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Case Summaries

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CASE SUMMARIES

CERLCA
The State of Nevada Department of Transportation (NDOT) acquired a piece of property in Henderson, Nevada as part of a highway right-of-way in 1987. It was subsequently discovered that the site contained hazardous waste materials, including chlorine and magnesium, that had been produced for the war effort during World War II. The NDOT, Stauffer Management Co., and Rhone-Poulenc, Inc. jointly filed a cost-recovery action against the United States and Atlantic Richfield Co. (ARCO) for site remediation efforts under the authority of §107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). ARCO was named as a defendant as a predecessor-in-interest to the Anaconda Mining Company and Basic Magnesium Inc., which were responsible for the dumping of the hazardous substances. The NDOT alleged the existence of previously incurred costs, as well as future cleanup costs, stemming from the release or threatened release of waste materials. There were no genuine issues of material fact in this case.

ARCO moved for summary judgment asserting that CERCLA liability could not be applied to the pre-enactment dumping by a predecessor-in-interest. The Magistrate Court issued a Report and Recommendation (R&R) to the District Court on the defendants' summary judgment request, supporting denial of the motion. Despite objection by ARCO, the R&R was adopted by the District Court with minor revisions.

ARCO contended that the summary judgment was proper in favor of the defendants for a series of reasons. First, ARCO argued that use of negative implication to assess response cost liability for pre-enactment hazardous material dumping is no longer valid following the Supreme Court decision in Landgraf v. USI Film Products (114 S.Ct. 1483). Negative implication has been used by courts when interpreting CERCLA to determine environmental liability for the release, or threatened release of hazardous material. In Landgraf, however, the Court eliminated the use of negative implication to incur retroactive liability in Title VII cases pending appeal prior to enactment of the 1991 Civil Rights Act. Therefore, ARCO contended that previous CERCLA case law is overturned, and can now only be applied in a prospective manner.

Second, ARCO argued that congressional acceptance of deletion of an express retroactive provision during the drafting provided evidence that Congress did not have clear intent in retroactive application of CERCLA. Third, ARCO further argued that the Magistrate was incorrect in his reliance on U.S. v. Shell Oil (605 F. Supp. 1064 (D.Colo.1985)) because it reversed the presumption against retroactive liability which is not permissible under the Landgraf holding. Finally, ARCO argued that the overall lack of clarity, and overweighing partisan controversy in the legislative history of CERCLA concerning retroactive application of liability, precludes the finding of clear intent required by Landgraf to overcome the presumption.

CERCLA has been interpreted by the courts since its enactment as applying retroactively in determining environmental liability for the release or threatened release of hazardous materials. There is not an explicit retroactive liability clause within CERCLA, but such liability has been found through the use of negative implication, such as found in the lead appellate case United States v. Northeastern Pharmaceutical & Chem. Co. (810 F.2d 726 (8th Cir.1986). An explicit retroactive liability limitation was inserted in CERCLA concerning natural resource damage liability. There was no such limitation on remediation response costs. Therefore by use of negative implication, an impressive body of CERCLA case law has been created in support of applying in providing for retroactive liability for response costs...

The District Court denied the summary judgment. The court recognized the presumption against retroactive liability was a continuing and valid doctrine. However, it determined that this presumption could be overcome in light of overwhelming evidence, including textual evidence and through legislative intent found in the statute's legislative history in favor of retroactive application. The court found that the Supreme Court in Landgraf was not forbidding the use of negative implication in statutory construction, but instructing lower courts when examining statutes to take into account the overall intent behind the entire statute rather than just expanding the intent of particular provisions within the statute to overbroad application. The court concluded that the presumption against retroactive application of statutes still exists in substantive matters under Landgraf, unless the statute only affects procedure.

The district court quickly dismissed ARCO's secondary arguments following a lengthy discussion of established case law in light of the court's position. The court held that the deletion of the express retroactive application clause did not affect the impact of the statute's intent in its entirety. Moreover, the statute's effective date was found irrelevant to retroactivity issues because it is simply an initiation point for filing suit not an indicator of prospective application. In addition, the lack of clarity found by ARCO was not seen by the court.
Instead, the court found that when examining CERCLA in its entirety, congressional intent clearly indicated its desire for retroactive application for response costs, with specific limitations on natural resource damage liability.

- by Christopher Pickett

Lion Oil Company, Inc. v. Tosco Corp., 90 F.3d 268 (8th Cir. 1996).

Lion filed suit against Tosco under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§9601 et seq., for indemnification of costs associated with the cleanup of hazardous waste on its oil refinery site. The site was purchased by Lion from Tosco in 1985.

During its ownership, Tosco constructed two hazardous waste management units (HWMUs) and operated several solid waste management units (SWMUs). The HWMUs and SWMUs were used to handle hazardous materials produced by the oil refinery. When Lion purchased the oil refinery from Tosco, the parties prepared an Asset Purchase and Sale Agreement. The agreement provided that Tosco would indemnify and hold Lion harmless for costs, fines, penalties and liabilities resulting from environmental harms arising from any of Tosco’s pre-closing date actions, including harms not yet inflicted or discovered. The agreement specifically referred to any liabilities arising under CERCLA violations. In 1986, the parties executed an Amendment and Release in which Lion released Tosco from any rights and claims Lion may have had against them under the aforementioned clauses of the Asset Purchase and Sale Agreement. In 1988, Lion applied for a Resource Conservation and Recovery Act (RCRA) permit to close the HWMUs. The permit required Lion to correct any leakage or potential leakage of hazardous materials from the SWMUs which occurred in violation of CERCLA. The requirement prompted to initiate this suit under CERCLA, for contribution of clean-up costs from Tosco.

Lion Oil Company (Lion) appealed the grant of judgment on the pleadings in favor of Tosco Corporation (Tosco) by the United States District Court for the Western District of Arkansas. On appeal, Lion argued that the district court erred in finding that the Agreement and Release comprised a general release of Tosco’s CERCLA liability.

The court found that the indemnity agreement entered into by Tosco and Lion was of the type permitted under CERCLA. It reasoned that courts enforce such contracts whenever the provisions of the contract manifest a “clear and unmistakable intent” of the parties to do so.

Lion argued that the contracts were ambiguous and therefore should be supplemented by extrinsic evidence to clarify the ambiguity. The court, however, referred to Arkansas state law which adopts a “plain meaning” point of view. Thus, the court decided that because the words used in the contracts were not unclear or ambiguous on their face, the parol evidence rule prohibited the admission of extrinsic evidence to alter the “otherwise ambiguous contracts.”

The judgment of the trial court was affirmed.

- by Rebecca J. Grosser

Gopher Oil, Co. v. Bunker, 84 F.3d 1047 (8th Cir. 1996).

Gopher Oil brought a declaratory judgment action against the Germaine Romness estate (the “Estate”) under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Minnesota Environmental Response and Liability Act (MERLA), and Minnesota tort and contract common law, Gopher sought to have the Estate declared liable to the extent of Gopher’s liability for the release of hazardous substances prior to Gopher’s ownership of the site.

