Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 2
Issue 1 *1993-1994*

Article 9

1994

Case Summaries

CASE SUMMARIES

CERCLA

United States v. Rohm and Haas Co., 2 F.3d 1265 (3d Cir. 1993)

The United States brought suit under CERCLA § 107, 42 U.S.C § 9607 (1988), against defendants Rohm and Haas Company ("R & H"), the Bristol Township Authority ("BTA"), Chemical Properties ("CP") and Rohm and Haas, Delaware Valley, Inc. ("R & H-DVI") to recover costs incurred by the Environmental Protection Agency ("EPA") related to the cleanup of a 120 acre landfill in Bristol Township, Pennsylvania. The cleanup was conducted pursuant to an Administrative Consent Order issued under § 3008(h) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C § 6928(h) (1988) which held R & H-DVI solely responsible for the site's cleanup. The agreement did not include a provision enabling the government to recoup its implementation expenses. R & H-DVI, under EPA supervision, complied with the order and continues to fulfill it's obligations. The government initiated this action seeking recovery for its response costs. The defendants argued that they were not liable under the Comprehensive Environmnetal Response, Compensation and Liability Act ("CERCLA") § 107 for any costs specifically related to the EPA oversight.

The EPA can bring actions to require removal or remediation pursuant to § 104(a) of CERCLA, 42 U.S.C. § 9604(a) (1988), where hazardous substances have been released or threaten to be released. Section 107 mandates that the responsible parties bear the cost of such actions. The EPA contended that the defendants were liable under § 107 for its oversight costs since oversight of a RCRA corrective action is equivalent to a CERCLA "removal" action. The defendants countered that because RCRA and CERCLA are two discrete statutory schemes, and RCRA itself does not authorize the EPA to seek reimbursement for supervisory costs incurred under RCRA, such costs are not recoverable.

The Court of Appeals for the Third Circuit held that § 107 of CERCLA preempts any conflicting or companion legislative schemes and thus, if an action qualifies as a "removal" action, CERCLA imposes liability on the responsible parties, regardless of what statutory tool the EPA utilized in effecting such action. Given this conclusion, the court reasoned that the determinative issue was whether the CERCLA definition of removal included expenses associated with government oversight of removal actions sponsored and conducted solely by private parties.

The court held that the governmental agencies could only recover their administrative costs, including costs incurred in a supervisory capacity, from those they regulate if the applicable statutory language explicitly reflected Congress' clear intention to delegate this authority to the agency in question. In ruling that the EPA had no such authority, the court relied primarily on CERCLA's lack of reference to governmental oversight of activities financed and conducted by private parties. Also, the court noted that § 104 of CERCLA was further indicative of Congressional intent to withhold this authority from the EPA because it allows the EPA to delegate the responsibility for numerous removal and remedial undertakings to private parties, yet only addresses the recovery of supervisory costs in regard to remedial investigations and feasibility studies ("RI/FS").

The Court of Appeals held that only direct action taken by the government in the form of investigation, evaluation, or observation of a release or threatened release constituted a recompensable "removal" under CERCLA. The court then remanded to the district court to determine which costs the EPA can recoup.

Defendant Chemical Properties contended that it should not be held jointly and severally liable because it owns only a small fraction of the offending site and because it did not actually dispose of any hazardous wastes at the site. The court held that though the language of CERCLA § 107 apparently imposes liability on only "the owner" of a site, common sense requires that this phrase be interpreted as "any owner," else property held by multiple owners escape the reach of CERCLA.

The court further held that imposing joint and several liability on the owner of a comparatively small share of a jointly-titled parcel of real estate would be inequitable in some circumstances. Damages can be apportioned where one harm can reasonably be attributed to separate causes. CP failed to prove that it was in no way responsible for any of the contamination and accordingly did not carry its burden.

The court noted that though CP was jointly and severally liable for EPA's costs, the less than 10% ownership of the site could be an "equitable factor" in subsequent contribution actions brought by CP against the other defendants.

— by Thad R. Mulholland

In re Cropwell Leasing Co. v. NMS, Inc., 5 F.3d 899 (5th Cir. 1993)

On January 26, 1992, a barge in tow of the M/V Scaup and a barge in the tow of the M/V De Lasalle, NMS 1905, collided at the intersection of the Intercostal Waterway and the Wax Lake Outlet in Louisiana. The NMS 1905 was damaged and consequently spewed approximately 100,000 gallons of the hazardous substance styrene into the Intercostal Waterway.

Following the collision, the owner and lessee of the M/V Scaup, ("Dravo"), along with the owner and lessee of the M/V de Lasalle, invoked the shipowner's Limitation of Liability Act, 46 U.S.C. §§ 183, *et seq.* in an attempt to limit their liability arising from the spill. The government intervened in Dravo's limitation proceeding and sought damages and removal costs under CERCLA, the Federal Water Pollution Control Act ("FWCPA"), and general maritime common law. The district court granted the government's request for voluntary dismissal of its FWCPA claims, granted summary judgment for Dravo on the government's CERCLA claims and dismissed the government's common law claims. The government appealed the dismissal of the common law claims.

The district court held that no such claim can be made because the CERCLA saving clause, 42 U.S.C. § 9652(d) (1988), does not specifically preserve the right of the government to institute a general maritime claim against a non-discharging vessel. The Court of Appeals of Appeals for the Fifth Circuit disagreed, holding that the CERCLA saving clause preserves state, federal, or common law remedies the government may seek in addition to a CERCLA action. Holding that the government's maritime common law claims constitute a federal law remedy preserved by CERCLA's saving clause, the court of appeals vacated the district court decision and remanded the case.

— by Thad R. Mulholland

In re Bell Petroleum Servs., Inc. , 3 F.3d 889 (5th Cir. 1993)

Sequa Corporation ("Sequa") appealed a district court judgment imposing joint and

several liability upon it for response costs the EPA incurred to remedy chromium waste which caused groundwater contamination. John Leigh, Western Pollution Control Corporation ("Bell"), and Woolley Tool Division of Chromalloy American corporation (which later merged with Sequa) all operated a chrome-plating shop near Odessa, Texas, from 1971 through 1977. Leigh operated the facilities from 1971 to 1972, Bell from 1972 to 1976, and Sequa during 1976 and 1977.

In 1984, the EPA designated a 24-block area with discolored drinking water as a Superfund site, authorizing response action under CERCLA § 104, 42 U.S.C. § 9604. A detailed study revealed the sole source of groundwater for the area contained elevated chromium concentrations, and on September 8, 1986, the City of Odessa water system was ordered to supply the area under a Record of Decision ("ROD") by the EPA Regional Administrator.

The EPA filed a CERCLA cost-recovery action against Bell, Sequa, and John Leigh. The district court ordered a three-phase case: Phase I to determine liability, Phase II to address recoverability of the EPA's response costs, and Phase III to examine responsibility. In Phase I, the district court found the defendants jointly and severally liable for past and future response costs. The district court in Phase II found the EPA's direct and indirect response costs from providing an alternate water supply ("AWS") to be recoverable, as well as prejudgment interest from the date such costs were incurred.

In June 1990, the district court held that the evidence presented no method, besides mere speculation, of apportioning the defendant's liability. Using equitable factors, the court concluded that Bell was responsible for 30 percent, Sequa for 35 percent, and Leigh for 35 percent. After the EPA obtained consent decrees settling any and all liabilities of Bell and Leigh, for $1,000,000 and $100,000, respectively, Sequa was held jointly and severally liable for $1,866,904, plus any future response costs.

Sequa appealed. The Fifth Circuit Court of Appeals issued a five-part holding. In its first two parts, the court held that defendants seeking to avoid joint and several liability under CERCLA were required to prove the amount of harm that they caused. The court found that Sequa had met its burden of proving a reasonable basis for apportioning liability among the defendants on a volumetric basis. The court's authority came from the Restatement of Torts, which states that whether apportionment among two or more causes is possible constitutes a question of law, not fact.

In making these two determinations, the court discussed three theories of apportionment: (1) the "*Chem-Dyne* approach," or Restatement approach, requiring proof of amount of harm caused by the defendant seeking to escape joint and several liability; (2) the "*Alcan* approach," followed in the Second and Third Circuits, which allows the defendants to altogether avoid liability upon a showing that the defendants' waste did not cause them to incur response costs; and (3) the "moderate" approach which applies Restatement principles in determining a reasonable basis for apportionment, but also allows the court discretion to refuse to impose joint and several liability where equitable factors suggest otherwise. The court adopted the *Chem-Dyne* approach. As Sequa provided evidence showing that the three parties whose operations resulted in chromium entering the groundwater existed at mutually exclusive times, the court remanded the case for a determination of apportionment on a volumetric basis.

In the third part of the court's holding, the court concluded that the EPA's decision to provide an AWS was arbitrary and capricious under 42 U.S.C. § 9613(j)(2). This conclusion was based on evidence that no attempt was made to determine whether anyone actually drank the water prior to making the decision, that the AWS did not reduce any public health threat, and that the AWS was a waste of Superfund money.

In the fourth part of the court's holding, the court found that because the EPA arbitrarily and capriciously implemented the AWS, the costs associated with the AWS were not recoverable under CERCLA because they were inconsistent with the National Contingency Plan.

