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## EPA'S NATIONAL ENFORCEMENT AND COMPLIANCE ASSURANCE PRIORITIES

By

**Melissa Page Marshall\***

The effectiveness of our environmental laws in ensuring protection of human health and the environment is directly related to the rate of compliance. The United States Environmental Protection Agency (EPA) has developed a set of national enforcement and compliance assistance priorities to address widespread compliance problems that also present significant risks to human health and the environment. States may want to consider bringing cases in these priority areas and partnering with EPA in enforcement actions taken under these priorities. Many states have already been co-plaintiffs in nationally important federal cases and found it to be a relationship that delivered important environmental benefits.

### Why National Priorities?

National priorities bring a critical focus to this country's enforcement of the environmental laws. Typically, "core" federal and state enforcement programs seek to maintain compliance broadly and evenly, across all of the environmental statutes. The national priorities have a different mission: they concentrate on sectors having nationwide patterns of significant noncompliance.<sup>1</sup> EPA is seeking to break these patterns using strategies that integrate enforcement and compliance assurance activities. The agency is committed to achieving sector-wide results that are effective, consistent, and quantitatively mea-

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asurable. Goals, implementation plans, schedules, and milestones are specified in each priority's strategy. The priorities are nationally shared environmental problems. Because states were actively involved in the selection process, the priorities reflect significant environmental compliance challenges faced by many state regulators. States may choose to partner with EPA in addressing these problems. And even without direct participation, states can receive important ancillary benefits by the attention focused on a particular type of violation and the environmental harm that it causes. "When EPA takes an aggressive position on a nationwide problem, it helps the states by giving [national] context to their own work," says Peter Lehner, Chief of the Environmental Protection Bureau in the New York State Attorney General's Office.

### The Selection Process

States were active in the selection of EPA's FY 2005-2007 national priorities, both as individual states and through state associations. In August 2003, EPA initiated a collaborative selection process by soliciting states and tribes for their suggestions as to potential priorities, their views on the existing enforcement program priorities, and their observations with respect to environmental risk and patterns of non-compliance. EPA air, water, pesticide and solid waste national program managers were also contacted with respect to any new program areas that might warrant a national enforcement and compliance assurance effort.

Three criteria were used to define the scope and nature of the environmental problems most appropriately addressed at the federal level:

- **Significant Environmental Benefit:** Can such benefits be gained, or risks to human health or the environment be reduced, through focused EPA action?

- **Pattern of Noncompliance:** Are there identifiable and important patterns of wide-spread non-compliance?
- **Appropriate EPA Responsibility:** Are the environmental and human health risks, or the patterns of noncompliance, sufficient in breadth and scale such that EPA is best suited take action or, alternatively, to pursue a collaborative approach in which EPA and other entities leverage their combined resources?

Fifteen potential priorities were identified, based on EPA's analysis of the background information supporting each nomination. In January 2004, the Office of Enforcement and Compliance Assurance met with representatives from EPA's various headquarters and regional offices, ten states,<sup>2</sup> four state organizations<sup>3</sup> and four tribes<sup>4</sup> to make the final recommendations of national priorities for EPA's FY 2005–2007 planning cycle.

Seven priorities have been selected. For each priority, teams of EPA headquarters and regional personnel, supplemented with state representatives, were established to develop performance-based strategies to implement the priority.<sup>5</sup> Although these priorities will eventually be incorporated into EPA's core enforcement program, it is anticipated that most will continue into EPA's FY 2007–2010 planning cycle before that occurs. An exception is petroleum refining, a priority that EPA anticipates will return to core program status in FY 2006. Once a priority is returned to the core program, EPA will continue to work with the states to resolve residual non-compliance in these sectors, to carry out future baseline compliance monitoring, and to preserve the environmental benefits that were obtained through settlements and litigation.

Robert Kinney, former Chief Counsel, Environment Project for NAAG, represented the Association in

the priority selection process and endorses EPA's use of national priorities as a planning device. "States need some consistency in the direction the agency is taking in its enforcement work," he points out. "Advance planning of federal priorities can help states avoid duplicate efforts in their own enforcement priorities. It can also give states the opportunity to work on collaborative enforcement efforts in support of the federal priorities."

### **Overview of EPA's National Enforcement and Compliance Assistance Priorities**

**1. CAA – Air Toxics.** Air toxics are hazardous air pollutants (HAPs) known or suspected to cause adverse environmental and human health impacts. Human exposure to HAPs, a significant problem due to the multitude of sources nationwide, can cause cancer, neurotoxic effects, reproductive or birth defects, and severe respiratory problems. HAPs are emitted from many different sources, ranging from massive industrial and utility operations to smaller manufacturing plants and neighborhood commercial facilities. The most hazardous HAPs are regulated through Maximum Achievable Control Technology (MACT) emission standards.<sup>6</sup>

EPA has issued approximately 90 MACT standards to date, applicable to a total of roughly 2,500 "major" facilities nationwide. A "major" source is one that has the potential to emit ten tons per year (TPY) or more of any HAP or twenty-five TPY or more of any combination of HAPs. Under this priority, EPA will address major sources of strategically chosen MACT emissions that present the greatest human health risk and/or non-compliance concerns. The primary goal for FY 2005–FY 2007 is to reduce the emission of air toxics regulated by MACT standards by at least 36,000 pounds (12,000 pounds a year).

**2. CAA – New Source Review/Prevention of Significant Deterioration.** The New Source Review (NSR) provisions of the CAA require that construction of new sources of air emissions, or the modification of existing sources, does not jeopardize an area's attainment of national ambient air quality standards. Prevention of Significant Deterioration (PSD) provisions protect areas with relatively clean air from degradation due to an influx of new sources of air pollution. Both NSR and PSD require installation of state-of-the-art pollution controls that remove 90 to 99.99 percent of many pollutants common throughout the United States. These pollutants — such as ozone, nitrogen oxides (NO<sub>x</sub>), sulfur dioxide (SO<sub>2</sub>), particulate matter (PM), and volatile organic compounds — can cause chronic and acute health effects as well as adverse environmental impacts. Violations can result in the annual release of thousands of tons of these air pollutants.

Many industries have failed to comply with NSR and PSD requirements. Although modifications of existing sources appear to have the highest rate of non-compliance, EPA believes that violations can also be found at new major sources. EPA review has found that over the last few years states have not issued many PSD or NSR permits. Given that trade association journals and economic indicators show that industrial facilities have substantially increased production across almost all sectors of the economy, this lack of permitting strongly suggests that many stationary sources are illegally emitting thousands of tons of pollution into the environment by avoiding NSR/PSD permitting requirements.

The first goal of the NSR/PSD priority is to ensure that the nation's coal-fired power-generating capacity is in compliance with the NSR/PSD provisions. The priority's second goal is to expand upon the ongoing coal-fired power plant enforcement initiative by adding three new national sectors for NSR/PSD review by the end of FY 2006. EPA estimates that

the power plant cases settled to date will result in the reduction of a million tons annually of air pollutants.

**3. CAA – Petroleum Refineries.** This priority is the continuation of one of the most successful enforcement initiatives undertaken by EPA. National focus on this sector began in 1995 and petroleum refining was designated a national priority in 1996. At that time, there were 162 domestic refineries, nearly half of them within three miles of population centers with more than 25,000 people. Refineries are responsible for large quantities of sulfur dioxide, hydrogen sulfide, nitrogen oxides, volatile organic compounds, carbon monoxides and particulate emissions. These air pollutants are directly related to serious respiratory problems and exacerbate cases of childhood asthma. They are easily wind borne to other areas of the country.

Although the number of individual refineries has declined since 1980, production capacity for the sector has significantly expanded. As part of this expansion, refineries generally failed to seek the various permits required for the resulting increased amount of emissions. EPA's subsequent compliance investigations identified the four most significant areas of CAA compliance and enforcement concern affecting the petroleum refining industry: New Source Performance Standards for fuel gas combustion devices, including sulfur recovery plants, flares, and heaters and boilers; Leak Detection and Repair requirements; Benzene National Emissions Standards for Hazardous Air Pollutants; and PSD/NSR.

Together, EPA and states embarked on a series of innovative, multi-issue/facility settlement negotiations with various petroleum refiners. The resulting agreements covered all of a refiner's facilities, based on claims developed at only a few. The "global" settlement approach has proved to be an effective and efficient method of rectifying complex environmental problems at several facilities. The settlements pro-

vide for comprehensive relief and assure continuing compliance with CAA requirements. States, localities, and state organizations that have actively participated and joined in one or more of these settlements include: Arkansas, Colorado, Delaware, Georgia, Hawaii, Illinois, Indiana, Kansas, Louisiana, Minnesota, Mississippi, Montana, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, Utah, Wayne County, Michigan, the Bay Area Air Quality Management District in California, and the Northwest Air Pollution Authority in Washington State.

Since 2000, EPA and co-plaintiff states have entered into global settlements with thirteen petroleum refining companies. The affected refineries are located in twenty-six states and represent over fifty percent of the nation's refining capacity. Based on the settling companies' estimates, these agreements will result in annual emission reductions of approximately 61,000 tons of nitrogen oxide and 155,600 tons of sulphur dioxide, as well as significant reductions of benzene, volatile organic compounds and particulate matter. The companies have also agreed to invest more than \$2.6 billion in control technologies, pay civil penalties totaling \$45 million, and perform supplemental environmental projects valued at approximately \$40 million.

Negotiations are still underway with refiners representing approximately another thirty percent of the nation's refining capacity. Investigations of the remaining capacity are also underway. EPA anticipates that under the national priority it will address eighty percent of the domestic refining capacity through settlements or filed civil actions. When this sector is returned to the core program, EPA regions, in conjunction with affected states, will resolve non-compliance in the remaining twenty percent of the sector.

**4. Clean Water Act (CWA) – Wet Weather.** Significant harm can come to human health and the environment when wet weather events cause discharges from four different sources of water pollution: sanitary sewer overflows; combined sewer overflows; storm water run off; and concentrated animal feeding operations. Each of these sources is a separate FY 2000–FY 2007 national priority.

**a. Sanitary Sewer Overflows.** When sanitary sewers overflow, raw sewage may contaminate streams, streets, parks, backyards, residential basements, and businesses. The main pollutants are bacteria, viruses, protozoa helminths (intestinal worms) and borroughs (inhaled molds and fungi), nutrients, untreated industrial wastes, toxic pollutants, such as oil and pesticides, and wastewater “solids” and debris. The diseases that sanitary sewer overflows (SSOs) may cause range in severity from mild gastroenteritis to life-threatening ailments, such as cholera, dysentery, infectious hepatitis and severe gastroenteritis.

