

# Journal of Environmental and Sustainability Law

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Missouri Environmental Law and Policy Review  
Volume 14  
Issue 2 *Spring 2006*

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Article 8

2006

## Environmental Updates

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### Recommended Citation

*Environmental Updates*, 14 Mo. Env'tl. L. & Pol'y Rev. 421 (2006)

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## **ENVIRONMENTAL UPDATES**

### **UNITED STATES SUPREME COURT**

Environmental Defense v. Duke Energy Corp., 127 S. Ct. 1423 (2007)

After Duke Energy Corporation replaced or redesigned some of its coal-fired electric generating units, the United States sued the owner of the electric plants for violations of the Clean Air Act (“CAA”), and environmental groups intervened as plaintiffs. The case was originally heard in the United States District Court for the Middle District of North Carolina, and the defendant plant owner was granted summary judgment. On appeal, the fourth circuit affirmed the district court’s finding of summary judgment in favor of the defendant. The Plaintiffs then petitioned the Supreme Court for a writ of certiorari, which was granted. The Supreme Court considered whether the EPA was required to interpret “modification” the same in the Prevention of Significant Deterioration (“PSD”) section of the CAA as interpreted in the section governing the New Source Performance Standards (“NSPS”).

The Clean Air Act was amended in the 1970s by the NSPS and PSD. Each modification of the CAA covers modifications to old sources and new sources of air pollution. The NSPS defines a “modification” as a physical change or a change in the method of operation that increases the amount of pollutant discharged or emits a new one measured in Kilograms per hour. The PSD requires a permit before a “modification” can take place and refers to “modification” as defined under the NSPS. Despite this cross-reference in the statute itself, the EPA’s regulations interpret the term modification differently under the two sections. Under NSPS regulations, a source must use the best available pollution-limiting technology when a modification would increase the discharge of pollutants. Under the PSD regulations, the source only has to get a permit and use the best available pollution-limiting technology when the modification is major. Under the PSD a modification is considered major when it would increase the actual annual emission of a pollutant above the actual average for the two prior years.

In this case, Duke Power had proceeded with modifications to its plants under the PSD without permits, claiming that the modifications

were not major based on hourly emission rates. However, the plaintiffs asserted that because the modifications were designed to allow the electric producing units to run longer each day that an hourly emissions standard is the wrong standard under the PSD. The defendant's argued that modification under the PSD must be interpreted the same as modification under the NSPS because of the specific referral back to the NSPS in the PSD definition of modification. Essentially, the defendants argued that the hourly increase standard should be applied as required under the NSPS instead of an annual emissions rate. The Supreme Court held that because the PSD serves a different purpose from the NSPS the EPA has the authority to interpret the term "modification" differently in the two sections. The court remanded the case to the District Court with the instructions that the PSD definition of "modification" could be interpreted as an annual increase in pollution rate rather than an hourly rate increase as defined under the NSPS. The court left for the district court to decide the question of whether the EPA should be precluded from enforcing the regulations of the PSD because the EPA had allowed Duke Power to proceed inconsistent with its own regulations for twenty years.

BROCK H. COOPER

## UNITED STATES COURT OF APPEALS

U.S. v. Burlington Northern & Santa Fe Ry. Co., 479 F.3d 1113 (9th Cir. 2007)

Under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9601, federal and state governments can clean up hazardous waste sites and later sue potentially responsible parties for reimbursement. In 1983, the Environmental Protection Agency (“EPA”) and the California State Department of Toxic Substances Control (“DTSC”) separately investigated an agricultural chemical storage and distribution facility in Arvin, California to determine whether repeated leaks and spills had caused soil and groundwater contamination. Finding several violations of hazardous waste laws, the agencies proceeded to clean up the site and in doing so incurred substantial cost.

