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NO COMPARISON: BARRING CITIZEN SUITS IN DUAL ENFORCEMENT ACTIONS

By

Thomas R. Head III and Jeffrey H. Wood*

Roughly speaking, there is no comparison — or is there? This is one question pondered recently by federal courts in an attempt to formulate a test for determining whether state water pollution control laws are comparable to the federal Clean Water Act (CWA) for purposes of barring citizen suits. *See McAbee v. Fort Payne*, 318 F.3d 1248 (11th Cir. 2003) (adopting the “rough comparability” test). Under the CWA, individuals or groups of citizens may sue alleged violators in federal court after providing the requisite notice to the U.S. Environmental Protection Agency (EPA), the appropriate state agency, and the alleged violator. Problems arise when citizens bring actions against an alleged violator and the applicable state environmental agency has already commenced an administrative enforcement action for the same alleged violations. In order to prevent the burden imposed by dual actions for the same violations, Section 309(g) of the CWA, 33 U.S.C. § 1319(g)(6), bars citizens from filing suit if, among other things, the state is diligently prosecuting an administrative penalty under a “State law comparable” to the CWA’s administrative penalty provisions. In addition to Section 309(g) there are other statutory and extrastatutory bars to citizen suits. These statutory bars have in some instances been interpreted in widely disparate manners by the courts. For example, two circuit courts of appeal have recently reached diametrically opposed interpretations of the meaning of “comparable” in the

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context of CWA citizen suits. *Compare McAbee v. Fort Payne*, 318 F.3d 1248 (11th Cir. 2003) with *Lockett v. EPA*, 319 F.3d 678 (5th Cir. 2003).

If there is one thing on which the courts do agree, or at least pay consistent lip service to, it is the underlying rationale for citizen suits. The CWA contemplates that state and/or federal agencies have primary enforcement authority and citizen enforcement simply acts as a backstop to ensure adequate enforcement. *See North & South Rivers Watershed Ass’n v. Scituate*, 949 F.2d 552, 555 (1st Cir. 1991) (stating, “The primary function of the provision for citizen suits is to enable private parties to assist in enforcement efforts where Federal and State authorities appear unwilling to act.”). The limitation on citizen suits when the government is diligently prosecuting an action “suggests that the citizen suit is meant to *supplement rather than to supplant* governmental action.” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 60 (1987) (emphasis added).

The CWA’s legislative history supports the notion that citizen suits are only proper when the government has failed to carry out its duties. “The Committee intends the great volume of enforcement actions [to] be brought by the State,” and citizen suits are proper only “if the Federal, State, and local agencies fail to exercise their enforcement responsibility.” S. Rep. No. 92-414, at 64 (1971), *reprinted in 2A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972*, at 1482 (1973). Therefore, once the government is diligently prosecuting an action, the citizen suit becomes unnecessary. *See Scituate*, 949 F.2d at 555 (citing *Gwaltney*, 484 U.S. at 60–61).

Generally speaking, federal environmental statutes authorize three types of citizen suits. First, most environmental statutes, including Section 505(a) of the CWA, 33 U.S.C. § 1365(a), allow “citizen enforcement actions” and typically state that any person may commence a civil action against any person alleged to be in violation of the statute, regulations, or a particular permit. These citizen enforcement actions empower citizens with the ability to act as “private attor-

neys general” by supplementing government enforcement against violators. Second, many federal environmental statutes allow “deadline” or “action-forcing” citizen suits, authorizing any person to file suit to force a government official to perform a nondiscretionary act or comply with a statutory deadline. *See, e.g.*, 42 U.S.C. § 7604(a). Finally, certain environmental laws, such as Section 307(g) of the Clean Air Act (CAA), 42 U.S.C. § 7607(b), authorize citizens to seek judicial review of the legality of agency actions. These “judicial review suits” basically supplement the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701–706.

Over the first fifteen years of modern environmental statutes, citizen groups were relatively successful in their enforcement initiatives, especially when suing under statutes, like the CWA, that required dischargers to voluntarily report their permit violations. In fact, by 1983, citizens were pursuing more CWA enforcement actions against alleged violators than EPA. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1957 (3d ed. 2000). As a result, dischargers began looking more closely at the language of the CWA citizen suit provisions to find inherent limits on the ability of citizens to file enforcement actions, and over the following decade, courts began to oblige by recognizing certain statutory “bars” to environmental citizen suits. Specifically, with respect to the CWA, three bars to citizen suits emerged. First, Section 309(g) bars citizen suits where the state is diligently prosecuting an administrative penalty action under “comparable” state law. Likewise, Section 505(b) of the CWA bars citizen suits where, regardless of whether comparable state law is used, the state is diligently prosecuting a civil enforcement action in court. Last, some courts have been willing to look beyond the statutes to the common law and will bar citizen suits, under the doctrine of *res judicata*, if the state has prosecuted an enforcement action to a final order.

While there are certainly other limitations on CWA citizen suits, whether they be jurisdictional or otherwise, this article focuses on these three bars to citizen suits based on the state’s decision to take its own en-

forcement action. In fact, at first glance, it may appear that, for purposes of barring citizen suits, little difference exists between administrative and civil enforcement. Interestingly, however, the extent to which a discharger is shielded from a CWA citizen suit often depends heavily on whether the state pursued administrative enforcement, with its comparable state law requirement, or pursued civil action, which imposes no comparability requirement.

Comparability Under Section 309

CWA section 309(g) precludes a citizen suit if “a State has commenced and is diligently prosecuting an action under a State law comparable to [CWA § 309(g)].” Absent any United States Supreme Court interpretation of the meaning of comparability, lower courts have issued varying opinion on the extent to which a state’s administrative penalty provisions must compare to the CWA. In fact, in a matter of days, two federal courts of appeal recently issued entirely different interpretations of comparable state laws. On January 23, 2003, the Eleventh Circuit held that Alabama’s water pollution control statute did not constitute a state law comparable to the CWA’s administrative enforcement provisions because Alabama’s program failed to provide adequate public participation. *McAbee v. Fort Payne*, 318 F.3d 1248 (11th Cir. 2003). One day later, however, the Fifth Circuit held that Louisiana’s water quality laws were sufficiently similar to the CWA to constitute comparable state law even though its public participation provisions were no more substantial than Alabama’s program. *Lockett v. EPA*, 319 F.3d 678 (5th Cir. 2003).

Anecdotal evidence suggests that the practical effect of the Eleventh Circuit’s ruling in Alabama was to discourage alleged violators from entering into administrative consent orders with state regulators, resulting in a sharp reduction in the amount of penalties collected by the Alabama Department of Environmental Management (ADEM) after the decision was handed down. Because ADEM’s only other alternatives are to either issue unilateral orders (which are often appealed to the circuit court) or sue alleged violators in a court (which consumes more time and re-

sources than the administrative enforcement process), ADEM's enforcement efforts were reportedly hindered by the ruling. In an effort to restore the incentive for regulated industries to enter administrative orders, the Alabama legislature responded to the Eleventh Circuit's decision by amending the state's environmental enforcement statute to ensure comparability with the CWA.

In the ten years prior to the Eleventh and Fifth Circuit decisions, at least four other circuit courts interpreted the comparability standard, and out of these four decisions came two theories. The first theory, adopted by the First, Eighth, and Sixth Circuits looked to the "overall regulatory scheme" applied to the states' clean water laws. See *North & South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991) (considering Massachusetts' clean water laws); *Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994) (considering Arkansas' clean water program); *Jones v. City of Lakeland*, 224 F.3d 518 (6th Cir. 2000) (considering Tennessee's water quality laws). These circuits established several criteria for comparability, which required state water quality laws to provide similar penalty-assessment provisions to prohibit the same violations, and to "provide interested citizens a meaningful opportunity to participate at significant stages of the [administrative] decision-making process." *Arkansas Wildlife Fed'n*, 29 F.3d at 381. The third criterion, the public participation requirement, would prove to be the most controversial aspect of comparability in 2003.

Of these three rulings, only the Sixth Circuit held the state enforcement scheme to be incomparable to the CWA, reasoning that the Tennessee Water Quality Control Act lacked adequate public involvement because it did not require public notice of hearings and failed to allow third parties to join enforcement proceedings. On the other hand, the First and Eighth Circuits found the regulatory schemes at issue to be comparable. Interestingly, the Eighth Circuit held that the Arkansas clean water program was comparable to the CWA even though the Arkansas program, much like the Tennessee program, only gave citizens an *ex post facto* right to intervene and did not require pub-

lic notice or an opportunity to comment on the proceedings at any time.