SSOs have a variety of causes and may reflect chronic problems. Pipe or water treatment plant capacity may be overcome in severe weather or where there was inadequate planning for population growth. Sewer systems may deteriorate with age, resulting in pipe and equipment failures. Poor management may occur. EPA believes these problems can be largely overcome through proper management and renewal of sewer infrastructure.

Although many SSO investigations and cases originate with states, the federal role remains important nationwide, as SSO violations often result in very large, complex cases and can have multi-state impacts. The significant federal investment in wastewater infrastructure also warrants federal involvement.

The primary goal of this priority is to protect public health and water quality. The priority will pay special attention to: 1) water bodies used for swimming and as public drinking water intakes; 2) water bodies containing shellfish beds or endangered species; 3) communities where frequent, recurring SSOs are resulting in human exposure to raw sewage; and 4) areas in which waters are already impaired, in part by the contribution of SSOs. The second goal of the national priority is to protect the public investment in wastewater infrastructure by ensuring that municipal collection systems have sufficient capacity and use proper asset management, operation, and maintenance principles.

**b. Combined Sewer Overflows.** Combined sewer systems are designed to collect rainwater runoff, domestic sewage, and industrial wastewater in the same pipe. During periods of high rainfall or snow melt, the wastewater volume in a combined sewer system can exceed the capacity of the system or treatment plant. When this happens, the excess wastewater escapes the system as combined sewer overflows (CSOs). These overflows contain storm water mixed with untreated human and industrial waste, toxic materials, and debris. CSOs may travel directly into nearby streams, rivers, or other water bodies; they often flood out of storm drains onto roads, parks, beaches, backyards, city streets, and playgrounds. Given the scope and serious impact of overflows, addressing CSOs as a national priority has the potential to result in immediate human health and environmental benefits.

There are approximately 836 permitted CSOs, located in 31 states and the District of Columbia; they serve approximately 46 million people, primarily in the Northeast and Midwest. A significant number of communities with CSOs have not implemented the minimum controls required under the CWA, do not have a long-term overflow control plan in place, or have one with a drawn out implementation schedule.

EPA is seeking to ensure that by the end of FY 2007, sixty-five percent of all permitted CSOs will have an approved long-term control plan with an enforceable compliance schedule or an enforcement action will have been initiated to achieve that result.

**c. Storm Water.** Storm water runoff adversely impacts water quality when it carries pollutants such as sediment, bacteria, fertilizers and other organic nutrients, hydrocarbons, salt, metals, pesticides, oil, and grease. The discharges often carry high concentrations of pollutants. Storm water picks up and transports these untreated pollutants, then discharges them directly to waterways or through storm sewer systems.

Urban storm water runoff and discharges from Municipal Separate Storm Sewer Systems are a primary cause of impaired water quality in this country, contributing to thirteen percent of impaired rivers and streams, eighteen percent of impaired lakes, fifty-five percent of impaired ocean shorelines, and thirty-two percent of impaired estuaries. Storm water runoff from construction activities can also have a significant impact on water quality. In addition to sediment, as storm water flows over a construction site it can pick up other pollutants, such as debris, pesticides, petroleum products, chemicals, solvents, asphalt, and acids.

In seeking to minimize discharge of polluted storm water to surface waters, EPA will focus on two business sectors: those located in high growth communities where storm water may result in high sediment loadings; and those where storm water may adversely impact water quality, drinking water quality, and public health. The agency will also concentrate on waters that are identified as either being impacted by storm water or by pollution likely caused by storm waters, such as those with shellfish restrictions, beach advisories, or fish kills, as well as those that are habitat for threatened or endangered species.

EPA's goal is to prevent 2.5 million pounds of sediment a year from discharging from construction sites into our nation's waters, and to prevent specific pollutants from discharging from industrial (non-construction) sources into our nation's waters.

**d. Concentrated Animal Feeding Operations.** Concentrated Animal Feeding Operations (CAFOs), generate enormous volumes of animal waste in relatively small areas. For example, approximately 700 dairy cows can create more excrement and wastewater than a city of 10,000 people. Pollutants associated with animal waste include nutrients (mainly nitrogen and phosphorus) and organic matter, solids, pathogens, pesticides, antibiotics, hormones, salts and various trace elements (including metals). Improperly managed manure and wastewater can be discharged from manure storage areas or land application. The resulting water quality degradation can contribute to: fish kills; nitrate contamination of private wells; livestock mortality from nitrate and pathogen contamination of drinking water; reduced shellfish harvests; and recreational opportunities; and increased public water treatment costs.

CAFOs are regulated under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) program. Nationwide, there are roughly 18,000 CAFOs, but only about 6,200 (thirty-four percent) have NPDES permits. Recent regulations now require most CAFOs to obtain and be in compliance with NPDES permits by April 2006.<sup>7</sup> The total annualized environmental and health benefits of the new rules are projected to be \$204 million to \$355 million.

Under this priority, EPA is focusing on facilities with high concentrations of one animal type in the same geographic area, those with a poor compliance history, and facilities located in priority watersheds (e.g., where CAFOs have the potential to impact water quality or public health; waters with shellfish harvest

restrictions, beach advisories, fish or wildlife advisories or fish kills). Although CAFOs will likely remain a national priority beyond FY 2007, it is anticipated that it will become a core NPDES program element when at least ninety-five percent of the total universe of CAFOs required to obtain a permit has permit coverage, eighty percent of permitted CAFOs is in compliance with their permits, and ninety-five percent of CAFOs has been inspected at least once in the past five years, with appropriate action taken to any address noncompliance.

**5. Resource Conservation and Recovery Act (RCRA) – Mineral Processing.** The mineral processing and mining sectors generate more wastes that are corrosive or contain toxic metals than any other industrial sector. Many of the facilities that manage these wastes have contaminated groundwater, surface water, and soil either through failure to comply with state or federal environmental requirements or through legally permissible waste management practices. Many facilities are located in populated areas, making health risks a significant concern. More than 500,000 people live within one mile of a mineral processing or mining facility and more than eight million are within five miles of one.

Mineral processing waste contains toxic metals, such as mercury, lead and arsenic. These metals become highly concentrated in the waste and can dissolve, moving easily into soils, surface waters, and groundwater if not properly managed. Acids that are used in mineral processing, and chemicals created during processing, also become part of the waste streams and add to their toxicity and mobility. Wastes are often managed in unlined surface impoundments, posing significant risk to groundwater and surface waters.

Under this priority, special emphasis is placed on the twenty mineral processing facilities now operating in the United States that produce phosphoric acid and

phosphate compounds, based on a growing body of evidence that they cause widespread environmental damage. EPA studies indicate that there is a moderate to high potential for groundwater contamination across the phosphoric acid industry. The processed wastewater from these facilities typically contains high levels of metals and acid. EPA will also examine twenty-five non-phosphoric acid mineral processing facilities and five mining sites for compliance status.

**6. Financial Responsibility.** Financial assurance requirements under the environmental laws ensure that persons or entities handling hazardous wastes, hazardous substances, toxic material, or pollutants have adequate funds to close the facilities, clean up any releases of those materials and, in some cases, compensate others who were harmed by the release of the materials. Where adequate financial resources are absent, the cost of releases that adversely affect human health and the environment by contaminating groundwater, soils, and surface waters is shifted from the responsible parties to state and federal taxpayers.

EPA is concerned that a widespread pattern of failure to meet financial assurance requirements under the various federal environmental laws is having a significantly detrimental effect on human and environmental health. This concern is shared by the Association of State and Territory Solid Waste Management Organizations, which urged EPA to adopt financial responsibility as an FY2005–2007 enforcement priority.

Because this problem cuts across various statutes, EPA is taking a phased approach. Initially, EPA is reviewing RCRA Subtitle C closure/post-closure requirements. It will then evaluate the Toxic Substances Control Act (TSCA), the Safe Drinking Water Act (SDWA) and RCRA Subtitle I financial assurance requirements.

**7. Tribal.** Within Indian country there is a diversity of regulated pollution sources, including drinking water and waste water treatment systems, manufacturing facilities, facilities that discharging pollutants into the air or water, facilities that treat or dispose of solid or hazardous waste, and abandoned waste sites. Facilities near Indian country may also affect the air, water, and land on which tribes depend. The result is a variety of environmental issues that cause significant human health and environmental problems in Indian country.

This priority will address these problems on two fronts. EPA will enhance its direct implementation of the environmental laws in Indian country by working with tribes on compliance assistance, compliance monitoring, and enforcement activities. The agency will also work with tribes to build tribal capacity to implement their own compliance assurance and enforcement programs or to obtain approval to implement certain federal environmental programs. EPA will initially focus national attention on three areas: drinking water, schools, and waste management. It will also work with tribes on improving compliance data and increasing the number of tribal environmental professionals by providing relevant training.

Because many tribal compliance assurance and enforcement programs are in the early stages of development, EPA anticipates assisting with tribal capacity building beyond the three-year span of this priority.

### **State Participation**

EPA anticipates that the national priorities will increase the opportunities for strong state/federal enforcement partnerships. Although there are challenges inherent in any partnership, recent state/federal partnerships in nationally important cases have had great success in producing notable environmental achievements and resource savings for both the states and EPA. Peter

Lehner, who has represented New York State in a number of these joint enforcement actions, characterizes state/federal enforcement as “terrific.” In his experience, “You get much more bang for the taxpayer buck when the feds and states work together.” Lehner also believes that joint effort results in stronger cases overall.

The strength of the partnership approach has been clearly demonstrated by the substantial environmental benefits that states have already garnered in national cases. For example, EPA, New York State, New Jersey, Connecticut, Virginia and West Virginia sued Virginia Electric and Power Co. (VEPCO) for CAA violations affecting all five states. In a 2003 settlement, VEPCO agreed to spend \$1.2 billion to eliminate 237,000 tons of sulfur dioxide and nitrogen oxides emissions annually from eight coal-fired electricity-generating plants in Virginia and West Virginia. These pollutants cause smog, acid rain, and soot. VEPCO also agreed to spend at least \$13.9 million on supplemental environmental projects to offset the impact of past emissions.<sup>8</sup>

The \$5.3 million civil penalty paid by VEPCO was shared among the plaintiffs; however, obtaining a substantial penalty is not the only goal. Chuck Corell, presently Chief of the Water Quality Bureau, Iowa Department of Natural Resources, observes that in the Archer-Daniel Midlands<sup>9</sup> national settlement, a large penalty was not his state’s measure of success: “Iowa was looking for emission reductions.” He is particularly pleased that an enforcement action “provided a chance to push a whole industry beyond MACT.”

