.” 40 C.F.R. § 81.300(a).

If PSD restrictions have already been triggered in an area, EPA’s discretion is more limited. EPA cannot redesignate, for example, if the new area would “intersect or be smaller than the area of impact of any major stationary source or major modification which . . . [e]stablishes a minor source baseline date.” 40 C.F.R. §§ 51.166(b)(15)(ii), 52.21(b)(15)(ii).

The present dispute involves the request by Nevada to divide baseline area 61 — an area of approximately 550 square miles — into two, lower 61 and upper 61. Nevada made the request, among other reasons, to more accurately reflect the “local air transport processes,” industrial development, and the region’s topography. In Nevada’s view, the Barrick Mine, located within area 61, although classified a major source, has never applied or been required to apply for a permit for new construction or a major modification. EPA issued a proposed rule and then a final rule, granting Nevada’s request, and noting that the Barrick Mine had not been subject to PSD review. Great Basin petitioned for review.

Holding

The standard for review is whether the agency acted arbitrarily, capriciously, or contrary to law or exceeded its statutory authority. The critical issue is whether Barrick triggered the PSD program in area 61.

Great Basin argued that Barrick’s *status* as a major source triggered the PSD program. However, the record does not indicate when Barrick was constructed or whether it was initially constructed as a major emitting facility. Great Basin’s other three challenges involve modifications that Barrick did undertake.

The PSD program requires a permit for any “major modification” that causes a forty tons-per-year (tpy) increase in nitrogen oxides. 40 C.F.R. § 51.21(b)(23)(I). It is undisputed that, in the aggre-

gate, Barrick’s three modifications, undertaken in 2001, increased nitrogen oxide emissions over that threshold. The question is whether these totals should be aggregated or viewed separately.

Great Basin’s first argument regarding accumulating the three modifications is that, in November 2001, Barrick submitted a Title V operating permit application including all three modifications. However, operating permits are not part of the PSD program. The CAA does not require EPA to treat PSD permits and operating permits interchangeably.

Second, Great Basin argued that, under EPA’s practice, the April and August 2001 modifications should be aggregated. (The final modification did not change nitrogen oxide emissions.) EPA rules indicate that, for major sources, minor emissions increases are accumulated during a period “contemporaneous” with the modification, with “contemporaneous” meaning within the preceding five years. The court noted, however, that Great Basin did not raise this argument before the agency, nor in its petition for review, nor in its opening brief. Second, in 2003, EPA clarified the regulation and it now states that emission increases are not netted unless the modification, in and of itself, is significant, which would mean, in this case, an increase of forty or more tpy of nitrogen oxides. Therefore, remanding to the agency now would not change the result because none of Barrick’s individual modifications met the threshold.

The court, therefore, concluded that EPA did not act arbitrarily or exceed its authority in granting the request by Nevada to divide area 61 into two areas.

Attorney-Client Privilege

Government Official Protected by Attorney-Client Privilege: *In re Grand Jury Investigation*, No. 04-2287-cv (2d Cir. Feb. 22, 2005)

Background

In February 2004, a federal grand jury in Connecticut subpoenaed the testimony of Anne C. George, the former legal counsel to the Office of the Governor of Connecticut. The grand jury subpoena was issued in connection to the investigation of possible criminal violations by Connecticut public officials and employees. When George appeared, she acknowledged that she had had conversations with the governor and members of his staff on the subject of receipt of gifts and related state ethics law. However, she refused to answer any questions concerning the content of those conversations, asserting an attorney-client privilege, which the Office of the Governor had refused to waive. In April, the district court entered an order compelling George's testimony. After the resignation of the governor in July, his successor, Governor Rell, also declined to waive the privilege. In August, the Second Circuit reversed the district court and, later, issued this opinion explaining its order.

Holding

The court noted, at the outset, that the attorney-client privilege is one of the oldest recognized privileges. The generally recognized purpose of the privilege is to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn Company v. United States*, 449 U.S. 383 (1981).

The government does not dispute that a governmental attorney-client privilege exists and that it may be invoked in the civil context. The privilege has been invoked a number of times to protect materials from disclosure under Exemption 5 of the Freedom of Information Act. Nonetheless, the government argued that recent caselaw supports the view that the gov-

ernmental attorney-client privilege is weaker than the traditional form. In *In re A Witness Before the Special Grand Jury*, 288 F.3d 289 (7th Cir. 2002); *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998); and *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), the courts questioned the relevance of the traditional rationale supporting the privilege to the government context.

Citing these decisions, the government contended that, in the circumstances presented by this case, the attorney-client privilege should not apply. First, George, as a government attorney has a different obligation than a private attorney representing a private individual. Loyalty to the governor as a client should yield to her loyalty to the public, to whom she ultimately owes her allegiance when there are potential violations of the criminal law. Thus, the government argued, the attorney-client privilege should not be used as a shield to permit a government attorney to withhold client confidences when the public interest would be to reveal them.

According to the court, the government's argument is based on the assumption that the public interest lies with disclosure. The court noted that it is also in the public interest for high state officials to receive and act upon the best legal advice. It noted that the public interest in Connecticut, through legislation, has deemed that this latter interest is of more importance. In Connecticut:

[I]n any civil or criminal case or proceeding or in any legislative or administrative proceeding, all confidential communications shall be privileged and a government attorney shall not disclose any such communications unless an authorized representative of the public agency consents to waive the privilege and allow such disclosure.

CONN. GEN. STAT. § 52-146r(b). The federal courts are not, of course, bound by state statute in this regard, but the court pointed this out to demonstrate that

the public interest is not as obvious as the government suggested.

The court stated:

We believe, if anything, the traditional rationale for the privilege applies with special force in the government context. It is crucial that government officials, who are expected to uphold and execute the law and who may face criminal prosecution for failing to do so, be encouraged to seek out and receive fully informed legal advice. Upholding the privilege furthers a culture in which consultation with government lawyers is accepted as normal, desirable, and even indispensable parts of conducting public business.

Slip op. at 5.

The court also declined to fashion a balancing test once it had determined that the attorney-client privilege applied. It quoted the Supreme Court as cautioning that the protection of attorney-client privilege must be reliably enforced to effectuate its goal of compliance with the law. *Swidler & Berlin v. United States*, 524 U.S. 399, 409 (1998). The court also commented that the application of the attorney-client privilege includes the exceptions to the privilege, such as a crime-fraud exception, that courts have developed.

Since the court could not accept the government's assumptions that disclosure is in the public interest and derogation of the privilege would only marginally affect an official's willingness to consult with counsel, it declined to abandon the privilege in a context where it is arguably needed the most.