In the 1960s, Gopher State Oil Inc. owned and operated a hazardous waste dump site known as Brooklyn Park. Gopher’s only shareholders were Charles and Germaine Romness. Bame Oil acquired Gopher State Oil through a stock acquisition from the Romnesses in 1973. In accord with the stock transfer, the Romnesses indemnified Bame with respect to any of Gopher State’s liabilities at the time of closing. Bame Oil then assumed Gopher State’s liabilities and distributed the assets to itself, changing its name to Gopher Oil. Although both of the Romnesses are deceased, Germaine’s estate remains open.

After Bame Oil acquired Gopher State, the Environmental Protection Agency (EPA) discovered hazardous substances at the Brooklyn Park site. The EPA expended in excess of $1.3 million dollars to clean the site. CERCLA, 42 U.S.C. §§9601-75, as amended, authorizes the EPA to institute cost recovery actions against those parties responsible for the environmental contamination. In January 1994, the EPA requested reimbursement from each of ten parties, including Gopher Oil, potentially responsible for the contamination, stating the EPA’s expectation to bring suit the following year.

Gopher Oil filed this declaratory judgment action against the Germaine Romness estate on four counts. Gopher alleged that the Estate is liable under CERCLA and MERLA, Minn.Stat.Ann. §§ 115B.01-115B.24 (West 1987 & Sup. 1994-95) to the extent of Gopher’s liability. Gopher also sought for declaration of the Estate’s primary tort liability to the extent of Gopher’s liability to the EPA based on the fact that the Romnesses actively owned the site at the time of the release. Finally, Gopher requested indemnity based upon the 1970 agreement between Bame Oil and the Romnesses regarding the Gopher State acquisition. The district court granted the Estate’s motion to dismiss.
for lack of subject matter jurisdiction. The court held the claims were not ripe because at the time Gopher initiated this declaratory judgment action, the EPA had not filed suit for the CERCLA violation naming Gopher as a defendant. The court also issued summary judgment in favor of the Estate on the MERLA, tort, and contract law claims on the basis of collateral estoppel.

In March 1996, the EPA filed a CERCLA cost recovery suit against Gopher Oil. On appeal, Gopher appeals the dismissal for lack of jurisdiction. The Estate cross appeals. Gopher Oil. On appeal, Gopher a CERCLA cost recovery suit against Estate on the MERLA, tort, and summary judgment in favor of the Estate on the CERCLA violation naming Gopher action, the

The Eighth Circuit upheld the district court on the MERLA and tort claims because no actual controversy existed. Specifically, there was no immediate threat of either type of liability. However, because a CERCLA liability suit had been instituted against Gopher, the summary judgment as to this issue was reversed. The Court followed the holding of Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1389 (5th Cir. 1989), which states that before the cost-recovery case is initiated, a potentially responsible party (PRP) cannot seek judicial review of the EPA. The Court determined the CERCLA issue to be ripe. Because one of CERCLA's goals is to avoid piece-meal litigation, the court remanded for further determination on effectuating that goal.

The Minnesota Court of Appeals (referring to MERLA) previously held that these environmental liabilities were not contemplated at the time of the agreement. Therefore, because MERLA was not enacted, or pending, at the time of the acquisition indemnity agreement, the liabilities could not have existed at closing. The Court adopted by analogy the Court of Appeals reasoning and applied it using CERCLA, upholding the district court's dismissal regarding the contractual indemnity agreement issue.

-by Rebecca J. Grosser

Board of Regents of the University of Washington v. Environmental Protection Agency, 86 F.3d 1214 (D.C.Cir. 1996).

The Tulalip Landfill (the landfill), which operated from 1964 to 1979, was placed on the National Priorities List (NPL), by the Environmental Protection Agency (EPA) under the authority of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675. The NPL is a prioritized list of disposal sites that require urgent environmental remediation. The leachate leakage at the landfill was detected by the EPA in 1988, in both pond water formation on the top of the landfill and through a berm.

The placement of a contaminated site on the NPL is determined by a Hazard Ranking System (HRS) value based on a multifactor formula calculation. A HRS value of 28.5 or higher is necessary for a site to be placed on the NPL. The EPA in its final listing decision for Tulalip HRS assigned a value of 50 to the landfill.

The petitioners were potentially responsible parties for remediation costs. Balance Council, a Washington State "labor and business" organization intervened in the suit. The petition sought judicial review of the EPA listing decision placing the landfill on the NPL. The review claim focused on challenging the EPA's environmental threat factor determinations in the HRS formula as arbitrary and capricious. The disputed threat factors were primarily the sources of the hazardous substances detected, reliance on the testing laboratories analysis, and the location of the landfill itself.

The most significant challenge to the listing concerned the water samples of the hazardous substances at the landfill discovered during the 1988 site inspection. Petitioners challenged the method used for obtaining a water sample at the site. Two principle methods of retrieving water samples exist. The first method is a filtered sample, typically used in conjunction with an invasive groundwater test, wherein the natural metals in the soil are filtered out so as to remove potential for biasing the data. The second method uses the unfiltered sample to test surface water, wherein the naturally occurring soil metals are undisturbed which may allow for risk of potential contaminant overstatement. The petitioners contended that the Tulalip samples should have been filtered rather than unfiltered, and thereby reducing the HRS value of samples. The court rejected this argument upholding the EPA's practice of using unfiltered samples, even with the risk of being over-inclusive.

Concerns raised by the petitioners, alleging possible other reasons for contamination, were rejected in deference to EPA technical expertise in interpreting sample data from the landfill.

Next, the petitioners argued that the laboratories contracted to test the samples were inadequate in their general performance and tracing documentation. Such inadequacies could skew the results so as to make it unreasonable for the EPA to rely on such information. It was shown that there were irregularities within certain contracted laboratories during the time the Tulalip sample testing was conducted. The court held that such irregularities, while potentially increasing the risk of inaccurate results, did not preclude the EPA from relying on analysis from those laboratories. The court noted that the EPA is not held to a perfection standard but one which is to “assure, to the maximum extent feasible” the level of contamination at the tested sites.

The location classification of the Tulalip landfill also was a decisive
factor in the determination of the NPL listing. The EPA concluded that the landfill was located within wetlands and adjacent to a National Estuary Program study area. This determination alone was sufficient to score the landfill with a HRS value of 30. The petitioners' initial brief states, in conclusory fashion with no supporting evidence, that this determination was arbitrary in that there was no independent EPA determination of the existence of wetlands surrounding the Tulalip site. This point was later expanded in the reply brief, precluding a response, to conclude a new argument of incorrect reliance on the part of the EPA in the form of outdated information concerning the wetlands determination in the Tulalip area. The Court upheld the EPA wetlands determination by holding that issues not raised until the reply brief are waived.

Petitioners' subsidiary arguments along with several respondent procedural motions were dismissed as moot. The Court of Appeals concluded that the Tulalip listing on the NPL was valid and not in contravention of the arbitrary and capricious standard established under 5 U.S.C. § 706(2)(a).