In 1996, the United States, acting through the EPA and DTSC brought a CERCLA suit against Brown & Bryant, Inc., owner and operator of the facility; Burlington Northern & Santa Fe Railway and Union Pacific Transportation Co. (“Railroads”), part landowners of the facility; and Shell Oil Company, distributor of the agricultural chemical products involved. The district court determined that the harm sustained at the site was capable of apportionment and apportioned the harm between the Railroads as “owners” and Shell as an “arranger.” B & B was insolvent. For the Railroads, the district court multiplied the percentage of ownership, percentage of time owned in relation to total operations, and fraction of hazardous products attributable to the Railroads’ parcel to determine that the Railroads were liable for 9% of the total cleanup costs. For Shell, the district court multiplied the percentages of leaks attributable to Shell to determine that Shell was liable for 6% of the total cleanup costs. Both parties appealed the judgment: the EPA and DTSC arguing that the Railroads and Shell are jointly and severally liable for the entire judgment, and Shell arguing that it is not an “arranger” under CERCLA and therefore not a party on whom any cleanup liability can be imposed.

Whether CERCLA liability is joint and several versus severable is an issue of first impression in the Ninth Circuit Court of Appeals. The Ninth Circuit followed its sister circuits, relying heavily on *U.S. v. Chem-*

*Dyne, Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983), and held that liability may be joint and several at the liability phase (thus allowing for apportionment of liability). Although the Ninth Circuit ultimately determined that the harm suffered at the Arvin site was capable of apportionment, it disagreed with the district court's method of apportionment.

The test used by the Ninth Circuit to determine if apportionment was proper was whether the Railroads and Shell had submitted evidence sufficient to establish a reasonable basis for the apportionment of liability. Regarding the Railroads, the Ninth Circuit found that the factors the district court used (percentages of land area, time of ownership, and types of hazardous products) bore an insufficient logical connection to the pertinent question: what part of the contaminants found on the land in question were attributable to the presence of toxic substances or to activities on the Railroad parcel? The Ninth Circuit rejected the district court's apportionment calculation and held that the Railroads had failed to prove a "reasonable basis" for apportioning liability. With regards to Shell, the Ninth Circuit found that because the appropriate consideration for apportionment is contamination, by presenting evidence of leakage Shell failed to prove whether its chemicals that were leaked had contaminated the soil in any specific proportion as compared to other chemicals spilled at the site. The Ninth Circuit held that Shell's evidence concerning leakage was insufficient to prove a "rational basis" for apportionment of liability.

Finally, the Ninth Circuit agreed with the district court that Shell was an "arranger" for purposes of CERCLA. On appeal Shell claimed that the district court used the wrong standard in determining whether it was an "arranger," that the "useful product" doctrine precludes imposition of "arranger" liability on Shell, that Shell lacked ownership and control over the chemicals at the time of the transfers, and the district court erred when it determined Shell contributed to the groundwater contamination. The Ninth Circuit rejected Shell's arguments, finding that an entity can be an "arranger" even if it did not intend to dispose of the product (under CERCLA, dispose can mean spill); the "useful product" doctrine does not apply where the sale of a useful product necessarily and immediately results in the leakage of hazardous substances; Shell had sufficient control over, and knowledge of, the transfer process to be considered an

“arranger” under CERCLA; and the record was sufficient to support the district court’s conclusion.

AMY L. GLEHORN

K.C.1986 Ltd. Partnership v. Reade Mfg., 472 F.3d 1009 (8th Cir. 2007)

A superfund site in North Kansas City, Missouri, the Armour Road Superfund Site ("Site"), had been contaminated by herbicide blending and packaging operations. The Site was occupied by four different entities from 1929 to the present. The current owner of the site filed a CERCLA suit against the former occupants of the contaminated site to allocate cleanup costs. Finding that each of these parties substantially contributed to the contamination of the site by their own independent actions, the district court allocated the clean up costs and determined which parties were entitled to reimbursement for costs that already were incurred.

On appeal, the Eighth Circuit reversed and remanded in part. The court first considered "whether the district court abused its discretion in refusing to amend the allocation order before final judgment was entered to credit the pretrial settlements obtained by one of previous owners from the EPA and private entities against the judgment." CERCLA provides that a judicially approved government settlement, such as the previous owner's settlement with the EPA, "does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement." Although CERCLA governs only the effect of settlements with the government and not the settlements with private parties, the court noted that "general equitable principles remain in play." As a general principle in a contribution claim, CERCLA directs the court to "allocate response costs among liable parties using such equitable factors as the court determines appropriate" and "articulates a policy against double recovery." Thus, the court found that the district court abused its discretion in refusing to credit the settlements obtained by the former operator of the herbicide blending facility on contaminated property against the final judgment.