The second theory, adopted by the Ninth Circuit, imposed a more rigorous test for comparability. Instead of looking to the entire regulatory scheme, the Ninth Circuit required that the specific state enforcement provision at issue be comparable to Section 309(g) of the CWA. See *Citizens for a Better Env't v. Union Oil Co.*, 83 F.3d 1111 (9th Cir. 1996). Under this more rigorous standard, the Ninth Circuit held that California had not acted under comparable state law when, as part of a settlement, it required an oil refinery to pay several million dollars for clean water violations because the statute at issue did not contain penalty provisions comparable to the CWA.

The Eleventh Circuit got its chance to review the comparability issue when Kim McAbee — a riparian landowner whose property abutted a creek near the waste-treatment plant of Fort Payne, Alabama — filed suit against the city for violations of its National Pollutant Discharge Elimination System (NPDES) permit. However, ADEM had already issued an administrative enforcement order fining the city \$11,200 and requiring it to publish general information about the violations. In addition, according to the city's brief filed with the Eleventh Circuit, the compliance cost associated with the administrative consent order, which included renovating the waste-treatment plant, totaled more than \$13 million. Nonetheless, the district court held that McAbee's citizen suit was not precluded by the state's enforcement action because Alabama's statutory scheme was not comparable to the CWA.

On appeal, after deciding that the comparability standard applies to the penalty, the Eleventh Circuit contemplated "whether courts should (1) insist that each class of state-law provisions be roughly comparable to its corresponding class of federal provisions, or (2) perform a balancing test that compares the overall effect of a state statutory regime against the overall effect of the federal CWA." *McAbee*, 318 F.3d at 1254. The court rejected the second option, which it characterized as a "loose" and "nebulous" standard

that would result in arbitrary comparability determinations as judges attempted to “weigh incommensurable values.” *Id.* at 1255. Instead, the court adopted the “rough comparability standard,” which it reasoned would provide more certainty by simply requiring that “each class of state-law provisions must be roughly comparable to the corresponding class of federal provisions.” *Id.* at 1255–56. In other words, the “rough comparability standard” requires a court to compare each class of state law provisions (*i.e.*, penalty-assessment provisions, public participation provisions, and judicial review provisions) to its “federal analogue.” *Id.* at 1256.

Analyzing the Alabama Water Pollution Control Act (AWCPA) and the Alabama Environmental Management Act (AEMA), the Eleventh Circuit reasoned that, even though Alabama’s penalty provisions were comparable to the CWA, the state’s public participation provisions fell short of the federal standards. The court pointed to two specific reasons for this conclusion. First, Alabama’s regulatory scheme only required public notice after the issuance of an enforcement order. The CWA, on the other hand, requires public notice before the enforcement agency issues a penalty order. Second, the AEMA only gave aggrieved parties fifteen days after the publication of newspaper notice to request a hearing to contest a penalty assessment. According to the Eleventh Circuit, this brief time made requests of a hearing nearly impossible. In contrast, the CWA allows thirty days after the issuance of an order for interested persons to request a hearing. As a result of the discrepancies between Alabama and federal public participation provisions, the Eleventh Circuit held that the plaintiff’s citizen suit was not precluded by ADEM’s enforcement action.

Only a day after the *McAbee* decision, the Fifth Circuit held that Louisiana’s enforcement scheme was comparable to the CWA despite the fact that Louisiana’s statute suffered from the same types of deficiencies that the Eleventh Circuit found fatal to Alabama’s enforcement scheme. In *Lockett*, a group of property owners brought an action against the Village of Folsom for NPDES permit violations at the

village’s sewage treatment facility. 319 F.3d 678. Prior to this lawsuit being filed, the Louisiana Department of Environmental Quality (LDEQ) issued a compliance order to the village and assessed a \$400,000 penalty. The district court dismissed the lawsuit because LDEQ was diligently prosecuting an action under comparable state law.

Importantly, Louisiana’s clean water enforcement statute does not require LDEQ to provide public notice before issuing any compliance order or penalty assessment. Broadly interpreting comparability to give states flexibility to enforce the water quality laws, the Fifth Circuit reasoned that the *ex post facto* nature of the public participation provisions in Louisiana’s statute was inconsequential because the public is allowed to participate after the enforcement action. For example, the public may submit comments if the violator requests a hearing to challenge the enforcement action. Likewise, the public may submit comments and demand a hearing before LDEQ may enter a settlement with the violator. Finally, an aggrieved person may request a hearing to challenge an enforcement order after it is issued. In any event, the public is given no opportunity to participate at any point prior to the issuance of an enforcement order. Despite this statutory scheme, which would certainly have failed under the Eleventh Circuit’s opinion in *McAbee*, the Fifth Circuit apparently found it sufficient that LDEQ made a list of administrative actions publicly accessible.

In an attempt to correct the deficiencies identified by the Eleventh Circuit, the Alabama legislature amended the Alabama Environmental Management Act in June 2003. Foremost among its purposes was to grant more meaningful public participation in the administrative enforcement process. For instance, the amendments require public notice of proposed administrative orders, instead of post-issuance public notice of final orders under the old regime. Not only is public notice provided “the old-fashioned way” through newspaper publication, but the amendments also require public notice to be made available on ADEM’s website and to be mailed to any person who signs up on a public notice mailing list maintained by ADEM. *See* ALA. CODE § 22-22A-5(18)a.

Furthermore, the amendments provide the public with the opportunity to comment on proposed orders and to request a hearing with ADEM before an order is issued, where none existed before. If the information submitted in support of the request for a hearing is deemed “material” and if a hearing may clarify issues raised in the comments, ADEM may hold a hearing, at which time persons subject to the proposed order, as well as persons who submitted written comments, can be heard and submit additional “information” to ADEM. However, the amendments make clear that the pre-issuance hearing is not a “full-blown” evidentiary hearing. After considering all available information, ADEM may issue the order as proposed, issue a modified order, or withdraw the proposed order. *See* ALA. CODE § 22-22A-5(18)a.

The amendments also require ADEM to provide written notice of the issuance of an order to persons who submitted written comments on the proposed order. Before the issuance of an order, persons subject to the order and aggrieved persons who submitted written comments on the proposed order are also, upon proper request, entitled to a hearing before the Alabama Environmental Management Commission. Aggrieved parties who participate in the hearing may seek judicial review in state court. The pre- and post-issuance hearing opportunities provided by the amendments closely reflect the hearing opportunities in the CWA and thus clearly meet the “rough comparability” standard adopted by the Eleventh Circuit. In fact, the amendments to the Alabama Environmental Management Act arguably provide more opportunities for public participation than the CWA. *Compare* ALA. CODE § 22-22A-5(18) *with* 33 U.S.C. § 1309(g)(4).

Depending on the approach adopted by the governing federal circuit court, states may need to evaluate the extent to which their water quality enforcement schemes compare to the CWA. For example, *ex post facto* public participation fails to meet the Eleventh Circuit’s test for comparability but not the Fifth Circuit’s standard. At stake are the state’s environmental agencies’ ability to coax alleged violators into administrative orders, regulated industries’ desire to avoid duplicative enforcement actions, and the public’s

desire to be involved in the water quality enforcement process.

With some circuits adopting a rough comparability standard, others adopting a more rigorous approach, and still others, like the Fifth Circuit, giving states flexibility in fashioning an enforcement scheme, the definition of “comparability” will remain unresolved unless the United States Supreme Court finally settles the matter. With no chance of that happening (none of the litigants in *McAbee* and *Lockett* petitioned the Supreme Court for review), industry may remain wary of entering administrative orders in states with limited public participation in the enforcement process. The Alabama legislature may be leading the way, however, to restoring both the public’s prerogative to participate in water quality enforcement and the permit-holders’ shield from duplicative enforcement.

No Comparability Under Section 505

Even before courts recognized the “comparability” issue under Section 309, dischargers were attempting to use other provisions of the CWA to defend against citizen suits. After repeated misfires at the lower court level, dischargers finally found an effective weapon in Section 505 of the CWA. That section, as the United States Supreme Court recognized in *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), bars citizen suits against ongoing violations if EPA or the state has “commenced and is diligently prosecuting a civil or criminal action” in federal or state court.

Interestingly, unlike Section 309(g), the citizen suit bar found in Section 505(b) does not require that the state enforcement action be conducted pursuant to comparable state law. In other words, a citizen suit is barred under Section 309(g) only if the state law used to enforce the administrative penalty is comparable to the CWA; however, a citizen is barred under Section 505(b) if the state takes civil enforcement action regardless of the comparability of the state law. The underlying justification for this difference is found in the CWA’s legislative history; specifically, when Congress amended the CWA in 1987 to include adminis-

trative enforcement provisions of Section 309, it intended administrative penalties to be imposed for minor violations that did not warrant the time and expense of a civil action. See S. REP. No. 99-50, at 27 (1985). Nonetheless, to prevent states from using the administrative penalty provisions to impose relatively light punishments for relatively egregious environmental violations, Congress allowed citizen suits to go forward despite the issuance of administrative penalties if the state enforcement provisions were not comparable to the CWA. As a result, CWA citizen suits following civil actions by a state agency are more likely to be barred than citizen suits following administrative enforcement.

