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Legal Developments Regarding North Carolina's Swine Farms

By
Ryke Longest*

More than 5,000 years ago, man domesticated the pig from the wild boar whose historic range included Europe, the Mediterranean, and southern Asia as far as Indonesia. Domesticated pigs accompanied Hernando DeSoto on his 1539 voyage to Florida. Some of these escaped and reversed the domestication process, becoming wild and eventually spreading across the continent. Domesticated swine are now raised throughout North America. Wild boar also still thrive throughout the continent, with some reaching massive size.[1] While wild boar live a foraging existence on free range in swamps and forests, their domesticated cousins are increasingly living a highly urbanized existence. During the past twenty years, the trend has been that more pork is being produced on fewer farms each and every year.

This trend has been especially pronounced in North Carolina, severely impacting the nutrient balance of the key pork production regions of the state. Over the past four years, state officials have been diligently working to evaluate new ways of handling the waste generated by pork production. This article traces the legal history of swine farming in North Carolina and describes current efforts to evaluate new waste management technologies and by-product markets.

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Early History of Swine Law in North Carolina

During several points in North Carolina's history, pork production has influenced the development of law. North Carolinians of the eighteenth century were mostly subsistence farmers, who relied on hominy, cornbread, and pork for staple foods.[2] Ninety-five percent of North Carolina's colonists were engaged in agriculture or related industries.[3] Since the colonists lacked paper money, gold, and silver, commodities were the chief means of commercial exchange. Sixteen commodities were rated as money within the colony in 1715, including pork.[4] About one-eighth of the pork and beef shipments from the English continental colonies were from North Carolina.[5] Conflicts between livestock owners and others have been occupying our courts and legislative assemblies ever since.

Methods for raising swine were similar to those for raising cattle; livestock were raised on an open range. Instead of branding, farmers notched the ears of their hogs to identify them. The farmers turned their swine out to run loose in swamps, pastures, fields, and woods to scavenge for food. In the autumn, as the weather began to turn colder, the owners would round them up, fence them, and feed them corn to improve the quality of the meat.[6] Hog killing and meat processing occurred on the farm. Occasionally, these wandering swine made their way into towns.

As urbanization advanced along the coast, port towns began to pass ordinances restricting the free roaming of livestock inside their boundaries. Beaufort's ordinance prohibiting swine running loose in the town was challenged by two swine owners, one of whom sued on the basis that the ordinance could not be enforced against him because he was not a town resident.[7] In ruling that the ordinance did apply, the North Carolina Supreme Court held that the farmer was liable under the ordinance, but noted that he had done "as every other farmer does, turned out his stock to range upon the unenclosed land around him."[8] Absent a valid town ordinance such as Beaufort's, such practice was legal in North Carolina.

Livestock grazing on unfenced land brought with it conflicts between row crop farmers and livestock growers, both in town and in the country. During the nineteenth century, a series of livestock fencing acts — referred to as the Stock Law — were passed as more counties sought to protect their row crop farmers from wandering livestock. The Stock Law was gradually extended to cover the entire state. Towns and counties were given the option to add the coverage of the Stock Law to their borders; where the law existed, it was a misdemeanor for the owner of livestock to allow them to run at large.[9] Cases involving the application of the Stock Law demonstrate that hogs and other livestock were getting loose and causing conflicts with row crop farmers and town residents for many years.[10] A case from 1916 indicates that nine-tenths of the state's territory was under the Stock Law by that time.[11] North Carolina's Stock Law produced over fifty reported appellate decisions.

North Carolina's Swine Population Boom

The legal conflicts were plentiful even as the amount of livestock raised in North Carolina was declining. North Carolina was always a top tobacco producing state but gradually became an insignificant producer of livestock. In 1920, the value of all livestock in North Carolina per farm was $442, one dollar above Alabama as the lowest ranking state.[12] In 1925, North Carolina's tobacco crop was worth $87,438,000, ranking North Carolina second in tobacco production to Kentucky.[13] The agricultural landscape changed dramatically in the latter half of the twentieth century. In 1940, $5,747,918 of North Carolina's $328,695,232 in farm income came from hogs;[14] in 1969, $118,614,000 of North Carolina's $1,406,161,000 in farm income came from hogs,[15] an increase of from two to more than eight percent of total farm income in less than thirty years. The biggest jump was yet to come as new swine production techniques were developed and introduced. By 1993, North Carolina had become the third largest pork producing state; instead of allowing their pigs to forage or feeding them garbage, swine producers copied the success of poultry producers and learned to efficiently produce pigs by formulating diets and constructing confinement structures.[16]

Modern hog production depends upon three carefully controlled factors: genetic selection, feed formulation, and climate control. A geneticist selects which strain will go on each farm. Nutritionists formulate feed to control costs and to meet specific nutritional needs of the genetic strain being raised with vitamin supplementation. Automatic feeders provide pigs with a steady stream of the specially formulated meal. Hogs are confined inside a building with electrical light and heat and cooling systems. Workers remove their clothes, take a shower, and put on coveralls before entering the hog house to prevent the transmission of diseases. Hogs are given water from wells specially dug for their house. Under these conditions, swine grow quickly to market weight and once they do so, they are shipped out and the house is cleaned to be ready for the next group or "turn."

Floors inside hog houses are slatted, some partially and some fully. The slats allow manure and urine to fall through to pits beneath the houses. It is as if the entire house sat over a giant toilet bowl. There are four different types of systems for this toilet bowl to use for removing the waste from the house: deep pit, pull plug, pit recharge, and flush. Deep pits are not used much in North Carolina, but the other three types are common. In North Carolina, once these systems are activated, wastewater is sent from under the house to a lagoon.

A lagoon is an open air primary waste treatment structure. Most lagoons in North Carolina are designed for anaerobic operation, meaning that the bottom portion of the lagoon has extremely low dissolved oxygen. Anaerobic bacteria, which do not tolerate oxygen, thrive in this environment and work to break down

the manure that sinks to the bottom of the lagoon. This breakdown produces gases and sludge, which accumulate in the lagoon until released or removed. Gases leave by complicated biological and chemical processes linked to life cycles of the bacteria, manure loading, and the pH of the wastewater. Sludge stays and accumulates until removed mechanically. The Natural Resources Conservation Service of the U.S. Department of Agriculture recommends that the accumulated sludge be removed every five years if it has encroached upon the treatment volume of the lagoon.[17]

Lagoons vary in design parameters such as shape, depth, and liner material. These differences are primarily correlated with lagoon age in North Carolina as lagoon designs have been modified over the years. A few farms have more than one stage in their lagoons to provide further storage and treatment. All farms need to have sufficient volume to treat the wastewater loaded into them and to store that wastewater until it can be disposed of through land application. An average sized pig of 135 pounds produces 1.37 gallons per day of urine and feces, compared to an 800 pound beef cow's production of 5.53 gallons per day. In addition to this waste volume, lagoons must also hold the fresh water added to the housing for cooling and the rainfall which flows into the lagoon. Lagoons in North Carolina are now supposed to be designed to accommodate heavy rainfall and a twenty-five year twenty-four hour storm event without encroaching into a twelve inch zone called the structural freeboard.[18]

Some wastewater from lagoons is recycled to serve as the flush water for the houses. Excess wastewater from the lagoon is applied to cropland primarily by spray irrigation for disposal. This disposal is limited by two primary factors: the nutrient requirements of crops and the ability of the soil to accept the hydrologic load. If too much wastewater is applied, it may pond up and run off the fields faster than the soil can absorb it. If too much waste is applied, the roots of the crops cannot absorb the nutrients and they may be lost to groundwater, the soil, or the atmosphere. Sprayfield crops generally include grasses for grazing and grains, which can be marketed or used by the producers. North Carolina's sprayfields do not currently produce enough crops to feed the number of livestock raised. North Carolina is still a net importer of grain for feed.

The North Carolina experience with growth in swine farms was in number of swine, not in the number of swine farms. This was a national trend in pork production, but more pronounced in North Carolina.[19] Nationwide, the number of farms with swine fell from 317,087 to 103,965 between 1982 and 1997.[20] During the same period, the number of swine produced rose from 7,730,637 to 8,522,082 nationwide for a net increase nationwide of 1,191,445 measured as animal units (AU).[21] North Carolina's growth accounted for 1,160,152 AU of that increase, or more than ninety-five percent of the net national increase. During the same period, the number of North Carolina swine farms decreased from 8,691 to 2,673.[22]

In 2002, hogs were still the number one cash receipts farm product in North Carolina, as they had been since the mid 1990s.[23] Out of the top seven crops in cash receipts for 2002, only two row crops are listed: greenhouse/nursery production was third and tobacco was fourth. Hogs almost accounted for more receipts than tobacco and greenhouse nursery combined. Within a single decade, pork eclipsed tobacco in North Carolina's agricultural economy.

North Carolina's pork production is now significant to the economy of the nation. On December 1, 2004, North Carolina was estimated to have 9.8 million hogs out of the whole U.S. herd of 60.5 million.[24] The total number of hogs owned by operations with over 5,000 head total inventory, but raised under production contracts, accounted for thirty-eight percent of the total U.S. hog inventory, up three percent over the previous year.[25] The top ten swine producing counties in North Carolina have combined inventories of more than seven million hogs.[26] North Carolina's top ten counties account for more than eighty percent of the state's swine inventory and more than ten percent of the national swine inventory.

Many of these animals are sent for slaughter to one of the two large slaughterhouses in North Carolina. They are often also sent to other grain-rich states to be fattened prior to slaughtering.[27] In 2001, 3.8 million hogs left North Carolina to be finished in other states.[28] In contrast, North Carolina only had 158,000 hogs shipped into this state from other states. It is therefore true that North Carolina weans far more pigs than it slaughters.

North Carolina hog slaughter is also nationally significant. In the 1950s, Burrows Lundy moved from Pennsylvania to Clinton, North Carolina, to open the Lundy Packing Company. With the help of Lew Fetterman, Mr. Lundy moved up processing capacity from 1,000 hogs per week in the 1950s to 8,000 hogs per day in the 1980s. North Carolina is now home to the largest hog slaughterhouse in the United States (and perhaps the world) with a capacity of 32,000 hogs per day. This plant is owned by Smithfield Packing Company and is located in Bladen County near the town of Tar Heel. Smithfield Packing's parent company, Smithfield Foods, is the largest pork processor in the world.[29] Nevertheless, the star jewel in its processing crown is the Bladen County plant. The Lundy plant is also still in operation although it has been significantly updated after Lundy Packing was acquired by Premium Standard Farms of Missouri, a national leader in vertical integration.