In regards to the argument that the district court erred by awarding prejudgment interest, the court held that "demands of defendants were sufficiently specific to put other parties on notice of amounts at issue and to support accrual of prejudgment interest from dates of such demand." The court reasoned that although the former operator did not demand specific amounts from each defendant, specific amounts of money were named and the case involved only a handful of third-party defendants who were related in some way to each other.

When considering an individual's liability as an "operator," the court looked at the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme. After finding that the individual was directly responsible for devising the procedures for the use and disposal of hazardous waste and had authority to make necessary decisions involving large expenditures by the company, the court found the individual liable as an "operator" under CERCLA, and thus liable for the release of hazardous substances.

The successor corporation argued that the "substantial continuity" test, on which the district court had based its decision, had been invalidated in *United States v. Bestfoods* and that it should not be liable under CERCLA. The Eighth Circuit noted "*Bestfoods* does not directly address corporate successor liability, and consequently, there may yet be contexts in which the substantial continuity test could survive." However, the court decided that since the facts in the instant case did not satisfy the substantial continuity test, it need not address that question. The proper application of the substantial continuity test requires the court to consider whether "CERCLA-defeating conduct" is present. However, the district court ruled on the corporate successor liability without finding that the purchase by the successor corporation was an attempt to avoid CERCLA liability. On this ground, the court held that the successor corporation of the company that purchased the operating assets of the predecessor corporation that had engaged in mixing and repackaging of herbicides on contaminated property, but did not purchase property itself, was not subject to liability on the basis of substantial continuity.

Another party made an argument that the successor corporation still remains liable under traditional exceptions for imposing successor liability. However, the court rejected this claim as there was no express agreement by the successor corporation to assume a predecessor corporation's liabilities, there was no continuity of shareholders, and there was no evidence that the successor knew of any potential CERCLA liability.

MIN CHUNG LEE

Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers,  
479 F.3d 1148 (9th Cir. 2007)

Southeast Alaska Conservation Council (“SEACC”) appealed a grant of summary judgment by the United States District Court for the District of Alaska in favor of the United States Army Corps of Engineers (“Corps”) and the U.S. Forest Service in regards to the Corps’ issuance of a permit under § 404 of the Clean Water Act to Coeur Alaska, Inc. for the discharge of mine tailings from its mill operation into a lake in the Tongass National Forest in Southeast Alaska. In August 2006, the district court entered judgment denying SEACC an injunction to prevent the implementation of the Coeur Alaska plan to dump the tailings into the Lower Slate Lake. SEACC appealed three days later. Although Coeur Alaska commenced building a temporary coffer dam after the district court judgment, due to Coeur Alaska’s knowledge that an appeal was pending, the Ninth Circuit entered an injunction pending appeal that prohibited Coeur Alaska, the Corps, and the Forest Service from proceeding with the construction of facilities to implement the plan to dispose of the tailings into the lake.

The Corps issued a permit to Coeur Alaska under § 404 of the Clean Water Act to discharge approximately 210,000 gallons of slurry, including 1,444 tons of mine tailings, per day from its froth-flotation mill operation at the Kensington Gold Mine into Lower Slate Lake, a 23-acre lake in Tongass National Forest in Southeast Alaska. The discharge would raise the bottom of the lake 50 feet and nearly triple the surface area. Nearly all the fish and most other aquatic life would be killed from being covered by the discharge. Coeur Alaska began building a 90-foot high, 500-foot long dam at the lake’s outfall point to prepare the lake for the disposal of tailings and the expansion of the lake’s surface area. After the appeal was filed, Coeur Alaska built a temporary “coffer dam” and began construction of a 38-foot high earthen dam behind the coffer dam. Coeur Alaska’s long-term plan also included the construction of a diversion ditch. The Ninth Circuit halted further construction at the site pending the outcome of this appeal.

In November 2006, Coeur Alaska filed a motion to vacate the injunction, raising concerns about the possible effect of weather on the integrity of the dam. The Ninth Circuit, in denying the motion, held the

“Corps’ permit to Coeur Alaska violated the Clean Water Act and that the construction would adversely affect the environment by destroying trees and other vegetation, and by killing aquatic life.” The Corps, because of conditional approval of Coeur Alaska’s plan, then sought the Ninth Circuit’s authorization of a plan to construct a diversion ditch known as the Western Interceptor Ditch (“WID”).

