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**REINVENTING CONSERVATION  
EASEMENTS: A NEEDED WORK  
IN PROGRESS**

**By**

**Jeff Pidot\***

***Foreword from the Author<sup>1</sup>***

*At last year's Georgetown Law Center's annual conference on Takings Law, I presented a paper ("Benevolent Wizard or Sorcerer's Apprentice? A Critical Examination of the Conservation Easement Phenomenon") concerning issues that have become evident to me, emanating from the largely unregulated and explosive growth of conservation easements around the nation. The relationship of conservation easements to regulatory takings may be seen as inverse. The exponential growth of the former, in some measure, may be an outgrowth of the increased pressure to avoid unlikely constitutional takings, and more commonplace negative public attitudes, emanating from land use regulation in some settings. Conservation easements leave land in private ownership while allowing the holder of the easement (typically a private land trust or a government entity) to enforce certain, contracted-for, voluntarily-imposed, often-donated, but increasingly paid-for, restrictions on future use of the easement-encumbered property. Consequently, conservation easements are welcomed by some as achieving the goals of land conservation without regulation and even often without government. My perspective, as a believer in the value of conservation easements,*

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*is that they are a tool, complementing regulation and land acquisition when appropriate, but that the legal systems by which they are designed and governed need reform, lest we ultimately lose the public benefits that we thought conservation easements would secure in the future.*

*The unexpected upshot of my paper at last year's Georgetown Conference was to be invited to the Lincoln Institute of Land Policy as a Visiting Fellow for a year, to explore these issues fully and consider and articulate the types of reforms, both in conservation easements and in the laws that govern them, that might enable these new inventions of real estate law to more assuredly keep the promises that they make to future generations. The ideas expressed here should be viewed as a work in progress. Thus, this paper's title.*

**I. Introduction**

*"Finally, as the land trust movement and use of easements matures, we are faced with questions born of our success." Jean Hocker, former president of the Land Trust Alliance.*

A quarter of a century ago, when the vast majority of us had never even heard of a conservation easement, Daniel Halperin, my tax law professor at the University of Pennsylvania Law School in 1972, later Deputy Assistant Secretary at the U.S. Department of the Treasury, and today a Professor at Harvard Law School, testified before Congress to express concerns about pending legislation that would make permanent certain temporary laws that experimentally granted income tax deductions for the donation of conservation easements to qualified holders. In his testimony, the concerns Professor Halperin raised about the future were nothing less than prescient.

He spoke about the difficulty of determining whether there would be a public benefit of donated but private conservation easements commensurate with the public subsidy that would be conferred by their income tax deductibility and other tax benefits. He spoke about the difficulty of appraising the value of donated

conservation easements for tax purposes, and the parallel difficulty for the IRS in evaluating whether these appraisals were fair. He spoke about the uncertainty of whether land trusts and other private conservation easement holders would have the resolve and resources to forever monitor and enforce the easements held by them, in the absence of which the public would receive no benefit at all. He spoke about the vagueness of the very concept of a conservation easement and its conservation purposes, as then expressed in the law, which is essentially unchanged to this day. He advocated for at least some public involvement in conservation easement creation, so that the public would have a say in what otherwise would be exclusively a private transaction. He spoke about the risk of conservation easements that conserve nothing of public value as well as those that would protect nothing that was at risk in the first place. He spoke about the potential abuse by taxpayers who donate conservation easements that benefit themselves more than they benefit the public that is subsidizing the easement. In short, he spoke about whether conservation easements, as then and still now devised under the law, would ultimately deliver the promise that the public believed and hoped they represented.

Twenty-five years later, we can now see, if we are willing, that Professor Halperin foretold many important issues presented by conservation easements, although I doubt that he could have predicted their forthcoming numbers and complexity. Does this mean that conservation easements are bad public policy? I would argue “no.” In a properly designed system, conservation easements comprise a valuable method of benefiting the public by preserving important portions of the American landscape with minimum cost and maximum effect when used wisely with sufficient and permanently emplaced oversight. A high quality conservation easement — one protective of a property having public conservation values, providing true and durable land protection (which cannot be accomplished through regulatory means), and held by an entity that

has the resolve and resources to permanently monitor, enforce, and defend it — is worth the public subsidy that it receives. Conservation easements may be of particular usefulness where outright public ownership is unnecessary or undesirable. *However, in few places in the nation is there a legal process by which these important values and benefits of conservation easements can be publicly scrutinized and thereby secured.*

It is the thesis of this paper that the laws governing conservation easements, and the content of these new interests in real estate, require reform in order that their public benefits be realized in the future. Otherwise, we may simply leave to future generations a legal morass of many tens or even hundreds of thousands of different conservation easements, the terms, holders, and even locations of which will be difficult or virtually impossible to track and the public benefits of which could be ultimately lost.

## II. The Exponential Functions

Certainly, no recent happening in land conservation rivals the deployment from coast to coast of conservation easements. Beyond tax and other subsidies, one of the driving forces favoring this growth is that conservation easements are perceived as an easy win-win strategy in land protection, by which willing landowners work with private land trusts or government agencies to provide lasting protection of conservation lands. From a constitutional takings perspective as well, the conservation easement can be both the private property owner’s and the government’s answer to measures that, if imposed by regulatory means alone, in some cases might result in restrictions so onerous as to risk implicating the takings clause. In short, conservation easements often accomplish something that comes easily and makes people feel good, which is certainly no vice but may help explain their popularity. The question, which this

paper explores, is whether they also present something of a legal time bomb and, if so, what we can do to minimize that effect.

The attractiveness of conservation easements is demonstrated by their explosive growth, just in the last few years. *When doing the numbers, however, perhaps the most important message is that no one knows, even approximately, how many there are.* The organization that supports many local land trusts nationwide, the Land Trust Alliance, estimated, in its most recent census in 2004, nearly 18,000 conservation easements held by some 1,600 land trusts, with a doubling of the number of acres under easement every four years. There are many other organizations, such as national and multi-national organizations like The Nature Conservancy, that hold additional thousands of conservation easements. There are also many untold thousands held by federal, state, and local governments. This last group is rapidly increasing its holdings, as local governments in many jurisdictions are requiring conservation easements as a quid-pro-quo for regulatory permits for development projects.

The scale of conservation easements can vary dramatically. There are conservation easements that do no more than “protect” a landowner’s residential backyard. By contrast, the largest known conservation easement protects from structural development (but doesn’t otherwise significantly restrict) 760,000 acres of remote forest land in mostly scattered townships in northern and western Maine, an aggregate area roughly the size of Rhode Island.

Often land trusts and government agencies alike understandably focus, publicize, and celebrate the accumulating numbers of conservation easements in their portfolios, and their numbers of acres, sometimes without equivalent regard to the quality of the easements and of the lands that they cover. The terms of conservation easements are infinitely variable. Indeed, calling something a conservation easement tells you little or nothing about what protections it affords or even what legal boilerplate it includes. Many conservation easement advocates not unreasonably extol the virtues of this nearly infinite flexibility, since it allows

the landowner and easement holder to tailor each easement to their mutual interests and the unique attributes of the particular property involved. However, another way of considering the increasing variability of conservation easements is that it will ultimately result in great difficulty, especially for holders and succession of landowners over time, in understanding the legal rights and responsibilities with respect to each easement. Heightening this effect is the fact that many conservation easements are increasingly negotiated, nuanced, and complex, leaving even legal experts challenged in easement preparation, interpretation, oversight, monitoring, defense, and enforcement.

While conservation easements are usually intended to be permanent servitudes on privately held property, in the vast majority of states there is no public registry for conservation easements, no precise legal structure and little or no public review or accountability with respect to most conservation easement design, monitoring, enforcement, or management. In sum, there seems to be a growing disconnect, or perhaps this is better described as a correlation, between the massive deployment of these new interests in real estate, their nearly infinite variability, and the multitude of often new-born land trusts that hold them, on the one hand, and the largely undisciplined laws that govern them, on the other.

While these trends in the deployment of conservation easements may be heartening to many in the land conservation community, including at least in part to me as a participant in their creation and celebration, they also pose equivalent challenges that require critical examination and remedy. However, change will be no easy task, since, as with all successful ventures, an industry has grown up that is based upon the status quo. If there is any hope of having the conservation easement community support legal reform, it is necessary to first persuade its participants of the precariousness of their long-term situation.

### III. Why Does the Public Have a Stake in This?

Why should the public, and therefore its government, care about how conservation easements are created, managed, and appraised? After all, like most other easements, conservation easements are often private transactions between a landowner and a land trust, so why should this be a *public* concern? One important answer is that, with virtually every conservation easement, there is a significant public subsidy. The public *should* care about how its money is being spent — whether it is being spent for something of long-term public benefit and whether it is being spent efficiently; that is, the public should be interested in whether it is getting the most public bang for its public buck.

What is the basis for my statement that the vast majority of conservation easements are publicly subsidized? First, increasingly, these easements are being purchased with public money, the most obvious form of public subsidy, and sometimes on a grand scale involving many millions of dollars. But even while most conservation easements are donated by private landowners to private land trusts, they almost always result in an income tax deduction to the donor, as well as, in many cases, reduced real estate and estate taxes and, in some cases, other substantial public subsidies as well. The public also invests in conservation easements by allowing tax-exempt status for their land trust holders and public funding for their government holders. Using all available tax breaks and government incentives, it may be more than just theoretically possible in selected states and/or situations for a landowner to actually make a *profit* out of *donating* conservation easements.

Even when a private land trust acquires a conservation easement by buying it from a private landowner (as is true for the largest conservation easement acquisition in history, the 760,000 acre easement in Maine purchased by the New England Forestry Foundation for \$28 million), the public's money is still at work. Virtually every dollar paid for such an easement was

donated to the cause, resulting in charitable gift income tax deductions for the donors; and many conservation easements result in reduced real estate taxes, affecting the public fisc annually, and reduced estate and/or inheritance taxes when the current landowner, and each successive landowner, dies. Beyond the public's financial investment, there is also a public dimension to conservation easements as a form of permanent charitable trust, the idea of which is that the public has an interest that transcends that of the parties to the transaction. Further, some conservation easements guarantee public access to the property, such as for hiking or scenic enjoyment, giving the public a further stake in the long term protection of the easement. And further still, in the case of conservation easements granted by developers as a quid-pro-quo for regulatory permits, although these types of easements are neither bought by the government nor donated by the landowner, nonetheless they comprise a public investment in that they are part of the consideration given to the public by a developer in exchange for the right to proceed with a financially lucrative project. Finally, the public has a valid interest in the future of orderly legal understandings and stability of interests in real estate. For instance, there is no less of a public interest in the long term, legal meaning of conservation easements than there is in that of fee simple deeds to property.

In sum, when a conservation easement is created, the public has a legitimate interest to ensure that the terms of the easement will be honored and that the holder has the capacity and will in fact take reasonable measures to monitor, manage, enforce, and defend the easement *forever*, as virtually all conservation easements provide. Indeed, the very purpose of state and federal laws that support and promote the creation of perpetual conservation easements, in derogation of the common law, is that the public interest is intended to benefit from this policy.

#### IV. The Time is Right for Considering Reform

This should be an uneasy time for us in the conservation easement community. Because of alleged conservation easement abuses widely reported by the Washington Post, Philadelphia Inquirer, and other news media, both Congress and the IRS are investigating conservation easement practices and those of their holders. The IRS has announced in stark terms that abusive easement donations that do not have a public benefit, or that result in bloated valuations and deductions, may result in fines for all those responsible, including landowners, appraisers, and tax advisors, as well as the potential of jeopardizing the 501(c)(3) status of the holder. It isn't yet known what the upshot of these investigations will be, and it seems probable that the results in the near term will be far less comprehensive than I believe necessary. However, the time is right to explore potentially useful reforms of all kinds.