Federal Water Pollution Control Act

While North Carolina was increasing its ranking in animal agriculture, the federal government began to regulate operations where large numbers of animals are confined. The Federal Water Pollution Control Act Amendments of 1972 (CWA) began a planning process for states to deal with water pollution from manure, called areawide waste treatment management plans, often referred to as the Section 208 process.[30] A few years later, this was amended to add an incentive program for agricultural polluters that used a cost sharing arrangement.[31] The Rural Clean Water Program offered financial incentives to landowners to implement best management practices (BMPs) to control nonpoint source pollution. This program was later expanded and funded under future farm bills to an alphabet soup of conservation incentive programs administered by the U.S. Department of Agriculture.[32]

Congress also took action to require states to report on their progress in water quality improvement on a watershed by watershed basis.[33] These requirements reinforced the notion that the primary role for developing plans for controlling pollution lay with states. At the same time, the states worked to implement these plans with a variety of legal mechanisms. Each state is required to "identify those waters within its boundaries for which the effluent limitations required . . . are not stringent enough to implement any water quality standard."[34] These waters are usually those which receive pollution from sources not regulated as point sources under the CWA. Potential sources of these pollution problems are numerous, but include runoffs and discharges from agricultural and livestock sources.

North Carolina's Incentives and Nonpoint Source Regulations

In the 1980s, North Carolina had adopted its own program to offer financial incentives to agricultural operations to undertake conservation measures. The primary program created was called the Agricultural Cost Share Program for Nonpoint Source Pollution Control. This program was created in 1986 and provides for the supervision of the program by the North Carolina Soil and Water Conservation Commission.[35] The program is used to fund a wide variety of conservation practices, including animal waste management systems.[36] Regulation of these sources beyond incentives has proven quite difficult scientifically, logistically, and politically. Nowhere has that proved more true than in North Carolina's Neuse River.

Environmental conditions in the Neuse River are driven by complex interactions between salinity, rainfall, wind, atmospheric deposition, shallow groundwater flows, water temperatures, biology, and chemistry. The Neuse is a relatively shallow river that drains into the Albemarle-Pamlico Sound complex, the second larg-

est estuarine system in the United States, second only to the Chesapeake Bay. The Sound's 30,000 square miles of watershed are significant habitat for a variety of birds, reptiles, turtles, fish, and shellfish. Situated at the northern range of southern species and the southern range of many northern species, it is the home for both alligators and tundra swans. Sea turtles nest on the beaches and swim in the inlets of the sound each summer and diving ducks feed in the sound each winter.

While pollution and fish kills in the Neuse have been problems for many decades, recent kills have become more worrisome to state planners. Even as discharges to the Neuse from point sources have been increasingly restricted, excess reactive nitrogen in the river has led to nuisance algae blooms. Researchers spent increasing time and energy focusing on the causes of these problems in the 1980s and 1990s.

In the early 1990s, North Carolina controlled animal waste management systems through administrative rules on nondisharge waste treatment.[37] These rules were referred to as the 0.200 rules due to their regulatory citation number. The 0.200 rules required farms with more than 250 swine to obtain certified animal waste management plans.[38] These rules also provided that compliant nondischarge facilities would be considered "deemed permitted" and would not have to obtain individual permits unless they broke the rules.

Meanwhile, one of North Carolina's largest newspapers, the Raleigh *News and Observer*, ran a series of articles on the growth of the swine industry and the state of its regulation. This series of articles was referred to as the "Boss Hog" series and won the reporters a Pulitzer Prize in 1996 for public service.[39] The Boss Hog articles were generally critical of the state's hog regulation. The articles contended that enforcement of environmental rules against hog farms was too lax and that the 0.0200 rules were not protective enough by themselves.

Oceanview Farms Case

One of the most egregious examples of breaking the 0.200 rules came to light on June 21, 1995. On that date, the eight-acre manure lagoon at Oceanview Farms in Onlsow County burst its dike, sending a tide of wastewater across neighboring roads, fields, and streams and into the New River near Jacksonville, North Carolina.

While the Oceanview facility had a certified animal waste management plan, it had not followed that plan. The farm had not been applying the waste to land as required so that the lagoon was filled far beyond its specified capacity, which required that there be a minimum of one foot of freeboard to protect the physical structure from breach.[40] Larval casings for insects were found within a few inches of the dike crest, indicating that the lagoon had reached the top of the dike before rupturing. Additionally, investigators found that less than half of the land required for land application had been cleared by Oceanview. Also, the dike walls had been weakened by installation of piping and pumps in the walls. These factors contributed to the lagoon's massive rupture, which spilled about twenty-five million gallons of wastewater.

The Oceanview Farms case resulted in an injunction being issued against the facility, requiring significant remedial and repair actions. The North Carolina Division of Water Quality levied a $92,000 fine against Oceanview Farms in 1995, the largest ever. After the company appealed, an Administrative Law Judge reduced the fine to $75,000. Later the North Carolina Department of Environment and Natural Resources (DENR) settled the appeal and further reduced the fine to $50,000, payable over six years. The enforcement costs were not reduced and were collected for $11,820.49. While the case was closed in 2001, its repercussions still linger.

Legislative Responses to Oceanview Farms and Subsequent Spills

The spill provoked national media coverage accompanied by a swift legislative response. Other spills occurred around the same time, with a one million gallon swine waste spill on a different farm the same day as Oceanview's and an eight million gallon spill of chicken wastewater from a lagoon on July 3, 1995. On July 10, 1995, Governor Jim Hunt ordered state water quality inspectors to do a blitz of inspections on the state's lagoons. On July 11, 1995, the North Carolina General Assembly enacted the Swine Farm Siting Act.[41] The Swine Farm Siting Act required a 1,500 foot setback for lagoons from residences with a farther setback from schools and a smaller one from property boundaries.[42] The Swine Farm Siting Act had a delayed effective date of October 1, 1995, which prompted a flurry of siting activity between July and October of 1995.

A second legislative response was to create a Blue Ribbon Study Commission.[43] The commission consisted of members appointed by the legislative leadership and the Governor. Based in part upon the commission's report, the General Assembly acted to strengthen permitting requirements beyond the minimum federal requirements.[44] This piece of legislation was the most comprehensive to date in North Carolina on the subject and is still referred to by its bill number, Senate Bill 1217. Senate Bill 1217 required that all operations with more than 250 swine obtain permits.[45]

Under these permits, the swine farms are required to follow a nutrient management plan with nitrogen acting as the limiting nutrient.[46] The farms are also required to use a certified applicator for waste application.[47] Senate Bill 1217 required DENR to conduct annual inspections of swine farms. It also increased setback distances, enhanced enforcement of the Swine Farm Siting Act, and increased the maximum daily civil penalty assessable against animal operations from $5,000 to $10,000 per day per violation.[48] The effects of Senate Bill 1217 were significant in North Carolina. Due to the requirements for waste management plan certification, many operations had to undertake significant upgrades of their waste management systems. The North Carolina Supreme Court has held these statutory changes to constitute complete regulation of the field.[49]

In addition to these measures, North Carolina adopted a set of operator certification requirements for those who operated animal waste management systems. These requirements included licensing upon a written examination, a disciplinary process, and continuing education requirements.[50] Since all animal waste management systems are required to have a certified operator, the threat of disciplinary sanctions has a significant salutary effect on waste handling practices. Lastly, North Carolina required that swine farm owners register the name of the owner of their livestock, or "integrator."[51] The registered integrator is to be informed of all violations observed at the owner's farm.[52] Each facility is mandated to have a compliance inspection annually.[53]

More Fish Kills and Moratorium Building Boom

During July, September, and October, 1995, extensive fish kills occurred in the Neuse River itself, a much larger water body than the New River affected by Oceanview Farms. Millions of menhaden, as well as many flounder, croaker, and striped bass, were killed. DENR collected copious water quality samples in the areas of the fish kills. The samples showed that the water lacked oxygen only 1 to 2 meters below the surface and contained a prevalence of algal blooms. During June of 1995, record rainfalls delivered a tremendous load of nonpoint source nutrients into the Neuse River. DENR took action.

On February 8, 1996, the North Carolina Environmental Management Commission (EMC) approved a draft conceptual Neuse River Nutrient Sensitive Waters (NSW) Management Strategy. The draft contained alternative language to further discussion at public workshops. Some initial changes were incorporated into the proposed rules as a result of comments received at the workshops and written comments. The Neuse River NSW Management Strategy's action

plans called for the establishment of a Neuse River Basin Coordinator to coordinate activities of agricultural agencies involved in implementing the strategy, and to ensure progress toward successful installation of BMPs. The NSW management strategy proposal required a thirty percent reduction in nitrogen input to the Neuse River by all major contributors. A final set of rules was adopted by the EMC December 11, 1997.

For agriculture, these rules provide flexibility for implementing locally determined and appropriate site specific BMPs, rather than imposing identical requirements on all agricultural land throughout the basin. Farmers collectively achieved the thirty percent reduction goal by signing on with a Local Advisory Committee (LAC). Each LAC developed the local strategy and farm plans. Farmers who did not wish to work with an LAC were required to implement the default BMP option provided under the rules. This default option combined riparian buffers and water control structures with nutrient management planning. The LACs had a more extensive matrix of options available allowing for some operations to avoid costly changes by using the average reduction of all operations. The reduction goal was thirty percent below the level determined as the average for 1991–1995. The reduction goal was met in the plans developed.

These regulatory changes were quickly followed by even more stringent legislative measures. In 1997, the Clean Water Responsibility and Environmentally Sound Policy Act was passed.[54] This bill established a moratorium on swine farm construction and expansion, expanded county zoning power over large swine farms, directed that odor control rules be developed, strengthened the Swine Farm Siting Act even more, and made sweeping changes to the nutrient regulation for other dischargers. This moratorium has been amended in 1998, 1999, 2001 and 2003, with the last amendment extending the moratorium to September 1, 2007.

Like the Swine Farm Siting Act, the initial moratorium had a delayed effective date. The delayed effective date triggered a new rush of applications and building activity to beat the deadline. Some in the industry have argued that the moratorium actually caused a supply glut, which led to swine price drops of 1998 and later.[55] These price drops have also contributed to the exit of many smaller producers.[56] During this time frame, Smithfield Foods of Virginia acquired three of North Carolina's largest hog producers: Brown's of Carolina, Carroll's Foods, and Murphy Family Farms.

Agreements with Smithfield Foods and Premium Standard Farms

Former North Carolina Attorney General Mike Easley negotiated with officials from Smithfield Foods, Inc., (Smithfield) for an agreement to evaluate improved technologies to lagoons on company-owned farms. On July 25, 2000, the Smithfield Agreement was signed. The Smithfield Agreement provides resources for the development of "Environmentally Superior Technologies" for treating swine manure. On September 29, 2000, a similar agreement was made with Premium Standard Farms (PSF), referred to as the PSF Agreement. Under the terms of these agreements, Smithfield and PSF have agreed to implement designated Environmentally Superior Technologies (EST) on their company-owned farms in North Carolina.