Res Judicata

Finally, a third bar to CWA citizen suits has emerged, arising not from the statute but from the common law. As previously discussed, if a state commences an action before the citizen suit, then the citizen may be statutorily barred from maintaining the lawsuit. However, the statutory bar may not apply when a citizen files a suit first and the state subsequently commences an action, be it administrative or judicial, against the alleged violator. See, e.g., *Citizens Legal Envtl. Action Network v. Premium Standard Farms, Inc.*, No. 97-6073-CV-SJ-6, 2000 WL 220464 at *2 (D. Mo. Feb. 23, 2000) (stating that the CWA precludes citizen suits only “when the EPA or the relevant state has commenced” an administrative penalty action or civil or criminal action); but see 33 U.S.C. § 1319(g) (providing that the Section 309(g) bar does not apply when a citizen suit is filed before the state or EPA commences its administrative enforcement action).

In general, *res judicata* bars a citizen suit if (1) an earlier action resulted in a final judgment on the merits by a court with proper jurisdiction; (2) both suits involved the same cause of action; and (3) both suits involved the same parties or their privies. See *U.S. EPA v. City of Green Forest*, 921 F.2d 1394, 1403 (8th Cir. 1991). In fact, when courts have addressed *res judicata* in the context of CWA citizen suits, the discussion most often focuses on whether the government and citizen actions involve the same issue

and whether the government is in privity with the citizens.

For example, in the *City of Green Forest*, the Eighth Circuit held that *res judicata* barred a citizen suit where an EPA enforcement action resulted in a court-approved consent decree even where EPA filed its action after the commencement of the citizen suit. *Id.* Specifically, a citizen group filed suit against Tyson Foods for various CWA violations. A few months prior to the citizen suit’s trial date, the court approved a settlement agreement between EPA and Tyson Foods and, as a result, the citizen group’s CWA claims were dismissed. Reasoning that the consent decree constituted “final judgment on the merits” and that EPA was a “privy” of the citizens (under the doctrine of *parens patriae*, whereby the government brings an action on behalf of the citizens), the court dismissed the citizen group’s CWA claims. *Id.* at 1404. Notably, however, in *Comfort Lake Ass’n v. Dresel Contracting, Inc.*, 138 F.3d 351 (8th Cir. 1998), the Eighth Circuit expressly limited the application of *res judicata* to “judicially approved consent decrees,” as in *City of Green Forest*, as opposed to “administrative enforcement agreements,” stating that a mere stipulation agreement without judicial approval is insufficient to trigger *res judicata*.

On the other hand, in *Citizens Legal Environmental Action Network*, a Missouri federal court delved more deeply into the violations covered by a court-approved consent decree than the Eighth Circuit, holding that *res judicata* only barred claims based on those “specific incidents” covered by the consent decree. 2000 WL 220464 at *17. In fact, according to the court, the citizen’s claims were precluded only to the extent that the consent decree addressed the same “particular facts, upon a particular date, at a particular facility or facilities, that violate a particular provision of law.” *Id.* Thus, while barring claims based on the “precise violations” addressed by the government in a court-approved consent decree, *res judicata* does not preclude citizen groups from bringing different CWA claims even if those claims could have been raised by the government in its action. *Id.* at *7.

Moreover, unlike the Eighth Circuit, the Missouri federal court reasoned that the citizen group was not in privity *per se* with the government based simply on the doctrine of *parens patriae*; rather, the citizen group is the “same party” as the government only as to those claims that the government has “diligently prosecuted.” *Id.* at *11. Citing *Harmon Indus. v. Browner*, 191 F.3d 894 (8th Cir. 1999), where the Eighth Circuit held that the Resource Conservation and Recovery Act’s (RCRA) “in lieu of” language precluded EPA from duplicating a state’s enforcement action, the court explained that the CWA’s language also determines whether parties are identical or in privity for purposes of *res judicata*. That is, unlike the RCRA in *Harmon*, the CWA does not provide that one particular party always represents the interests of another; instead, the court examined whether the government had “diligently prosecuted” the case. Thus, under at least one court’s determination, the common law bar of *res judicata* depends greatly on the requirements of the statutory bar. As a result, given this relationship between the common law and statutory bars, the statutory concepts of diligent prosecution and comparability may carry over into the common law of *res judicata*. Nonetheless, while relatively few cases actually address in detail the application of this common law doctrine to the CWA, litigants have more often than not been successful when employing *res judicata* to bar citizen suits.

As a practical matter, the nature of *res judicata* as an affirmative defense somewhat minimizes its effectiveness as a bar to CWA citizen suits. For instance, Rule 8(c) of the Federal Rules of Civil Procedure lists *res judicata* as an affirmative defense that must be raised by the defendant in its answer to the complaint. Moreover, as an affirmative defense, the defendant bears the burden of proof at trial to show that the doctrine of *res judicata* precludes the citizen suit. Therefore, unlike the CWA statutory bars to a citizen suit that require the plaintiffs to show that they satisfy the statutory requirements for bringing the citizen suit as a jurisdictional matter, the common law bar of *res judicata* is a burden that must be carried by the defendant.

In summary, there is much to compare between the statutory and common law bars to citizen suits. As explained above, whether a defendant may successfully raise a statutory citizen suit bar often depends substantially on the jurisdiction in which the violation takes place. Considerations of sufficient notice, diligence of a state’s prosecution, and the comparability of applicable state law each present opportunities for courts to delve into the appropriate role for citizen-plaintiffs in the CWA enforcement framework. However, in the end, if courts believe violations alleged in citizen suits have been (or are being) addressed by the state, they will often try to find a way to resolve the issue to recognize the primacy of state enforcement responsibilities, even if it means looking beyond the statutory bars to the common law.

[Editor’s note: After this article was originally published, the U.S. Court of Appeals for the Seventh Circuit issued its decision in *Friends of Milwaukee’s Rivers and Lake Michigan Federation v. Milwaukee Metropolitan Sewerage District*, 382 F.3d 743 (2004). In that decision, the court held that, in order for there to be privity for *res judicata* purposes where the citizen suit was filed prior to the state’s action, the court must find that the state’s action constituted a diligent prosecution. On March 7, 2005, the U.S. Supreme Court denied certiorari. No. 04-889.]

DECISIONS

Air

Court Grants Review of Regional Haze Regulation: *Center for Energy and Economic Development v. Environmental Protection Agency*, No. 03-1222 (D.C. Cir. Feb. 18, 2005)**Background**

1977 amendments to the Clean Air Act (CAA) required some states to submit state implementation plans (SIPs) that contained measures to make reasonable progress towards alleviating haze in class I federal areas. To determine “reasonable progress” U.S. EPA was to consider costs, time, environmental impacts of compliance, and the remaining useful life of any existing regulated source. 42 U.S.C. § 7491(g)(1). To impose best available retrofit technology (BART) on the states, the agency was to consider those four factors plus “the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.” 42 U.S.C. § 7491(g)(2).

In July 1999, EPA promulgated the Haze Rule, 40 C.F.R. §§ 51.308–309. Parts of the rule were vacated in *American Corn Growers Association v. EPA*, 291 F.3d 1 (D.C. Cir. 2002). In the rule, EPA instructed states to measure the first four BART factors by source but to measure degree of improvement by the *area* affected. The court held that “[t]o treat one of the five statutory factors in such a dramatically different fashion distorts the judgment Congress directed the states to make for each BART-eligible source.” *Id.* at 6. The court reversed and remanded; the remand is now pending before EPA.

EPA incorporated in the Haze Rule a regional alternative to the BART mandate. This rule allows states “to implement an emissions trading program or other alternative measure” so long as the alternative would achieve better than BART results. 40 C.F.R. §§ 51.308 (e)(2), 51.309(a). Under 40 C.F.R. § 309, the

commission, or a regional body formed to implement a commission report, may choose a regional alternative by submitting an annex to that report. Once the program described in the annex was approved by EPA, then any state among the nine covered by the commission could adopt the program in lieu of the state-by-state requirements. EPA approval was primarily based on whether the regional alternative would provide “greater reasonable progress than would be achieved by” BART. 40 C.F.R. § 3309(f)(1)(i).