**by Christopher Pickett**

**RCRA**

Respondent is the owner of a Kentucky Fried Chicken restaurant operated on land in Los Angeles County. The county health department ordered KFC Western, Inc. to clean up contaminated soil on the site discovered during the restaurant's construction in 1988. Three years after KFC removed the soil at a cost of $211,000 the company brought suit against the land's former owners, Alan and Margaret Meghrig. KFC's contention is that the Meghrigs are responsible for "equitable restitution" for the cleanup costs KFC incurred because, as previous owners of the land, they were contributors to the site under the Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (a), (1988 ed.).

The District Court dismissed the case on the grounds that the waste at issue did not pose an imminent danger to the environment at the time the suit was filed in accordance with language that requires such in § 6972 (a) (1) (B) of the RCRA. The court held further that § 6972 (a) of the Act does not allow recovery for cleanup costs that have been incurred in the past. This decision was overturned by the Ninth Circuit Court of Appeals, which found the District Court had authority to award compensation for past costs incurred in a cleanup. The Court of Appeals upheld KFC's assertion that it was enough if the waste at issue presented imminent danger at the time of the cleanup. The Supreme Court granted certiorari to hear this case because the Ninth Circuit's decision directly opposed the Eighth Circuit's decision in *Furrer v. Brown*, 62 F.3d 1092, 1100-1101 (1995), and because the Ninth Circuit addressed the RCRA language addressing imminent danger in an unprecedented fashion.

The Supreme Court began its analysis by contrasting the goals of the Comprehensive Environmental Response, Compensation and Liability Act against RCRA's objectives. The purpose of CERCLA, Justice O'Connor wrote, is cleanup of hazardous waste and compensation of costs, while the RCRA is primarily targeted at reducing production of such waste and dealing with it properly once produced. Justice O'Connor rejected the Ninth Circuit's remedy of awarding past cleanup costs. Her analysis in a plain reading of the statute was determinative that RCRA § 6972 allows a private citizen suit to seek only a mandatory or prohibitory injunction (i.e. one that demands that a responsible party take action or refrain from further violation). Justice O'Connor contrasted this remedial scheme with the types of relief provided for in CERCLA, which include recovery of removal costs by the government, response costs incurred by others and contribution from a party liable or potentially liable for these costs. 42 U.S.C. § 9607 (a) (4) (A) & (B); § 9613 (f)(1), (1988 ed.). Justice O'Connor concluded that the deliberate absence of this language in RCRA's remedial scheme demonstrates Congress did not intend to provide relief for past cleanup costs in the RCRA.

The Supreme Court further stated that RCRA § 6972 (a) (1) (B) allows a private party to sue when the waste at issue "may present an imminent and substantial endangerment of health or the environment." Justice O'Connor defined imminent as an immediate threat and concludes that this section was designed toward reducing present or future risks of harm, not past. The lack of two additional factors, a statute of limitations and a requirement that response costs sought are reasonable, make RCRA what she labeled an "irrational mechanism" for private parties to seek compensation for past costs.

In conclusion, the Supreme Court reversed the judgment of the Ninth Circuit on the basis that past cleanup costs cannot be recovered under RCRA and the Act permits suit by a private party only if the waste at issue poses an immediate threat, not that it did pose a threat at some time in the past.

**by Wendy Hickey**

**CAA**
Ober v. Environmental Protection Agency, 84 F.3d 304 (9th Cir. 1996).

Petitioners challenged the EPA's approval of Arizona's State Implementation Plan (SIP) for the control of airborne particulate matter pursuant to the Clean Air Act. Petitioners, a group of Phoenix citizens, alleged the SIP violated the Clean Air Act because the plan failed to: (1) address the 24-hour standard, (2) consider transportation control measures as presumptively "reasonably available control measures" and (3) provide adequate state assurances for implementation of the plan.

The Arizona SIP addressed

**MELPR**
the impracticability of attainment of the PM-10 annual standard and not the PM-10 24-hour standard. The 24-hour standard concerns the expected number of days per calendar year where a 24-hour average concentration above 150 micrograms per cubic meter is equal to or less than one. The annual standard is attained when the expected annual arithmetic mean concentration is less than or equal to 50 micrograms per cubic meter. The EPA took the position that since the annual standard could not be obtained, the Phoenix area would have to be reclassified as a “serious nonattainment area.” Therefore, it was unnecessary to address the 24-hour standard.

The Court of Appeals agreed that failure to meet one standard was sufficient to reclassify the area as “serious.” However, due to the different functions of the standards, the Court held that the SIP must address both the annual and the 24-hour standard. The Ninth Circuit determined that the 24-hour standard protects against short-term exposures to high PM-10 levels as opposed to high PM-10 concentrations throughout the year.

Petitioners claim that the Transportation Control Measures were presumptively “reasonably available control measures.” In Delaney v. EPA, 898 F.2d 687 (9th Cir. 1990), the Court held that the measures listed in 42 U.S.C. § 7408 were presumed reasonably available. In order to reject any of these measures a state must show that the measure would not advance attainment, would cause adverse impact, or would take too long to implement. Petitioners argued that Arizona did not meet the requirements of Delaney. However, Delaney was decided before the 1990 Amendment; and therefore, the EPA was no longer bound by that decision. The Court held that the EPA did not abuse its discretion by rejecting the contention that the Transportation Control Measures were presumed to be “reasonably available”. Instead, the reasonableness of the control measures should be based on local circumstances.

The Court also rejected petitioner’s claim that the EPA’s approval of the Implementation Plan violated the Clean Air Act because the plan failed to provide necessary assurances by the State for the implementation of plan provisions that rely on a local or regional government or agency, as required by 42 U.S.C. § 7410(a)(2)(E)(iii). The EPA did not abuse its discretion in determining that the Implementation Plan had adequate assurances, in that Arizona’s statute clearly addressed state responsibility and action for enforcing plan provisions that rely on local and regional entities.

Petitioners also asserted that the EPA violated the Administrative Procedures Act when it: (1) accepted and relied on additional information justifying the rejection of certain control measure submitted after the comment period; (2) substituted its own determination of “reasonable further progress” and (3) included in the PM-10 Implementation Plan measures from the Carbon Monoxide and Ozone Implementation Plans. The Court upheld petitioners’ contention, and remanded the case to the EPA to provide an opportunity for public comment on the post-comment period justifications for rejecting control measures and on the “reasonable further progress” demonstration.

The Court also awarded attorneys’ fees and expert witness costs to petitioners pursuant to 42 U.S.C. § 7607(f).

Texas Municipal Power Agency v. EPA, 89 F.3d 858 (D.C. Cir. 1996).

The 1990 Amendment to the Clean Air Act included provisions to limit acid rain by means of marketable permits. This case concerns the original distribution of permits. Petitioners in the case were several utilities claiming that they had been “shortchanged” in the distribution of permits. The court denied all of the utilities claims.

First, the court held that petitioners’ claims were not barred by statutory restrictions on judicial review. Section 402(4)(C) of the Act provides that “corrections” to the allowances are not subject to “judicial review.” The court struggled with the problem of how to decide if the issue in the instant case was a “correction” or just an addition, and if the provision barred both substantive and procedural claims to the same extent. The court found that the section did not bar any of the claims at issue in the case. The court also held that the provision dictating that actions brought under the Act be filed only in the D.C. Circuit Court of Appeals was a venue provision only. Because the EPA had failed to object, the venue requirement had been waived.

