Real Estate/Environmental Liability News

ROUTE TO:

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Clean Water Act

Challenge to *Tulloch II* rule moves forward; ripeness not an issue

Organizations in the construction industry could challenge a regulation to implement the **Clean Water Act** requiring a permit for activities resulting in a discharge unless only incidental fallback results. The claim was ripe for review because the issues were purely legal and their legality would not change from case to case or become clearer in a concrete setting. (*National Association of Home Builders v. U.S. Army Corps of Engineers, et al.*, Nos. 04-5221, 04-5222, 04-5223, 04-5224 (D.C. Cir. 02/03/06).)

The **U.S. Environmental Protection Agency** and the **U.S. Army Corps of Engineers** issued a final rule under the CWA known as *Tulloch II*. The rule provides that the use of mechanized equipment to conduct any type of earth-moving activity in U.S. waters results in a discharge of dredged material unless "project-specific evidence shows that the activity results in only incidental fallback." Incidental fallback is defined as "the redeposit of small volumes of dredged material that is incidental to excavation activity ... when such material falls back to substantively the same place as the initial removal."

(See **FALLBACK** on page 8)

RCRA

$40 million waste disposal project wins over speculative project

A company was unable to invalidate a federal exemption from the **Resource Conservation and Recovery Act** issued by the **Environmental Protection Agency** to a waste disposal company. The company's competing project was speculative and incompatible with the waste disposal project and would cause substantial harm to others as well as the public interest. (*Sunoco Partners Marketing & Terminals L.P. v. Environmental Protection Agency, et al.*, No. 05-74742 (E.D. Mich. 01/20/06).)

Environmental Disposal Systems Inc. began operations at its deep injection wells and hazardous waste facility after complying with federal, state and local requirements. As part of the requirements, Systems obtained an exemption from the RCRA land disposal restrictions for deep injection of hazardous waste from the EPA.

Sunoco Partners Marketing & Terminals LP conducted a liquid petroleum storage facility one-half mile from Systems' project. After Systems went through the extensive permitting process and began construction of its facility, Sunoco notified the **Michigan Department of Environmental Quality** and the EPA that it intended to expand its activities and undertake a brine extraction project. Sunoco

(See **WELLS** on page 10)

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Clean Water Act

Energy Policy Act exemption strips oil, gas group's standing

An oil and gas group did not have standing to challenge the **Environmental Protection Agency**'s issuance of a general permit under the **Clean Water Act**. While the case was pending, **Congress** passed the **Energy Policy Act**, which expressly exempts construction activities in the oil and gas industries from the CWA's permit requirements. (*Texas Independent Producers and Royalty Owners Association, et al. v. Environmental Protection Agency*, Nos. 03-3277, 03-3278, 03-3279, 03-3280, 03-3281 (7th Cir. 01/27/06).)

The EPA issued a general permit under the CWA, which required permit authorization for stormwater discharges related to small construction activity at oil and gas sites. The group sued the EPA, challenging various aspects of the general permit as applied to uncontaminated discharges. The EPA extended the deadline to obtain permits for oil and gas sites to examine the rulemaking process under the CWA. The **5th U.S. Circuit Court of Appeals** held that the group's challenge was not ripe for review noting the EPA intended to address the problems cited by the group during the deferral period (*see July 22, 2005 issue, p.2*).

The **7th U.S. Circuit Court of Appeals**, where the petition was originally filed, ordered the parties to submit briefs addressing the ripeness issue. Before the briefs' deadline, Congress enacted the Energy Act. The act clarified that the CWA provisions regarding stormwater discharges did not apply to oil and gas construction activities. The group argued that following the passage of the Energy Act, it was not subject to the general permit for uncontaminated discharges.

The 7th Circuit agreed with the group. However, it concluded that the group lacked standing to sue the EPA because the restrictions it challenged were exempt from the permitting requirements. The CWA allows interested persons to obtain review of an EPA action. Interested persons must have Article III standing, which requires a party to demonstrate a causal link between the injury and the challenged action that can be redressed with a favorable court decision.

The Energy Act made clear that the EPA cannot require permits for uncontaminated discharges from oil and gas operations. The court concluded, therefore, that there was no causal link between the alleged injury and the permit requirements. The 7th Circuit dismissed the group's petition for lack of standing.

News

EPA overseeing cleanup of DDT-laced soil at California site

The **Environmental Protection Agency** is overseeing contaminated soil removal work being conducted under EPA order from an industrial parcel outside Torrance, Calif. The soil will be disposed at a regulated hazardous waste landfill in Nevada.

The EPA ordered **Montrose Chemical Corp.**, **Ecology Control Industries** and **Ronald Flurry** to remove up to 5,000 tons of excavated DDT-contaminated soil piles from the property in Torrance. The estimated cost of disposal is $1.6 million, according to the agency.

Montrose Chemical manufactured DDT from 1947 until 1982 at the property. The 13-acre property was named a federal Superfund site in 1989. The EPA believes that DDT was released into storm drains from the 1950s through the 1980s.

The soil piles, located at an industrial property several blocks from the Montrose property, were created when the landowner was conducting environmental assessment activities in preparation for a potential property sale last year, the EPA said.

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Practitioner spotlight

Secured lenders bank on litigator's know-how

Attorney **Bradley S. Tupi** is in charge of **Tucker Arensberg PC**'s environmental law practice. He is a 1975 graduate of **Columbia College** and a 1978 graduate of **Columbia University School of Law**. Prior to joining his current firm, Tupi was an in-house attorney at a manufacturer of pharmaceuticals, pesticides and industrial chemicals where he defended toxic tort and product liability suits and pursued insurance coverage for environmental liabilities.