In 1990, Congress instructed EPA to research visibility impairment in national parks and wilderness areas. 42 U.S.C. § 7492(a)(1). It also instructed the establishment of a commission to study the factors affecting visibility in the Grand Canyon National Park. To fulfill its mandate, EPA established the Grand Canyon Visibility Transport Commission; it submitted recommendations in a 1996 report. The report covered both the Grand Canyon and fifteen other areas on the Colorado Plateau.

In September 2000, the Western Regional Air Partnership, a body formed to implement the 1996 commission report, submitted an annex. The annex first estimated BART’s likely achievements by a methodology similar to the one the court rejected in *American Corn Growers*. It then developed “milestones” that would meet the Haze Rule’s better-than-BART standard. The annex did not impose direct restrictions on any source. However, if sources (in the aggregate) fail to meet the milestones established in the annex, an emissions trading program automatically comes into force. Under that program, sources will receive “entitlements” via allotment from the state or via trading and they may not exceed those entitlements. The court acknowledged that the trading program would plausibly meet the better-than-BART benchmark because it covers more sources than those that are BART-eligible under the statutes and regulations. EPA adopted the annex rule as part of its haze regulations.

The Center for Energy and Economic Development represents a group of pollution sources in the region. In its petition for review, it argued that the use of

BART benchmark in the annex rule is unlawful under the court's analysis in *American Corn Growers*. EPA raised two jurisdictional objections—that the petitioner lacks standing and that the court's judgment in *American Corn Growers* precluded review.

Holding

EPA's argument against standing touches on all three of the elements required for standing—injury in fact, causation, and redressability. The agency argued that the annex rule's voluntary system of trading emission allowances was more favorable to the petitioner's clients than the "command and control" BART rules. It also addressed the Center's contention that the annex rule does not achieve enough visibility improvement to constitute "reasonable progress." If that is true, EPA argued, then a rule meeting the standard would be more stringent and worsen the Center's burden.

The court disagreed. The annex rule requires *immediate* compliance with some reporting requirements; these requirements are subject to sanctions so that they burden the Center's members now. As for the argument as to the difference between section 308 (on remand to EPA) and the annex rule, the Center's complaint is that the rule lacks the legally required evidence of attendant visibility gains, in violation of *American Corn Growers*. It is the Center's hope that both the annex rule and section 308 will, upon repromulgation after remand, impose substantially lighter burdens. In *America's Community Bankers v. FDIC*, 200 F.3d 822, 828–29 (D.C. Cir. 2000), the court noted that "[w]here an agency rule causes the injury, the redressability requirement may be satisfied . . . by vacating the challenged rule and giving the aggrieved party the opportunity to participate in a new rulemaking the results of which might be more favorable to it."

Another issue is whether any harm has come from the Center as a result of EPA's actions—in other words, was it not each individual *state's* action adopting the annex rule that caused the purported harm to the Center's members? Certainly the state's pursuit

of the annex alternative is the *direct* cause of the Center's injury. The amici states, in support of EPA, noted that the western states themselves provided the initial blueprint for the annex rule.

The court answered that the existence of state choice between the eventually repromulgated section 308 rule and the annex rule is immaterial; it is simply a choice between one burden and another. Nor is it material that it was the state's initiative to design the annex rule. The pressure still comes from EPA. The rule addresses *regional* haze. The court commented: "Without federal intervention . . . a state calculating how hard it should press in limiting pollution has no incentive to consider resulting enhancements of other states' welfare. There is no reason to believe that . . . [one state] would without federal pressure tighten limits for in-state polluters an extra notch so that tourists could gaze at clear skies above the Grand Canyon." Slip op. at 9. Therefore, the regulatory scheme is a "substantial" factor that motivated the states' actions and the Center's injury is "fairly traceable" to that scheme.

The court then addressed EPA's second challenge—that the Center's claims were ripe and defeated in *American Corn Growers* and, thus, now precluded. These claims include the Center's argument regarding EPA's statutory authority to promulgate the Annex Rule, the Annex Rule's effect on state discretion, and its compliance with the reasonable progress goals. EPA argued that these legal arguments were ripe for review when it promulgated the Haze Rule and contended that the Center should have sought clarification or petition for rehearing in that case. EPA's argument is based on its interpretation of the *American Corn Growers* decision as having struck down only the group BART provisions, not those governing BART alternatives.

The Center, however, reads *American Corn Growers* as concluding that the BART provisions are contrary to section 169A of the Clean Air Act and that the decision did not distinguish mandatory BART from BART alternatives.

The court concluded that an exact parsing of *American Corn Growers* had no effect on the outcome of this case. Either way that the decision is read, it forbade use of EPA's original BART methodology in any context under section 169A of the CAA, 42 U.S.C. § 7491(a).

Turning to the argument on the merits, the court noted that EPA's interpretation of section 169A is due deference if the statute is ambiguous. The Center argued that section 169A(b)(2) can be read only in one way—that each SIP must include BART. EPA, on the other hand, reads that statute as requiring BART only insofar as it might be necessary to make reasonable progress toward national visibility goals. The court did not find EPA's reading to be unreasonable.

Nonetheless, EPA must exercise its discretion to approve better-than-BART SIPs. In approving the annex rule, according to the Center, EPA did not fulfill its mandate because the rule was based on a variant of pre-remand BART. The Center's contention is that EPA is requiring states to exceed reductions based on an unlawful methodology. EPA disagreed, reading *American Corn Growers* as invalidating "group" BART only when imposing BART on specific sources.

The court concluded that, since the annex rule looked to the impact of *all* emissions to estimate visibility progress, the rule is a hybrid, as was the rule in *American Corn Growers*. It, thus, granted the petition for review.

Eleventh Amendment

Pollution Control District Not Entitled to Eleventh Amendment Immunity: *Jacob W. Beentjes v. Placer County Air Pollution Control District*, No. 03-15598 (9th Cir. Feb. 4, 2005)

Background

Jacob W. Beentjes was an employee with the Placer County Air Pollution Control District. He was diagnosed with chronic obstructive pulmonary disease in 1997 and then terminated from his position. After he sought an accommodation under the Americans with Disabilities Act, he was given another position with the county. He later quit this position. He then filed suit for damages and injunctive relief alleging that the Control District had discriminated against him on the basis of his disability and had failed to reasonably accommodate him. The district moved for summary judgment on Eleventh Amendment sovereign immunity grounds. The court denied the motion and the District filed an appeal.

Holding

The Court in *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 363 (2001), noted that "[t]he ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." The immunity, however, has never been extended to political divisions of a state. The question as to whether sovereign immunity is extended to an entity is whether that entity is treated "as an arm of the State . . . or is instead . . . treated as a municipal corporation or other political subdivision . . ." *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977).

The Ninth Circuit employs a five-factor test (the *Mitchell* factors) to determine whether a particular entity is an arm of the state:

[1] [W]hether a money judgment would be satisfied out of state funds,

[2] whether the entity performs central governmental functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

Belanger v. Madera Unified School District, 973 F.2d 248, 250–51 (9th Cir. 1992) (quoting *Mitchell v. Los Angeles Community College District*, 861 F.2d 198, 201 (9th Cir. 1988)).

The predominant factor is whether a money judgment would be satisfied out of state funds. The court concluded that the funding scheme for air pollution control districts and the applicable state law would not make the state responsible for paying a money judgment against the district. Under the California Government Code, a “local public entity” includes a “district” and distinguishes that from “the State.” Provisions of the Code make it clear that a judgment against a local public entity must be paid by that entity. Nonetheless, the District argued that, since state revenues constitute a significant portion of its annual budget, from which it pays the insurance premiums to purchase the policy that will ultimately pay for any money judgment against it, in essence the state would be paying any judgment. The court noted, however, that the “state revenue” which funds a portion of the District’s budget is actually from a vehicle surcharge that does not represent state funds, but is considered, instead, a local tax.

The District, relying on the holding in *Belanger, supra*, argued that local funds that are commingled with state funds should no longer be deemed local in nature. However, in *Belanger*, seventy-five percent of the school district’s budget came from the state and the state exerts substantial control over school districts’ budgets. Furthermore, budgetary shortfalls must be made up by the state. Under California law, though, the District must turn to local cities and counties to make up budgetary shortfalls. The District has the authority to raise its own funds by leasing, selling, or

disposing of property. This ability to raise revenue is a relevant consideration because it indicates that the state has created an autonomous entity.

Applicable state law provides that California has no legal obligation to pay a money judgment against the District and there is no evidence that the state would replace funds used to satisfy a judgment. Therefore, the first factor favors a finding that the District is not an arm of the state.