Similarly, in the 2001 settlement with Conoco, Inc. for violations of the CAA at four refineries, Colorado, a co-plaintiff along with Louisiana, Montana, and Oklahoma, was also focused on the environmental results. “We wanted to take the greatest environmental benefits [of the settlement] back to Den-

ver and the State,” explains Jill Cooper, Senior Advisor for Environmental Programs, Colorado Department of Public Health and the Environment. “We were able to develop some really good, creative supplemental environmental projects.” Conoco agreed to spend \$2 million on these projects in Denver, alone; among the co-plaintiffs, the largest number and concentration of people negatively affected by air pollution from the company’s refineries were in Denver. Cooper gives high marks to EPA and DOJ for their work with the state and the community to develop the SEPs. “It was an excellent process,” she says.

For some states, partnering with EPA has simply meant having the resources to take on a large, technically complex set of violations at a facility. Robert Kinney observes, “No one’s resources are getting bigger; it makes sense to share where the gains will be efficiency and effectiveness.” Chuck Corell agrees, “A small program like [Iowa’s] could not take on a major corporation and get the emission reductions that came out of the case against ADM.”

EPA can bring to a national team a breadth of specialized expertise that not every state may have available. “[There is] no way some of the small states can do this,” notes Chuck Corell, of Iowa. “It means a lot of talent at the table,” says Matt Dunn, Chief of the Environmental Enforcement/Asbestos Litigation Division, Illinois Office of the Attorney General. EPA and the U.S. Department of Justice (DOJ) also have more contractor funding to support the litigation, while states bring to the partnership great reservoirs of data and truly invaluable hands-on experience with a company and its facilities. For example, in the ADM national case, Iowa engineers had already been reviewing the company’s processes in great detail.

Chuck Corell has two words of advice for any state that wants to be a player in a national case: “Get involved.” He recommends full participation in con-

ference calls, meetings, and information exchange among states. Although he is highly complimentary of the communication and coordination work done by DOJ lawyers, he also observes that, "If you don't insert yourself in the process, you can get left behind." Peter Lehner thinks that it only makes sense to do this. "It's a joint endeavor. These are often tough cases and it's important that all states share in the work." Matt Dunn agrees. "Be ready to do the work if you want to be more than a tag-along." He adds, "It is not fair to think that you will get a quarter share of the penalty without being involved."

Jill Cooper points out that the situation can sometimes be challenging if your state has only a very minor facility as its part of the national case. Because your state's interests may not have as high a profile as states with greater numbers of non-complying facilities, she recommends, "Make the effort to stay in the loop." It is Cooper's observation that maintaining an appropriate degree of active involvement in the case and being a signatory to any consent decree will give you more leverage during the negotiations to achieve your state's priorities.

### Conclusion

EPA's national enforcement and compliance assurance priorities focus on significant environmental risks and noncompliance patterns country-wide. They offer many opportunities for state and federal partnerships that can result in important environmental and human health improvements.

### ENDNOTES

1. Like the core program activities, the national priorities program has been incorporated into the agency's FY 2005 - 2007 Strategic Plan. Detailed information on the agency's Strategic Plan is available at <<http://www.epa.gov/compliance/data/planning/priorities/index.html>>.
2. California, Kansas, New York, North Carolina, Oklahoma, Oregon, South Carolina, Texas, Utah and Virginia.
3. National Association of Attorneys General; Environmental Council of the States; Tribal Association for Solid Waste and Emergency Response; and State and Territorial Air Pollution Program Administrators/Association of Local Air Pollution Control Offices.
4. Washoe Tribe, CA; Navajo Nation, AZ; Cortina Rancheria, CA; and Tohono O'odham Tribe, AZ.
5. Further information the national priorities may be found through the EPA web site <<http://www.epa.gov/compliance/planning/priorities/indexhtml>>. This page serves as the gateway to more detailed descriptions of each priority, including a statement of the environmental problem it will address, goals, implementation strategy and measures of success.
6. Section 112 of the CAA, 42 U.S.C. § 7412, *et seq.*
7. A recent decision of the U.S. Court of Appeals for the Second Circuit vacated the requirement that all CAFOs apply for a NPDES permit, regardless of the circumstances at the particular CAFO. EPA is evaluating what changes may be necessary to the regulations in light of the decision. *Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2d Cir. 2005), *reh'g den.* (May 3, 2005).
8. A summary of the VEPCO settlement can be found at <<http://www.epa.gov/compliance/resources/cases/civil/caa/vpecofs.pdf>>.
9. Grain industry giant Archer-Daniels Midland Company (ADM) entered into an unprecedented settlement with EPA and fourteen states and counties in 2003 for violations under the CAA. The settlement covered operations at fifty-two plants in sixteen states, requiring sweeping environmental improvements nationwide that will result in a reduction of at least 63,000 tons of air pollution a year. ADM agreed to install state-of-the-art controls on a large number of units; shut down some of the oldest, dirtiest units; take restrictive emission limits on others; and apply certain more stringent emission limits that are expected to set new standards for the industry. A number of worthy supplemental environmental projects were agreed upon and a significant penalty was shared among the co-plaintiffs. For additional information see <<http://www.epa.gov/Compliance/resources/cases/civil/caa/adm.html>>.

## DECISIONS

### Air

#### **Court Affirms Asbestos Conviction: *United States v. Marvin Rubenstein & Isaac Rubenstein*, No. 03-1721 (2d Cir. Mar. 31, 2005)**

#### **Background**

The defendants own a commercial building on Prince Street in Brooklyn, New York. One of the tenants of the building is a sweater knitting factory, owned by Marvin Rubenstein and his mother, Bella. Marvin's son, Isaac, assists his father in running the knitting operation and in managing the building. Eckstein, a real estate developer, approached Marvin about leasing the Prince Street building. Before signing any contract, however, he had an environmental consultant inspect the building. Isaac accompanied the inspector who noted the presence of asbestos in the building.

In July 2000, Eckstein and Marvin executed a forty-nine year, \$50 million lease. Marvin orally agreed to remove the asbestos as a condition of the lease. In December 2000, Marvin hired men whom he had previously employed at the knitting factory to remove the asbestos. He instructed them to remove it with a knife or scissors and put it in boxes. However, he never told them the material was asbestos. Eckstein's contractors noticed the boxes, which were not sealed, and heard Marvin ordering his workers to place the boxes in a garbage compacting truck. On February 8, Eckstein told Marvin that asbestos could not be removed in that manner, but Marvin told him that "it is not that big a deal."

That same day, officials from the New York City Department of Environmental Protection visited the building. Marvin told them he had hired men off the street to remove the insulation and that removal had begun earlier that week. Isaac also told the officials that they had hired men off the street but said that removal had just begun that day and that no asbestos

had been transported from the building. Isaac later said he did not know the nature of the insulation material.

On February 9, the DEP Commissioner issued an order directing the defendants to vacate the building, to submit a scope of work order the next day, and to remediate the asbestos contamination. On February 11, an asbestos contractor toured the building and agreed to remove the asbestos that same day for a \$10,000 cash payment. He was told he did not need to submit a scope of work order to the DEP and to lock the door if DEP officials came around. The director of DEP's asbestos section visited and noticed that work was underway to remove the asbestos. The next day, a different asbestos contractor submitted and obtained DEP approval for a scope of work order and subsequently satisfactorily performed the asbestos abatement.

The Rubensteins were subsequently charged with violating the work-practice standards for asbestos as set out in the Clean Air Act (CAA) and of conspiring to do so. After the jury found them guilty and they were sentenced, they appealed their conviction on the ground that the jury charge was erroneous. They also challenged their sentences with respect to certain enhancements.

#### **Holding**

The defendants argued at trial and, again, on appeal that they live in an insular religious community of Hasidic Jews in which the knowledge of the dangers of asbestos is not known nor of interest. Under the CAA, a person is criminally liable if he "knowingly violates any requirement or prohibition of . . . section 7412 of this title." 42 U.S.C. § 7413(c)(1). According to *United States v. Weintraub*, 273 F.3d 130, 147 (2d Cir. 2001), "knowledge of facts and attendant circumstances that comprise a violation of the statute, not specific knowledge that one's conduct is illegal, comprises a "knowing" violation. *Weintraub* was also a case involving violation of the asbestos work-practice standards. In that case, the court stated that "no one can reasonably claim surprise that asbestos is

regulated and that some form of liability is possible for violating these regulations.” *Id.* at 151.

According to the defendants, however, since they are members of the Hasidic Jewish community, it is not “reasonable” to ascribe such knowledge concerning asbestos to them. The court was not convinced. It stated that the statute presupposes a knowledge that asbestos is a regulated material in exactly the same way that other criminal statutes presuppose basic knowledge of the physical world. Furthermore, the defendants are worldly enough to own an asbestos-contaminated building and to negotiate for its removal to satisfy the terms of a \$50 million lease. They had received notice that there was asbestos in the building; they had been informed by others that their removal was improper. Even when they were confronted by officials, they attempted to circumvent the regulatory requirements. Therefore, the court concluded that there was no foundation for their claim that they acted in good faith and were ignorant of the dangers of their conduct.

The court then turned to examine the sentencing enhancements that the trial court imposed. The usual procedure in addressing challenges to application of the sentencing guidelines after the Supreme Court’s holding in *United States v. Booker*, 125 S. Ct. 738 (2005), would be to remand to the district court to determine if there would have been any difference in the sentence if the trial judge had treated the Guidelines as advisory. In this case, however, the court determined that the trial judge had interpreted one of the guidelines erroneously.

The trial judge gave a four-level enhancement under section 2Q1.2(b)(4), transporting a hazardous or toxic substance without a permit. The district court reasoned that the defendants had violated two state regulations regarding the transportation of asbestos. However, the CAA violation did not involve the violation of the New York State permit regulations. Although this was an issue of first impression in this circuit, the same issue was addressed by the Third Circuit in *United States v. Chau*, 293 F.3d 96 (2002). In that case, the court noted that section 2Q1.2(b)(4) requires

that the “offense involve” activity in violation of a permit. Thus, the *Chau* court ruled that the four-level enhancement was inapplicable to the CAA offense charged. The court in the case at bar agreed. It noted that the CAA, unlike other federal environmental statutes where there is an express federal permit requirement or where there is a delegation of that function to the states, does not require a permit for the disposal of asbestos.

The court affirmed the defendants’ convictions and remanded to the court to conduct resentencing.

## CERCLA

**Court Allows CERCLA Citizen Suit to Proceed Regarding Bloomington, Indiana, Superfund Site: *Sara E. Frey et al. v. Environmental Protection Agency et al.*, No. 03-3877 (7th Cir. Apr. 6, 2005)**

## Background

This lawsuit involves three sites in Bloomington, Indiana, that were contaminated by polychlorinated biphenyls (PCBs) by the predecessor-in-interest to Viacom, Inc. Two lawsuits, one brought by U.S. EPA and one by the City of Bloomington against Viacom, were consolidated and, in 1985, the parties entered into a consent agreement under which Viacom was to fully excavate and incinerate the PCBs at the six sites. The agreement required Viacom to build an incinerator.

