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CASE SUMMARIES

CERCLA

Curran Composites, Inc. v. Liberty Mutual Insurance Co., 874 F. Supp. 261 (W.D. Mo. 1994)

This diversity action stems from a dispute between Curran Composites (Curran) and Liberty Mutual Insurance (Liberty) over the scope of coverage for environmental cleanup under comprehensive general liability and umbrella excess liability insurance policies. Curran alleged that Liberty breached those contracts in that Liberty failed both to reimburse him for cleanup costs and defend him during his involvement with the Environmental Protection Agency (EPA). Motion for summary judgement was granted in favor of Liberty.

Curran owns and operates a resin production plant in Saukville, Wisconsin. Curran bought the plant from Freeman Chemical Company and received all of Freeman's rights and interests in the property. Liberty provided insurance coverage for both Freeman and Curran. The plant generates a substance called "reaction water," which is classified as a liquid hazardous waste. In 1952, the State of Wisconsin informed Freeman that the reaction water from the plant could be disposed of in a dry well at the Saukville facility. Freeman disposed of his waste in this manner until 1965. In 1979, the EPA and the Wisconsin Department of Natural Resources (WDNR) determined that the reaction water leached into the municipal water supply, causing vast groundwater contamination. In 1987, Freeman made a claim to Liberty to recover the cost of investigating and remediating contamination at the Saukville facility. In 1989, Liberty informed Freeman that it had denied his claim for reimbursement of costs.

Wisconsin law provides that letters from a governmental agency requesting cleanup do not constitute a "suit." As such, no duty to defend was triggered. The Wisconsin courts have ruled that a "suit" applies only to a court proceeding and not something that is functionally equivalent. Since no claim in the form of a lawsuit was filed, Liberty had no duty to defend.

The determination whether Liberty had an obligation to reimburse Curran for costs incurred in conducting an environmental cleanup, hinged on the definition of the word "damages" in the insurance policy. Under Wisconsin law, "damages" are interpreted to be "legal compensation for past wrongs or injuries." The Wisconsin Supreme Court had held that cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and equivalent state statutes did not constitute damages in an insurance policy context. Curran had entered into a consent decree with the EPA and WDNR under the Resource Conservation and Recovery Act (RCRA) to remediate the production site. Since RCRA and CERCLA were complementary statutes, the district court found that cleanup costs under RCRA were not damages in the current situation. Therefore, the court held that Curran had no claim for reimbursement from Liberty.

— by Greg Moldafsky

Harley-Davidson, Inc. v. Minstar, Inc., 41 F.3d 341 (7th Cir. 1994)

Minstar, Incorporated and AMF, Incorporated (Minstar), previous owners of a manufacturing plant, successfully defended a Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) suit brought by Harley-Davidson. Harley-Davidson bought a manufacturing plant from a predecessor of Minstar. Upon purchase, the buyer agreed to indemnify the seller against all liabilities relating to the property of the plant. In time the land on which the plant was located was deemed to be contaminated, and Harley-Davidson was burdened with the clean-up costs. CERCLA gives the owner of the contaminated land the right to seek contribution from other persons who are responsible for the contamination. Harley-Davidson brought an action against Minstar and others for contribution. Minstar argued the indemnity agreement in defense, but the district court found that the agreement was invalid under

CERCLA. The district judge certified this interlocutory ruling for an immediate appeal.

Harley-Davidson's first argued that the indemnification agreement was invalid. Section 107(e) of CERCLA states that no indemnification or similar agreement shall be effective to pass liability to any other person. However, the second sentence of this exact provision states that nothing in this subsection shall prohibit any agreement to indemnify a party for liability. The Seventh Circuit Court of Appeals found that as a whole, the subsection does not outlaw indemnification agreements, but its purpose is to keep the liable party from transferring liability. Indemnification does not "transfer" liability, rather the indemnified party remains fully liable but is able to share the clean up expense. The court states that the only time the drafters have barred shifting the costs of liability is in the case of deliberate wrongdoing.

Harley-Davidson's next argued that if indemnification occurs, potential polluters will have little incentive to avoid CERCLA liability. The court points out that this is a problem with any form of insurance. There is no evidence of a decision disallowing polluters to insure. Furthermore, it would be totally inconsistent with CERCLA which explicitly allows such agreements.

Finally, Harley-Davidson argued that the scope of the indemnification agreement was too narrow to encompass the contamination of the plant site. The court quickly dispelled this argument, stating the agreement could not be more broadly worded. The agreement states, "[Harley-Davidson] shall . . . indemnify AMF Incorporated against all debts, liabilities, and obligations, without any limitations." The court enforced the indemnification agreement and barred Harley-Davidson's claim against the defendants.

— by Jacqueline K. Hamra

Modern Constructors, Inc. v. Continental Casualty Co., 38 F.3d 377 (8th Cir. 1994)

Appellant Modern Constructors, Inc. (Modern) brought a declaratory judgment action against its comprehensive general liability insurer, Continental Casualty Company (Continental). Modern was a third-party defendant in a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cost-recovery action and sought a declaration of coverage for any potential liability it may have at a contaminated waste site in Minnesota. The district court granted Continental's motion for summary judgment.

ment claiming a pollution exclusion in the insurance policy precluded coverage. The district court further held a "sudden and accidental" exception to the exclusion did not apply since the release of pollutants at the site occurred over many years.

The Eighth Circuit Court of Appeals affirmed the district court's decision. Modern contended on appeal that the term "sudden and accidental" did not require a temporally abrupt release. Instead, Modern urged the court to read the language as meaning "unexpected or unintended," negating the interpretation requiring a short period of time.

After the district court ruled on the case, the Minnesota Supreme Court held in *Board of Regents v. Royal Insurance Co.*, 517 N.W.2d 888 (Minn. 1994), that the term "sudden" had a temporal connotation. Reading "sudden" to mean "unexpected" would make the use of the word "accidental" redundant. The court concluded a release of asbestos fibers over twenty years was not "sudden and accidental."

The Eighth Circuit Court of Appeals relied on the Minnesota Supreme Court's interpretation and concluded the exception to the pollution exclusion did not apply to the gradual release of a pollutant over several years.

— by Stephen B. Maule

United States v. Charles George Trucking, Inc., 34 F.3d 1081 (1st Cir. 1994)

Suits filed by the United States and the Commonwealth of Massachusetts against the owner-operators of a hazardous waste site were combined and amended to also include a group of generator and transporter defendants. These new defendants impleaded additional generator defendants. After issuing a case management order (CMO), which expressly prevented the United States from bringing suit against the third-party defendants, the District Court for the District of Massachusetts determined all defendants except for the appellants to be liable for the cleanup.

The court then facilitated settlement negotiations between the Government and the various defendants. Two consent decrees resulted: one terminated liability of the generators, transporters, and third-party

defendants for a settlement of \$36,000,000, and the second, pertaining to the government's claim against the appellants, proposed a payment of \$3,100,000. Both decrees became finalized in district court hearings, which held the decrees to be just and in accord with the governing principles of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

Charles George Trucking, Incorporated appealed the entry of the decrees based on several arguments to which the First Circuit Court of Appeals applied a standard of review of manifest abuse of discretion. The court stated that for CERCLA consent decrees, the over-riding requirement is fairness and faithfulness to CERCLA objectives. Further, the Court found it must give great deference to the findings of both the EPA and the trial court.

The appellants first claimed that the consent decrees were not reasonable in light of the fact that they did not effectively carry out the objectives of CERCLA and the district court did not hold an evidentiary hearing to determine efficacy before approval. The instant court stated that a hearing is only necessary in special cases. An independent review of the record, the court held, revealed a particularly effective remedy.