The second factor is whether the entity in question performs a central governmental function. The District argued that it does perform a central governmental function because the State of California created it to enforce statewide and nationwide air pollution standards. The court acknowledged that the various pollution control districts are the means by which the state meets and maintains state and federal quality standards under the federal Clean Air Act and state law. However, their functions are highly localized. A state agency, the California Air Resources Board, has only a limited oversight role over the districts; the districts primarily perform local governmental functions. They also have considerable discretion and substantial autonomy in performing their duties. These districts have the authority to promulgate even more stringent standards than the state’s. In view of the decentralized structure of enforcement of air quality in California and each district’s autonomy, the court agreed with the district court that the District does not perform a central governmental function.

Since application of the other Mitchell factors also argued against considering the District an arm of the state — the District has the power to sue and be sued, may take property in its name, and, under California law, is considered a “body corporate” under state law — the court affirmed the district court’s judgment that the District does not have Eleventh Amendment immunity.

Fourth Amendment

Special Needs Exception Applicable to Warrantless Entry: *Paul Palmieri v. Pamela Lynch*, No. 03-9038 (2d Cir. Dec. 10, 2004)

Background

Paul Palmieri owns a home in Babylon, New York, on Long Island's Great South Bay, encompassing both New York regulated tidal wetlands and a regulated adjacent area. He applied for and received permits from the state's Department of Environmental Conservation (DEC) for extending his boat dock and adding a boat lift and for installing a fence on the bulkhead. Both permits included a condition that they were "subject to inspection at reasonable hours and intervals by an authorized representative of the DEC to determine whether the permittee is complying with this permit" and New York environmental law. Palmieri refused the DEC physical access to his property to perform the inspections and notified the agency of his refusal to allow such access in three separate letters. DEC complied with Palmieri's wishes by performing inspections by boat.

The back and side yards of Palmieri's homes are fenced. Access is provided by a gate on which has been posted "No Trespassing" and "Beware of Dog" signs.

In May 1999, Palmieri submitted another application to extend his dock by an additional fifty feet and add a third boat lift. The defendant-appellee Pamela Lynch, a DEC Marine Resource Specialist, was assigned to review Palmieri's application. In March 2000, Palmieri allegedly mailed a letter to Lynch restating his refusal to consent to a land-based inspection of the premises. The court, for the purposes of summary judgment, assumed that Lynch received the letter.

In April 2000, Lynch and another person from DEC visited the property to inspect it in connection with DEC's review of Palmieri's pending permit application. Lynch rang the front doorbell and, not receiving a response, walked to the side of the house and en-

tered the enclosed rear yard. Palmieri, who was recording with a video camera, then asked her to identify herself. After she did so, Palmieri ordered her off the property. While exiting, Lynch explained that, without an inspection, she could not complete her review of the permit application. Lynch then left. The entire encounter lasted about three minutes.

Palmieri then filed this action, alleging a violation of his Fourth Amendment rights, a conspiracy to violate his Fourth amendment rights, and common law trespass. Lynch filed for summary judgment at the close of discovery, which the district court granted. It found, *inter alia*, that Lynch's visit fell under the "special needs" exception. Palmieri appealed.

Holding

The special needs exception to the general requirement that a warrant be obtained prior to an inspection by a public official stems from the Supreme Court's holdings in *Griffin v. Wisconsin*, 483 U.S. 868 (1987), and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). In *Griffin*, the Court held that "searches pursuant to a regulatory scheme need not adhere to the usual requirements" where special governmental needs are present. 438 U.S. 873-74. In *Ferguson*, the Court stated that "in limited circumstances, a search unsupported by either warrant or probable cause can be constitutional" where "'special needs'" other than the normal need for law enforcement provide sufficient justification." 532 U.S. 76 n.7. This typically occurs where "the usual warrant or probable-cause requirements" have been rendered impracticable. *Griffin*, 583 U.S. at 873.

Where a search is conducted pursuant to a legislated regulatory scheme in an area where there is a diminished expectation of privacy, courts have allowed warrantless searches. The special needs exception has been used in the employment context where the court allowed the warrantless search of a government employee's government-issued computer for non-standard software. *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. 2001). The court noted that courts must be cautious in applying the special needs doctrine but also

recognizing that the doctrine provides “a framework to balance important non-arbitrary governmental objectives against de minimis intrusions in situations in which there is some degree of an expectation of privacy.” Slip op. at 12

In applying the special needs doctrine, the court weighs the governmental conduct by analyzing three factors: (1) The nature of the privacy interest at issue; (2) the character of the alleged governmental intrusion; and (3) the immediacy and nature of the state’s concerns and the governmental efficacy in meeting those concerns.

The nature of the privacy interest includes an examination of both the subjective and objective expectations of privacy. In this case, there is no question that Palmieri expressed a subjective expectation of privacy. The question of an objectively reasonable expectation of privacy is not as easily answered. The court noted that, in *United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997), it had held that “what a person chooses voluntarily to expose to public view . . . loses its Fourth Amendment protection.” The district court found that the space around Palmieri’s house was completely exposed to public view because the house faced a public street on the front and had a beach accessible to the public at the rear. The previous permits had been conditioned on routine inspection by the DEC. Therefore, the district court found that the privacy interest in his backyard had been “severely diminished.” The appellate court also pointed out that his applying for a new permit on state-regulated wetlands further diminished his privacy interest. The court analogized Palmieri’s privacy interest “to the diminished level of privacy interest typically recognized to reside in other regulated zones of activity in the public sphere.” Slip op. at 15.

The district court found that Palmieri’s backyard was clearly visible from the rear deck and backyard areas of at least one neighbor’s homes and that his deck was visible to his neighbor’s deck. Furthermore, the only barrier between his back yard and the water was a heavy rope strung between poles that provided no visible obstruction. However, the court noted that it

did not necessarily agree with the trial court’s conclusion that the privacy interest was objectively unreasonable merely because the areas are open to public view. Nevertheless, the backyard and the deck possessed a lower degree of privacy than the interior spaces of his home. Furthermore, because of his application for a building permit, Palmieri’s privacy expectation was also diminished. Merely because DEC had respected his wishes concerning inspections before does not mean that there was a guarantee that it would continue to do so. Applicants should not be allowed to dictate to the DEC exactly how it must fulfill its statutory and regulatory mandate.

For these reasons, the court concluded that, although there was some objective reasonability to Palmieri’s expectation to privacy, it was a diminished one that mitigates the extent to which this factor should weigh against applying the special exception doctrine.

Next, the court discussed the character of the intrusion. The district court found that the level of intrusion was minimal. Lynch left immediately upon being asked to leave and before she was able to conduct an inspection. Thus, the court found that the second factor weighed heavily against Palmieri.

As to the third factor, the district court found that “the governmental interest . . . in protecting the natural resources and the public beaches and waterways is serious.” The appellate court agreed. There is no caselaw directly on point with respect to an environmental inspection of residential property, but the court could find no “principled distinction” between the need to inspect commercial property and the need to inspect residential property where the latter consists of protected tidal wetlands. The court stated that “[I]t is axiomatic in this day and age that the state’s interest in performing regulatory inspections associated with applications to permit construction on protected tidal wetlands is unquestionably of the highest order.” Slip op. at 20. Although the agency may not have needed to inspect Palmieri’s property immediately, an inspection at some time was required and appropriate.

There are a number of practical reasons why the DEC had a strong interest in conducting the inspection in the manner Lynch attempted. The burden to the agency of obtaining boats and conducting the inspection by water would have involved additional cost and time. Since the existing structures extend from Palmieri's property, the staff deemed it necessary to inspect that area. An inspection by boat would have also entailed technical conditions because the DEC had to determine whether the existing structures were causing impacts that might be compounded by approving Palmieri's permit.

The court cited three reasons why it was holding that the special needs exception applied in this case. First, Palmieri had a diminished expectation of privacy in the areas outside his home subject to public view. Second, the character of the intrusion was minimal and was the same degree of observation that could have been accomplished by the public. Finally, the state's interest in regulating construction on tidal wetlands overrode any expectation of privacy in the outside areas that were adjacent to the water.

The court emphasized that it was not holding that *any* warrantless visit to premises under environmental laws and regulations is permissible. It did hold, however, that a regulatory scheme involving warrantless searches may be subject to a special needs, fact-specific balancing test.