In the fifth and final part of the holding, the court stated that the EPA's filing of a complaint was sufficient for meeting the written notice requirement for specified response costs as a prerequisite to awarding prejudgment interest. Because the court had previously concluded that the EPA's response costs were not recoverable, however, it also vacated the district court's decision to award prejudgment interest. The court held that to the extent that the EPA was found to have recoverable costs, interest on such costs should be calculated from the date of the complaint (for costs incurred before the complaint) and from the date the costs were incurred (for other costs).

— by Mark A. Meyer

Louisiana-Pacific Corp. v. ASARCO Inc., 6 F.3d 1332 (9th Cir. 1993)

The plaintiff, Louisiana-Pacific Corporation ("Louisiana-Pacific") sued ASARCO Incorporated ("ASARCO") under CERCLA, the Washington Hazardous Waste Management Act, Wash. Rev. Code Ann. §§ 70.105.005 *et seq.* ("West 1992") and the Washington Products Liability Act ("WPLA"), Wash. Rev. Code Ann. §§ 7.72010 *et seq.* (West 1992) for cleanup costs for slag contamination and for contribution or indemnity. ASARCO counterclaimed against Louisiana-Pacific under CERCLA and state law.

ASARCO had been smelting copper from copper ore near Tacoma. The process produced the byproduct slag. ASARCO had sold the slag to various log yards beginning in 1973. Several years later, the EPA and the Washington Department of Ecology ("WDOE") determined that the slag had contaminated water runoffs from the log yards and ordered a cleanup of the site. Louisiana-Pacific owned one of the log yards which was contaminated by the slag.

The District Court for the Western District of Washington held ASARCO liable under CERCLA for 79-100% of the cleanup costs and for 75-100% of the cleanup costs under Washington state law. In addition the court found ASARCO liable for attorneys fees and costs under both state and federal law, subject to reduction based on comparative fault.

Upon appeal by ASARCO, the Court of Appeals for the Ninth Circuit examined ASARCO's liability for cleanup costs under CERCLA. The court found the slag to be a hazardous substance under CERCLA even though slag is specifically exempted under the Bevill Amendment, 42 U.S.C. § 9601(14)(C) (1988). The court reasoned that even though the Bevill Amendment excludes slag, the exclusion applies only to that particular subsection. Slag contains components such as copper, lead, arsenic and zinc, which are considered hazardous under the Bevill Amendment, 42 U.S.C. § 9601 (14)(A),(B) and (D) (1988). The court decided that slag may still be considered a hazardous substance under any other subsection under the statute and may be re-

garded as a hazardous substance under CERCLA.

The court also looked at whether slag could be both a "product" under the WPLA and "waste disposal" under CERCLA. The court held that while slag may be considered a product that can be sold and has value, it may also be characterized as waste disposal under CERCLA in order to comport with the broad purposes of the statute. The court noted that the jury's finding on the trial level that slag was a product did not preclude the court from finding it also to be waste disposal.

The court addressed whether ASARCO should be responsible for cleanup costs at one of the contaminations sites if the cleanup did not comply with the notice and comment provisions of the National Contingency Plan ("NCP"), 42 U.S.C. § 9607(a)(4)(B) (1988). The court held that substantial, rather than perfect, compliance was required, and that the meetings held regarding the cleanup of that site substantially complied with the NCP.

The court next examined ASARCO's liability under several Washington state law claims. The first issue raised was ASARCO's liability for attorneys' fees and prejudgment interest awarded to the plaintiffs by the district court under Washington's Hazardous Waste Management Act ("HWMA") which was amended to provide a private cause of action. In reversing the district court decision, the appellate court noted that the amendment was not yet in effect when ASARCO sold its slag to Louisiana-Pacific. The amendment could not be applied retroactively; consequently, the court found ASARCO not to be liable for attorney fees and prejudgment interests associated with its slag sales before the amendment took effect.

The court then looked to the district court's award of damages under the WPLA for Louisiana-Pacific's lost use of its log yard due to the slag contamination. The court stated that the WPLA does not allow for recovery for lost use.

— by V. Alyse Hakami

FMC Corp. v. United States Dep't of Commerce, 1993 WL 489133 (3d Cir. 1993)

The United States and the United States Department of Commerce appealed from a judgment entered against them which held the United States was jointly and severally liable, as an "owner," "operator," and "arranger" of a facility at which FMC is responsible for cleanup under CERCLA.

FMC purchased the Front Royal, Virginia facility from American Viscose in 1963. American Viscose began manufacturing textile rayon at the facility in 1940. After the Pearl Harbor attack, the government determined that it needed more high tenacity rayon to make up for the lack of rubber in airplane and truck tires.

The Work Production Board ("WPB"), which was established in 1942, issued directives to industry in connection with war procurement and production and also was empowered to seize and operate non-complying industries. The WPB required American Viscose to convert the Front Royal plant to enable it to produce high tenacity rayon. Because the government considered this a war plant, it was subject to the government's maximum control.

The government leased and government owned equipment and machinery for use at the facility and contracted with another company to design and install the equipment at the facility. In October 1942, the government obtained draft deferments for personnel, brought in additional workers and supplied housing for them at the Front Royal facility. The government was active in every phase of labor at the facility, including management, worker supervision, and investigation and resolution of problems.

Production of the high tenacity rayon resulted in viscose waste which was disposed of in large unlined basins located on site. From 1942 through 1945, at least 65,500 cubic yards of viscose waste were placed in the on-site bins.

The 1982 inspection of the plant revealed carbon disulfide in the groundwater surrounding the plant. The EPA began cleanup operations and notified FMC of its potential liability. FMC filed suit in 1990 against the Department of Commerce under § 113(f) of CERCLA, 42 U.S.C. § 9613(f) (1988) alleging that as a result of the government's activities during World War II, that the United States became jointly liable with FMC as an "owner" and "operator" of the facility and as an "arranger" for disposal of hazardous wastes there.

The district court concluded that the government was an owner and operator of the facility and an arranger of waste disposal. The parties settled the allocation of liability, subject to the government's appeal of the ruling holding it liable as an operator and arranger. The government conceded its liability as an owner and was allocated 8% of the cleanup costs. The court found the government to be an operator as its conduct was similar to that of a private, commercial party in that its regulation was in furtherance of its commercial goals and thus had substantial control over the day-to-day operations of the facility.

The court found the government to be an arranger through applying a three-part test: [A]rranger liability may be imposed on an entity who (1) supplied raw materials to another and (2) owned or controlled the work done at the site, where (3) the generation of hazardous substances was inherent in the production process. Application of those factors resulted in a finding that the government was indeed an arranger under CERCLA.

The Court of Appeals for the Third Cir uit upheld the government's liability as an operator and arranger and its total liability under the settlement agreement was increased to 26% of the cleanup costs. The court rejected the government's argument for sovereign immunity under CERCLA § 120(a)(1). The court also determined that the "regulatory" exception suggested by the government would undermine Congressional intent.

— by Christine Hymes

Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d 10 (2d Cir. 1993)

Consolidated Aluminum Corporation ("Conalco") appealed a ruling that granted Olin Corp.'s ("Olin") motion for partial summary judgment, denied Conalco's motion for partial summary judgment and dismissed with prejudice Conalco's first claim for relief in its counterclaim which was based on CERCLA.

The Court of Appeals for the Second Circuit addressed the interpretation of the indemnity and release provisions contained in agreements between the two parties. Conalco claimed that these provisions which predated CERCLA were insufficient to relieve Olin of its liability under CERCLA.

In 1974, Conalco bought Olin's aluminum business in Hannibal, Ohio, and agreed to indemnify Olin for "all liabilities (absolute or contingent), obligations and indebtedness of Olin" related to the assets purchased. In 1972, Olin had learned that its byproducts contained polychlorinated biphenyls ("PCBs") and began to dispose of the toxins properly. Olin did not, however, take any action to eliminate contaminants from the impound-

ment pool it had previously used to dispose the PCB's.

In 1986 the Ohio Environmental Protection Agency ("Ohio EPA") concluded that the pool and the surrounding soil were contaminated with PCBs and ordered remediation of this hazard. Conalco complied and sought voluntary contribution from Olin, which Olin refused. Olin then filed a declaratory judgment action seeking a determination that Conalco was liable to Olin for the costs of defending suits against it regarding their former aluminum business. Conalco's counterclaim, based upon CERCLA, included two claims: the first claim sought reimbursement for $991,359.91 it allegedly spent cleaning up the Hannibal site and the second was a declaratory judgment declaring Olin liable for claims related in any way to the PCB's at the Hannibal site and also at the site of Eastern Diversified Metals in Hometown, Pennsylvania. Both parties subsequently filed cross-motions for partial summary judgment.

The court concluded that CERCLA permits private parties to contract with respect to indemnification and contribution for environmental liability. The court further concluded that the indemnification and release agreements that Olin and Conalco had entered into were clear, valid and enforceable. The court denied Conalco's motion for partial summary judgment, granted Olin's partial summary judgment and dismissed with prejudice Conalco's CERCLA counterclaim.