Having defended banks in three **Comprehensive Environmental Recovery Compensation and Liability Act** cases, Tupi has a special interest in lenders' environmental risks. He advises banks about the environmental risks in loans, workouts and foreclosures, and about the opportunities at Brownfield sites. He has offered training seminars at several banks, and has helped banks develop their own environmental due diligence procedures. Tupi writes and lectures frequently about environmental topics affecting lenders.

Bradley S. Tupi

Q. Can you tell us about your background with your firm?

A. I joined Tucker Arensberg as a shareholder in 1990. Before that I was with a larger Pittsburgh firm; before that I was in-house at **Ciba-GEIGY Corp.**, a chemical company. Before that I was a lawyer for the **City of New York**.

Here at Tucker Arensberg, I am in charge of the environmental practice. This involves CERCLA litigation, environmental due diligence for real estate and lending transactions, underground storage tank cases, and some **Toxic Substances Control Act** work.

Q. What was your most memorable legal victory?

A. In the environmental field, I handled two cases where lenders became entangled in CERCLA litigation foreclosure-type activities at contaminated industrial sites. The first one, called *Guidice*, settled on very favorable terms. In the second, *METCOA*, we won summary judgment after **Congress** amended the CERCLA's secured creditors exemption.

Q. What led you into the environment sector?

A. When I was an in-house attorney at Ciba-GEIGY, part of my responsibility was insurance coverage. In the 1980s, the largest part of that job was trying to secure coverage for environmental cleanup liabilities. That was my first exposure to environmental law.

Q. Which legal issues do you see coming up in the field of environmental law?

A. I can only say that I hope our regulators and courts will take into account the costs as well as the benefits of environmental regulation. Every environmental lawyer can tell tales of huge costs imposed on companies to achieve relatively trivial environmental benefits.

Q. Is practicing environmental law in your state different than practicing in other areas of the country?

A. Practicing any kind of law in Pittsburgh is terrific. The local bar is extremely collegial. Lawyers here are forthcoming and honest. Verbal agreements are honored, courtesies extended.

Q. What organizations are you affiliated with and what activities are you involved in with those groups?

A. I am a member of the Environmental Law Section of the **Allegheny County Bar Association**, where I attend educational programs. I am a member of the **Federalist Society**, which holds informative programs on many topics of interest. I am an allied attorney with the **Alliance Defense Fund**, which litigates to preserve religious freedom. I serve on the executive board of **St. Paul of the Cross Retreat Center**, which offers religious weekend retreats to Catholic men and women.

Q. What advice would you give to practitioners just starting out in the environmental field?

A. You must work with competent, well-qualified environmental consultants. You must never shy away from learning the science. You must represent your client's interests, which may not accord with your personal beliefs.

Q. What aspect of environmental law do you find most interesting?

A. Toxic exposure cases. It never ceases to amaze me how people think infinitesimal doses of a toxin can cause almost any malady known to man.

Tupi is licensed to practice in Pennsylvania and New York. He has authored numerous publications and presentations on subjects including sewer overflows, environmental law and construction law. He was named a Pennsylvania Super Lawyer® for 2004 and 2006. He can be reached by phone at 412-594-5545 or by e-mail at btupi@tuckerlaw.com.

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Constitutional claims

6th Cir. knocks down county's discriminatory waste disposal ordinance

A county's waste disposal ordinance was unconstitutional because it was facially discriminatory against interstate commerce. The ordinance violated the dormant Commerce Clause by requiring waste collectors to dispose of the waste at the county's landfill. (*National Solid Wastes Management Association v. Daviess County, Ky.*, No. 04-6498 (6th Cir. 01/24/06).)

Daviess County, Ky., enacted an ordinance directing all municipal solid waste haulers to dispose of waste at the county landfill. **National Solid Wastes Management Association** sued the county alleging that the ordinance was unconstitutional. It argued that the ordinance did not allow its members to dispose of waste at out-of-state disposal sites. It also argued that its members that operated out-of-state waste disposal sites would be unable to participate in the waste disposal market for the county.

The **6th U.S. Circuit Court of Appeals** explained that the dormant Commerce Clause prohibits local regulation of interstate commerce. Municipalities cannot burden interstate commerce or impede its free flow, the court explained. The county argued that the ordinance was not discriminatory because it affected both in-state and out-of-state entities in the same way. That is, all haulers of solid waste generated in the county had to dispose of the waste in the county's landfill. While the court agreed that the ordinance did not discriminate against out-of-state haulers, it pointed out that it did discriminate against out-of-state disposal facilities.

The court found that "by forcing [the association's] members to use [the county's] disposal and transfer facilities, the [o]rdinance would prohibit these members from using other in-state and out-of-state facilities." Therefore, the ordinance was facially discriminatory against out-of-state interests.