The court next examined the plaintiffs’ substantive claim. American Municipal Power—Ohio, Inc. (“AMP-Ohio”) claimed that the EOA had improperly used average sulfur content of fuel burned by AMP-Ohio plant when calculating the sulfur amount for the purpose of distributing the permits. Since the data that the EOA typically used to calculate the emissions of a given
electric utility were not available for AMP-Ohio’s plant, the EPA allowed AMP to submit figures. However, AMP’s figures were inadequate, the EPA used the average sulfur content data. An AMP-Ohio plant was included in the allowances on the National Allowance Database (NADB), but less than AMP-Ohio expected. Therefore, AMP-Ohio raised a number of substantive and procedural claims.

Substantively, the court held that the EPA’s interpretation of the term “actual emission rate” did not run against the statute or Chevron analysis. The court found that the statute did to address what the EOA should do when the database it was using did not include a plant, such as in AMP-Ohio’s case. In the absence, the court followed the second part of the Chevron analysis and found that the agency’s solution was reasonable. The court noted that the EPA had published that data it expected to have from companies in AMP-Ohio’s position, and the EPA was under no duty to repeatedly warn a party when its submission does not meet the published requirements. Procedurally, the court held that the EPA did not err when it did not affirmatively correct AMP-Ohio’s submissions of emission rates because an agency does not have to respond to comments if the answer to the comment has already been answered in a published notice. The EPA also did not err when it used a calculated emission rate rather than the rate AMP-Ohio had submitted.

Indiana Municipal Power Association ("IMPA") and Wyandotte Municipal Service Commission ("Wyandotte") complained about the denial of any allowances for their plants because they had not met the statutory and administrative deadlines to submit data. IMPA claimed it did not submit figures because its plants were new and it misunderstood that the reporting set out in 1991 applied to 1992 units. The court held that since parties in this claim could not have reasonably concluded that a 1991 notice did not apply 1992 units, the claim must be denied. The IMPA neither submitted the data in time, nor did they do anything to demonstrate why the data was unavailable. Wyandotte’s claims were dismissed on similar grounds.

Texas Municipal Power Authority ("TMPA") argued that the EPA misread a section of the Act that allows adjustments for "prolonged" plant outages. As a result, TMPA contended that the EPA should have allowed TMPA an adjustment units fuel consumption in the measuring period for a month long shutdown. The EPA had interpreted the statutory language allowing for allowances from "prolonged" shutdowns to be three calendar months. Again, the court performed a Chevron analysis. The court found the term "prolonged" to be ambiguous. However, the court found the EPA’s interpretation, that "prolonged" equaled three months, to be reasonable. Three months was longer than the average outage, but not so long as to effectively remove the provision from the statute. The court also dismissed various procedural claims raised by TMPA.

Last, Nebraska Public Power District Southwestern Public Power District, Southwestern Public Service Company and Arco Coal Company (collectively, “NPPD”), contended that the EPA misread a statute governing the conversion of disparate emissions into a standardized form. NPPD contended that the EPA erred because the provision applies to only measurements taken at one instance in time rather than a yearly average. The court, however, pointed out that this petitioner’s argument was without merit, noting that the NPPD could not point out why Congress would fail to require limitations in one form, but not in another.

- by Kevin Murphy

CWA
Citizens for a Better Environment v. Union Oil Company of California, 83 F.3d 1111 (9th Cir. 1996).

Citizens for a Better Environment (CBE) brought an action under the Clean Water Act (CWA), claiming that Union Oil (UNOCAL) violated effluent and clean water standards. The court held that the citizen suit could continue even though UNOCAL had paid a settlement to avoid state prosecution, because the settlement did not come under a CWA rule precluding citizen suits where the state has already conducted enforcement actions.

UNOCAL operates an oil refinery in the San Francisco Bay area. Waste water from the plant must meet standards set by the California Regional Water Quality Control Board. Water quality standards were raised, and UNOCAL could not meet the standards, citing technological difficulties. UNOCAL and other refineries entered into a cease and desist order (CDO), which had the effect of letting UNOCAL make a payment to the Regional Board (of which UNOCAL’s share was $780,000) that would let UNOCAL comply with the limits in 1998 rather than immediately. CBE filed suit. The district court held that a subsequent citizen suit was not precluded by 33 USC §1319(g)(6)(A)(ii-iii), which is designed to restrict citizen suits to situations where there is a “final order not subject to judicial review,” and there is “penalty” that has been assessed under that subsection or “comparable state law.”

On appeal, the Ninth Circuit held that §1319(g)(6)(A)(i) did not apply to this lawsuit based on the “penalty” and “comparable state law” language of the section. In deciding that the provision did not apply, the court held that the payment of money to the Regional Board was not a “penalty.” First, UNOCAL had insisted on characterizing the money as a “payment” rather than a penalty, in order to maintain an air of good standing for the company, and to avoid a scrutiny regarding the “nature and amount” of a penalty. The court pointed out that UNOCAL could not have it both ways: if it wanted to avoid the “penalty” language earlier, it could not avail itself of the benefits of that language later. CBE had also pointed out that while penalties were
due within a certain time limit, UNOCAL's payment would have been significantly after expiration of the time limit. Having held that the settlement was not a "penalty," the court addressed whether the settlement had also been under "comparable state law."

The court held that the CDO had not been written under "comparable state law." The court expressly refused to adopt the reasoning of *North and South Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552, 555-556 (1st Cir. 1991). The court's first reason was that a plain reading of §1319 meant that the provision that authorized the CDO would have had to be specifically for the purpose of setting penalties. The court disagreed with UNOCAL's argument that the California provision authorizing the CDO, though not a penalty statute, was part of the same statutory scheme, thus constituting "comparable state law." In addition, the court noted that §1319(g) required public notice and comment procedures. The California provision authorizing the CDO gave no analogous opportunity. Third, if the California statute authorizing the CDO were considered a analogous penalty, then state environmental action would preclude more citizen suits than federal environmental rules.

The court also held that §1319(g)(6)(A)(vi), which precludes citizen suits if the State "has commenced and is diligently prosecuting an action under a State law comparable to this subsection," would not bar a citizen suit. The court had already held that the CDO was not under "comparable state law." In addition, since the CDO had already been entered, there was no longer ongoing "enforcement."

Finally, the court held that the CDO did not effectively delay the compliance date for discharges of the type that UNOCAL were putting into the bay. UNOCAL had argued that the CDO served to change UNOCAL's compliance date, which would have meant that CBE had failed to state a claim upon which relief could be granted. The trial court had held that the CDO was the equivalent of prosecutorial discretion and did not act as a shield against a citizen suit. The instant court agreed with the trial court, and added that 33 USC §1342(o) contains an "anti-backsliding" provision, which is a substantive restriction on regulators so that any new water standard will be more restrictive than the one it replaced.

Where the CDO to create a later compliance date, the court ruled that it would be precluded by the anti-backsliding provision.