The appellate court agreed with the district court's decision regarding interpretation of the agreements. The appellate court directed the district court to amend the judgment to provide that the claims in Conalco's CERCLA counterclaim dealing with third party sites, other than the Pennsylvania site, were to be dismissed without prejudice based on the fact that the agreements were entered into prior to any knowledge of CERCLA and Conalco should be able to bring other claims against Olin as a result of Olin's disposal of hazardous wastes on properties later sold to Conalco. As to the Pennsylvania site, the appellate court ruled that it had no authority to make findings of fact and remanded the claim for the district court to make findings and then rule on Conalco's CERCLA claim as it pertains to that site.

— by Christine Hymes

United States v. Shell Oil Co., 841 F.Supp. 962 (C.D. Cal. 1993)

The United States and California brought suit under the CERCLA for cleanup costs of a contaminated site in Fullerton, California ("McColl site"). The defendants include four oil companies and McAuley LCX Corporation ("McAuley").

The McColl site is 22 acres and contains six pits, or sumps. The site became contaminated in World War II with acid sludge byproducts of alkylation processes used to produce high octane aviation fuel. During the war, the federal government required all oil companies to produce high octane aviation fuel. Companies that did not comply were subject to government takeover.

The defendant oil companies voluntarily entered into lucrative contracts with the government. The acid sludge that they produced was disposed of in the unlined sumps at the McColl site during World War II. McColl and the oil companies covered the sumps at the request of the City of Fullerton. A country club and golf course were later built over part of the McCall site. McAuley purchased the club in 1980 with knowledge of the underlying sumps.

Since 1980, acid sludge had been oozing to the ground surface, causing an estimated 10,000 cubic yards of soil to become contaminated. Pursuant to § 107 of CERCLA, the governments must prove that due to the release of a hazardous substance at a facility, they have incurred response costs. The court found all elements to be satisfied by the governments and imposed liability on the defendants for owning the facility and for arranging for disposal of the sludge.

The court rejected all defenses, including act of war defense at 42 U.S.C. § 9607(b)(2) (1988). The defendants asserted that they dumped the acid sludge at the McColl site only because the government required them to produce so much aviation fuel that they had no alternative means of disposing the waste products. The court sought to determine Congressional intent behind the phrase "act of war." The court could find no explanation for the term and emphasized the general Congressional intent to impose strict liability for CERCLA cleanups. Despite government regulation of the oil companies fuel production in World War II, the court rejected the application of § 9607(b)(2) (1988) based on the fact that the defendants had voluntarily entered into fuel production contracts with the government and were compensated.

Defendants also asserted that the acid sludge contamination was an act of third parties, namely the act of United States, Japanese and German governments in World War II. The court rejected this defense, again referring to the volitional contracts entered into between the oil companies and the United States.

McAuley raised the innocent landowner defense of 42 U.S.C. § 9601(35) (1988), that it did not know or have reason to know of the release of hazardous substances. The court found that McAuley had known of the sumps when it purchased the property and rejected McAuley's defense.

The defendants also attacked the retroactive application of CERCLA as being unconstitutional under the Due Process and Takings Clause of the Fifth Amendment. The court could find no basis to distinguish this case from others which had retroactively applied CERCLA. In addition, it found Congressional intent to compel cleanup of past careless waste disposal tactics and thereby rejected the defense.

— by Christine Hymes

Velsicol Chem. Corp. v. ENENCO, Inc.,1993 WL 462512 (6th Cir. 1993)

Velsicol Chemical Corporation ("Velsicol") appealed their liability for CERCLA response costs, arguing that the statute of limitations for a claim under CERCLA § 107 should be applied retroactively and that laches is available for a § 107 claim. The Court of Appeals for the Sixth Circuit held that the statute of limitations should not apply retroactively and that laches was unavailable.

Velsicol's claim accrued in 1981 though it did not file its claim until 1988. In October of 1986, Congress added a statute of limitations to § 107(a) of CERCLA in the Superfund Amendments and Reauthorization Act ("SARA"), setting a limit of three years after the completion of a remedial action or six years after initiation of construction on a remedial action for bringing suit for recovery of response costs. The court found that the statute of limitations did not apply to Velsicol's claims. It relied on the fact that there had been no statute of limitations prior to the 1986 amendment and the established pre-

sumption that a new congressional enactment will not be construed to apply retroactively unless specifically stated. Velsicol, therefore, had at least three years from the enactment of the statute of limitations to file suit.

The court also found that the defense of laches did not bar Velsicol's claims. It noted that § 107 specifically states three defenses to this type of claim: an act of God, an act of war and an act or omission of a third party other than an employee or agent of the defendant. The court determined that Congress specifically limited CERCLA defenses to the three stated.

— by Anemarie Mura

WATER

United States v. Plaza Health Labs., Inc., 3 F.3d 643 (2d Cir. 1993)

Defendant Geronimo Villegas, co-owner and Vice President of Plaza Health Laboratories, was convicted in district court for violating the Clean Water Act ("CWA") by knowingly discharging pollutants into navigable waters. Villegas appealed, claiming that he was not a "point source" as defined under the act. Plaza Health Laboratories, Inc. is a blood-testing laboratory in Brooklyn, New York. On at least two occasions, Villegas loaded containers or vials of human blood from his business into his car, carried them to his condominium at the edge of the Hudson River and disposed them in the water. The vials later washed ashore. A group of children found some vials; maintenance workers found others. Cleanup crews retrieved the vials, some of which contained blood contaminated with hepatitis-B.

Villegas was charged with knowingly discharging pollutants from a "point source" without a permit. Villegas argued on appeal that the reading of a human being as a "point source" was ambiguous. Villegas argued that the rule of lenity should apply, so that any ambiguities in a statute be resolved in the defendant's favor.

The Court of Appeals for the Second Circuit looked to the definition of "point source" contained in 33 U.S.C. § 1362(14) (1988). It found that the definition evoked images of physical structures and instrumentalities that convey pollutants from an industrial source to waterways. The court also examined the purpose of the CWA to discourage pollution. The court found that the CWA's legislative history and regulatory structure as well as case law suggested that human beings were not to be included in the definition of "point source." The court, therefore, found that the rule of lenity should apply and reversed the defendant's conviction for discharging pollutants in violation of the CWA.

— by Anemarie Mura

James City County v. United States Envtl. Protection Agency, 1993 WL 539821 (4th Cir. 1993)

Plaintiff-Appellee James City County, Virginia ("the County"), was granted a permit under § 404(b) of the CWA by the United States Army Corps of Engineers ("the Corps") in 1988 to build a dam and reservoir at Ware Creek. Defendant-Appellant EPA vetoed the permit pursuant to § 404(c) of the CWA. The County filed suit in district court and moved for summary judgment. The court granted summary judgment and ordered the Corps to issue the permit. On appeal, the Court of Appeals for the Fourth Circuit upheld the district court's ruling that there was not substantial evidence to support the EPA's finding of the existence of practicable alternatives to the Ware Creek Reservoir. The Fourth Circuit, however, remanded the case to the EPA in order to permit the EPA to determine if solely environmental considerations supported the veto.

The EPA determined that environmental considerations alone provided a sufficient basis for its veto, and once again the County responded by filing suit in district court. The district court granted the County's motion for summary judgment, holding that the EPA did not have authority to base its veto on environmental considerations alone, and alternatively that there was insufficient evidence to warrant the EPA's finding of unacceptable adverse environmental effects. The EPA appealed.

The Fourth Circuit held that the EPA did have the authority to base a § 404(c) veto on environmental considerations alone. The County argued that the EPA must consider a community's water needs before vetoing a project. The court pointed out that Congress intended the Corps to consider the full range of factors when deciding to issue a permit. The court held that Congress gave the EPA the final decision in this process and invested it with unquestionable authority to veto a project to protect the environment. The court recognized that this is a broad grant of power, but that a primary mission of the EPA is to assure clean water. The court held that a veto based solely on environmental considerations was justified since the EPA's function under the CWA is to assure the purity of water, not its availability.

The court turned next to the sufficiency of evidence supporting the EPA's finding of unacceptable adverse environmental effects. It held that the EPA's findings in the administrative record were not arbitrary and capricious and were supported by substantial evidence. The court pointed to the administrative record, in which the EPA had enumerated the loss of 381 acres of vegetated wetlands, 44 acres of palustrine, estuarine, or lacustrine open water systems, and 792 acres of adjacent forested uplands habitat. The EPA predicted that cumulative damage to the ecosystem from the loss of these wetlands would stretch to the Chesapeake Bay. The EPA also pointed to the harm or eventual loss of various fish and wildlife species, including a valuable Great Blue Heron rookery. Furthermore, the Fourth Circuit ruled that the district court had not given proper deference to the EPA's finding that the County's mitigation plan was inadequate to offset the loss of specific types of wetlands habitats.

The Fourth Circuit reversed the decision of the district court, finding that the EPA did have authority under § 404(c) of the CWA to veto the Ware Creek Reservoir project solely on the basis of environmental considerations and that the EPA's findings on these considerations were sufficient to support its veto.