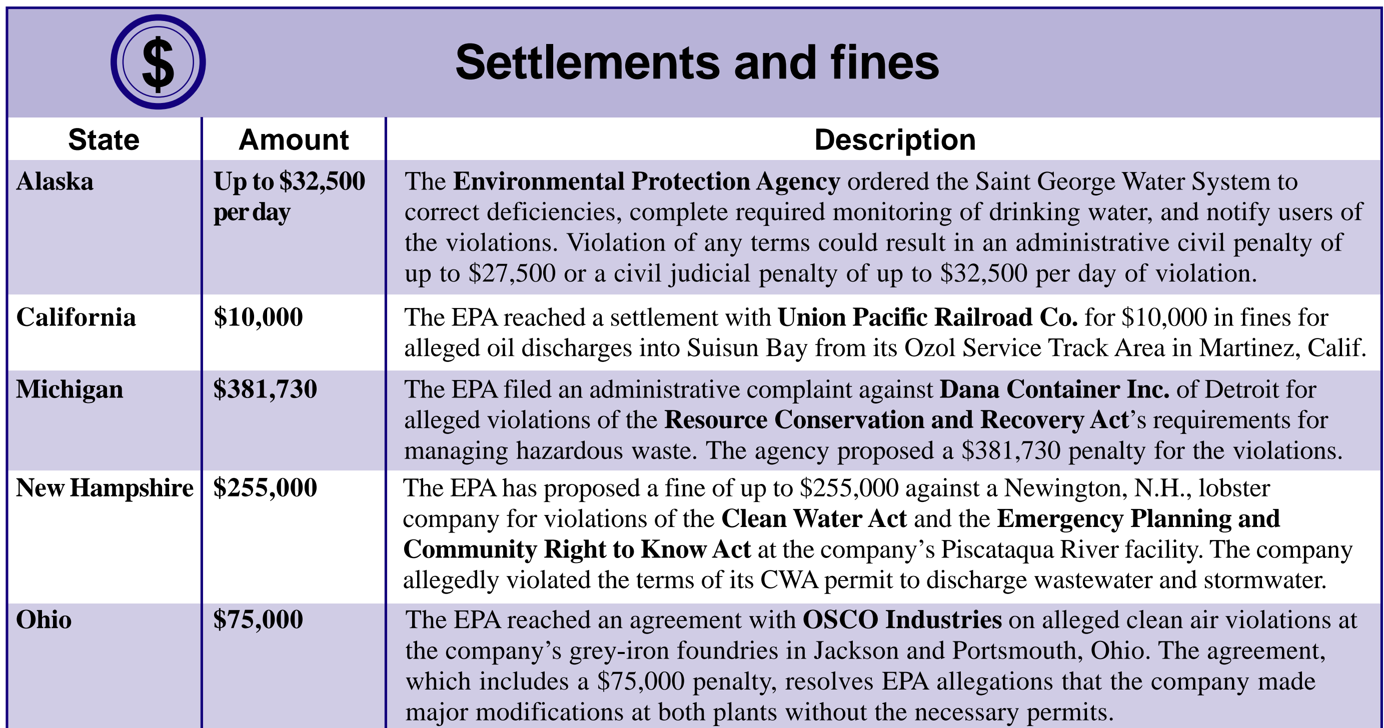
Stream of commerce

The 6th Circuit relied on *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994), to reach its conclusion. The **Supreme Court** held that an ordinance requiring all nonhazardous solid waste from the town to be processed at the town's waste transfer station was unconstitutional. The Court found that the ordinance "hoarded solid waste, and the demand to get rid of it for the benefit of the preferred processing facility." The ordinance deprived out-of-state businesses access to the local market.

The county attempted to distinguish its case from *Carbone* by arguing that *Carbone* involved a waste transfer station, whereas the ordinance related to a waste disposal facility. When the waste was delivered to the disposal facility, it ceased to be in the stream of commerce. The 6th Circuit rejected this argument. It first pointed out that *Carbone* applied to waste disposal facilities as well as transfer stations.

It also noted that the regulated article of commerce was the service of processing and disposing of it, not the solid waste itself, so it did not matter at what point of the stream of commerce it was. In this case, the ordinance restricted the free flow of commerce by requiring disposal at the county's facility. Out-of-state disposal service providers, therefore, could not participate in the county's disposal market.

The 6th circuit affirmed the **U.S. District Court, Western District of Kentucky**'s grant of summary judgment in favor of the association.



Settlements and fines

State	Amount	Description
Alaska	**Up to $32,500 per day**	The **Environmental Protection Agency** ordered the Saint George Water System to correct deficiencies, complete required monitoring of drinking water, and notify users of the violations. Violation of any terms could result in an administrative civil penalty of up to $27,500 or a civil judicial penalty of up to $32,500 per day of violation.
California	**$10,000**	The EPA reached a settlement with **Union Pacific Railroad Co.** for $10,000 in fines for alleged oil discharges into Suisun Bay from its Ozol Service Track Area in Martinez, Calif.
Michigan	**$381,730**	The EPA filed an administrative complaint against **Dana Container Inc.** of Detroit for alleged violations of the **Resource Conservation and Recovery Act**'s requirements for managing hazardous waste. The agency proposed a $381,730 penalty for the violations.
New Hampshire	**$255,000**	The EPA has proposed a fine of up to $255,000 against a Newington, N.H., lobster company for violations of the **Clean Water Act** and the **Emergency Planning and Community Right to Know Act** at the company's Piscataqua River facility. The company allegedly violated the terms of its CWA permit to discharge wastewater and stormwater.
Ohio	**$75,000**	The EPA reached an agreement with **OSCO Industries** on alleged clean air violations at the company's grey-iron foundries in Jackson and Portsmouth, Ohio. The agreement, which includes a $75,000 penalty, resolves EPA allegations that the company made major modifications at both plants without the necessary permits.

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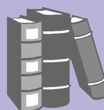
CERCLA

Nonconforming settlement agreement precludes contribution claim

A lead smelting company was unable to obtain contribution from a potentially responsible party under the **Comprehensive Environmental Response Compensation and Liability Act**. The agreement between the company and the state department of environmental quality did not meet the statutory requirements of a settlement within the meaning of Section 113(f)(3)(B). (*Asarco, Inc. v. Union Pacific Railroad Co.*, No. CV 04-2144-PHX-SRB (D. Ariz. 01/24/06).)

Union Pacific Railroad Co. owned a parcel of land, which it filled with several hazardous substances in order to develop it. It leased, and later sold, the property to **Asarco Inc.**, on which Asarco operated a lead smelter and refinery. Prior to closing the site, Asarco voluntarily submitted to the **Nebraska Department of Environmental Quality** a remedial action plan for the site in accordance with the state's **Remedial Action Plan Monitoring Act**.