*by Kevin Murphy*

**In re Marine Shale Processors, Inc.,** 81 F.3d 1371 (5th Cir. 1996).

The EPA instituted suit against Marine Shale Processors, a hazardous waste treatment facility, for alleged violations of the Resource Conservation and Recovery Act ("RCRA"), the Clean Air Act ("CAA") and the Clean Water Act ("CWA") in the U.S. District Court for the Western District of Louisiana. The District Court found that the facility had violated the provisions of all three acts. Marine Shale was fined and permanent injunctions prohibiting further violations were granted against Marine Shale. Marine Shale appealed the decision.

This case arises from a petition for mandamus involving two issues. First, the status of the coercive relief ordered against Marine Shale and second, Marine Shale's request for coercive relief against the EPA. On appeal, the Fifth Circuit continued the injunctions and the stay pending a supplemental opinion from the district court explaining its decision to issue the injunctions. Judge Duplantier issued a ruling on the motion orally and on the record. He stated that Marine Shale was asking the court to permit it to operate pending the very lengthy process of pursuing an application from the State of Louisiana for a permit to operate as an incinerator of hazardous waste. Moreover, Judge Duplantier stated that he had no authority to allow Marine Shale to operate without a license or to prevent the EPA from interfering with Marine Shale operations.

The refusal to exercise the equitable power of the court to stop a certain activity does not render the activity legal or immune from further action. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). In other words, staying the injunctions against Marine Shale did not make their activities legal. Therefore, the stay is still in place pending formal findings of fact and conclusions of law (in accord with FRCP 65(d)) from Judge Duplantier either explaining his decision, lifting the stay or dissolving the injunctions.

Marine Shale also requested an order preventing the EPA from interfering with its operations, including (1) taking any action against Marine Shale during the application process, (2) exercising its prosecutorial power against Marine Shale's customers, and (3) informing inquiring entities as to the agency's litigating position. The Court of Appeals agreed with the District Court that it had no power to grant such an extraordinary motion. Marine Shale cited no statute, constitutional provision, or source of law providing a court the right to gag the EPA or prevent them from exercising their power to respond to violations of the RCRA. Therefore, the petition was denied.

*by Tom Collins*

**NEPA**

Swanson v. United States Forest Service, 87 F.3d 339 (9th Cir. 1996).

The Idaho Sportsmen's Coalition (ISC) challenged United States Forest Service's (Service) sale of timber on National Forest land in Idaho. ISC alleged that the Service did not comply with the Endangered Species Act (ESA), the National Environmental Policy Act (NEPA), and the National Forest Management Act (NFMA), and the Clean Water Act (CWA) in the timber sales. Part of ISC's claim specifically related to the Snake River's chinook salmon, an
endangered species. The circuit court denied all of ISC's claims. The Ninth Circuit Court of Appeals affirmed the lower court's decision, observing that ISC provided little support for most allegations, and dismissed the Clean Water Act claims on procedural grounds.

The dispute arose from the Service's sale of two portions of the Nez Perce National Forest in Idaho. In preparation for the timber sales, the Service conducted assessments of the effect logging would have in the area, including the effect on sensitive animal species, such as the chinook salmon. The Service found that the logging would have no effect. After the sales were awarded, but before the transactions had been completed, the chinook salmon was upgraded from a "sensitive species" to an "endangered species." The Service delayed the sales to conduct further study on whether the salmon would be affected by the sales. The Service again found that the sales would have no significant effect on the salmon. At the time of filing briefs, one sale had been completed, and the other was near completion.

ISC filed its complaint in September 1993, alleging that the Service had violated several environmental statutes because the pre-sale studies had been inadequate. ISC specifically alleged that the Service had made inaccurate reports and had failed to consider the impact of the sales on animal habitat and recreational activities in the area. ISC was granted a temporary injunction.

The court sustained the lower court's holding that the Service complied with NEPA and NMFA claims. The court noted that the NEPA is a procedural statute, in place to ensure that agencies take a "hard look" at the environmental impact of government projects. The court held that the government took an adequate hard look at the timber sales, including comprehensive reviews of the effect on animal species, recreation, visual quality, cultural resources, wilderness, the recreation industry, and game. The court refused to "fly-speck" the Service's environmental analysis.

The court also held that the addition of the chinook salmon to the endangered species list was not a significant circumstance to require an supplemental EIS because the salmon's legal status had changed, but its status in the wild had been unchanged. Therefore, the earlier analysis, the court held, was still valid. Finally, the court held that the Service had complied with NMFA requirements that species in the area must be monitored. The court pointed out that the ISC had little support for its claims, since the Service was conducting continued monitoring in several areas.

The court dismissed ISC's Clean Water claims because of late filing. The court also refused to allow ISC to incorporate outside sources into their brief.

- by Kevin Murphy

Inland Empire Public Lands Council v. United States Forest Service, 88 F.3d 754 (9th Cir. 1996).

The plaintiffs, a number of environmental groups, challenged timber sales in the Upper Sunday Creek Watershed region of the Kootenai National Forest by the United States Forest Service. Plaintiffs claimed that the Service's analysis of the impact of the seven species — the lynx, boreal owl, flammulated owl, black-backed woodpecker, fisher, bull charr, and wet-sloped cutthroat trout — was inadequate under both the National Forest Management Act and the National Environmental Policy Act of 1969.

The district court concluded that the Service's analysis was sufficient and granted summary judgment for the Service and refused to enjoin the sales. The plaintiffs appealed, arguing first that the Service failed to comply with 36 CFR § 219.19, which requires a minimum level of population viability analysis. Second, the plaintiffs contended that the Service violated the National Environmental Policy Act (NEPA) because the viability analysis it did perform only examined the effect of the timber sales on wildlife populations living within the project boundaries. The Ninth Circuit affirmed the decision of the district court.

The appellate court concluded that the habitat management analysis conducted by the Service for the black-backed woodpecker, lynx, fisher, and boreal owl was not in any way "plainly erroneous" or "inconsistent" with the regulatory duties under 36 CFR § 219.19. They further decided that the Service's methodology reasonably ensured the viability of populations by requiring that the decision area contain enough of the types of habitat essential for survival. The court recognized that the Service's methodology assumes that maintaining the acreage of habitat necessary for survival would in fact assure a species' survival. The court found, however, the assumption reasonable and that the Service's habitat analyses for the black-backed woodpecker, lynx, fisher, and boreal owl were not arbitrary or capricious.

Moreover, the court did not find the less rigorous analysis performed for the flammulated owl, the bull charr trout, and the wet-sloped cutthroat trout arbitrary and capricious. The court concluded that the Service's failure to engage in a more intensive analysis for the bull charr trout and the wet-sloped cutthroat trout was understandable since neither species would be affected by the timber sales. Also, the Service's treatment of the flammulated owl was reasonable. The Service did not engage in a more extended analysis of the owl's nesting and feeding habitat requirements because such data were unavailable. The court held that an analysis that uses all the scientific data currently available is a sound one.

Finally, the court concluded that the Forest Service performed its duty under NEPA. The Service never limited its analysis of cumulative effects to the Upper Sunday area. In
addition, the court declared that adoption of the plaintiffs' position as a rule of law would be impractical. If adopted, an agency would have to adopt a rule of law would be impractical.

