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Editor's Note: Due to continued cuts in our grant from U.S. EPA and the decision by NAAG to fund other priorities, this will be the last issue of the NEEJ in its current format. I would like to thank all of you who have been so helpful to me in writing and publishing the NEEJ over the last seventeen years. Your names are legion but include folks at U.S. EPA, U.S. DOJ, the U.S. Attorneys offices, numerous district attorneys offices, and the wonderful people in the state attorneys general offices who are so talented, knowledgeable, and dedicated. You have taught me, encouraged me, and assisted me in so many ways and have freely shared your expertise with others in the environmental enforcement community. Thanks also to our eagle-eyed proofreader, Terri Slocomb, who ensured I never misspelled words such as dibutyl 1,2-benzenedicarboxylate and to the environmental counsels at NAAG under whom I have worked and from whom I have learned — Herb Johnson, Ann Hurley, Brian Zwit, Bob Kinney, and Paula Cotter. I wish all of you — in the words of the traditional Navy benediction—fair winds and following seas.

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**THE NATIONAL INVASIVE SPECIES
COUNCIL AND FEDERAL EFFORTS TO
ADDRESS INVASIVE SPECIES**

By

Lori Williams*

Invasive species inhabit all regions of the United States and every nation. Society pays a high price for invasives, reflected not only in significant economic damages but also in high levels of environmental degradation, loss of recreational opportunities, and harm to animal, plant, and human health. Executive Order 13112 (EO)¹ was issued in 1999 to enhance federal coordination and response to the complex and accelerating problem of invasive species.

The EO defines an invasive species as a species not native to the region or area whose introduction by humans causes or is likely to cause harm to the economy, the environment, or animal or human health. This definition encompasses all types of invasive species: plants, animals, and microorganisms. The definition makes a clear distinction between non-native (or alien) species and invasive species. Most introduced species are not harmful. In fact, many nonnative species — which include most U.S. crops and domesticated animals — are extremely important sources of food, fiber, or recreation. Only a small percentage of non-native species proves to be harmful and is, thus, considered invasive.

The effects of invasive species can be seen in declining wildlife and plant populations, loss of economically important resources, and impacts to human health. Over forty percent of the species listed as threatened

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or endangered in the United States under the Endangered Species Act is at risk primarily because of invasive species. Forests are at risk from invasive insects, such as emerald ash borer, and plant diseases such as sudden oak death. Zebra mussels and other fouling organisms clog intake pipes for utilities and other industries. On the island of Guam, brown tree snakes cause power outages by climbing onto power cables; they have eliminated ten of the twelve native bird species from the island. Since its first appearance in 1999, West Nile virus — an invasive species transmitted by mosquitoes to wildlife, livestock populations, and humans — has caused the death of 284 people in the United States.

Because of the broad and complex nature of invasive species, many agencies and departments across the federal government play an important role in the federal response to them. Given that invasive species do not respect jurisdictional boundaries, partnerships and cooperation with state, local, and private organizations are critical. In many instances (especially in the areas of control and management), state and local authorities (not federal authorities) play the leading role in dealing with invasive species in their respective areas; the federal role is often to support or provide tools for local, state, or regional efforts.

Instead of creating a new department or regulatory authority, the EO established the National Invasive Species Council (NISC)² as a high-level, inter-departmental organization to provide leadership, planning, and coordination for current federal programs. Secretaries and Administrators of the thirteen departments and agencies serve as the members of the NISC. The Secretaries of the Interior, Commerce, and Agriculture serve as co-chairs, reinforcing the importance of cooperation and coordination in every action of the Council. The EO also established the Invasive Species Advisory Committee (ISAC), which consists of nonfederal experts and stakeholders who provide recommendations as well as input and consensus advice to the NISC. The Secretary of the Interior provides support for a staff of six and NISC member agencies have assigned detailees to provide assistance. Each NISC member is represented by a Policy Liaison who

provides coordination between his or her department or agency and the NISC.

EO 13112 sets out important goals for the NISC to improve federal invasive species prevention and control efforts. These objectives include:

- Providing national leadership and coordination;
- Monitoring the implementation of the order;
- Encouraging planning and action at the state and local level;
- Developing recommendations for international cooperation;
- Developing NEPA guidance on invasive species for federal agencies;
- Monitoring and facilitating efforts to document the impacts of invasive species;
- Facilitating a coordinated, information (data) sharing system;
- Publishing a national invasive species management plan.

Many of the accomplishments reflect invaluable expert and stakeholder input from ISAC on issues ranging from planning to website development. A great deal still remains to be done to enhance NISC efforts to prevent and control invasive species. However, the EO has provided an effective tool, not only in improving coordination across NISC agencies and departments, but also in providing a forum for collaborative programs, outreach, and partnerships with the state, local, and private sectors.

NISC accomplishments include:

- Publication and distribution of the first national management plan and comprehensive blueprint for federal coordinated action for

invasive species in 2001, *Meeting the Invasive Species Challenge*.³

- Preparation of the first invasive species performance-based crosscut budget for fiscal years 2004–2006, providing both general budgetary information on invasive species expenditures and specific initiatives highlighting areas of inter-departmental cooperative planning and action on invasive species.
- Completion of a comprehensive list of pathways — the means by which species are accidentally introduced into the country. This includes the issuance of draft criteria for ranking each pathway’s importance and preparatory work for developing a risk-based screening system for intentional introductions.
- Development of the NISC website (www.invasivespecies.gov), which provides links to invasive species information across governmental agencies and nongovernmental organizations in partnership with USDA’s National Agricultural Library.
- Publication, in collaboration with other coordinating groups, of NISC guidance on the formulation and evaluation of early Detection and Rapid Response systems.
- Publication of guidance on setting priorities for projects to control and manage invasive species.
- Providing technical assistance to states for creating invasive species councils or other coordinating bodies — eighteen states now have invasive species councils.⁴
- Development of implementation procedures to track NISC progress under the EO.
- Sponsoring of workshops and meeting with state and local partners on issues of common concern such as the April 2004 “Team Tama-

risk: Cooperating for Results” workshop, which involved more than 300 participants from ten states,⁵ several tribal governments, local government, federal government, non-profit groups, universities, and others interested in the control of tamarisk or saltcedar.