Asarco and the department entered into an agreement setting forth a remedial action work plan, which was to be conducted according to the requirements of applicable state laws and under the department's supervision. Upon Asarco's completion of the cleanup, the department issued a no further action letter as required by the agreement. Asarco sued Union under Sections 107(a), 113(f)(1) and 113(f)(3)(B) of the CERCLA. The first two claims were dismissed after *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), was issued. The **Supreme Court** held in *Cooper Industries, Inc. v. Aviall Services*, 543 U.S. 157 (2004), that a party could not recover under Section 113(f)(1) unless the party had been sued under Sections 106 or 107.



Additional Resources

Contribution requires compliant settlement

In *Asarco, Inc. v. Union Pacific Railroad Co.*, No. CV 04-2144-PHX-SRB (D. Ariz. 01/24/06), the court found that a party could not seek contribution under Section 113(f)(3)(B) of the **Comprehensive Environmental Response Compensation and Liability Act**. It reasoned that the agreement it entered into with the state did not settle its liability under the act. Because the party did not comply with CERCLA settlement procedures, it was not entitled to initiate a CERCLA contribution action. Other courts have also used this reasoning. See:

Ferguson v. Arcata Redwood Co., LLC, 2005 WL 1869445 (N.D. Cal. 08/05/05) (*see Sept. 16, 2005 issue, p.1*).

W.R. Grace & Co. v. Zotos Int'l, Inc., 2005 WL 1076117 (W.D.N.Y. 05/03/05) (*see May 3, 2005 issue, p.1*).

City of Waukesha v. Viacom Int'l, Inc., 362 F.Supp.2d 1025 (E.D. Wis. 2005) (*see Dec. 16, 2005 issue, p.6*).

Settlement requirements

Under Section 113(f)(3)(B), a party that enters into an administrative or judicially approved settlement resolving its liability to the **United States** or a state can seek contribution from a nonparty to the settlement. The **U.S. District Court, District of Arizona** agreed with Union that Asarco failed to meet the statutory requirements of a settlement under the CERCLA, and was precluded from seeking contribution under Section 113.

The court found that Section 113(f)(3)(B) requires that a settlement resolve a PRP's CERCLA liability, not merely its liability under state law (*see box*). In order to do so, a settlement must conform to certain requirements under Section 122, such as containing a covenant not to sue and being entered as a consent decree by a court. A PRP that adheres to the settlement requirements can pursue contribution under the act. The same requirements apply whether the settlement is with a state or with the **Environmental Protection Agency**. A settlement with a state that is not authorized by the EPA to enter into the settlement, however, does not resolve CERCLA liability and so the PRP cannot seek contribution under Section 113(f)(3)(B).

EPA authorization

In this case, the court pointed out that the state had not obtained the EPA's authorization to enter into the settlement agreement. It also noted that the settlement agreement did not conform to Section 122's requirements. The agreement did not contain a covenant not to sue and was not entered as a consent decree in the appropriate District Court. The court stated that the only way the government can resolve liability is through a covenant not to sue, which requires compliance with a consent decree. The requirements bind the EPA and so also the states that have received EPA authorization.

The court rejected Asarco's argument that compliance with the section is optional. "There is no reason to believe that the statutory provisions that bind the EPA when entering into settlement agreements can somehow be circumvented or rendered optional when the EPA delegates its authority to a state government to enter into a settlement agreement," the court said.

Terms of the agreement

The court found that the agreement did not purport to resolve Asarco's liability under the CERCLA. The agreement contained no reference to the act or to the EPA. It also did not have any language stating that the parties contemplated resolving Asarco's CERCLA liability. Instead, it required Asarco to perform the cleanup pursuant to the agreement in accordance with applicable state laws. The department did not determine that the work plan conformed to EPA standards. Lastly, the court noted that the agreement specifically stated that it was not a waiver or modification of any federal law requirements.

The court concluded that the agreement did not resolve Asarco's CERCLA liability and so was not entitled to maintain an action under Section 113(f)(3)(B).

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Clean Water Act

Environmental groups join EPA, Corps in pivotal CWA case

A coalition of environmental and public health groups has filed a friend-of-the-court brief in what they argue could be the most important **Clean Water Act** cases ever to be heard by the **Supreme Court**. In the brief, the groups argue for continued federal protection of streams and wetlands from pollution in the face of industry petitions asking the Court to eliminate decades of CWA safeguards for these waters.

"These cases pose the question whether the Clean Water Act regulates any discharges into the great majority of this country's tributaries and adjacent wetlands — involving not just discharges of dredged or fill material, but also discharges of sewage, sediment and toxic chemicals such as cyanide from factories," the groups wrote in the brief.

The environmental legal firm **Earthjustice**, representing numerous groups including **American Rivers**, **Environmental Defense**, **National Audubon Society**, **Natural Resources Defense Council**, **Physicians for Social Responsibility**, and the **Sierra Club**, filed the brief on the side of the U.S. government in the two consolidated cases, *Rapanos, et al. v. United States*, 376 F.3d 629 (6th Cir. 2004), and *Carabell, et al. v. U.S. Army Corps of Engineers*, *et al.,* 391 F.3d 704 (6th Cir. 2004), which the Supreme Court was scheduled to hear Feb. 21. Both cases involve proposed commercial developments in Michigan wetlands adjoining streams that are tributaries of the Great Lakes.

Last October, the Supreme Court agreed to hear these two cases challenging the definition of federally protected waters. In both cases, the developers are arguing that they can discharge pollutants to the waters at issue without a CWA permit.

According to Earthjustice, such arguments have been consistently rejected by the **Environmental Protection Agency** and the **U.S. Army Corps of Engineers**, who have applied the CWA's safeguards equally, not only to large water bodies where boats can travel, but also to tributaries of such waters, and to wetlands adjoining those tributaries. These streams and their adjacent wetlands, which would go unprotected under the developers and industries' view of the law, are used for fishing, recreation, wildlife habitat and drinking water supplies, as well as for filtering pollutants and helping prevent floods, the brief argues.