CAFOs

Court Rejects Part of EPA's CAFO Rule: *Waterkeeper Alliance, Inc. et al. v. U.S. Environmental Protection Agency*, Nos. 03-4470(L) et al. (2d Cir. Feb. 28, 2005)

Background

On February 12, 2003, U.S. EPA promulgated its CAFO (Combined Animal Feeding Operation) Rule, 40 C.F.R. §§ 9, 122, 412, under the Clean Water Act (CWA). The rule requires CAFO owners or operators to apply for an individual National Pollutant Discharge Elimination System (NPDES) permit or submit a notice of intent for coverage under a general NPDES permit. However, if an owner or operator secures a determination from the relevant permitting authority that a Large CAFO has "no potential to discharge" manure, litter, or process wastewater, a permit is not required.

The rule also requires that each CAFO develop and implement a nutrient management plan that satisfies nine enumerated criteria. There are additional requirements for Large CAFOs, including that the nutrient management plan includes a waste "application rate" that "minimize[s] phosphorus and nitrogen transport from the field to surface waters." 40 C.F.R. § 412.4(c)(2).

Under the rule, all land application discharges from a CAFO are subject to NPDES requirements so that manure, litter, or process wastewater that has been applied to land and then flows into a water of the United States is a discharge under the CWA that must be permitted. If, however, the CAFO has applied waste in accordance with a site-specific nutrient management practice that ensures appropriate agricultural use of the waste's nutrients, the rule considers any "precipitation-related" discharge to be an "agricultural stormwater discharge, exempt from regulation. 33 U.S.C. § 1362(14).

In addition, the rule establishes effluent limitation guidelines (ELGs) that apply to land application discharges

by Large CAFOs and to the “production areas” of Large CAFOs. However, instead of establishing quantitative or numerical ELGs, EPA promulgated “best management practices,” qualitative or non-numerical ELGs from Large CAFOs, based on technology standards prescribed by the CWA. 40 C.F.R. 412.4. The rule also organizes Large CAFOs into four subcategories, based on the type of animals being fed, so the ELGs are also organized into four subcategories. The best management practices in regard to land application requires soil and manure sampling, inspection of land application equipment, and various setback requirements. 40 C.F.R. § 412.4(c)(3)–(5). In regard to production areas, best management practices include inspections of equipment and the installation of depth markers in surface and liquid impoundments. 40 C.F.R. § 412.37.

Two sets of petitioners brought challenges to the CAFO rule: the environmental interest groups and farm interest groups. The court grouped the challenges into three general categories: challenges to the permitting scheme established; challenges to the types of discharges regulated; and challenges to the ELGs.

Holding

The court noted that its review of the CAFO Rule as to its conformance with the CWA was governed by the standards set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Where the inquiry was whether the rule violated the Administrative Procedure Act as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), the specified standard was set forth in *Motor Vehicle Manufacturers’ Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29 (1983).

CAFO Permitting Scheme

The environmental petitioners argued that the CAFO Rule creates an “impermissible self-regulatory permitting regime” because permits may be issued to

Large CAFOs without meaningful review of a CAFO’s nutrient management plans and the terms of the nutrient management plan are not required to be included in the NPDES permit. The court agreed.

Under the CWA, an NPDES permit may only be issued where the permit ensures that every discharge of pollutants will comply with all applicable effluent limitations and standards. See 33 U.S.C. §§ 1311, 1342(a)(1),(2), and 1342(b). The CAFO Rule does not provide for permitting authority review of the nutrient management plan, so that there is nothing that ensures that a Large CAFO has developed a plan that satisfies all the requirements and, thus, does not ensure that a Large CAFO will comply with all applicable effluent limitations and standards.

The court noted that the Ninth Circuit’s decision in *Environmental Defense Center, Inc. v. EPA*, 33 F.3d 832 (2003), supported its conclusion. In that case, the challenge was to EPA’s Phase II Rule for municipal storm sewer systems. The rule deemed a municipal storm sewer system in compliance if a notice of intent to comply with a general permit included a stormwater management plan, but it did not require authorities to review the plan. The Ninth Circuit stated that “programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable [the relevant statutory standard].” *Id.* at 856. Like the Phase II Rule, the CAFO rule does not require any review to ensure that the plan designed by Large CAFOS will, in fact, reduce land application discharges in a way that “minimiz[es] nitrogen and phosphorus movement to surface waters.” 40 C.F.R. § 412.4(c)(1).

EPA argued that the nutrient management plan does not constitute an ELG but is simply a planning tool that is not statutorily mandated to be submitted for permitting authority review. The court rejected that view, finding, later in its opinion, that the terms of the nutrient management plans are themselves effluent limitations. However, it noted that, even if it were to accept EPA’s argument, the requirement to develop

and implement a nutrient management plan is an effluent limitation, one of the “best management practices” required by the CAFO Rule.

EPA also contended that there was no need for review because the rule provides Large CAFOs with little discretion since states must develop “technical standards” based on certain “field-specific assessments” and requires Large CAFOs to adopt application rates that comply with those technical standards. The court pointed out, however, that state standards are based on *field-specific* assessments, but Large CAFOs must set application rates based on *site-specific* assessments of the relevant field conditions. Large CAFOs could misunderstand or misrepresent application rates. By not requiring permitting authority review, the rule does not guarantee that the plans or the waste application rates will comply with all applicable effluent limitations and standards.

The second complaint about the permitting scheme was that the rule did not require that the terms of the nutrient management plans be included in the NPDES permits. The CWA defines effluent limitation to mean “any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources. . . .” 33 U.S.C. § 1362(11). Clearly, under the rule, the restrictions imposed by the terms of the nutrient management plan are the *only* restrictions actually imposed on land application discharges. Therefore, the court concluded that by failing to require the terms of the nutrient management plan to be included in NPDES permit, the rule violates the CWA.

Lack of Public Participation

In the CWA, Congress guaranteed a role for the public. The act states that “[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States.” 33 U.S.C. § 1251(e). Thus, the act requires that the public have

an opportunity to be heard prior to the issuance of any NPDES permit, that copies of permits and permit applications be available to the public, and that “any citizen” might bring a civil suit for violations of the CWA.

The CAFO Rule fails to provide the public any means of access to the terms of each nutrient management plan. Since these plans constitute effluent limitations (as earlier determined by the court), lack of public access deprives public participation in the “development, revision and enforcement of . . . [an] effluent limitation.” 33 U.S.C. § 1251(e). This failure also compromises the public’s right to bring a citizen-suit to ensure enforcement of the CWA. Under the rule, all a citizen could do would be to bring a suit to require development of a plan, but there would be no means to enforce the plan itself because there would be no public access to the terms of the plan.

The court commented that, even if it had not found that the plans were effluent limitations in themselves, the lack of public access would still be considered violative of the CWA. According to EPA in its preamble to the rule, “the only way to ensure that non-permitted point source discharges of manure, litter, or process wastewaters from CAFOs do not occur is to require . . . [land application] in accordance with site specific nutrient management practices.” Preamble to the Final Rule at 7198. Therefore, the nutrient management plans are the basis of the “regulation, standard, plan, or program” the agency established to regulate land application discharges. 33 U.S.C. § 1251(e). Since there is no public participation in or public access to these plans, the rule violates the dictates of the CWA.