The agreements define Environmentally Superior Technologies as any technology, or combination of technologies that: (1) is permittable by the appropriate governmental authority; (2) is determined to be technically, operationally, and economically feasible for an identified category or categories of farms and (3) meets the performance standards. The performance standards are:

1. Eliminate the discharge of animal waste to surface waters and groundwater through direct discharge, seepage, or runoff;
2. Substantially eliminate atmospheric emissions of ammonia;
3. Substantially eliminate the emission of odor that is detectable beyond the boundaries of the parcel or tract of land on which the swine farm is located;

4. Substantially eliminate the release of disease-transmitting vectors and airborne pathogens; and
5. Substantially eliminate nutrient and heavy metal contamination of soil and groundwater.

The five performance factors replicate the performance factors required by North Carolina's General Assembly under previous moratorium legislation. The Smithfield and PSF Agreements create a process for evaluating technologies by a person referred to as the Designee. The Designee is currently Dr. C. Mike Williams of North Carolina State University. The Designee appointed an expert peer review panel per the terms of the agreements, which included the representation required by the agreements: "1) experienced researcher(s) in the area of animal waste management, 2) experienced researcher(s) in the areas of environmental science and public health, 3) DENR, 4) environmental and community interests, 5) swine agribusiness interests, including a representative from one of the Companies, and 6) faculty from the University of North Carolina system with expertise in business management." This panel is chaired by the Designee and meets regularly (as it has for the past four years).

The agreements are also very specific regarding the determination of economic feasibility. The agreements provide that:

> In determining whether it is economically feasible to construct and operate a particular alternative technology for a category of farms, the Designee will consider all relevant information including, but not limited to, the following factors: (i) the projected 10-year annualized cost (including capital, operation and maintenance costs) of each alternative technology expressed as a cost per 1000 pounds of steady state live weight for each category of farm system; (ii) the projected 10-year annualized cost (including capital, operation and maintenance costs) per 1000 pounds of steady state live weight for each category of farm system of a lagoon and sprayfield system that is designed, constructed and operated in accordance with current laws, regulations, and standards, including NRCS design, construction and waste utilization standards; (iii) projected revenues, including income from waste treatment byproduct utilization, together with any cost savings from the new technology; (iv) available cost-share monies or other financial or technical assistance from federal, state or other public sources, including tax incentives or credits; and (v) the impact that the adoption of alternative technologies may have on the competitiveness of the North Carolina pork industry as compared to the pork industry in other states.

The agreements also provide resources to conduct this research and to implement environmental enhancement projects. Smithfield Foods committed $15 million to fund the research effort. Smithfield also committed an additional $2 million per year for environmental enhancement grants with up to $2 million going for agreement implementation. PSF agreed to provide $2.5 million for any or all of these purposes as needed. In order to assist the Attorney General in making selections of recipients of these monies, the office has created an Environmental Enhancement Grant process. Grants issued under the EEG process have been used for projects to clean up the New River, the site of the Oceanview Farms spill, as well as to close lagoons no longer in use. The grants have also been used to restore wetlands and conserve riparian lands and open space. EEG Grant monies have also been used to fund the evaluations of by-products from swine waste treatment and treatment technology projects designed to clean wastewater back to drinking water standards.

Each summer, on the anniversary date of the Smithfield Agreement, the Designee issues a status report on

the project. In 2004, Dr. Williams announced that two of the technologies considered have been shown to be capable of meeting the agreements' technical performance standards. These technologies are called the Super Soils technology and the ORBIT technology. Researchers working on the Super Soils technology have found that this system removed more than ninety percent of the criteria pollutants measured. Information about these technologies can be most easily obtained by consulting the website for North Carolina State University's Animal Waste Management Center at http://www.cals.ncsu.edu/waste mgt/smithfield projects/Smithfieldsite.htm.

Economic evaluation of these technologies is still ongoing and has not been finalized. For that reason, no technology has yet met the tests under the agreements to be designated an EST. More technology evaluations are expected this summer. Information regarding the status of those projects can also be found at the website referenced above. Other projects are still being evaluated and may not be ready for final reports until later this year or early next year. Interest in this effort has once again heightened in the legislature with several bills being introduced this session relating to the effort. Some of these bills would provide financial incentives for byproduct markets in energy, while one would require all farms to convert to new technologies.

Increased Federal Regulation of Concentrated Animal Feeding Operation

In October 1989, the Natural Resources Defense Council (NRDC) filed suit against EPA alleging that EPA had failed to meet its obligation to issue effluent limitations guidelines under the CWA. In January 1992, the NRDC agreed to a settlement under which EPA would issue effluent limitations guidelines. EPA chose the swine feedlot industry as one of the source categories subject to the consent decree.[57] Under that consent decree, EPA had to propose new effluent limitation guidelines for swine farms. These guidelines were to define when a swine farm would be considered a Concentrated Animal Feeding Operation (CAFO). The CWA specifically defined point source in pertinent part as, "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel …concentrated animal feeding operation ... from which pollutants are or may be discharged."[58] Just to keep things interesting, the definition does not include "stormwater discharges and return flows from irrigated agriculture."[59] EPA sought to clarify this point by rulemaking.

On February 12, 2003, the EPA promulgated its Final CAFO Rule.[60] A series of legal challenges were filed to this rule by a number of interested parties — Waterkeeper Alliance, Inc., Sierra Club, Natural Resources Defense Council, Inc., American Littoral Society, American Farm Bureau Federation, National Chicken Council, and the National Pork Producers Council. These challenges were consolidated into an action in the Second Circuit Court of Appeals.[61] The Second Circuit struck down portions of EPA's rule, but also rejected several challenges from both industrial and environmental petitioners.[62] The most significant ruling struck down EPA's size criteria for a CAFO designation. The Court reasoned that EPA's Final Rule had gone too far because it "imposes obligations on all CAFOs regardless of whether or not they have, in fact, added any pollutants to the navigable waters."[63] It is uncertain how this will be modified by EPA or whether challenges to this holding will be successfully made.

While no one can say what the new federal rule response will be to this case, it is clear that many states have been using threshold numbers for permits for some time. States such as North Carolina are not limited in regulating only those systems that show a discharge to navigable waters. North Carolina has been regulating all facilities with over 250 swine under state enforced nondischarge permits for more than ten years. Accordingly, there is expected to be little impact on North Carolina law from the Second Circuit's ruling.

Air Emissions

As was discussed above, some gases are created by the breakdown of swine waste in anaerobic lagoons. These gases include ammonia, one of the pollutants being evaluated by the Designee under the Smithfield and PSF Agreements. Other gases may cause or contribute to odors, which are also being evaluated by the Designee under the agreement. In addition, some of these gases are regulated air pollutants.

On January 31, 2005, EPA published a draft Consent Agreement form in the Federal Register.[64] This Consent Agreement purports to allow Animal Feeding Operations to "pool their resources to lower the cost of measuring emissions and ensure that they comply with all applicable environmental regulations in the shortest amount of time." The shortest amount of time under the draft Consent Agreement would appear to be three years.

The Consent Agreement purports to settle past and ongoing liability for certain violations of the Clean Air Act (CAA), the Emergency Planning and Community Right to Know Act (EPCRA), and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The Consent Agreement's protection is limited to emissions from an Emission Unit, defined as, "any part of a Farm that emits or may emit Volatile Organic Compounds (VOCs), Hydrogen Sulfide (H2S), Ammonia (NH3), or Particulate Matter (TSP, PM10 and PM2.5) and is either: (a) A building, enclosure, or structure that permanently or temporarily houses Agricultural Livestock; or (b) a lagoon or installation that is used for storage and/or treatment of Agricultural Waste." Only Emissions Units are required to be measured and monitored under the Proposed Agreement. Only violations from Emission Units are therefore settled by the Consent Agreement.

Additionally, the definition of Farm under Paragraph 14 is, "production area(s) of an animal feeding operation, adjacent and under common ownership, where animals are confined, including animal lots, houses or barns; and Agricultural Waste handling and storage facilities. ''Farm" does not include land application sites for Agricultural Waste. This definition is limited exclusively to this Agreement and establishes no precedent for the interpretation of any statute, regulation or guidance."[65] Spray irrigation equipment, land application sites, and feed storage are all also sources of emissions, but appear not to be included within the definitions of Farm and Emission Unit. Additionally, naturally ventilated housing has been excluded from the study for swine and poultry;[66] for dairy cattle, however, only naturally ventilated buildings will be measured.

The Consent Agreement requires that signatories report ammonia and hydrogen sulfide releases from their farms under CERCLA.[67] Over 200 other volatile organic compounds (VOCs) including methane, carbonyls, olefins, terpenes, phenols and other sulfides are produced and detected in analyses of gases at swine farms alone. Many of these compounds may be subject to release reporting requirements under CERCLA. The Consent Agreement will be taking samples from these barns and lagoons, but will not be analyzing them for these other gases.[68] Thus, the full spectrum of reportable emissions will not be characterized under the Consent Agreement. One other notable aspect of the Proposed Agreement is that it lacks a plan for evaluating control measures.

Conclusion

North Carolinians are known to say that a person who speaks of his own health excessively, "truly enjoys ill health." While North Carolina has been challenged by the pork production boom it has enjoyed, the state's response has been to do more than talk about it. North Carolina's Attorney General stepped into a leadership role. Many other states are also pursuing research in the same area. A groundbreaking set of actions was undertaken by Missouri's Attorney General shortly before the Smithfield and PSF Agreements were undertaken in North Carolina. We acknowledged that debt to our sister state in the preamble to the PSF Agreement as well as the contribution of PSF to the efforts there. States including Illinois, Iowa, Mississippi, Washington and Colorado have similarly

shown themselves to be leaders in this arena. This leadership can pay off by developing markets for what has been historically viewed as waste.

ENDNOTES

1. *O Hogzilla, We Praise thy Hamhocks*, VIRGINIAN-PILOT (Norfolk, Va.), Mar. 28, 2005 at B8. Hogzilla is believed to be a cross between domesticated and feral swine.

2. HUGH TALMADGE LEFLER & ALBERT RAY NEWSOME, THE HISTORY OF A SOUTHERN STATE: NORTH CAROLINA 124 (3d ed. 1973).

3. *Id*. at 89.

4. *Id*. at 157–58.

5. *Id*.

6. *Id*. at 95.

7. See Whitfield v. Longest, 28 N.C. 268 (1846).

8. *Id*. at 273.

9. N.C. GEN. STAT. § 68-16 (2003).

10. *See* State v. Tweedy, 115 N.C. 704; 20 S.E. 183 (1894) (indictment of town resident for shooting hog running at large in town overturned because indictment did not charge that hog was running loose lawfully); Broadfoot v. Fayetteville, 121 N.C. 418; 28 S.E. 515 (1897) (challenges to ordinance and stock law under state and federal constitutions rejected by court); Bowen v. Town of Williamston, 171 N.C. 57; 87 S.E. 959 (1916) (swine owner's arguments require a nuisance hearing before seizure).