Appellants also argued that the consent decrees were not faithful to the statute's objectives, one of the most important being the goal of fairness. The court determined that because of appellant's faulty record-keeping and the nature of the clean-up, it would have been impossible for the consent decrees to assign a specific amount of liability to each defendant. Therefore, requiring the various potentially responsible parties (PRPs) to allocate the cost of the payments among themselves was both fair and practical.

In answer to the appellants' claim that the consent decree settlements were not reasonable, the court stated that the party's ability to pay was not determinative. Instead, the court compared the percentage of expected cost with the percentage of attributed liability of the two groups of defendants, and determined that the generators, transporters, and third-party defendants were to pay slightly

more than their share of the costs by terms of the consent decree. The court acknowledged that the appellants, as non-settling parties, may be liable for costs over the estimated total amount, but the decrees were reasonable nevertheless.

Finally, the appellants claimed that the Government exceeded the scope of the original CMO in submitting the two consent decrees. The appellants specifically pointed to overbreadth in terms of addressing claims not pleaded before the court, and addressing claims the CMO precluded. However, the instant court held that because courts are allowed a great deal of flexibility, the consent decrees were well within the boundaries of district court authority. Claims that were not specifically pleaded against PRPs, which were settled by virtue of the broad consent decrees, were permissible because the claims were still within the general scope of the pleadings. Further, the court stated that district courts can modify CMOs at will in the interest of bringing about a swift and fair settlement, which the court determined occurred in the instant case.

— by Sarah Madden

United States v. Colorado & Eastern Railroad Co., 25 Env'tl. L. Rep. 20,309 (10th Cir. 1994)

The Tenth Circuit Court of Appeals held that claims involving potentially responsible parties (PRPs) attempting to properly apportion costs assessed under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) are always considered contribution claims under CERCLA §113; that, under §113, such claims for contribution related to matters addressed in settlement are barred; and any settlement reduces the liability of other PRP's who will not or have not settled by the amount of the settlement.

In May 1965, a pesticide formulation facility in Commerce City, Colorado burned down. During reconstruction of the facility, contaminated debris and materials were deposited throughout the site. From 1968 until 1984, the site changed ownership three times. In 1983, the site was added to the National Priorities List of hazardous

waste sites and ultimately the Environmental Protection Agency (EPA) performed a remedial investigation and feasibility study. The EPA specified remediation measures necessary to clean up the site. Pursuant to a Record of Decision of these measures necessary for clean up, the EPA initiated a lawsuit against all PRP's which included Colorado & Eastern Railroad Company (CERC), Farmland Industries (Farmland), and McKesson Corporation (McKesson), the previous and current owners.

Farmland and McKesson subsequently entered into a Partial Consent Decree with the EPA. They agreed to pay \$700,000 in response costs already incurred by the EPA and to perform all remediation. Eventually, CERC also entered into a Consent Decree with the EPA in which they agreed to pay \$100,000 in response costs to the EPA.

Ultimately, all the defendants in the action by the EPA cross-claimed against each other. Farmland's claim against CERC was the only claim not dismissed or settled prior to trial. Farmland sued for cost recovery under CERCLA §107, or in the alternative for contribution under CERCLA §113(f). Judgment was entered against CERC requiring them to pay \$734,058.34 plus post judgment interest of \$27,060.00.

CERC appealed contending the district court erred first in applying strict liability under §107 as opposed to requiring proof of causation pursuant to §113(f)(1) and in denying them contribution protection under §113(f)(2); second, in finding the costs requested were "necessary and consistent" with the National Contingency Plan; and third, in failing to rule on CERC's Act-Of-God and Act-Of-Third-Party defenses.

The Tenth Circuit Court of Appeals reversed the district court on the first claim that the court applied the wrong section of CERCLA and thus the wrong elements of proof, and ruled the trial court was not in error on the remaining two claims. As to the first claim, the court held that claims for cost recovery between PRP's is a claim for contribution under §113(f) as opposed to §107 and thus the claimant must show causation.

Holding in favor of CERC, the court reasoned that determining the extent of liability of a single party was difficult and

thus, unless the defendant can prove divisibility, the court will apply joint and several liability. The court then held that federal authority recognizes a right to contribution where PRPs are subject to joint and several liability.

Applying §113(f), the court looked to the legislative intent of CERCLA to encourage settlement and thus broadly construed "matters addressed" to include the matters involved in CERC's settlement with the EPA and the earlier settlements between Farmland, McKesson and the EPA. Similarly, the court chose the "pro tanto credit rule" to reduce the potential liability of CERC by the actual amount of the previous settlement which nullified any liability attributable to CERC.

The court also found that CERC's failure to pay the settlement was irrelevant because only the EPA can revoke a settlement and they had not done so. In addition, the court held that the trial court's determination that response costs incurred by Farmland were necessary and consistent with the National Contingency Plan was not clearly erroneous, and that a defense of Act-Of-God or Act-Of-Third-Party was not available for contribution actions.

— by Joseph P. Hewes

Witco Corp. v. Beekhuis, 38 F.3d 682 (3rd Cir. 1994)

In a case of first impression for federal appellate courts, the Third Circuit Court of Appeals held that the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) statute of limitations does not preempt state probate "nonclaim" statutes. In *Witco*, a corporation knew that a decedent was a potentially responsible party (PRP) to a CERCLA priority site action, but the company did not take advantage of a Delaware state law allowing extensions for such claims. Therefore, the company did not have three years after its own Environmental Protection Agency (EPA) settlement to sue for recovery. Instead, the cause of action was barred eight months after the PRP's death.

Dr. Beekhuis was the director and owner of Halby Products (Halby), which in turn

owned a plot of land in Delaware (the site). Halby merged into Witco Incorporated (Witco), and the site was later sold to Brandywine Chemical (Brandywine). In 1985, the EPA found the site to be contaminated and placed it on the CERCLA National Priority List.

Dr. Beekhuis transferred all of his assets to the Wilmington Trust Company to establish a lifetime income to himself, and upon his death to pay off debts and expenses. Residual assets from the first trust would go into another trust for his daughter Jeanne. Dr. Beekhuis died in March of 1989. Eight months later, after the Delaware statute of limitations for claims against the estate had run out, all remaining assets were placed into Jeanne's residuary trust. In December of 1990, twenty months after Dr. Beekhuis' death, Witco sought to impose a constructive trust on the estate's assets. Witco's petition was struck down as premature because the EPA had not yet asserted a claim against the property. In August of 1991, the EPA notified Witco, Brandywine and the estate of Dr. Beekhuis that each was a PRP. In 1992, Witco entered into a consent decree with the EPA and proceeded to cleanup the site, incurring expenses. Witco filed a claim for contribution against Jeanne Beekhuis, the corporation acting as trustee for the estate, and Brandywine. Witco lost on summary judgement, and Jeanne Beekhuis won her counterclaim motion against Witco for indemnification.

Defendants argued that because Witco failed to present its CERCLA contribution claim to the executrix of Dr. Beekhuis' estate within eight months after Dr. Beekhuis' death, the claim was barred under the Delaware nonclaim statute. Witco contended that CERCLA conflicts with the state statute, and therefore the CERCLA limitations period should preempt the state statute. The CERCLA limitation for contribution claims allows three years after Witco entered into the consent decree. 42 U.S.C. § 9613(g)(3).