CERCLA

Testimony, documents insufficient to prove personal liability

A city was not entitled to summary judgment because there were issues of material fact as to whether a railroad terminal owner was personally liable under Section 107(a) of the **Comprehensive Environmental Response Compensation and Liability Act**. A question existed as to whether the owner was an operator, as defined under the act, of the railroad terminal at the time hazardous substances were released. (*City of New York v. New York Cross Harbor Railroad Terminal Corp., et al.*, No. 98 CV 7227 (ARR)(RML) (E.D.N.Y. 01/17/06).)

The **City of New York** leased part of a yard to **New York Cross Harbor Railroad Terminal Corp.**, which was used for freight railroad operations. **Robert R. Crawford** was the owner and CEO of Cross Harbor. The city discovered contamination at the site and sued Crawford alleging that, as an operator, he knowingly allowed chemical drums and other waste to be improperly disposed of at the site.

The **Supreme Court** defined operator for purposes of the CERCLA in *United States v. Bestfoods*, 524 U.S. 51 (1998): "an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations." The Court added that the term includes the exercise of direction over the facility's daily activities.

The **U.S. District Court, Eastern District of New York** found that summary judgment in the city's favor was not appropriate as there remained issues of triable fact in dispute. The city's allegations rested on deposition testimony of three individuals and on Cross Harbor documents. The individuals claimed to have seen drums and other waste being buried in a trench at the site. They also claimed that Crawford was at the site on a daily basis and that he was the boss. However, the court pointed out that the testimony did not reveal that they ever saw or heard Crawford directing anyone regarding the waste disposal. In addition, the individuals did not know what the drums contained. The court noted that it was also not clear when the disposal occurred.

The court also found the documentary evidence insufficient. The evidence consisted of Crawford's signature and his designation as a contact person on a solid waste permit application, his signature on a solid waste management facility inspection report as the responsible person in charge, and his participation in meetings with environmental regulators. While the court noted that the documents demonstrated Crawford's direct involvement in some environmental compliance issues for Cross Harbor, it found that it did not demonstrate conclusively the level of involvement required to find operator liability.

The court concluded that it was improper for it to draw an inference of liability on a motion for summary judgment, where it was required to resolve ambiguities in favor of the party against whom summary judgment is sought.

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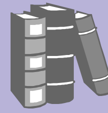
CERCLA

Federal government must include city in selection of remedial action

A city was entitled to enjoin the **U.S. Army Corps of Engineers** and the **Environmental Protection Agency** from issuing a proposed cleanup plan for a contaminated site. The government had not provided the city with information and the opportunity to participate in the selection of a remedy as required by Section 120 of the **Comprehensive Environmental Response Compensation and Liability Act**. (*City of Moses Lake v. United States, et al.*, No. CV-04-0376-AAM (E.D. Wash. 12/30/05).)

The **City of Moses Lake**, Wash. sued several corporations and U.S. agencies under the CERCLA for contamination of wells it obtained from the **United States** when the city acquired a former air force base. The city sought to add claims against the Corps and the EPA under Section 120 of the CERCLA. Section 120 provides that the government must allow state and local officials to participate in the planning and selection of a remedial action. It sought a preliminary injunction preventing the agencies from issuing a proposed plan selecting a remedial action of the contaminated site until they complied with Section 120.

The government contended that the site was not a federal facility because it was not currently owned or operated by the United States, excluding it from Section 120's ambit. It also argued that the cleanup was a removal action governed by Section 104, which could not be challenged pursuant to the jurisdictional bar found in Section 113(h).



Additional Resources

Remedial or removal action?

In *City of Moses Lake v. United States, et al.*, No. CV-04-0376-AAM (E.D. Wash. 12/30/05), the court pointed out that, in determining whether a governmental cleanup action is remedial or removal in nature, courts have found that removal actions generally are immediate responses, and remedial actions generally are permanent responses. See:

United States v. W.R. Grace & Co., 429 F.3d 1224 (9th Cir. 2005) (*see Dec. 30, 2005 issue, p.1*).

California v. Neville Chem. Co., 358 F.3d 661 (9th Cir. 2004).

Carson Harbor Village, Ltd. v. National Semiconductor Corp., 287 F.Supp.2d 1118 (C.D. Cal. 2003).

Advanced Micro Devices, Inc. v. National Semiconductor Corp., 38 F.Supp.2d 802 (N.D. Cal. 1999).

Channel Master Satellite Systems, Inc. v. JFD, 748 F.Supp. 373 (E.D.N.C. 1990).

Federal facility

The **U.S. District Court, Eastern District of Washington** dismissed the government's first argument, stating that the site had at one point been used as a federal facility. It pointed out that the court in *Shea Homes Limited Partnership v. United States*, 397 F.Supp.2d 1194 (N.D. Cal. 2005) (*see Dec. 16, 2005 issue, p. 12*), which dealt with contaminated property formerly used as an Air Force base, did not find it significant that the property was no longer owned by the government in its analysis of whether the cleanup was pursuant to Section 104 or 120.

In addressing the government's second argument, the court relied on *Fort Ord Toxics Project, Inc. v. California Environmental Protection Agency*, 189 F.3d 828 (9th Cir. 1999). In *Fort Ord*, the **9th U.S. Circuit Court of Appeals** explained that Section 120 grants the EPA authority to conduct remedial actions on federal property. Since Section 120 contains no analogous authority for removal actions, the 9th Circuit concluded that removal actions on federal property must fall under Section 104. Section 113(h) would then preclude challenges to a removal action, but not a remedial action.