On appeal the issue was the integrity of the temporary coffer dam that Coeur Alaska rushed to construct in the twenty days between the district court judgment and the injunction. The Ninth Circuit examined Coeur Alaska’s motives to remedy any perceived weather problems created by the construction of the dam.

The Ninth Circuit found Coeur Alaska’s ditch plan violated the injunction. The injunction prohibited construction activities that included cutting trees, building roads, clearing vegetation, and building dams or other structures, among others. Coeur Alaska’s ditch plan required cutting trees on 7.6 acres of forested land, building a 30-foot wide road, excavating and digging a 3000-foot ditch, along with other violations. Coeur Alaska then sought permission to reinforce the coffer dam so it would not breach. However, the Ninth Circuit denied this motion, reiterating that if Coeur Alaska were allowed to begin preparing the site for disposal prior to the court’s resolution on appeal, the plan would not maintain the status quo, but would allow Coeur Alaska to begin working to a significant extent on its overall plan, which was not consistent with the injunction.

The Ninth Circuit then announced its intentions to reverse the district court, vacated the permits and the Record of Decision authorizing the use of Lower Slate Lake as a disposal facility, and remanded to the district court with instructions to enter summary judgment in favor of SEACC. The court found that the Corps violated the Clean Water Act in issuing its permit to Coeur Alaska for use of the Lower Slate Lake as a disposal site. Although the discharge from the mill operation met the Corps’ current definition of “fill material” because it would have the effect of raising the bottom elevation of the lake, the EPA issued performance standards that prohibits discharges from froth-flotation mills into waters of the United States. The Ninth Circuit found this regulation applied to Coeur Alaska’s mill. Although the Corps’ definition of “fill material” and the EPA’s performance standards conflict, the EPA’s standards apply to all

discharges. The performance standard governs because it is more specific; it applies precisely to froth-flotation mills. Also, statements made by the Corps and the EPA during the course of evaluating Coeur Alaska's permits demonstrate that the EPA's performance standard for the froth-flotation mills was to apply in this case. Due to the court's intention to reverse and vacate the Record of Decision and permits, the Ninth Circuit held that all construction-related activities implementing Coeur Alaska's plan to dispose of tailings into Lower Slate Lake should cease.

NIKKI A. MULLINS

The Tennessee Valley Authority (“TVA”) is a public power company created by Congress, which owns and operates the power plant at issue in this case. The plant, Bull Run, is located in Clinton, Tennessee. All emissions produced by the plant must comply with Tennessee’s state implementation plan (“SIP”), which is the system used to enforce the EPA’s National Ambient Air Quality Standards (“NAAQS”). Tennessee’s SIP specifically requires polluters to apply for separate permits to construct and operate air pollution facilities, such as the Bull Run plant. This helps to regulate any modifications to polluting facilities or changes in their operation that may lead to significantly increased air pollution.

In 1988, the TVA made substantial modifications to its Bull Run plant by replacing several thousand feet of tubing inside the boiler used to produce electricity. The EPA noted, eleven years later, that the modification to the boiler constituted a modification requiring a construction permit under Tennessee’s SIP. The SIP also imposes an ongoing duty on polluters to apply best available control technology (“BACT”), a limitation normally found within a construction permit, even when they fail to obtain a construction permit. TVA’s failures to apply the BACT and obtain a construction permit were the violations in question brought before the Eastern District Court of Tennessee in 2001. After a stay of proceedings, the district court held in 2004 that because TVA’s violations took place in 1988, the action brought by the National Parks Conservation Association and other environmental organizations was time-barred under the five-year statute of limitations.