Duty to Apply

The farm petitioners contended that EPA had exceeded its statutory jurisdiction by requiring all CAFOs to either apply for NPDES permits or, in the alternative, to demonstrate that they have no potential to discharge.

The CWA requires a permit before the discharge of a pollutant. “Discharge of any pollutant” means “(A)

any addition of any pollutant to navigable waters from any point source, [or] (b) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.” 33 U.S.C. § 1362(12). Thus, it is clear that Congress intended that sources that do not discharge a pollutant to navigable waters had no statutory obligation to seek or obtain an NPDES permit.

EPA’s rule violates this scheme. It imposes an obligation on all CAFOs to either apply for a permit or demonstrate that they do not need to apply for a permit because there is “no potential to discharge.” EPA noted in its preamble to the rule that, since all CAFOS have a potential to discharge, the permit or demonstration of no potential is appropriate. The court disagreed. The CWA gives EPA the authority to regulate and control only actual discharges, not potential discharges.

EPA also argued that the “duty to apply” provision is permissible because a point source is defined in the CWA not only as “any discernible, confined and discrete conveyance” from which pollutants “are” discharged, but also “any discernible, confined and discrete conveyance” from which pollutants *may be* discharged. However, EPA could not point to any CWA provision that convinced the court that effluent limitations could be applied to any point sources other than those that are actually discharging.

Nor was the court convinced by EPA’s argument that the “duty to apply” rule is consistent with the CWA’s goal of not just reducing, but eliminating, water pollution. The rule may be consistent with the CWA’s goal, but it contravenes the statutory language and, thus, on its face, prevents EPA from imposing on CAFOs the obligation to seek an NPDES permit or otherwise demonstrate that they have no potential to discharge.

Challenges to Types of Discharges Regulated

The CAFO Rule, mirroring the CWA, carves out an exception for discharges that are classified as “agricultural storm water discharge.” The rule classi-

fies, as agricultural stormwater, any “precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO” where the “manure, litter, or process wastewater has [otherwise] been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization.” 40 C.F.R. § 122.23(e). The environmental petitioners contended that the rule’s approach violates the CWA and the APA because the CWA’s definition of “point source” requires regulation of all CAFO discharges. The court disagreed.

The CWA defines “point source” as:

[A]ny discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, *concentrated animal feeding operation*, or vessel or other floating craft, from which pollutants are or may be discharged. *This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.*

33 U.S.C. § 1362(14) (emphasis added). The court found that the provision is ambiguous as to whether CAFO discharges can ever constitute agricultural stormwater. On the one hand, a “point source” explicitly includes concentrated animal feeding operations. On the other hand, a “point source” explicitly does not include agricultural stormwater discharges. Thus, the question is whether the CAFO Rule’s exemption for “precipitation-related” land application discharges is a permissible construction of the CWA.

The court found it reasonable to conclude that Congress did not intend to impose liability for agriculture-related discharges triggered by the weather, not by negligence or malfeasance, even if those discharges would otherwise be considered point sources. In an earlier case, *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2d

Cir. 1994), the court held that a discharge from a CAFO can be considered either a CAFO discharge, subject to regulation, or an agricultural stormwater discharge, not subject to regulation. The court determined that it is the *cause* of the discharge which will determine whether a discharge is regulable. In that case, the discharge was caused not by the rain but by the over-saturation of fields by manure.

EPA's CAFO Rule in this regard comports both with Congress' intent and with the holding in *Southview Farm*. It removes liability for agriculture-related discharges primarily caused by nature. The court also rejected the environmental petitioners' argument that discharges from a CAFO should be considered industrial, not agricultural. When the agricultural stormwater exception was adopted, dictionaries defined "agriculture" or "agricultural" to encompass the activities undertaken by CAFOs. The CAFO Rule itself is tied to agricultural endeavors. It defines discharges as agricultural stormwater only where CAFOs have otherwise applied "manure, litter, or process wastewater . . . in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization." 40 C.F.R. § 122.23(e).

The Farm Petitioners argued that the CAFO Rule violates the CWA because it regulates discharges that are not "collected" or "channelized" at the land application area. The court rejected this challenge. "Point source" specifically includes concentrated animal feeding operations; thus, the court concluded that the CWA actually demands that land application discharges be construed as discharges "from" a CAFO unless they are classified as agricultural stormwater.

In *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001), the court held that "point source" refers to "the proximate source from which the pollutant is directly introduced to [a] destination water body." *Id.* at 493. There is no doubt that CAFOs are the "proximate source" of any discharge of pollutants from land application area under their control (except when they are agricultural stormwater). It is true that the CWA generally contemplates that discharges be

"channelized"; however, a CAFO itself is a "channel" under the CWA because it is listed as an example of the type of "point sources" that EPA may regulate.

Even if the CWA did not require that land application discharges be regulated, the court stated that it would still find that EPA had permissibly construed the statute in defining as a "discharge from a CAFO," the "discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control." 40 C.F.R. § 122.23(e). Since land application areas are an indispensable part of CAFO operations, the court found this portion of the rule a reasonable interpretation of the CWA.

The court denied the environmental petitioners' challenge to the best available technology economically achievable (BAT)-based ELGs. The court concluded that, for all BAT subcategories, EPA had either adopted the technology used by the best performers or declined to adopt them for permissible reasons. However, it did agree with the environmental petitioners that EPA violated the CWA by failing to adopt requirements designed to reduce pathogen discharges.

Under the CWA, EPA is required to promulgate best conventional pollution control technology (BCT) for at least one pathogen, fecal coliform. 33 U.S.C. §§ 1311(b)(2)(E); 1314(a)(4). In its preamble to the rule, EPA acknowledged that pathogens in animal wastes pose a potential risk to human health and the environment. EPA defended its decision by pointing out that the pathogen controls it evaluated would have imposed significant costs and would not necessarily have led to significant pathogen reduction and that the ELG adopted by the CAFO Rule may "incidentally" achieve some reductions of pathogens in CAFO discharges.

However, the CWA *requires* EPA to select the best pollutant control technology for reducing pathogens. EPA may determine that the ELGs adopted by a CAFO do represent the BCT for reducing pathogens or EPA may determine that the ELGs otherwise

adopted by the CAFO Rule will *directly*, not just incidentally, reduce pathogens better than other technologies, but EPA is statutorily mandated to act. Thus, the court granted the petition regarding EPA's failure to impose ELGs specifically designed to reduce pathogens in CAFO discharges.