No Reasonable Expectation of Privacy in Wastewater Flowing to Public Sewer: *Riverdale Mills Corporation and James M. Knott Sr. v. Justin Pimpire and Daniel Granz*, No. 04-1626 (1st Cir. Dec. 22, 2004)

Background

Riverdale Mills, located in Northbridge, Massachusetts, manufactures plastic-coated steel wire products. The cleaning process, used during manufacturing, generates both acidic and alkaline wastewater. A pretreatment system within the plant is supposed to treat and neutralize the wastewater before it reaches the public sewer. The wastewater first flows through

a meter loop that measures the quantity and then to an area covered by Manhole 1 toward the public sewer. Manhole 1 is covered by a 171-pound steel manhole cover, located on a paved street owned by the mill. The wastewater then flows three hundred more feet to Manhole 2 where it merges with other flows and then onto the public sewer. Riverdale's flow may be sampled at Manhole 2 prior to it joining with the other flows.

In the summer of 1997, EPA received a letter, purportedly from a Riverdale employee, alleging that the plant's pretreatment system was not being run properly. On the morning of October 21, 1997, two agency inspectors were sent to perform an inspection. They did not obtain a search warrant and there were no exigent circumstances. The inspectors met with Knott, the company's president, treasurer, and chief executive officer. Knott was asked to give his consent to an inspection of the wastewater treatment facility, including tests of the wastewater. According to Knott's affidavit, Knott explicitly told the inspectors that they could sample the wastewater and tour the plant only if they were accompanied at all times by Knott or employees designated by Knott. At some point during the day, he also told the inspectors that the public sewer did not begin until Manhole 2 and that he owned the sewer lines under Manhole 1.

There is disputed evidence as to whether the inspectors informed Knott that they would be taking periodic samples from Manhole 1 during the day. The initial sampling was conducted with Knott present. Two additional samples were taken later that day. These were not taken with any employees present, but in full view of employees. A sample from the second test was given to one of the Riverdale employees who then signed a chain of custody form.

The data resulting from the sampling led EPA to obtain an administrative search warrant and, later, a criminal search warrant. Riverdale and Knott were indicted by a grand jury in August 1998 for violating the Clean Water Act. They moved to suppress evidence obtained during some of the searches. The district court concluded that the two later searches

conducted on October 21 exceeded the scope of Knott's consent. The government then moved to dismiss the indictment without prejudice, which the court granted.

Knott and Riverdale then brought this action for damages, based on alleged constitutional violations. In March 2004, the district court denied the inspectors' motions for summary judgment on the grounds of qualified immunity. The court articulated the three-part test for qualified immunity and, after reviewing the standard and the facts of this case, denied the inspectors' motion. They filed an interlocutory appeal.

Holding

The district court correctly articulated the three-fold test for qualified immunity: (1) Do the allege facts establish a violation of a constitutional right; (2) was the right allegedly violated clearly established; and (3) were the defendants' actions objectively reasonable? The court assumed that the search exceeded the scope of Knott's consent. The threshold question, thus, is whether there was any constitutional abridgment — in other words, was there a Fourth Amendment search?

A Fourth Amendment search exists only if Riverdale had a reasonable expectation of privacy in the wastewater underneath Manhole 1. The appellants urged that the court adopt a per se rule that there is never a reasonable expectation of privacy in wastewater. The court declined to do so. The factual dimensions of each case might give differing answers. One of the factors that the court considered potentially relevant was the commercial aspect of the property. The fact that Manhole 1 is on private property is relevant, but not dispositive. The court noted that the contours of the Fourth Amendment are not coterminous with property and trespass law. In *Oliver v. United States*, 466 U.S. 170, 183-84 (1984), the Court held that, "in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment."

The controlling fact in this case, however, was that the wastewater at Manhole 1 is *irretrievably* flowing into the public sewer, only 300 feet away. Thus, the court concluded that the circumstances are similar to trash left out on the curb for pick up by the trash collector. There is no reasonable expectation of privacy in that case. Even if the trash analogy is not exact there is similarity because the wastewater will assuredly enter the public sewer. Riverdale had no cut-off valve at Manhole 1 and, therefore, no way to stop the irretrievable flow to the public sewer. There was no reasonable expectation of privacy in waster flowing irretrievably into a place where it will be "exposed . . . to the public." *California v. Greenwood*, 486 U.S. 35, 40 (1988).

Riverdale argued that the Massachusetts Supreme Judicial Court decision in *Commonwealth v. Krisco Corporation*, 653 N.E.2d 579 (Mass. 1995), should control the court's decision. That case held that a commercial proprietor had a reasonable expectation of privacy in a dumpster that was gated until the trash collector actually arrived. Riverdale contended that the manhole cover played the same role as the gates in the *Krisco* decision. The court disagreed. The gates represented the owner's attempt to completely bar the public from access from the area. The manhole cover, in contrast, is normally provided so that access may be gained. It is not intended to leave the public ignorant as to what is underneath them. Furthermore, the trash in *Krisco*, held stationary behind the gates for pickup, is different from wastewater that is flowing to the public sewer.

The court concluded that Riverdale did not have an objective reasonable expectation of privacy. As an alternative ground for its holding, the court also discussed the second prong of the qualified immunity inquiry. This asks whether the constitutional right that was allegedly violated was clearly established at the time so that a reasonable officer would know that his conduct was unlawful. The standard is whether prior caselaw must give the officer reasonable notice as to the standard existing at the time. The district court erred by posing the second prong as whether the law was clear regarding the necessity of obtaining a search

warrant. The proper standard, according to the court, should be “whether an officer on October 21, 1997, should have understood based on prior law that it was unlawful, without a warrant or consent, to take industrial wastewater from underneath a manhole cover on a privately-owned street, but headed irretrievably to a public sewer 300 feet away.” Slip op. at 12.

Even if there had been a reasonable expectation of privacy in the wastewater at Manhole 1, there was no notice in prior law to an officer that there was such a reasonable expectation of privacy. The officers, thus, are entitled to immunity on the second prong as well as the first. The denial of qualified immunity was reversed and the case remanded.

Hazardous Waste

No Breach of Contract Found Where IEPA Issued “No Further Remediation” Letter: *St. Charles Manufacturing Limited Partnership and St. Charles Acquisition Limited Partnership v. Whirlpool Corporation and Whirlpool Kitchens, Inc.*, No. 04-1762 (7th Cir. Feb. 11, 2005)

Background

Whirlpool Corporation sold St. Charles a twelve-acre site with buildings, underground storage tanks, and parking lots in 1989. Under the contract, Whirlpool agreed that it would bring the property into compliance with all applicable environmental laws and regulations. A dispute between the parties about the cleanup was settled in 2000 when the parties agreed that Whirlpool would clean up the property and obtain a “No Further Remediation (NFR)” letter from the Illinois Environmental Protection Agency (IEPA). In return, St. Charles would release Whirlpool from all claims with respect to pre-existing conditions at the facility.

Whirlpool obtained the NFR. St. Charles then sold the property, but at a discounted price because, it alleges, of the nature of the NFR letter. St. Charles claims that the NFR letter is inadequate because it is “voidable.” St. Charles claimed the letter is “voidable”

because Whirlpool provided the IEPA with incomplete, inaccurate, and misleading information. To prove its claim, St. Charles submitted an affidavit, which was not challenged, from an environmental engineering firm. St. Charles asked the court to find that Whirlpool breached the March 2000 agreement because the NFR letter was obtained through misrepresentation and is, therefore, voidable. The district court found in favor of Whirlpool and St. Charles appealed.

Holding

The Illinois statutes that provide the basis for issuance of an NFR letter specifically provide that a letter “shall be voidable if the site activities are not managed in full compliance with the provisions” of the Act. 415 ILL. COMP. STAT. 5/58.10(a). Therefore no NFR letter is absolute and non-voidable. The statute sets out the procedures that the IEPA must follow if it seeks to void an NFR letter.

The letter obtained by Whirlpool states that the “remedial action was completed in accordance with” the remedial action plan on the twelve-acre site. It sets out conditions for the use of the land and states clearly that, should IEPA seek to void the letter, it must provide notice and state the cause for seeking avoidance. Among those statutory reasons is a letter that was obtained by fraud or misrepresentation.

Therefore, if Whirlpool engaged in fraud or misrepresentation in obtaining the letter, the agency could seek to void the letter. However, even if the court were to find such fraud and/or misrepresentation, it is the *agency’s* prerogative to initiate a proceeding to void the letter. Even the plaintiff did not ask that the court void the letter. The court concluded that the IEPA is the agency with expertise and knows better than the court the type of documentation that is appropriate to support an NFR letter. The agency is the proper authority to void the letter if it determines that Whirlpool engaged in fraud or misrepresentation in obtaining it.