On appeal, the plaintiffs argued that Tennessee’s SIP permitted application and issuance of a construction permit after the fact where a modification or source was constructed without such a permit. They alleged that this ongoing duty to ensure appropriate emissions, despite an initial failure to do so, constituted actionable failures continuously extending the point in which the limitation period began to accrue. On the contrary, TVA argued that the SIP only prohibited construction without a permit; therefore, the statute began to run in 1988 and expired in 1993. The Sixth Circuit disagreed with the TVA and the district court by holding that the “case presents a series of discrete violations rather than a single

violation that may or may not be 'continuing' in nature." Therefore the failures to obtain a construction permit for the modification to the boiler and failure to apply BACT were actionable because the violations renewed each day the plant operated. The circuit court held that violations extending back five years before the date the suit was filed in 2001 were actionable and within the statute of limitations. The district court's decision was reversed and the cause remanded.

The dissenting judge disagreed with the view that the case involved continuous violations renewing each day the plant operated. This opinion emphasized the distinction between the operating permit, which the TVA had obtained, and the construction permit required prior to the modification in 1988. The dissent termed the TVA's continuous failure to obtain the permit as a series of discrete harms rather than a series of discrete violations. As an example, the judge compared the situation to contracting with a carpenter to repair a roof. The carpenter's failure to repair the roof would be a single violation, and every time it rains there would be a harm. The carpenter cannot breach the contract every time in rains; therefore, no new or discrete violation would occur. The dissent referred to the failure to obtain a construction permit as a single violation and the failure to apply BACT as the harm resulting thereof. Under this view, the statute of limitations would have expired in 1993 for the construction permit claim and a separate claim should be filed for the continuous failure to apply BACT.

RYAN WESTHOFF

The Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) makes liable among others any person who arranges for disposal of hazardous substances by any other party or entity, at any facility from which there is a release of a hazardous substance. But, what happens when the hazardous substance is released by a person outside the boundaries of the United States and settles in the waters of the United States? This question went long unanswered until the 9<sup>th</sup> Circuit Court of Appeals ruled on a case involving a Canadian company facing this exact situation.

Teck Cominco Metals, Ltd. (“Teck”) is a Canadian company that owns and operates a lead/zinc smelter in Trail (“Trail Smelter”), British Columbia. From 1906 to 1995 Teck generated and disposed of hazardous materials in both liquid and solid form into the Columbia River. These wastes, known as “slag,” include the heavy metals arsenic, cadmium, copper, mercury, lead, and zinc. Up until 1995 the Trail Smelter released as much as 145,000 tons of waste into the Columbia River Annually.

These discharges were made in Canada, but the EPA determined that the discharges eventually flowed downstream to settle in the waters of the United States. The Trail Smelter is determined to be a significant contributor to the contamination of the Upper Columbia River and Lake Roosevelt. The physical and chemical decay of slag has been found to be an ongoing process that releases arsenic, cadmium, copper, zinc, and lead after it has settled back into the environment. This release could cause harm to human health and the environment.

In 1999 the EPA began a site assessment of waters containing slag from the Trail Smelter. This assessment was done at the request of the Colville Tribes under § 9605 of CERCLA. The EPA found from this assessment contamination that included “heavy metals such as arsenic, cadmium, copper, lead, mercury and zinc.” The EPA also observed the presence of slag and in 2003 determined that the Upper Columbia River Site was eligible to be placed on the National Priority List (“NPL”). Eventually the EPA issued a Unilateral Administrative Order (“Order”) against Teck.

The order if enforced would require Teck to conduct a remedial investigation/feasibility study (RI/FS) which is meant to assess the site

conditions and evaluate alternatives to the extent necessary to select a remedy. The EPA issued the order in December of 2003 when its negotiations with Teck Cominco American, Inc. (a wholly-owned American subsidiary of Teck) broke down over the amount of information needed for the EPA to select an appropriate remedy for the contamination.

In *Pakootas v. Teck Cominco Metals, Ltd.* the 9<sup>th</sup> Circuit Court of Appeals reviewed the United States District Court for the Eastern District of Washington's 2004 decision denying the defendant's motion to dismiss the citizen suit seeking (1) a declaratory judgment that Teck violated the order issued by the EPA against Teck, and (2) enforcement of the order. The district court held that there was federal subject matter jurisdiction since the claim arose under CERCLA.

The district court also devoted much of its opinion to the evaluation of whether the suit involved impermissible extraterritorial application of CERCLA requiring the suit to be dismissed for the plaintiff's failure to state a claim. In this discussion the district court determined that CERCLA expresses a clear intent by Congress to remedy domestic conditions within the territorial jurisdiction of the U.S. and therefore extraterritorial application of CERCLA would be appropriate in this case.