11. Marshburn v. Jones, 176 N.C. 516; 97 S.E. 422 (1918).

12. HUGH TALMADGE LEFLER & ALBERT RAY NEWSOME, THE HISTORY OF A SOUTHERN STATE: NORTH CAROLINA 578 (3d ed. 1973).

13. *Id*.

14. *Id*. at 647.

15. *Id.*

16. *Id.*

17. Natural Resources Conservation Service Practice Standard for Waste Treatment Lagoon, CPS 359, Rev. 4, p. 15 (NRCS-NC, January 1998).

18. *Id.*

19. Economic Research Service, U.S. Department of Agriculture, information available on the Internet at: http://www.ers.usda.gov/data/Manure/spreadsheets/prk82.xls and http://www.ers.usda.gov/data/Manure/spreadsheets/prk97.xls.

20. *Id.*

21. *Id.* Each swine animal unit equals 1,000 pounds of live animal weight and one swine animal unit may represent between several individual hogs depending on the weight of the animals.

22. *Id.*

23. AGRICULTURAL STATISTICS DIV., N.C. DEP'T OF AGRIC., CASH RECEIPTS, available on Internet, at http://www.ncagr.com/stats/cashrcpt/commrank.htm (Feb. 6, 2004).

24. AGRICULTURAL STATISTICS DIV., N.C. DEP'T OF AGRIC., LIVESTOCK, available on Internet, at http://www.ncagr.com/stats/livestoc/anihgi12.htm (May 10, 2005). Units are hogs, not animal units.

25. *Id.*

26. AGRICULTURAL STATISTICS DIV., N.C. DEP'T OF AGRIC., LIVESTOCK, available on Internet, at http://www.ncagr.com/stats/cnty_est/ctyhogtt.htm (May 10, 2005).

27. *Id.*

28. Dennis A. Shields and Kenneth H. Matthews, Jr., *Interstate Livestock Movements*, USDA Economic Research Service, available on Internet, at: http://www.ers.usda.gov/publications/ldp/jun03/ldpm10801/ldpm10801.pdf .

29. Annual Report, Smithfield Foods, Fiscal Year 2004.

30. 33 U.S.C.A. § 1288 (2005).

31. 33 U.S.C.A. §§ 1288(i), (j) (2005).

32. The Farm Security and Rural Investment Act of 2002 authorized federal funding for the following cost share conservation programs: Agriculture Management Assistance (AMA), Conservation of Private Grazing Land (CPGL), Conservation Reserve Program (CRP), Conservation Security Program (CSP), Environmental Quality Incentives Program (EQIP), Farmland Protection Program (FPP), Grasslands Reserve Program (GRP), Wetlands Reserve Program (WRP) and Wildlife Habitat Incentives Program (WHIP). Pub. L. No. 107–171 (May 13, 2002).

33. 33 U.S.C.A. § 1329.

34. 33 U.S.C.A § 1313(d)(1)(a).

35. N.C. GEN. STAT. § 143-215.74(a).

36. *Id*. at (b)(5).

37. 15A N.C.ADMIN. CODE § 2H 0.0200 *et seq*. (1993).

38. *Id.* § 2H 0.0217.

39. NEWS AND OBSERVER. The articles were published on February 19, 21, 22, 24 and 26, 1995. Electronic copies are available online at: http://www.pulitzer.org/year/ 1996/public-service/ works/.

40. Plaintiff's Preliminary Injunction Brief, pp. 5-11, State of North Carolina *ex rel.* Michael F. Easley v. Oceanview Farms Limited Partnership, 95 CVS 1993 (Onslow County Superior Court, Sept. 12, 1995).

41. 1995 N.C. Sess. Laws, Chapter 420.

42. *Id*.

43. 1995 N.C. Sess. Laws Ch. 542, Sec. 4.1 through 4.7.

44. *Id.* Ch. 626.

45. *Id* at Sec. 1.

46. *Id*.

47. *Id* at Section 5.

48. *Id* at Section 4.

49. "We conclude from the foregoing specifications that North Carolina's swine farm regulations, the Swine Farm Siting Act and the Animal Waste Management Systems statutes are so comprehensive in scope that the General Assembly must have intended that they comprise a 'complete and integrated regulatory scheme' on a statewide basis, thus leaving no room for further local regulation." Craig v. County of Chatham, 356 N.C. 40, 50, 565 S.E.2d 172, 179 (2002)

50. N.C. GEN. STAT. §§ 90A-47 *et seq*. (2003).

51. *Id.* § 143-215.10H (2003).

52. *Id*. at (d).

53 N.C. GEN. STAT. § 143-215.10F (2003).

54. 1997 N.C. Sess. Laws 458.

55. *Industry Pacesetters: Interview with Bill Prestage*, NAT'L HOG FARMER (June 15, 2001).

56. *Smithfield's ROI*, NAT'L HOG FARMER (Mar. 15, 2003).

57. NRDC v. Reilly*, modified sub. nom*., NRDC v. Whitman, No. 89-2980 (D.D.C. Jan. 31, 1992).

58. See 33 U.S.C.A § 1362(14) (2005).

59. *Id*.

60. 40 C.F.R. §§ 9, 122, 123, 412.

61. Waterkeeper Alliance, Inc. v. United States EPA, 399 F.3d 486 (2d Cir. 2005).

62. *Id*.

63. *Id.*

64. 70 Fed. Reg. 4957 *et seq.* (Jan. 31, 2005).

65. *Id.* at 4963.

66. *Id* at 4971–74.

67. *Id* at 4963–64.

68. *Id* at 4972.

DECISIONS

Air

EPA Had Jurisdiction to Bring Action Against Landfill: *In re Lyon County Landfill,* No. 04-2689 (8th Cir. May 9, 2005)

Background

Lyon County, Minnesota, owns and operates the Lyon County Landfill. In July 1994, the Minnesota Pollution Control Agency (MPCA) conducted an asbestos compliance inspection at the landfill. The inspectors saw ripped plastic bags with asbestos warning labels lying uncovered and dust blowing from and around the bags. The next day, the inspectors returned. Some of the bags had been covered with dirt, but they found more ripped bags on the surface. There were visible emissions from the bags. The samples collected on both days contained between five and thirty percent asbestos. Negotiations with Lyon County proved unsuccessful and the MPCA eventually referred the matter to EPA for enforcement. EPA filed an administrative compliant pursuant to 42 U.S.C. § 7413(d)(1) on July 18, 1996, alleging violation of certain regulations regarding active asbestos waste disposal sites.

The Administrative Law Judge dismissed the case for lack of jurisdiction under 42 U.S.C. § 7413(d)(1). EPA appealed and the Environmental Appeals Board (EAB) reversed and remanded for a decision on the merits. On remand, the ALJ found Lyon County liable on all counts and imposed a penalty of $45,000. On appeal to the EAB, some of the findings of liability were reversed and the penalty was reduced to $18,800. Lyon County petitioned for review in the district court, which affirmed the EAB. The county appealed, arguing, *inter alia,* that EPA did not have the jurisdiction to bring this action.

Holding

The first question was whether EPA's interpretation of the statute should be accorded *Chevron* deference. Lyon County argued that deference is not due when an agency is interpreting a question regarding its own jurisdiction. The court disagreed, noting that the Fourth and Eighth Circuits have rejected this approach. Lyon County also argued that the interpretation advocated by EPA is a result of an informal process and, thus, not due full *Chevron* deference. The court pointed out, however, EAB decisions are formal adjudications, consistent with the Administrative Procedure Act. Therefore, it determined that EPA's interpretation was due *Chevron* deference if the statutory language is ambiguous.

The authority to bring civil administrative enforcement actions under the Clean Air Act (CAA) is set out in section 113(d)(1):

> The Administrator's authority under this paragraph shall be limited to matters where the total penalty does not exceed $200,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a large penalty amount or *longer period of violation* is appropriate for administrative penalty action. Any such determination by the Administrator and the Attorney General shall not be subject to judicial review.

42 U.S.C. § 7413(d)(1) (emphasis added).

EPA interpreted the phrase "longer period of violation" to refer to a longer period between the first occurrence of the violation and the time the administrative action commenced. Lyon County argues that a "period of violation" refers to the duration of the violation. The court concluded that both interpretations

are plausible. Since the statute is ambiguous, *Chevron* deference is appropriate.

EPA's interpretation parallels the general limitation; both refer to the same time period. The phrase "larger penalty amount or longer period of violation" is the exception which should be read with reference to the general rule. A "larger penalty amount" is a total penalty greater than $200,000. A "longer period of violation" is one greater than twelve months. EPA's interpretation of the statute is plausible and the court adopted it.

In this case, the action was brought two years after the violation was observed. However, the Administrator and the Attorney General agreed that an administrative penalty action was appropriate. Therefore, EPA had jurisdiction to bring this action.

CERCLA

Award of Summary Judgment to Defendants Largely Upheld : *Eileen Syms et al. v. Olin Corporation et al.,* No. 03-6234 (2d Cir. May 13, 2005)

Background

The plaintiffs in this action are persons and entities related to John Syms and the Somerset Group. It was brought to recover response costs allegedly incurred in cleaning up hazardous substances and for compensation for the alleged injury to the value of the property contaminated. The district court dismissed the claims brought under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Federal Tort Claims Act (FTCA). The court declined to exercise supplemental jurisdiction over the state law claims against defendant-appellee Olin Corporation.

The property in question was part of the property purchased in 1942 by the U.S. Department of War, for use as a TNT plant and related military activities. It was called the Lake Ontario Ordnance Works (LOOW). Production of TNT ceased in 1943; the site was thereafter used for the disposal of radioactive waste and various contaminants from the Army's chemical warfare service. During the 1950s, Olin Corporation operated an experimental fuel production facility at LOOW under contract with the federal government. Before the plant became fully productive, the contract was cancelled, but Olin remained at LOOW to perform decommissioning activities.

In 1966, the government sold 564 acres of LOOW to Fort Conti Corporation, which, in 1972, sold 132 acres to Somerset Group, owned by John Syms. Somerset renovated the buildings on the site and, in 1972, opened the Lew-Port Industrial Park. In April 1972, the New York Department of Health issued an order restricting the use of the site because of concerns about exposure to radioactive material. No further development could occur there and any decontamination efforts, other than those undertaken by the government, had to receive the approval of the Department of Health.

Somerset cancelled its tenants' leases, fenced the site, and hired guards to secure the property. After lobbying efforts, the Department of Health allowed activities to resume on some of the site but the Town of Lewiston cut off water supply to the area because of concern that contamination would enter the water while it circulated through the site. Somerset filed for bankruptcy in 1980. During those proceedings, it sold ninety-three acres of the site to an adjoining landowner which operated an industrial waste landfill.