- Working with the U.S. State Department to address global invasive species mechanisms and treaties, such as the International Plant Protection Convention, the Commission on Economic Cooperation under NAFTA, and the Asian Pacific Economic Cooperation (APEC).
- Sponsoring international regional workshops to exchange information and build international capacity for combating invasive species. Partners in this effort include the U.S. State Department, including U.S. AID, the Transportation Department, and the Global Invasive Species Programme.⁶

In summary, the NISC employs a cooperative approach to enhance the federal government’s response to the threat of invasive species. A forum for coordination and planning, the Council and the Advisory Committee strive to ensure that federal programs are successful, avoid duplication, and minimize costs. In the last five years, NISC has emphasized prevention, early detection and rapid response, and the sharing of information to create a more pro-active and effective invasive species strategy. By providing an overall framework for federal invasive species policy, coordination, and outreach, EO 13112 enhances federal efforts to minimize the harm to the economy, the environment, and human health caused by invasive species.

ENDNOTES

1. 64 Fed. Reg. 6183 (Feb. 8, 1999).
2. The NISC consists of thirteen federal departments and agencies: the Departments of Agriculture, Commerce, Defense, Health and Human Services, Homeland Security, Interior, State, Transportation, and Treasury and U.S. AID, U.S. EPA, NASA, and the Office of the U.S. Trade Representative. Michael Slimak is the policy liaison from EPA. He may be reached at (202) 564-3324.
3. The plan is posted at <http://www.invasivespecies.gov>.
4. The states are Delaware, Florida, Hawaii, Idaho, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and South Carolina. Guam also has a council. Many of the states that do not have a council do have invasive plant programs.
5. Arizona, California, Colorado, Kansas, Nevada, New Mexico, Texas, Utah, Washington, and Wyoming.
6. The Global Invasive Species Programme’s website is a source of valuable information on the effort to combat invasive species around the world. It is available at www.gisp.org.

DECISIONS

Air

Court Upholds EPA's Decision Not to Regulate Carbon Dioxide Emissions: *Massachusetts et al. v. Environmental Protection Agency*, No. 03-1361 (D.C. Cir. July 15, 2005)**Background**

In September 2003, EPA concluded that it did not have statutory authority to regulate carbon dioxide from motor vehicles and, even if it did, it declined to exercise the authority at that time. 68 Fed. Reg. 52,922 (Sept. 8, 2003). The petitioners in this proceeding were twelve states, three cities, an American territory, and numerous environmental organizations challenging EPA's decision not to regulate. Ten states and several trade associations intervened in support of U.S. EPA as respondent. EPA claimed that the petitioners lacked standing to bring the lawsuit

Holding

Under the doctrine of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), standing exists only if the petitioner has suffered an injury in fact, fairly traceable to the action that is challenged, and redressable by a favorable decision. When standing is challenged in a motion for summary judgment, the petitioner must set forth by affidavit or other evidence "specific facts," which, for purposes of the motion, will be taken as true. *Id.* at 561. Federal courts are instructed to resolve Article III standing prior to looking at the merits of a case. *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998). The complication in this case is that there is a factual overlap of the standing issues with EPA's justifications for not regulating greenhouse gases.

Where there is such an overlap, there are three options a court might pursue. The first is to refer the

standing issue to a special master for a factual determination. However, that proceeding would largely duplicate the proceedings on the rulemaking petition. A second option would be to remand to EPA for a factual determination on causation and redressability. However, such judgments are the responsibility of the federal courts and, second, EPA has already reached a decision about the state of the evidence regarding global warming from greenhouse gases. The third option would be to proceed to the merits with respect to EPA's alternative decision not to regulate on the grounds, among others, that it is unclear as to the effect of greenhouse gases on the climate and the models used to predict changes in the climate might not be accurate. The third option is the one the court chose.

Thus, the court assumed, *arguendo*, that EPA has statutory authority to regulate greenhouse gases from new motor vehicles; the question is whether EPA properly declined to exercise this authority.

EPA requested public comments on the petitioners' 1999 petition for rulemaking. After the comment period closed in May 2001, the White House requested the National Academy of Sciences (NAS) to assist in a review of climate change policy. The National Research Council, the NAS' principal operating agency for providing such advice, issued a report which concluded that it could not be "unequivocally established" that there was a causal linkage between greenhouse gas emissions and global warming. It also concluded that "there is considerable uncertainty in current understanding of how the climate system varies naturally and treats to emissions of greenhouse gases." NATIONAL RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE, at 1. It further noted that past assumptions about effects of future greenhouse gas emissions have proven "erroneously high." *Id.* at 19.

The petitioners challenged EPA's decision not to regulate, citing *Ethyl Corporation v. EPA*, 541 F.2d 1 (D.C. Cir. 1976). The court, however, determined that *Ethyl* supports EPA's decision because the discretion given the Administrator under the Clean Air Act (CAA) includes "policy judgments," not only assessment of scientific evidence. *Id.* at 20. In this

case, the EPA Administrator's analysis cited both scientific uncertainty and the many policy considerations that, in his judgment, warranted regulatory forbearance. 68 Fed. Reg. at 52,929. Therefore, it is not accurate, as the petitioners alleged, that the Administrator made his decision only on the basis of scientific uncertainty.

Where, as here, the agency "must resolve issues 'on the frontiers of scientific knowledge,'" the court will uphold agency decisions based on policy judgments. *Environmental Defense Fund v. EPA*, 598 F.2d 62, 82 (D.C. Cir. 1978). Therefore, the court held that the EPA Administrator properly exercised his discretion under section 202(a) (1) of the CAA in denying the petition for rulemaking.

[Editor's note: CJ Santelle, concurring in the judgment, would have dismissed the petition for lack of standing because the petitioners are representing the "generalized public good" and do not have a particularized injury. CJ Tatel's dissent stated his view that EPA's order cannot be sustained on the merits and that the Commonwealth of Massachusetts had adequately demonstrated its standing.]

The petitioners have asked for an *en banc* hearing.]

CERCLA

CERCLA Does Not Apply Extraterritorially: *Arc Ecology et al. v. U.S. Department of the Air Force et al.*, No. 04-15031 (9th Cir. June 15, 2005)

Background

The United States left Clark Air Force Base and Subic Naval Base in the Philippines in 1992, withdrawing its military personnel and turning the bases over to the Philippine government. Since 1947, the United States had operated the bases under agreements with the Philippine government. In December 2002, the appellants brought a suit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), alleging that they had been exposed, or were likely to be exposed, to contamination at the bases that was created during the American occupation. The plaintiffs sought an order compelling the defendants to conduct preliminary assessments of Clark and Subic and a declaratory judgment that CERCLA applied to those bases.

The district court, relying on the statutory presumption that legislation is presumed to apply only within the territorial jurisdiction of the United States unless a contrary intent appears, granted the defendants' motion to dismiss under Rule 12(b)(6). The plaintiffs appealed.