The court also agreed with the Environmental Petitioners as to a portion of the New Source Performance Standard (NSPS) for swine, poultry, and veal. In its final rule, for NSPS, EPA barred all production area discharges, but allowed a CAFO to comply with this requirement by designing, operating, and maintaining a facility to contain the runoff from a 100-year, 24-hour rainfall event or allow a CAFO to comply through alternative performance standards. Unfortunately, EPA never modeled the potential overflows and pollutant loads from a system with a 100-year, 24-hour storm event design capacity, so could not adequately substantiate its claim that this standard is functionally equivalent or a logical outgrowth of a total prohibition standard. Nor has EPA justified its decision to allow a CAFO to comply through alternative performance standards. Finally, EPA did not indicate that it was considering either of these two alternatives in its preliminary rulemaking so that there was no opportunity for comments on these provisions.

The final challenge to the rule brought by the Environmental Petitioners is that the rule fails to promulgate quality based effluent limitations (WQBELs) and also bars states from doing so. The court agreed, in part, with the challengers. It is not clear why the CAFO Rule exempts discharges other than agricultural stormwater discharges from WQBELs and whether the rule bars states from promulgating them for other than stormwater discharges.

The CWA states that WQBELs "shall be established" by EPA or by the states where "discharges of pollutants from a point source or group of point sources . . . would interfere with the attainment of maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a bal-

anced population of shellfish, fish and wildlife, and allow recreational activities in and on the water." 33 U.S.C. § 1312(a). EPA did not attempt to explain its failure to promulgate WQBELs nor does the preamble to the rule justify this decision. The court, thus, found that EPA's failure to justify the lack of WQBELs is arbitrary and capricious in violation of the APA. It directed EPA to explain whether WQBELs are needed and, given the ambiguity in the preamble, whether states may promulgate WQBELs for discharges other than for agricultural stormwater discharges.

CERCLA

PRP May Not Recover Under Section 107: *Elementis Chemicals, Inc. v. TH Agriculture and Nutrition, LLC et al.*, No. 03 Civ. 5150 (LBS) (S.D.N.Y. Feb. 3, 2005)

Background

In 1981, the predecessor-in-interest to the plaintiff, Elementis Chemicals, Inc., (ECI) purchased various chemical manufacturing and distribution facilities. Among these were fourteen of particular relevance in this lawsuit, located in Alabama, Colorado, Florida, Georgia, Iowa, Kansas, Louisiana, Minnesota, Oklahoma, and Texas. The acquisition was accomplished through an asset purchase agreement. Two of the sellers were North American Philips Corporation (NAP) and Thompson-Hayward Chemical Company (T-H), which had used various hazardous substances at one or more of the purchased facilities. Elementis brought this action to recover its costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in dealing with these hazardous substances. It also alleged various contract and state law causes of action and remedies.

NAP and T-H counterclaimed against ECI and brought third-party claims. Those third party defendants asserted claims against Elementis. Various motions for summary judgment were brought. The court discussed the CERCLA claims first because a victory for the defendants on those claims would lead it to decline to exercise supplemental jurisdiction over

the state-law claims.

Holding

The court noted that there are two sections of CERCLA that grant a private right of action for recovery of some CERCLA clean-up costs: section 107(a), 42 U.S.C. § 9607(a), and section 113(f), 42 U.S.C. § 9613(f). The court identified the legal question as whether a party that bears legal responsibility under CERCLA may seek to recover costs against other parties where there has not been a previous civil action nor a settlement with the state or federal government.

The Supreme Court's decision in *Cooper Industries v. Aviall Services*, 125 S. Ct. 577 (2004), settled the issue as to section 113 recovery. In that decision, the Court held that contribution under section 113(f)(1) may only be sought if there has been a previous civil action. Thus, the only other avenue of recovery to Elementis would be under 107(a); however, existing Second Circuit precedent precludes recovery to a potentially responsible party (PRP) under section 107(a) unless that party has an affirmative defense under section 107(b).

This precedent was established in the 1998 decision in *Bedford Affiliates v. Sills*, 156 F.3d 416. In that case, the court found that the structure of section 107(a) CERCLA was to provide a method of recovery for the completely innocent while section 113(f)(1) was a less generous remedy for PRPs:

The language of CERCLA suggests Congress planned that an innocent party be able to sue for full recovery of its costs, *i.e.*, indemnity under § 107(a), while a party that is itself liable may recover only those costs exceeding its pro rata share of the

entire cleanup expenditure, *i.e.*, contribution under § 113(f)(1).

Id. at 424. Thus, in order for Elementis to pursue recovery under section 107(a), there would have to be a genuine issue of material fact regarding whether plaintiff has a section 107(b) affirmative defense or the court would have to repudiate its holding in *Bedford Affiliates*.

In *Bedford Affiliates*, the court held that the facility owner was a PRP under section 107(a)(1). Elementis still owns several of the facilities for which recovery is sought. The others were sold in 2001. Logically, then, the Elementis would also be considered a PRP as an owner or operator of a facility. One issue is when a party's status as owner and operator under CERCLA section 107(a) is to be determined. There is some authority for the defendant's position that the status is determined at the time of the cleanup for which cost recovery is sought; however, according to the court, the issue has rarely been squarely addressed and the cases are not unanimous.

If Elementis had filed suit to recover its costs when they were incurred and when it was an owner of all of the facilities in question, it is clear it would be a PRP at all the facilities. The court opined that it would be odd if CERCLA were to allow recovery under section 107(a) merely because a facility had been sold. It seemed more logical to the court that a party's status as present owner and operator should be determined at the time a claim accrues, not at the time the suit is filed.

Elementis argued that the *Cooper Industries* decision had effectively overruled *Bedford Affiliates* because the underlying premise of the *Bedford Affiliates* decision was that PRPs could seek recovery under section 113. That avenue of recovery is no longer available under *Cooper Industries*.

According to the court, the problem with this reasoning is that the Supreme Court in *Cooper Industries* explicitly withheld judgment regarding the various courts of appeals' decisions holding that a PRP may not pursue a section 107(a) against other PRPs. There are at least two reasons, according to the court, why the Second Circuit might decide to leave the *Bedford Affiliates* rule in place, even in light of *Cooper Industries*.

First, the *Bedford Affiliates* court expressed a concern over the apparent superfluosity of section 113(f)(1) if section 107(a) is available to PRPs. Why would a PRP who is not barred by the *Cooper Industries* holding from pursuing a section 113(f)(1) action sue under that contribution section instead of under the more generous provisions of section 107(a)? The relationship between these two sections remains a difficult one. Furthermore, the problem faced by PRPs unable to pursue a section 113(f)(1) recovery after the *Cooper Industries* could be justified as a matter of policy. The decision forces a PRP to settle with some government agency regarding its liability at the site so that it can then pursue contribution under section 113(f)(2).