Proposed plan

The District Court found that the proposed plan was a remedial action pursuant to Section 120 so that Section 113(h)'s bar did not apply. It explained that several decisions dealing with whether an action was remedial or removal in nature concluded that removal actions are generally immediate or provisional responses, while remedial actions are generally permanent (*see box*). In this case, the EPA had been involved in the cleanup of the site for the past 18 years and had placed the site on the national priority list 13 years ago.

The court pointed out that the proposed plan was not a "short-term action taken to halt [an] immediate risk." The EPA began the remedial investigation and feasibility study about six years ago. The investigation lasted for four years and the study for about six months. "Obviously, the proposed plan ha[d] been a work in progress for a considerable period of time," the court said.

Although the plan was technically temporary until a permanent remedy was selected, the court noted that it was part of the procedural steps required for a remedial action. The court stated that the plan was in response to a non-urgent threat and noted that the EPA had time to undertake the procedural steps required for a remedial action.

The court concluded that Section 113(h) did not preclude the city's action. The city, therefore, had the right to participate in the planning and selection of the remedial action for the site. The court enjoined the EPA and the Corps from issuing the proposed plan and ordered them to deliver to the city a copy of the plan and all other relevant information.

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Takings

Finality of county's land use determination ripens landowner's claim

A landowner's constitutional taking claims were ripe for adjudication. The county had reached a final decision that its wetland regulations limited the development of the landowner's property. (*Dunn v. County of Santa Barbara*, No. B175149 (Cal. Ct. App. 01/25/06).)

David J. Dunn applied with the **County of Santa Barbara** to subdivide his six-acre parcel, which was zoned for a single-family residence, into two equal parcels. Relying on an environmental impact report, which stated that wetlands on one parcel would be adversely affected by construction, the county denied the application. It concluded that the property was subject to state laws and local regulations enacted to protect wetlands and environmentally sensitive habitat areas. Therefore, only one residence could be built on the property.

Dunn sued the county alleging that his property had been taken without compensation in violation of the takings clause of the Fifth Amendment. The trial court dismissed his regulatory takings claims finding they were not ripe for adjudication. It stated that the claim was not ripe because Dunn had not sought a final determination from the county regarding the extent of development that would be allowed on his property.

The **California Court of Appeal** reversed the trial court's decision. It explained that a regulatory takings claim is not ripe until the government entity that implements the regulations reaches a final decision regarding the regulations' application to the property at issue. "Once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened," the court said, relying on *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

The court stated that the county made it clear that its wetland and environmentally sensitive habitat area regulations limited the development of Dunn's property to one residence. Therefore, his takings claim was ripe for adjudication. It found that it was not necessary for Dunn to apply for a permit to develop a residence on his property for him to obtain a final decision from the county regarding the permitted use of the land. It was sufficient that the county had repeatedly stated that it would allow the building of one residence and that it did not have the authority to divide the property into two lots.

The court concluded that the county had made the permissible use of the property known to a reasonable degree of certainty. Where the extent of permitted development is clear and it is not alleged that the applicant did not comply with state-law exhaustion or pre-permit processes, "federal ripeness rules do not require the submission of further and futile applications," the court said, citing *Palazzolo*.

FALLBACK (continued from page 1)

The **National Association of Home Builders** and other organizations in the building industry sued the EPA and the Corps under the **Administrative Procedures Act** alleging the rule exceeded the agencies' statutory authority. The **U.S. District Court, District of Columbia** granted the agencies' motion for summary judgment. It concluded that the action was not ripe for review until the Corps applied the issues in concrete factual situations. It also stated that delaying review would not impose hardship on the organizations.

Fitness of issues

The **U.S. Circuit Court of Appeals, D.C. Circuit** explained that in determining whether an action is ripe for review, courts must evaluate the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. For the first prong, courts determine whether the issues are purely legal, whether consideration of the issue would benefit from a more concrete setting and whether the agency's action is sufficiently final.

The District Court concluded the challenge was not ripe because "both the court and the agencies would benefit from letting the questions presented here 'arise in some more concrete and final form.'" It stated that a case-by-case analysis was required to determine which discharges are subject to being regulated. The D.C. Circuit stated that while the latter statement was true, it did not prevent the final rule from being reviewed.

The D.C. Circuit noted that the issues raised were purely legal and, therefore, were presumptively reviewable. In addition, the legality of the challenge would not change from case to case or become clearer in a concrete setting. It stated that the organizations' challenge was to the "faithful application of the regulation" which they claimed facially exceeded the agencies' statutory authority. It concluded that the ripeness doctrine was inapplicable because the organizations' claim "rests not 'on the assumption that the agency will exercise its discretion unlawfully' in applying the regulation, but on whether 'its faithful application would carry the agency beyond its statutory mandate.'"

Hardship

In analyzing the second prong of the test, courts consider whether postponing judicial review would impose an undue burden on parties, not if they suffered direct hardship, or would benefit the court. The D.C. Circuit found that there were no significant agency or judicial interests that required the postponement of review. It found that the organizations' members would be burdened, however. The rule would require every party engaging in dredging activities to determine whether their conduct resulted in more than incidental fallback, and if so, to obtain a permit.

The court concluded that the regulation was reviewable as "a substantive rule which as a practical matter requires the [organizations] to adjust [their] conduct immediately." It reversed the District Court's order of dismissal and remanded for review.

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Jurisdiction

Challenge to Corps' selection of dredge disposal site goes aground

Property owners could not sue the **U.S. Army Corps of Engineers** under the **Federal Torts Claims Act** for lack of jurisdiction. The Corps' actions were discretionary and involved policy-related judgments so that its conduct fit into the discretionary function exception to the act. (*Montijo-Reyes, et al. v. United States*, No. 05-1353 (1st Cir. 01/24/06).)