Between 1982 and 1984, the federal government began to consolidate the radioactive contamination into a 191-acre site, known as the Niagara Falls Storage Site. This area is one-half mile from Somerset's property, connected to it by the Central Drainage Ditch used to drain radioactive waste. In December 1986, the Department of Energy notified Somerset that radiological surveys had confirmed that the remedial action on its property had been satisfactorily completed.

Somerset continued to urge cleanup of the nonradioactive contamination on its property. The U.S. Army Corps of Engineers performed a Phase I Remedial

Investigation/ Feasibility Study and performed interim asbestos abatement there. In 1999, Somerset allegedly learned for the first time that groundwater was contaminated with lithium and an explosive known as RDX. In August 1999, Somerset submitted a demand and claim letter to the Department of Justice seeking to recover response costs it allegedly incurred in the cleanup of hazardous substances and damages for injury to the value of its property. When this claim was denied, it filed this lawsuit.

The magistrate judge recommended granting the defendants' motion for summary judgment on the CERCLA claims. He considered Somerset to be a potentially responsible party, ineligible for cost recovery under section 107(a). He also noted that Somerset had failed to demonstrate that its response costs were necessary and in conformance with the national contingency plan. He also concluded that the recovery claim was time-barred with respect to radioactive contamination. He recommended granting the government summary judgment on the section 1983 claims since there was no allegation that any defendant was acting under the color of *state* law. The claims under the FTCA were time-barred and the discretionary function exception shielded the government from liability. The district court partially adopted the reasoning of the magistrate judge's report, granting the defendants' summary judgment on the CERCLA claims for failure to demonstrate the necessity of its response costs and granting the government summary judgment on the FTCA claims by reason of untimeliness. It also declined to exercise supplemental jurisdiction over the remaining state law claims against Olin. Somerset appealed.

Holding

At the outset, the court noted that, as this appeal was pending, the Supreme Court issued its decision in *Cooper Industries, Inc., v. Aviall Services, Inc.,* 125 S.Ct. 577 (2004), which held that a private party cannot obtain a judgment for contribution under section 113(f) of CERCLA. Thus, Somerset's section 113 claim is not viable.

The district court did not discuss the statute of limitations in dismissing Somerset's section 107(a) claims. The appellate court agreed with the magistrate judge that the claims are time-barred in connection with the radioactive contamination. The time for filing a cost recovery action expired, at the latest, in May 1998. Somerset did not file its demand and claim letter until August 1999. The district court concluded that the response costs incurred by Somerset were not "necessary." As to those activities that were not time-barred, the government found that a genuine material issue of fact exists regarding costs incurred in providing the government with site access that precludes summary judgment. The record showed that the Syms spent some time admitting government officials and contractors to the site in connection with the RI/FS conducted in 1998. This issue, thus, was remanded to the district court.

The court then reviewed the other non-time-barred claims. The claim regarding physical maintenance of the site did not relate to any investigation or cleanup of contamination. The claim regarding alleged damage caused during asbestos removal is not recoverable under CERCLA. The repair of damage caused during cleanup may give rise to an ordinary tort action, but not a CERCLA cost recovery action.

The third set of activities for which Somerset sought recovery was the activities of its counsel reviewing documents and facilitating site access. In *Key Tronic Corporation v. United States,* 511 U.S. 809 (1994), the Court held that litigation-related and settlement-related attorneys' fees are not a necessary cost under CERCLA. However, certain work closely tied to the actual cleanup could constitute a necessary cost of response. In that case, the Court held that the cost of reviewing documents to identify potentially responsible parties was recoverable. However, in this case, Somerset did not present any evidence that its efforts uncovered the identity of any party not already known. Other activities, such as negotiating site access, also fail as necessary response costs. The *Key Tronic* decision taught that costs incurred primarily to protect the interest of a client does not qualify as necessary recovery costs.

The expenses incurred by Somerset's attorneys to perform a limited radiological investigation of the Central Drainage Ditch are not compensable because Somerset's attorneys paid those expenses and there is no evidence in the record that Somerset has reimbursed them or that it is obligated to do so.

As to the medical monitoring costs, the only two courts of appeals to consider the matter have concluded that private monitoring of an individual's health is not a valid response cost under CERCLA. Both the Ninth Circuit in *Price v. U.S. Navy,* 39 F.3d 1011 (1994), and the Tenth Circuit in *Daigle v. Shell Oil Company,* 972 F.2d 1527 (1992), concluded that such costs are not recoverable. The *Daigle* Court concluded that monitoring as part of a removal action refers to monitoring necessary to prevent contact with hazardous substances, not monitoring to detect future disease. It noted that both houses of Congress had expressly rejected bills providing damages for personal injury and medical expenses. In the case at bar, the court agreed with the *Price* and *Daigle* courts.

The court declined to determine whether, after *Cooper,* there is a blanket prohibition against a PRP suing under section 107(a) instead of suing for contribution under section 113. The district court did not address this because it assumed that the costs for which Somerset was suing were not necessary. Since *Cooper* was decided after the district court issued its opinion, the appellate court concluded that it would be best to allow the district court to address the issue of Somerset's eligibility to sue under section 107(a) on the limited issue of the costs required to admit government officials and contractors to the site.

The district court concluded that the claim under the FTCA was time-barred. That statute provides that a "tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). The date of the accrual of an FTCA claim is a matter of federal law. There is no question that the statute of limitations has run on the harm caused by the radioactive contamination, of which Somerset was aware by 1972 at the latest. The district court concluded that Somerset was sufficiently aware of the existence of nonradioactive contamination on its land as to have triggered the statute of limitations more than two years prior to its having filed its claim. Somerset argued that the continuing tort doctrine should be applied. There are some cases that have applied the continuing tort doctrine to claims against the federal government under the FTCA. The government argued that these cases were wrongly decided.

The court concluded, however, that in order for such a claim to be brought against the federal government, it must be valid under local law. Since New York no longer recognizes the existence of a continuing tort doctrine in latent exposure cases seeking money damages, it cannot be used by Somerset to recover damages under the FTCA.

It is also clear from the record that Somerset knew or should have known about the nonradioactive contamination on its land well before 1997. In his deposition, John Syms admitted that he knew his property had been contaminated by 1990. There is a question whether the knowledge of one or two contaminants presupposes knowledge of additional contamination. The court concluded that there were so many warning signs that it should have prompted an investigation, which would have disclosed, among other things, a New York State Assembly's 1981 report documenting a "vast network of underground waste lines with TNT wastes and residues."

Finally, Somerset argued that the government should be estopped from arguing that it should have known about the RDX and lithium contamination because the government assured it that it had cleaned the property. However, those assurances discussed only the cleanup of radioactive contamination. They said nothing about nonradioactive contamination.

Therefore, the court affirmed in part, vacated in part, and remanded.

Court Allows Discovery to Proceed on GE's "Pattern and Practice" Claim: ***General Electric Company v. Stephen L. Johnson and U.S. Environmental Protection Agency,*** **362 F. Supp. 2d 327 (D.D.C. 2005)**

Background

General Electric (GE) brought a constitutional challenge to section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The defendants brought a motion for summary judgment, contending that GE's challenge is a facial challenge and, thus, GE must prove that the statute is unconstitutional in every application. EPA argued that, at the very least, section 106 is constitutional in emergency situations and that, therefore, GE's challenge must fail. GE responded that its challenge was not only a facial challenge but that its due process challenge was also based on EPA's pattern and practice of administering section 106.

Holding

Section 106 of CERCLA allows EPA to clean up a site that has been contaminated with hazardous waste and to then file suit in a federal district court to compel a party to comply with EPA's remedy. Under section 106(b)'s penalty provision, any person who, "without sufficient cause," willfully violates a section 106 order or refuses or fails to comply with it may be fined up to $25,000 for each day of violation. Section 107 also allows a court to impose punitive damages of up to three times the amount incurred for a party's failure to take action should a party not comply with a section 106 order.

The court examined GE's amended complaint and concluded that the company gave sufficient notice as to both of its theories challenging the constitutionality of CERCLA. The complaint makes several references to EPA's administration of section 106, providing sufficient notice of a practice and pattern challenge to CERCLA.

EPA argued that the appellate court's decision in *General Electric v. EPA,* 360 F.3d 188 (D.C. Cir. 2004), and section 113(h) bars a pattern and practice claim. In that decision, according to EPA, the court characterized GE's claim as "facial," noting such language as: "GE's due process challenge to CERCLA's administrative orders regime is not a challenge to the way in which EPA is administering the statute . . . but rather it is a challenge to the CERCLA statute itself." *Id.* at 191. Therefore, the agency argued, the circuit court opinion held only that a facial claim was viable under section 113(h).

The district court disagreed. It read the decision as drawing an important connection between facial and systemic claims. The court distinguished between systemic and "as applied" or "particularized" claims. The court built on an analogy between facial and systemic claims through caselaw and the text and purpose of section 113(h) to confine the jurisdictional bar only to those claims that challenge a specific order. Pattern and practice claims do not address specific orders; they constitute a broader systemic challenge. The appellate court found that the language of section 113(h) limits the jurisdictional bar only to challenges of specific section 106 orders.

The circuit court relied on the decision in *McNary v. Haitian Refugee Center, Inc.,* 598 U.S. 479 (1991), in his holding. In that case, the plaintiff brought a challenge to the manner in which the Immigration and Naturalization Service was administering the Special Agricultural Worker provision. Judicial review of a specific application was barred, but the Supreme Court held that the plaintiff was not barred from challenging "unconstitutional practices and policies used by the agency in processing applications." *Id.* at 492. The circuit court directly applied the reasoning in *McNary* to find that a judicial review bar does not preclude the type of systemic claim raised in *McNary* and, hence, the facial and systemic claims here.

The court opined that EPA's argument that GE's pattern and practice claim does not exist independently neglected the citations in the appellate decision to cases that have recognized those claims. Thus, the court

found that GE's pattern and practice claim presents a cognizable legal theory not barred by section 113(h) of CERCLA.

The court also rejected EPA's argument that GE lacked standing to bring a pattern and practice claim. The agency noted that *McNary* was brought by a class of plaintiffs and contended that GE lacks standing to raise third party claims. Thus, the claim should be dismissed. The court disagreed. The true nature of GE's claim is not a claim on behalf of third parties and it is not seeking relief on anyone else's behalf. GE's standing to bring the claim is based upon the fact that the complained of practice has been applied to and injured GE, not on the basis that it is representing third party interests.

The court then addressed EPA's argument that GE's challenge is to the text of CERCLA and, thus, should be decided exclusively based on the statutory language. As such, no discovery is necessary and the claim is ripe for adjudication. EPA argued that GE's argument fails because GE cannot establish that the section 106 order procedure is unconstitutional in every application.