In reaching its decision, the court noted the presumption against federal preemption of state law, especially in areas traditionally dominated by the individual states. Probate matters were held to be such an area. The court first stated as a settled fact that CERCLA

does not expressly preempt all state law, nor is it such a comprehensive scheme of regulation as to provide no room for supplementation. Therefore the only issue left open was whether the state law actually conflicts with the federal regulation. This issue was broken down into two questions: (1) is it possible to comply with both laws, and, (2) does the state law stand as an obstacle to the intent of Congress?

Is it possible to comply with both laws? The Delaware estate nonclaim statute expressly provides a mechanism to preserve CERCLA contingent contribution claims. If Witco asserted a claim against the executrix within eight months of Dr. Beekhuis' death, then the company could have petitioned the state court for a filing extension. The company would then have been able to file its contribution claim up to three years after its settlement, as per the federal regulation. Therefore, it would have been entirely possible for Witco to comply with both the state and federal statutes of limitation.

Does the state law stand as an obstacle to the intent of Congress? The court recognized that there could be instances where a PRP seeking contribution would find it impossible to comply with both state nonclaim statutes and with the CERCLA statute of limitations. For example, a state nonclaim statute could run out before a PRP even became aware of his own liability. This could interfere with Congress' intent to ensure that those parties who are responsible for contamination pay its cost. Previous district court rulings held that state probate nonclaim statutes do stand as an obstacle to Congress' intent and are therefore preempted. The court rejected these holdings. The court noted four main reasons for its decision: (1) the states' interest in quick resolution of probate disputes; (2) the CERCLA "innocent landowner defense," which protects those who inherit land from liability; (3) the fact that CERCLA references the Federal Rules of Civil Procedure § 17(b), which provide that state laws determine capacity to be sued; and (4) the fact that it may be impossible to trace and retrieve the money from an estate at the time that CERCLA liability is imposed, which may be decades after the distribution.

The other main issue in the case was one

of first impression in the Third Circuit Court of Appeals. The court found that the Delaware statute requiring corporations to indemnify agents is not preempted by CERCLA. Delaware law provides for broad indemnification protection where a corporate officer successfully defends himself against personal liability claims that arise from his corporate position. Under federal law, Dr. Beekhuis could have been found personally liable as an "operator" within the meaning of CERCLA. However, the court found that Dr. Beekhuis' personal liability under CERCLA does not, by itself, void the Delaware corporate indemnity shield. Witco made no claims that Dr. Beekhuis' actions were not performed directly on behalf of Halby. Therefore, the court held that the estate was entitled to indemnification from Witco.

— by Kin Semsch

***Price v. United States Navy*, 39 F.3d 1011 (9th Cir. 1994)**

In October, 1988 Gloria Price hired Sylvan Pools to construct a swimming pool in the backyard of her property. While excavating the backyard, Sylvan discovered what appeared to be asbestos in the soil. After contacting the San Diego County of Health Services, Price discovered that her property, as well as the property of four neighbors, was contaminated with asbestos, lead, zinc and copper. It was later determined that Price's house was constructed on the site of an old landfill used by the United States Navy during the 1930's. Price instituted a private cost recovery action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) against the Navy in federal district court. She requested that the Navy pay the costs she incurred in removing the contamination as well as the attorneys' fees she incurred in prosecuting this action. She also requested that the Navy pay all of the medical bills she incurred in monitoring her health for latent diseases that may occur as a result of her contact with the hazardous waste. These medical bills were for services such as tissue sampling, chromosomal testing, epidemiological studies and other assistance. Finally,

she requested additional costs under the Resource Compensation and Recovery Act (RCRA) that she would incur in removing the remaining contamination located under the foundation of her house.

The district court used a comparative fault analysis to find that the Navy was ninety-five percent responsible for Price's costs and that the man who sold the land to Price was one percent at fault. However, since Price was already compensated for the full amount of her clean-up costs by Sylvan pools, the court ruled that she could collect nothing from either party. The court also ruled that private "response costs" do not include medical monitoring in order to discover a potential disease which might have been caused by a person's exposure to the hazardous waste. The court found that she was not entitled to recover under RCRA and that she was not entitled to recover her attorneys' fees. Price appealed these rulings.

After determining that Price's appeal was valid even though she did not sign her Notice of Appeal, the Ninth Circuit Court of Appeals examined the issue of whether private "response costs" under 42 U.S.C. §9607(a)(4)(B) may include expenses for medical monitoring. The court, relying on *Daigle v. Shell Oil Co.*, 972 F.2d 1527 (10th Cir. 1992), found that they did not. That court focused on the legislative intent of the enactors of CERCLA in determining that CERCLA was not intended to pay for medical monitoring costs. Essentially, it found that the legislature purposefully deleted provisions for the collection of personal medical expenses or loss of income in earlier versions of the bill. This coupled with the fact that CERCLA, in other parts of the bill, does provide for the assessment of health risks in regard to the hazardous substance regulation convinced the *Daigle* court that CERCLA was not intended to allow recovery for personal medical monitoring costs under the guise of private "response" costs. The instant court agreed with this reasoning and held that Price could not recover those costs.

The court next turned to the issue of whether a private party may be able to recover attorneys' fees in a CERCLA action as part of the "response" costs. The

court looked to a recently decided case, *Key Tronic Corp. v. U.S.*, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994), in determining under what circumstances a private party may be entitled to attorneys' fees. The Court in *Key Tronic* ruled that "response" costs for private actions will include attorneys' fees, but only those fees incurred as a result of the attempt to identify other potentially responsible parties. The court in the instant case remanded this issue back to the district court for a determination of exactly how much of Price's legal fees were incurred by searching for potentially responsible parties.

The court then determined that the district court's use of comparative fault determination was proper. The court found that although CERCLA can use joint and several liability in cases of indivisible harm, the determination of the proper theory of recovery should be handled in accordance with the common law.

Finally, the court addressed whether or not Price should be able to recover under RCRA for the costs associated with the additional removal of possibly contaminated soil located under her house's foundation. The court ruled that in order for the RCRA claim to succeed, Price would need to prove that the hazardous material under her foundation presented an "imminent and substantial endangerment" to her health or environment. This "imminent and substantial" endangerment need not consist of any actual harm but need only be a threatened or potential harm. The court concluded that Price did not meet her burden of proving that her potential harm met any of the criteria to succeed in a RCRA action. The court ruled this way primarily based on the testimony of experts who examined and tested nearby property and who had found that there was very little danger, imminent or otherwise, that would require immediate action. The court found that even though contaminants may still exist on the property, and even though this contamination may decrease the value of the property, if the level of the contamination is not high enough to pose a "substantial and imminent" threat, further action was unnecessary.

— by Byron Woehlecke

RCRA

United States v. Bethlehem Steel Corporation, 38 F.3d 862 (7th Cir. 1994)

On behalf of the Environmental Protection Agency (EPA), the United States brought suit against Bethlehem Steel Corporation (Bethlehem) to enforce the requirements for hazardous waste under Resource Conservation and Recovery Act (RCRA) and the Safe Drinking Water Act (SDWA). The Seventh Circuit Court of Appeals addressed three main issues: 1) whether Bethlehem could assert impossibility as a defense to compliance with the underground injection control "UIC" permits for its discharge of ammonia, 2) whether the district court appropriately ordered injunctive relief and 3) whether Bethlehem's mixture of hazardous waste with non-hazardous waste constituted a listed hazardous waste for compliance purposes with RCRA's interim status requirements.

As for the first issue, the Seventh Circuit Court of Appeals affirmed the partial summary judgment and injunction against Bethlehem Steel for violating the Underground Injection Control "UIC" permit requirements of RCRA and Safe Drinking Water Act (SDWA). The Burns Harbor steelmaking facility in Indiana, under the ownership and operation of the Bethlehem Steel Corp., violated RCRA and SDWA by failing to comply with the UIC permit requirements. Compliance with UIC permits under SDWA also satisfies RCRA requirements. Bethlehem's discharge of hazardous waste, ammonia waste liquor, required its compliance. Bethlehem received two UIC permits upon the condition that Bethlehem would enact a three-phased program to correctly manage its solid waste units. Time limits governed each phase.