— by Theodore A. Kardis

Rueth v. United States Envtl. Protection Agency, 1993 WL 540816 (7th Cir. 1993)

Plaintiff-appellant Harold G. Rueth, d/b/a Rueth Development Company, Inc. ("Rueth") was notified on January 22, 1991 by Defendant-appellant Army Corps of Engineers ("Corps") that he had failed to obtain a permit for discharging dredge and fill materials into wetlands and that such discharges were unauthorized. Rueth asked the Corps for identification of the discharge areas. Defendant-appellant EPA, which also has jurisdiction to enforce the CWA, issued Rueth a compliance order under § 309(a) of the CWA on April 11, 1991. The order, which contained the EPA's findings, also ordered Rueth to stop discharging into the wetlands and to begin restoring them. Rueth then

sought a nationwide permit from the Corps to authorize the previous filling. The Corps denied the permit based on its finding that Rueth was trying to circumvent a review of the environmental impact of its development plans by seeking review in "piecemeal" fashion.

Rueth filed suit in federal district court for both injunctive relief and a declaratory judgment. The government filed a motion to dismiss due to lack of subject matter jurisdiction, and the district court granted the motion. Rueth appealed.

The Court of Appeals for the Seventh Circuit held that the intent of Congress when it enacted the CWA was to allow judicial review of administrative agency decisions only after the agency sought judicial enforcement of a compliance order or the enforcement of administrative penalties. Rueth claimed not to be challenging the compliance order, but rather the government's jurisdiction over the wetlands in its development project. The court found no merit in this argument, responding that challenging the existence of the EPA's jurisdiction was indistinguishable from challenging its extent.

The court instructed Rueth that the district court would not have subject matter jurisdiction until there is an EPA finding that Rueth's property is a wetland under the CWA and the EPA seeks enforcement of penalties against Rueth. While admitting that its ruling could potentially cause problems for Rueth in the interim, the court admonished the developer for failing to seek the proper permits mandated by the CWA prior to filling the wetlands. Although Rueth maintained that it was unaware the area was a wetland constituting "waters of the United States" under the CWA, the court noted that nearly all wetlands are encompassed by the far-reaching definitions of the CWA. The court asserted its ability to intervene in pre-enforcement activity where either the EPA or the Corps oversteps the bounds of their authority, but stated that this was not such an instance.

Next, the court responded to an argument by Rueth that the Administrative Procedure Act ("APA") gave it jurisdiction. The court held that the APA does not allow judicial review since the CWA precludes it. Finally, Rueth attempted to persuade the court that it had jurisdiction under the Declaratory Judgments Act, but the court pointed out that the act is not an independent grant of jurisdiction. Since jurisdiction must have a statutory basis, the Court rejected Rueth's argument by returning to its central holding that it lacked jurisdiction under the CWA and affirmed the decision of the district court.

— by Theodore A. Kardis

Committee to Save Mokelumne River v. East Bay Municipal Util. Dist., 1993 WL 535692 (9th Cir. 1993)

The East Bay Municipal District ("District") and the members of the California Regional Water Quality Control Board, Central Valley Region, appealed from a district court's order holding them liable for violating the CWA. The plaintiffs, Committee to Save Mokelumne River ("Committee") alleged that the District owned and operated the Penn Mine facility and that the facility, was discharging pollutants into the Camanche Reservoir and Mokelumne River without a permit, in violation of the CWA. The district court found in favor of the Committee.

The Penn Mine property is the site of an abandoned copper and zinc mine. The companies that mined the site until the 1950's left behind reactive mine tailings, waste rock and excavated ores. These materials form "acid mine drainage" when exposed to oxygen and water. "Acid mine drainage" contains high concentrations of aluminum, cadmium, copper, zinc, iron and sulfuric acid. Unless preventative measures are taken, the runoff from the acid mine drainage into runoff flows into the Mokelumne River.

In the 1960's, the District acquired part of the Penn Mine property to build the Camanche Reservoir. The District owns water rights on the Mokelumne River and supplies water to east San Francisco. In 1978, the District built the Penn Mine Facility to reduce the toxic runoff. Occasionally, however, the polluted water and drainage from the District's facility spilled over into the Mokelumne River and Camanche Reservoir. That spillage caused the Committee to sue the District under the "citizen suit" provisions of the CWA.

The Committee sought a judgment declaring the District liable for discharging the pollutants without a permit. The Committee also wanted the District enjoined from discharging pollutants until it obtained a proper permit under the National Pollutant Discharge Elimination System ("NPDES").

The district court found that the District was discharging pollutants into the Camanche Reservoir and Mokelumne River without a permit in violation of the CWA. Based on this finding, the court partially granted the Committee's motion for summary judgment on the issue of liability.

The Court of Appeals for the Ninth Circuit looked at four issues. First, the appellate court determined whether the District's facility was violating the CWA's permit requirements. The five elements required for proof of a permit violation include showing that defendants: 1) discharged, or added 2) a pollutant 3) to navigable waters 4) from 5) a point source. The main issue in the instant case is whether the District was responsible for discharging or adding pollutants. The District admitted to the other four elements. The appellate court held that the district was adding pollution through the polluted surface runoff that came from the mine site. Consequently, the court found the District to be subject to the CWA's permit requirements.

Second, the District contended that it had raised an issue of material fact at trial so as to preclude a summary judgment against it. The appellate court held that it had not. The District stated that whether it was still liable under the CWA when the level of contaminants in the river was not increased by the pollutants discharged into the Mokelumne was a material issue that should have precluded summary judgment. The court held that the permit violation took place regardless of the level of pollution. The District, therefore, had failed to raise a material issue, and summary judgment was proper.

Third, the court examined whether regulatory actions taken by a state to prevent or reduce pollution were subject to the CWA's permit requirements. The court held that no exemptions from the permit requirement existed for state actions to prevent or reduce discharge of pollutants. As a result, the District could not escape liability simply because it was a state agency.

Finally, the court discussed whether the Eleventh Amendment to the United States Constitution protected the Water Board, a defendant in this action, from liability under the CWA. The court held that the Eleventh Amendment did not protect against claims seeking prospective equitable relief. Because equitable relief was the nature of the Committee's claim, it was not barred by the Eleventh Amendment.

The appellate court concluded that the district court had properly granted summary judgment in favor of the Committee on the

issue of defendant's liability under the CWA.

— by Kimberly Bettisworth

Natural Resources Defense Council, Inc. v. Texaco Refining and Marketing, Inc., 2 F.3d 493 (3d Cir. 1993)

Environmental groups, including Natural Resources Defense Council, Inc. ("NRDC") brought a citizen suit under the CWA alleging violations of a NPDES discharge permit by a Texaco refinery.

In 1988, Texaco was discharging pollutants into the Delaware River pursuant to an NPDES permit. Texaco's permit set up seven monitoring points, or outfalls, through which pollutants could be discharged. Each outfall contained a specific parameter, meaning a specific attribute of a discharge. The parameters were subject to strict effluent limitations. Texaco's permit required it to sample every parameter at every outfall at prescribed intervals and to report the results monthly. Star Enterprise ("Star"), a Texaco subsidiary, acquired the Texaco refinery in 1988. A new NPDES permit was issued to Star in 1989.

The trial court had granted NRDC's motion for summary judgment on the issue of Texaco's liability and thereby found Texaco liable for alleged permit violations. The court also enjoined Texaco from future violations of the 1989 permit. Texaco filed an interlocutory appeal. The Court of Appeals for the Third Circuit vacated the injunction and remanded the case to the district court. On remand, the district court allowed NRDC to give additional evidence of its standing. The court found that NRDC presented sufficient evidence of standing and concluded that Texaco had exceeded its NPDES permit effluent limitations 414 times between March 1983 and February 1991. The court, however, determined that it had jurisdiction only over continuous and intermittent violations and not over wholly past violations. Of the 414 violations, the district court found that 365 were continuous or intermittent and 49 were wholly past. The court imposed a civil penalty of $500 per day of violation, which totalled $1,680,000. The court again enjoined further violations of the 1989 permit. Texaco appealed and NRDC cross-appealed.

The Court of Appeals for the Third Circuit first examined its subject matter jurisdiction. On cross-appeal, NRDC alleged that the district court had erred by failing to exercise jurisdiction over 49 violations that occurred prior to the filing of NRDC's complaint. The court sought to determine the proper standard for determining the extent of a court's subject matter jurisdiction over cases in which there are a series of permit violations involving multiple parameters. The NRDC argued that the court should use a "permit-based" standard, under which jurisdiction attaches to entire cases, not to individual violations within the case. The court found this standard overbroad.

Texaco urged the court to use a "parameter-based" standard, under which the court looks at each violation separately and exercises jurisdiction only over continuous or intermittent violations as of the time of the complaint. The court found this standard to be too narrow in that one flaw in the treatment process could often lead to violations of several parameters.

The court chose use a "modified by parameter standard." Under this standard the plaintiff could establish at trial that violations were continuous or intermittent either by proving the likelihood of a violation of the same parameter, or by proving a likelihood that the same source of trouble would cause violations of different parameters.

Texaco also argued that the district court erred in holding that post-complaint violations of a parameter were dispositive proof of pre-complaint violations. The court had found that 42 parameter violations had occurred after the filing of the complaint and 323 had occurred prior to the complaint's filing, but were continuous or intermittent when the complaint was filed. The appellate court held that plaintiff need not prove both that a post-complaint violation had occurred and that independent evidence proves a likelihood that violations would recur. Either method of proof was enough to prove that pre-complaint violations were continuous or intermittent.