The Ninth Circuit, therefore, affirmed the decision of the district court and upheld the Service's population viability and cumulative effects analysis.

- by Constance S. Chandler

CONSTITUTIONAL CLAM

Plaintiffs were commercial fisheries who brought suit against Frances S. Buchholzer, as Director of the Ohio Department of Natural Resources, and Richard B. Pierce, Chief of the Division of Wildlife, and George B. Voinovich, Ohio State Governor. Plaintiffs argued that the regulations and state statutes prohibiting the commercial fishing of walleye and yellow perch were unconstitutional in that they violated the Commerce Clause of the Constitution. The Sixth Circuit began its analysis by noting that state laws that regulated fish and wildlife protection are within the reach of the Commerce Clause.

The court next applied the two-part test established by Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981). First, the court found that the Ohio statutes in question did not constitute "simple economic protectionism" because the statutes did not favor Ohio fishermen over out-of-state fishermen. The plaintiffs had attempted to show that the statutes discriminated against in-state fishermen by implying that the actual goal of the statutes was to promote the economic interests of Ohio's tourism industry. The plaintiffs also asserted that the statutes were discriminatory against them in that they promoted sport fishing while harming the nation's food industry.

The court found that such regulation would not be a per se violation of the Constitution because the allocation of resources by the statute was not arbitrary or capricious, and did not infringe upon any fundamental right.

After successfully passing the first phase of the Clover Leaf test, the statutes then were analyzed to determine if their effect on interstate commerce was "clearly excessive in relation to the putative local benefits." The court found that the local benefits of the statutes appeared to outweigh any burden imposed on interstate commerce because of the "substantial state interest in promoting conservation of natural resources." Therefore, because the statutes did not impose a "clearly excessive" burden on interstate commerce, they did not violate the Commerce Clause.

Plaintiffs argued, however, that the statutes did not promote conservation of natural resources, but merely benefited sport fishermen while they harmed commercial fishermen. The court stated that even if this were true, benefiting sport fishermen may reflect a legitimate state interest and therefore would not invalidate the statutes. Because the plaintiffs could not show that the statutes failed the test established in Clover Leaf, the court held the commercial fishing statutes to be valid.

- by Cynthia Giltnar

NWPA

The Utility and State Commissions, which paid fees pursuant to the Nuclear Waste Policy Act (NWPA), sought review of an order of the Department of Energy (DOE) declaring that the DOE was not obligated to dispose of high-level radioactive waste or spent nuclear fuel (SNF) in the absence of an operational repository or an interim storage facility constructed under the NWPA.

The Nuclear Waste Policy Act of 1982 ("NWPA") allowed the Secretary of Energy to enter into contracts with the owners and generators of radioactive waste and spent nuclear fuel (hereafter referred to as "SNF"). Under the terms of the NWPA the private parties are to pay the Secretary fees set forth in the statute. In return, the Secretary, "beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or SNF involved". 42 U.S.C. § 10222(a)(5)(B) (1994).

In 1993, several parties who entered into agreements with the Secretary, including states and utilities, became concerned with the DOE's ability to meet its obligations by the January 31, 1998, deadline. The DOE responded in February 1994, by issuing a letter stating that the DOE did not have a "clear legal obligation under the NWPA to accept SNF absent an operational repository or other facility constructed under the NWPA". In its final interpretation, issued on April 28, 1995, the DOE concluded that it had neither an unconditional statutory or contractual obligation to accept SNF in the absence of a repository or interim storage facility constructed under the NWPA. The DOE also concluded that the DOE had no authority to provide interim storage in the absence of a facility constructed under the NWPA.

Review of the DOE's final interpretation of the construction of a statute is governed by Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Under the 2-step analysis in Chevron, the Court must first ask whether Congress has spoken unambiguously to the question at hand. If so, then the Court must follow that language. If not, the Court must apply the second step and determine if the agency's interpretation is "reasonable and consistent with the statute's purpose."

On appeal to the D.C. Circuit, the utilities and state commissions argued that § 302(a)(5)(B) means what
it says, that “in return for the payment of fees . . . [DOE], beginning not later than January 31, 1998, will dispose of the [SNF],” and that DOE must begin accepting SNF on or before January 31, 1998. The DOE contended that the obligation was conditioned on the availability of a repository or other facility authorized, constructed, and licensed in accordance with the NWPA. The DOE based its argument on interpretation of the statute as a whole. They argued that use of the term “dispose” created such a condition because “disposal” was defined by the statute as “the emplacement in a repository of . . . spent nuclear fuel . . . with no foreseeable intent of recovery.” DOE stated that “dispose,” as a different grammatical form of “disposal,” was intended by Congress to have the same interpretation.

The Court rejected the DOE’s interpretation because there was no indication in the statute that Congress intended the words to be used in any way but according to common sense. Therefore, “dispose” should be given its common meaning, including “to get rid of; throw away; discard.” The Court concluded that even in light of the definition of “disposal” there was no evidence of the limited use of “dispose” supported by the DOE.

The DOE also argued that subsections (A) and (B) of 302(a)(5) should have been read together to create one requirement because title and disposal cannot be separated. The Court rejected this argument stating that the subsections clearly set forth independent requirements. The Court also concluded that although Congress intended a repository by 1998, the absence of such a facility did not make subsection (B) illogical and only effected the remedy they could provide.

The Court’s final conclusion was that § 302(a)(5)(B) created an obligation on the part of DOE to start disposing of the SNF no later than January 31, 1998.

OTHER


The facts in this case are undisputed. Willamette Industries (Willamette) owns a plant that manufactures fiberboard in Malvern, Arkansas. Fine wood shavings and wood pulp are reduced to a fiber, and mixed with urea formaldehyde, and is then dried into the fiberboard. Particulate matter, that had been treated with formaldehyde, from this manufacturing process, is emitted into the air through the normal course of production.

The Wright family, who lived near the Willamette plant, filed a toxic tort against Willamette. The Wrights alleged a variety of ailments attributed to breathing in the formaldehyde treated particulate matter emissions from the nearby plant. The district court jury awarded $226,250 in damages based on the negligence claim.

Willamette filed a post-verdict motion for a judgment as a matter of law contending that the Wrights failed to present a submissible case based on negligence due to the lack of evidence of proximate cause. The district court denied the motion and Willamette appealed to the Eighth Circuit.

The Eighth Circuit examined the issue of what constitutes proximate cause of injuries. Proximate cause in Arkansas has been defined as the cause which inflicted damage to a party which occurred in a logical progression without which the damage would never have been inflicted. The Wrights alleged that the proximate cause of their injuries was the formaldehyde treated emissions they inhaled.

Willamette, however, contended that the Wrights had to affirmatively demonstrate that they were actually exposed to levels of formaldehyde treated particulate matter emitted from the Willamette plant and that the levels were high enough to cause the alleged ailments.

The Eighth Circuit agreed with Willamette, and reversed the district court’s denial of judgment as matter of law, and set aside the jury award for damages. The Court held that for a toxic tort plaintiff to recover she must prove that the levels of exposure to the toxic substance are hazardous to humans, and also must show the actual level of exposure to the plaintiff.