GE raised three constitutional problems: First, a PRP is deprived of property without a hearing; second, a PRP doesn't receive a meaningful postdeprivation hearing; and, third, the civil fines and penalties that accompany a section 106 order are so coercive they constitute a due process violation under *Ex Parte Young,* 209 U.S. 123 (1908). The court agreed that there are no issues of fact in order to resolve GE's facial challenge. It thus proceeded to the merits of EPA's motion for summary judgment.

GE's claim that it and others are unconstitutionally deprived of property under a section 106 order is generally based on the decision in *Mathews v. Eldridge,* 424 U.S. 319 (1976), in which the Court described a three-part balancing test, weighing the private interest, the risk of error, and the governmental interest to determine whether the procedure challenged meets due process requirements. However, prior to applying the *Mathews* three-part test, GE first must show that a PRP suffers a deprivation of property upon the issuance of a section 106 order. EPA argued that there is no deprivation of property until a court actually enforces compliance with a 106 order. GE answered that the unilateral administrative order (UAL) issued under section 106 does not need to be self-executing to constitute a deprivation and cited *Hodel v. Virginia Surface Mining,* 452 U.S. 264 (1982). In *Hodel,* the Court held that an administrative order requiring immediate cessation of mining operations was a deprivation of property even though, to collect penalties, there had to be judicial intervention.

The court concluded that, since a party may refuse to comply with a UAL, there is no immediate deprivation of property. EPA cannot deprive a party of its property without judicial intervention. A party has a meaningful choice upon receipt of a UAL; therefore, there is no automatic deprivation of property. The court cited the Second Circuit decision in *Asbestos Construction Services, Inc. v. EPA,* 849 F.2d 765 (1988). In that case, EPA issued a compliance order under the Clean Air Act, requiring compliance in future asbestos abatement projects. Failure to comply could result in EPA's enforcing the order in court. The Second Circuit rejected the plaintiff's argument that issuance of a compliance order without a prior administrative hearing deprived it of property without due process.

The court also rejected GE's attack on the sufficiency of the judicial hearing, noting that CERCLA's statutory scheme does not require EPA to bear the burden of persuading that its order constituted an appropriate remedy because a UAO may only be challenged under an "arbitrary and capricious" standard. The court found two flaws with GE's argument. First, EPA is required to prove, under a de novo standard, that the defendant is a liable party. The second flaw is that it is well established that judicial review under the arbitrary and capricious standard satisfies due process requirements.

Ex Parte Young established the principle that a statutory scheme imposing penalties when a person seeks judicial review is unconstitutional if "the penalties for

disobedience are by fines so enormous . . . as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation." 209 U.S. at 147. The courts have recognized, however, that a statute which provides a "good faith" defense provision can be saved from being deemed unconstitutional. CERCLA provides that daily penalties for failure to comply with a UAO will be imposed by a court only if the defendant has failed to comply "without sufficient cause." Further, CERCLA provides a court with discretion as to whether to impose fines and penalties. The court held that the availability of judicial discretion coupled with the "sufficient cause" defense cures any potential constitutional problem under *Ex Parte Young.*

GE's concerns regarding the risk of potentially millions of dollars on a "sufficient cause" defense that has not been fully developed in caselaw may warrant development in its pattern and practice case. However, the textual challenge to the section 106 UAO scheme must fail.

The court also agreed with EPA that the *Salerno* doctrine (from *United States v. Salerno,* 481 U.S. 739 (1987)) should be applied to GE's facial challenge. The *Salerno* doctrine instructs a court to uphold a statute if the plaintiff cannot show that the statute is unconstitutional in every application. The court did note that some justices have expressed concern about some aspects of the *Salerno* doctrine. Nevertheless, since it is applied in appropriate circumstances in the D.C. Circuit, the court found it applicable in this case. However, the court also commented that GE might be correct that the doctrine is inappropriate for a pattern and practice claim.

Applying the *Salerno* doctrine, it is clear that section 106, even assuming there are due process concerns, could be constitutionally applied in emergency situations. Therefore, GE's facial challenge must fail. The court, thus, granted EPA's motion for summary judgment on GE's facial challenge to CERCLA, but held that the pattern and practice claim was viable and that GE may proceed with discovery on that aspect of its claim.

Court Allows Suit by PRP to Proceed Under Section 107: *Metropolitan Water Reclamation District of Greater Chicago v. Lake River Corporation et al.,* No. 03 C 0754 (N.D. Ill. Apr. 12, 2005)

Background

The plaintiff owns property in Chicago, Illinois. In the 1940s and 1950s, it entered into a long-term lease of the land with Lake River Corporation which operated an industrial chemical storage, mixing, and packaging facility. The land became contaminated and the plaintiff brought a lawsuit for cost recovery pursuant to section 107(a) and for contribution pursuant to section 113(f)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The defendants include a successor in interest to Lake River, North American Galvanizing & Coatings, Inc. North American brought a motion to dismiss.

Holding

Since the Water Reclamation District was and still is the owner of the land, it is a potentially responsible party (PRP) within the meaning of CERCLA. Originally, prior to the passage of the Superfund Amendments and Reauthorization Act (SARA), CERCLA did not contain an explicit right of contribution for PRPs. Nonetheless, many courts held that a contribution right could be implied from the provisions of the statute. Since the passage of SARA, courts have questioned whether the implied right of recovery for PRPs under section 107(a) survived. In dicta in *Key Tronic Corporation v. United States,* 511 U.S. 809, 816–17 (1994), the Supreme Court suggested that some implied right to contribution remained: "the statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107."

The majority in *Cooper Industries v. Aviall Services, Inc.,* 125 S. Ct. 577, 581 (2004), did not resolve this issue when it held that PRPs that voluntarily clean up a site can not pursue contribution under section 113

of CERCLA. The dissent, however, opined that there was "no cause for protracting this litigation by requiring the Fifth Circuit to revisit a determination [the Court] has essentially made already. . . . [F]ederal courts, prior to the enactment of § 113(f)(1), had correctly held that PRPs could recover [under ¶ 107] a proportionate share of their costs in actions for contribution against other PRPs." *Id.* at 588. The dissent went on to note that section 113(f)(1) includes a savings clause preserving all *preexisting* state and federal rights of action for contribution, including, presumably, the right of contribution under section 107.

Like the plaintiff in *Aviall*, the plaintiff in this case voluntarily undertook clean-up efforts, so a section 113 contribution claim is unavailable to it. The Seventh Circuit has not yet allowed a claim to go forward under an implied right of contribution in section 107. Nevertheless, in dicta in *Rumpke v. Cummins Engine Company,* 107 F.3d 1235, 1241 (7th Cir. 1997), the court observed that "to the extent this looks like an implied claim for contribution . . . we note that dicta in the Supreme Court's decision in *Key Tronic* suggests that the Court was not disturbed by that possibility."

In *Rumpke,* the court noted that the plaintiff fell into the category of an innocent landowner who could bring a cost recovery suit under section 107. Those who have qualified for innocent landowner status have fallen into two categories: plaintiffs who have unknowingly purchased contaminated land and plaintiffs whose land was contaminated by a third party's surreptitious dumping. In this case, the plaintiff is not eligible for that status because it entered into a long-term lease with a party who it knew was intending to keep and process chemical materials.

Since the Water Reclamation District cannot seek contribution under section 113(f)(1) and it cannot claim innocent landowner status, its only remaining CERCLA remedy is an implied right to contribution under section 107(a). The court concluded that PRPs are covered by the "any other person" language who may bring a suit under section 107. Since SARA explicitly preserved all state and federal contribution rights that preexisted the amendment, the court determined that an implied right of contribution under section 107(a) survived the passage of SARA. The court concluded that "[a]ny other outcome would seem to lie contrary to the general purposes of CERCLA to promote prompt and proper cleanup of contaminated properties."

[Editor's note: The court in *Vince Street LLC v. James R. Keeling,* No. 6:03-CV-223 (E.D. Tex. March 24, 2005), came to a similar conclusion. "Section 107(a) . . . entails a wider range . . . [of] actions, including potentially responsible parties seeking contribution for costs incurred in voluntary cleanups." Slip op. at 13.]

Court Lacks Jurisdiction to Review EPA's Final Administrative Determination: *Narragansett Electric Company v. U.S. Environmental Protection Agency,* No. 04-1127 (1st Cir. May 6, 2005)

Background

In 1987, the Commonwealth of Massachusetts sued Blackstone Valley Electric Company, the predecessor-in-interest to the Narragansett Electric Company in federal district court to recover cleanup and response costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The cleanup was to remove soil and wood chips contaminated with ferric ferrocyanide (FFC), a byproduct of a coal-based gas manufacturing process. At issue in the lawsuit was whether FFC was a "hazardous substance" within the meaning of CERCLA. The definition of "hazardous substance" in CERCLA incorporates lists of substances from other environmental statutes, including "toxic pollutants" from the Clean Water Act (CWA). The district court granted partial summary judgment on this issue but, on appeal, the court held that there was no plain meaning as to whether the term "cyanides" included FFC. The appellate court remanded the case to the district court to refer to EPA, under the doctrine of primary jurisdiction, the question for administrative determination of whether FFC qualifies as one of the

cyanides "within the meaning of 40 C.F.R. § 401.15 and 40 C.F.R. § 302.4."

In 2003, EPA determined that FFC was a cyanide within the meaning of the Toxic Pollutant List under the CWA. In reaching this conclusion, the agency undertook both a scientific and legal review. EPA provided notice and opportunity for public comment as well as a peer review of its proposed determination by scientists prior to promulgating its final administrative determination (FAD). Unhappy with the FAD, Narragansett filed a petition for review in the appellate court. EPA countered that the court of appeals lacked subject matter jurisdiction. Massachusetts intervened, taking no position on the jurisdiction question, but arguing that, if there is no jurisdiction, the action should be transferred to the district court hearing the initial case.

Holding

Narragansett acknowledged that the FAD issued in this case is not specifically covered by section 1369(b) of the CWA, the jurisdictional provision at issue. That provision allows the courts of appeals to directly review the promulgation of "any effluent standard, prohibition, or pretreatment standard" under 33 U.S.C. § 1317. 33 U.S.C. § 1369(b)(1)(C). Narragansett argued, however, that EPA should consider the FAD equivalent to a "listing" of FFC as a "toxic pollutant" under the CWA, instead of merely an interpretation of an existing listing. It also argued that, since a listing is a precondition for the promulgation of effluent standards or prohibitions dealing with a listed substance and is, thus, intertwined with a promulgation, the listing itself must be directly reviewable.

EPA answered that a listing is not so intertwined with a subsequent standard or prohibition as to require initial review in the courts of appeals. Narragansett had cited *Natural Resources Defense Council, Inc. v. Train,* 519 F.2d 287, 290–91, as support for its argument, but EPA noted that the case predated revisions that loosened the relationship between listings and effluent standards.