Therefore, this court determined that a future overruling of *Bedford Affiliates* is not inevitable. Thus, this court was bound by the holding in that case and granted summary judgment to the defendants on the plaintiff's CERCLA causes of action.

[Editor's note: The en banc panel of the U.S. Court of Appeals for the Fifth Circuit has remanded *Aviall Services, Inc. v. Cooper Industries, Inc.*, to the district court with instructions to permit Aviall to amend its complaint "free of any challenge of waiver or forfeiture." In doing so, the panel denied a motion by Aviall for the appeals court to itself decide the CERCLA section 107 issue left undecided by the U.S. Supreme Court.]

Subcontractor Was Not Operator at Site: *United States v. Qwest Corporation and Utility Resources, Inc.*, No. 04-3540 (D. Minn. Jan. 24, 2005)

Background

The federal government brought this action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to recover costs it incurred at the MacGillis and Gibbs/Bell Lumber & Pole Superfund Site in New Brighton, Minnesota. The site was contaminated with various chemicals from wood treating processes. As a remedy, U.S. EPA built extractions wells and underground forcemains that transported contaminated groundwater to an on-site biological treatment unit.

In October 2000, Qwest arranged for a utility contractor, Commincor Corporation, to install an underground line in a public right-of-way adjacent to the MacGillis site. Commincor hired defendant Utility Resources, Inc., (URI) to install the communications line. URI contacted Minnesota's "One Call Center" to determine the location of all underground utilities in the right-of-way. The underground water lines were not registered with the "One Call Center" utility program, as required by state law, nor had EPA installed tracers so that the lines could be detected from the surface. During URI's drilling to install the communication line, the forcemains were ruptured, resulting in the release or threatened release of hazardous substances from the untreated groundwater. The government incurred approximately \$130,030 in costs to repair the ruptured underground lines.

The government's complaint alleges that the defendants are liable as operators of the site. Qwest filed a motion to dismiss.

Holding

CERCLA imposes liability on the "owner and operator of a vessel or a facility." 42 U.S.C. § 9607(a). In interpreting the term "operator," the Supreme Court stated that "[a]n operator must manage, direct, or conduct operations specifically related to pollution, that

is operations having to do with the leakage or disposal of hazardous waste or decisions about compliance with environmental regulations.” *United States v. Bestfoods*, 524 U.S. 51 (1998).

The government argued that the defendants’ conduct falls squarely within this definition of “operator” because they operated the drilling that resulted in the disposal of hazardous substances into the environment. The government pointed to caselaw that demonstrated that the defendants’ status as contractor did not affect its status as operator so long as there was control of the phase where the contamination occurred. See *Kaiser Aluminum & Chemical Corporation v. Catellus Development Corporation*, 976 F.2d 1338, 1340–42 (9th Cir. 1992); *United States v. Warner Brothers Well Drilling, Inc.*, 889 F.2d 15 (6th Cir. 1990). Qwest pointed out, however, that in both of the cited cases, the “operator” had a contractual relationship with the party who controlled the remediation at the site. In this case, there was no contractual relationship between either of the defendants and EPA or between them and the owner or operator of the MacGillis Site.

Qwest further pointed out that its efforts were not at the site, but was on a public right-of-way outside the boundaries of the site. The *Bestfoods* Court defined an operator as “someone who directs the workings of, manages, or conducts the affairs of the facility.” Neither defendant fits within that definition. *Bestfoods*, 524 U.S. at 66.

The court noted that several courts have rejected the idea that those with a tenuous relationship with a facility fell within the “operator” definition. See *United States v. Vertac Chemical Corporation*, 46 F.3d 803, 808 (8th Cir. 1995); *Interstate Power Company v. Kansas City Power & Light Company*, 909 F. Supp. 1284, 1288–90 (N.D. Iowa 1994). In this case, the defendant did not conduct any activities relating to the handling of hazardous substances at the site and their activities adjacent to the site did not “specifically relate to pollution.”

In fact, in its allegations, the government did not allege that the defendants had any actual control over the site or the forcemains. It only alleged that the defendants controlled the drilling activities. The forcemains were operated by EPA. It designed them, installed them, and placed the contaminated groundwater in them.

The court also noted that the legislative history of CERCLA illustrates that Congress did not intend to extend operator liability to anyone who inadvertently comes into contact with hazardous substances from a Superfund site. Congress targeted industries and consumers that profit from “products and services associated with the hazardous substances which impose risks on society,” 126 Cong. Rec. S14962 (Nov. 24, 1980); “those who generate, ship, transport, or dispose of waste,” H.R. Rep. 96-012016, Part I; and “those who control hazardous wastes throughout the whole process of disposal.” H.R. Rep. No. 96-848 (1980).

None of the facts alleged by the government would bring the defendants within the definition of “operator” under CERCLA. Therefore, the court dismissed the action.

Takings

SMCRA Did Not Result in Physical Taking: *Stearns Company, Ltd. v. United States*, No. 04-5031 (Fed. Cir. Jan. 28, 2005)

Background

In 1937, the Stearns Company sold surface rights to certain property to the United States; this property is currently part of the Daniel Boone National Forest. In its sale, Stearns retained in perpetuity the mineral rights in the land conveyed. Under Kentucky law, retention of the mineral rights also includes an implied easement for the use of the surface to remove the minerals.

In 1977, Congress enacted the Surface Mining Control and Reclamation Act (SMCRA). SMCRA spe-

cifically prohibits surface mining, including surface activity associated with underground mining, in national forests unless an applicant can establish it has “valid existing right” (VER) or where “the Secretary finds that there are no significant recreational, timber, economic, or other values which may be incompatible with such surface mining operations.” 30 U.S.C. § 1272(3)(2). A party has a VER only where permits to conduct mining were applied for or secured before SMCRA was enacted.

In 1980, Stearns leased its mineral interest to Ramex Mining Corporation. Ramex initially sought a compatibility determination but Stearns demanded that Ramex withdraw the application. In 1986 the Office of Surface Mining determined that Stearns does not have a VER. Stearns chose not to apply for a compatibility determination but, instead, filed suit in the Court of Federal Claims, claiming that the denial of a VER constituted a taking of its property.

The court agreed that, in implementing SMCRA, the United States caused a “physical taking by operation of law.” *Stearns Company v. United States*, 53 Fed. Cl. 446, 447 (2002). The federal government appealed.

Holding

The appellate court determined that the application of SMCRA to Stearns’ mineral property is not a physical taking. A physical taking occurs “when the government itself occupies the property or ‘requires the landowner to submit to physical occupation of its land.’” *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1364 (Fed. Cir. 1999) (quoting *Yee v. Escondido*, 503 U.S. 519, 527 (1992)). The government has not occupied the mineral property or the implied appurtenant easement. The appellee has attempted to transform a regulatory taking claim into a per se physical taking by alleging that the appurtenant easement creates a power to be free from regulation regarding access to the mineral estate.