Bethlehem argued that it was relieved from complying because the EPA fulfilled Phase I of the corrective action by submitting a RCRA Facility Assessment Report (RFA). The court rejected Bethlehem's argument, stating that even if the EPA's RFA did fulfill the Phase I requirement, Bethlehem was still required to submit a preliminary assessment. Furthermore, the court noted that Bethlehem failed to object to the time con-

straint deadlines and, therefore, Bethlehem could not argue impossibility as a defense.

Next, the court approved of the partial summary judgment, deeming the injunction a permissible remedy. In reaching this conclusion, the court found it permissible that the district court failed to balance the equities because Bethlehem willfully chose not to comply. Additionally, the court noted that the United States stood as the plaintiff and that the case involved issues of public health and safety.

Lastly, the court vacated the district court's ruling which granted partial summary judgment on several claims advanced by the United States. The court remanded the case and instructed the district court to grant partial summary judgment for Bethlehem instead. The court held that Bethlehem's wastewater sludge did not constitute hazardous waste under RCRA. Bethlehem mixed electroplating wastewater, a byproduct of its tin and chromium electroplating operation, with non-hazardous wastewaters. Bethlehem sent the resulting sludge to two lagoons. The landfill held the sludge filtered out of these lagoons. EPA allowed Bethlehem to operate without a permit on an interim basis, requiring the facility to manage its hazardous waste in accordance with the standards under the interim status.

Under RCRA, a listed waste must meet the permit requirements in subtitle C. The government argued that the sludge is a F006 listed waste which includes wastewater treatment sludge from electroplating operations since the language of the F006 listing contemplates "mixed" sludges. Finding that the F006 listing failed to mention mixes, the court found Bethlehem's wastewater treatment sludge not included as an F006 listed waste. Even though the EPA published a "mixture rule" in its final regulations regarding the definition of hazardous waste, which includes within the definition of hazardous waste a listed hazardous waste that is mixed with solid waste, the court explicitly rejected this rule. Citing *Shell Oil v. EPA*, 950 F.2d 741 (D.C. Cir. 1991), which also rejected the mixture rule, the court held that the F006 listing terms and the failure of the EPA to amend F006 to include mixes reveals that F006 does not apply to hazardous sludge mixed with non-hazardous waste.

— by Jill Morris

Owen Electric Steel Co. of South Carolina, Inc. v. Browner, 37 F.3d 146 (4th Cir. 1994)

When does material which is ultimately to be recycled become "solid waste" under Environmental Protection Agency (EPA) rules? In *Owen Electric*, the Fourth Circuit Court of Appeals determined that slag from a steel mill is a solid waste if it is left "untouched" for six months before it is "picked up" by another company for recycling.

The Owen Electric Steel Company (Owen Electric) produces steel in an electric arc furnace. Residue (slag) is removed from the metal and processed by a third party contractor. After processing, the slag is placed in bare earth holding bays to cure and expand. After about six months of open-air curing, the slag is sold to the construction industry as an aggregate material for roadbeds.

After reviewing Owen Electric's procedures, the EPA designated the slag processing area as a solid waste management unit (SWMU). This designation required further EPA oversight and evaluation of the area. Owen Electric disputed the finding, but the EPA held to its original determination. A series of administrative proceedings finally led to Owen Electric's suit in circuit court. The only issue in the case was whether or not the slag constituted a "solid waste" for the purposes of determining SWMU status. Whether the slag was a "hazardous" material was irrelevant to this case. In general, the definition of "solid waste" only includes hazardous materials of RCRA Subtitle C. However, the SWMU's are subject to regulation regardless of whether the materials are hazardous.

The Resource Conservation and Recovery Act (RCRA) § 1004 defines "solid waste" as any "discarded material" resulting from industrial activities. Owen Electric argued that its slag is not a "discarded material" because it is ultimately recycled. The EPA countered by arguing that because the slag lies dormant and exposed on the ground for six months, it is discarded even if it is later used in another capacity.

The court accorded EPA's statutory inter-

pretations substantial deference, and held that the EPA did not abuse its discretion in concluding that the slag had become "part of the waste disposal problem." Owen Electric relied on *American Mining Congress v. EPA*, 824 F.2d at 177 (D.C. Cir. 1987) which held that a material is a solid waste if it is not "destined for beneficial reuse or recycling in a continuous process by the generating industry itself." However, the court concluded that Owen Electric interpreted this case too broadly after reviewing subsequent caselaw which held that *American Mining Congress* only applied to byproducts that are immediately recycled for use in the same industry. Since Owen Electric's slag was not immediately recycled to be used later by Owen Electric, the EPA was justified in finding that the slag was solid waste.

— by Kin Semsch

CLEAN WATER ACT

Adams v. EPA, 38 F.3d 43 (1st Cir. 1994)

The First Circuit Court of Appeals denied Adams' petition which opposed the Environmental Protection Agency's (EPA) issuance of a National Pollution Discharge Elimination System (NPDES) permit. EPA issued the permit which allowed a wastewater treatment facility in Seabrook, New Hampshire to discharge effluent into the ocean. Adams, who owns a beach-front house on the Gulf of Maine, asserted three main complaints: 1) the calculations used for dilution were inaccurate; 2) the plant's outfall would decrease the beach's recreational value; and 3) the zone around the outfall limited shellfishing.

The Clean Water Act (CWA) requires a NPDES permit for the emission of pollutants into the water. 33 U.S.C. §§ 1251 et seq. The Seabrook plant must meet the Ocean Discharge Criteria, including whether the emission will 'unreasonably degrade' the marine environment. 33 U.S.C. §§ 1343. The process for securing an NPDES permit first requires an application. The EPA then issues a draft of the permit and provides a thirty-day comment period. A public hearing may be requested. After the final permit decision, the Regional Administrator de-

cides whether to grant or deny an evidentiary hearing if requested on the issues raised during the comment period. The denial constitutes a finalized action in thirty-days, unless the party appeals to the Environmental Appeal Boards. If the Board denies review, the Regional Administrator's earlier decision becomes final. A party may then seek judicial review in the Circuit Court of Appeals.

Adams took issue with the draft permit through an 8 count written complaint submitted during the comment period. New Hampshire verified that the permit met the state water quality standards. EPA issued the final permit, and Adams requested an evidentiary hearing. The Regional Administrator denied Adams an evidentiary hearing because he failed to provide a material issue of fact. Adams requested the Environmental Appeals Board (EAB) to review the decision and the EAB denied his appeal. Therefore, the Administrator's decision became final.

The First Circuit Court of Appeals reviewed Adam's petition to determine whether the EPA complied with the Ocean Discharge Criteria or acted in an "arbitrary or capricious" manner. The arbitrary and capricious standard, required by the Administrative Procedure Act, accords great deference to Agency action. Therefore, the court analyzed whether EPA barred Adams in an arbitrary or capricious manner in light of the procedural default doctrine.

The court found that the EAB lacked a rational basis for contending that Adams improperly raised his complaint during the public comment period. The court found that Adams met the "threshold requirement of materiality" and noted the underlying policy of encouraging public participation. Consequently, the court deemed the EAB's action of ignoring the record as arbitrary and capricious.