The 9<sup>th</sup> Circuit Court of Appeals found that the District court was correct in its interpretation of CERCLA but differed from the lower court on the issue of extraterritorial application of CERCLA. The Court of appeals found that the release of hazardous waste from the slag into the Upper Columbia River was actually a domestic release and therefore required no analysis of extraterritorial application of CERCLA. The court reasoned that the leaching of hazardous waste constituted a release from the slag which comes from the Trail Smelter facility and such a release is a domestic release under CERCLA.

This is the first suit filed against a foreign company under CERCLA. In a world that is growing extensively into a global business community this case is important to all sectors of the business community. Perhaps this case will be most important to companies and their insurers who do business along the Mexican or Canadian boarder. This is so because of the joint and several liability structure of CERCLA and the importance of potentially responsible parties being able to attach liability for contamination to those who contribute to the contamination.

Because of the 9<sup>th</sup> Circuit Court of Appeal's expansive interpretation of what constitutes a release under CERCLA one can recognize how far this analysis might go to included releases that "re-release" hazardous waste once they are upon U.S. territory. Teck filed a petition for Certiorari on February 27, 2007 to seek the high court's ruling on this Canadian company's liability under U.S. law when it is in compliance with Canadian law. Teck claims that the 9<sup>th</sup> Circuit ruling would usurp the foreign-relations powers of the political branches of the United States and Canada and could provoke retaliatory actions against U.S. interests by Canada or its courts. These assertions make it a hard call as to whether a company that has contributed pollution to U.S. waterways for almost 100 years should be forced under U.S. law to contribute to the clean up of the hazardous waste it contributed.

KRISTOL WHATLEY

Alabama-Tombigbee Rivers Coalition v. Kempthorne, 477 F.3d 1250  
(11th Cir. 2007)

Alabama-Tombigbee Rivers Coalition (“the Coalition”), an Alabama non-profit corporation, and other plaintiffs appealed a decision of the U.S. District Court for the Northern District of Alabama which approved a decision by the Fish and Wildlife Service (“the Service”) to list the Alabama sturgeon as an “endangered species” and required the Service to also list a “critical habitat” for the sturgeon. The Coalition made three claims in their appeal to vacate the Service’s listing: that the Service failed to consider the relevant factors in reaching the listing decision; the Service failed to designate the critical habitat of the Alabama sturgeon when it listed the fish on the Endangered Species List; and the Service exceeded the power granted to it in the Commerce Clause. The district court granted the Service’s motion for summary judgment, and the U.S. Court of Appeals for the Eleventh Circuit affirmed.

The Coalition made three arguments in the claim that the Service failed to consider all the relevant factors in reaching its listing decision: the Service used older, “morphological taxonomy” instead of modern genetics; that the Service cherry-picked its scientific evidence; and the Service wrongfully interfered with the research of one of its own scientists. The Service used taxonomy evidence to aid it in deciding whether or not the Alabama sturgeon was a distinct species of fish from the more-abundant shovelnose sturgeon. The Service used morphological taxonomy because that method included other non-genetic factors in identifying separate species, but it also looked at mitochondrial cytochrome b gene evidence, the “d-loop” of the sturgeons’ mitochondrial DNA, and nuclear DNA. In those studies, small but consistent differences were found. In its final rule, however, the Service doubted that using genetic evidence could definitively resolve the issue of whether the Alabama sturgeon is a separate species, and the court deferred to the Service’s decision not to exclusively rely on it.

The Coalition also argued that the Service failed to consider all the relevant factors by ignoring scientific data. Specifically, the data that the Coalition thought the Service ignored was a single article in a statistics journal, not a zoological, ichthyological, or systematics journal, and two other studies which were not available for peer review in the ichthyological

community. The court understood that there would be differences of opinion, given the nature of taxonomy, and then said that disagreements in the field do not preclude agency decision making. Although that rule does not allow an agency to arbitrarily dismiss relevant scientific data, the court did not see such abuses by the Service. Instead, the court said the Service's decision was consistent with relevant professional organizations and was supported by scientific, peer-edited studies.