Texaco next argued that the district court should have dismissed many of NRDC's claims for penalties on mootness grounds. Texaco argued that the 1989 permit relaxed many of the parameters enough to eliminate any possibility of future violations. The court found that injunctive remedies with respect to the relaxed parameters were moot, but civil penalties were not. The court noted that a citizen suit would not be effective if a defendant could avoid paying penalties by post-complaint compliance with its permit.

Texaco also claimed that a permanent injunction, prohibiting it from future violations was inappropriate because Texaco no longer owned the refinery, no evidence existed of irreparable injury and because the injunction was overbroad. The court held first that the injunction could be extended to future owners and second that NRDC had proven irreparable injury. The court further ordered the case remanded for the district court to narrow the injunction to order compliance only with the parameters that were being continuously or intermittently violated and which had not been rendered moot by the subsequent permit.

— by Anemarie Mura

Washington Pub. Interest Research Group v. Pendleton Woolen Mills, 1993 WL 492315 (9th Cir. 1993)

The Washington Public Interest Research Group ("PIRG") brought a citizen suit against Pendleton Woolen Mills, Inc. ("Pendleton") for alleged permit violations. Pendleton operates a textile mill in Washougal, Washington at which it processes wool. Its operations create oil, grease, chromium, zinc and other pollutants. Pursuant to its NPDES permit, Pendleton discharged the waste products into the Columbia River and one of its tributaries.

The EPA found that Pendleton was in violation of its NPDES permit and ordered Pendleton to improve its operations to comply with NPDES mandates. Pendleton made improvements, but some evidence existed that it was still exceeding its permit limitations. In December, 1990, PIRG filed suit seeking a declaration that Pendleton was continuing to violate its permit, as well as an injunction for compliance and civil penalties for violations.

Under 33 U.S.C. § 1365(a) (1988), a citizen may bring a civil action against any person alleged to be in violation of an effluent standard or limitation. The EPA authority to seek administrative penalties is limited by 33 U.S.C. § 1319(g)(6) (1988). That provision ensures that administrative penalties do not duplicate any other penalties imposed upon the violator of the NPDES permit and provides that when the Administrator is already prosecuting an action for a permit violation, a civil penalty suit may not be brought by a citizen. As a result, the Court of Appeals for the Ninth Circuit stated that the citizen suit provision could not be invoked to seek civil penalties when the EPA was already pursuing the matter.

The court noted that 33 U.S.C. § 1319(g) (1988) requires certain procedures

including a public notice and comment period and a hearing in administrative penalty actions. In issuing its compliance order, the EPA provided none of these. The court determined that Congress did not intend that a compliance order constitute an administrative penalty action. The court found that the EPA's compliance order did not trigger application of 33 U.S.C. § 1319(g) (1988). Consequently, the court held that the EPA's compliance order did not preclude PIRG's citizen suit.

— by Michelle Vokoun

Commonwealth v. United States Postal Serv., 1993 WL 525044 (3d Cir. 1993)

The Commonwealth of Pennsylvania, Department of Environmental Resources ("DER") appealed from a district court order granting judgment on the pleadings in favor of defendant, United States Postal Service ("Postal Service"). The district court for the Middle District of Pennsylvania held that the Postal Service was not liable for civil penalties for violations of state environmental requirements because of sovereign immunity. The Court of Appeals for the Third Circuit reversed and remanded, finding the district court's reasoning inconsistent with Supreme Court precedent.

In 1991, the DER filed a complaint with the Pennsylvania Environmental Hearing Board seeking civil penalties against the Postal Service in connection with the construction of a post office facility. The DER claimed that the Postal Service had violated the Pennsylvania Clean Streams Law in constructing the facility. The Postal Service moved for judgment on the ground of sovereign immunity, which the district court granted.

On appeal, the DER argued that the "sue and be sued" provision of the Postal Reorganization Act of 1970 ("PRA") served as a waiver by the Postal Service of its sovereign immunity. The DER asserted that the Supreme Court in *Franchise Tax Bd. v. U.S. Postal Serv.*, 467 U.S. 512 (1984) and *Loeffler v. Frank*, 486 U.S. 549 (1988) had outlined exceptions to the waiver of sovereign immunity and that such exceptions did not apply in the present case. The Postal Service argued that the "sue and be sued" provision of the PRA did not waive its sovereign immunity from civil penalties.

According to the appellate court, the Postal Service was a hybrid organization. While it retained certain attributes of a government operation, by design it was operated more like a business. The appellate court held that the "sue and be sued" clause of the PRA waived the Postal Service's immunity from civil penalties because the Postal Service acted as a business. The court found that even if the PRA did not specifically waive Postal Service immunity, 33 U.S.C. § 1323 (1988) of the Clean Water Act did.

The Postal Service argued that the "sue and be sued" clause did not apply to civil penalties because such penalties were not "the natural and appropriate incidents of legal proceedings." *Commonwealth* at 3, *citing Loeffler*, 486 U.S. at 555. The Postal Service, however, failed to explain why civil penalties were not the natural incidents of a legal proceeding.

The court also distinguished between the sovereign immunity of the government itself and immunity of a federal instrumentality that enters into a commercial business. The court cited *Loeffler*, stating that a commercially oriented business like the Postal Service would not be immune unless it could be

> clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue-and-be-sued' clause in a narrow sense.

Commonwealth v. United States Postal Serv., 1993 WL 525044 (3d Cir. 1993) *citing Loeffler*, 486 U.S. at 554. The court found that the Postal Service met none of these requirements and ruled that the Postal Service had waived sovereign immunity.

—by Kimberly Bettisworth

Atlantic States Legal Found. v. Eastman Kodak Co., 1993 WL 517388 (2d Cir. 1993)

Atlantic States Legal Foundation ("Atlantic") appealed from an order of the United States District Court for the Western District of New York. The district court had granted summary judgment to Eastman Kodak Company ("Kodak") and dismissed the action brought by Atlantic States for Kodak's alleged violation of State Pollutant Discharge Elimination System ("SPDES") permit rules. The Court of Appeals for the Second Circuit affirmed the district court order.

Appellee Kodak operates an industrial facility in Rochester, New York, that discharges waste water into the Genesee River and Paddy Hill Creek under a SPDES permit. Kodak operates the facility to purify waste produced in the manufacture of photographic supplies and other laboratory chemicals.

Atlantic originally brought suit against Kodak claiming that Kodak discharged pollutants not covered by its permit and exceeded the effluent limits imposed by its permit. Atlantic brought its action under the "citizen suit" provision of the CWA. Atlantic requested a declaratory judgment as to the above violations, an injunction against future violations and several other remedies, including civil penalties of $25,000 per day of violation, for each violation.

Atlantic argued that no pollutant not listed in Kodak's permit could be discharged by Kodak. Kodak, however, claimed that it was not prohibited from discharging pollutants not specifically assigned effluent limitations in a NPDES or SPDES permit. Kodak also claimed that if the permit did prohibit discharge of the pollutants that Kodak had released, then such a prohibition would be broader than that of the NPDES program that allowed Atlantic to bring a citizen suit against Kodak.

The district court granted Kodak's motion for summary judgment on the grounds listed above and dismissed the case. Atlantic appealed from that judgment.

The appellate court agreed with Kodak's argument that the permits allowed polluters to discharge pollutants not specifically listed in their permits so long as they followed the reporting rules and any new limitations imposed upon such pollutants.

Atlantic also argued that Kodak's discharge of certain pollutants violated New York regulations regarding the permits. The appellate court, however, held that such state regulations could not be enforced through citizen suits. For the reasons listed above, the appellate court affirmed the district court's order granting summary judgment to Kodak and dismissed the case.

— by Kimberly Bettisworth

HAZARDOUS WASTE

Ciba-Geigy Corp., et al. v. Sidamon-Eristoff, 3 F.3d 40 (2d Cir. 1993)

Ciba-Geigy Corporation ("Ciba"), brought suit against the EPA to challenge the authority of the EPA to issue federal hazardous waste site permits in states that have authority to issue their own permits under the Hazardous and Solid Waste Amendments ("HSWA") to the Resource Conservation and Recovery Act ("RCRA"). Under the original RCRA the EPA could delegate its powers of issuing permits to the states upon approval of their program by the EPA Administrator. The HSWA were added to the RCRA to deal with past mismanagement of hazardous wastes. The HSWA required that permits issued to plants with existing hazardous waste problems also provide plans for cleanup of these waste problems. States which had permit programs created before the adoption of the HSWA must affirmatively adopt the HSWA regulations and obtain authorization from the EPA for their HSWA programs. If a state has RCRA authorization but not HSWA authorization, then a permit applicant must get permits from both the state and the EPA in order to operate a hazardous waste site.

In this case, the New York Department of Environmental Conservation ("DEC") had both RCRA and HSWA authorization for its hazardous waste programs as evidenced by a Memorandum of Agreement ("MOA") between the EPA and DEC. This MOA provided that pending permit applications would be transferred to the DEC, but any existing federal permits would continue to be administered by the EPA.

Ciba ran a paint pigment production site in New York which produced hazardous waste. Ciba decided to close the facility, so it applied to the New York Department of Environmental Conservation (DEC) for a hazardous waste permit.