- by Christopher Pickett

Alliance Against IFQs v. Ronald H. Brown, Secretary of Commerce, 84 F.3d 343 (9th Cir. 1996).

Plaintiffs are a group of fisherman and others who claim they suffered from the economic impact of regulation of commercial fishing of halibut and sablefish from waters of the northern Pacific Ocean. Defendants include the Secretary of Commerce and others in charge of regulating fishery management. Plaintiffs sought to challenge the Secretary’s regulation of a fishery management plan, and argued that the plan was created arbitrarily and capriciously in that the plan did not properly consider the “present participation” in the fishery. Plaintiffs also challenged the Secretary’s decision to include a certain port in the regulatory list of approved transfer locations, and that the regulations violated the legally protected interests of individual fishermen. The Ninth Circuit affirmed the lower court’s decision upholding the Secretary’s regulation of the commercial fisheries in question.

The Magnuson Fishery Conservation and Management Act, 16 U.S.C. §1801 et seq., recognized that some stocks of fish had been harvested nearly to the point of extinction and needed federal protection to ensure conservation of certain fish. Pursuant to this Act and the Northern Pacific Halibut Act of 1982, the Secretary of Commerce implemented a management plan for sablefish and halibut fishing in the waters of the Gulf of Alaska, the Bering Sea, and the waters off the
The Ninth Circuit, although concerned with the Secretary's delay in establishing the regulations, did not find the delay to be a reason to change the result of the regulations. Because Congress left the Secretary room for discretion by not defining ‘present participation,’ and by listing it as only one of many factors which 'the Secretary must 'take into account' the court found that the final regulations were promulgated in a time “roughly 'present' with the time when the regulations were first proposed” and that this was sufficient. The Ninth Circuit thereby established that 'present' could not prudentely be contemporaneous with the promulgation of the final regulations. Hence, the court found that the length of time between the end of the participation period considered and the promulgation of the rule was reasonable, and therefore not “arbitrary or capricious.”

The plaintiffs next argued that the “allocation of quota shares to vessel owners and lessees violate[d] the statutory requirement that allocation be 'fair and equitable to all such fishermen’’” as required by the Magnuson Act at 16 U.S.C. § 1851(a)(4). The court noted, however, that the Act also requires the Secretary to, inter alia, “prevent overfishing” and “promote conservation.” The inconsistencies and tension among the several objectives almost certainly require the Secretary to favor one objective over another. The court noted that the Secretary favored allocating quota shares to owners and lessees for several reasons. First, it was easier to ascertain the amount of fish taken by a boat than the amount taken by individual fishermen. Second, the Secretary expressed that equity required a recognition of those who had invested financially in the operation of the boats. Since vessel owners and lease holders are the participants who supply the means to harvest fish, they suffer the financial and liability risks to do so, and hence, if anyone must be favored over another, the risk-takers and financial backers should be rewarded with the quota permits. Citing to case law, the Ninth Circuit noted that unless the Secretary acts in an arbitrary and capricious manner in promulgating such regulations, they may not be declared invalid. Additionally, the “Secretary is allowed . . . to sacrifice the interest of some groups of fishermen for the benefit . . . of the fishery as a whole.” Alaska Factory Trawler Ass'n v. Baldridge, 831 F.2d 1456, 1460 (9th Cir.1987)

The plaintiffs' next main complaint was the Secretary's decision to designate a port in the state of Washington as a port where fish can be unloaded and transferred from the harvest vessels. Plaintiffs argued that this listing was inappropriate because they feared some vessels will harvest regulated fish in waters off Alaska, and then cheat by selling fish before they arrived The Ninth Circuit, however, found that the Secretary had two good reasons for listing the Washington port. First, the Secretary believed that not designating a port outside Alaska would violate the U.S. Constitution at Art I, Sec. 9, para. 6 which requires that “[n]o Preference shall be given by any Regulation of Commerce . . . to the Ports of one State over those of another.” 84 F.3d 350. Second, the Washington port had been one which historically had been a port where the selling of halibut and sablefish had occurred. Once again, the court found that the Secretary's decision in this regard had not been arbitrary and capricious.

In conclusion, the court noted that this was a particularly troubling case because some “[p]erfectly innocent people going about their legitimate business in a productive industry have suffered great economic harm because the federal regulatory scheme changed.” 84 F.3d at 352. It went on to note, however, that “regulation of an industry necessarily transfers economic rewards from some who are more efficient and hardworking to others who are favored by the regulatory scheme,” yet the court...
could not say that the Secretary's decision was arbitrary and capricious, nor contrary to law.

- by Cynthia Giltner


This case involved an appeal from a decision in the United States District Court for the District of Oregon to determine whether the review of certain timber sales was proper under the Administrative Procedure Act. The plaintiffs were Oregon Natural Resources Council and Umpqua Watersheds, Inc., a group of environmentalists who were attempting to prevent the sale of timber by the United States Forest Service at Pinestrip and Snog, areas located in the North Umpqua River Basin in southeastern Oregon. The high bidders on the two sales were interveners to the suit: Huffman and Wright Logging Company, Inc. and Douglas Timber Operators, Inc.

The questionable sales concerned timber that exists on land subject to the President's Northwest Forest Plan commonly called Option 9. This plan maintains old trees and late successional forests that extend from the Canadian border to northern California, and manages the trees for the species living in those forests. Thirty miles of the nearby North Umpqua River Basin which flows through southwestern Oregon has been dubbed by Congress a "wild and scenic river," and supports a salmonid fishery.

The plaintiffs made several claims against the sale of timber at Pinestrip and Snog. First, they claimed that the timber sales would decrease native species populations and damage aquatic resources in violation of the National Forest Management Act, 16 U.S.C. § 1604(g) and accompanying regulation 36 C.F.R. §§ 219.10(e). Second, the plaintiffs claimed that the Forest Service sold the timber capriciously and arbitrarily under the APA § 706(2)(A), lacking information or explanation of the environmental impact on the aquatic and amphibious species and the watershed.

Despite the plaintiffs' claims, the case was dismissed by the lower court for several reasons. First, the case was dismissed based on theAPA and the Rescissions Act of 1995. The current court, in reviewing the Rescissions Act, found that the Act did not mandate specific documentation or procedure for timber sales that were classified as Option 9. Therefore, the court found the Forest Service's sales, along with the documents and procedures connected with it, to be in compliance with all federal environmental and natural resource laws.

In addition to its finding that the plaintiffs' case failed to comply with the APA and Rescissions Act, the lower court also found that since judicial review of an agency action was forbidden under 5 U.S.C. § 701(a)(2), and that the sale of timber was an act of discretion by the agency, the case lacked subject matter jurisdiction. In their appeal, plaintiffs contended that this analysis was in direct contrast with the Rescissions Act § 2001(f)(1), which provided that subsection (d) timber sales are subject to judicial review. Nonetheless, the Ninth Circuit found that the plaintiffs could only prevail if the Rescissions Act insulated subsection 2001(d) sales from judicial scrutiny, other than arbitrary and capricious review under the APA § 706(2)(A). Because the Act allowed legal challenges based on federal contract law, a violation of log export laws or some other sort of non-environmental law other than the APA, subsection § 2001(f)(1) was not rendered meaningless as plaintiffs claim. Furthermore, the court interpreted the language in 2001(d) "notwithstanding any other law" to direct the disregard of only environmental laws. The court based its conclusion on both previous case law in the Ninth Circuit and Congressional intent. Therefore, the court held that the provision for judicial review for Option 9 sales in subsection 2001(f)(1) is not meaningless even if arbitrary and capricious review is not unavailable under the APA.