Third, the Coalition argued that the Service failed to consider all the relevant factors by interfering with the research of one of its own scientists. That researcher had been contacted by a scientist employed by the Coalition; when the Service heard that one of its own researchers was conducting studies for interested parties in the rule making, the Service stopped the researcher from further contacting the Coalition. The court held there was no wrongful interference by the Service because the Service was actually cluing the researcher into a key fact that he didn't know: the scientist wasn't a disinterested party. Furthermore, the court held that there was no evidence that the Service influenced the outcome of the study that its researcher was conducting. Therefore, the court held that the Service did consider all the relevant factors.

The Coalition's second claim against the Service was that Service failed to designate a critical habitat for the Alabama sturgeon, the remedy for which the Coalition argues should be vacating the Service's final rule. The District Court instead ordered the Service to have a proposed rule designating a critical habitat by May 14, 2006, and a final rule by November 16, 2006. According to the Coalition, vacating the Final Rule was the proper remedy because failure to propose and designate the species and the habitat at the same time would undermine the final listing decision. The Coalition argued that giving notice of the proposed critical habitat designation could encourage more people to participate in the Service's public comment process. The court, however, noted that under the Environmental Species Act, the Service could propose the critical habitat after closing the period for public comment on the proposed endangered species listing. The court stated that the purpose of the statute was not undermined by its interpretation because the purpose of the statute was to prevent the Service from indefinitely putting off the designation of a critical habitat for listed species.

The Coalition's third claim against the Service was that Congress

exceeded the power granted to it under the Commerce Clause by authorizing protection of an intrastate, noncommercial species. At issue was whether regulating the Alabama sturgeon was an activity that substantially affected interstate commerce. The Service pointed out, however, that three Circuit Courts of Appeals since *United States v. Lopez* have upheld the constitutionality of Congress authorizing the Service to list a purely intrastate species as endangered under the Endangered Species Act, and that no circuit court has held to the contrary. The court agreed with those courts that the Endangered Species Act bears a substantial relation to commerce. It pointed to the value of such species in illegal markets, and the value of a species' mere presence in its natural habitat for hunting, fishing, and tourism.

After ruling against the Coalition's three points on appeal, the Eleventh Circuit affirmed the decision of the district court. Its decision kept the Alabama sturgeon listed as an endangered species and required the Service to propose a critical habitat for the sturgeon.

JOHN H.A. GRIESEDECK

## STATE COURTS

Meyer ex rel. Coplin v. Fluor Corp., \_\_\_ S.W.3d \_\_\_, 2007 WL 827762 (Mo. 2007)

The Fluor Corporation operates the Doe Run lead smelter in Herculaneum, Missouri. Every year the smelter emits large quantities of lead into the local environment, which results in higher levels of lead and other toxins in the air in and around Herculaneum. Neither side disputed that lead exposure can often result in latent injuries, in which the physical effects are not identifiable for several years.

The plaintiff filed a petition asserting she is a member of a class of over 200 children in and around Herculaneum, that have been exposed to toxic emissions from the smelter. The petition alleged negligence, strict liability, and private nuisance. The plaintiff sought class status because she sought compensatory damages in order to establish a medical monitoring program for class members. The purpose of the medical monitoring program would be to provide ongoing diagnostic testing to determine whether the exposure to lead and other toxins has been caused or is in the process of causing an injury or illness.

The circuit court denied the class certification. It held that individual issues will necessarily predominate over common issues in this case and that the case would not be efficiently addressed on a class wide basis. On appeal, the plaintiff argued that the circuit court abused its discretion by incorrectly assuming that a present physical injury is a necessary element of a medical monitoring claim.

The Missouri Supreme Court ultimately held that the circuit court abused its discretion in denying the class certification. The court first noted that if there were a requirement for a present physical injury, the claim would essentially be extinguished and the plaintiffs would be barred from a full recovery. The court pointed out that the correct standard that should have been applied is that a plaintiff can obtain damages for medical monitoring upon a showing that the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case absent of the exposure. Then the plaintiff must show that medical monitoring is, to a reasonable degree of medical certainty, necessary in order to properly diagnose the warning signs of the disease. The Missouri

Supreme Court reversed and remanded the case, holding that the circuit court incorrectly required that there needed to be a present physical injury.

WILLIAM GUST