This application was processed before DEC had HSWA authority; thus, both the EPA and DEC were required to issue permits. Ciba opposed the EPA's issuance of its permit, but the EPA contended that issuing the EPA permit was necessary because the DEC permit would not cover all of the requirements for the management of a hazardous waste site.

Ciba first sought review of the EPA permit from the EPA Administrator who consequently upheld the permit. Ciba then appealed to the Environmental Appeals Board ("EAB"). Ciba argued that the federal permit was unnecessary because it was nearly identical to the state permit. Ciba also argued that in order for a federal permit to be issued it had to contain an "automatic termination provision" upon state authorization to administer HSWA regulations. The EAB concluded that before a state had HSWA authorization an EPA permit was required even if the EPA permit was "substantially similar" to the state's program. The EAB also held that federal permits issued in conjunction with state permits were not required to have automatic termination provisions. Such provisions could be resolved in the MOA. Subsequently, the federal permit became effective two weeks before the DEC obtained its authorization for its HSWA program. The final authorization of the DEC program prompted Ciba to again challenge the federal permit. The EPA indicated that a federal permit for Ciba's facility would probably still be necessary because DEC did not have total authorization to administer all of the HSWA requirements.

The Court of Appeals for the Second Circuit first examined whether Ciba had exhausted its administrative remedies. The court concluded that Ciba had exhausted its remedies as to the EAB's decision regarding the status of the federal and state permits, but held that Ciba had not exhausted its administrative remedies as to the Regional Administrator's decision not to terminate the federal permit. Section 42 U.S.C. § 6976(b)(1) (1988) allows appellate court review of "administrator's actions" which includes the EAB but not the Regional Administrator. In addition, the EPA has set forth its own rules regarding the exhaustion of administrative remedies before judicial review is allowed, one of which provides for administrative review by an Administrator following a Regional Administrator's decision.

The court next addressed whether Ciba's challenges to the federal permit were ripe for review. Concluding that the permitting decision was ripe for review, the court found that without judicial determination Ciba would face difficulties complying with the procedural requirements of both statutes. The court further held that Ciba had standing to challenge the MOA on the basis that the agreement did not contain an automatic termination provision for the federal permit since RCRA authorizes "any interested person" to bring suit against an EPA action regarding RCRA authorization.

Finally, the court looked to the merits of Ciba's challenge to the absence of a termination clause in the MOA. Concluding that the MOA is not required to contain an automatic termination provision upon state authorization, the court looked to several factors. First, the court found that judicial estoppel had no effect upon the requirement of such a provision in the MOA.

Next, Ciba argued that the EPA's position ran afoul of 40 C.F.R. § 271.8(b)(6). That regulation provides that the MOA shall specify procedures for the transfer of permits from the EPA to state administration. Ciba argued that this regulation required the EPA to include termination provisions in federal permits and to terminate federal permits upon state authorization. The court rejected the argument that 40 C.F.R. § 271.8(b)(6) required a termination provision since the regulation does not govern what provisions a permit must contain. The court concluded that nothing in the statute provides for such a provision. Accordingly, the court held that the EPA's refusal to include a termination provision in the MOA was reasonable in light of the overall purposes of RCRA and HSWA.

—by V. Alyse Hakami

U.S. v. Laughlin, 1993 WL 495765 (2d Cir. 1993)

The owner of a railroad tie treating business was convicted of knowingly disposing of hazardous waste without a permit in violation of both RCRA and CERCLA. The United States Court of Appeals for the Second Circuit affirmed the conviction.

Defendant Goldman owned a railroad tie treating business, which placed untreated green ties in a large cylinder and then added creosote. Through a heating process, the creosote penetrated the ties. The excess creosote, along with water and wood alcohol from the ties, vaporized in the cylinder. The vaporous mixture was drawn off and run through condensation coils, which separated the creosote sludge for reuse in the treatment process. The creosote sludge is a hazardous waste as defined by RCRA.

As problems with this process developed, the sludge became contaminated. The contaminated sludge was soaked up with sawdust and dumped in remote areas of the company's property. The company never applied for a RCRA treatment, storage, or disposal permit. As a result, no regulatory agency was aware that the company was handling such waste.

After a major spill of creosote, the New York State Department of Environmental

Conservation began visiting the company. Shortly thereafter, the company ran out of room to store the sludge/water mixture, a problem created when the company boiler ceased to function. Goldman ordered the excess to be stored in a railroad car. When that became too full, defendant Laughlin, the Vice President of Operations and Plant Manager, dumped the mix onto the ground, and covered it with rock and gravel.

During the trial, Goldman testified that he knew the company did not have a permit to dispose of hazardous waste; he also knew one was required by the government. He also testified that he knew it was illegal to dump creosote on the ground, and that he never reported the dumping.

Goldman claimed the court erred by improperly instructing the jury as to the elements of both the RCRA violation and the CERCLA violation. He claimed that the government was required to prove that he was aware of the RCRA regulations applicable to creosote sludge, among other elements. Goldman also claimed that the court was required to instruct the jury that the government must prove that, as an element of the CERCLA offense, Goldman knew that his release of creosote sludge violated CERCLA. The court of appeals in affirming the convictions, held that when knowledge is an element of a statute intended to regulate hazardous substances, the knowledge element is satisfied upon a showing that a defendant was aware he was performing proscribed acts; knowledge of the actual regulatory requirements is not necessary.

— by Jason Johnson

United States v. Self, 2 F.3d 1071 (10th Cir. 1993)

The defendant Self, was the owner and president of a hazardous waste recycling facility called "Ekotek." Representatives of Ekotek transported and handled natural gas pipeline condensate produced by the Southern California Gas Company ("SGOC") pursuant to a Resource Conservation and Recovery Act ("RCRA") permit. Ekotek indicated that it would dispose of the natural gas condensate by burning it as fuel in Ekotek's onsite process heaters and boilers.

Instead, Self instructed the transporter to leave the trailers containing the natural gas condensate at a gas station that Self owned. Self then had the gas station manager mix the natural gas condensate with the gasoline it sold to the public. The mixture contained from five to ten percent natural gas condensate and was sold to the public. Self further instructed the manager to falsify Ekotek's operating log to show that Ekotek had actually received the shipment of pollutants.

Ekotek also began receiving 55 gallon drums containing a mixture of ultraviolet curer ink waste, solvent ink waste and cleaning solvent. The solvent ink waste had a flash point well below 140 degrees Fahrenheit and according to EPA guidelines was considered hazardous due to its ignitability.

Ekotek used two warehouses to store the drums, even though its RCRA permit authorized storage in only one of the warehouses. Self ordered the warehouse supervisor to scrape hazardous waste label off of each drum, paint a number on each drum and list it on an inventory sheet.

Self was charged and convicted on four counts of violating RCRA, one count of mail fraud, and one count each of conspiracy to violate RCRA, the Clean Air Act and the Clean Water Act.

Self claimed that the natural gas condensate was exempted from regulation because it was a "recyclable material." The court considered whether natural gas condensate could be classified as a "solid waste" as required for it to be the subject of RCRA regulation. Under RCRA, only certain listed commercial chemical products were considered solid wastes when burned to recover energy. The Court of Appeals for the Tenth Circuit found that because natural gas condensate was not listed, it was not subject to RCRA regulation.

The court also found that whether the natural gas condensate could be considered hazardous waste depended upon how it was ultimately disposed. The regulatory authorities did not know for certain that the condensate would be burned for energy recovery. The court determined that the condensate was not a hazardous waste. As a result, the court overturned Self's conviction of one of the counts of RCRA violation.

As for the storage of the drums containing the ink solvent mixture, the United States claimed that 42 U.S.C. § 6928(d)(2)(B) (1988) controlled. That section prohibits "knowingly ... storing ... hazardous wastes ... in knowing violation of any material condition or requirement of [a RCRA] permit." Self asserted that the United States had not proved that the material in the drums was hazardous. The court, however, found the evidence sufficient to prove that the material was in fact hazardous. The court also found that Ekotek knowingly violated its RCRA permit by storing the waste in more than one warehouse. The court consequently upheld the remaining convictions for RCRA violations.

— by Jason Johnson

Greenpeace, Inc. v. Waste Technologies Indus., 9 F.3d 1174 (6th Cir. 1993)

Greenpeace and others sought to enjoin Waste Technologies Industries ("WTI") from continuing to operate its hazardous waste storage and treatment plant located in East Liverpool, Ohio. The district court for the Northern District of Ohio entered an order enjoining WTI from operation until the EPA determined the plant's safety. WTI appealed the decision.

On review, the Court of Appeals for the Sixth Circuit cited numerous occasions, beginning in 1983, in which Greenpeace failed to voice its concerns over the EPA's grant of an operating permit to WTI, despite several public comment periods and hearing. Greenpeace did not participate in any of those hearings and did not appeal any permits granted to WTI subsequent to the hearings.

Greenpeace filed its first complaint in 1993, immediately before WTI was to conduct an eight day trial burn before the permit would be granted. Greenpeace filed suit under the citizen suit provision of RCRA, complaining that operation of the facility would pose an imminent and substantial danger to the public health and the environment and that operating the facility would constitute a public nuisance.

The district court denied Greenpeace's request to enjoin the trial burn but did enjoin operation of the facility following the burn. WTI appealed the decision and was granted an emergency stay of the court's order. Greenpeace's applications to vacate the stay were denied. WTI conducted its trial burn and resumed operation of the facility after the burn.