Holding

The appellants argued that section 105(d) of CERCLA is meant to apply to the bases because Congress intended the statute to apply to former military bases located outside the United States. CERCLA's definition of the "United States," includes "the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virginia Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction." 42 U.S.C. § 9601(27). The appellants pointed to the

plain language of the Defense Environmental Restoration Program (DERP), 10 U.S.C. §§ 2700 *et seq.*, alleging that it also shows Congress' extraterritorial intent. DERP provides that the "Secretary shall carry out (in accordance with the provisions of this chapter . . . and CERCLA . . .) all response actions with respect to releases from . . . [e]ach facility or site which was under the jurisdiction of the Secretary and . . . possessed by the United States at the time of actions leading to contamination[.] 10 U.S.C. § 2701(c) (1) (A)–(B).

The court was not convinced. It could find no evidence that Congress intended to provide relief to foreign claimants such as the appellants. Only "clear evidence" may overcome a presumption against extraterritoriality and the court could not find the evidence that Congress intended to authorize suits under CERCLA by foreign claimants allegedly occurring on a U.S. military base located in a foreign country. The court noted that, even if it were to accept that the CERCLA language could be interpreted as bringing such sites within the geographic reach of the statute, this would still not overcome the presumption which would counsel against interpreting CERCLA as providing a cause of action to foreign claimants.

Furthermore, the court noted that there was no statutory coverage of the bases when the appellants filed suit in 2002. At the time, the United States no longer had control or possession of Clark or Subic. The U.S. government had no authority to conduct any assessment at the bases after they were returned to Philippine control in 1992. According to the court, "[I]t would be unreasonable . . . to find that, in enacting CERCLA, Congress intended for the President to undertake preliminary assessments or cleanups on foreign soil absent some agreement with the foreign government." Slip op. at 14.

Applying the statutory construction doctrine of *expressio unius est exclusio alterius*, the court pointed out that CERCLA does expressly authorize actions by a narrow class of foreign claimants in 42 U.S.C. 9611(l). This section covers releases of hazardous substances in the navigable waters, territorial

sea, or adjacent shoreline of a foreign country where the suit is authorized by a treaty or executive agreement between the United States and the country involved. The appellants do not meet the requirements of this portion of the statute. Applying *expressio unius est exclusio alterius*, the court concluded that Congress' allowing one class of foreign claimants to bring a claim under CERCLA excluded all other foreign claimants which do not fit under the specified class. Furthermore, under the Foreign Claims Act, Congress has provided another avenue of relief for a foreign claimant who is harmed due to noncombat activities of the U.S. armed forces outside the United States.

Other provisions of CERCLA supported the court's holding that CERCLA did not apply extraterritorially. For instance, there is a provision that requires the President to consult with an affected state, but no provision that requires the President to consult with a foreign country. CERCLA requires a citizen suit to be brought in the district in which the alleged violation occurred, but there is no venue provided for suits brought where the violation was outside the United States.

The appellants argued that the court should interpret CERCLA in accordance with international law, which espouses the principle that activities within a country's control should not cause significant injury to the environment of another country. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 601–02 (1987). However, the court could find no evidence that denying the appellants' claim violates international law. Furthermore, presumably any compensation owed would have been negotiated between the Philippines and the United States when the bases were returned to the Filipino government.

Finally, the appellants relied on the doctrine of *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). In that case, the Court was faced with whether a ship could be seized for violating an American embargo against France. The Court interpreted the relevant statute so as to avoid a foreign policy dispute not foreseen by the President or Congress,

holding that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Id.* at 118. However, the doctrine has never been applied against the United States where it has been a party nor has it ever been used to extend the effect of domestic legislation into another sovereign’s territory. If the court were to apply CERCLA to the bases in the Philippines, it would result in exactly what the *Charming Betty* Court sought to avoid — intrusion on the affairs of foreign sovereigns and international discord.

Accordingly, the court affirmed the decision of the district court.

CERCLA Does Not Preempt Texas Statute of Repose: *Burlington Northern & Santa Fe Railway Company et al. v. Skinner Tank Company et al.*, No. 04-11217 (5th Cir. July 28, 2005)

Background

The defendant, Skinner Tank Company, manufactures and sells storage tanks. It sold two large above-ground storage tanks for Poole Chemical Company, which operates an agricultural blending facility near Slanton, Texas, in October 1988. In January 2003, one of the tanks ruptured, releasing several hundred thousand gallons of chemicals onto Poole’s property and an adjacent railroad right-of-way, owned by the plaintiff Burlington Northern & Santa Fe Railway Company (BN&SF). Poole and the Slanton fire department initiated emergency response and Poole was able to reclaim some of the spilled chemicals. BN&SF conducted an emergency cleanup and restoration costing \$2.1 million. On March 4, 2004, BN&SF brought a lawsuit against Poole under the Comprehensive Environmental Response, Compensation, and Liability Act for the cost of the cleanup.

Poole filed a third-party complaint against three defendants, including Skinner. Among the allegations was that the tank that Skinner sold was defective. Skinner moved for summary judgment based on Texas’ fifteen-year statute of repose for products liability claims. The district court entered judgment in

Skinner’s favor. Poole appealed arguing, *inter alia*, that CERCLA preempted Texas’ statute of repose.

Holding

Poole argued that section 309(a)(1) of CERCLA, 42 U.S.C. § 9658(a)(1), imposes a rule of discovery on the commencement of the running of the Texas statute of repose so that the statute did not begin until the tank ruptured in January 2003. This section reads:

In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

The court concluded, however, that this portion of CERCLA was not applicable to the Texas statute at issue because it is a statute of repose, not a statute of limitations. The difference between these two types of statutes is significant:

A statute of limitations extinguishes the right to prosecute an accrued cause of action after a period of time. It cuts off the remedy. . . . A statute of repose limits the time during which a cause of action can arise and usually runs from an act of a defendant. It abolishes the cause of action after the passage of time even though the cause of action may not have yet accrued.

Servicios-Expoarma, C.A. v. Industrial Maritime Carriers, 135 F.3d 984, 989 (5th Cir. 1998).

Therefore, awareness of injury is not a factor in determining when a statute of repose begins to run. Under a statute of repose, there is no longer a cause of action after the period specified. Such statutes “represent a response by the [Texas] legislature to the inadequacy of traditional statutes of limitations and are specifically designed to protect [manufacturers] . . . from protracted and extended vulnerability to lawsuits.” *Texas Gas Exploration Corporation v. Fluor Corporation*, 828 S.W.2d 28, 32 (Tex. App. 1991).

The Texas statute in question, section 16.012 of the Texas Civil Practice and Remedies Code, is clearly a statute of repose because it cuts off the right to sue a manufacturer for a product defect and it is commenced by a defendant’s act: “[A] claimant must commence a products liability action against a manufacturer or seller of a product before the end of 15 years after the date of the sale of the product by the defendant.”