The question is not whether the government *can* regulate, but whether government regulation produces a

taking. According to the court, this is a classic regulatory taking problem, not an example of a physical taking.

Once viewed in this light, it is clear that the appellee’s claim is not ripe. The general rule is that the government entity charged with implementing the complained-of regulations must have reached a final decision regarding the application of the regulations to the property at issue. See *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985).

Permission under SMCRA may be achieved in one of two ways: a showing of a VER or a favorable compatibility determination. The appellee may still obtain permission to use its easement and access the minerals by seeking a compatibility determination. OSM has the authority to permit the use that the appellee seeks so this is not a case where resort to the administrative procedures would be futile.

Thus, the court concluded that the lower court had erred when it determined that a physical taking occurred when OSM determined that the appellee did not have a VER. There was never any physical occupation of either the government or a third party on the appellee’s property interest. The regulatory taking claim is not ripe because OSM has not made a determination on the compatibility issue. Therefore, the court reversed the decision of the Court of Federal Claims.

Wetlands

Court Interprets “Swampbuster” Amendment: *Horn Farms, Inc. v. Mike Johanns et al.*, Nos. 04-2948 & -2909 (7th Cir. Feb. 2, 2005)

Background

In general, if a farmer has converted wetlands to agricultural use, he loses his eligibility for federal agricultural subsidies. When this legislation (dubbed Swampbuster) was initially passed in 1985, the loss was proportional to the amount of wetland converted.

In 1990, Congress passed an amendment that provided that a farmer converting *any* wetland would cause loss of *all* agricultural payments. Another amendment in 1996 provided an exception for wetlands that had once been drained and farmed, had reverted to wetland status, and then were restored to agricultural use. The interpretation of this 1996 amendment is the crux of this case.

Horn Farms drained 6.2 acres of wetlands in 1998. This was not the first use of the land for agricultural purposes as there was a system of tiles under the ground already present. However, the parcel had reverted to wetlands well before 1998. One witness estimated that the reversion had certainly occurred before 1982. The amendment covers:

A wetland previously identified as a converted wetland (if the original conversion of the wetland was commenced before December 23, 1985), but that the Secretary determines returned to wetland status after that date as a result of — (i) the lack of maintenance of drainage, dikes, levees, or similar structures; (ii) a lack of management of the lands containing the wetland; or (iii) circumstances beyond the control of the person.

16 U.S.C. § 3822(b)(2)(D).

The Department of Agriculture reads the phrase “after that date” to refer to December 23, 1985. Since the date on which the land in question reverted to wetland status was prior to December 23, 1985, the Department of Agriculture determined that Horn Farms was ineligible for the exception and would, thus, lose all federal agricultural subsidies.

Horn Farms, on the other hand, argued that “that date” is the date of the original conversion. Under its reading, any wetland converted to farm use before December 23, 1985 may be farmed again without any loss of federal subsidy. The federal district court agreed and ordered restoration of subsidy payments.

It rejected Horn Farms’ argument that the legislation was unconstitutional as a misuse of Congress’ spending power. Both sides appealed.

Holding

The exception provision is ambiguous. The date referenced could be December 23, 1985, or it could be the date on which the wetland was “previously identified” or the date on which the “original conversion . . . was commenced.” The court concluded that the reading by the government was correct. First, December 23, 1985, is the last antecedent of “that date.” Second, if a wetland was converted prior to December 1985, the date on it was “previously identified” is meaningless since that is the date the statute’s approach to “identifying” wetlands came into existence. Third, a reading that would have the date of original conversion as the antecedent would make much of the language of the exception surplusage. Finally, when “that date” is read as December 23, 1985, the subsection becomes a nondegradation clause so that the legislation protects wetlands that existed on the date of the amendment’s enactment. Reading “that date” as the date of original conversion would allow net reduction in wetlands after the amendment’s enactment.

Thus, the government’s interpretation is both reasonable and the most sensible understanding of the legislation. The interpretation, expressed in a regulation adopted after notice and opportunity for comment, also deserves *Chevron* deference. The district court had relied on one piece of legislative history to conclude that Horn Farms’ reading was correct. However, the legislative history the court looked to was written in regard to the first Swampbuster legislation, passed in 1985. Furthermore, the statement of one representative should not prevail over the interpretation of an ambiguity by the agency to whom authority has been delegated.

The court then turned to Horn Farms’ argument that the legislation itself is unconstitutional, relying principally on Justice O’Connor’s dissenting opinion in *South Dakota v. Dole*, 483 U.S. 203, 212–18 (1987). In that

decision, she opined that the spending power may not be used in a manner that would coerce states to surrender fundamental attributes of their sovereignty. Beside the fact the Justice O'Connor was writing for herself and not the Court, Horn Farms is not a governmental body so lacks sovereignty that can be trampled upon.

Furthermore, taking Horn Farms' argument to its logical conclusion, if it is unduly coercive to link agricultural subsidies to how the farmer uses agricultural land, it must also be unduly coercive to link the subsidy to the agricultural product. This argument would demolish the whole system of agricultural subsidies and, in fact, any federal legislation that links financial rewards to the satisfaction of conditions.

The majority in *South Dakota* identified three potential limits on the spending power: conditions set on expenditures must promote the general welfare, be unambiguous (at least when they affect states), and relate to a legitimate federal interest. The preservation of wetlands both promotes the general welfare and promotes a legitimate federal interest. The legislation itself is clear. The last time it was challenged, this court concluded the legislation was constitutional. See *United States v. Dierckman*, 201 F.3d 915, 922-23 (7th Cir. 2000).

At the close of its opinion, the district court stated that the Secretary of Agriculture's removal of Horn Farms' subsidy violated the Administrative Procedure Act (APA) because it deprived Horn Farms of a "license" without the procedures required under the APA. However, that section of the APA deals with an application for a license required by law. Horn Farms did not "apply" for a "license." Horn Farms does not need anyone's permission to engage in farming. The procedures used for resolving disputes about whether land was wetlands and when conversions occurred are provided in the Swampbuster legislation and its implementing regulations, independent of the APA.

The court reversed the judgment and the case was remanded to enter judgment against Horn Farms.

CIVIL PROCEEDINGS

New Filings

Air

New Jersey et al. v. U.S. EPA, No. 05-1097 (D.D.C. Mar. 29, 2005)

A lawsuit has been filed by California, Connecticut, Maine, Massachusetts, New Hampshire, New Mexico, New York, Vermont, and Wisconsin in the U.S. Court of Appeals for the District of Columbia Circuit challenging the new mercury rule, alleging that it fails to protect children and expectant mothers from danger posed by power plants' mercury emissions. Massachusetts has filed another lawsuit (No. 05-10450 (D. Mass. Mar. 10, 2005)) under the Freedom of Information Act requesting that U.S. EPA produce documents which, the state alleges, contain information that would warrant stronger limits on mercury pollution than proposed by the rule issued on March 15.