In 1988, the plaintiff in the current lawsuit filed suit to challenge the proposed incineration remedy. The court in *Schalk v. Reilly*, 900 F.2d 1091 (7th Cir. 1990), dismissed the action for lack of subject matter jurisdiction. Subsequently, the Indiana State Legislature acted to block construction of the incinerator. This required the parties to re-enter negotiation. The district court ordered that the sites be remediated by 1999, but the parties were unable to reach an agreement by that date. The court then appointed a special master who recommended the deadline be pushed back to 2000 and noted that the parties had reached agree-

ment on some alternative methods of PCB excavation and had agreed to repeat the excavation by the end of 2000. While the excavation was on going, Viacom agreed to investigate water treatment and sediment remediation solutions at three sites. The parties were to engage in further negotiations regarding water treatment and sediment removal at two sites following the completion of excavation at each site.

In March 1999, U.S. EPA issued an amendment of its Record of Decision (ROD) for the source control operable unit at one site. The modified remedy called for excavation and removal of material with high levels of concentration ("hot spots") and the construction of a landfill cap. In May 2000, EPA issued an amended ROD for another of the sites, again adopting the "hot spots" remedy and including the statement that "future remedial decisions will be made regarding treatment of contaminated groundwater." The hot spots at both sites had been excavated by November 2000. At the third site, PCB-contaminated sediments were excavated in the fall of 1999 and in September 2000. Water and sediment contamination had not been fully addressed at any of the sites. Testing and investigation are still underway.

Frey brought a second lawsuit, alleging that the excavation remedy has failed to bring the sites into compliance with CERCLA and other statutes. The district court dismissed the action, finding that CERCLA's timing of review provisions eliminated subject matter jurisdiction. Frey appealed.

### **Holding**

Section 113(h), 42 U.S.C. § 9613(h), states, in part:

No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or reme-

dial action, selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title in any action except one of the following [listing five exceptions].

In its first decision in this case, *Frey v. EPA*, 270 F.3d 1129 (7th Cir. 2001), the court reversed the *sua sponte* dismissal of the lawsuit for lack of subject matter jurisdiction. In that decision, the court noted that a lawsuit could not continue when only one stage of a broader remediation plan is finished. The statute prohibits a lawsuit when "remedial action" remains to be done. *Id.* at 1134. EPA argued that the PCB excavation is simply one stage of its proposed plan and that, thus, Frey's suit is prohibited until all phases, including water and soil remediation, have been completed.

The court expressed concern, however, for the seemingly open-ended process that EPA was undertaking at the sites. Although it is clear that EPA is "studying" remediation, there does not seem to be any time frame for completing the "study." At oral argument, EPA counsel indicated the EPA felt itself protected from review so long as it might, at some future time, take further action at the site.

In *Frey I*, the court held that "the time limits in § 113(h) are geared to concrete, existing, remedial measures; not measures that might be devised at some future date. *Id.* at 1134. In order for EPA to delay Frey's suits, there must be some "objective referent" that commits the agency and others to an action or plan. There is no such objective evidence in this case. There is no timetable or other objective criterion by which one could assess when the study and investigation phase may end.

Frey asked the court to read the text to narrowly preclude review *only* when EPA has selected a remedy through its Record of Decision process. The court rejected that broad a holding. However, it did conclude that there must be "some objective indicator that allows for an external evaluation, with reasonable target completion dates, of the required work for a site."

Slip op. at 12. In this case, the court saw “only a desultory testing and investigation process of indefinite duration.” *Id.*

The district court noted that section 113(h)(4) bars lawsuits when “the process of investigation and analysis — by definition a ‘removal’ action — is underway in order to determine what ‘remedial’ action is to be taken.” However, this challenge is not to a removal action. By definition, a removal action is taken to halt immediate risks posed by hazardous wastes. This lawsuit, instead, is a challenge to a removal action. Congress intended for remedial action to be complete before permitting judicial review. However, the court concluded that Congress did not intend to extinguish judicial review altogether.

Thus, the court reversed the judgment of the district court and remanded for further proceedings.

## Discovery

**Court Holds Privilege Was Waived: *Burlington Northern & Santa Fe Railway Company v. U.S. District Court for the District of Montana*, No. 04-72134 (9th Cir. Mar. 31, 2005)**

## Background

Brian and Ryann Kapsner brought a lawsuit in state court against Burlington for the railroad’s alleged intentional dumping of diesel oil and toxic solvents that led to contamination of the Kapsners’ land and for the company’s failure to contain and remediate this damage. The railroad company moved the case to federal court on diversity grounds. Discovery has been ongoing since early November 2002. This process has led to misunderstandings and increased acrimony between the parties.

Burlington’s first response to the Kapsners’ document requests was not accompanied by a privilege log. The record indicates that both parties intended and expected that a privilege log would be produced. Burlington’s response to the document request was an invitation for the Kapsners to inspect documents

on the company’s premises. The Kapsners objected and also complained that the documents were neither organized nor kept “in the usual course of business,” but, instead, were simply produced in boxes with no underlying organizational scheme. The Kapsners also believed that documents were being improperly withheld. They filed a motion with the court to compel discovery.

Before the court could rule, Burlington produced a privilege log. The Kapsners contended that the log made it difficult to determine whether Burlington was complying in good faith with the discovery request. The magistrate judge ordered Burlington to organize its production and to produce documents responsive to the Kapsners’ requests.

The controversy over discovery continued for more than a year. Burlington modified its privilege log several times and the Kapsners repeatedly demanded voluntary production of the documents requested. They then filed a second motion to compel. The magistrate judge granted the motion and, on appeal to the district judge, the order was upheld. Burlington then brought this petition for a writ of mandamus to overturn the district court’s order.

## Holding

In its holding, the district court agreed with the Kapsners that “defendant waived its privilege objections by failing to provide a privilege log at the time it served its discovery responses.” The court evidently read Federal Rule of Civil Procedure 26(b)(5) and Rule 34 as incorporating a *per se* rule that failure to produce a privilege log in a timely manner triggers waiver of privileges. The appellate court disagreed. Rule 34 requires that a written response to a discovery request be served within thirty days of the service of the request. This rule imposes a bright-line rule defining timeliness. It does not, however, contain any prohibition against boilerplate objections or assertions of privilege.

Rule 26 provides:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

There is nothing in this rule that correlates the requirement—that a claim of privilege be specific—to Rule 34’s thirty-day requirement nor does it contain an explicit waiver rule.

The advisory committee notes suggest a temporal framework for asserting privilege and also suggest the waiver of the privilege for failing to provide proper notice. There is not explicit guidance as to the nature of the required notice. This has created a climate in which practitioners can strategically manipulate the discovery process. No circuit has decided the contours of the Rule 26(b)(5) notice requirement nor that rule’s relationship to Rule 34. The Ninth Circuit in *Dole v. Milonas*, 889 F.2d 885, 890 (1989), did hold that a privilege log is enough to assert privilege but did not hold that it is required in order to assert privilege. That court, however, did name a variety of methods in which privilege might be asserted, such as *in camera* review and redactions of privileged material. One circuit, in a similar case, refused to issue a writ of mandamus to a trial court. In *Peat, Mitchell & Co. v. West*, 748 F.2d 540 (10th Cir. 1985) (per curiam), the court ruled that untimeliness had destroyed the attorney-client privilege, even though “it does not seem seriously disputed that the privilege would have attached if the objection had been timely and adequately asserted.” *Id.* at 542.

It is clear that the overall aim of the discovery rules “is to provide a mechanism for making relevant infor-

mation available to the litigants. . . . Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues.” Rule 26(f) advisory committee’s note (1983 Amendment). Thus, the court held that boilerplate objections or blanket refusals as a response to a Rule 34 request for documents is insufficient to assert a privilege. However, a privilege is not waived if a privilege log is not produced within the thirty-day limit of Rule 34. Instead, a court, using the thirty-day period as a guideline, should make a case-by-case determination, taking into account various factors:

[T]he relative specificity of the objection or assertion of privilege (where providing particulars typically contained in a privilege log is presumptively sufficient and boilerplate objections are presumptively insufficient); the timeliness of the objection and accompanying information about the withheld documents (where service within 30 days, as a default guideline, is sufficient); the magnitude of the document production; and other particular circumstances of the litigation that make responding to discovery usually easy (such as, here, the fact that many of the same documents were the subject of discovery in an earlier action) or unusually hard.

Slip op. at 9–10.

The court went on to caution that these factors should be applied in the context of a “holistic reasonableness analysis.”

In this case, the district court found a waiver when the privilege log was filed five months after the Rule 34 deadline had passed. Additional circumstances support the ruling. Burlington is a knowledgeable and repeat player in environmental lawsuits and a sophisticated corporate litigant. It is difficult to sustain its claim that responding in a timely fashion would have been overly burdensome, especially since many of

these requested documents had been produced in an earlier lawsuit. Furthermore, even the untimely assertion of privilege was insufficient because there was no correlation of specific documents with specific discovery requests. Furthermore, even after producing the log, Burlington made substantial changes to that log.

The district court's order was not clearly erroneous. Therefore, Burlington's petition for a writ of mandamus was denied.

## Energy

### **FERC May Require Monitoring of Invasive Species: *Rhineland Paper Company v. Federal Energy Regulatory Commission*, No. 04-1133 (D. C. Cir. Apr. 12, 2005)**

#### **Background**

Rhineland Paper Company has had a license to operate a hydroelectric project on the Wisconsin River in Oneida County, Wisconsin, since 1938. In June 1998, it filed an application for a license to continue operating the facility with the Federal Energy Regulatory Commission (FERC) pursuant to the Federal Power Act (FPA), 16 U.S.C. §§ 791a *et seq.* The U.S. Fish and Wildlife Service (FWS) recommended, *inter alia*, that FERC require Rhineland to prepare, in consultation with it and the Wisconsin Department of Natural Resources (DNR), a plan to monitor and control the spread of invasive plant species. The FWS acknowledged that there was no evidence of infestation at this time, but noted it could become a problem over the term of the license.

FERC's final Environmental Assessment acknowledged that there was no apparent infestation of invasive plants at this time, but agreed with the FWS recommendation that Rhineland develop a plan to monitor two invasive species, purple loosestrife and Eurasian milfoil. The permit was subsequently issued with a requirement that Rhineland submit for FERC approval an "exotic species control plan to monitor invasive species." Rhineland filed a petition for review.

#### **Holding**

Rhineland contended that the invasive species requirement was beyond FERC's authority under section 10(j)(1) of the FPA. In relevant part, this section states:

That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement.

16 U.S.C. § 803(j)(1). Rhineland claimed that spread of the two plant species of concern would not be caused by any activity related to operating a hydroelectric dam and, thus, are not an *effect* of the generation of hydroelectric energy.