The court, thus, held that CERCLA did not preempt the state’s statute of repose.

NHPA

NHPA Contains No Private Right of Action Against Federal Government: *San Carlos Apache Tribe et al. v. United States et al.*, No. 03-16874

Background

The Coolidge Dam, built in 1924, is located in the southern portion of the San Carlos Apache reservation. The reservoir is surrounded by the tribe’s land, but its water is almost entirely committed to others outside the tribe. In the 1990s, due to continued drought, the reservoir became seriously depleted. After the tribe failed to negotiate for commitments that water be retained in the reservoir, it filed for injunctive relief alleging, *inter alia*, violations of the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 *et seq.* The

district court denied requests for a temporary restraining order and a preliminary injunction and ruled against the tribe on all of its claims. The issue on appeal is whether the district court properly dismissed the tribe’s claim under the NHPA.

Holding

Section 601 of the NHPA requires that federal agencies “take into account the effect of the[ir] undertaking[s] on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.” *Id.* at § 470f. There is nothing in this section that expressly provides that an individual might sue to enforce its provisions. This is an issue of first impression in the Ninth Circuit. In *Tyler v. Cisneros*, 136 F.3d 603, 608 (9th Cir. 1998), the court assumed without deciding that the NHPA contains a private right of action.

A private right of action to enforce federal law must be created by Congress. Thus, the court turned to the statutory language of the NHPA. In *Alexander v. Sandoval*, 532 U.S. 275 (2001), the Court distinguished between statutes that focus on the person regulated rather than on individuals protected. Section 602 of Title VI of the Civil Rights Act, the statute under consideration in *Sandoval*, authorizes agencies to issue rules, regulations, or orders of general applicability to effectuate the provisions of section 601, the heart of the statute. Since section 602 focuses on regulatory agencies, the Court found that no private right of action existed to enforce it.

Similarly, section 160 of the NHPA is a directive to the federal government; it is not directed to individuals or entities that may be harmed through violation of NHPA’s requirements. Furthermore, just as in *Sandoval* where the Court found that there existed a means by which regulations promulgated could be enforced, there is, in this case, an alternative means of ensuring that government officials comply with the NHPA — a lawsuit brought under the Administrative Procedure Act. As the court in *NAACP v. Secretary of HUD*, 817 F.2d 149, 152 (1st Cir. 1987), explained:

It is difficult to understand why a court would ever hold that Congress, in enacting a statute that creates federal obligations, has implicitly created a private right of action against the federal government, for there is hardly ever any need for Congress to do so. That is because federal action is nearly always reviewable for conformity with statutory obligations without any such "private right of action."

The court compared the NHPA with NEPA, noting that it is a fundamental principle of environmental law that there is no private right of action under NEPA. In contrast to other environmental statutes, parties are required to proceed under the APA to challenge claimed violations of NEPA.

The court noted that, in holding that section 106 does not contain a private right of action, it was diverging from two other circuit court decisions, *Boarhead Corporation v. Erickson*, 923 F.2d 1011, 1017 (3d Cir. 1991), and *Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown*, 875 F.2d 453, 458 (5th Cir. 1989). Both courts based their decisions on the attorney's fees provision in the NHPA. The Ninth Circuit read the fees provision as permitting fees in an action to enforce the NHPA, but that it said nothing about whether there is a direct private right of action against the federal government.

Therefore, the court affirmed the holding of the district court.

Water

EPA Has Authority to Consider Jeopardy to Endangered Species When Evaluating State's Petition to Obtain Pollution Permit Authority: *Defenders of Wildlife et al. v. U.S. Environmental Protection Agency*, No. 03-71439 (9th Cir. Aug. 22, 2005)

Background

Arizona applied for pollution permitting authority for its waterways in January 2002. EPA's regional office determined that the transfer could affect listed species under the Endangered Species Act (ESA) and, thus, initiated section 7 consultation with the Fish and Wildlife Service (FWS). When it announced the consultation decision, EPA stated that section 7(a)(2) of the ESA required that consultation occur. 67 Fed. Reg. at 49,917. FWS staff concluded that a transfer of authority to the state could harm certain listed species and habitat because the state would not be required to undergo consultation under the ESA when issuing a permit. EPA staff opined that it did not have the legal authority to consider impacts that were associated with water quality when it made a permit transfer decision.

Staff of the two agencies developed an "Interagency Elevation Document," transferring authority over the Biological Opinion to the Director of FWS, the Director of the National Marine Fisheries Service, and the Deputy Assistant Administrator of Water at the EPA. 66 Fed. Reg. 11,202, 11,209 (Feb. 22, 2001). After consultation at the national level, the Field Supervisor of the Arizona Ecological Services Field Office of the FWS issued a Biological Opinion recommending approval of the transfer of permitting authority. Noting that there would be a loss of section 7 consultation with the transfer, the opinion nevertheless concluded that the loss would not be caused by EPA's decision to approve the transfer but, rather, by the absence of the section 7 process in the Clean Water Act (CWA), reflecting Congress' decision to grant states the right to administer their own programs without undergoing the consultation procedure. The opinion further stated

that other federal and state laws, such as section 9 of the ESA, would sufficiently protect endangered species. This portion of the opinion contrasted with the earlier staff concern that section 9 would not sufficiently offset the effects of approving the transfer.

EPA approved permitting authority in December 2002. The petitioners in this lawsuit challenged the transfer in two separate lawsuits that were consolidated. They alleged that EPA failed adequately to consider the transfer's impact on endangered and threatened species and on their habitat, violating the ESA, and the decision was, therefore, arbitrary and capricious.

Holding

Having determined that it had both jurisdiction to hear the case and that the petitioners had standing, the court turned to the merits of the case. Section 7(a)(2) of the ESA states:

Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to section (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

16 U.S.C. § 1536(a)(2).

Under the "arbitrary and capricious" standard of the Administrative Procedure Act (APA), an agency decision is valid if it is:

[R]ational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute. . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Company, 463 U.S. 29, 42–43 (1983) (citations omitted). In addition, an opinion may not be internally contradictory or inconsistent. The court determined that it had to consider whether EPA, through the biological opinion or otherwise, considered all relevant ESA factors and offered an explanation for its decision that was both plausible and internally coherent.

As an initial matter, the court concluded that EPA's approval was arbitrary and capricious because the agency took legally contradictory positions regarding its section 7 obligations. At the outset of the process, EPA definitely stated that section 7 required consultation regarding the effect of a permitting transfer on listed species. Before determining that consultation was necessary, EPA had determined that transferring pollution permitting authority to Arizona "may affect" listed species and their critical habitat. In litigation, however, EPA has not been consistent in its arguments. In the Fifth Circuit, in *American Forest & Paper Association v. EPA*, 137 F.3d 291 (5th Cir. 1998), EPA "suggested" that section 7 compelled consultation regarding pollution permitting transfers and, when necessary, could allow conditioning such

transfers on states' following section 7 procedures when issuing permits. The Fifth Circuit did not address EPA's authority to undergo section 7 consultation, but did reject its argument that it could condition permitting transfer on a state's agreeing to undergo ESA consultation when issuing permits.