The principal source of many concerns with conservation easements is that the federal and state laws that govern these unique, new interests in real estate were written at a time when no one could possibly have known the explosive degree to which easements and land trusts would be created. Accordingly, for many of the solutions to these problems, we have to consider reforming these laws so as to respond to the reality that we now know. While national organizations like the Land Trust Alliance and regional land trusts like the Maine Coast Heritage Trust, have shown outstanding leadership in devising and promoting standards, practices, and other assistance for land trusts dealing with many of these issues, these standards are purely voluntary, and land trusts have no legal obligation to follow or even to know them. Moreover, in some cases, the worst offenders with respect to long term stewardship of conservation easements are the growing multiplicity of government holders.

In sum, most laws governing conservation easements *enable* the creation and management of easements

on what some might describe as a nearly free-wheeling basis. The obvious solution is to make legal requirements for conservation easements and their holders more explicit, transparent, and rigorous. Doing so would be in the long term best interests for both those in the conservation easement community as well as for the public at large.

Certainly, one effective way to undertake legal reform among the states would be for the National Conference of Commissioners, which gave birth to the Uniform Conservation Easement Act in 1981, to reconvene and consider the issues that went unresolved in its earlier work, some of which are highlighted below. Meanwhile, the IRS can have a significant impact by clarifying its rules concerning donated conservation easements, so as to make sure that these are fairly appraised and the public benefits of them are both real in the present and assured in the future.

#### V. Selected Problems and Responsive Reforms to Consider

As stated at the outset, this paper is not a final, but only a *progress*, report. Accordingly, I am outlining here some of the problems that we have already encountered or can readily expect with conservation easements, as well as some broadly described ideas that should be considered, among others, to allow for greater predictability and stability in the creation and management of conservation easements in the future.

##### A. Conservation Easement Uniformity, Public Accountability, and Durability

In the context of legal history, conservation easements today are at the same state of immaturity as was the fee simple deed when land was first conveyed by the King. With each deed and succession of deeds using varying formulations of words, the courts of England were given the opportunity to engage in a few hundred years of case law parsing the precise meaning of these distinctions. Ultimately, with fee simple deeds,

there emerged boilerplate legal language to denote a finite set of real estate interests and reservations, and these have been further simplified and distilled by today's statutory deed forms enacted in many states.

What should make the conservation easement community anxious is the fact that, after just a few decades, there is more and increasing complexity and variability in the terms of conservation easements than historically existed with fee simple deeds. In fact, it is often said by their proponents that each conservation easement is, and *should* be, different, being negotiated to the parties' mutual and particularized specifications. This state of affairs, with our already many tens of thousands of legally different conservation easements, cannot serve future generations well. How can we expect land trusts and government agencies that hold these easements, no less a multitude of succeeding generations of landowners, to understand and attend to the often subtle differences in their terms?

The *quality* of conservation easements, not to mention of their holders, which determines how well the easements will be able to deliver their promises over time, also differs markedly and often depends heavily upon the degree of legal expertise, negotiating skills, and individual agendas of the parties to the transaction. *By way of comparison, can you imagine my telling you this in the context of the quality of the deed to your home?* The upshot of this piecemeal process of individualized conservation easement design is that landowners and holders alike will doubtlessly experience difficulties in the future, mounting with the passage of time, in understanding, tracking, and monitoring easements so as to assure compliance with their often complex and differentiated requirements. This problem is heightened by the fact that these interests in property are designed to last in perpetuity.

Also requiring greater legal refinement are issues concerning when conservation easements may be legally terminated or modified. The Uniform Conservation

Easement Act leaves this issue to whatever laws apply to the similar disposition of other easements under state law. But conservation easements are interests in real estate that are supposed to endure and with respect to which there is a substantial public investment and interest. This suggests that amendment or termination of easements should involve more than just the momentary interests of the parties to the easement or their successors. Just as it is later argued in this paper that the state Attorney General should have power to enforce and defend conservation easements if the holder defaults in its duty to do so, so also state or judicial approval should be required for the termination or significant amendment of conservation easements. The law should make clear, and narrowly provide for, the circumstances under which a conservation easement may be terminated, or amended in a fashion that impairs its conservation values. Likewise, the law should explicitly negate any extinguishment of a conservation easement that merges with the fee by reason of the holder's acquisition of the latter and should, instead, require the continuation of the easement, with enforcement vested in the state Attorney General or designated third party enforcer.

The primary, if not exclusive, purpose of a conservation easement should be conservation-oriented, at least in the broadest sense of preserving publicly beneficial conservation values in the property. While all conservation easements reserve to the landowner certain uses of the property, these retained uses should be consistent with the property's conservation values and the easement's primary conservation purposes. However, some substantially unrestricted "working forest" easements have been proposed, and a few even executed, that, although called conservation easements, contain purpose clauses and other terms that strongly suggest or even mandate a primary purpose of continuing generally unrestrained timber harvesting and related land management uses, the only economic uses to which the property has been and is likely to be put in the foreseeable future.

Serious efforts should be made to stabilize these situations, so that there are a legally sustainable number of basic conservation easement formulations for the different types of protections that are typical. In each case, the emphasis should be on simplification and standardization wherever possible, so that easement monitoring and compliance are reasonably achievable and efficient. Likewise, there must be greater and more uniform efforts to tighten the relationships of conservation easement purposes and restrictions, so as to minimize the opportunity for future confusion and disagreement about the intent of the parties. *In short, easement drafters must always be mindful that the words of the easement must have clear meaning to non-lawyers who will be among the generations of landowners and holders to come.* Drafters should also bear in mind the perpetual monitoring and management costs of each of the terms of the easement.

Of course, certain substantive provisions of a farmland easement will differ from those designed to protect pristine oceanfront or rare wildlife habitat, but there is especially no reason that the *boilerplate* of conservation easements should be variable and negotiated. If conservation easements are to withstand the tests of time, they should be routinized as much as possible, so that there is an implicit understanding of the basic legal terms and framework of each type of easement.

Often, when I make this point, conservation easement advocates will respond that, while perhaps the problem is as I describe, the remedy is impossible because any effort to address this problem directly conflicts with the entire theory of variability that is the essential hallmark of the conservation easement. However, already in Maine and other jurisdictions, there is recognition among many practitioners experienced with this body of law that at least the basic boilerplate of a conservation easement ought not vary from one to the next. Likewise, increasing numbers of those in the conservation easement legal community are expressing concerns about the need for greater uniformity and simplicity.

More than that, there is nothing to prevent the IRS and/or states from adopting or authorizing a model easement form, the basic terms of which should not be varied if the parties desire the tax and other benefits of conservation easements. Perhaps even better, as is very close to the situation in Massachusetts, the law could require review and approval by a public agency of *all* conservation easements, with the agency adopting a model of essential easement terms and requiring conformity in the absence of a demonstrated reason otherwise. Indeed, the Massachusetts system for public agency conservation easement review and approval has benefited the land trust community there, in that land trusts receive expert input from one source that has considerable experience with easements across the state. Land trusts also benefit from this system by being able to use the public review agency for support in negotiating with landowners who otherwise want to depart from the norm.

To those who contend that a system of public agency review and approval of conservation easements will bog down and bureaucratize their efficient development in the private marketplace, it is noteworthy that Massachusetts has reviewed and approved an estimated (and astronomical) 3,000 conservation easements held by private land trusts and municipalities (this number doesn't include easements held by state government), and that many of these have benefited, sometimes substantially, from the public agency comments received during the review process. Indeed, it is not unreasonable to say that, while its system has room for improvement, Massachusetts possesses the oldest, most unassailable — and nearly the most prolific — conservation easement program in the nation.

In short, there seems to be no good reason for the legally unbridled degree of variability and lack of public accountability that has become the hallmark, and is sure to become the troubled legacy, of conservation easements today.

## B. Conservation Easement Tracking

Especially with the passing of time after a conservation easement has been established, its location, terms, and even its existence may become unknown beyond (and sometimes even to) the parties to the transaction. Although conservation easements are typically recorded in the local registry of deeds as with all other interests in real estate, in the vast majority of states there is no separate registry of conservation easements and no map or system that shows where they are located, who holds them, what restrictions they impose, or even that they exist. Both government agencies and land trusts that hold conservation easements sometimes have difficulty keeping track of their own holdings. As easement acquisition continues to accelerate, so will this problem.

The future significance of this problem cannot be overstated. The public benefits of conservation easements depend upon being able to know what they are and where they are. Just as there is a powerful public interest in conservation easements, there is an equivalent need to be able to keep public track of them. Recordation at the local registry of deeds is sufficient to put future owners of the easement-encumbered property on notice of the existence of the easement (assuming that they have a title search performed before acquiring the property), but this system is woefully ineffective at public tracking of conservation easements, since in most states they are recorded with all other interests in property and, accordingly, are simply buried from public view. Moreover, most states require title searches back only a finite number of years (usually fifty) or require periodic re-recording, so that with the passage of time what was intended as a permanent conservation easement could become unknown under the current system.

In response to this issue, every state should have a legally required, public registry of conservation easements. Such a registry would enable their long-term

monitoring and scrutiny, which is especially important if the land trust holder goes out of business or otherwise fails to carry out its responsibilities. A central registry of conservation easements might also include other conservation land holdings of government and non-profit organizations, enabling better coordination and planning for future acquisitions.

Again, the Massachusetts model, while not perfect, seems to come closest to this ideal. Since all conservation easements held by land trusts and municipalities must be approved by a public agency in that state, there is an automatic registration system in place. Massachusetts is making further efforts to employ geographic information systems and other techniques to locate easements on computer-generated maps. However, Massachusetts might do well to integrate into its registry all easements held by state agencies, and might consider, for uniformity, requiring those easements as well to be reviewed by the same public agency that must approve easements held by land trusts and municipalities.

In some states, like Maine under the leadership of the Maine Coast Heritage Trust, a voluntary system is being devised for registering easements. While this is a good start, the real need is for a legally required, public repository for conservation easements. This is a very simple measure that would go a long way toward securing the future of easements.

## C. Long Term Conservation Easement Monitoring, Enforcement and Defense

Of course, even the best-made conservation easements are only as good as the holder's willingness and capacity over the long haul to monitor, enforce, and defend them. Many land trusts, which now number some 1,600 nationwide, are newly created and may be in a particularly poor position to undertake the kind of monitoring, compliance, and defense work that is required, *perpetually*, for maintenance of conser-

vation easements. Many land trusts have few or no assets, office, or support staff, relying instead on a small cadre of volunteers. While these kinds of local, community-based, conservation initiatives are useful in dealing with local landowners, one must worry about the long-term future of these small organizations and the conservation easements that they hold. The ability of a land trust or other holder to enforce a conservation easement can become seriously compromised, or could even be legally construed as abandoned, if there is a failure to monitor on a regular basis, there isn't sufficiently thorough baseline documentation that describes in words and pictures the condition of the property at the time of the easement's acquisition, there isn't a continuous program to maintain communications with landowners, or the land trust doesn't have the resources and resolve to deal effectively with easement violations that will inevitably occur with the passage of time.

Conservation easement monitoring is a particularly costly task where the property involved is large, difficult to access, or becomes divided in the future so that the number of landowners and monitoring efforts multiply. In some cases, as recommended by the Land Trust Alliance's standards and practices, endowments and other financial resources are set aside by the easement holder for this purpose, but there is no legal requirement to do so and many holders make modest or no such provision. This work, so essential to easement maintenance, has none of the fundraising nor political glamour associated with conservation easement acquisition.