Using the two-step *Chevron* framework, the court first asked whether Congress had directly spoken to the issue. The verb "affect," in common language, means to "produce an effect on; to influence in some way." Black's Law Dictionary 92 (8th ed. 2004). There can be no doubt that the hydroelectric project "affects" the river's waters and the fish and wildlife there in by trapping water to turn turbines before discharging it back into the river. Rhineland acknowledged that invasive species might spread their seeds by flowing down the river or arriving on equipment, vehicles, or people who recreate there. The activities of the project, therefore, may increase the spread of these weeds. The invasive species, in turn, can crowd out native wetland plants and cause aquatic weed problems that alter fish communities. Thus, the court concluded that FERC has the authority to require a plant control plan "to equitably protect, mitigate damages to, and enhance, fish and wildlife" which are "affected by" Rhineland's "development, operation, and management of the project."

Nonetheless, Rhinelander cited two FERC decisions, which it contended, found that proposed monitoring and eradication recommendations proposed by the agency were not proper. The court found the decisions to be unhelpful to Rhinelander. In the second of those decisions, FERC's position is explicitly detailed—that the implementation of control measures might be outside its jurisdiction, but the implementation of monitoring measures is not. This is exactly what FERC has required Rhinelander to do in its new license. With Rhinelander monitoring invasive species, if they are discovered, it need only cooperate with the state Department of Natural Resources and the FWS to undertake reasonable measures to control or eliminate those species in the project area.

The court denied Rhinelander's petition for review.

### Preemption

**Vermont's Environmental Land Use Statute Preempted by Federal Law: *Green Mountain Railroad Corporation v. State of Vermont et al.*, No. 05-0366-cv (2d Cir. Apr. 14, 2005)**

### Background

Green Mountain Railroad Company operates fifty-two miles of track between Rutland, Vermont, and Cold River, New Hampshire. The line serves industries that rely on trucks to transport goods from the rail site. Green Mountain owns a sixty-six acre tract, known as Riverside, along its rail line in Rockingham, Vermont. The area is bounded by the Connecticut River on the east; portions of the property are wetlands. Green Mountain wanted to build facilities at Riverside for temporary storage and transport of salt, non-bulk goods, and bulk cement.

Vermont's Act 250 is an environmental land use statute that requires preconstruction permits for land development. Applications are filed with one of nine District Commissions and are evaluated using ten criteria, including "undue water or air pollution," VT. STAT. ANN. tit. 10, § 6086(a)(1), and "undue adverse effect on the scenic or natural beauty of the area, aesthet-

ics, historic sites or rare and irreplaceable natural areas," VT. STAT. ANN. tit. 10, § 6089(a), (b).

In 1997, PMI Lumber leased part of Riverside and applied for an Act 250 construction permit. A land permit was subsequently issued in the names of PMI Lumber and Green Mountain which required maintenance of a one-hundred foot buffer zone. After PMI Lumber ceased using the site, Green Mountain used it for transloading activities and encroached on the buffer zone.

Green Mountain sought to amend the permit in the spring of 1998 to allow construction of a 2,750 square foot salt storage shed. That permit was issued with certain conditions. In October 1999, Green Mountain applied for another permit to modify the size, color, and location of the salt shed. No permit was issued, but Green Mountain began construction of the modified shed in November 1999.

Early in 2000, the state issued a notice of violation of the issued permit, citing, *inter alia*, storage of materials within the one-hundred-foot buffer zone. A second notice of violation was issued in February 2000, alleging construction of the salt shed without a permit.

In the spring of 2000, the state conducted hearings on Green Mountain's shed permit application. Green Mountain argued that the state Environmental Commission lacked jurisdiction to adjudicate the pending permit application because the state's land use statute is preempted, insofar as this issue is concerned, by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10101 *et seq.* Green Mountain then filed this lawsuit in the federal district court, seeking a declaration that the Termination Act preempted the state statute. It also requested a declaratory order from the federal Transportation Board. The Transportation Board deferred to the district court. In the meantime, the state moved to dismiss the district court action and, while that motion was pending, it issued the permit Green Mountain sought. In September 2001, the district court granted the state's motion to dismiss Green Mountain's facial challenge

to the applicability of the statute, but ordered further discovery on whether the state's enforcement efforts violated the Termination Act. In December 2003, the court granted Green Mountain's motion, holding that the state's efforts to enforce the statute were preempted under the Termination Act. The state appealed.

### Holding

The court began by quoting language from *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) regarding preemption of state law by federal law. There are three ways in which state law may be preempted. First, state law is preempted if there is explicit or implicit preemption in the language, structure, and purpose of the federal law; second, preemption occurs if the state law actually conflicts with federal law; third, there is preemption if the federal law thoroughly occupies a field, leaving no room for state legislation.

The Termination Act contains an express preemption clause:

Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b). Section 10501 of the Termination Act vests exclusive jurisdiction over "transportation by rail carriers" and "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." 40 U.S.C. § 10501(b). "Transportation" is defined to include "a locomotive, car, vehicle, vessel, warehouse . . . yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail." 49 U.S.C. § 10102(9). The plain language, thus, grants the Transportation Board authority over the transloading and storage facilities undertaken by Green Mountain.

The court cited other courts' decisions that recognized the Termination Act's preemption of states' and localities' pre-construction permit requirements. *See, e.g., City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), *Soo Line Railroad Company v. City of Minneapolis*, 38 F. Supp. 2d 1096 (D. Minn. 1998), and *CSX Transportation, Inc. v. Georgia Public Service Commission*, 944 F. Supp. 1573 (N.D. Ga. 1996). The Transportation Board has ruled similarly.

The Vermont statute at issue in this case is similarly preempted. First, it gives a local body the ability to deny a carrier the right to construct facilities or conduct operations, unduly interfering with interstate commerce. It can also allow a local body to delay unduly the construction of railroad facilities. This is not to say that all police powers over the development of railroad property is preempted by the Termination Act. To the extent the regulations "protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion or subjective questions," they are enforceable. Slip op. at 14. Thus traditional building codes and direct environmental regulations enacted for the protection of public health and safety are not preempted.

The state argued that the statute cannot be preempted on its face unless there is no possible condition that would be placed on a permit that would not conflict with federal law. The court disagreed. It noted that what was preempted was the permitting process itself, not the length or outcome of that process. The state also argued that the statute should not be preempted because it is an environmental, not an economic, regulation. According to the court, that distinction is not helpful. The court quoted language from the *City of Auburn* that answered the state's argument: "[I]f local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." *City of Auburn*, 154 F.3d 15 031. The court also distinguished this case from its holding in *Ace Auto*

*Body & Towing, Ltd. v. City of New York*, 171 F.3d 765 (2d Cir. 1999). In that case the court concluded that the Termination Act's provisions relating to motor carrier operations did not preempt New York's police power to suppress the practice of "chasing." "Chasing" involved tow trucks competing for business by racing to accidents broadcast on police radio frequencies. The statutory language provided that a state or locality "may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The court held that the language focused preemption on economic regulations and left the state free to regulate under its police powers where economic burdens were only incidental. The regulations against "chasing" were sufficiently grounded in public safety to withstand a preemption challenge.

In contrast, the language in the Termination Act's section regarding integral rail facilities clearly indicate congressional intent to preempt state and local regulation except in the narrow public safety area articulated earlier in the court's decision. Therefore, the court affirmed the district court's judgment.

## Water

**Court Orders Repeal of EPA Regulation Regarding Discharges from Vessels: *Northwest Environmental Advocates et al. v. U.S. Environmental Protection Agency*, No. C 03-05760 SI (N.D. Cal. Mar. 30, 2005)**

### Background

The Clean Water Act (CWA) requires that dischargers of pollutants from a "point source" into the navigable water of the United States must have a National Pollutant Discharge Elimination System (NPDES) permit. Under the CWA's definitions, a "point source" includes a "vessel or other floating craft." 33 U.S.C. § 1362(14). A "discharge of any pollutant" is defined as "(A) any addition of any pollutant to navigable waters from any point source, [and] (b) any addition of any pollutant to the waters of the

contiguous zone or the ocean from any point source other than a vessel or other floating craft." *Id.* at § 1362(12). Biological materials are included within the definition of a "pollutant." *Id.* at 1632(6). The CWA specifically excludes from its definition of a "pollutant" any "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces." *Id.* at § 1362(6).

In its regulations, U.S. EPA has exempted the following discharges from the NPDES requirement:

- (a) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development.

40 C.F.R. § 122.3(a).

Relying on this regulation, EPA has exempted the discharge of ballast water from NPDES permitting requirements. Unfortunately, according to numerous government reports, the discharge of ballast water has introduced nuisance species into various water bodies. The consequences of these species can be seen in the high cost dealing with the introduction of zebra mussels into the Great Lakes.

In January 1999, the plaintiffs and others filed a petition with EPA requesting that it repeal 40 C.F.R. § 122.3(a) because, they alleged, it conflicts with the

CWA which does not exempt “discharges incidental to the normal operation of a vessel.” EPA denied the petition in September 2003. The plaintiffs then filed this complaint with the court, requesting that the agency’s failure to rescind the regulation is in clear violation of the CWA and requesting an injunction directing the repeal and rescission of 40 C.F.R. § 122.3(a).

The parties filed cross-motions for summary judgment. New York, Illinois, Michigan, Minnesota, Pennsylvania, and Wisconsin filed an amicus brief in support of the plaintiff’s motion.

### Holding

Prior to addressing the substantive issues, the court discussed whether it had subject matter jurisdiction over this case. The defendant contended that the Courts of Appeals have exclusive jurisdiction because the regulation in question involves “effluent limitations and other limitations” contained in NPDES permits. Citing *Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency*, 673 F.2d 400 (D.C. Cir. 1982), the agency argued that the term “effluent limitations” includes regulations that implement NPDES permit programs. In response, the plaintiffs argued that a regulation exempting discharges from NPDES permit requirements cannot be construed as an “effluent limitation or other limitation” under 33 U.S.C. § 1369(b)(1)(E), the section that governs subject matter jurisdiction for review of the “Administrator’s action . . . in approving or promulgating any effluent limitation or other limitation . . . .”

The court noted that the Ninth Circuit has “counseled against the expansive application of” section 1369(b). See *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1190 n.8 (9th Cir. 2002). It also commented that the agency had not cited any cases that deal with an exemption for an entire class of discharges. It distinguished *Environmental Defense Center, Inc. v. U.S. Environmental Protection Agency*, 344 F.3d 832 (9th Cir. 2003) (*EDC v. EPA*), from the issue in the case at bar. Although in *EDC*, EPA had exempted a narrow group of facilities from

NPDES permit requirements, it clearly limited storm sewer pollutants. This is not the situation in the instant case. Since the EPA regulation involved here does not constitute an “effluent limitation or other limitation,” the court found that the Court of Appeals did not have exclusive jurisdiction under section 1369(b)(1)(E).