The district court claimed subject matter jurisdiction under the citizen suit provisions of RCRA to determine whether dioxin levels from the trial burn period substantially endangered the environment. The district court stated that even if WTI had obtained an EPA approved permit, the burn could still harm the environment.

The court of appeals, however, rejected the district court's reasoning. The appellate court found that citizen suit provisions did not apply to facilities operating within the limits of RCRA permits. According to the appellate court, Greenpeace's

petition constituted an improper collateral attack on the EPA's decision to allow such burns.

The court also stated that even if citizen suits were proper in this case, the district court did not have subject matter jurisdiction because 42 U.S.C. § 6972(b) (1988) allowed judicial review of RCRA permits by circuit courts of appeals, not by federal district courts. The court noted that 42 U.S.C. § 6972(b)(2)(D) (1988) states that citizens may not commence suits "with respect to the citing of a hazardous waste...disposal facility, nor to restrain or enjoin the issuance of a permit for such facility." The court found that decisions of the EPA regarding the grant of permits should be appealed only to the circuit courts of appeals, which has exclusive jurisdiction in such matters.

The court also rejected Greenpeace's argument that it could attack the permit in district court if operation of the facility imminently and substantially endangered to the environment, despite compliance with the permit. The court noted that such interpretation would nullify the requirement that EPA-issued permits must be appealed to an EPA administrator before review by the appropriate circuit court of appeals.

The court concluded that because Greenpeace did not bring its complaint in the appropriate court within 90 days of the issuance of the permit to WTI as required by RCRA, it lost its opportunity to oppose operation of the facility, and dismissed the complaint.

MISSOURI

City of Jefferson v. Missouri Dep't of Natural Resources, 863 S.W.2d 844 (Mo. banc 1993)

The appellants include Jefferson City, St. Joseph, Eldon and Buchanan County. The appellants challenged that Senate Bill 530 ("S.B. 530"), passed in 1990, violated Article III, § 39(10); Article VI, §§ 16, 19 and 19(a) and Article X, §§ 10(a) and 21 of the Missouri Constitution. The respondent, Missouri Department of Natural Resources, moved for summary judgment, which was granted by the trial court. Appellants appeal the trial court's judgment.

Section 260.305.1 of the Missouri Revised Statutes authorizes the creation of solid waste management districts and § 260.305.3 directs how cities and counties may form these districts. Section 260.310.2 states that a solid waste management district may contract with any city or county in that district to provide solid waste management services for that city or county. If the city or county has given the district the authority to manage all of its solid waste, then the city or county need not file its own solid waste management plan. Counties and cities over 500 persons that choose not be members of a solid waste management district must submit a solid waste management plan within 180 days of their decision not to join a district.

Appellants argued that these statutes violate Article X, § 21 of the Missouri Constitution which provides that a new service or increase in service "beyond that required by existing law shall not be required by the General Assembly or any state agency. . .unless a state appropriation is made and disbursed to pay the county or other political subdivision for increased costs." Appellants argue first that S.B. 530 requires that they finance a solid waste management district if the county in which the city resides decides to join a district. Second, appellants claim that if the county fails to join a district, they must file a solid waste management plan that is more extensive than previously mandated by law.

Appellants stated that S.B. 530 impliedly requires that a municipality join a district if the county in which the municipality is located is a member of a district. Appellants support this inference with § 260.305.3 which provides that a city located in more than one county may join a district which any one of the counties has joined. Appellants argued that this section implies that a city located in only one county must join a district if the county does so. Appellants also cite § 260.325.8, which requires a city to withdraw from a district if the county where it is located withdraws.

The court found that the statutes were unclear and subject to the inferences which appellants drew. The court also noted, however, that the statutes may be interpreted to read that no mandate exists regarding municipality membership in a district. The court consequently held that S.B. 530 does not require that a city join a solid waste management district; a city may join only if it chooses to.

Appellants also argued that S.B. 530 requires them to file a new solid waste management plan that conforms to § 260.325. Filing this plan, appellants claimed, would result in additional costs beyond those incurred under previous requirements. Because the respondents had failed to address this issue in their motion for summary judgment, the court reversed on that issue and remanded for further proceedings.

Appellants also asserted that § 260.305 violated Article VI, § 16 which provides that a municipality may contract or cooperate with other municipalities and political subdivisions for the planning or operation of any public improvement. Appellants argued that § 260.305 limited its right to contract with any political subdivision of the state that it chooses. The court noted that if a municipality did not want to contract or cooperate with a particular subdivision, then it could choose not to join the district; therefore, the legislative limitation did not violate the Missouri Constitution.

Finally, appellants Jefferson City and St. Joseph claimed that S.B. 530 violated Article VI, § 19(a) which grants charter cities all powers that the General Assembly confers upon those cities, and such powers are not limited or denied by the charter. The cities argue that S.B. 530 creates a separate level of government which may limit or deny charter cities the authority granted to them in the Constitution. The court denied this point for two reasons. First, S.B. 530 does not require charter cities to join a district; therefore, their powers are not deprived. Second, any conflicts between a charter city's power and a state statute are to be resolved in favor of the statute.

— by Christine Hymes

Missouri Attorney General Enforcement Actions

BANKRUPT COMPANIES CANNOT DODGE ENVIRONMENTAL RESPONSIBILITIES

As a result of action taken in 20 bankruptcy cases, the Attorney General's Environmental Protection Division has gained $2.2 million to protect Missouri's environment this year.

Approximately $2 million comes from agreements by companies to pay cleanup costs which the state would have incurred but for the Attorney General's action. The remaining $200,000 represents actual recoveries by the state.

These savings and recoveries result from Nixon's new effort to prevent companies from declaring bankruptcy to avoid fines, penalties and environmental cleanups. With help from the state's Department of Natural Resources, Nixon has developed a process to determine whether companies declaring bankruptcy have met their environmental duties.

According to Nixon, most of the bankruptcy claims involved the failure of site owners, lessees and operators to cleanup and properly close underground storage tanks.

ST. LOUIS CONTRACTOR PLEADS GUILTY TO POLLUTING CREEK

Steven Smith, owner of Atlas Excavating, pleaded guilty to criminal misdemeanor charges for dumping 17,600 pounds of concrete into Deer Creek in Webster Groves. Smith incurred a $2,500 fine and two years' probation and was ordered to cleanup the site.

A resident who saw Smith back his truck into the creek bank and dump the concrete into the creek immediately called the Webster Groves Police Department. A police officer arrested Smith at the scene.

BRANSON DEVELOPER ORDERED TO STOP SELLING HOMES UNTIL WATER AND SEWER LINES ARE REPAIRED

International Real Properties of Missouri, Inc., (IRP) a real estate developer, has been ordered to cease its operations until it builds water and sewer lines in Branson West Highlands, a subdivision in Branson West.

Attorney General Jay Nixon sued IRP for violations of Missouri's Safe Drinking Water Law. IRP admitted it constructed a public drinking system without permission of the Department of Natural Resources (DNR). IRP also allegedly installed inferior sewer lines without DNR approval.

IRP allegedly failed to install water lines at least 10 feet from sewer lines. It also failed to lay water lines on a gravel bed at least six inches deep and did not place sewer lines in a straight line.

The Stone County Circuit Court has prohibited IRP from connecting homes in Branson West Highlands to the public drinking or sewer system until IRP abandons the existing sewer system and obtains a permit from DNR to install new water and sewer systems.

AMOCO TO PAY $1 MILLION FOR OIL SPILL

Amoco Pipe Line Co. will pay a $1 million settlement for a 1990 pipeline explosion in Macon County that released 86,000 gallons of oil into the Little Turkey Creek and Chariton River.

The rupture of pressurized oil cut a 20-foot-long ditch into the ground and covered trees 50 feet high, standing 1,000 feet from the pipeline. The black crude oil spilled over 30 miles of Missouri waterways, killing nearly 6,000 organisms, including fish, frogs, birds and mammals.

In addition, Amoco will indemnify the Department of Natural Resources for cleanup costs. The DNR has spent more than $277,000 inspecting the damages, overseeing Amoco's cleanup and finding ways to protect the environment long-term.

Macon County Circuit Court ordered Amoco to remove all oil from the affected areas, ensure that groundwater meets drinking water standards and take responsibility for future contaminations of groundwater resulting from the oil spill.

Through cleanup efforts, most of the oil has been removed from the ground and water. Amoco is still treating contaminated groundwater.

The agreement provides that Amoco will pay $900,000 to the Natural Resources Protection Fund for environmental damages. Amoco will also pay $100,000 in penalties to be divided between Chariton and Macon county school funds. Missouri statutes created these funds to maintain and improve resources like those damaged.

The explosion occurred as Amoco was closing the pipeline which extends 156 miles from La Plata in Macon County to central Cass County.

MOBERLY RAILWAY COMPANY TO PAY $3.4 MILLION IN ENVIRONMENTAL SETTLEMENT

Norfolk and Western Railway Co. has paid $700,000 in civil penalties and damages and will pay an additional $2.7 million to the state for improperly disposing of at least 500 containers of waste paint at its railroad yard in Moberly. The paint is considered hazardous because of its ignitability.