The new rule gives power plants until 2019 to reduce seventy percent of the forty-eight tons of mercury they emit annually. The previous standard required a ninety percent reduction of mercury emissions by 2008.

[For information on the multi-state lawsuit directly challenging the rule, contact New Jersey DAG Christopher Ball at (609) 633-8713. For further information about the Massachusetts lawsuit, contact Massachusetts AAG Bill Pardee at (617) 722-2200, ext. 1-3353.]

Settlements

Air

Mieras v. BP West Coast Productions, LLC, Nos. BC-327560 & -291876 (Cal. Super. Ct. Los Angeles County Mar. 17, 2005)

BP West Coast Productions, an energy company, has agreed to settle two lawsuits, filed on behalf of the California South Coast Air Quality Management District, alleging that the company violated hydrogen sulfide emissions limitations at a refinery in the Los Angeles, California, area. Under the agreement, BP will pay \$25 million in penalties, \$6 million in past emissions fees, and spend \$20 million to reduce emissions at its Carson refinery. BP will also pay \$3 million a year for ten years to fund health projects involving treatment programs for respiratory illnesses.

[For further information, contact SCQAQD prosecutor, Peter Mieras, at (909) 396-2000.]

United States and Illinois v. Illinois Power Company, No. 99-833-MJR (S.D. Ill. March 7, 2005)

Illinois Power Company has agreed to settle a lawsuit brought against it in 1999, alleging that it violated the New Source Review provisions of the Clean Air Act by making modifications at its Baldwin Power Station without installing the appropriate pollution controls. Under the agreement, Illinois Power will spend about \$500 million to reduce emissions at five of its coal-fired power plants by 54,000 tons annually. These plants are at Baldwin, Havana, Hennepin, Oakwood, and Alton, Illinois.

In addition to installing the controls that will reduce sulfur dioxide and nitrogen oxide emissions, the company will pay a \$9 million civil penalty to the federal government. Illinois Power will also spend at least \$15 million on supplemental environmental projects,

including truck stop electrification to reduce emissions from idling diesel engines, energy conservation for municipal buildings, acquiring and preserving over 1,100 acres of forest in Vermilion County, Illinois, and a \$2.75 million donation to the Illinois Conservation Foundation for land acquisition and restoration.

[For further information, contact Illinois AAG Matt Dunn at (312) 814-2521 or Tom Davis at (217) 782-7963.]

United States et al. v. Ohio Edison, No. 2:99-CV-1181 (D. Ohio Mar. 18, 2005)

The federal government and the States of Connecticut, New Jersey, and New York have entered into a settlement with Ohio Edison and its parent, First Energy, that will reduce emissions from the company's coal-fired Sammis power plant by between seventy and eighty percent, amounting to air pollution reductions of 212,000 tons per year.

A federal court ruled in August 2003 that Ohio Edison had violated the Clean Air Act. The settlement avoids a second trial that would have addressed the penalty phase.

Among the terms of the settlement is an obligation Ohio Edison will also pay a penalty of \$8.5 million to the federal government and \$10 million to fund clean air and alternative projects in Connecticut, New Jersey, and New York over the next five years.

[For further information, contact New York AAG Peter Lehner at (212) 416-8450; Connecticut AAG Kimberly Massicotte at (860) 808-5250; or New Jersey DAG Kevin Auerbacher at (609) 292-6945.]

SDWA

United States and Nebraska v. City of McCook, No. 8:05CV00093 (D. Neb. Mar. 2, 2005)

The City of McCook, Nebraska, has entered into a consent decree that resolves charges by the federal and state governments that it had violated the Clean

Water Act (CWA) and the Safe Drinking Water Act (SDWA). Under the agreement, the city will make improvements to its drinking water system and upgrade its sewage treatment system. The city will also pay a civil penalty of \$225,000, \$136,000 for violating the SDWA and \$89,000 for violating the CWA.

The complaint, filed simultaneously with the consent decree, alleges that McCook violated the SDWA in that levels of nitrates and uranium in the public water supply exceed the maximum contaminant levels under both state and federal law. The complaint also alleges that McCook violated the CWA in failing to comply with the summer seasonal ammonia concentration and mass limitations contained in its National Pollutant Discharge Elimination System permit. The city's publicly owned treatment works (POTW) discharges water into the Republican River, one of Nebraska's impaired waters.

[For further information, contact Nebraska AAG Jodi Fenner at (402) 471-1090.]

Wetlands

United States v. Adams Brothers Farming, Inc., No. CIV 00-07409 (C.D. Cal. Mar. 2, 2005)

A proposed consent decree has been filed to resolve allegations that Adams Brothers Farming illegally filled in seventy acres of federally regulated wetlands. Under the proposed settlement, the company will pay a \$200,000 penalty to the federal government and \$915,000 to the Land Conservancy of San Luis Obispo County to allow it to purchase property similar to the destroyed wetlands. Adams Brothers must also preserve twenty acres of wetlands, creeks, and riparian habitat on their property.

In November, Adams Brothers Farming, Inc., won a \$5.47 million judgment against a county planning and development department and several individuals for civil rights violations regarding the designation of ninety-five acres of its property as protected wetlands.

[For further information, contact AUSA Suzette Clo-

ver at (213) 894-2442.]

CRIMINAL PROSECUTIONS

Pleas/Verdicts

RCRA

United States v. Norman Solomon, No. 05-80041 (E.D. Mich. Feb. 25, 2005)

The president of Michigan Industrial Finishes Corporation, a paint manufacturing company in Hamtramck, Michigan, recently pled guilty to knowingly storing hazardous waste without a permit. U.S. EPA has undertaken cleanup of the facility; more than 3,300 drums of flammable, paint-related solvents were being stored there. The company generated at least one metric ton of hazardous waste per month.

[For further information, contact AUSA Mark Chutkow at (313) 226-9168.]

Water

Missouri v. Stephen Lindsey, No. 304-CM-10321 (Cir. Ct. Greene County Mar. 10, 2005)

Stephen Lindsey, the owner of a water-treatment company in Springfield, Missouri, has pled guilty to violating the Missouri Clean Water Law. Lindsey admitted that his company, German Septic Service, dumped molasses into a sinkhole. The dumping was discovered when a neighbor reported to authorities that two springs on his property were discharging reddish-brown water. Hundreds of fish were killed. A nearby facility owned by Purina Mills had contracted with Lindsey to dispose of 50,000 gallons of spoiled molasses.

Under the plea agreement, Lindsey will pay \$6,000 to the neighbor, serve two days' of detention, and two years' probation.