The court determined it need not address the issue raised but, instead, adopted EPA's alternate argument that the FAD issued was not equivalent to a "listing' under section 1317(a). Before listing a substance as a toxic pollutant, EPA is required to consider various factors. In contrast, the question the district court referred to EPA was "whether FFC qualifies as one of the 'cyanides' within the meaning of" the pertinent regulations. EPA answered that question by emphasizing legal considerations, using scientific considerations only to support its analysis. The scientific review did not include a consideration of the required statutory factors required in determining whether a substance should be listed.

Therefore, the court determined it lacked jurisdiction and agreed that transfer to the district court, as requested by Massachusetts, was appropriate.

Preemption

FIFRA Does Not Preempt Certain State Law Claims: *Bates v. Dow Agrosciences LLC,* No. 03-388 (U.S. Apr. 27, 2005)

Background

Twenty-nine peanut farmers brought this lawsuit alleging that their crops were severely damaged in 2000 by the application of an herbicide named "Strongarm," manufactured by the respondent. The issue is whether the state law claims brought are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.*

Under FIFRA, a manufacturer that wishes to register a pesticide (a term that includes that which would commonly be known as an herbicide) must submit a proposed label to U.S. EPA as well as certain supporting data. If the agency determines the product is efficacious (although the agency may waive the efficacy review), that it will not have unreasonable adverse effects on humans and the environment, and that the label does not constitute "misbranding," EPA will register it. A "misbranded" pesticide is one that has a false or misleading statement on its label con-

cerning the efficacy of the pesticide or one whose label does not carry the necessary warnings or cautionary statements.

Under FIFRA, manufacturers have a *continuing* obligation to ensure the labeling requirements are fulfilled. The states' role in pesticide regulation was addressed in FIFRA's 1972 amendments:

> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.
>
> (3) Additional uses
>
> (1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator. Such registration shall be deemed registration under section 136a of this title for all purposes of this subchapter, but shall authorize distribution and use only within such State. . . .

7 U.S.C. § 136v.

When Strongarm was registered, there was a general waiver as to efficacy demonstration. EPA confirmed it was not evaluating pesticide efficacy. In its statement, the agency stated that "pesticide producers are aware that they are potentially subject to damage suits by the user community if their products prove ineffective in actual use." Pesticide Registration Notice 96-4, at 5 (June 3, 1996).

According to the petitioners in this lawsuit, the respondent knew, or should have known, that Strongarm, used in soils with a pH of 7,0 or greater, would stunt the growth of peanuts. Nonetheless, the label stated "Use of Strongarm is recommended in all areas where peanuts are grown." Typically, soils in western Texas have PH levels of 7.2 or higher. Prior to the 2001 growing season, Dow reregistered the Strongarm label providing a supplemental label for use with products being distributed in New Mexico, Oklahoma, and Texas. The new label stated: "Do not apply Strongarm to soils with a pH of 7.2 or greater."

The petitioners were unsuccessful in their attempts to negotiate their claims with Dow. They then gave notice of their intent to bring suit, a requirement of the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA). Dow then filed a declaratory judgment in federal district court, asserting that the claims were expressly or impliedly preempted by FIFRA. The petitioners brought counterclaims under state law, including common law tort claims and the DTPA. The district court granted Dow's motion for summary judgment, rejecting one claim on state law grounds and dismissing the others as expressly preempted by FIFRA, 7 U.S.C. § 136v(b). The Court of Appeals affirmed, finding that a judgment against Dow would induce it to alter its product label.

The Court of Appeals' decision was consistent with the majority of the Courts of Appeal and several state high courts. It conflicted with other decisions as well as the views of EPA set forth in an amicus curiae brief filed with the California Supreme Court in 2000 in *Etcheverry v. Tri-Ag Service, Inc.,* 993 P.2d 366 (2000).

The Supreme Court granted certiorari.

Holding

FIFRA's 1972 amendments changed the statute from "a labeling law into a comprehensive regulatory statute." *Ruckelshaus v. Monsanto Company,* 467 U.S. 986, 991 (1984). The Court previously addressed preemption under FIFRA in *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597 (1991). In that case, the Court rejected a claim that section 136v(b) preempted a town's ordinance requiring a special permit for aerial application of pesticides. The Court stated that FIFRA was not "a sufficiently comprehensive statute to justify an inference that Congress had occupied the field to the exclusion of States." *Id.* at 607. In fact, the Court held that the statute left "ample room for States and localities to supplement federal efforts even absent the express regulatory authorization of § 136v(a)." *Id.* at 613. In view of the role envisioned for the states under FIFRA, the Court concluded that:

> Nothing in the text of FIFRA would prevent a State from making the violation of a federal labeling or packaging requirement a state offense, thereby imposing its own sanctions on pesticide manufacturers who violate federal law. The imposition of state sanctions for violating state rules that merely duplicate federal requirements is equally consistent with the text of § 136v.

In examining the petitioners' claims in light of its views of FIFRA's scope, the Court addressed the viability of the following state law claims: breach of express warranty, fraud, violation of the DTPA, strict liability, negligent testing, and negligent failure to warn.

Section 136v(b) of FIFRA states: "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." The prohibition is to "requirements." The Court stated that "[a]n occurrence that merely motivates an optional decision does not qualify as a requirement" even though the word does reach beyond positive enactments to include common-law duties. Slip op. at 10. For a state rule to be preempted under the statute, there must be a requirement for "labeling or packaging" and that requirement must be "in addition to or different from" those required in FIFRA.

Many of the common law rules on which the petitioners rely are not, in fact, requirements for labeling or packaging. These include rules that require the design of reasonably safe products, the use of due care in conducting testing of the products, the marketing of products free of manufacturing defects, and the honoring of express warranties or other commitments. Even though the warranty in this case was on the label, the common law rule does not require a warranty or that the warranty be in any particular form. Therefore, it is not a requirement for labeling or packaging.

The appellate court concluded that a finding of liability on these claims would "induce Dow to alter [its] label." 332 F.3d at 332. However, an effects-based test is not supported by the statutory text which speaks only in terms of "requirements." According to the Court, the appropriate inquiry calls for an examination of the elements of the common law duty at issue, not for speculation as to what will happen if a manufacturer should lose a jury verdict. The inducement test, used by the appellate court, is overbroad. It would knock down design defect claims that even Dow concedes would not be preempted. Furthermore, the test is not consistent with FIFRA's language that confirms the state's broad authority to regulate the sale and use of pesticides. The Court concluded:

> It is highly unlikely that Congress endeavored to draw a line between the type of indirect pressure caused by a State's power to impose sales and use restrictions and the even more attenuated pressure exerted by common-law suits. The inducement test is not supported by either the text or the structure of the statute.

Slip op. at 13.

On the other hand, the fraud and negligent-failure-to-warn claims are based on common law rules that qualify as "requirements for labeling or packaging." Those rules are alleged to have been violated by the label in question by containing false statements and inadequate warnings. The Court of Appeals assumed that these claims were preempted under FIFRA, as they were in *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504 (1992), a case in which the Court held that the term "requirement or prohibition" in the Public Health Cigarette Smoking act of 1969 included certain common-law duties. However, the appellate court failed to note the textual differences between the preemption clauses in the two statutes.

FIFRA, unlike the act under consideration in *Cipollone,* prohibits only labeling and packaging requirements that are "in addition to or different from" those required under FIFRA. The petitioners argued that their claims are not preempted because these common-law duties are similar to the duties under FIFRA. The Court agreed with the petitioners that the state need not explicitly incorporate FIFRA's standards as an element of a cause of action in order to avoid preemption. However, the Court left it to the court of appeals to determine whether the common law duties in question are equivalent to FIFRA's misbranding standards.

The "parallel requirements" reading which the Court adopted is supported by the Court's holding in *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 475 (1996). In that case, the Court held that a preemption provision in a statute regulating medical devices did not deny Florida the right to provide a traditional damages remedy for violations of common law duties whether they paralleled federal requirements. Dow argued that the "parallel requirements" reading of section 136v(b) would "give juries in 50 States the authority to give content to FIFRA's misbranding prohibition, establishing a crazy-quilt of anti-misbranding requirements different from the one defined by FIFRA itself and intended by Congress to be interpreted authoritatively by EPA." Brief for Respondent 16; see also Brief for United States as *Amicus Curiae* 25–27. However, this argument do not give any plausible alternative reading for the words "in addition to or different from." Indeed, it would seem that the argument would, instead, read that part of the provision out of the statute. Furthermore, there is no evidence that these types of suits have led to any "crazy-quilt" of standards or otherwise led to hardship for manufacturers or for EPA.

Even if an alternative reading had been offered by Dow, the Court would still have to adopt the reading that would disfavor preemption. In areas of traditional state regulation, the Court assumes a federal statute does not preempt state law unless Congress has made that intent "clear and manifest." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company,* 514 U.S. 645, 655 (1995). According to the Court, "[t]he notion that FIFRA contains a nonambiguous command to pre-empt the types of tort claims that parallel FIFRA's misbranding requirements is particularly dubious given that just five years ago the United States advocated the interpretation that we adopt today."

The Court also found support for its holding in the "long history of tort litigation against manufacturers of poisonous substances." Slip op. at 17. Particularly since Congress amended FIFRA to allow EPA to waive efficacy review of newly registered pesticides, the Court found it unlikely that Congress intended section 136v(b) to give pesticide manufacturers virtual immunity from certain forms of tort liability. Although over-enforcement of FIFRA's misbranding prohibition may create a risk of imposing unnecessary financial burdens on manufacturers, under-enforcement

creates both financial risks for consumers and risks to their safety and to the environment.

The Court further rejected the policy argument that emphasized that FIFRA intended uniformity and centralization of pesticide regulation. Instead, the Court found that the statute authorized a relatively decentralized scheme, preserving a broad role for state regulation. A literal reading of section 136v(b) is consistent with the shared authority of the federal and state governments.

Furthermore, private remedies enforcing federal misbranding requirements would aid in exposing new dangers associated with pesticides. FIFRA contemplates that labels will evolve as manufacturers gain more information about their products' performance in diverse settings.

Since the Court had not received sufficient brief on the issue of whether the Texas common law remedies are parallel to a requirement under FIFRA, it remanded the case to the court of appeals, emphasizing that there must be true equivalence and that state law requirements must be measured against relevant EPA regulations. To survive preemption, the state law requirement does not need to be phrased in identical language. A manufacturer should not be held liable under a state requirement unless it would also be liable for misbranding as defined by FIFRA.