The DNR discovered that paint, solvents and other waste had been buried in April 1989 in a trench two feet wide, 20 feet deep and 50 feet long. The DNR uncovered 20 five-gallon and 540 one-gallon paint containers and one 55-gallon container of solvent and other waste.

Attorney General Jay Nixon, along with Edward L. Dowd Jr., U.S. Attorney for the Eastern District of Missouri, sought civil and criminal penalties against the railway company. The company agreed to a settlement which included payment of $350,000 to

Randolph County School Fund and $350,000 to the Natural Resources Protection Fund and cleanup the railroad yard to comply with hazardous waste laws.

The company must also pay a criminal penalty of $1 million to the Missouri State Parks Earnings Fund to benefit Katy Trail Park. In addition, it must buy the state $1.7 million worth of equipment and materials used to investigate environmental violations. The company must also develop and implement an environmental awareness program for its employees.

The criminal plea also requires the company to pay a $500,000 fine plus another $500,000 to the United States for its costs and damages. Dowd has recommended that $300,000 of the fine be eliminated once the company has fully cleaned up the site and complies with environmental laws and regulations.

NIXON OBTAINS INJUNCTION AGAINST ILLEGAL TIRE DUMPING

Attorney General Jay Nixon obtained a court order requiring DWM of Mid-America Inc. to store 2 million tires according to state environmental laws and national fire protection regulations or else remove the tires from the Polk County property.

Nixon alleged that DWM illegally stored tires without a permit and violated fire protection regulations and runoff protection requirements. Some of the tires were dumped in standing water.

Polk County Circuit Judge Theodore B. Scott ordered DWM to stop storing solid waste on its property, dispose of the tires according to state environmental laws and remove all tires from water. DWM must additionally pay a $2,000 civil penalty to Polk County School Fund and penalties up to $5,000 per day if it fails to comply with the consent order. The company either can remove all the tires within 180 days or properly cut and bail the tires for storage.

WEST PLAINS COMPANY TO PAY HAZARDOUS WASTE PENALTIES

A West Plains furniture manufacturer will pay $18,000 in civil penalties for producing waste solvents and contaminating soil in violation of environmental laws.

Amyx Manufacturing Limited Partnership, which manufactures oak furniture, created and improperly stored and dumped hazardous waste solvents without permission of the Department of Natural Resources. The company dumped the solvents behind its factory, polluting the soil along a railroad track. Nixon also accused the company of having an inadequate emergency preparedness plan.

Amyx officials said they did not know the waste was hazardous. Amyx was notified of the violations in April 1990 and has since remediated the contaminated soil.

In the settlement, Amyx agreed to comply with Missouri's Hazardous Waste Management Law and pay a $17,920 civil penalty to the Howell County School Fund.

TWO OZARK COMPANIES TO PAY HAZARDOUS WASTE PENALTIES

Attorney General Jay Nixon has obtained settlements of more than $40,000 from two Lake of the Ozark companies accused of violating state environmental laws.

Amusement Equipment Manufacturer Ltd., an Eldon company that produces and repairs amusement park ride equipment also agreed to implement hazardous waste emergency plans. The other company, Lake Ozark Construction Industries, Inc., agreed to use hazardous waste monitoring equipment.

Amusement Equipment Manufacturers allegedly failed to label, date and properly close containers of hazardous waste. The company also failed to post "No Smoking" signs, test emergency sprinklers and send updated emergency plans to local emergency agencies; and did not properly train its employees. The company also neglected to us licensed hazardous waste transporters and use authorized treatment, storage and disposal facilities.

Amusement Equipment Manufacturers agreed to pay $23,140 to the Miller County School Fund, submit to emergency agencies an emergency contingency plan within 30 days detailing how it would handle hazardous waste and test its sprinkler system.

Lake Ozark Construction, allegedly had violated the Missouri Air Conservation Law at its Linn Creek and Osage Beach facilities for two years. The company is accused of exceeding its permitted production limits, failing to keep production records on site and operating without proper permits of pollution-monitoring equipment.

Lake Ozark Construction has agreed to pay $9,000 to each of the Camden and Miller county school funds and $12,000 in suspended penalties for future violations. The company will also begin to use equipment to monitor pollution and will install water spray controls. For each day it fails to comply with the agreement, it will also pay $500 in penalties.

SOUTHWEST MISSOURI WATER DISTRICT TO PAY ENVIRONMENTAL PENALTY

The Vernon County Consolidated Public Water Supply District No. 1 will pay a $12,000 penalty for allegedly failing to obtain construction permits before drilling a well and creating a public water system.

A well, water tower and pipeline were constructed before the DNR issued violation notices to the district. Despite such notices, the company continued construction.

In addition to a $12,000 penalty to be paid to the Vernon County School Fund, the water supply district agreed to stop construction until a permit is issued, issue notices that the well has not been approved and the water may not meet drinking water standards, submit to DNR engineering reports, plans and specifications to obtain a permit. The district must also drill holes around the system so that the pipeline might be inspected, have the water tested for bacteria and other contaminants and correct any problems in its distribution and treatment facilities to ensure that the system complies with environmental laws.

The state is entitled to request additional court-imposed penalties if the district fails to comply with the consent order.

MISSOURI

Environmental

Law and Policy Review

Volume 2 No. 2

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EDITORS' PERSPECTIVE

THE ENVIRONMENTAL AUDIT PRIVILEGE BENEFITS ALL SIDES

Within the past two years, four states (Colorado, Indiana, Kentucky, and Oregon) have passed laws which create a privilege for environmental audits. Several more states, including Arizona, California, Idaho, Illinois, Minnesota, Mississippi, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, and Virginia, have similar laws in various stages of the legislative process. In Missouri, regulators, representatives of the regulated community, and members of environmental groups have come together to form the Environmental Audit Privilege Working Group, which is in the process of reviewing a draft of a Missouri environmental audit privilege act for potential proposal to the Missouri legislature. A clash between federal and state policymakers, however, threatens the utility of the environmental audit privilege in the states which have it or are considering adopting it.

The EPA's policy on environmental auditing was initially set forth in 1986 and was reaffirmed without change in July, 1994. While EPA encourages environmental auditing, it does not recognize the application of a privilege to audits. Furthermore, EPA opposes the approach taken by the states, citing the risk of less effective and less efficient state enforcement, and an increased enforcement burden on EPA's scarce resources. EPA's fears are overstated.

An environmental audit privilege recognized by both state and federal agencies would have many benefits. Allowing companies to conduct audits for the purpose of determining whether they are in compliance with environmental laws without fear that the results will be used against them in an enforcement action could shift much of the cost for enforcing compliance from government to the regulated community. Additionally, the privilege would promote the early identification and correction of violations. A disincentive to investigation currently exists, especially where automatic penalties are in place for noncompliance. There is little reason for a company to conduct a voluntary compliance audit or report violations under such a policy. A privilege would increase compliance rates by removing this disincentive. Furthermore, detailed audits may disclose violations that a regulatory inspection would miss, thus identifying problems which could escalate with the passage of time.

Most existing and proposed state and federal legislation regarding an environmental audit privilege has adequate safeguards to protect against the abuse of the privilege. For instance, all the pieces of legislation contain language that provides that the privilege is lost if it is asserted for a fraudulent purpose. Furthermore, nearly all the legislation requires the party conducting the audit to make a prompt, good-faith effort to remedy non-compliance in order to retain the privilege. Another typical safeguard allows use of the audit in a criminal proceeding under certain circumstances. Provisions concerning waiver of the privilege and assignment of the burden of proof also should tend to prevent misuse of the privilege. Some legislation even contains a sunset clause which would require a re-evaluation of the privilege after a few years. This is an excellent way to allay the concerns of officials responsible for enforcement while giving the regulated community an opportunity to demonstrate how the environmental audit privilege can bring about a cost-effective increase in compliance rates.

Existing EPA policy is hindering state efforts to implement this cost-effective tool for increasing compliance. EPA's opposition to the state privilege on the basis of increased expenditure of its resources is merely a preface to EPA's overt threat to "overfile" on state enforcement actions, which could circumvent the state-recognized privilege. Moreover, EPA's standing offer to reward companies which conduct compliance audits by considering the audits as a mitigating factor during enforcement responses has been met with industry skepticism. Such a promise does not reach the level of certainty necessary for the regulated community to participate in voluntary compliance audits.

EPA should reconsider its current policy concerning the environmental audit privilege. In the alternative, or perhaps preferably, Congress should circumvent EPA's unwillingness to recognize the privilege by passing legislation creating a federal environmental audit privilege. The climate in Congress seems receptive, considering that a recent voice vote on an amendment in the Senate encouraged EPA to recognize the privilege, and that Senator Mark O. Hatfield (R-Ore) is circulating a federal bill similar to his state's law which may be proposed in the near future. I hope that Congress and the Missouri Legislature will consider the value of the environmental audit privilege. The interests of companies, state and federal agencies, and the environment could all be served by a well-drafted environmental audit privilege.

I invite our readers to submit articles and opinion pieces regarding the desirability of an environmental audit privilege at a federal level and in Missouri. The MISSOURI ENVIRONMENTAL LAW & POLICY REVIEW encourages all points of view on this important issue which demands the immediate attention of anyone who wishes to have a voice in the ensuing policy debate.

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