The Corps announced by public notice proposed emergency maintenance dredging from a federally authorized navigation channel. Pursuant to the **Clean Water Act**, it requested a waiver of water quality certificate from the **Puerto Rico Environmental Quality Board** for near-shore disposal of dredged material, which the board granted. The Corps then revised its plan to dispose the material only on the shoreline, but then began disposal in open waters, which had not been suggested as an alternative.

After the **U.S. Fish and Wildlife Service** discovered the material was being deposited on a coral hard-ground community, the Corps began disposing the material along the property owners' shoreline. This resulted in an increased height of the beach of about 15 feet. The Corps installed a concrete wall and silt fence to protect nearby private property and streets from blowing sand.

The property owners sued the Corps pursuant to the FTCA alleging damages by sand from the beach where the Corps deposited the dredged material. They argued that the Corps violated the CWA and the Puerto Rico Water Quality Standards Regulations because it did not obtain a water quality certificate or an exemption for disposal on that site.

Discretionary function exception

The FTCA provides a limited waiver of the federal government's sovereign immunity where its employees' negligent actions caused injury or loss of property under the law of the location where the tort occurred. The discretionary function exception bars claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency." In applying the exception, a court must first determine if the conduct is discretionary. If so, it must determine if the exercise of discretion involves policy-related judgments. If the conduct fits both factors, then the exception bars subject matter jurisdiction.

The property owners conceded that the Corps' selection of the disposal site involved policy-related judgments. However, they argued that the Corps violated the nondiscretionary duty under the CWA to comply with state water quality requirements by disposing the dredged material at a non-approved site.

The **1st U.S. Circuit Court of Appeals** held that the property owners did not overcome the discretionary function exemption because they failed to allege a causal connection between the Corps' failure to comply with the CWA and the state water regulations and the alleged damages they suffered. It stated that the property owners did not allege that the board would have rejected an exemption request by the Corps for disposal at the beach site.

Causation

The court found that "the Corps' failure to follow the CWA's mandate to comply with state law [did] not even pass the but for causation test." It also stated that the CWA and the state water regulations did not seek to prevent private property damage from negligent site selection or maintenance. The Corps' decision to maintain the beach site by building it to a specific height and building a concrete wall and silt fence was discretionary since the regulations do not prescribe any specific measures for maintaining a beach disposal site. "Thus, whether or not the Corps obtained a water quality certificate or exemption, the negligent conduct that allegedly caused [the property owners'] damages was not forbidden," the court said.

Lastly, the 1st Circuit noted that nothing in the CWA or state water regulations indicated a legislative intent to protect private homes from the effects of dredged material disposal. It agreed with the District Court's conclusion that the permit or waiver requirement was only one factor that the Corps had to consider in making its site selection.

Conference Calendar

April 6-8
Toxic Torts and Environmental Law Committee
Tort Trial and Insurance Practice Section
Phoenix
www.abanet.org

May 31-June 2
Environmental Impact Assessment: NEPA and Related Requirements
ALI-ABA
San Francisco
www.ali-aba.org

June 7-9
Wetlands Law and Regulation
ALI-ABA
Washington, D.C.
www.ali-aba.org

June 21-24
Environmental Litigation
ALI-ABA
Boulder, Colo.
www.ali-aba.org

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WELLS (continued from page 1)

applied for a brine extraction well permit, which was denied because Systems' permitted use could contaminate the brine. If extracted, Sunoco would be producing hazardous waste. The projects were deemed incompatible under the department's administrative rules.

Before the exemption was granted, however, the department reversed its position and granted Sunoco a permit for its extraction project. Ultimately, the permit was invalidated by the county circuit court, whose decision was affirmed by the **Michigan Court of Appeals**.

Sunoco sued the EPA and to enjoin the effectiveness of Systems' exemption. It claimed that it was in the process of obtaining another permit for its project and that the EPA should have anticipated that Sunoco would, in the future, operate a brine extraction project in the same area as Systems' project. Therefore, the exemption would be invalid if Sunoco's extraction project ever materialized.

The **U.S. District Court, Eastern District of Michigan** held that Sunoco was not entitled to a preliminary injunction under the four-factor test (*see box*). It first found that the company could not establish a likelihood of success on the merits because it could not show that the EPA acted arbitrarily or capriciously under the **Administrative Procedure Act**. The court stated that Sunoco would be unable to obtain a permit for its project because it would result in operations incompatible with Systems' existing permitted use, contrary to Michigan law.

Success on the merits

The court pointed out that, in order to obtain the permit, Sunoco would have to prove the opposite of what it sought to prove in its challenge to the exception. It claimed that Systems' injection of hazardous waste would adversely affect Sunoco's project because it would cause hazardous waste to migrate. Therefore, under Michigan law, its project would be incompatible with Systems' project. The court concluded that this inability to obtain a permit supported the EPA's determination that the "proposed extraction well, if even drilled, would not be drilled and operated in formations that form the injection zone of the Systems wells."

In upholding the EPA's decision, the court also noted that, even if it could obtain a permit, Sunoco would also have to obtain a hazardous waste construction permit and operating license before commencing its extraction operation. This process would take years and in the end, it was possible that a permit and license would be denied, the court said.

Sunoco also failed to prove that it would suffer irreparable injury if the exemption was not invalidated. The court found that Sunoco's argument was unsuccessful because its project was speculative and remote, not actual or imminent, as is required for an injunction to be issued. It pointed out that Sunoco had no legal right or interest under Michigan law to conduct its project or in the brine to be extracted.

Sunoco's argument that it would be irreparably harmed because Systems' project would impose substantial costs on its project also failed. The court noted that an injunction is an inappropriate remedy for financial injury, which can be resolved by money damages.

Substantial harm to others

The District Court explained that injunctive relief is denied where harm to others is substantial. It found that Systems would be imminently and irreparably harmed if the exemption was invalidated. Systems spent many years and $40 million constructing its facility and obtaining the necessary permits. Ceasing its operations would cause it to breach customer contracts and lose industry good will, the court said. In addition, its primary investor would most likely pull out of the project and the operations would be shut down.