Furthermore, in this case, the parties specifically agreed to let the IEPA determine whether the cleanup

was adequate. St. Charles was copied on all the documents Whirlpool presented to the agency but never alerted the agency that there were any problems with the submissions. St. Charles also presumably knew, or should have known, that the NFR letter is, by statute, voidable so there would be no breach of the agreement because Whirlpool received a voidable NFR letter. The court, thus, affirmed the district court's decision.

Preemption

Federal Law Does Not Preempt California's Appliance Regulations: *Air Conditioning and Refrigeration Institute et al. v. Energy Resources Conservation and Development Commission et al.*, No. 03-16621 (9th Cir. Feb. 3, 2005)

Background

California's appliance efficiency program requires manufacturers to publish information about the appliance's size and energy performance on their appliances. Four major trade organizations claimed that California's regulations are preempted by the Energy Policy and Conservation Act (EPCA). The district court agreed and enjoined the California Energy Resources Conservation and Development Commission from enforcing them. The Commission appealed.

Holding

The court began its analysis by noting two presumptions about the nature of preemption. First, there is the presumption that Congress did not intend to supplant state law. This presumption against preemption leads to the principle that express preemption provisions should be narrowly interpreted. Second, Congress' intent and purpose is the "ultimate touchstone" for every preemption case.

The language of the provision in question, 42 U.S.C. § 6297, provides, in relevant part:

- (a) Preemption of testing and labeling requirements

(1) Effective on March 17, 1987, this part supersedes any State regulation insofar as such State regulation provides at any time for the disclosure of information with respect to any measure of energy consumption or water use of any covered product if—

(A) such State regulation requires testing or the use of any measure of energy consumption, water use, or energy descriptor in any manner other than that provided under section 6293 of this title; or

(B) such State regulation requires disclosure of information with respect to the energy use, energy efficiency, or water use of any covered product other than information required under section 6294 of this title.

42 U.S.C. § 6927

The first regulation questioned by the associations is section 1606 of title 20 of the California Code Regulations. This requires appliance manufacturers to submit certain information to the Commission for each appliance to be sold in California, including the manufacturer, the brand name, the model number, and data produced during tests required to be performed by the manufacturer under California regulations. The question is whether this regulation requires "disclosure of information." The district court and the appellate court found that the phrase "disclosure of information" is ambiguous.

Since there is a presumption against preemption, the court narrowly construed "disclosure of information." It also concluded that the statute as a whole supports a narrow interpretation of "disclosure of information" as pertaining only to labeling directed to consumers at the point of sale or use. The court also noted that the relevant FTC regulations interpret "disclosure of in-

formation” as consumer-directed labeling. The legislative history of the act also supports this narrow interpretation.

A second part of the California regulations challenged by the trade associations are the appliance marking requirements which require appliances to be labeled with the manufacturer’s name, brand name, or trademark, the model number, and the date of manufacture. This information is not “with respect to any measure of energy consumption or water use. . . .” 42 U.S.C. § 6927(a)(1). There is very little relation between the information required by California regulation and measures of energy consumption, defined as “energy use, energy efficiency, estimated annual operating cost, or other measure of energy consumption.” 42 U.S.C. § 6291(8).

Other provisions of California regulations merely require compliance with federal marking requirements. The Fourth Circuit has stated that “if state law adopts or imposes a labeling requirement that is the same as the federal standard, even if the state law provides compensation or other remedies for a violation, so long as Congress chooses not to explicitly preempt the consistent law, it will not be said to be in conflict with federal law.” *Worm v. American Cyanamid Company*, 970 F.2d 1301, 1307 (4th Cir. 1992). California regulations merely provide manufacturers with another reason to comply with existing federal regulations.

One portion of California regulations requires federally-regulated commercial and industrial equipment to be marked with certain energy performance information. 42 U.S.C. § 6316(a),(b) preempts “any State regulation insofar as such State regulation provides at any time for the disclosure of information with respect to any measure of energy consumption or water use . . . if . . . such State regulation requires disclosure of information . . . of any covered product other than information required” under federal law. California regulations do not include electric motors for which the U.S. Department of Energy (DOE) has adopted labeling rules. However, DOE has not prescribed test procedures for most classes of equipment

covered by EPCA and, thus, has not decided as to whether to prescribe labeling rules. Agency inaction alone does not preempt state regulations. In *Baltimore & Ohio Railroad Company v. Oberly*, 837 F.2d 108, 115 (3d Cir. 1988), the court stated, “it is essential that an agency declare, at a high degree of specificity, its intention that inaction preempt state law before we may assume such a desire and give it legal effect.” DOE has not done so; thus the court found no preemption.

RCRA

Court Upholds Finding of Substantial Endangerment: *Interfaith Community Organization et al. v. Honeywell International, Inc., et al.*, Nos. 03-2760 et al. (3d Cir. Feb. 18, 2005)

Background

Beginning in 1895, Mutual Chemical Company of America operated a chromate chemical plant in Jersey City, New Jersey. Mutual piled its waste residue at a tidal wetlands site along the Hackensack River. The site consists of some 1.5 million tons of waste, fifteen to twenty feet deep, covering about thirty-four acres. The waste has a high pH and high concentrations of hexavalent chromium. The high pH prevents the hexavalent chromium from naturally reducing to the less-toxic trivalent form and enhances the waste’s ability to leach freely into surface water and groundwater. The hexavalent chromium is highly soluble. EPA has classified it in the first quartile of known human carcinogens; it is highly toxic to humans, animals, and lower life forms, including benthic organisms. Dumping continued until 1954. Honeywell is the current owner of the site.

New Jersey first sought a remedy for the site in 1982. Seven years later, Honeywell adopted an interim measure, which consisted of pouring concrete and asphalt over seventeen acres of the site and placing a plastic liner cap over the remaining seventeen acres. It was originally intended that the temporary remedy would last about five years, during which a study would be performed as to a permanent remedy and that rem-

edy implemented. Honeywell acknowledged that the temporary remedy would not prevent all discharges. This “interim” remedy has been in constant need of repair. In addition to other problems, the waste at the site has caused both vertical and horizontal heaving, resulting in the development of peaks and valleys of more than two feet and even the structural failure of at least one building.

In 1993, a consent order involving the site was signed in which AlliedSignal, a previous owner of the site, promised \$60 million towards a permanent containment solution. The order also stated that the permanent remedy would be put in place through the New Jersey Department of Environmental Protection’s usual process of delineating, analyzing potential remedies and selecting a remedy, and taking remedial action. These steps have not been completed.

In 1995, a local community organization, Interfaith Community Organization (ICO), and five individual plaintiffs sued under the citizen suit provision of the Resource Conservation and Recovery Act (RCRA). The district court found for the plaintiffs and enjoined Honeywell to clean up the site through excavation of the contamination. Honeywell appealed.

Holding

The court began its discussion by establishing the standard of review for RCRA endangerment determinations, an issue of first impression. It determined that this issue was a question of fact so that the district court’s determination should not be disturbed absent clear error.

The court then turned to a discussion of standing and upheld the district court’s determination that both the organization and the individual plaintiffs had standing. The remaining issue in this appeal was whether the waste piles “may present an imminent and substantial endangerment to health or the environment.” 42 U.S.C. § 6972(a)(1)(B)(3). In *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1015 (11th Cir. 2004), the court summarized the statutory language as follows:

The operative word . . . [is] “may” . . . [P]laintiffs need only demonstrate that the waste . . . “may present” an imminent and substantial threat Similarly, the term “endangerment” means a threatened or potential harm, and does not require proof of actual harm The endangerment must also be “imminent” [meaning] threatens to occur immediately. . . . Because the operative word is “may,” however, the plaintiffs must [only] show that there is a potential for an imminent threat of serious harm . . . [as] an endangerment is substantial if it is “serious” . . . to the environment or health.

In this case, the court concluded that this approach was the most faithful to the statutory language.

The district court had added four additional requirements to the showing of endangerment:

[A] site “may present an imminent and substantial endangerment” within the meaning of RCRA where: (1) there is a potential population at risk; (2) the contaminant at issue is a RCRA “solid” or “hazardous waste”; (3) the contaminant is present at levels above that considered acceptable by the state; and (4) there is a pathway for current and/or future exposure.

263 F. Supp. 2d at 838.

The court concluded that at least two of these requirements are irreconcilable with the statutory language. The first requirement is a population at risk; however, the statute specifically states that endangerment be to health *or* the environment. There is also no support in the statute for the third requirement. “Substantial” equates with “serious”; it does

not require a quantification measurement. No court of appeals has required a quantitative showing. The only support for the district court's requirement is *Price v. U.S. Navy*, 818 F. Supp. 1323 (S.D. Cal. 1992), in which the district court heard testimony from the defendant's two experts that an endangerment under the citizen suit provision could be found only upon satisfaction of the four requirement standard used in this case by the court below. The Ninth Circuit affirmed without discussing these four requirements. 30 F.3d 1011 (9th Cir. 1994).