Conservation easement enforcement and defense, when it becomes necessary, is even more costly than monitoring. Legally enforcing or defending just one conservation easement can cost well into six figures. Just a modest portfolio of easements will inevitably incur these types of expenses in the long-term future. Furthermore, in the scenario where new successions of landowners do not have the same conservation-minded motivation or understanding as the original

easement grantor or where the conservation easement's neighborhood becomes significantly more valuable for development than at the time of the easement's creation, the predictable result is that a well-financed landowner may look for ways to challenge or even outright violate the easement.

This body of issues also could be resolved by state and/or IRS legal requirements, setting standards for the minimum financial resources, credentials, and track records of land trusts that qualify to hold easements. Alternatively, there could be a legally required process of certification of land trusts before they are qualified to hold easements. Since the same issues arise, and in some cases are even more severe, with respect to easement monitoring efforts by government agencies, appropriate standards should be imposed upon them as well. Land trusts or government agencies that don't meet these standards should be able to hold a conservation easement *only* if there is a back-up easement holder that does meet the standards.

Of course, any system devised would have to have a degree of flexibility in order to make it workable. However, the current lack of any legal system will not serve us well in the future.

#### D. Enforcement and Defense of "Orphaned" Easements

Conservation easements can be "orphaned" in two ways, both of which are guaranteed to occur in increasing numbers with the passage of time.

First, a land trust may simply go out of business. Recognizing that most land trusts, as well as most conservation easements, are a recent phenomenon and that hundreds of them that are here today were not in existence just a decade ago, it is more than reasonable to believe that many of these, just like other young corporations, will go out of business in the future. If a land trust does so in a legally responsible fashion, it

will first assign all of its conservation easements to another qualified holder. Yet, one must anticipate that the small group of passionate citizens that created a community land trust may not be able to perpetuate themselves, and the trust may simply become inoperative. In this regard, it is important to note that conservation easements, unlike fee ownership of land, are not an *asset* but a *liability*, permanently imposing (we hope) on the holder responsibilities of monitoring, enforcement, and defense, as described above. The upshot is that, unless the easement covers property of great significance, it may be difficult or impossible for a financially strapped land trust to find another willing and qualified holder to take over the easement. *What happens then? While theories may abound, the truth is that, in most states, we just do not know the legal answer.*

A second way that conservation easements can be “orphaned” is simply by the inattention of the holder. A land trust may remain in existence but become disinterested in the easement, or even in all of its easements. This may be for lack of resources and staff, change in priorities and attitudes, lack of institutional memory, or for any number of other reasons. Depending upon the particular laws of each state, it may be possible for the protections afforded by a conservation easement to be legally abandoned by the holder’s simply not enforcing them.

So, who steps into the breach to enforce and defend an orphaned conservation easement? There are three problems here: first, stepping into the breach means the expenditure of potentially large sums of money; second, because of the issues described above, no one may even know that the easement exists or that it has been orphaned; and third, in many states it is legally unclear whether there is anyone who may enforce an easement beyond the parties to it. Absent a statutory provision to the contrary, it is reasonably clear under the common law applicable in most states that private persons who are not parties to a conservation easement, including neighbors of the land covered by the easement, lack standing to enforce it. Those who participated in the creation of the Uniform Conservation Easement Act (UCEA) considered some of these

issues but decided not to deal with them, leaving them to whatever state laws otherwise exist to do so. Consideration was given but rejected to the UCEA’s explicitly granting this authority to the state Attorney General.

Under the common law in many states, and under statutory law in some, the Attorney General has the power to enforce charitable trusts, which, it is my contention, include conservation easements as well as the land trusts that hold them. But there are problems here as well. First, the UCEA as well as the enabling laws in many states don’t address this issue or at best do so ambiguously. Second, in order for the Attorney General to step into the breach, there has to be a system for tracking conservation easements, an issue discussed above. Third, the Attorney General may well find that enforcing conservation easements, which were purely private transactions to begin with, is unworthy of the public resources that must be spent to do so.

What is the remedy to this problem? Again, in state laws and/or IRS requirements, there should be explicit powers for at least the state Attorney General to initiate enforcement actions with respect to conservation easements that have been orphaned in the ways described above. There is a public subsidy and a public trust attached to each easement, so this only makes sense. However, if there is a public expectation that the state will step into the breach when a land trust defaults, not only should this be explicit in the law but conservation easements should be subject to public review and registry, as recommended above, so that the state, as a participant in the process, has determined that the easement is publicly beneficial and worthy of enforcement and defense.

#### E. Public Input and Accountability

Since virtually every conservation easement has a public investment and attribute as a public trust, it is reasonable that there be a process by which the public has some opportunity for input in the course of conservation easement design, even when the easement will be held by a private land trust. In most

states, because land trusts are private corporations, the terms of their conservation easements are the product of exclusively private arrangements between them and private landowners, subject only to minimal statutory standards and IRS regulations where applicable. One may reasonably ask the question of whether there should be more public accountability in these transactions, especially since most of them receive public subsidies.

I believe that the answer to this question is in the affirmative. For each conservation easement, there should be an efficient, legal process by which the public can have input. This means that, using the Massachusetts model of public review and approval, there would be an opportunity for the public to know of the proposed conservation easement and a meaningful but timely opportunity to provide comment. If, as in Massachusetts, there were a public agency review process, an efficient approach to obtain public input would be for each proposed conservation easement to be posted on-line for public comment for a prescribed period before approval is given. By this very low cost means, the public would become enfranchised in the conservation easement design process, and all parties to the easement, including the state reviewing agency, could only benefit from the public input received.

#### F. Conservation Easement Valuation and Related Tax Issues

As predicted by Professor Halperin twenty-five years ago, one of the thorniest aspects of conservation easements lies in their valuation appraisal, which must be undertaken in virtually all cases of their creation. An appraisal is required to set the price if the easement is being purchased or to determine the allowable tax deduction if it is being donated.

As with so many issues with conservation easements, much of the uncertainty that attends their appraisal derives from the generalized way that the applicable laws were written in the first place, at a time when no one could have foreseen the number and complexity of easements that would follow. The means by which conservation easements are appraised has never been

meaningfully specified by Congress, the IRS, or most state legislatures, leading to understandably large and widespread differences in these practices. However, unlike property appraisals that involve purely private real estate transactions, appraisals of conservation easements are matters in which the public has a legitimate concern about whether the appraisal is fair.

This concern is heightened by the fact that conservation easement appraisals are often (indeed, in the case of donated easements, are always) arranged and paid for by the private landowner who is donating the easement, a person who understandably wants the highest possible value ascribed to the easement in order to maximize the tax and other financial incentives available. I wouldn't suggest that an independent, professional appraiser is influenced by knowing the interest of the client in maximizing this appraised value, *any more* than I would suggest that a professional in my own field of the law is motivated in devising legal opinions by what the client wants to hear, but the reality is that any human, no matter how virtuous, especially given the types of often highly subjective judgments that attend conservation easement appraisals (as well as legal opinions), cannot be oblivious to the interests of the client who is paying the bill. One must also recognize the important fact that, in the case of conservation easement appraisal for a donated easement, there is no negotiating force on the other side of the table trying to drive down the valuation, since the donee usually takes little or no interest in, and may never even know, the appraisal results. In other words, there is no willing buyer and seller setting the valuation. Especially in this context, it may be legitimate to consider whether an appraiser may face an added dimension of conflict if employed by a business that is simultaneously actively engaged in selling or owning other real estate in the same general marketplace as the land subject to the easement

I will touch upon just a few of the ways in which current laws make conservation easement appraisal practices, as currently undertaken by even the most scrupulous of appraisers, fraught with questions, at least from a public accountability perspective. IRS regulations tell us that the best way to appraise a con-

servation easement is by looking at the price of comparable easements. But that is almost never an availing technique, because there rarely are any comparables, not only because there may be no similar, easement-encumbered lands in the area, but also because most conservation easements are donated and their appraised values are not publicly known and have not been subject to negotiation between a willing buyer and seller. Moreover, unlike the fee in property conveyed in comparable transactions, conservation easements are very likely to be different from one another in the particular property rights they convey or extinguish. This generally means that appraisal of conservation easements almost always defaults to the "before and after" appraisal technique, but that also can be fraught with uncertainties and opportunities for subjectivity.

Conservation easement appraisal may be seen as particularly difficult when applied in remote areas, where there is little or no development marketplace or prospect of development in the reasonably foreseeable future, and even more so when the property involved will continue to be managed without restriction for forestry, farming, ranching, or other natural resource industries, where these have been the historically economic uses of the property to begin with.

These uncertainties can become compounded if zoning or other laws already significantly restrict or potentially prohibit residential subdivision and other forms of development in a fashion that the conservation easement largely mirrors. To what degree does the appraiser in this situation have to speculate about whether regulations or zoning applicable to the property might change in the future, or regulatory permits issued, in order to accommodate developments that are currently legally foreclosed? Sometimes, appraisers of conservation easements turn to the staffs of state regulatory agencies to ask them to make hopefully informed guesses about the prospect of zoning being changed or permits being issued to accommodate different development scenarios. While this may be a legally legitimate practice in some instances, one might question whether such speculations by agency staffs are sufficiently reliable, particularly when mil-

lions of dollars may be held in the balance. One may also ask whether there is any public value, in terms of benefits or tax deductions, in a landowner committing not to do that which it is currently legally unable to do.

Consider also the difficulties of valuing a conservation easement when the landowner has withheld from the easement's coverage those portions of its ownership that are most likely to have development value in the future. The IRS requires that the potential increase in value of other properties held by related persons be considered in appraising a conservation easement, but a common understanding among conservation easement appraisers is that the IRS will nearly always allow some amount of deduction for the donation of a conservation easement, even when, in some selected markets, there are those who say that the existence of a conservation easement might actually add value to the property of the donor. A related issue concerns how to appraise a conservation easement when it covers an area that has only marginal development value in the first place, since one can expect that whatever development potential may exist in that area would have focused in any event on the lands that have been excluded from the easement.

Further, one wonders how precise and defensible computations can be made of the appraised value of adding public access to the bundle of rights granted by a conservation easement, particularly in a remote area where this type of access may have little impact on the retained uses of the landowner. And what if public access has long been a tradition in the area, so that there will be no meaningful change in the future use of the property? In this context, exactly how many dollars does one reliably ascribe to a non-intensive, pedestrian public access right in a conservation easement? Since most conservation easement appraisals are not public documents, this writer at least is uncertain whether some appraisers calculate a value for public access in these instances.

And then there are the multitude of issues that attend the sometimes nuanced complexity and unique terminology that may lie in each conservation easement. In evaluating any conservation easement, sometimes difficult-to-decipher differences in legal terminology can have substantial meaning with potential impacts on the property's future protection and present economic value.

Because each of these necessarily speculative factors multiplies the others, the mathematical result is that even small changes in assumptive inputs can yield large differences in appraisal outputs.

Many of the tests and standards for the deductibility of conservation easements, enacted by Congress and adopted by the IRS at a time when no one could have foreseen the exponential growth and potential complexity of this new property interest, are themselves highly subjective and lacking in substantive rigor. The tax laws provide some degree of specificity in the following limited ways: in order to be deductible, a conservation easement must be permanent, recorded in the local title registry, not subject to a mortgage, appraised by a "qualified appraiser," accompanied by some sort of baseline documentation that describes the property's condition, and held by a government or non-profit organization legally capable of holding it and vested with the right to inspect the property and enforce the restrictions.