The defendant also argued that section 1369(b)(1)(F) placed the subject matter jurisdiction of this case within the Court of Appeals’ jurisdiction. This section of the CWA places exclusive jurisdiction in the Court of Appeals for reviews of action “in issuing or denying any permit under section 1342” of the CWA. The defendant relied on two Ninth Circuit cases in making its argument under this section, *NRDC v. EPA*, 966 F.2d 1292 (9th Cir. 1992), and *American Mining Congress v. EPA*, 965 F.2d 759 (9th Cir. 1992). In both of these cases, the court based its jurisdiction to review EPA regulations on subsection (F). The court distinguished these cases by noting that both involved *temporary* exclusions from the NPDES permit requirements, not the permanent exclusions found in this case. Instead, this court cited its decision in *Environmental Protection Information Center v. Pacific Lumber Company*, 266 F. Supp.2d 1101 (N.D. Cal. 2003), in which the court considered an EPA regulation that exempted some silvicultural activities from the definition of “silvicultural point source.” The court determined that subsection (F) did not apply because, once exempted by regulation, there was no permit to request or deny. This is the same situation that the court was confronting in this case. EPA could never issue or deny a permit for ballast water discharges because these discharges are completely exempted from the NPDES permitting scheme under the regulation. Therefore, the court held that it had subject matter jurisdiction.

The court next discussed the statute of limitations issue. The plaintiffs brought two causes of action pursuant to 5 U.S.C. § 706(2). The first asserted that EPA’s promulgation of the regulation at issue was “inconsistent with, and in excess of EPA’s statutory authority under, the Clean Water Act.” Compl. at 29. The second alleged that EPA’s denial of the plain-

tiffs' petition was "arbitrary, capricious, an abuse of discretion and not in accordance with the Clean Water Act." *Id.* at 32. There is no statute of limitation problem regarding the second cause of action. However, EPA argued that the first was barred by the six-year statute of limitations provided in 28 U.S.C. § 2401(a) since the regulation was first promulgated in 1973.

In *Wind River Mining Corporation v. United States*, 946 F.2d 710 (9th Cir. 1991), the court held that a substantive challenge to an agency decision that alleged the agency lacked statutory or constitutional authority to make a decision can be brought within six years of the application of that decision to the petitioner as an "as applied" challenge. The defendant argued that this dispute was not an "as applied" challenge because the regulation was never applied to the plaintiffs. However, several courts have held that, where the allegation is that an agency has violated a statute, that claim may be raised outside a statutory limitations period by filing a petition for amendment or rescission of the regulation. *See, e.g., Legal Environmental Assistance Foundation, Inc., v. EPA*, 118 F.3d 1467, 1473 (11th Cir. 1997). The court found that the first cause of action was an "as applied" challenge which accrued when EPA rejected its petition in September 2003.

The court then turned to the substantive issue involved. Under the *Chevron* standard, the first inquiry is whether Congress has directly spoken to the issue. It is clear that the discharge of ballast water falls within the definition of "discharge" or "addition" under the CWA. The discharge clearly introduces biological materials from outside sources. The discharged water constitute "pollutants" under the CWA and there is no dispute that these discharges occur within "navigable waters nor that they occur from a "point source." The two explicit exemptions contained in the CWA — those discharges to the contiguous zone or ocean and "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" — are not applicable. Therefore, the court found that the clear language of the CWA and the clear intent of Congress would be to require

NPDES permits before discharging pollutants from non-military vessels into the navigable waters.

EPA defended its denial of the plaintiffs' petition by arguing that Congress has assented to EPA's interpretation. The length of time since its promulgation and Congress' failure to revise or repeal the regulation constituted, from EPA's perspective, persuasive evidence that Congress intended the interpretation offered by EPA in its regulation. It cited two decisions — *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), and *Bob Jones University v. United States*, 461 U.S. 574 (1983) — as standing for the proposition that Congress' failure to rescind or pass legislation overturning a regulatory provision could constitute affirmative evidence of congressional intent.

The court noted, however, that the Supreme Court cautioned in a more recent case, *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), that courts should exercise extreme care when recognizing congressional acquiescence. In *SWANCC*, the court noted the reasoning behind the decision in *Bob Jones*. In that case, the IRS interpretation of the statute was correct: Congress had held hearings on the precise issue and the thirteen bills introduced to overturn the IRS' interpretation had failed. Thus, there was overwhelming evidence of acquiescence. There is nothing in the present case close to offering "overwhelming" evidence of congressional acquiescence in EPA's interpretation of the CWA as exempting discharges incidental to the normal operation of a vessel from the NPDES requirement. The text of two other statutes enacted to address the invasive species issue — the Non-indigenous Aquatic Nuisance Prevention and Control Act, 16 U.S.C. § 4701, reauthorized and amended by the National Invasive Species Act of 1996 (NISA) and the Act to Prevent Pollution from Ships (APPS), 33 U.S.C. §§ 1901 *et seq.* — is not sufficient to overcome the plain text and import of the CWA. NISA addresses only aquatic nuisance species from ballast water, not the other types of pollutants that are found there. APPS specifically has a general savings clause that states that it does not

amend or repeal any other provisions of law except as specifically stated in the statute. EPA argued that, since the questioned regulation was in effect at the time APPS was passed, this is another indication of congressional acquiescence. The court, however, said the general savings clause cannot be taken to endorse an action that is directly contradictory to the CWA and is certainly not the type of “overwhelming” evidence required by *SWANCC*.

Since the court found that EPA had not carried its burden of proof by demonstrating “overwhelming evidence of acquiescence” by Congress with respect to the exemption, the court found that EPA acted in excess of its authority when it exempted the entire category of vessel discharges from the NPDES permitting scheme and when it denied the plaintiffs’ petition. It thus granted the plaintiffs’ motion for summary judgment and ordered EPA to repeal 40 C.F.R. § 122.3(a).

**Court Adopts Commingled Product Theory of Market Share Liability Theory in MTBE Litigation: *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, No. 1:00-3898 (S.D.N.Y. Apr. 20, 2005)**

**Background**

The plaintiffs in this multi-district, consolidated litigation seek relief for the defendants’ alleged contamination, or threatened contamination, of groundwater by methyl tertiary butyl ether (MTBE). The defendants moved for the complete dismissal of all the complaints filed in fifteen states: Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Vermont, Virginia, and West Virginia. These cases were removed to federal court over the plaintiffs’ objections.

The defendants’ motions to dismiss are based on the plaintiffs’ failure to identify which defendant’s MTBE

proximately caused their harm. The plaintiffs have conceded that they are unable to so specify. Therefore, unless the plaintiffs’ claims can proceed on a theory of collective liability, they cannot survive.

**Holding**

Before issuing her ruling, the judge highlighted an important point regarding federalism. She noted that it was the duty of a federal court to predict what a state court would decide if presented with the issue of collective liability. In diversity cases, some federal courts have exercised restraint in ruling on novel issues of state law. The Second Circuit stated that the role of the federal court is to “construe and apply state law as [it believes the state’s highest court would, not to adopt innovative theories that may distort established state law. *City of Johnstown v. Bankers Standard Insurance Company*, 877 F.2d 1146, 1153 (2d Cir. 1989). The judge also noted, however:

When a defendant removes a case from state to federal court, a liberal construction of state law protects the principle of dual sovereignty by protecting a party who sought to obtain a resolution of state law claims from state courts. If this Court were to adopt a more restrictive reading of state law than the highest courts of the relevant states would be likely to adopt, the parties would be treated differently than they would be in a state court — a result directly contrary to the fundamental goals of *Erie*, namely the “discouragement of forum-shopping and avoidance of inequitable administration of laws.” Therefore, while a court may not adopt “innovative theories” without

support in state law, or “distort” existing state law, when a case is removed to federal court, the plaintiff is entitled to the same treatment it would receive in state court — no more, and no less.

2005 U.S. Dist LEXIS 6686, at \*6 (citations omitted).

The court reviewed the plaintiffs’ factual allegations, including that the defendants were aware that mixing MTBE with gasoline would result in groundwater contamination, that they purposely misled EPA into not testing MTBE under the Toxic Substances Control Act, that they promoted MTBE to profit from using a refining waste byproduct, that MTBE doesn’t actually reduce ozone and smog, and that gasoline containing MTBE from various refineries is commingled during transmission to distribution centers.

The court held, at the outset, that the plaintiffs’ claim cannot survive the motions to dismiss based on the possibility that the plaintiffs might be able to identify the manufacturer whose product caused each plaintiff’s injury during the discovery process. To accept that argument would be akin to allowing pre-action discovery to the plaintiffs. However, the court also rejected the defendants’ argument that the plaintiffs were bound by the admissions in their complaints that product identification is impossible. The court concluded it would be unfair to treat those assertions as binding when the defendants are in the better position to know who manufactured the offending product.

The court then discussed the various theories of collective liability. The theory of concurrent wrongdoing is based on the thought that when two actors combine to produce injuries, neither actor should be relieved from liability and plaintiff should not have the burden of proving apportionment of wrong. Thus, courts have usually imposed joint and several liability on the defendants under this theory. A second theory of collective liability is an extension of vicarious liability, the theory of concert of action. This theory is used when a tortious act is committed in concert with another or

as part of a common design or when one party knows that the other’s act is a breach of duty and gives assistance or encouragement to performing that act, or one party gives substantial assistance to the other in committing the tortious act and this conduct constitutes a breach of duty to the injured party. This makes the one party responsible for the act of another. Although this theory is often connected to the term “conspiracy,” it is not necessary that there be an express agreement among the actors for the theory to be applied. The classic example of concerted action is injury caused by a drag race when one driver causes the injury but the other driver is held jointly liable for the injury.

The decision in *Summers v. Tice*, 199 P2d 1(Cal. 1948), adopted the theory of alternative liability. This theory shifts the burden of identification to the defendants where each has acted tortiously toward the plaintiffs, but only one of the defendants caused the injury. In *Summers*, the plaintiff sustained injury to his eye when two hunters fired shots in his direction. This doctrine is now embodied in Restatement (Second) of Torts. In most cases, the theory has been applied where the defendants’ conduct occurred simultaneously, was of the same character, created the same risk of harm, and all potential tortfeasors were joined as defendants.

A fourth theory is enterprise liability. This theory originated in *Hall v. E.I. DuPont de Nemours & Company*, 345 F. Supp. 353 (E.D.N.Y. 1972), in which thirteen children, injured in separate blasting cap accidents, brought a lawsuit against six manufacturers, alleging that their failure to place warnings on individual blasting caps created an unreasonable risk of harm. The plaintiffs alleged both joint knowledge of the high incidence of injury to children and joint conscious agreement not to place warnings on the caps. Three policy considerations influenced the court: The defendants’ joint control of the risks, the assignment of costs to those most able to reduce them, and affording a remedy to innocent plaintiffs.