Although the plaintiffs were required to make a showing on the merits that was higher than the statutory requirements, the district court still found endangerment to both human health and the environment as well as actual harm to the environment.

The district court found that the amounts of hexavalent chromium far exceeded all applicable NJDEP contamination standards. Although New Jersey's standard was evidently not finalized at the time of trial, it was tentatively set in the range of 80 to 370 ppm. Concentrations in the river sediments were roughly ninety to four hundred times higher. There was ample evidence that there existed present and continuing pathways for exposure to both human population and the environment. The interim measures that had been adopted earlier are severely compromised. There is evidence of human trespass at the site as well as exposure to river organisms, dogs and cats, and birds. The district court's findings were not clearly erroneous.

Honeywell argued that the district court erred in enjoining it to clean up its site through excavation and removal. The evidence shows that experts presented all other conceivable remedial options and none were appropriate for the site except excavation. The court heard extensive testimony as to why containment was not appropriate for the site. Evidence was also produced as to Honeywell's delaying tactics and the inability of NJDEP to deal effectively with those tactics with respect to the site.

Honeywell argued that the injunction is not sufficiently

narrow to be "necessary" within the meaning of RCRA. The district court expressly rejected Honeywell's position at trial and its findings were not clear error. The injunction orders Honeywell to excavate and remove soil and remedy river sediments that have been contaminated. It also requires that Honeywell study groundwater contamination and then report back to the district court which will determine whether additional remedial actions are necessary.

Honeywell also contended that the district court's order improperly overrode an ongoing administrative process. However, the record clearly showed that the NJDEP had been ineffective in dealing with Honeywell's dilatory tactics. Honeywell suggested that NJDEP's involvement should preclude a judicial remedy because Congress preferred agency-directed cleanups. The legislative history of RCRA, however, shows that Congress rejected that approach. Honeywell argued that the district court had limited injunctive powers. That view was rejected in *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 1000 (9th Cir. 2000). In that case, the court stated:

According to Defendant, a court may do little more than tell the violator to comply with the applicable [state plan] requirements We do not agree that a district court's equitable authority is so cramped. The authority to "enforce" . . . is more than the authority to declare that [a] requirement exists and repeat that it must be followed. So long as the district court's equitable measures are reasonably calculated to "remedy an established wrong," they are not an abuse of discretion.

Thus, the court affirmed the judgment of the district court.

CIVIL PROCEEDINGS

Settlements

Air

***United States v. Jewel Food Stores, Inc.*, No. 05C-0809 (N.D. Ill. Feb. 9, 2005)**

The federal government has reached an agreement with Jewel Food Stores, Inc., to resolve allegations that Jewel violated EPA regulations regarding refrigerant leak repair, testing, recordkeeping, and reporting — regulations designed to protect stratospheric ozone.

Under the agreement, by 2007, Jewel will retrofit at least thirty-seven of its supermarkets in and near Chicago, Illinois, with systems that use non-ozone-depleting refrigerants. Jewel will also retrofit any unit at any store which has had more than three significant leaks in a year. Any new store in the Chicago area will use only commercial refrigeration units that use an approved non-ozone-depleting refrigerant. The company will also pay a \$100,000 fine for alleged past leaks of ozone-depleting refrigerants.

[For further information, contact AUSA Lara Laufmann at (208) 334-1211.]

CERCLA

***United States v. Occidental Chemical Corporation et al.*, No. C05-5103 (W.D. Wash. Feb. 8, 2005)**

A consent decree has been filed under which the Occidental Chemical Corporation, the Port of Tacoma, Marina Properties, Inc., and Pioneer Americas agreed to complete the cleanup of contaminated sediments in the Hylebos Waterway of Commencement Bay in Tacoma, Washington. The waterway is part of the Commencement Bay/Nearshore Tidelands Superfund Site. The cleanup is expected to cost about \$36.5 million.

This consent decree addresses the “mouth of the Hylebos” area. An earlier consent decree required other parties to address the “Head of the Hylebos.” The total cost for the entire cleanup is expected to exceed \$66 million.

The superfund site is located toward the southern end of Puget Sound. The Hylebos Waterway is in the eastern corner of the bay. Various facilities discharged hazardous material, resulting in the contamination of the sediments and intertidal area with substances such as PCBs, pesticides and hexachlorobenzene, polycyclic aromatic hydrocarbons, and a variety of metals.

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

[For further information, contact Mike McNulty, DOJ, at (202) 514-1210.]

CRIMINAL PROSECUTIONS

Indictments

Air

***United States v. W.R. Grace et al.*, No. CR 05-07 (D. Mont. Feb. 7, 2005)**

A federal grand jury has indicted W.R. Grace and seven current and former Grace executives for knowingly endangering residents of Libby, Montana, and concealing information about the health affects of its vermiculite mining operations. According to the indictment, the defendants attempted to conceal information about the adverse health effects of the company’s operations; they are also charged with obstructing the government’s clean-up efforts and wire fraud.

According to the indictment, by the late 1970s, the defendants knew of that the vermiculite was contaminated with a form of asbestos called tremolite and knew the toxic nature of the substance. Although required by the Toxic Substance Control Act to turn over information to EPA they possessed, they failed to do so and also obstructed the National Institute of Occupational Safety and Health when it attempted to study the health conditions at the Libby mine in the 1980s. The indictment also alleges that Grace officials distributed asbestos-contaminated vermiculite throughout the Libby community, including allowing workers to leave the mine site covered in asbestos dust, allowing residents to take waste vermiculite for use in their gardens, distributing tailings to Libby schools for various uses, and selling asbestos-contaminated properties to local buyers without disclosing the nature or extent of the contamination.

[For further information, contact AUSA Kris A. McLean at (406) 542-8851 or Kevin M. Cassidy, DOJ, at (202) 305-0333.]

Pleas

Water

United States v. All State Environmental Dredging, Inc., and Rudy J. Lanier, No. 2:04-CR-221 (E.D. Va. Feb. 2, 2005)

Rudy J. Lanier, owner of All State Environmental Dredging, Inc., of Sneads Ferry, North Carolina, has pled guilty, along with his company, to violating the Clean Water Act by dumping dredged material into the Chesapeake Bay. The company's contract with the Army Corps of Engineers was to dredge a channel on Tangier Island and to use the spoil for beach nourishment. When the company had problems with clogging of its equipment, Lanier instructed the dredge operator to uncouple the pipeline and dump the dredged material in the bay. Lanier then took affirmative steps to make the discharge seem unintentional.

A mound of 4,750 square feet of dredged material was located in the bay by sonar.

[For further information, contact AUSA Stephen Haynie at (757) 441-6331.]

Sentences

Fraud

United States v. Hector Villa and Denise Y. Villa-Aceves, No. EP04CR579FM (W.D. Tex. Feb. 16, 2005)

The principals in Villafam Contracting Services, LLC, of El Paso, Texas, Hector Villa and his sister, Denise Y. Villa-Aceves, were sentenced recently for their roles in a conspiracy to defraud the City of El Paso. The defendants were involved in a scheme to submit fraudulent invoices to the city. The scheme involved inflating the amounts of hazardous waste their company was collecting and disposing of under a contract with the city. The waste consisted of household hazardous waste material, including paint, pesticides, aerosol cans, and the like.

Villa was sentenced to serve five years in prison, pay \$685,410.35 in restitution to the city, and spend three years of court supervision after release from incarceration. Villa-Aceves was sentenced to three years of probation and ordered to perform 300 hours of community service.

Sentencing for the company will be held in early March.

[For further information, contact AUSA Bill Lewis at (915) 534-6884.]

RCRA***United States v. Roof Depot*, No. CR04377 (D. Minn. Feb. 16, 2005)**

Roof Depot has been sentenced for violating the Resource Conservation and Recovery Act by illegally storing and disposing of hazardous waste. The company will pay a \$75,000 criminal fine, pay restitution of more than \$36,000 to the Hennepin County Department of Environmental Services and the Minnesota Pollution Control Agency, pay an additional \$50,000 in restitution to the Midwest Environmental Enforcement Association, provide in-kind contributions of goods worth \$190,000 to Twin Cities Habitat for Humanity, serve five years' probation, and pay a special assessment of \$400.

In September 1998, the company placed several pallet loads of hazardous waste roofing cement, strippers, and solvents behind its buildings in Minneapolis and stored them under a tarp. Later, the wastes were buried in an unloading dock area that the company was filling and grading.

[For further information, contact AUSA Bill Koch at (612) 664-5600.]