The court applied the summary judgment standard for Adams' request for an Evidentiary Hearing. New Hampshire certified that Seabrook's plant would not violate its water quality standards. EPA based the final permit on New Hampshire's findings, thus creating a rebuttable presumption. Adams failed to provide an evidentiary basis for why EPA or New Hampshire was incor-

rect and thus, failed to rebut the presumption that the discharge would cause unreasonable degradation. The court held that EPA did not arbitrarily or capriciously deny Adams' claims because they lacked a "genuine issue of material fact" as to why EPA could not rest on New Hampshire's certification.

Adams also failed to assert of genuine issue of material fact regarding the design and location of the outfall. In addition, Adams provided no data to substantiate unreasonable degradation of marine life. As such, EPA's reliance on New Hampshire's certification that provided for coliform limits to protect public health was not arbitrary or capricious.

Finally, the court found Adams did not establish that the shellfish closure zone would result in a loss of recreational or economic value unreasonable in comparison with the benefits of the discharge. Again, Adams failed to raise a genuine issue of material fact to justify an evidentiary hearing.

— by Jill Morris

***Concerned Area Residents For the Environment v. Southview Farm*, 34 F.3d 114 (2nd Cir. 1994)**

Plaintiffs, Concerned Area Residents For the Environment (CARE), are a group of citizens who live near Southview Farm. Southview Farm, one of the largest farms in the state, is a dairy farm located in the town of Castile, New York. Defendants are the farm itself and Richard H. Popp. CARE brought this suit under the Clean Water Act of 1977, 33 U.S.C. §§ 1251 et seq. (1988 & Supp. IV 1992) (CWA). CARE also alleged violations of state law for nuisance, negligence and trespass. CARE's complaint focuses on the spreading of liquid manure on the dairy farm. The farm uses storage lagoons that holds approximately six-to-eight million gallons of liquid manure. Through an irrigation system liquid manure is propelled between 12 and 30 feet onto fields. A large hose traveler is also used to send liquid manure 150 feet in either direction. A piping system can carry the liquid manure from the Southview Farm to various locations without the use of vehicles.

The plaintiffs alleged eleven CWA violations and a jury returned a verdict in favor of the plaintiffs on five counts. On July 1, 1993, the defendants filed a motion for judgment as a matter of law and the court granted in part defendants' motion. Plaintiffs proceeded to file a timely notice of appeal.

Without a permit and subject to certain limitations, the CWA mandates that any person discharging any pollutant is acting unlawfully. 33 U.S.C. § 1311(a). "Pollutant" includes such substances as solid waste, sewage, biological materials, and agricultural waste discharged into water. 33 U.S.C. § 1362(6). Therefore, manure is considered a pollutant. A "discharge" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The term point source is the controversy in the court. "Point source" includes "any discernible, confined and discrete conveyance, including but not limited to any ... concentrated animal feeding operation [CAFO]. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14).

The first complaint arose when the plaintiffs observed liquid manure flowing into and through a swale on the Wyant Farm which continued to flow through a drain tile leading directly into a stream and then into the Genesee River. Appellants argue that because the Southview operations involve more than 700 cattle, it is a facility which is defined in the regulations under the Act as a CAFO, and therefore a "point source" under the Act. Even though a permit for discharges was not obtained as required, the district court concluded Southview was not a CAFO because crops are grown on a portion of the farm.

The second complaint occurred on field 104 of the Wyant property which shares the boundary line with Letchworth State Park. A slew on field 104 collects liquid manure spread by Southview's tankers and conveys it through a pipe through Southview Farm to the boundary of the state park. Two plaintiffs observed the manure flowing off the Southview property and eventually into the Genesee River. The district court and

appellees concluded that the discharge was not a point source discharge because the liquid naturally flowed into the stream. The appellants contended that the manure was channelled sufficiently to constitute a discharge by a point source.

The Second Circuit Court of Appeals found that in both instances the discharge was from a point source. The court found that the swale which leads into the stream was in and of itself a point source. The court notes that the court has previously defined point source broadly. The court also points out that a least one other court found a defendant is not relieved from liability simply because it does not actually maintain the conveyances which transport the pollutants into navigable water. The court also found that the manure spreading devices themselves were point sources.

Two plaintiffs testified that they saw the manure running through the field and dumping in the corner of the field, above the stream. They also testified that manure was spread on the same field the very day they saw the manure running. The district court held that the jury's finding of discharge was complete conjecture due to plaintiffs' failure to offer direct eyewitness testimony on manure actually leaving the property. However, the Second Circuit Court of Appeals found that the jury had enough circumstantial evidence to find discharges of liquid manure to infer violations of the CWA.

The court also found that even though the statute includes an exception for "agricultural stormwater discharges", there is no exemption for agricultural pollution simply because it occurs on rainy days. The court held that the jury had a reasonable basis to find the discharges were not a result of rain, but rather simply occurred on days when it was rainy.

— by Jacqueline K. Hamra

***Leather Industries of America, Inc., v. EPA*, 40 F.3d 392 (D.C. Cir. 1994)**

Petitioners Leather Industries of America, Incorporated, the Association of Metropolitan Sewerage Agencies, the Milwaukee Metropolitan Sewerage District, and the City of Pueblo Colorado (Leather Industries) challenged certain regulations enacted by the Environmental Protection Agency (EPA) regu-

lating the use and disposal of sewage sludge.

The Clean Water Act of 1972 (CWA) sets forth provisions relating to the management of sewage sludge which is the by-product of pre-discharge sewage. In addition, these provisions deal with the treatment of wastewater by public and private treatment works (POTWs) directing the EPA to enact discharge standards. Following the enactment of the CWA the amount of sewage sludge from POTWs has nearly doubled. In 1977 the Federal Water Pollution Control Act amended the CWA to provide standards for safe use and disposal of sewage sludge through guidance from the EPA. In 1987, another amendment required the EPA to enact regulations setting "numeric limits for toxic pollutants that may be present in sewage sludge in concentrations which may adversely affect public health or the environment." In addition, it set forth practices for the use and disposal of this type of contaminated sludge. These regulations were to be enacted in two phases, the first of which establishes the limits on ten pollutants in sludge to be used for land application. The EPA formulated four tables or levels of concentrations.

Leather Industries challenged the application of the 99th percentile caps in Table 3 because they are not related to risk of harm. Should the sludge fall into the third Table and the concentration of each of the pollutants in the sludge is below the Table 3 caps, as well as the Table 1 caps, it is considered "clean" sludge and may be utilized on the land without further regulation. The District of Columbia Court of Appeals held that the "regulatory safe harbor for land application of sewage sludge based on the 99th percentile levels of chromium and selenium indicated in a national survey violated the Clean Water Act."

One petitioner, City of Pueblo, challenged the method for assessing risk used to derive the risk-based limits on selenium in Tables 1 and 2. Specifically, City of Pueblo challenged the standard of a "child who ingests sewage sludge daily for up to 5 years" with respect to "public contact sites" to which children had no access. The court held that the EPA failed to supply a rational relationship between its exposure assumptions and the actual usage regulated by such assumptions in that there was no rational basis for

its highly conservative assumptions on exposure to selenium from land application of sewage sludge.

City of Pueblo also argued that because the EPA did not provide for site-specific variances, they were prohibited from appealing the land application limitations according to the Administrative Procedure Act. The court held that the EPA, in keeping with its discretion, had no obligation to develop site-specific variance procedures for the regulation of selenium in sewage sludge for individual land application sites.

In addition, Leather Industries challenged the EPA's authority to regulate under Table 2 based on phytotoxicity where a greater than 50% reduction in plant growth results. The court held that the EPA abused its discretion in establishing phytotoxicity limit on soil concentration of chromium in sewage sludge applied to land.