Except for these legal requirements, there are few others that have specificity. For instance, the Tax Code and regulations provide that a conservation easement must have a conservation purpose. While the law provides several ways in which an easement's conservation purpose may be determined, all of them are largely subjective. Although some of these issues may not be considered direct concerns of the appraiser, with similar lack of clarity IRS regulations forbid a tax deduction for a conservation easement that, even while meeting one of the abstract conservation purpose tests under the Code, would permit the destruction of other important conservation interests. Yet, most conservation easements reserve to the owner some development or other uses of the property that

*might* be characterized in this way. The consequence is that no one can really know how to precisely interpret and apply these requirements except in the most obvious of cases.

For all of these reasons, conservation easement appraisal methodologies have been described as part art and part science, with appraisal results often varying with the appraiser and his or her chosen methodology. However, now that the IRS and Congress have announced that they are going to closely scrutinize conservation easement donations and appraisals, with the IRS threatening to penalize anyone involved in what it considers to be abusive practices, we have to look at these highly subjective tests with renewed caution and consideration of reform.

In many respects, it may be far more reassuring and helpful to appraisers and others associated with conservation easement deductions to have a more precise set of rules from the IRS, and/or a public certification process for appraisers and appraisals alike. In connection with equally potentially subjective, charitable donations of works of art, the IRS relies upon an independent advisory panel of experts in reviewing selected appraisals. A similar panel of experts could be used in connection with selected conservation easement appraisals. At a minimum, the IRS should require state-certified appraisers to work in conformity with the most rigorous applicable set of industry standards. For large donations, the IRS might also want to require an independent review appraisal.

But even more basic than this is imposing a requirement that any tax deduction taken for donation of a conservation easement include a filing with the IRS of the full appraisal report upon which the deduction is dependent, something that has not been required except very recently for large claimed donations. Moreover, as repeatedly admonished in recent years by Stephen Small, a noted advocate and expert with respect to conservation easement practices and taxation, land trusts should take care to resist taking donations of easements where it is apparent that the appraised value for tax deduction purposes is unrealistic. However, it isn't for a land trust to police ap-

praisal valuations, and even the Land Trust Alliance's Standards and Practices seems to equivocate about what a land trust should do if it is asked to take an easement where it believes the appraised value is unrealistically high.

Finally, I would advance the idea that conservation easement appraisals should be public documents, subject to whatever safeguards are necessary to protect proprietary or personal information. After all, as discussed above, these appraisals determine the public investment in the easement. Even if nothing else were changed in the laws dealing with conservation easement appraisal, subjecting these appraisals to scrutiny of the public, as well as of other appraisers, would undoubtedly have a significant effect in curtailing abuses before they happen, since all appraisers would be on notice that their work product would be subject to public and peer review. Further, a public record of each conservation easement appraisal might result in better appraisals in the future, since all appraisers would have access to past appraisals relevant to similar donations.

#### G. Conflict of Interest Avoidance

In the series of articles in the Washington Post and Philadelphia Inquirer revealing alleged conservation easement abuses, one of the underlying themes was what might be considered self-dealing by land trust insiders, in connection with donation or other creation of conservation easements of relatively little public value, while taking substantial tax deductions. The Land Trust Alliance cautions its members to scrupulously avoid such self-dealing, but their standards and practices are not legal requirements. Reasonable efforts by Congress, the IRS, and/or state legislatures to set standards on this issue would be therapeutic.

Some conflicts of interest among land trust insiders may be subtle, and some may be unavoidable. Especially with a small, community-based land trust, board members making decisions about whether to accept a conservation easement may have friendly relationships with prospective donors. Likewise, often families that donate conservation easements are the same

conservation-minded and generous people who financially support the donee land trust and may serve on informal advisory groups for that land trust. All of these involvements may inevitably make the land trust more deferential to its greatest benefactors in a manner that is unavoidably human and cannot be subject to regulation. On the other hand, at least the IRS should be clear that it will seriously scrutinize deductions for conservation easement donations in cases where a conflict of interest is obvious, as where the donor sits on the governing board of the land trust or is an officer of it.

#### H. Steering Clear of the Intersection with Regulatory Laws

Easements that just mirror current or reasonably foreseeable regulations raise serious questions as to what public benefit is being accomplished, and appraisals of such easements should be significantly discounted since the valuation of the easement depends upon a conjecture that the regulation will be repealed at some point in the future. Holders should guard against taking conservation easements that do no more than mirror the terms and effects of already applicable or reasonably foreseeable land use regulations, especially when the easement is being purchased, and most especially when purchased by the government, where undermining effects on the regulatory power are at their most severe. However, regulations being ephemeral, there might be some value to making environmentally important portions of them permanent under the terms of an easement that has a broader scope and purpose.

Easements that do no more than that which can readily be achieved by regulation create potentially significant expectations among landowners that regulatory protections will be paid for. Likewise, a sense of inequity may become pervasive if some landowners are paid handsomely for conservation easements, the protections of which other landowners must live with by regulation. Conservation easements are usually best reserved for land that is in the path of development; the essential question when considering the public

benefits of an easement being whether it will change anything that might realistically happen in the future.

This issue is subtle at the edges, and its impacts over time may likewise be subtle, but they are real. Especially when conservation easements protect from development areas that are already zoned for current uses, such as for forestry or ranching, the reasonable expectations of the landowner community will clearly be affected, as will those of the political culture of government. Likewise, when a conservation easement is used simply to impose a building setback requirement around shorelines in a fashion that is little different than that which is already, or readily could be, in place under zoning controls, the net effect of the easement may be to undermine the government's ability to impose similar setback requirements by regulation. In sum, that which can be accomplished by reasonable land use regulation should be exhausted before one turns to a conservation easement.

Again looking to the Massachusetts model, a public review and approval process for conservation easements would ferret out those that should be avoided for lack of any meaningful public benefit beyond that which is already, or can readily be, accomplished by regulation.

#### I. Steering Clear of the Intersection with Public Ownership

While conservation easements have been on a strikingly fast growth track over the past fifteen years, outright public land acquisition in many areas, and particularly at the federal level, has been relatively slow during the same period. It is hard to say whether the latter phenomenon has had an effect in spawning the former or the other way around, but one suspects that these two phenomena have a strong relationship. As with government regulation, while there can be subtle and gray distinctions in some cases between the purposes served by a conservation easement and those of public land acquisition, these two methods of land protection should keep their distance and be viewed as complements to each other.

For instance, where the primary objective is broad, public recreational use of land, which yields the best opportunities for the public to determine how the land will be managed and used for its benefit, public acquisition is the best means to accomplish the goal. In other words, if the desired objective is a park, outright acquisition should be the means. By contrast, conservation easements, whether held by land trusts or government agencies, are best utilized where conservation of the land is important but the public interest requires balancing this value with continued, private ownership and use. Care should be taken to determine how limited, available money for conservation of land should best be spent, whether for purchasing land outright or conservation easements. Thus, opportunity costs of expending public money for conservation easements should be carefully weighed.

Proponents of conservation easements point out that the cost of acquiring an easement on any particular land will be less than the cost of acquiring outright fee ownership, but one should also consider whether there may be more public benefit to a smaller park in an area that is accessible to where people live and has very high value for public recreation, as an alternative to spending the same public dollars on conservation easements covering larger and often more remote lands where the public will be able to make little or no actual use of the property.

In making cost comparisons between fee and easement acquisitions, one should also bear in mind that the true cost of a conservation easement is not depicted by its up-front acquisition price. The cost of an easement may only be known over time, in dealing with monitoring, enforcement, and defense issues, which when litigated can add extraordinary and unbudgeted expenses. In some cases, especially where the cost of a conservation easement approaches the cost of fee ownership of the same land, a conservation easement, which is essentially a liability to its holder, may ultimately become more costly than buying the fee.

While it is easy to see that sensitive evaluation and weighing of these issues is necessary to good public policy-making, some federal and state financial incentive programs, favoring conservation easement acquisition, may skew the outcome in a fashion that, when closely scrutinized, might not be to the public's greatest benefit.

The point here is that conservation easements are an appropriate tool designed for certain conservation purposes, but they shouldn't be viewed as supplanting the need for acquiring public park and other recreational land, the public benefits of which are not well achieved by the type of mixed ownership and objectives that are the hallmark of the conservation easement.

#### J. Public Access and Dissemination of Public Information

Neither the IRS nor most state laws governing conservation easements require that public access be included in the bundle of rights included in a conservation easement. Some (but not all) state conservation easement financing programs routinely require the inclusion of at least traditional, pedestrian public access rights. The question is whether, in order to receive public tax and other subsidies, public access rights ought to be more routinely required with at least certain types of conservation easements. In certain situations, an argument may be made that, in the absence of at least non-intensive, pedestrian public access necessary for the public to enjoy the scenic and natural values of many conservation easement properties, the easement could have little, meaningful public benefit unless there is some other substantial and demonstrably publicly valuable purpose to be achieved.

Of course, there are a number of types of conservation easements where public access would be undesirable. For instance, in the case of easements that protect productive farmland, fragile wildlife habitat or important public viewsheds, as well as those designed to limit development to a community's carrying capacity, public access need not be a part of the transaction. However, in other cases it may be hard to

perceive a significant public benefit of a conservation easement that merely protects land that cannot be seen or accessed by the public.

Even where conservation easements do allow for public access, that right is meaningful and of public benefit only if there is a reasonable way for the public to know about the existence of the easement and of its access rights. Far too often, conservation easements are acquired by land trusts and even government with little or no effort to inform the public of their existence and location. Indeed, easements holders often actively avoid providing this information to the public, citing concerns that they don't have sufficient resources to manage public access should it occur beyond the small audience that is closely affiliated with the land trust or otherwise in the know. While it is clearly appropriate for easement holders and landowners to impose reasonable conditions on public access to assure responsible public use, a land trust or government agency that uses concerns about public access management to avoid meaningful public knowledge about the easement is in fact significantly diminishing the value of an easement containing public access rights. In these cases, the public subsidy invested in the easement could have little or no meaningful return, placing in question whether the easement's appraised value for tax or acquisition purposes was fair.

The significance of this issue should not be underestimated. While some land trusts make reasonable efforts to disseminate information to the public concerning their publicly accessible easement properties, most do not and there is no requirement that they do so. A land trust or government agency that acquires a conservation easement, one of the purportedly important (and perhaps appraised) values of which is public access, should make sure that it has the resources and commitment to manage public access and to take measures to allow the public to know of the availability of the property for responsible public use. As with most of the issues raised here, the remedy lies in changing the federal and state laws governing conservation easements, so that the promise of public access in these easements is delivered and so that the

funding necessary to manage that access is incorporated into the transaction at the outset.

## **VI. Accountability, Transparency, Responsibility, and Public Benefit**

How dire is the future of conservation easements with respect to the issues outlined above? I believe that, just as conservation easements are designed to endure, each of these concerns will have its day; some already have. When asked to evaluate the effectiveness of conservation easements under the prevailing legal structure, my answer is that the jury will be out for one hundred years, but I'm worried enough to write this in anticipation of a possibly adverse verdict. Avoiding that outcome requires being open to legal reform.

As I pursue my fellowship at the Lincoln Institute in further pursuit of answers to the issues spawned by the conservation easement phenomenon in America, the following principles will guide me:

- That the value of conservation easements depends upon their being able to truly and permanently deliver public benefits;

- That landowners, land trusts, and other conservation easement holders, who receive the benefits of the state and federal laws that provide for and subsidize conservation easement acquisition, should be legally accountable for upholding their part of the bargain, including assuring that the public benefits of these easements are secured over the long term;
- That the process by which conservation easements are designed, appraised, and managed should be more rigorous, publicly transparent, and accountable.

For land conservation in America, conservation easements present the opportunity to make an enormous difference. But we need to act concertedly, using the power of legal reform, if conservation easements are ultimately to deliver on the promises that they make to future generations.