EPA argued that the *American Forest & Paper* decision supported a finding that EPA lacked authority to consider endangered species when making a permit transfer decision but maintained that the court did not need to decide the question, noting that its permit decision was not based on that position. At oral argument, the agency declined to take a position on whether it had an obligation under section 7 of the ESA in making a permit transfer decision. The court commented that, despite EPA's "equivocation," the record clearly demonstrated that EPA based its action on its belief that section 7 required consultation.

The biological opinion reasoned there could be no effect on listed species by the permit decision because (1) EPA had no authority to disapprove transfer applications because of impact on listed species; (2) any impact was thus the result of Congress' determination that states have no consultation or mitigation obligations; and (3) any potential future impact would be caused entirely by new private development, not by the transfer decision. In other words, although EPA was required to consult with FWS regarding the state's application, there was no authority to refuse permit transfer should the consultation reveal a negative impact.

The court opined that Congress would not set up such a nonsensical regime. An agency's requirement to consult is in aid of its obligation to shape its own actions so as not to jeopardize listed species. This is one integrated requirement. Therefore, EPA's determination that it could do nothing other than consult was not the result of reasoned decisionmaking and was arbitrary and capricious. In addition, the biological opinion's determination that private development, not the permit transfer, had the potential to cause harm ignores the obvious that there would not be the potential harm if the federal government were still doing

the permitting. Therefore, it is *both* activities together — the transfer to the state of the permitting authority and private development — that have the potential to cause the harm to listed species.

The court next examined EPA's conclusion that it had no authority to base its transfer decision on the loss of consultation under section 7. Under the ESA, an agency is to "insure" against likely jeopardy of listed species. The court identified three statutory concepts governing the reach of section 7(a)(2): the nexus to any impact on listed species; the nature of the obligation to "insure" against jeopardizing; and the actions covered.

In looking at nexus, the court noted that caselaw requires that the agency have some control over the result of its action for there to be the requisite nexus. In *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), the court held that the Department of Transportation was responsible for development encouraged by interstate highway construction because it controlled the placement of the highway and interchanges. In a NEPA case, the U.S. Supreme Court determined that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770 (2004).

The court determined, then, that deciding whether the biological opinion followed ESA regulations defining "indirect effects" must begin with a determination as to whether EPA can consider and act upon loss of section 7 consultation benefits in making a transfer decision. In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the Court noted that section 7 is an affirmative command by Congress to "halt and reverse the trend toward species extinction, whatever the cost." *Id.* at 194. The Court's analysis in *Hill* confirms that the ESA grants authority to agencies to protect endangered species beyond that conferred by the agencies' own governing statutes. The ESA gives first priority to the declared national policy of saving endangered species. Furthermore, section 7(a)(2), in

contrast to subsection (1) which refers to agencies' authorities, specifically directs agencies to proceed in a manner not likely to jeopardize listed species. The court noted that legislative history confirms this interpretation of the ESA.

After the decision in *Hill*, Congress amended the ESA by adding section 7(g), creating a narrow exception to section 7's requirements whereby agencies could apply to an Endangered Species Committee for exemptions. EPA did not apply for such an exemption, but the existence of the mechanism to apply for an exemption affirms the all-inclusive requirement that agencies "insure" against jeopardy to listed species.

Having determined that each agency has a strict obligation under section 7, the court then questions whether EPA's transfer decision is the type of agency action to which the obligation applies.

Agency actions that are "authorized, funded, or carried out" by an agency are covered by the obligation in section 7(a)(2). The regulatory provision interpreting this section reads: "Section 7 and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control." Court decisions interpreting the regulatory gloss on the statute have held that section 7(a)(2) is not applicable if the agency had "no ongoing regulatory authority" and was, thus, not responsible for decisionmaking with respect to the action in question. The court rejected Arizona and the Chamber of Commerce's argument that the CWA's requirement that EPA "shall approve" state applications meeting certain enumerated factors meant EPA had no discretion in this case. The court noted that EPA itself did not make that argument and, in fact, recognized its duty to consult. The court concluded that, since EPA had continuing decision-making authority over the transfer decision, that decision fell within section 7(a)(2)'s scope.

The court noted that there is an intercircuit conflict on the issue. Both the Eighth Circuit in *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294 (1989), and the First Circuit in *Conservation Law Foundation v. Andrus*, 623 F.2d 712 (1979), agree with the

Ninth Circuit's reading of the ESA. However, the Fifth Circuit in *American Forest & Paper Association v. EPA*, 137 F.3d 291 (1998), and the D.C. Circuit in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27 (1992), concluded that section 7 by itself does not authorize agencies to protect listed species. The court in this case, however, rejected the D.C. Circuit's and the Fifth Circuit's holding, noting that, in its opinion, their decisions did not reflect a full consideration of the text and history of section 7(a)(2).

Thus, the court held that the pollution permitting transfer application triggered both section 7(a)(2)'s consultation requirement and its mandate that agencies not affirmatively take actions that are likely to jeopardize listed species. It concluded that it is EPA's transfer decision that will cause whatever harm may flow from the loss of the consultation procedure if Arizona were to have its permit application approved. Since the biological opinion opined otherwise, EPA erred in relying on it.

The court also concluded that the biological opinion contained no detailed discussion of effects on all listed species and that none of the alternative mechanisms to protect endangered species, including the ESA's anti-take provisions and Arizona state law, are sufficient substitutes for section 7's consultation and mitigation mandates. The biological opinions' flaws are legal in nature and take no specific technical or scientific expertise to discern them.

EPA also argued that it had relied on assurances from the Arizona Game and Fish Department that federally-listed species would not suffer from the lack of section 7 consultations. However, the court noted that there is no indication that Arizona would be bound by this letter. The agency responsible for permitting decisions, the Arizona Department of Environmental Quality, has not signed on to these assurances. Nor did the letter supplying such assurances specify as to how the agency would carry out such assurances. Voluntary compliance by state agencies might substitute for section 7 coverage but EPA would first have to analyze the likelihood that all relevant Arizona agen-

cies would live up to the promises as well as considering the effectiveness of federal oversight should the agencies not live up to their promises.