—by Tracy L. Warren

CLEAN AIR ACT

Save Our Health Organization v. Recomp of Minnesota, Inc. 37 F.3d 1334 (8th Cir. 1994)

Plaintiffs, the Save Our Health Organization (Save Our Health), brought suit against Recomp of Minnesota, Incorporated (Recomp), alleging an exceedance of allowable odor levels. Recomp operated a land-fill/compost station in St. Cloud, Minnesota, and was required to follow Environmental Protection Agency (EPA) approved odor standards that Minnesota's State Implementation Plan (SIP) established under the Clean Air Act (CAA).

On appeal from the United States District Court of Minnesota, which granted Recomp's motion for summary judgment, the parties each brought separate appeals before the Eighth Circuit Court of Appeals. Recomp argued that the court did not have jurisdiction, and the plaintiffs did not have standing to bring suit. Save Our Health maintained that the violations it cited in its notice of intent to sue were sufficient to establish a claim.

The Eighth Circuit Court of Appeals affirmed the district court below and held that the CAA, under which Minnesota's SIP

operates, gives any person the right to sue a party on the basis that a SIP has violated. In this case, Save Our Health's allegations that Recomp violated the SIP's emission standard established both authority to sue and subject matter jurisdiction.

The court also affirmed the lower court's grant of Recomp's motion for summary judgment. It found that while Save Our Health's notice of intent to sue did document odor violations attributed to Recomp, as required by the CAA's provision for citizen suits, the violations did not exceed the upper levels set by Minnesota's SIP. The SIP designated an "odor unit" test, which varies the number of odor units allowable by the municipal zoning of the particular location.

The test results Save Our Health included in its notice of intent to sue showed violations all below the level of two odor units. While the samples originated in different areas, all were zoned either "light industrial," which allows a maximum of two odor units, or "highway commercial," for which the SIP did not specify an odor unit limit. However, for the purposes of determining ambient air contamination, the court stated that highway commercial zones should also be limited to two odor units, based on the similarity between light industrial and highway commercial zones.

The court did not allow Save Our Health to use additional test results procured by county officials that would have more conclusively shown a violation. Despite the fact that Recomp may have known of the tests, the court determined Recomp was not given sufficient notice of the additional samples, as these results were not included in the plaintiff's notice of intent to sue.

The court did state that it would be permissible for Save Our Health to file a new suit based on the additional odor test results. However, that future court would have to make a finding on the issue of whether or not the CAA allows for the EPA to be the body which approves SIPs that pertain to odor regulation, an issue on which the instant court did not make a determination.

—by Sarah Madden

Alabama Power Co. v. EPA, 40 F.3d 450 (D.C. Cir. 1994)

In 1990, to protect natural resources and public health from the hazards of acid rain, Congress enacted programs to limit the levels of nitrogen oxides (NOx) emitted by specific sources. 42 U.S.C. § 7651. The programs required the Environmental Protection Agency (EPA) to promulgate rules that set limits on NO subx emissions from certain types of coal-burning boilers used by utility companies. In addition, the EPA was required to authorize "alternative emission limitation" (AEL) if a utility company could prove that it was unable to meet the emissions limit set forth in the EPA rule by using "low NO subx burner technology". The utility could only receive an AEL if their current "low NO subx burner technology" was unable to control emissions as stated in the EPA rule.

The central issue in the case revolved around what Congress meant by "low NO subx burner technology". The plaintiff argued Congress intended "low NO subx burner technology" to mean low NOx burners only. The EPA asserted the language in question was intended by Congress to include low NOx burners and overfire air, another emission control technique sometimes used with NOx burners. Thus the EPA, when it promulgated its rule as directed by 42 U.S.C. § 7651, insisted the questionable language to mean that a utility, in order to receive an AEL, had to prove their burners plus overfire air technology was unable to meet the emission limit set forth in the EPA rule. The plaintiff, on the other hand, argued a utility only had to prove their burners were unable to meet the emission limit in order to receive an AEL.

The case came down to a statutory interpretation question with each side arguing the intentions of Congress. The EPA believed it was Congress' intention for "low NO subx burner technology" to mean burners and overfire air because more utilities would be required to meet the prescribed emission limit. The petitioners argued that the EPA did not have authority from the statute to include overfire air in the definition

of "low NO subx burners".

The disputed language of "low NO subx burner technology" was found by the District of Columbia Circuit Court of Appeals to mean only low NOx burners and not overfire air. The court found the EPA did exceed its authority because the language was unambiguous and the intention of Congress was clear to mean only burners. When a statute uses technical language or terms, the courts assume Congress intended the terms to have its established meaning, in the absence of contrary intention by Congress. Specifically, the court found express statutory language that utilities seeking an AEL need not install equipment beyond low NO subx burners. In addition, no technical literature relied on by the EPA indicates that low NOx burner technology refers to a combination of low NOx burners and overfire air. The court found the statutory text, structure, and history of 42 U.S.C. § 7651(b)(1), supported the conclusion that Congress could have only meant burners and not overfire air.

The court concluded the EPA's rule exceeded their statutory authority. Accordingly, the utility companies were able to suspend any compliance with emission limits until further rulemaking by the EPA.

— by Christy L. Fisher

NEPA

Galloway v. Arkansas State Highway and Transportation Dep't, 885 S.W.2d 17 (Ark. 1994)

This case stems from a suit filed by William W. Galloway and others (Galloway) against the Arkansas State Highway and Transportation Department (ASHTD) to enjoin a construction project that would widen a portion of Highway 64. Galloway claimed that: 1) ASHTD was required to hold public hearings and prepare an Environmental Impact Statement (EIS) for the project; and 2) ASHTD's expenditures on the project, were not in accordance with federal law, and were therefore illegal exactions under the Arkansas Constitution.

Shortly after the suit was filed, ASHTD awarded the contract for the project to Southern Pavers, Inc.. Galloway, wanting to prevent Southern Pavers from doing any

work on the project, filed and received a preliminary injunction. The injunction, however, was conditioned on the fact that Galloway post a \$500,000 bond. This bond was never paid. The trial court dismissed Galloway's suit after concluding that ASHTD: 1) complied with appropriate federal law; and 2) was not required to hold a public hearing on the matter. Galloway appealed the decision, arguing that the trial court erred in two respects.

Galloway argued first that the requirement of a \$500,000 bond denied him due process. He claimed that Southern Paver's potential damages as an intervenor were not caused by his suit, but rather by the fact that ASHTD awarded Southern Paver the contract for the project after the original suit was filed. The Supreme Court cited to ARCP 65(d), which gives the trial court discretion in requiring security as a condition precedent to a preliminary injunction. In addition, the Supreme Court noted that Galloway had cited no authority for his position and had not attempted to show how he was prevented from obtaining a preliminary injunction.

Second, Galloway argued that the trial court erred in granting a directed verdict by finding that no public hearing or EIS was required for the highway project. The Supreme Court found the highway project to be a federal action for purposes of the National Environmental Policy Act (NEPA). This matter was of little dispute since the project was going to receive eighty percent of its funding from the Federal Highway Administration (FHWA). The court examined the regulations promulgated by the FHWA implementing NEPA in order to determine whether ASHTD had complied. The regulations specifically set out the circumstances where a public hearing was required for any Federal-aid project that includes: 1) significant amounts of right-of-way; 2) substantial changes in the layout or functions of connecting roadways or of the facility being improved; 3) substantial adverse impact on abutting property; or 4) otherwise has a significant social, economic, environmental or other effect, or for which the FHWA determines that a public hearing is in the public interest. 23 C.F.R. §§771.111(h)(2)(iii). After the FHWA and the ASHTD inspected the site where the

proposed project was to take place, the ASHTD determined that no public hearing was required. The FHWA subsequently approved the project. The Supreme Court viewed the FHWA's acquiescence as a clear indication that the highway project did not fall into any of the above categories and therefore, must have been categorically excluded from NEPA requirements. In order to overturn an agency's categorical exclusion determination, the action must be arbitrary and capricious. Since Galloway cited no authority that would support such a finding the Supreme Court of Arkansas upheld the trial court's decision that a public hearing and an environmental impact statement were not required in the instant case.