### **ENDNOTE**

1. I've received ideas from many people in the course of assembling this paper. Each of them will be acknowledged in the final work product, but, as this remains a work in progress, the group keeps growing. For now, let me just express my gratitude to everyone who has helped me, including all of those who have been interviewed by me or provided comments to me. While no two of them think identically on these issues, and some differ with my ideas, all of their thoughts, as well as my personal experiences and reading, have helped frame the views expressed here, which are exclusively my own.

## DECISIONS

### CERCLA

**Court Rejects Challenge to NPL Listing: *Carus Chemical Company v. U.S. Environmental Protection Agency*, No. 03-1455 (D.C. Cir. Jan. 11, 2005)**

#### Background

Carus Chemical Company operates a manufacturing plant that was once part of a larger property, referred to as the Matthiessen & Hegler Zinc Company Site. Located east of La Salle, Illinois, the site, for over one hundred years, was a smelter and rolling mill. Two large slag piles remain on the property; a portion of one pile is on Carus's property. U.S. EPA has placed the entire site on the National Priorities List (NPL). In this lawsuit, Carus argued that EPA's action was arbitrary and capricious because the agency misapplied the Hazard Ranking System (HRS) and disregarded more recent data that contradicted data on which the agency relied to make its determination.

#### Holding

The HRS is a methodology by which EPA evaluates a site for the potential release of hazardous substances and a mathematical model by which it quantifies the environmental risks. In order to evaluate a waste site under the HRS, EPA first identifies the sources of contamination — soil exposure, air migration, groundwater migration, and/or surface water migration, the pathway relevant to this case. The surface water migration pathway is evaluated based upon threats to the drinking water, the human food chain, and the environment.

With each pathway and each threat, EPA measures the likelihood of release (or exposure), waste characteristics, and targets of the threat. When, as in this case, there has already been a release, EPA assigns a fixed number for the "likelihood of release," regardless of the level of that release. In judging the waste characteristics, the HRS requires EPA to choose the

substance that poses the greatest potential hazard for the pathway. After that, EPA is to evaluate persistence, bioaccumulation, and toxicity. In determining the toxicity factor value, if there are multiple routes of exposure, the agency is to use the highest assigned value, considering all exposure routes as the toxicity factor value. A site with a score greater than 28.50 is eligible for the NPL.

EPA's study of the Matthiessen & Hegler site was based primarily on data compiled by Illinois EPA. On the basis of that data, EPA determined that hazardous substances were being released into the Little Vermilion River, a fishery. Therefore, the agency used the surface water migration pathway and scored it based on the threat posed to the human food chain. Turning to the waste characteristics of the hazardous substances at the site, EPA used the toxicity factor value for cadmium corresponding to the inhalation route of exposure. EPA found a total HRS score of 50 for the site.

Carus argued that EPA should not have used a toxicity factor value for cadmium based on inhalation exposure because the likely avenue of exposure is ingestion. According to Carus, if EPA had used that factor, the site would have scored below 28.50. Carus opined that it makes no sense for EPA to interpret the rule to require the use of a toxicity factor unlikely to present a threat, considering the pathway being scored.

Although Carus recognized the doctrine of substantial deference, it argued that it is inappropriate to use it when that interpretation is merely a "litigation position."

The court noted, however, that EPA has consistently interpreted the HRS as requiring it to use the highest toxicity factor regardless of the most likely route of exposure. This position was reiterated in the agency's response to Carus's comments to EPA's proposed listing of the site. Therefore, the court was required to defer to the agency's interpretation unless the plain language of the regulation compels an alternative reading.

The regulation reads, in relevant part:

*Toxicity Factor.* Evaluate toxicity for those hazardous substances at the site that are available to the pathway being scored. For all pathways and threats, except the surface water environmental threat, evaluate human toxicity as specified below.

....

For hazardous substances having usable toxicity data for multiple exposure routes (for example, inhalation and ingestion), consider all exposure routes and use the highest assigned value, regardless of exposure route, as the toxicity factor value.

HRS § 2.4.1.1.

Carus claims that EPA has misread the rule. Under Carus's interpretation, the rule allows the use of only those toxicity factor values corresponding to the route of exposure that EPA has found to be a threat. The court rejected that reading of the regulation. The court determined that the agency's interpretation was reasonable. Carus's interpretation would ignore the regulation's requirement to use the highest toxicity factor value "regardless of exposure route."

Carus also argued that EPA relied upon insufficient and outdated sampling data. It argued that the more recent data from samples collected by GeoSyntec Consulting (commissioned by Carus) shows that EPA erred in listing the site on the NPL. However, EPA concluded and the court agreed, that Carus's comments did not show how Geosyntec's data would show that the site score assigned by EPA was incorrect.

Thus, the court denied Carus's petition for review.

**Plaintiffs Did Not Incur Response Costs: *Young and James v. United States et al.*, No. 02-7133 (10th Cir. Jan. 4, 2005)**

**Background**

The plaintiffs purchased 330 acres of property, at a reduced price, adjacent to the Eagle-Picher Superfund Site in Henryetta, Oklahoma. Cleanup at the site was completed in 1998. The plaintiffs purchased the acreage with a general knowledge of the clean-up activity at the site; however, they did not conduct any environmental tests nor review any documents prior to purchasing the property. After purchasing the property, the plaintiffs hired an environmental consulting company to conduct an "abbreviated" site investigation and hired an environmental hydrology and engineering company to assess potential risks to humans who worked on their property. These investigations revealed that there were hazardous substances on the property, including lead and arsenic, which posed a potential health risk.

The plaintiffs brought this lawsuit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to recover the \$237,273 they spent on the investigations. They claim that hazardous substances continue to migrate onto their property from the adjoining site. The plaintiffs have now abandoned their property and do not intend to spend any money to clean up the contamination.

The district court granted the defendants' motion for summary judgment, holding that the plaintiffs' claim failed as a matter of law because they were potentially responsible parties (PRPs) and, thus, unable to assert a cost recovery claim under section 107(a). The plaintiffs appealed.

**Holding**

The court noted, at the outset, a basic principle of CERCLA law — that it is not a general vehicle for toxic tort claims. Instead, the twin aims of CERCLA are to clean up hazardous waste sites and impose the costs of cleanup on parties responsible for the con-

tamination. Under the statutory scheme, the first priority must precede the second.

Unlike the district court, the circuit court did not determine whether the plaintiffs were PRPs under section 107(a). Instead, it focused on the fact that the claim must fail because the plaintiffs had not incurred any response costs that are necessary and consistent with the National Contingency Plan (NCP).

Under CERCLA, the plaintiff bears the burden of proving that its response costs were necessary and consistent with the NCP. Caselaw emphasizes that, in order for an expense to be considered a “response” cost, it must be necessary and tied to the actual cleanup of hazardous releases. A response cost must also be consistent with the NCP. In order for it to be consistent, it must be in substantial compliance with the regulations *and* result in a CERCLA-quality cleanup. In this case, some of the costs that the plaintiffs expended are examples of preliminary steps taken in response to a discovery of a release or threatened release of hazardous substances. However, some of the expenses the plaintiffs seek to recover, such as the cost of surveying their property, do not qualify. Nonetheless, even assuming that *all* of the plaintiffs’ expenses qualify as an initial matter, they cannot be deemed “response costs” because they were not tied in any manner to the actual cleanup of hazardous releases. There is no nexus between the costs expended and an actual cleanup because the plaintiffs have testified that they do not intend to spend *any* money on the cleanup of the contamination on their property.

Indeed, according to the court, the expenses incurred by the plaintiffs seem to have been incurred in connection with preparing for and undertaking this litigation. If the investigation costs were connected to an actual clean-up effort, then they could be considered “response costs.” In this case, the plaintiffs have failed to establish, as a matter of law, that the release or threatened release of a hazardous substance caused them to incur necessary response costs consistent with the NCP.

## Discovery

**Documents Submitted in Response to Audit Inquiry Protected: *Laguna Beach County Water District v. Superior Court of Orange County*, No. G034238 (Cal. Ct. App. 4th Dec. 15, 2004)**

## Background

The underlying lawsuit was brought by Violet Woodhouse against the Laguna Beach County Water District and others, asserting their responsibility for the allegedly defective construction of a reservoir near her home. The water district is a member of the Association of California Water Agencies/Joint Powers Insurance Authority (ACWA); the membership gives it liability protection. The ACWA hired Robert Gokoo, the defendant’s attorney, to represent the water district on this matter. During the course of Gokoo’s representation, the auditors for the ACWA sent out an audit inquiry to Gokoo. This inquiry asked that Gokoo give an explanation of the litigation and his opinions concerning it.

During the discovery phase, the plaintiff’s attorney sought to discover the letters written by Gokoo to the auditors. The defendant argued that these letters were protected under the work product doctrine. The court, however, determined that the defendant had waived this privilege by sending the information to a third party. The water district appealed.

## Holding

Auditors routinely send letters to lawyers regarding pending matters when they are preparing financial statements on behalf of a mutual client. Industry-wide guidelines govern the information an auditor must obtain regarding claims against a company. In addition, the American Bar Association has a policy regarding attorneys’ response to audit inquiries.

The letter Gokoo sent to the auditors contained his thoughts and ideas about pending actions — clearly the attorney’s work product. The question is whether

the work product privilege was waived when the letters were sent to the auditors. The court noted that “[t]he purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation.” *BP Alaska Exploration, Inc. v. Superior Court*, 199 Cal. App.3d 1240 (1988). Therefore, unless the disclosure is wholly inconsistent with the privilege’s purpose, the privilege will not be waived.

In this instance, Gokoo clearly marked the top of each letter with the notation “ATTORNEY-CLIENT AND ATTORNEY WORK PRODUCTION COMMUNICATION.” Thus, there was a clear intent to preserve the privilege. Furthermore, there is no waiver unless the information is divulged to a third party “who has no interest in maintaining the confidentiality . . . of a significant part of the work product.” *OXY Resources California v. Superior Court*, 115 Cal. App.4th 874, 891 (2004).

There have seemingly been no California cases specifically dealing with this issue. Federal cases have come down on both sides. In *Tronitech, Inc. v. NCR Corporation*, 108 F.R.D. 655 (S.D. Ind. 1985), the court held that the work product doctrine protected the audit response letter. The cases finding against the protection are, according to the court, distinguishable. First of all, California’s protection is broader than the federal protection. Under the federal rules, work product documents are only protected if they are prepared in anticipation of litigation or for trial. In California, however, the protection applies to any writing prepared by an attorney even while acting in a nonlitigation capacity.

Therefore, the court concluded that Gokoo’s audit response letters remain protected from discovery under the work product doctrine.

## Eleventh Amendment

### State Has Not Waived Immunity in Post Confirmation Lawsuit: *In re Pegasus Gold Corporation et al.*, No. 03-15958 (9th Cir. Jan. 11, 2005)

#### Background

Pegasus Gold Corporation and eighteen of its affiliates began voluntary Chapter 11 proceedings in Nevada in 1998. The State of Montana and its Department of Environmental Quality filed several proofs of claims against the debtors based on their environmental clean-up obligations at two Montana mines, the Zortman sites. The state claimed that the reclamation bonds posted in connection with the mines would not be sufficient and requested an additional \$8.5 million in the bankruptcy proceedings.

Eventually, the state, the debtors, and a number of other parties reached a settlement agreement, which was approved by the bankruptcy court. Under the agreement, the debtors would form a new entity, Reclamation Services Corporation (RSC). RSC would perform reclamation work for the state at the mines, at least until a competitive bidding process could be conducted. The agreement also stipulated that the bankruptcy estate would contribute up to \$1 million in operating capital for RSC and another \$600,000 to the state which would be used solely for paying RSC for its reclamation work. The agreement also required the estate to transfer another \$50,000 to the state for reclamation purposes, but there was no requirement that this sum be paid to RSC.