EPA erred when it failed to understand its authority under section 7(a)(2) and its failure to discuss the specific effects of its decision on the various listed species present in Arizona. The court noted that it is possible that some combination of state and federal protections might replace the benefits of section 7 consultation. However, EPA would have to specifically analyze each listed species within Arizona and carefully consider the protection of other federal and state statutory provisions.

Typically, when an agency violates the ESA, the court vacates the action and remands to the agency. The court carefully weighed the equities in this case to determine whether it should allow Arizona to retain its permitting authority but finally concluded that the risk to listed species, particularly the pygmy owl, made it essential to vacate the action and remand to the EPA for proceeding consistent with the court's opinion.

[Editor's note: CJ Thompson dissented from the court's conclusion that EPA had the authority to consider the impact on listed species in making its permit transfer decision because, in his view, there was no discretion with EPA to deny the permit transfer.]

CWA Does Not Waive Corps' Sovereign Immunity: *In re Operation of the Missouri River System Litigation*, No. 04-2204 (8th Cir. Aug. 16, 2005)

Background

Lake Sakakawea, a reservoir in North Dakota, is part of the Missouri River main stem reservoir system established by the Flood Control Act of 1944 (FCA). The FCA designates the U.S. Army Corps of Engineers as the agency responsible for managing the main stem reservoir system. In accord with the goals of the FCA, the Corps releases water from Lake

Sakakawea to support downstream navigation. North Dakota filed suit to enjoin the releases, arguing that lowering the water level in the lake would violate state law water quality standards established pursuant to the Clean Water Act (CWA), 33 U.S.C. §§ 1251 *et seq.* Nebraska and South Dakota filed suit as intervenors.

The district court dismissed the North Dakota complaint, holding that the CWA does not waive the Corps' sovereign immunity involving the Corps' authority to maintain navigation. North Dakota appealed.

Holding

The question in this appeal is whether Congress has unequivocally waived the federal government's sovereign immunity from suit in the CWA:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity

33 U.S.C. § 1323(a). This limited waiver of sovereign immunity is further curtailed by section 511(a), 33 U.S.C. § 1371(a), which states that the CWA "shall not be construed as . . . affecting or impairing the authority of the Secretary of the Army . . . to maintain navigation."

In 1977, the CWA was amended to emphasize that the statute applies to discharges from the Corps' channel-dredging operations. North Dakota argued that

the legislative history of the 1977 amendments demonstrates that Congress intended the Corps to comply with the CWA in all its operations despite section 511(a). The court rejected this argument, noting that Congress had left the navigation authority intact in the 1977 amendments and that legislative history should not be looked at absent ambiguity in the statute.

North Dakota also argued that it was a fact-based inquiry as to whether enforcing North Dakota's water quality standards would affect the Corps' authority to maintain navigation. It pointed out that the Corps could draw the warmer water from the top of the lake and still meet the state water quality standards. Although the Lake is now constructed to siphon water from the bottom of the lake, the construction of a new outflow structure could siphon water from the top. The court rejected the state's interpretation:

If we allowed North Dakota to enforce its water-quality standards on this basis, there is no discernible limit to the new structures and new operational plans that other states with main-stem reservoirs could demand to force the Corps to comply with their own water-quality standards. If each state is allowed to use its reservoir water-quality standards as a tool to control how the Corps must release water from the main stem reservoirs, the "authority of the Secretary of the Army . . . to maintain navigation" will obviously be affected, in violation of § 1371(a).

The principle of preemption also supports the court's view of the statute. Implied conflict preemption arises when a state law is an obstacle to the accomplishment of the full purposes and objectives of Congress. Under the doctrine of *International Paper Company v. Ouellette*, 479 U.S. 481 (1987), if a state statute interferes with the methods by which a federal statute is designed to reach its goal, then it is preempted.

Congress set forth the method in the FCA by which it was designed to reach the goal of flood control and downstream navigation, with the secondary interest of irrigation, recreation, fish, and wildlife. That method is to vest in the Corps the duty to balance navigation with other water-use interests. To allow states to use their water quality standards to control how the Corps balances these interests would frustrate the design of the FCA.

Accordingly, the court affirmed the dismissal of North Dakota's complaint.

Wetlands

Issuance of Nationwide Permit is Final Agency Action: *National Association of Home Builders et al. v. U.S. Army Corps of Engineers et al.*, No. 04-5010 (D.C. Cir. July 29, 2005)

Background

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWP) covering differing activities that oftentimes involve discharging fill or dredged material into our nation's waters. This litigation involves new activity-specific general permits created to replace NWP 26. Some of the activity-specific new NWPs reduce the per-project area of impact from ten acres to one-half acre and require preconstruction notification for impacts greater than one-tenth acre. These new permits prompted three law suits that were consolidated into one. The three suits bring four claims against the Corps, alleging that it had exceeded its statutory authority under the CWA, acted arbitrarily and capriciously in violation of the Administrative Procedure Act, and violated the Regulatory Flexibility Act and the National Environmental Policy Act.

While the parties' cross-motions for summary judgment were pending, the Corps issued all the NWPs intended to replace NWP 26. In November 2003, the district court granted summary judgment to the Corps, concluding that the NWPs with their general conditions constituted the completion of a decision-making process, they did not constitute "final" agency action

because, however, until an individual permit application is denied or an enforcement action instituted, there is no legally binding action that has yet taken place. This appeal followed.

Holding

The Administrative Procedure Act (APA) gives a federal court the right to review a “final agency action for which there is no other adequate remedy in a court.” 5 U.S.C. § 704. In order for the action under examination to be considered “final,” two conditions must be met. “First, the action must mark the consummation of the agency’s decision-making process — it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). The NWP’s were obviously the end result of the Corps’ decision-making process. In addressing the second prong, the district court determined that an applicant that did not meet the conditions of an NWP had not been denied anything until he had exhausted all of his permit remedies because “the general permit program, in effect, is the first step of a larger permitting process that enables the agency to streamline the overall process by limiting the pool of applicants at the front-end of the process.” *National Association of Home Builders v. U.S. Army Corps of Engineers*, 297 F. Supp. 2d 74, 80 (D.D.C. 2003). The intervenors also argued that the Corps, in its NWP’s, did not determine exactly what conditions a would-be discharger must comply with nor did it deny authorization for discharges that exceeded the terms and conditions.