The fifth theory grew out of the injuries sustained by plaintiffs from their mothers’ ingestion of the drug di-

ethylstilbestrol (DES) during pregnancy. The plaintiffs brought a class action against eleven drug manufacturers, alleging that they were jointly liable because they acted in concert in producing, marketing, and promoting DES as a safe and effective drug to prevent miscarriages. The district court dismissed the claims because the plaintiffs were unable to identify which manufacturer was responsible for the injuries. The California Supreme Court reversed the decision. Alternative liability was not applicable because not all potential tortfeasors had been joined. Concert of action was not applicable because the allegation was that there was parallel action among defendants, not a tacit understanding or a common plan. Enterprise liability was not suitable because of the large number of DES manufacturers and the defendant's lack of joint control over the risk of harm. The court coined a new theory, now known as market share liability.

Under the market share liability theory, if the plaintiff establishes a prima facie case on every element of the claim except identification of the tortfeasor and if manufacturers representing a "substantial share" of the market have been joined, then the burden of identification shifts to the defendants. Five states adopted some form of market share liability: Florida, New York, Washington, and Wisconsin in DES cases and Hawaii in a case involving a blood product. These courts have held that liability is several, rather than joint and several, and limited to the market share of each defendant. Most of the other states have not addressed market share liability; some have declined to apply it in cases involving nonfungible goods.

Restatement (Third) of Torts indicates:

In deciding whether to adopt a rule of [market share] liability, courts have considered the following factors: (1) the generic nature of the product; (2) the long latency period of the harm; (3) the inability of plaintiffs to discover which defendant's product caused plaintiff's harm, even after exhaustive discovery; (4) the clarity of the causal connection between the

defective product and harm suffered by plaintiffs; (5) the absence of other medical or environmental factors that could have caused or materially contributed to the harm; and (6) the availability of sufficient "market share" data to support a reasonable apportionment of liability.

*Id.* at § 15 cmt. c (1998).

The court noted that MTBE contamination presents "as compelling a circumstance for the application of market share liability as does DES." 2005 U.S. Dist. LEXIS 6686, at \*19.

The court further noted that, from time to time, courts have fashioned new approaches to permit plaintiffs to pursue recovery when facts and circumstances have raised unforeseen barriers to relief. This case suggested a modified market share liability theory which incorporates elements of concurrent wrongdoing. The court called this theory the "commingled product theory" of market share liability. Under this theory, "if a defendant's indistinct product was present in the area of contamination and was commingled with the products of other suppliers, all of the suppliers can be held liable for any harm arising from an incident of contamination." *Id.* at \*20.

Under this theory, defendants would not be held jointly and severally liable. Instead, damages would be apportioned according to a defendant's market share at the time a risk of harm was created. The defendant would have no liability if it were proved that its product was not present at the relevant time or place. Plaintiffs would need to identify only those defendants whom they believe contributed to the commingled product that caused the injury, but they need not name all potential tortfeasors. The difference between this theory and market share liability is that, in this case, the blend of the defendants' products is a new commodity and each supplier's product is known to be present. It is also known that the commingled product caused the harm. What is not known is the percentage of each supplier's goods present in the new

blended product. Therefore, there is assurance that all defendants have actually caused a plaintiff's loss. Another difference is that the harm caused need not have a long latency period (as did the harm caused by DES). The harm may occur immediately; however, this does not assist in the victim's ability to identify the actual tortfeasor.

Having discussed this new commingled product theory and adopting it to this lawsuit, the balance of the opinion was given over to the court's exhaustive review of the case law of each involved state. The court discussed in detail what each of the highest courts in each state would rule in connection with collective liability theory, looking primarily at the cases involving the commingling of fungible products because they are the most analogous to the present lawsuit. It concluded that Florida, Louisiana, Massachusetts, New Jersey, New York, Pennsylvania, Vermont, Virginia and West Virginia would use the market share liability theory; that Connecticut, Kansas, and Indiana were likely to use the commingled product theory; that Illinois and Iowa would use a concert of action theory of liability in this case; and that New Hampshire would use theories of collective liability to relax the causation requirement.

The court denied the motions to dismiss complaints filed in Florida, Kansas, Massachusetts, New York, Pennsylvania, Vermont, and West Virginia in their entirety. Some of the common law and statutory claims filed in Connecticut, Illinois, Indiana, Iowa, Louisiana, New Hampshire, and New Jersey were dismissed.

### **California May Consider Economic Factors When Applying "More Stringent" Restrictions: *City of Burbank v. State Water Resources Control Board et al.*, No. S119248 (Cal. Apr. 4, 2005)**

#### **Background**

Three wastewater treatment plants in California were the subject of two lawsuits, one brought by the City of Burbank and one by the City of Los Angeles. All three discharge into navigable waters and, together, process of hundreds of millions of gallons of sewage each day. All three plants are tertiary treatment facilities, meaning that the water they discharged is safe enough for human body contact for recreational purposes. In 1998, the Los Angeles Regional Water Board issued renewed National Pollutant Discharge Elimination System permits for the three wastewater treatment facilities under its 1994 basin plan which provided, in part, that "[a]ll waters shall be maintained free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal, or aquatic life." The 1998 permits reduced this narrative criteria to specific numeric requirements by setting daily maximum limitations for more than thirty pollutants.

Burbank and Los Angeles filed appeals with the State Board, contending that achievement of the numeric requirements would be too costly when balanced with the potential benefit to water quality and that the restrictions were unnecessary to meet the narrative criteria. The State Board denied the cities' appeal. The cities then filed writs in the superior court, alleging that the Los Angeles Regional Board had failed to comply with California's Porter-Cologne Act because it did not consider the economic burden on the cities when establishing the numeric criteria. According to Los Angeles, compliance would cost more than \$50 million annually, a cost that would be more than forty percent of its entire budget for operating its four wastewater treatment plants and sewer system and Burbank estimated it would cost over \$9 million annually, an almost one hundred percent increase over its annual budget for wastewater treatment.

The trial court ruled that the state's Porter-Cologne Act required a regional board to consider costs of compliance in both its basin and water quality plans and also in setting the allowable pollutant content of discharged wastewater. The court found no evidence that the Board had considered economic factors at either stage and ordered the Board to vacate the contested restrictions. The Court of Appeals reversed, holding that the act only required a regional board to take into account economic considerations when it adopts water quality standards in a basin plan but not when it sets specific pollutant restrictions in wastewater discharge permits to satisfy those standards. The California Supreme Court granted the cities' petition for review.

### **Holding**

Section 13263 of the Porter-Cologne Act governs the issuance of wastewater permits by a regional water board. In relevant part, it provides that "[t]he regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge [of wastewater]. The requirements shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, *and the provisions of Section 13241.*" CAL. WATER CODE § 13263 (a) (emphasis added).

Section 13241 lists factors a regional board should consider in establishing water quality objectives. These factors include subsection (d), economic considerations. The cities argued that section 13263's express reference to section 13241 requires the Los Angeles Regional Board to consider economic considerations before issuing NPDES permits. The court agreed. The plain language of these two sections indicates that the legislature intended that a regional board consider the cost of compliance when setting effluent limitations in a wastewater discharge permit. Nevertheless, the court also analyzed these sections in the context of the entire statutory scheme. Section 13377 of the Porter-Cologne Act, added in 1972, speci-

fies that discharge permits issued by California's regional boards must meet the federal standards set by federal law. Thus, in effect, the section forbids consideration of economic hardship if the effect of doing so would be to dilute the requirements of federal law. The court stated: "To comport with the principles of federal supremacy, California law cannot authorize this state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law." Slip op. at 13.

The court was not persuaded that the federal Clean Water Act (CWA) incorporated state water policy so as to make the consideration of economic considerations unlawful even if the restrictions under consideration are more stringent than those in federal law. The court noted that the CWA reserved to the states significant aspects of water quality policy and specifically authorizes the states to enforce limitations that are not "less stringent" than the federal standard. It, thus, does not prohibit a state from considering economic factors when imposing more stringent limitations.

The court, therefore, remanded to the trial court to determine whether the restrictions set in the challenged permits meet or exceed the requirements of the federal Clean Water Act.

**CIVIL PROCEEDINGS****Settlements****Air*****United States v. Golden Triangle Energy, No. 05-6032-CV (W.D. Mo. Apr. 8, 2005)***

As part of U.S. EPA's enforcement efforts against ethanol producers, Golden Triangle Energy LLC has agreed to pay a \$30,000 fine and install \$2 million of control equipment at its Craig, Missouri, plant. The settlement resolves allegations that the plant was in violation of the Clean Air Act's New Source Review provisions.

The new equipment is expected to result in annual reduction of over 260 tons of air pollutants. It also includes facility wide emissions caps.

[For further information, contact AUSA Charles Thomas at (816) 426-3130.]

***United States v. Mobil Exploration & Producing U.S., Inc., No. 2-05-319 (D. Utah Apr. 8, 2005)***

The federal government has entered into a settlement with Mobil Exploration & Producing U.S. that resolves allegations that the company violated the Clean Air Act at its oil production facility on Navajo Nation property in the Four Corners area near Aneth, Utah. The government had alleged that Mobil operated unpermitted equipment, exceeded air pollution emission limits for sulfur dioxide and volatile organic compounds, failed to monitor its main flare and equipment leaks, and failed to notify EPA that the company was demolishing its gas plant that may have contained asbestos.

Under the settlement, Mobil will pay a \$350,000 penalty and spend \$500,000 on operation improvements.

It will also spend \$99,849 on a public health project that will provide equipment to the Montezuma Creek Community Health Center in Montezuma Creek, Utah.

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

***United States v. Saint-Gobain Containers, Inc., No. 1-05-00516 (N.D. Cal. Apr. 20, 2005)***

The federal government has entered into a settlement agreement with Saint-Gobain Containers, Inc., of Muncie, Indiana, to resolve alleged Clean Air Act violations at its facility in Madera, California. The company has agreed to purchase approximately \$6.6 million worth of new equipment that will ultimately reduce emissions of nitrogen oxides, sulfur dioxide, and particulate matter by more than 400 tons per years. Saint-Gobain will also pay a civil penalty of \$929,000 and spend \$1.2 million on a supplemental environmental project. It will also cost the company approximately \$2.2 million a year to operate and maintain the new equipment.

The settlement resolves allegations that Saint-Gobain failed to apply the best available control technology (BACT) when it modified a furnace in 1998.