The bankruptcy plan was confirmed and Montana and RSC entered into a letter agreement under which RSC would begin interim reclamation. A formal work agreement was executed in April 1999. Almost immediately, there were problems between the parties. After billing disputes, Montana terminated RSC from working on the cleanup and hired a new company, Spectrum Engineering, to perform the reclamation work.

RSC and the bankruptcy trustee then brought the current action against the state and Spectrum in bankruptcy court. The lawsuit alleges a number of contract breaches and also alleges that the state was unjustly enriched and that it fraudulently induced RSC to enter into the letter agreement and formal work agreement and tortiously interfered with RSC's relationship with its employees. Claims against Spectrum included tortious interference and conversion.

The state and Spectrum moved to dismiss the complaint, arguing that the bankruptcy court lacked subject matter jurisdiction. The state also asserted Eleventh Amendment immunity from suit. The bankruptcy court denied the motion and the district court affirmed. This appeal followed.

### Holding

A bankruptcy court's jurisdiction extends to "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). A bankruptcy court also has jurisdiction over proceedings that are "related to" a bankruptcy case. In the Ninth Circuit, the *Pacor* test is used to determine the scope of "related to" jurisdiction. That test is whether "the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy." *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). However, the Ninth Circuit has not applied the *Pacor* test to post-confirmation proceedings. Other courts have limited or modified the test when applied to post-confirmation lawsuits.

The Third Circuit, in *In re Resorts International, Inc.*, 372 F.3d 154, 166–67 (2004), reviewed the various approaches used to addressing post-confirmation proceedings and concluded that the "essential inquiry appears to be whether there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter." Trusts, such as the liquidating trust involved here, "by their nature maintain a connection to the bankruptcy even after the plan has been confirmed." *Id.* at 167. The Ninth Circuit panel adopted the "close nexus" test

"because it recognizes the limited nature of post-confirmation jurisdiction but retains a certain flexibility, which can be especially important in cases with continuing trusts." Slip op. at 9.

In this case, there are allegations that the state committed fraud in the inducement at the time it entered into the plan and the agreement. The remedies sought include the disgorgement of the \$1,050,000 paid to the state. Resolution of these claims will likely require interpretation of the plan and the agreement. Moreover, the claims could affect the implementation and execution of the plan, which called for the creation of RSC and the transfer of the money to the state. Thus, the court concluded there is a "close nexus" to the plan in this case so as to uphold bankruptcy court jurisdiction. As to the tort claims, the bankruptcy court could exercise supplemental jurisdiction over these claims.

The court then addressed the Eleventh Amendment immunity issue. A state may waive its immunity by filing a proof of claim in a bankruptcy proceeding. The question is the scope of that waiver. In *In re Lazar*, 237 F.3d 967 (9th Cir. 2001), the court held that the state waived its immunity with regard to the bankruptcy estate's claims "that arise from the same transaction or occurrence as the state's claim." *Id.* at 978. The *Lazar* court explained:

A logical relationship exists when the counterclaim arises from the same aggregate set of operative facts as the initial claim, in that the same operative facts serve as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights otherwise dormant in the defendant.

*Id.* at 979.

The *Lazar* court's "logical relationship" test was based on Federal Rule of Civil Procedure 13(a) involving compulsory counterclaims. In this case, the debtors

had no claim against the state at the time the proofs of claims were filed. The current action against the state does not involve the “same aggregate set of operative facts” that gave rise to the state’s original claim. Furthermore, the rationale underlying waiver of immunity when a state files a proof of claim assumes that the state is able to determine the extent of its waiver of immunity, knowing that it will include compulsory counterclaims.

The appellees also argued that the state’s active and extensive participation in the bankruptcy case was sufficient to determine that the “logical relationship” test was satisfied. The court rejected that argument. A state’s active advocating of its rights in a bankruptcy proceeding does not subject it to an expanded waiver of its immunity.

Thus, although the claims in the current lawsuit are sufficiently related to grant the bankruptcy court jurisdiction, they did not arise out of the same transaction or occurrence as they proofs of claims that the state filed. The state, thus, cannot be deemed to have waived its immunity.

## Sentencing Guidelines

### Court Rejects Mandatory Federal Guidelines: *United States v. Booker*, No. 04-104 (U.S. Jan. 12, 2005)

#### Background

Booker, the respondent, was charged with possession with intent to distribute at least fifty grams of crack cocaine. The jury found him guilty of violating 21 U.S.C. § 841(a)(1). That statute prescribes a minimum sentence of ten years’ imprisonment and a maximum sentence of life.

Under the Sentencing Guidelines, the quantity of drugs found by the jury and Booker’s criminal history required the trial court judge to select a “base” sentence of not less than 210 nor more than 262 months in prison. At a post-trial sentencing proceeding, the judge found, by a preponderance of the evidence, that

Booker had possessed an additional 566 grams of crack and that he was also guilty of obstructing justice. With these findings, the Guidelines required that the judge select a sentence between 360 months and life imprisonment. Therefore, instead of the twenty-one years and ten months that the judge would have imposed on the facts found by the jury, Booker received a thirty-year sentence.

The U.S. Court of Appeals for the Seventh Circuit held that this application of the Sentencing Guidelines was in conflict with the Court’s holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In that decision, the Court held that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” 530 U.S. at 490. Expanding on *Apprendi*, the Court, in *Blakely v. Washington*, 125 S.C. 21 (2004), held that “the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Id.* at 28. Based on these holdings, the Seventh Circuit held that the sentence violated the Sixth Amendment and remanded the case to the district court to sentence the defendant according to the jury’s findings or to hold a separate sentencing hearing before a jury.

In the companion case, *United States v. Fanfan*, No. 04-105, the jury found that the amount of cocaine held was 500 or more grams. The maximum statutory sentence under the facts found by the verdict was seventy-eight months’ imprisonment. However, in a separate sentencing hearing, the trial judge found additional facts that authorized a sentence, under the Sentencing Guidelines, in the 188- to 235-month range. The trial judge concluded that he could not follow those particular provisions of the Sentencing Guidelines and imposed a sentence based solely on the jury’s findings and the guilty verdict. The government filed a notice of appeal to the First Circuit and petitioned the Supreme Court for a writ of certiorari before judgment. In *Booker*, the government appealed the Seventh Circuit’s decision. The court granted certiorari to determine whether the *Apprendi* line of cases ap-

plies to the Sentencing Guidelines and, if so, whether any portions of those guidelines could, constitutionally, remain in effect.

### Holding

In *Jones v. United States*, 526 U.S. 227 (1999), the court determined that, under the federal carjacking statute, the degree of harm to the victim (on which the length of the sentence was based) was an element of the crime, and not merely part of the sentencing provisions. The Court stated that its holding was consistent with a “rule requiring jury determination of facts that raise a sentencing ceiling” in state and federal sentencing guidelines systems. *Id.* at 251, n. 11. In *Apprendi v. New Jersey*, *supra*, the defendant pled guilty to a charge of possession of a firearm for an unlawful purpose, a charge that carried a prison term of from five to ten years. After the jury verdict, the trial court found that Apprendi’s conduct had been racially motivated and, therefore, he had violated the state’s “hate crime” law. The court imposed a twelve-year sentence. The Supreme Court set aside the enhanced sentence, holding that any fact that would increase the statutory maximum sentence must be submitted to the jury and proven beyond a reasonable doubt.

The Court reaffirmed its holding that the characterization of critical facts is constitutionally irrelevant in *Ring v. Arizona*, 536 U.S. 584 (2002). In that case, the Court held that the trial judge could not determine whether aggravating factors (required by Arizona law for imposition of the death penalty) were present. The Court stated: “If a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt.” *Id.* at 602.

After *Jones*, *Apprendi*, and *Ring*, the requirements of the Sixth Amendment were clear. Thus, in *Blakely v. Washington*, 125 S.Ct. 21 (2004), when the Court dealt with a Washington State law akin to the Federal Sentencing Guidelines, the Court held that the defendant’s right — to have a jury find the existence

of any fact that the law makes essential to his punishment — was violated. There is no constitutionally significant difference between the Federal Sentencing Guidelines and the Washington procedures examined in *Blakely*. The Court’s conclusion was based on the premise that, in both systems, the relevant rules are mandatory, imposing binding requirements on sentencing judges.

The Court noted that, if the Guidelines had been written as merely advisory provisions, there would be no constitutional issue because the Court has always recognized the authority of a judge to have broad discretion in imposing a sentence within a statutory range. However, the Guidelines as written are mandatory and binding. The availability of a departure in circumstances “not adequately taken into consideration by the Sentencing Commission in formulating the guidelines” does not avoid the constitutional problem. 18 U.S.C.A. § 3553(b)(1). These departures are not unavailable in the vast majority of cases.

The Court noted that, once determinate sentencing had fallen from favor, judges commonly determined facts justifying an imposition of a longer sentence because of the manner in which a particular defendant acted. Nonetheless, the effect of the increased emphasis on facts that increased sentencing ranges was to diminish the traditional power of the jury. The Court was forced to deal with the issue of how the guaranteed right to jury trial could be preserved under the new sentencing schemes.

The government argued that *Blakely* should be distinguished because, unlike Washington where the sentencing guidelines were legislatively imposed, in the federal system, the Guidelines were promulgated by the Sentencing Commission. The Court found that this distinction lacked constitutional significance. It is of no consequence that a commission, rather than a legislature, concluded that a particular fact must be proved in order to sentence a defendant within a certain range. The government also noted that in *Apprendi*, the Court referred to “any fact that increases the penalty for a crime beyond the prescribed statutory maximum . . .” 530 U.S. at 490. Thus, accord-

ing to the government, since the Guidelines are not “statutory,” *Apprendi* is inapplicable. The Court rejected that argument. The “statutory” language was appropriate in *Apprendi* because the Court was considering a statute. In that case, it expressly declined to consider the Guidelines. The principles sought to be applied in *Apprendi* should be the focus here. These principles are not recent innovations, but reflect the concerns of the Framers of the Constitution that the right to a jury trial be guaranteed to avoid the threat of “judicial despotism” that might arise from “arbitrary punishments upon arbitrary convictions.” *The Federalist*, No. 83, p. 499 (C. Rossiter ed. 1961) (A. Hamilton).

Finally, the government argued that four recent cases, *United States v. Dunnigan*, 507 U.S. 87 (1993); *Witte v. United States*, 515 U.S. 389 (1995); *United States v. Watts*, 519 U.S. 148 (1997); and *Edwards v. United States*, 523 U.S. 511 (1998), precluded the Court from applying the holding in *Blakely* to the Sentencing Guidelines. However, in the first three cases, the constitutional issues addressed in this decision were not raised. In *Edwards*, the Court commented that the defendants had failed to make the argument that would have presented the statutory and constitutional claims to the appellate court. These decisions are not inconsistent with the decision in the present case.

The government also argued that any holding that would require the sentencing factors to be proved to a jury beyond a reasonable doubt would effectively transfer the guidelines to a legislatively-enacted code, violating the separation of powers doctrine. The Court disagreed. In *Mistretta v. United States*, 488 U.S. 361 (1989), the Court noted that the promulgation of the Guidelines was like other activities in the Judicial Branch, such as the creation of the Federal Rules of Evidence. *Id.* at 387. The Court concluded that the Commission did not exercise adjudicatory functions when it promulgated the Guidelines. Thus, congressional delegation to the Commission was appropriate.