The court pointed out, however, that the new NWP’s were not simply a change from the Corps’ permitting procedures. Nor are they simply a definitive statement of agency policy. Instead, they “carry easily-identifiable legal consequences for the appellants and

other would-be dischargers.” The court acknowledged that there is no bright-line rule for the finality inquiry, but looking at other cases and applying the finality requirement in a flexible and pragmatic way, it determined that the NWP’s did constitute final agency action. It noted that it had found that an EPA directive forbidding the use of third-party human test data to evaluate pesticides’ effects, see *CropLife America v. EPA*, 329 F.3d 876, 881–83 (D.C. Cir. 2003), and a Federal Communications Commission decision placing on telephone companies the burden to show their entitlement to certain costs, see *Mountain States Telephone & Telegraph Company v. FCC*, 932 F.2d 1035, 1091 (D.C. Cir. 1991), was suitable for review despite their pronouncements not having been used against any applicant. To the court’s mind, all of these challenges constitute to agency action “with legal consequences that are binding on both petitioners and the agency.” *CropLife*, 329 F.3d at 882.

In this case, the NWP’s create legal rights and impose obligations in their authorization of certain discharges without any detailed, project-specific review by the Corps. If the planned activities do not meet an NWP’s conditions, an applicant may either put a project on hold while it applies for an individual permit or modify his planned activity to conform to the NWP’s conditions.

The court then turned to the ripeness issue, noting that the argument that, under the NWP’s, discharges could still pursue an individual permit or conform its project is more a ripeness inquiry than a finality inquiry. This doctrine has two components. First, the court considers whether the issue is fit for judicial review and then considers the hardship to the parties of delaying consideration of the case.

In this case, the issue clearly satisfies the first prong.

The APA challenge is purely legal and the court has held that a purely legal claim constituting a facial challenge, as is present here, is “presumptively reviewable.” *National Mining Association v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003). Although the court has also held that “even purely legal issues may be unfit for review,” *Atlantic States Legal Foundation v. EPA*, 325 F.3d 281, 284 (D.C. Cir. 2003), in this case there are no further factual developments that are required in order to evaluate the appellants’ challenge. Thus, the court concluded that the appellants’ APA claim is fit for judicial review now.

The court also concluded that the ripeness test is fulfilled. There would be no hardship for the Corps should the court entertain this lawsuit, but there is clear hardship for the appellants. They must either modify their projects or refrain from building until they can secure individual permits. There is a direct and immediate impact on the appellants’ activities from the NWP.

The court next turned to a consideration of the RFA allegations. Under the RFA, “a small entity that is adversely affected or aggrieved by final agency action is entitled to judicial review of agency compliance with the requirements of sections 610, 604, 605(b), 608(b), and 610” for any rule subject to the RFA. 5 U.S.C. § 611(a)(1). The Corps argued that the NWPs are not a “rule” subject to review under section 604 of the RFA but, instead, fall within the APA’s definition of “adjudication.” The court disagreed. Each NWP easily falls within the APA’s definition of a “rule” because it is “a legal prescription of general and prospective applicability which the Corps has issued to implement the permitting authority the Congress entrusted to it in section 404 of the CWA.” Slip op. at 22. While it is true that the NWPs were not promulgated as would a legislative rule, with notice of proposed rulemaking, the court noted that it has not hesitated to consider an agency pronouncement issued without meeting required APA procedures a rule.

The Corps also challenged the prudential standing of the appellants to maintain a NEPA challenge, contending that they do not fall within NEPA’s zone-of-interest because any injury would be economic. It is

true that an allegation of injury to monetary interest only does not bring a party within the zone of interest as contemplated by NEPA for standing. *Realty Income Trust v. Eckerd*, 564 F.2d 447 (D.C. Cir. 1977). However, an economic interest does not necessarily disqualify an appellant from standing. In this case, though, the appellants have not shown any evidence that there is a substantial probability of actual or imminent injury that is within NEPA’s zone of interests for standing. Therefore, the court affirmed dismissal of the NEPA claim.

The district court’s grant of summary judgment on the APA and RFA claims was reversed.

CIVIL PROCEEDINGS

New Filings

Air

***Illinois v. White Brothers Salvage & Recycling, Inc.*, No. 05CH85 (Cir. Ct. Marion County Aug. 16, 2005)**

A Centralia, Illinois, salvage and recycling business has been sued by the Illinois Attorney General's Office which has charged it with operating a clandestine smelter to reclaim aluminum from its salvage operations. The lawsuit also alleges that White Brothers Salvage and Recycling, Inc., dumped old tires and demolition debris.

The lawsuit seeks a penalty of \$50,000 per violation and an additional \$10,000 for each day the violations continue. The company was involuntarily dissolved by the state the first of July.

[For further information, contact Illinois AAG Javonna Homan at (217) 782-9034.]

Jurisdiction

***New Jersey v. Delaware*, No. 11 (Original) (U.S. July 28, 2005)**

New Jersey has filed suit against Delaware, asking the U.S. Supreme Court to affirm New Jersey's exclusive jurisdiction over waterfront projects on the Delaware River in Gloucester and Salem counties in an area called the "twelve-mile circle." Delaware recently asserted regulatory jurisdiction over proposed construction projects on the New Jersey shoreline, including the plans of BP to build a liquefied natural gas plant there. Delaware denied a permit to BP to build a pier at the proposed facility because, according to state officials, such a project is prohibited under Delaware's coastal zone protection laws.

In its lawsuit, New Jersey asserts that a 1905 interstate compact gives it the right to control riparian access and structures on its side of the river.

[For further information, contact New Jersey DAG Rachel Horowitz at (609) 984-6811.]

Water

***Missouri v. Osage Water Company*, No. CV105-617CC (Cir. Ct. Camden County July 29, 2005)**

The Missouri Attorney General's Office has sued an Osage Beach, Missouri, water company for multiple violations of Missouri's drinking water and clean water laws at two lake-area subdivisions. The violations include failure to submit required samples and allowing untreated water to bypass its treatment plant.

[For further information, contact Missouri AAG Tim Dugan at (573) 751-3640.]

Settlements

Air

***Illinois v. ExxonMobil Oil Corporation*, No. 99CH757 (Cir. Ct. Will County Aug. 18, 2005)**

ExxonMobil Oil Corporation has agreed to settle a lawsuit brought against it by the Illinois Attorney General's Office regarding air pollution violations at the oil company's refinery located southwest of Joliet, Illinois. According to the lawsuit, in July 2000 and December 2002, the refinery's coker unit released dangerous contaminants into the air. In one case, gas oil and steam were released, covering everything in an area one mile by six miles. In the other incident, thousands of pounds of hydrocarbons, hydrogen sulfide, benzene and sulfur dioxide were released.

Under the settlement, the company will pay \$110,000 to local government and law enforcement agencies to pay for local environmental projects, \$150,000 to the Illinois Environmental Protection Fund, and \$21,846 to the Illinois Environmental Protection Agency.

[For further information, contact Illinois AAG Rebecca Burlingham at .]