Sovereign Immunity

Federal Government Did Not Waive Sovereign Immunity: *Marina Bay Realty Trust LLC et al v. United States et al.,* No. 04-1909 (1st Cir. May 3, 2005)

Background

Between 1917 and 1953, the United States used a parcel of land in Quincy, Massachusetts, for various defense purposes, including as a Naval air station. In 1954, the base was closed and offered for sale. Eventually, the property was purchased by a Peter Gordon who was advised to undertake a study to determine if there were underground storage tanks present. Gordon declined to do so. Instead, he transferred the property to a Gordon entity, Marina Bay Development Group, LLC, (MBDG) who then transferred it to appellant Marina Bay. Marina Bay paid for an environmental investigation which discovered elevated levels of petroleum hydrocarbons in the soil. Eventually, a corroded 3,000 gallon underground storage tank and an intake 350-plus gallon underground storage tank were removed and contaminated soil excavated.

Marina Bay sold the property to Alliance and then brought an action against the federal government for clean-up costs and for increased construction and finance costs associated with the delay experienced as a result of the contamination. The claims included claims under Massachusetts General Laws, the Resource Conservation and Recovery Act (RCRA), and the Federal Tort Claims Act (FTCA) as well as common law negligence. The district court dismissed the RCRA claims and entered judgment for the United States on the FTCA claims. This appeal followed.

Holding

Under the doctrine of *Lane v. Pena,* 518 U.S. 187 (1996), a waiver of sovereign immunity must be "unequivocally expressed in statutory text." The appellants argued that section 6001(a)(1) of RCRA contains such a waiver, arguing that compliance with chapter 21E of Massachusetts law (regarding liability for the release of oil or hazardous material) is a "requirement" under Massachusetts state law. RCRA's waiver provision provides, in relevant part, that the federal government:

> [S]hall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste dis-

> posal and management in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. . . . The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge).

Id.

There is no express waiver of immunity for private suits seeking monetary damages. As the court commented in *McClellan Highway Corporation v. United States,* 95 F. Supp. 2d. 1 (D. Mass. 2000):

> [A] clear focus on the precise statutory language —"requirements . . . respecting control and abatement" including "all administrative orders and all civil administrative penalties and fines" — does not plainly encompass response costs and thus does not evidence an unambiguous waiver of sovereign immunity to private suits for reimbursement of response costs. . . . At most, there is an ambiguity regarding a waiver, and such an ambiguity must be construed in favor of immunity.

Id. at 16–17.

The text of the FTCA provides, in relevant part, that federal sovereign immunity is waived:

> [F]or money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

The waiver language requires that there must have been a "negligent or wrongful act or omission" in order for the United States to be liable. This means that there has to be a showing of fault in order for liability to attach. The appellants argued that a violation of Chapter 21E on its own is sufficient to establish negligent or wrongful conduct. The court disagreed. The causation requirement of Chapter 21E requires more than a showing of mere ownership; it requires that a showing that the prior owner caused the contamination. However, it does not require a showing that the owner was negligent or wrongful in doing so.

Thus, the court affirmed the district court's dismissal of the RCRA claims and entry of judgment for the United States on the FTCA claims.

CIVIL PROCEEDINGS

New Filings

Air

***New Jersey et al. v. U.S. Environmental Protection Agency,* No. 05-60771 (D.D.C. May 19, 2005)**

The attorneys general of ten states — New Jersey, California, Connecticut, Maine, Massachusetts, New Hampshire, New Mexico, New York, Pennsylvania, Vermont, and Wisconsin — have filed suit against U.S. EPA, challenging the agency's mercury rule, issued in March. The "cap-and-trade" rule allows power plants to purchase emissions reduction credits from plants whose emissions fall below target levels. The regulation is due to take effect in 2010.

[For further information, contact New Jersey DAG Kevin P. Auerbacher at (609) 984-5612.]

Settlements

Air

***Arizona ex rel. Stephen A. Owens v. Maricopa County Clean Creek Landfill,* No. CV 2005-00753 (Super. Ct. Maricopa County May 11, 2005)**

To settle allegations that Maricopa County, Arizona, has allowed methane gas to escape from a landfill, the state has filed a complaint and has entered into a settlement with the county's Board of Supervisors. The county has agreed to a settlement valued at $230,000 that would include at least three collection events for hazardous household waste.

The county intends to convert the property into a 128-acre park, known as the Horseshoe Park and Equestrian Centre, after the landfill is filled and capped. The park will include equestrian arenas, bleachers, stables, horse trails, and picnic tables.

[For further information, contact Arizona AAG Jeff Cantrell at (602) 542-8500.]

***Missouri v. Renewable Environmental Solutions LLC,* No. 05AP-CC-00035 (Cir. Ct. Jasper County May 6, 2005)**

In April, the Missouri Attorney General's Office and the City of Carthage, Missouri, filed a nuisance suit against the owner of an animal-waste conversion facility alleging that the odors emanating from the company's factory in Carthage, Missouri, were creating a public nuisance. Under a recently filed preliminary injunction and consent decree, the company will install an enhanced thermal oxidizer and upgrade a high-efficiency scrubber. It will also take additional measures to control odors when handling raw materials.

A thermal conversion process is used to convert turkey waste into alternative fuels and specialty chemicals. The facility is a joint venture of Changing World Technologies, Inc., and Con-Agra Foods, Inc. It is the first commercial-scale Thermal Conversion Process plant.

[For further information, contact Missouri AAG Bill Bryan at (573) 751-8815.]

***United States v. Valero Refining Company,* No. SA-05-CA-0569 (W.D. Tex. June 16, 2005)**

The U.S. Department of Justice and the states of Colorado, Louisiana, New Jersey, Oklahoma, and Texas have entered into a settlement with Valero Refining Company regarding Clean Air Act violations. The consent decree will require Valero and the purchaser of a former Valero refinery in Martinez, California, to spend more than $700 million to install and implement innovative emission control technologies at their refineries.

Under the proposed consent decree, Valero will also pay a $5.5 million civil penalty and spend more than $5.5 million on environmentally beneficial projects to reduce emissions further and to support activities in the communities where its refineries are located.

The settlement was undertaken as part of U.S. EPA's Petroleum Refinery Initiative. To date, fifteen refiners have reached multi-facility settlements with the federal government which affect seventy-five refineries in twenty-five states.

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

[For further information, contact Dianne Shawley, DOJ, at (202) 514-0096.]

***United States v. DuPont de Nemours,* No. 3-05-0345 (M.D. Tenn. May 2, 2005)**

The federal government has reached a proposed settlement with DuPont regarding Clean Air Act (CAA) violations at its titanium dioxide manufacturing facility in New Johnsonville, Tennessee. The complaint, filed simultaneously with the consent decree, alleged that DuPont violated the CAA after its industrial process refrigeration equipment (IPRs) and comfort cooling appliances leaked hydrchloroflurocarbon-22 refrigerant in excessive amounts. Nearly 9,000 pounds or refrigerant leaked into the atmosphere as a result of DuPont's failure to perform the required testing, reporting, recordkeeping, and repairs.

Under the proposed agreement, DuPont will perform injunctive relief valued at $1.1 million, pay $250,000 in civil penalties, and perform a Supplemental Environmental Project valued at $1.2 million. The injunctive relief and SEP require DuPont to replace or retrofit each chiller or IPR with IPRs that use only non-ozone depleting refrigerant. The settlement will prevent over 20,000 pounds of refrigerants from entering the environment each year.

[For further information, contact Cheryl Smout, DOJ, at (202) 514-5466.]

CRIMINAL PROSECUTIONS

Pleas/Verdicts

Water

***Alaska v. Greenpeace, International,* No. 1KE-S-04-771CR (Dist. Ct. Ketchikan May 9, 2005)**

Greenpeace was recently found guilty of violating Alaska law when its ship *Arctic Sunrise* entered state waters without filing an oil spill response plan application. Greenpeace's ship came to Alaska to conduct a campaign against logging in Tongass National Forest. The ship's captain, Arne Sorensen, was convicted on two counts of failing to file the oil spill response plan paperwork and one count of failing to file a certificate of financial responsibility.

The charges were filed after the ship sailed despite having been ordered to stay anchored in Ketchikan until the paperwork was in order.

[For further information, contact Alaska AAG James Fayette at (907) 269-6379.]

***United States v. David Marshall Haggard Sr. and Haggard Company, Inc.,* No. 05-84 (E.D. Ky. May 20, 2005)**

David Marshall Haggard Sr. and Haggard Company, Inc., of Winchester, Kentucky, recently pled guilty to knowingly discharging trucked and hauled pollutants directly into the Winchester Municipal Utilities sewer system in violation of the Clean Water Act.

Haggard Company was in the business of sewage collection. It dumped material it had collected into a sewer line on its property instead of disposing of it correctly.

[For further information, contact AUSA Robert M. Duncan Jr. at (859) 233-2661.]

***Wisconsin v. Menard, Inc.,* No. 04CF670 (Cir. Ct. Eau Claire May 16, 2005)**

Menard, Inc., a home improvement retailing company, recently pled guilty to a misdemeanor water pollution charge stemming from the discharge of pollutants down a shop drain at the company's distribution center in Eau Claire, Wisconsin. The complaint alleged that employees of the company disposed of solvents, cleaners, oils, washwater, and other pollutants down the drain, which led to a storm water tunnel that eventually emptied into a tributary of the Chippewa River.

[For further information, contact Wisconsin AAG Hillary Schwab at (608) 267-7163.]

Sentences

Air

***United States v. Phillip H. Cohn,* No. 3:04-cr-30051 (S.D. Ill. May 20, 2005)**

Phillip H. Cohn of St. Louis, Missouri, has been sentenced after he pled guilty to fraud and a Clean Air Act violation. Cohn pled guilty to submitting false invoices to a school district for purportedly doing environmental cleanup at a middle school site. After the checks were issued, he caused endorsements of environmental companies to be forged on checks and used the money for personal expenses. Cohn also admitted to failing to remove substantial quantities of known asbestos-containing materials from the Spivey Building, the tallest building in East St. Louis, before sending work crews into the building for demolition and renovation work.

He was sentenced to sixty months' imprisonment and five years' supervised release and was ordered to pay $347,200 restitution to the defrauded school district.

[For further information, contact AUSA Hal Goldsmith at (618) 628-3700.]

Hazardous Waste

***Pennsylvania v. Willie C. Hennington,* No. 1960-2004 (C.P. Franklin County May 11, 2005)**

Willie Hennington has been sentenced on his pleading guilty to a felony count under the Pennsylvania Solid Waste Management Act. He was setnenced to three months' incarceration and five years' probation. In addition, he was ordered to pay a $25,00 fine to the Department of Environmental Protection's (DEP's) Solid Waste Abatement Fund, pay $28,907 in investigative costs to the DEP and $1,600 to the Office of Attorney General.

In June 2004, the Pennsylvania Attorney General's Environmental Crime Section executed a search warrant at a warehouse in Franklin County leased by Hennington. Investigators discovered 55-gallon drums of waste, waste tires, and other municipal waste. Some of the waste was tested and found to be hazardous. In his sentencing, Hennington was ordered to pay $3,737 in restitution to the owner of the warehouse.

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