In another portion of the majority’s opinion, authored by Justice Breyer, the issue of the remedy was addressed. To answer the question about remedy, the

Court sought to determine what, given the Court’s holding, would Congress intend. There are two approaches: Justice Stevens, in his dissent, would retain the Guidelines but would engraft onto them a “jury trial” requirement. This approach would prevent the sentencing court from increasing a sentence on the basis of any fact not found by a jury or admitted by the offender. The other approach would be to make the Guidelines advisory. That is the approach the Court chose. The Court acknowledged that both approaches would significantly alter the system designed by Congress, but it determined severability would affect it “less radically.” According to the Court:

[T]he constitutional jury trial requirement would . . . affect every case. It would affect decisions about whether to go to trial. It would affect the content of plea negotiations. It would alter the judge’s role in sentencing. Thus we must determine likely intent not by counting proceedings, but by evaluation the consequences of the Court’s constitutional requirement in light of the Act’s language, its history, and its basic purposes.

Slip op. at 5.

Examining the text of the Sentencing Act as currently written, the Court concluded that Congress intended *only* the judge, not the judge working together with the jury, to make determinations under the Guidelines. Therefore, to read “the court” as encompassing the jury would be adverse to that what Congress originally intended. To engraft a requirement for the jury to find necessary facts would destroy the system where a judge has traditionally relied on a presentence report for factual information and would undermine the statute’s basic aim of ensuring similar sentences for similar behavior. The engrafting remedy would also create a system far more complex than Congress would have intended. Indictments might have to allege details of how a crime was committed instead of just the fact of the crime and the defendant’s connec-

tion to it. The Court also opined that plea bargaining, under the engrafted remedy, would probably lead to sentences that would not reflect conduct but, rather, the “skill of counsel, the policies of the prosecutor, the caseload, and other factors that vary from place to place, defendant to defendant, and crime to crime.” Slip op. at 13. The result would be a diminished uniformity in sentencing, not an increased uniformity. A final concern of using an engrafted remedy would be that the prosecutors would have the power to limit the sentencing factors that could be considered, thereby exercising a power the Sentencing Act has vested in judges: “the power to decide, based on relevant information about the offense and the offender, which defendants merit heavier punishment.” Slip op. at 14. A final concern about an engrafted remedy would be that judges would have the discretion to adjust sentences downward, but not upward. This would be completely at odds with Congress’ intent in passing the Sentencing Act.

The Court determined that it should sever and excise two specific provisions: that which requires sentencing courts to impose a sentence within the applicable range of the Guidelines and the provision that sets forth standards of review on appeal. The remainder of the act can function independently. Judges would still be required to take into account the Guidelines and other sentencing goals.

The Court then discussed the standard of appellate review that would be appropriate in view of the fact that the section involving appellate review must be excised to eliminate the constitutional concerns. Prior to 2003 when Congress amended the standard to add a *de novo* review for departures and inserting cross-references, the standard, when a sentence fell outside a Guideline range, was whether the sentence was unreasonable, given various factors. The Court read the statute as implying such a reasonableness standard, a standard “consistent with appellate sentencing practice during the last two decades.” Slip op. at 19. The Court stated that this “reasonableness” standard of review has been used on review of departures and on review of sentences imposed where there

was no applicable guideline, reviews that account for over sixteen percent of sentencing appeals. Since courts have familiarity with the reasonableness standard, the majority rejected the concern expressed by Justice Scalia in his dissent that there is little judicial familiarity with the reasonableness standard and that using such a standard would lead to “excessive sentencing disparities.” Dissent at 10. The Court acknowledged that the standard might not provide the uniformity that Congress desired, but it is the choice that the Court concluded Congress would choose, given the unconstitutionality of the mandatory system that was in place.

The Court applied its holdings to all cases now on direct review. However, the Court emphasized that not every sentence will give rise to a Sixth Amendment violation, nor every appeal lead to a new sentence hearing. The reviewing court, applying ordinary prudential doctrines, should determine such things as whether the issue was raised below and whether it fails the plain error test.

## Water

**Court Upholds State NPDES Permit: *Building Industry Association of San Diego County et al. v. State Water Resources Control Board et al.*, No. D042385 (Cal. Ct. App. 4th Dec. 7, 2004)**

## Background

In February 2001, the California Regional Water Board issued a fifty-two page National Pollutant Discharge Elimination System (NPDES) permit that governed municipal storm sewers owned by San Diego County, the San Diego Unified Port District, and eighteen San Diego-area cities. At issue in this appeal were two categories of restrictions. First, the municipalities are prohibited from discharging those pollutants “which have not been reduced to the maximum extent practicable . . . .” Second, the municipalities are prohibited from discharging pollutants “which cause or contribute to exceedances of receiving water quality objectives . . . .” and that “cause or contribute to the violation of water quality standards . . . .”

This latter prohibition essentially prohibits discharges if those discharges would cause the receiving water body to exceed the applicable water quality standard.

The water quality standards provisions are qualified by Part C of the permit which details a procedure for enforcing violations of those standards through a step-by-step process known as the “iterative” process. When a municipality violates the standard, it must prepare a report documenting the violation and describing a process for improvement and prevention of further violations. It requires that the municipality and the Regional Water Board work together to achieve compliance, but still permits enforcement while the report is being prepared and implemented.

The permit also requires the municipalities to implement, or to require users to implement, “best management practices” control measures. It requires regulation of discharges associated with new development and redevelopment and requires municipalities to ensure that a completed project will not significantly increase discharges of pollution from storm water runoff.

After issuance of the permit, the Building Industry, an organization that represents the interests of numerous construction-related businesses, filed an administrative challenge with the State Water Board. Among its contentions, the Building Industry argued that the water quality standards provisions in the permit require compliance with state water quality standards beyond what is “practicable” and, therefore, violates federal law. The State Water Board rejected the Building Industry’s appeal although it did modify the permit to clarify that the iterative enforcement process applied to the water quality standards provision.

The Building Industry then challenged the permit in state court, asserting, *inter alia*, that the Water Board violated the Clean Water Act (CWA) by imposing a standard greater than the “maximum extent practicable standard.” The court ruled in favor of the Water Board. This appeal followed.

## Holding

The portion of the CWA at issue reads:

### (B) Municipal discharge

Permits for discharges from municipal storm sewers—

(i) may be issued on a system- or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers, and

(iii) shall require controls to reduce the discharge of pollutants *to the maximum extent practicable, including* management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the state determine appropriate for the control of such pollutants.

33 U.S.C. § 1342(p)(3)(B). (Emphasis added.)

The focus of the Building Industry’s argument is that subsection (iii) sets the upper limit of the type of control that can be used in a permit as “the maximum extent practicable.” The plaintiff read the final “and such other provisions” clause as providing authority for states and EPA to include only types of controls that are under the “maximum extent practicable” standard.

The Water Board, however, argued that the term “including” refers only to (1) management practices; (2) control techniques; and (3) system, design and engineering methods. In its interpretation the “such other provisions” phrase provides EPA and the state with authority to go beyond the “maximum extent practicable” standard. To rebut that interpretation of the statutory language, the Building Industry pointed out that the Water Board’s interpretation would make the “and such other provisions” phrase the direct object of the verb “require.” Permits do not usually “require” provisions; they include or contain them.

The court concluded that the respondents had the stronger position as a matter of grammar and word choice. With no comma after the word “techniques,” it does not “logically serve as a parallel construct with the ‘and such other provisions’ clause. Slip op. at 21. The court also did not agree that the phrase “and such other provisions” could not be a direct object of “require.” The court found that the language of the statute communicates the basic principle that a permitting agency retains the discretion to impose “appropriate” water pollution controls *in addition to* those contained within the definition of “maximum extent practicable.” The court found support of its interpretation in the statute’s legislative history.

This interpretation of the language is also consistent with EPA’s interpretations and those of the Ninth Circuit Court of Appeals. In its regulation, EPA construed section 1342(p)(3)(B)(iii) as granting authority to a permitting agency to impose water-quality standards controls in an NPDES permit if appropriate. The regulations state that the provision requires “controls to reduce the discharge of pollutants to the maximum extent practicable, *and where necessary water quality-based controls. . .*” 55 Fed. Reg. 47,990, 47,994 (Nov. 16, 1990). (Emphasis added.) The U.S. Court of Appeals for the Ninth Circuit in *Defenders of Wildlife v. Browner*, 191 F.3d 1149, 1166 (1999), rejected an argument by the intervener municipalities that “EPA may not . . . require strict compliance with state water-quality standards, through numerical limits or otherwise.” The court responded that under the discretionary provision of section 33 U.S.C. § 1342(p)(3)(B)(iii), “the EPA has the authority to determine that ensuring strict compliance with state water-quality standards is necessary to control pollutants.”

The appellants also relied on the statutory provisions addressing nonpoint source runoff which expressly identifies only the maximum extent practicable standard. *See* 33 U.S.C. § 1329(a)(1)(C). They argued that this limitation indicates that Congress wished to similarly limit the storm sewer point source pollution regulations to the same standard. The court rejected that argument. Instead, it interpreted the language in

the nonpoint source provisions to indicate that Congress had a different intent when it enacted the storm sewer point source provisions.

The court also rejected the Building Industry’s argument that the standards are “impossible” to meet. The court noted that there is no such showing in the record. The court also rejected the argument that it was the Water Board’s burden to affirmatively show the feasibility of meeting the applicable water quality standards provisions.

Finally, the court rejected the argument that a permit requirement that is more stringent than a “maximum extent practicable” standard is, by definition, “not practicable” and, thus, “technologically impossible” to achieve. The court noted that the federal “maximum extent practicable” standard is not defined in the CWA nor in its regulations. As defined in the NPDES permit, the standard is a “highly flexible concept,” which requires balancing numerous factors. The permit’s definitional section notes that the standard considers economics and “is generally, but not necessarily, *less* stringent than” the best available technology economically achievable. If the maximum extent practicable standard is “less stringent” than another CWA standard, one can certainly not conclude that anything more stringent than the maximum extent practicable standard is necessarily impossible.

Thus, the court upheld the permit.

**CIVIL PROCEEDINGS****New Filings****Notification*****Iowa v. Greg Coalbank, No. CV 28419 (Warren County Jan. 3, 2005)***

The Iowa Attorney General's office has filed suit against Greg Coalbank, whose equipment is alleged to have cut through a gas pipeline operated by MidAmerican Energy Company in Hartford in March 2003. The lawsuit claims that, instead of notifying the owners and operators of the pipeline, as required by Iowa law, Coalbank attempted to fix the cut with tape, tubing, and hose clamps. The pipeline was then covered. Two months later, a gas leak developed where the line had been damaged.

[For further information, contact Iowa AAG David Sheridan at (515) 281-5351.]

**Verdicts/Settlements****Air*****Illinois v. Ortek Incorporated, No. 2003CH11997 (Cir. Ct. Cook County Jan. 10, 2005)***

The Illinois Attorney General's Office has entered into an agreement with Ortek Incorporated under which the company will pay a \$50,000 fine and take steps to prevent sulfur-like odors from emitting, causing discomfort to the company's residential neighbors. Ortek is the owner of an oil recycling plant in McCook, Illinois. Its process involves heating used oil in distillation towers. A pollution control device was not properly working because of errors made by Ortek.

[For further information, contact Illinois AAG Mike Partee at (312) 814-2069.]

***New York v. Niagara Mohawk Power Corporation, No. 02-CV-24 (E.D.N.Y. Jan. 11, 2005)***

New York has entered into two significant settlements with six coal-burning power plants in upstate New York. The plants have agreed to significantly reduce emissions which, according to officials, will be the equivalent of removing 2.5 million cars from New York roads as well as every diesel truck and bus in the nation. The settlements will cut by more than half the amount of sulfur dioxide produced each year by all the power plants and factories in New York and more than one-fifth the amount of nitrogen oxide.