— by Greg Moldafsky

***Sierra Club v. Espy*, 38 F.3d 792 (5th Cir. 1994)**

This is an interlocutory appeal challenging the district court's ruling that the Sierra Club was entitled to a preliminary injunction against the Forest Service's even-aged management practices in four Texas National Forests. The case was based on nine pending timber sales within the four National Forests. The district court held that the environmental assessments (EA's) conducted by the Forest Service for each of the nine sales did not comply with either the National Environmental Policy Act (NEPA) or the National Forest Management Act (NFMA). First, the district court believed that the NFMA only provided for the use of even-aged management techniques in "exceptional circumstances." Second, the court held that the Forest Service did not adequately consider the environmental consequences and criticisms of its proposed actions. The district court focussed specifically on the fact that even-aged management was the predominant timber method chosen for all nine sites.

Even-aged management includes clearcutting, shelterwood cutting, and seed tree cutting methodologies. To conform with the NFMA, the Forest Service may choose clearcutting as its management policy only if it is the "optimal method" for achieving the objectives and requirements of the Forest's Land and Resource Management Plan (LRMP). Similarly, in order to use

shelterwood cutting or seed cutting, the Forest Service must determine that those methods are "appropriate" for achieving the objectives and goals of the LRMP.

In an effort to determine the scope of the Forest Service's authority under the NFMA, the Fifth Circuit Court of Appeals looked at the legislative history of the act. The court recognized that there was a delicate balance struck in Congress between those favoring and those disfavoring even-aged management techniques. As such, the NFMA must reflect that balance. The fact that even-aged management can only be used if it is the optimum or appropriate method to accomplish the objectives of the LRMP does not make it the exception to the rule. The court stated that the requirement of even-aged management to protect forest resources does not itself limit its use. The court concluded that the district court's interpretation that even-aged management only be used in exceptional circumstances was too harsh. The NFMA only requires the Forest Service to meet certain substantive requirements before even-aged management could be used.

The next issue was whether the Forest Service had met those substantive requirements. The district court held that the Forest Service's even-aged management plan failed to protect forest diversity and resources. The court defined "protection" narrowly so that the Forest Service's failure to consider old growth forests and its acknowledgement that some forest species would be diminished were inadequate protection. The Fifth Circuit Court of Appeals held that the NFMA's multiple use mandate contemplated both even and uneven aged management. The court pointed out that the NFMA regulations provide that reductions in plant, animal, and tree diversity may be prescribed only where needed to meet overall multiple-use objectives. The statutory language of the NFMA leaves such policy-oriented decisions up to the managing agency's discretion. The NFMA only mandates that the Forest Service manage fish and wildlife habitats to insure viable populations of species and to ensure diversity in plant and animal communities. The Forest Service looked at a variety of alternatives including no action, even-

aged management, and uneven-ages management. In addition, the Forest Service noted in its EA that all wildlife populations will remain at viable levels. The findings of the court show that by choosing an even-aged management policy, the seven species of wildlife will increase with only two species decreasing. However, by choosing an uneven-aged management policy only two species of wildlife will increase while the rest decrease. Having extensively looked at the alternatives and the effects of their actions, the court concluded that the Forest Service had not exceeded its authority under the NFMA.

The next major issue in the case involved the Forest Service's compliance with NEPA. The district court held that the Forest Service did not take a "hard look" at the alternatives and consequences of their actions. The Court of Appeals disagreed and pointed out that the Forest Service had considered four alternatives for the first eight timber sites and five alternatives for the ninth site. In addition, the EA addressed the consequences of each of its alternatives on wildlife, vegetation, water, soil, and recreation resources, as well as any applicable mitigating circumstances. The court concluded that the Forest Service had indeed met the requirements of NEPA.

—by Greg Moldafsky

MISSOURI

***Green Hills Solid Waste Management Authority v. Madison Township Planning and Zoning Commission*, 892 S.W.2d 621 (Mo.Ct.App. 1994)**

Green Hills Solid Waste Management Authority (Green Hills), representing thirteen Missouri municipalities, formed to establish a nonhazardous solid waste landfill. In 1989, Green Hills purchased a tract of land in Mercer County, Missouri, which was located in Madison Township. Both the Madison Township Planning and Zoning Commission (Commission) and the Missouri Department of Natural Resources (DNR) denied the various applications Green Hills filed.

Green Hills sued for declaratory relief to establish that it met statutory requirements

for overruling the planning and zoning commission decision and to determine if the Commission's regulations were unreasonable. The circuit court dismissed the plaintiff's claim, holding that Green Hills failed to exhaust administrative remedies before filing suit.

In reversing the decision of the court below, the Missouri Court of Appeals for the Western District stated that in respect to Green Hills' claims against the Commission, only an appeal from the Commission's decision would require Green Hills to exhaust administrative remedies. The court determined that Green Hills' suit was instead an action for declaratory judgment, which alleged the Commission's zoning restrictions were invalid. Therefore, statutory procedure requirements did not demand Green Hills first appeal the Commission's decision to the township Board of Zoning Adjustment, as the Commission argued.

However, the Commission also alleged that Green Hills failed to exhaust other existing administrative remedies in that Green Hills did not appeal the DNR's negative decision. The DNR denied Green Hills' application on the basis that it did not show Green Hills proceeded in accordance with local zoning requirements. To appeal a DNR decision, parties must request a hearing within thirty days, which Green Hills claimed it did, resulting in a DNR request to get a declaratory judgment against the Commission. The court, however, could find no evidence of the appeal or subsequent DNR order in the record. Therefore, the Court remanded the case to determine if Green Hills did in fact exhaust its administrative remedies with respect to the DNR

— by Sarah Madden

OTHER

Dico, Inc. v. Diamond, 35 F.3d 348 (8th Cir. 1994)

Dico, Incorporated (Dico) brought suit against the Environmental Protection Agency (EPA) and others for reimbursement of costs incurred as a result of compliance of an administrative order to clean up a contaminated ground water cite in Des Moines,

Iowa. The United States District Court for the Southern District of Iowa granted summary judgment to the EPA and this appeal followed.

The Superfund Amendments and Reauthorization Act of 1986 (SARA) grants "any person who receives and complies with the terms of any order issued [by the EPA] the right to petition the EPA for reimbursement of any response costs the party incurred for which it was not liable." 42 U.S.C. § 9606(b)(2). When the EPA denies any such request, that party can bring a reimbursement action against the EPA in federal court. This procedure facilitates expeditious cleanup by potentially responsible parties who may or may not be responsible for a particular Superfund site.

Dico was ordered by the EPA to design and implement a system to capture and treat the contaminated groundwater found on their property. The EPA order mandated extensive and expensive procedures to which Dico responded to by letter and in a hearing. The EPA modified the order several times, and Dico brought the remedial system into operation.

When Dico petitioned the EPA for reimbursement, their request was denied due to the fact that the EPA's original order was issued prior to the effective date of SARA. The district court upheld the EPA's decision regarding the reimbursement provision and dismissed Dico's due process and takings claims for lack of subject matter jurisdiction.