[For further information, contact Missouri AAG Harry Boaoian at (573) 751-8803.]

United States v. Evergreen International, S.A., No. 3:05-CR-05229 (W.D. Wash. Apr. 4, 2005)

Evergreen International, one of the Evergreen-related companies involved in the container ship business, recently pled guilty to twenty-four felony counts and one misdemeanor. The charges included making false statements, obstruction of Coast Guard inspections, failing to maintain an accurate Oil Record Book, and a negligent violation of the Clean Water Act relating to a discharge in the Columbia River. The charges were filed in five judicial districts — Los Angeles, California; Newark, New Jersey; Portland, Oregon; Seattle, Washington, and Charleston, South Carolina — five counts from each federal district.

The investigation of Evergreen ships and companies began in March 2001 after investigators discovered approximately 500 gallons of oil in the Columbia River near Kalama, Washington. U.S. Coast Guard officials traced the spill to the *Ever Group*, a container vessel managed by Evergreen Marine (Taiwan), Ltd. Investigators from the Washington State Department of Ecology discovered a bypass pipe used by crewmembers on another Evergreen vessel, the *Ever Given*. Further investigation revealed that at least seven Evergreen ships regularly and routinely used bypass equipment to discharge oil waste and sludge oil and kept fictitious vessel logs.

The company will pay a \$25 million fine, to be divided equally among the five judicial districts. Of this amount, \$10 million will be used for environmental community service projects.

[For further information, contact Richard Udell, DOJ, at (202) 305-0361 or David Kehoe, DOJ, at (202) 305-0382.]

Wetlands

United States v. Robert J. Lucas et al., No. 1:04CR60 (S.D. Miss. Feb. 25, 2005)

Three individuals have been found guilty of twenty-two counts of violating the federal Clean Water Act and nineteen counts of mail fraud. The violations were in connection with the unpermitted development and sell of lots in a mobile-home park in federally protected wetlands. The defendants were Robert J. Lucas, developer of the Big Hill Acres mobile-home park along the Mississippi Gulf Coast; Robbie Lucas Wrigley, his daughter and a real estate agent; and M.E. Thompson Jr., an engineer who developed the septic systems for the development. In addition, Lucas' two corporations, Big Hill Acres, Inc., and Consolidated Investments, were found guilty of conspiracy and mail fraud.

The septic tanks, installed in saturated wetland soils, failed to operate properly. Officials feared that they could possibly contaminate the local drinking water aquifer. The Mississippi Department of Health warned the defendants that they were creating a public health threat. They ignored this warning as well as several warnings and a cease and desist order from the U.S. Army Corps of Engineers and U.S. EPA.

According to investigators, over 1,230 acres of the 2,620-acre subdivision were delineated as federally protected wetlands. Thus, this prosecution represents the largest criminal case involving wetlands enforcement to date.

[For further information, contact Jeremy Korzenik, DOJ, at (202) 305-0325.]

Sentences

Air

***United States v. Tyler Pipe*, No. 6:05-CR-00029 (E.D. Tex. Mar. 22, 2005)**

Tyler Pipe, an east Texas foundry, recently pled guilty under the Clean Air Act (CAA) for concealing information from federal officials and failing to seek permits when they rebuilt a sixty-foot, pollution-emitting furnace. The company has agreed to pay a \$4.5 million fine and has received a five-year probationary term that includes an agreement that the company will install state of the art pollution controls.

Tyler Pipe is the first company to be criminally prosecuted under the CAA under its New Source Review provisions.

[For further information, contact AUSA Arnold Spencer at (409) 839-2538.]

RCRA

***United States v. Gazi George*, No. 5:03-CR-90025 (E.D. Mich. Mar. 16, 2005)**

Gazi George, former vice-president of the City Environmental facility in Detroit, Michigan, has been sentenced to twenty-seven months' imprisonment and a fine of \$60,000. He earlier pled guilty to felony violations of the Resource Conservation and Recovery Act and of the Clean Water Act.

City Environmental was a waste treatment facility in the business of receiving, treating, hauling, and disposing of liquid and solid hazardous and non-hazardous waste. The indictment charged George and facility operations manager Donald Roeser of causing the transportation of hazardous waste to unpermitted facilities, making false statements, and of bypassing

treatment and tampering with a monitoring device. Roeser was sentenced in December 2004 to twelve months' imprisonment and a fine of \$60,000.

[For further information, contact Jim Morgulec, DOJ, at (202) 305-0328 or Kris Dighe, DOJ, at (202) 305-1574.]

Water

***United States v. Edward V. Kellogg*, No. 03-CR-00321 (E.D. Pa. March 15, 2005)**

Edward Kellogg, who was the president of the former Johnston Laboratories in New Cumberland, Pennsylvania, was recently sentenced to sixteen months' incarceration for falsifying the results of tests he performed for nine customers. He was also ordered to pay a \$3,400 special assessment and a total of \$7,181 in restitution to the victims. These included the Pennsylvania Department of Environmental Protection, six Pennsylvania businesses, and a Maryland landfill operator.

The falsified results of the water quality tests were sent by Kellogg's customers to state and federal environmental agencies.

[For further information, contact AUSA Seth Weber at (610) 776-0186.]

***United States v. Kailash Bhushan Singh*, No. A05-0025-CR-RRB (D. Alaska, Mar. 30, 2005)**

Kailash Bhushan Singh, the captain of the Malaysian-flagged *Selendang Ayu*, recently pled guilty to falsifying the ship's log and making false statements to investigators. In exchange for his plea, Singh will serve three years' probation.

The ship lost power on December 6, drifted 140 miles, and eventually broke in half on Unalaska Island, spilling more than 300,000 gallons of fuel oil into a national wildlife refuge. Singh inaccurately reported the time of the engine failure, evidently in an effort to avoid reporting "down-time" and losing fees under the

chartering contract for the ship. Singh also delayed notifying his home office of the problem and the home office failed to search for a tug in a timely manner. After drifting for fifteen hours, Singh finally used the ship's satellite telephone to call Dutch Harbor and request help.

Singh also instructed the crew to lie to investigators concerning the correct time that the engine stopped. Four days later, he revised his story.

Under the plea agreement, Singh could face further charges if new evidence arises.

[For further information, contact AUSA Kevin Feldis at (907) 271-3392 or Bob Anderson, DOJ, at (406) 829-3322.]

UPDATE

Milwaukee Metropolitan Sewerage District v. Friends of Milwaukee's Rivers, No. 04-889 (U.S. Mar. 7, 2005): The U.S. Supreme Court has denied certiorari of this lawsuit, leaving intact the ruling from the U.S. Court of Appeals for the Seventh Circuit, which held that environmental organizations had a right to sue under the Clean Water Act even though the sewerage district was working to reduce its overflows under a consent agreement with the state. (*See* the October 2004 issue of the *NEEJ*.)