United States v. Cosmed Group, Inc., No. 1:2005CV00353 (D.R.I. Aug. 18, 2005)

The federal government has entered into the first nationwide settlement of a Clean Air Act enforcement action for violations of the standards for ethylene emissions from sterilization facilities. EPA investigators found violations of ethylene oxide Maximum Achievable Control Technology (MACT) at six of the eight sterilization facilities in California, Illinois, Maryland, New Jersey, Rhode Island, and Texas.

Cosmed Group, Inc., headquartered in Jamestown, Rhode Island, sterilizes products for the food and medical industries. Under the consent decree, the company will pay a \$500,000 civil penalty and spend an additional \$1 million to perform supplemental environmental projects (SEPs). Cosmed will also complete environmental audits at all eight of its current and former facilities. The SEPs will include projects to reduce pollution from municipal diesel vehicles in Camden, New Jersey, Lake County, Illinois, and San Diego, California. In Dallas, Texas, the company will convert gasoline-powered school buses to run on propane.

[For further information, contact AUSA Michael Iannotti at (401) 709-5000.]

CERCLA

United States et al. v. Atlantic Richfield Company and NorthWestern Corporation, No. CV89-039-BU-SEH (D. Mont. Aug. 2, 2005)

An agreement has been reached among the federal government, the State of Montana, the Confederated Salish and Kootenai Tribes, Atlantic Richfield, and the NorthWestern Corporation under which the companies have agreed to complete a cleanup of the Milltown Reservoir. The cleanup is expected to cost over \$100 million.

Under the consent decree, a subsidiary of British Petroleum, Atlantic Richfield Company, will remove almost 2.5 million cubic yards of contaminated sediment from Milltown Reservoir. The Milltown Dam spillway and related structures will be removed so that recontamination does not occur. Montana, as lead natural resource damage trustee, then will implement a streambank channelization and revegetation effort to enhance fish habitat. Atlantic Richfield and NorthWestern will provide funds for historic preservation, bull trout mitigation, and other related costs.

[For further information, contact Montana SAAG Rob Collins at (406) 494-0205 of Matthew Morrison, DOJ, at (202) 514-3932.]

United States v. City and County of Denver et al., No. 02-1341 (D. Colo. Aug. 22, 2005)

The federal government has reached a proposed settlement with the City and County of Denver, Waste Management of Colorado, Inc., and six other companies under which they will pay \$13.9 million to reimburse money spent in connection with the Lowry Landfill Superfund Site near Denver, Colorado. The settlement also requires that the defendants continue site cleanup and pay costs incurred by the United States in the future. Long-term maintenance of the area is expected to cost \$43 million and continue for more than thirty years.

One of the largest Superfund sites in the country, Lowry Landfill occupies 508 acres in Arapahoe County, Colorado. The site received approximately 138 million gallons of liquid industrial waste from 1966 to 1980 that was placed in unlined trenches and pits and then covered by twenty-five to sixty feet of municipal refuse. The investigation and cleanup has been underway for more than twenty years.

[For further information, contact Elliot Rockler at (202) 514-2653.]

Water

***United States and Maryland et al. v. County of Baltimore*, No. 1:05-cv-02028 AMD (D. Md. July 26, 2005)**

***United States and Maryland et al. v. Washington, D.C., Water and Sewer Authority*, No. PJM-04-3679 (D. Md. July 26, 2005)**

The federal government and the State of Maryland recently lodged two settlement agreements that are anticipated to lead to more than \$1 billion in sewer system improvements. The settlements are a part of the federal government's enforcement effort committed to addressing the problem of sewage overflows from municipal sewer systems.

In the latest agreements, the Washington Suburban Sanitary Commission (WSSC) has agreed to a fourteen-year, \$200 million plan to repair and upgrade its wastewater collection system and improve water quality monitors. The agreement includes evaluations on all of the WSSC's twenty-six sewer basins covering more than 5,000 miles of sewer pipe. In addition, the WSSC will pay a \$1.1 million penalty, divided between the federal and state governments, and complete three supplemental environmental projects.

The agreement with Baltimore County requires it to implement comprehensive investigation, rehabilitation and maintenance measures throughout its system that are expected to result in more than \$800 million in improvements over the next 14 1/2 years. The county will also pay a \$750,000 penalty and perform three supplemental environmental projects valued at \$4.5 million.

These settlements are designed to prevent chronic sewage overflows to waterways such as the Chesapeake Bay and the Anacostia, Patapsco, Patuxent, and Potomac Rivers.

[For more information on the Baltimore County case, contact Maryland AAG Jennifer Wazenski at (410) 537-3058. For more information on the WSSC case, call Maryland AAG Rosewin Sweeny at (410) 537-3049 or AAG Nancy Young at (410) 537-3042.]

CRIMINAL PROSECUTIONS

Indictments

Solid Waste

New Jersey v. Cordell Nesbitt, Ind. No. SGJ512-05-7 (Aug. 25, 2005)

The Environmental Crimes Bureau of the New Jersey Attorney General's Office has obtained a State Grand Jury indictment against a former employee of the Jersey City Incinerator Authority. Cordell Nesbitt has been charged with illegal disposal of solid waste and the unlawful collection of solid waste. He faces more than five years in state prison and a fine of up to \$25,000 upon conviction of both charges.

The indictment charges that, during the latter part of 2004 and the first five months of 2005, Nesbitt illegally collected construction and demolition debris from several residential construction sites and illegally dumped the debris in a city-owned lot. It is alleged that Nesbitt was paid between \$475 and \$600 to collect and dispose of the debris.

The indictment stems from investigations under the Attorney General's Urban Environmental Initiative which targets illegal dumping of solid waste, contaminated soils, and the abandonment of trailers containing construction and demolition debris in urban areas, vacant lots, and at abandoned industrial sites throughout the state. The initiative is a partnership between the Department of Environmental Protection's Compliance and Enforcement Bureau, the Division of Criminal Justice-Environmental Crimes Bureau, and county and municipal law enforcement agencies.

[For further information, contact New Jersey DAG Betty Rodriguez at (973) 599-5932.]

Sentences

Water

Maryland v. Paul Wayne Adkins, No. 19K-05-7867 (Cir. Ct. Somerset County Aug. 25, 2005)

Paul Wayne Adkins was recently convicted of violating state water pollution laws and was sentenced to serve one year in jail. The convictions results from Adkins' discharging commercial grease directly into Manokin Run in Somerset County, Maryland. Adkins, the owner and operator of a septic hauling business, pumped out commercial septic tanks and grease traps and purportedly hauled their contents to licensed disposal facilities.

The banks of the creek and much of the nearby vegetation were covered with a greasy residue, extending three to four feet up the trunks of the tree. Additionally, fragments of toilet paper and other personal hygiene items were caught in vegetation along the creek.

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