The first settlement covers the two largest coal-powered plants in the state, the Huntley and Dunkirk power plants in western New York. That lawsuit, brought against the plant's current owner, NRG Energy, Inc., and NRG's former owner, Niagara Mohawk Power Corporation, charged that the plants had made major modifications without installing the pollution controls required by federal law. Niagara Mohawk has agreed to pay a \$3 million fine, give 2,500 acres of land along the Salmon River to the state, and spend another \$3 million on environmental projects.

The second settlement, made without litigation, covers four smaller plants, owned by AES, in the Finger Lakes and Southern Tier regions. AES will install new, cleaner technology at the Greenidge plant in Torrey, New York, and will either shut down or install pollution controls at the Hickling plant in Corning, the Westover plant in Johnson City, and the Jennison plant in Bainbridge. The latter two plants have been dormant for years, but would be allowed to reopen if they can comply with the standards set by the agreement. The plants' former owner, the New York State Electric and Gas Corporation, will pay a \$700,000 fine and AES will provide \$1 million toward environmentally friendly projects.

[For further information, contact New York AAG at Michael Myers at (518) 402-2594 or AAG Jared Snyder at (518) 474 8010.]

***Sierra Club et al. v. Tyson Foods, No. 4:02 CV-73-M (W.D. Ky. Jan. 27, 2005)***

To settle a lawsuit brought by the Sierra Club and three Kentucky residents, Tyson Foods has agreed to spend up to \$500,000 to monitor air for ammonia at two chicken farms it owns in western Kentucky. It will also plant buffers of trees at other locations. The three individual plaintiffs in the case will receive financial compensation. However, the specific terms of settlements with the individuals are to remain confidential.

The lawsuit, filed in 2002, claimed that the Tyson Foods was responsible for the pollution emitted from eight farms in rural Kentucky with which the food company had contracts. In November 2003, the district court judge agreed that Tyson could be held responsible for failing to report the releases of ammonia.

[For further information, contact Barclay Rogers at (415) 977-5646.]

***United States et al. v. ConocoPhillips, No. 4:05CV00258 (S.D. Tex. Jan. 27, 2005)***

The federal government, Illinois, New Jersey, Pennsylvania and the Northwest Clean Air Agency, State of Louisiana, have entered a settlement with ConocoPhillips, the largest domestic petroleum refining company, under the Clean Air Act. Under the settlement, ConocoPhillips will pay a civil penalty of \$4.5 million and spend more than \$10 million on supplemental environmental projects to reduce emissions and to support activities in the communities where it operates. ConocoPhillips will spend more than \$525 million to install and implement innovative control technologies to reduce emissions at nine U.S. petroleum refineries in seven states. The agreement is expected to reduce annual emissions of nitrogen oxide by more than 10,000 tons and sulfur dioxide by more than 37,100 tons per year. Emissions of particulate matter are expected to be significantly reduced.

The affected refineries are located in Belle Chasse, Louisiana, Linden, New Jersey, Borger and Sweeny, Texas, Carson/Wilmington, California, Ferndale, Washington, Trainer, Pennsylvania, and Roxanna/Hartford, Illinois. The states joining the settlement will share in the penalties and supplemental projects.

[For further information, contact Annette Lang, DOJ, at (202) 514-4213.]

***United States and Kansas v. U.S. Energy Partners LLC, No. 6:04-CV-01011-JTM (D. Kan. Jan. 13, 2005)***

A settlement has been entered among the federal government, the State of Kansas, and U.S. Energy Partners LLC to settle allegations that the company violated the Clean Air Act's New Source Review provisions. Under the settlement, the facility will pay a civil penalty of \$30,000 and install emission control equipment valued at about \$2 million at the company's ethanol plant in Russell, Kansas.

This settlement follows a 2002 settlement with twelve Minnesota ethanol plants under which each plant was required to install thermal oxidizers to reduce VOC emissions and pay penalties of from \$20,000 to \$39,000.

[For further information, contact Julie Van Horn, EPA at (913) 551-7889 or Yvonne Anderson, Kansas Department of Health and Environment at (785) 296-5334.]

**Natural Resources*****United States and Texas v. Chevron U.S.A., Inc. et al., No. 1:05CV0021 (E.D. Tex. Jan. 13, 2005)***

The federal government and Texas have entered into an agreement with Chevron U.S.A., Inc., Chevron Environmental Management Company, and Chevron Phillips Chemical Company, LP that provides for restoration projects as compensation for natural resource damages that resulted from the release of oil and hazardous substances from the Port Arthur Refinery in

Jefferson County, Texas. Under the settlement, Chevron will construct and plant at least eight-five acres of estuarine marsh and approximately thirty acres of wet prairie. It will also construct water control structures to enhance nearly 1,600 acres of coastal wet prairie near Port Arthur. Chevron will also reimburse state and federal governmental agencies for the costs incurred in evaluating the damages.

[For further information, contact Liz Edmonds, DOJ, at (202) 514-6655 or Texas AAG Albert Bronson at (512) 463-2012.]

## CERCLA

### ***United States v. Weyerhaeuser Company, No. 1:05CV0003 (W.D. Mich. Jan. 7, 2005)***

Weyerhaeuser Company has agreed to pay \$6.2 million to settle a lawsuit brought by the federal government over PCB contamination of the Kalamazoo River. Weyerhaeuser will also clean up a landfill it used to dispose of contaminated waste and a nearby mill property and reimburse EPA \$138,000 in costs related to the cleanup of the mill and landfill. The site is on the NPL list.

In addition, Weyerhaeuser has agreed to withdraw its objections to a related bankruptcy court settlement between the government and Weyerhaeuser's corporation parent, Plainwell, Inc.

[For further information, contact Renita Ford, DOJ, at (202) 305-0232 .]

## Water

### ***State [California] v. Shell Oil Company, No. 80431 (Super. Ct. Orange County Jan. 6, 2005)***

Shell Oil Company has agreed to pay \$14.5 million to settle a lawsuit brought by the city concerning leaks of the gasoline additive methyl tertiary-butyl ether (MTBE) at service stations in Orange County, California. The money will pay for tests to determine the amount of MTBE that has leaked into soil and ground-

water from tanks under the 173 stations. The company will also clean up any contamination that is found.

In addition, Shell will pay \$4 million to fund consumer and environmental prosecutions, the county health care agency, and several county fire departments.

[For further information, contact DDA Joe D'Agostino at (714) 347-8726.]

## Wetlands

### ***Adam Brothers Farming, Inc. v. County of Santa Barbara (Super. Ct. Santa Barbara County Nov. 23, 2004)***

After a three-week trial, a California jury has awarded actual damages of \$5.47 million collectively against a county planning and development department, one of its paid consultants, and three current or former employees who helped write a community plan for Orcutt, California. The jury found that the county had recklessly violated the rights of the company when it designated ninety-five acres along Highway 1 as protected wetlands. The jury found that the actions were intentional and done with malice, oppression, or fraud.

Adam Brothers Farming filed its lawsuit in early 2000, alleging that the designation violated due process and equal protection. An appellate court, in an unpublished 2002 opinion, held that the complaint sufficiently set forth substantive due process and equal protection violations. At the time of the wetlands designation, Adam Brothers did not own the property.

In a federal civil lawsuit (*United States v. Adam Brothers Farming, Inc., et al.*, No. CV00-7409-CAS (C.D. Cal.), which seeks fines and mitigation fees against Adam Brothers Farming for bulldozing and filling in areas designated as wetlands by the Corps of Engineers without permits, the parties are in settlement discussions.

[For further information, contact Devid Pettit, Caldwell, Leslie, Newcombe, & Pettit at (202) 3305-0232.]

## CRIMINAL PROSECUTIONS

### Indictments

#### Hazardous Waste

***Washington v. Wei Guo Huang, aka Larry Huang, No. 04-1-14403-1SEA (Super. Ct. King County Dec. 14, 2004)***

Washington officials have charged Wei Guo Huang with improperly disposing of waste petroleum products and crushed automobile batteries, failure to properly store hazardous wastes, and failure to notify state officials about hazardous waste spills as well as operating an automobile wrecking yard without a license. According to the charges, Huang operated Japanese Auto Wrecking in Kent, Washington, on land he had rented. He was evicted in 2003; cleanup costs are estimated at \$5 million.

[For further information, contact King County Deputy Prosecuting Attorney Lynn Prunhuber at (206) 296-9010.]

### Pleas/Convictions

#### Water

***United States v. William Daisey, No. CR 004-134SLR (D. Del. Jan. 24, 2005)***

The former Chief of Operations at the Delaware Department of Natural Resources and Environmental Control facility in Lewes, Delaware, recently pled guilty to a violation of the Clean Water Act. William Daisey admitted that, in 2000 and 2001, he regularly directed a DNREC employee to discharge oil-contaminated water from a 350-gallon sump pit into wetlands. The wetlands connect through a series of ditches to the Broadkill River. The Lewes facility serves as the base of operations for its Division of Soil and Water conservation program, responsible for dredging the state's waterways and replenishing its beaches

[For further information, contact AUSA Edmond Falgowski at (302) 573-6220.]

***United States v. Prime Plating, Scott Hanson, Sam Opore-Addo, and Arlyn Hanson, No. CR04-208 (D. Minn. Dec. 15, 2004)***

Prime Plating, a metal finishing business, was recently convicted on eight counts of violating the Clean Water Act (CWA), conspiracy, failure to notify of a change in a discharge system, and introducing pollutants into a sewage treatment system which it knew or should have known could cause injury or damage. Scott Hanson, the company's owner, and the other two individual defendants were also convicted on the eight counts of violating the CWA. Hanson, in addition, was convicted of conspiracy and failure to notify.

Hanson and Prime Plating conspired to discharge industrial wastewater from the company's facility, dumping the wastewater directly into sewers using pumps and garden hoses and subsequently hiding the discharges from state and federal regulators.

[For further information, contact AUSA Bill Koch at (612) 664-5787.]

### Sentences

#### Water

***United States v. Alfredo D. Lozada and Felipe B. Arcolas, No. 2:04-CR-100&101-P-H (D. Me. Jan. 13, 2005)***

Two chief engineers of the freighter, *M/V Kent Navigator*, owned by Petraia Maritime Ltd., were recently sentenced for their roles in concealing the overboard ocean dumping of waste oil from the ship through false log books and statements designed to deceive the U.S. Coast Guard. The investigation of the freighter was initiated by an anonymous tip that a vessel bound for Portland, Maine, was illegally discharging its waste oil and bilges while at sea.

Both defendants were sentenced to a fine of \$3,000 each and probation for two years. The first month of their probation will be spent at their temporary residence in Portland, Maine; the remainder may be served at their homes in the Philippines.

[For further information, contact Wayne Hettenbach, DOJ, at (202) 305-0213.]

#### Wetlands

***United States v. Jeffrey Balch, No. 04-10013CR Moore (S.D. Fla. Jan. 10, 2005)***

Jeffrey Balch, the owner of bayfront property in Marathon, Florida, was sentenced last month for illegally depositing fill material in Florida Bay. Balch will spend five months in prison, followed by five months of home confinement. In addition, he was sentenced to pay a \$15,000 criminal fine and must pay \$66,122 to the Florida Keys Restoration Fund and remove the illegally placed fill.

Balch allowed a contractor for the Little Venice Sewerage Project, Felix Equities, to dump excavated fill on his property. He then used equipment to push the fill into the waters of the bay.

[For further information, contact AUSA Jose Bonau at (305) 961-9426.]