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

**Water*****Illinois v. Dave Matthews Band, No. 04CH13809 (Cir. Ct. Cook County May 2, 2005)***

The Dave Matthews Band has settled a lawsuit brought against it by the state stemming from human waste being dumped from a tour bus onto people touring the Chicago River. It has agreed to pay \$200,000 to an environmental fund and take measures to avoid any repeat of the incident.

The bus was not carrying the band at the time of the violation. As the bus was crossing a bridge last summer, the waste poured through metal grates onto the open deck of an architectural tour boat carrying more than one hundred people. The driver of the bus was fired by the band and sentenced to probation and community service after he pled guilty to reckless conduct and discharging contaminants to cause water pollution.

The band has already donated \$50,000 to Friends of the Chicago River and another \$50,000 to the Chicago Park District.

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

***Kentucky v. Louisville and Jefferson County Metropolitan Sewer District, No. 3-04-236 (W.D. Ky. Apr. 25, 2005)***

A comprehensive Clean Water Act settlement has been entered by the United States and Kentucky with the Louisville and Jefferson County Metropolitan Sewer District (MSD) to remedy the overflow problems that have caused billions of gallons of untreated sewage and combined sewage to enter the Ohio River each year. The consent decree will require the MSD to make extensive improvements to its sewer system; those improvements will likely cost over \$500 million.

Under the consent decree, MSD will implement corrective action plans to bring overflows from its combined sewers into compliance with water quality standards; implement corrective action to eliminate unauthorized discharges from sanitary sewers carrying untreated sewage; improve its management, operation, and maintenance programs to prevent future overflows; and respond to overflows when they occur.

The consent decree also requires the MSD to pay a civil penalty of \$1 million to the Commonwealth of Kentucky and perform \$2.25 million in supplemental environmental projects.

The proposed decree is subject to a thirty-day public comment period and final court approval.

[For further information, contact Brenda Lowe, EPPC, at (502) 564-5576 or Steven Keller, DOJ, at (202) 514-5465.]

## CRIMINAL PROSECUTIONS

### Indictments

#### Water

***United States v. Franklin Robert Hill, No. 1:05-cr-10111 (D. Mass. Apr. 26, 2005)***

Franklin Robert Hill, a tugboat pilot, was recently charged with violating the Clean Water Act and the Migratory Bird Treaty Act. The charges stem from an April 2003 incident in Buzzards Bay in the Cape Cod Canal in Massachusetts. Hill was the mate on a tugboat pulling a barge when it went off course onto rocky shoals. The vessels hit a rock outcropping, ripping a twelve-foot hole in the bottom of the barge and rupturing an oil tank. The resulting spill killed hundreds of birds and shut down shellfish beds. In all, nearly ninety miles of Massachusetts and Rhode Island coastline were affected.

It is alleged that Hill left the helm to work at the stern of the boat and failed to monitor the radio, missing a warning issued by another vessel that the boat was entering a shallow part of the bay. The tugboat's

owner, Bouchard Transportation Company, pled guilty last November to violating the Clean Water Act and agreed to pay a record \$10 million fine. Most of the money will go for wetlands conservation in southeastern Massachusetts. Of the fine, one million was suspended provided that Bouchard complies with the requirements of a three-year probation.

[For further information, contact AUSA Jonathan Mitchell at (617) 748-3100.]

### Pleas

#### Water

***United States v. Danny Hurd*, No. 2:04-cr-00071 (E.D. Tenn. Mar. 21, 2005)**

Danny Hurd, former drinking water plant operator for the First Utility District of Hawkins County, Tennessee, recently pled guilty to falsifying drinking water measurements. From early 2000 to late 2002, the defendant falsified chlorine measurements and drinking water samples to the Tennessee Department of Environment and Conservation. Hurd faces a maximum sentence of up to five years' imprisonment and a fine of up to \$250,000.

[For further information, contact AUSA Guy Blackwell at (423) 639-6759.]

#### Wetlands

***United States v. Crossings Development Company, LLC, and Matthew D. Congdon*, No. 3:04-00324 (D.S.C. Apr. 8, 2005)**

Matthew D. Congdon of Columbia, South Carolina, a principal of Crossings Development Company, LLC, recently pled guilty, along with the company, of violating the Clean Water Act by filling wetlands without a permit. Despite being advised by two consultants

that wetlands existed on a 429-acre tract in Richland County, South Carolina, the defendants began work without a permit. About forty-five acres of wetlands were filled or otherwise adversely affected.

Crossings Development has agreed to pay a fine of \$1,100,000. Congdon faces a maximum prison sentence of not more than one year and a potential fine of not less than \$2,500 nor more than \$25,000 per day of violation when sentenced.

[For further information contact AUSA Winston Holliday at (803) 929-3000.]

### Sentences

#### RCRA

***United States v. BEF Corporation et al.*, No. 04-CR-588 (E.D. Pa. Apr. 1, 2005)**

BEF Corporation of Allentown, Pennsylvania and BEF's founder and president, Elward Brewer, have been sentenced for violating the Clean Water Act by discharging heavy metal-laden acidic wastewater into sewers operated by the City of Bethlehem, Pennsylvania and the City of Allentown, Pennsylvania. In addition, BEF pled guilty to violating the International Emergency Economic Powers Act and to making false statements to the government.

BEF purchases used one-hour photo processing machines, refurbishes them, and resells them throughout the world. During the refurbishing process, silver, lead, and chromium-laden wastes and acidic wastes were illegally discharged to the sewers. The other charges stem from BEF's illegal exportation of goods to Iran and from its practice of discounting the fair market value of its photo labs on declarations to help international customers avoid paying import duties.

BEF and Brewer were sentenced to jointly pay a \$700,000 penalty, including spending \$50,000 on a supplemental environmental project which will be paid to the Wildlands Conservancy. BEF was ordered to serve a five year period of probation. Brewer was sentenced to six months' house arrest, thirty-six months of supervised release, and 160 hours of community service in an environmental activity.

[For further information, contact AUSA Chris Hall at (215) 861-8432.]

***United States v. Kahn Cattle Company et al., No. 4:05-CR-00006 (N.D. Ga. Mar. 24, 2005)***

Kahn Cattle Company of Bartow County, Georgia, its owner, Roger Kahn, and farm manager, Glen M. Bramlett, have been sentenced for violating the Resource Conservation and Recovery Act and the Migratory Bird Treaty Act (MBTA).

Roger Kahn and Glen Bramlett spread corn laced with a chemical known as Warbex around a pond on property owned by Kahn Cattle Company in January 2003 to kill nuisance birds. The corn contained Famphur, a preparation that is applied topically to cattle to control insect pests. Over 3,300 birds died as a result of ingesting the corn, including a great horned owl, red-tailed hawks, mourning doves, and Canada geese.

Kahn Cattle Company was ordered to pay \$95,664 in restitution and a \$170,000 criminal fine for illegally disposing of hazardous waste. Of that total, \$108,000 will be used to acquire and preserve wetlands. Roger Kahn and Glen Bramlett will each spend six days in home confinement, perform 160 hours of community service, and serve one year of supervised release. Each man will also pay a \$15,000 fine for violation of the MBTA. All three defendants have been ordered to publish advertisements in trade publications warning others not to use pesticides to illegally kill birds.

[For further information, contact AUSA Susan Coppedge at (404) 581-6000.]

## **Water**

***Maryland v. John E. Branham, No. 0A00142527 (Dist. Ct. Anne Arundel County Apr. 6, 2005)***

John E. Branham of Port Republic, Maryland, was recently convicted of practicing well drilling without a license and drilling a well without a permit. He was sentenced to one year's incarceration, with six months suspended, a \$2,000 fine and \$4080 in restitution.

Homeowners in Crownsville, Maryland, hired Branham to drill a well on their property in March 2003. After he began work, the homeowners inquired about the well drilling permit. When he could not produce one, he was ordered to leave the property. Further inquiries with the Anne Arundel County Health Department revealed that Branham was not licensed to drill wells and that he had not obtained a permit to drill a well on the property. It was subsequently learned that his license to drill wells had been revoked in 1998 because of his conviction for well drilling violations.

[For further information, contact Maryland AAG Sharon Street at (410) 537-3333.]

***United States v. Keith Shearer, No. 1:01-cr-00237 (M.D. Pa. Apr. 21, 2005)***

Keith Shearer, York County, Pennsylvania, farmer and waste hauler, has been sentenced for violating the Clean Water Act. He pled guilty in April 2004 to a multi-count indictment in which he was accused of illegally dumping a half million gallons of liquid pig manure onto farm fields and killing 2,500 fish in Codorus Creek in July 1998 and of illegally dumping thousands of gallons of untreated manure in an unnamed York County waterway in April 2003.

He was sentenced to eight months' incarceration, two years' probation, a \$5,000 fine, and sixty hours of community service. The case was jointly prosecuted by the Pennsylvania Office of Attorney General and the U.S. Attorney's Office

[For further information, contact Pennsylvania AAG Glen Parno at (717) 787-1340 or AUSA Martin Carlson at (570) 326-1935.]

***United States v. Carl Simon, No. 2:04-CR-01006 (N.D. Iowa Apr. 6, 2005)***

Carl Simon, owner and operator of Simon Dairy in Farley, Iowa, has been sentenced to serve thirty months in prison, pay a \$5,000 administrative penalty that had been assessed earlier by the Iowa Department of Natural Resources (DNR), and serve one year of supervised release as a result of his conviction on four counts of violating the Clean Water Act. Simon was convicted on charges that he illegally dumped cow manure and waste milk into Hogan's Branch, a tributary of the Mississippi River, between March 2003 and January 2004.

Simon used two foot trenches, dug from his dairy manure lagoon, to a steep embankment overlooking Hogan's Branch to discharge the manure. The milk was discharged through a four-inch PVC pipe. Simon had refused to pay the penalty ordered by DNR or make the changes that DNR ordered to be made in his disposal practices.

[For further information, contact AUSA C.J. Williams, at (219) 937-5500.]

## **Wetlands**

***Maryland v. William Costello, No. 02K042407 (Cir. Ct. Anne Arundel County Apr. 26, 2005)***

An Annapolis, Maryland, man has been convicted of wetlands and sediment control violations on his property in Annapolis. The violations occurred after Hurricane Isabel damaged property in September 2003. State and local agencies enacted expedited regulations to permit property owners to repair property damaged by the hurricane, provided that the structures were "in kind" to the structures destroyed by the hurricane. Costello obtained a permit under these regulations to replace a damaged embankment. At the direction of Costello, a contractor built a revetment by placing dirt fill, filter cloth, and stone on state wetlands. The revetment exceeded the damaged structure by 10,000 square feet.

Costello was sentenced to thirty days in jail, with all thirty days suspended, one year of supervised probation, and a \$10,000 fine. State and federal agencies are currently determining the scope of the remediation required to be completed by Costello on his property.

[For further information, contact Maryland AAG Sharon Street at (410) 537-3333.]