The plaintiffs' third claim argued that an agency's sale of Option 9 timber was not discretionary because it has typically and traditionally been reviewable. The court, however, ruled that because plaintiffs did not show that any relevant statute other than the APA required the Forest Service to obtain the environmental impact information necessary according to the plaintiffs, agency actions were not reviewable as arbitrary and capricious.

Finally, the plaintiffs argued that the review could still be conducted under the APA, independent of another statute, citing Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 463 U.S. 29 (1983). The court rejected this suggestion, holding that review was unavailable under the APA § 706(2)(A) unless a law applies under § 701(a)(2). Therefore, the judgment of the district court was affirmed and the plaintiffs' case was dismissed.

- by Wendy Hickey

Citizens for a Better Environment v. The Steel Co., 90 F.3d 1237 (7th Cir. 1996).

This case involves an issue of first impression in the Seventh Circuit, and only the second occasion a federal appellate court has addressed the question involved. In 1995, Citizens for Better Environment (CBE) discovered what it believed to be multiple violations of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) §§ 312 and 313 by The Steel Company (Steel), a manufacturer and pickler of steel. CBE provided 60 day notice to the proper authorities on March 16, 1995, alleging that Steel failed to
submit a toxic chemical inventory or release form. Upon receipt of notice, Steel proceeded to file the appropriate, although overdue, forms. Because the EPA failed to initiate an enforcement proceeding, CBE brought a citizen enforcement suit against Steel under EPCRA, Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. §§ 11001 et seq.

In its complaint, CBE argued that EPCRA authorized citizen suits to enforce the statutorily prescribed filing deadlines. However, the district court, relying on Atlantic States Legal Foundation, Inc. v. United Musical Instruments U.S.A., Inc., 61 F.3d 473 (6th Cir. 1995), dismissed the suit because Steel’s filings were current when CBE filed the complaint, making the alleged violations purely historical. CBE appealed the district court’s decision.

On appeal, the Seventh Circuit rejected the Sixth Circuit holding in United Musical Instruments, which ruled that EPCRA required forms are considered completed and filed, even if such forms are filed late. United Musical Instruments relied on the Supreme Court decision in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987), which interpreted the citizen suit provisions of the Clean Water Act (CWA) to require a present, ongoing violation before a citizen suit could be instituted. In addition, Gwaltney pointed out the use of present tense throughout the statute, which also indicated congressional intent to require a continuing violation. Moreover, the Gwaltney Court found that CWA’s 60 day notice provision was established to give the alleged violator an opportunity to bring itself into compliance, rendering a citizen suit unnecessary. When interpreting the citizen suit provisions of EPCRA the Seventh Circuit used the same reasoning as did the Gwaltney Court when interpreting the citizen suit provision of CWA, yet reached an opposite conclusion.

The Seventh Circuit interpreted EPCRA’s statutory language which authorizes citizen suits for “failure to complete and submit forms under §§ 312 and 313” to mean in accordance with those sections. The court decided that failure to timely file §§ 312 and 313 reports would not be in accordance with those sections and thus authorized by EPCRA. In addition, the Seventh Circuit pointed out that present tense language was absent from the EPCRA enforcement provisions. Therefore, the court concluded that this past tense language further evidences Congress’ ability to require allegations of an ongoing violation as a prerequisite to citizen suit.

In conclusion, the Seventh Circuit held that EPCRA citizen suits are not reserved for only ongoing violations. The court determined that the EPCRA notice provisions are not gratuitous, and exist to provide an opportunity for the alleged violator to mediate their exposure to penalties. Moreover, the court remarked that to follow the Sixth Circuit decision in United Musical Instruments would undermine EPCRA because citizens would have no incentive to invest time and money to investigate what will inevitably become a historical violation. Therefore, the Seventh Circuit reversed and remanded the district court’s decisions.

-by Rebecca J. Grosser


The right of intervention was the focus of this action. The plaintiffs, snowmobiling enthusiasts, brought suit against the government to enjoin its execution of laws which would restrict their sport within a Minnesota national park, Voyageurs Region National Park. The association of this park sought to intervene on the concern that the government may settle with plaintiffs or compromise the current restrictions. The district court denied the association’s motion to intervene as of right and for permissive intervention, and permitted only participation as amicus curiae.

Background information important for this court’s opinion included disputes that occurred in 1991 and 1992 concerning the potential impact on wildlife in the park from snowmobiling activity. The association filed the first suit after the National Park Service issued final regulations allowing snowmobiling on all the park’s lakes and several trails without the input of the association. In an effort to appease, the National Park Service, together with the input of the Fish and Wildlife Service, proposed a wilderness plan that closed specified trails, lakes and shores to snowmobilers. Because a significant area was affected by this closure without opportunity for notice or comment, the snowmobilers filed a claim against the government contending the regulations were arbitrary and capricious. It was this dispute that the association attempted to intervene. The association contended that the government has long-allowed unrestricted snowmobiling in the park without rules protective of park wildlife, and hence cannot be trusted to represent the association in this suit.

The plaintiffs argued that the association lacked standing to intervene. The district court held that standing was not necessary to intervene under Rule 24(a). Rule 24(a) lists three requirements for intervention: (1) a recognizable interest in the lawsuit issues that, (2) may be impaired, and (3) is not sufficiently guarded by the parties to the suit. However, the appellate court did require standing. The appellate court stated that a federal case is a “limited affair.” In other words, it is an Article III case or controversy where all parties to the suit must have standing, including an intervenor who seeks to be a party. Standing, the court noted, entitles one to a decision on the merits of a dispute, and since that is what an intervenor seeks, an intervenor must not only satisfy Rule 24 requirements but also meet Article III’s demands. Thus, the appellate
court held that the association must have Article III standing to intervene in the dispute.

The court concluded that the association did have Article III standing. Standing requires that the would-be party suffer injury connected with the disputed conduct and likely to be redressed by the relief sought. It was argued that the injury the association would incur if the restrictions were lifted, was speculative. However, the court held that the denial of opportunity to observe several species in their natural state and the imposition of park closures without a proper basis are allegations of “concrete, particularized, immediate injuries,” and equate the same standing that the snowmobilers had to bring suit.

In addition, the court focused on whether it was appropriate to presume that the government adequately represented the interests of the association in accordance with the doctrine of parens patriae. The court found that the association rebutted the presumption that the government will represent its interests in court with a well-documented history of past disputes. In conclusion, the appellate court determined that the district court should have granted the motion to intervene because the association had a right to intervention as a matter of right.

- by Wendy Hickey