On appeal, the Eighth Circuit Court of Appeals held that the EPA's interpretation of the reimbursement provision is not entitled to judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). An agency's interpretation of a statutory provision is required only if the agency is charged with administering the statute. *Id.* at 844. SARA allows the United States District Courts to decide disputes, therefore the reimbursement provision is subject to judicial scrutiny.

Next, the court concluded that since the EPA modified the initial order three times, the final time being after SARA became effective, the reimbursement provision would be available to Dico. Finding for Dico, the court rejected the EPA's argument that for a

party to proceed under the reimbursement provision, it must have received and complied with an order subsequent to SARA's effective date. The EPA cited cases in support, but the court distinguished them in that those courts granted deference to the EPA's determination on the availability of the reimbursement provision, and also that these claimants had a "cleanup order in final form well before" the effective date.

In this case, Dico's requested modifications made the resulting order quite different from the original order. Furthermore, the court held that Dico was not capable of complying with the order until it received the last modification, which was subsequent to when the reimbursement provision became effective. Therefore, the reimbursement provision of SARA is available to Dico. However, the court left open whether the reimbursement provision applied retroactively to a party who received and complied with an order issued prior to SARA's effective date.

— by C. Todd Ahrens

United States v. Liebman, 40 F.3d 544 (2nd Cir. 1994)

Defendant David Liebman and his family owned a company that owned a mill in Rockville, Connecticut. In an attempt to sell the mill, Defendant hired a broker who learned, through an environmental assessment, that asbestos was used to insulate pipes on the premises. As a result, the broker arranged for the removal of two large boilers which were insulated by asbestos. He hired two local salvagers, two teenage boys and another man to do the removal. Defendant claimed he was unaware there would be asbestos removal.

Defendant took over management of the removal process when he had problems with his broker. He realized it involved asbestos, but continued to illegally remove and dispose of the asbestos in plastic bags to a gravel pit in the woods. Ultimately, the government discovered the illegally disposed asbestos and prosecuted defendant. Defendant plead guilty to failing to report environmental release to the appropriate federal agency in violation of 42 U.S.C. § 9603(b).

Pursuant to USSG § 3B1.1 (Sentencing Guidelines), the district court increased

defendant's base offense level from eight to twelve and accordingly sentenced him to 10 months imprisonment and a \$3,000 fine. Defendant appealed from this base level increase and sentence.

The Second Circuit Court of Appeals reviewed the trial court's determinations under the Sentencing Guidelines. Remanding for resentencing, the court found that the base offense level increase pursuant to § 3B1.1(B) was erroneous. The statute stipulates that such an increase in the base offense level requires a finding that defendant supervised five or more participants in criminal activity or that the activity was "otherwise extensive." The trial court did not make any specific findings in support of a §3B1.1(b) determination. The court thus remanded to the trial court for specific findings that satisfy §3B1.1(b).

In advising the trial court to make specific findings pursuant to § 3B1.1(b), the court found defendant to be a "supervisor" as defined in the statute in that he, "exercise[d] some degree of control over others involved in the commission of the offense." However, the court found defendant did not have control over the requisite "five" criminally responsible people because the teenagers involved were not criminally responsible.

Also, in analyzing § 3B1.1(b), the court rejected defendant's argument that the "otherwise extensive" language does not apply to him because he was not an "organization". The court construed the intent of the drafters to use "organization" for convenience in indicating any group of people working together and thus included defendant and his actions.

In addition to the defendant's § 3B1.1(b) argument, the court found the trial court could hear defendant's contention that his guilty plea was for a record keeping offense as opposed to a substantive offense. This, according to defendant, means that any base level increase was inappropriate. Although this issue was not brought up in trial, the court allowed it to be considered on remand since remand was already required.

Additionally, the court found the alleged errors in determinations made on other base offense level increases were correct. The court found that, under § 2Q1.2(b)(1)(A), an enhancement for ongoing and repetitive discharge of hazardous substances does not require proof of actual contamination. Instead the court found contamination will be assumed. The court also found, pursuant to § 2Q1.2(b)(5), that an application of the

sentencing guidelines to defendant's plea depends on whether or not his offense was an effort to hide substantive environmental offenses and not only on actual substantive offenses.

Ultimately, the defendant's conviction was affirmed but the sentence was vacated and remanded for resentencing based on the rulings of the Second Circuit Court of Appeals.

— by Joseph P. Hewes

Roberson v. DuPont De Nemours & Co., 863 F. Supp. 929 (W.D. Ark. 1994)

Defendant DuPont manufactured and distributed a fungicide named Benlate. The Environmental Protection Agency (EPA) placed a stop order on the sale, use and removal of Benlate due to its contamination with atrazine, an herbicide. Plaintiffs Joseph and James Roberson claim the contamination harmed their peach orchards.

The contamination allegedly occurred when a contract manufacturer of DuPont, Terra International, Incorporated (Terra), produced the Benlate. Prior to making Benlate, Terra produced Prozine, which consists of atrazine. After cleaning its equipment with starch and sugar, Terra used the contaminated starch and sugar in producing Benlate, a process of which DuPont was aware. Plaintiffs claim Terra used application rates of the contaminated starch and sugar at three times the intended intensity and also used defective packaging which exposed the Benlate to warm, humid air, resulting in the formation of phytotoxic compounds harmful to crops. Plaintiffs claimed DuPont knew all of the above before registering the Benlate with the EPA and never told the EPA thereafter of the defects.

DuPont claimed the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) preempts the plaintiffs' state law claims of negligence, strict liability, and breach of warranty. Under FIFRA, a manufacturer may not market a pesticide until it registers with the EPA. Applicants for registration must include proposed product labels. The final labels must be adequate or accurate or the company will face civil and criminal penalties, including revocation of its registration. As for packaging requirements, FIFRA only requires packaging sufficient to protect children and adults from serious injury or illness.

FIFRA's express preemption clause requires states to refrain from imposing any labeling or packaging requirements "in addition to or different from" the FIFRA requirements. The court adhered to precedent and statutory language, and held the plaintiffs' failure to warn claim was preempted by FIFRA. In addition, FIFRA does not distinguish between inadequate labeling and inadequate packaging; FIFRA thus preempts state law claims of negligence and strict liability as they relate to a failure to warn or inadequate packaging.

The plaintiffs next claimed DuPont did not give the EPA all of the information it possessed concerning the production of the Benlate and was thus estopped from relying on FIFRA's preemption language. FIFRA operates under the premise that the EPA must rely on the producers of pesticides to provide accurate information, and there is a risk that some ingredients may be withheld because they are trade secrets. The court held DuPont may be estopped from relying on FIFRA's preemption language if it withheld material facts from the agency. While this may undermine the federal government's control of pesticide production, the court explained that companies would rather be more careful in their labeling and packaging than risk facing liability under state law claims.

As for the plaintiffs' breach of express warranty claims, the court relied on *Cipollone v. Liggett Group*, 112 S. Ct. 2608 (1992), and held FIFRA did not preempt their claim. Although FIFRA prohibits the states from imposing further labeling requirements, the express warranties at issue are imposed by the EPA, not the state. The EPA sets out the standards companies must follow when making the labels but does not dictate exactly what must be said. As for the implied warranty claims, state law determines those obligations and FIFRA is thus preempted to the extent the labeling and packaging are guaranteed.

Finally, the court refused to hear the plaintiffs' claims that DuPont violated standards of care established by FIFRA. While the plaintiffs may have been correct in stating FIFRA contains the correct standards for determining whether DuPont violated state law, the court held the issues were not properly before it since DuPont did not move to dismiss those claims.

— by Stephen B. Maule