Lastly, the court found that the public interest would be harmed by the issuance of an injunction. It found that Systems' project advanced the public interest by safely disposing of hazardous wastes. It also pointed out that the EPA found in its decision that "[Systems'] proposed injection is protective of human health and the environment." The public would also be harmed if companies could challenge a project that was fully permitted, constructed and operating. The court pointed out that Systems had gone through all the procedures required to bring its project to fruition. To deny it its right to do business would shake the public's confidence of being treated fairly.

A CLOSER LOOK

Preliminary injunction test

The **6th U.S. Circuit Court of Appeals** set forth in *Capobianco v. Summers*, 377 F.3d 559 (6th Cir. 2004), a four-factor test to determine if a party is entitled to a preliminary injunction. The following factors must be balanced:

1. Whether the party has shown a strong or substantial likelihood of success on the merits.
2. Whether the party has demonstrated irreparable injury.
3. Whether the issuance of a preliminary injunction would cause substantial harm to others.
4. Whether the public interest is served by the issuance of an injunction.

Wanted: New legal theories, issues or trends you see developing in litigation

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Also in the courts ...

Environment issues:	Case:	Ruling:
CERCLA	*United States v. Gurley*, No. 04-2627 (8th Cir. 01/20/06).	The government's proof of claim filed in the bankruptcy court for response costs and interest for two contaminated sites was not time-barred under the **Comprehensive Environmental Response Compensation and Liability Act**. The court rejected the sites' owner's argument that the government was required to file a separate CERCLA action outside the bankruptcy process. The court held that the filing of its proof of claim constituted the government's requisite action to recover costs under the CERCLA.
Permits	*Veit Co., et al. v. Lake County, Minn., et al.*, No. A04-1958 (Minn. Ct. App. 01/17/06).	A conditional-use permit for a commercial gravel operation was approved by operation of law because the county did not comply with mandatory notice requirements. The applicable statute provides that an agency must provide written notice of a denial of an application at the time it denies the request. Failure to do so results in the approval of the application by operation of law. The agency provided written notice to the applicants, but it did not explain the reasons for the denial.
Resource Conserva-tion and Recovery Act	*Clark, et al. v. City of Anchorage, et al.*, No. 04-677-C (W.D. Ky. 01/17/06).	An action by property owners against a state's **Environmental and Public Protection Cabinet** for failure to enforce the **Resource Conservation and Recovery Act** was not barred by the Eleventh Amendment. An exception to the amendment allows suit against state officials in their official capacity for violations of federal law. The owners alleged violations of the RCRA and named the director of the cabinet as a defendant, so their suit was not barred.
Standing	*Alliance for Environmental Renewal, Inc., et al. v. Pyramid Crossgates Co., et al.*, No. 04-3000-cv (2d Cir. 01/24/06).	A District Court erred in dismissing an environmental group's **Clean Water Act** action for lack of statutory standing, finding that salt is not a pollutant under the act. The **2d U.S. Circuit Court of Appeals** held that, under *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), it should have first resolved whether subject matter jurisdiction existed on which the group's Article III standing depended before awarding a judgment that was essentially on the merits. The case was remanded for determination of Article III standing.
Zoning	*Turner, et al. v. City of Independence*, No. WD 64998 (Mo. Ct. App. 01/24/06).	A city's decision to rezone two tracts of land from agricultural use to residential planned unit development was not unreasonable. Although property owners challenging the decision presented evidence of private detriment, there was sufficient evidence that public benefit significantly outweighed the detriment. The development conformed to the character of surrounding neighborhoods and there was testimony that it was important to the city's economic development.

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Clean Water Act

Mitigation requirements support Corps' issuance of permit

The **U.S. Army Corps of Engineers** did not act arbitrarily or capriciously in issuing a dredge and fill permit to the **City of Cleveland** pursuant to the **Clean Water Act** for an airport expansion project. The Corps adequately balanced economic and environmental factors, including the benefits and detriments of the probable impacts of the proposed activity on the public interest. (*City of Olmsted Falls, Ohio, et al. v. U.S. Environmental Protection Agency, et al.*, No.02-02210 (6th Cir. 01/24/06).)

In connection with its airport expansion project, and as required by the CWA, Cleveland applied to the **Ohio Environmental Protection Agency** to obtain certification that it met Ohio's environmental requirements. After holding hearings, the agency waived the certification. The Corps then reviewed the project and issued a 404 permit requiring Cleveland to undertake certain mitigating activities to offset the environmental degradation of the airport expansion project.

The **City of Olmsted Falls**, Ohio, a down-river municipality, sued the Corps alleging the issuance of the permit was arbitrary and capricious in violation of the CWA and the **Administrative Procedure Act**. It also argued that the Corps improperly relied on the state agency's certification waiver.

Reliance on waiver

The **6th U.S. Circuit Court of Appeals** found that the Corps properly relied on the certification waiver. It rejected Olmsted's argument that the Corps knew that under Ohio law, the state agency could not issue a waiver of the certification. It reasoned that it would be cumbersome and duplicative of effort if the Corps had to analyze each state's rules and regulations regarding the issuance of waivers and conclude whether the state agency followed those rules. It would also undermine the role of the state environmental agencies in the certification process, the court said.

Olmsted argued that the Corps violated 40 CFR §230.10(c), which provides that "no discharge ... shall be permitted which will cause or contribute to significant degradation of the waters of the United States." The court did not agree. Even though the project would detrimentally impact certain areas, it noted that the Corps issued the permit requiring Cleveland to undertake several projects to preserve, improve and protect other streams and wetlands.

The court also disagreed with Olmsted's argument that the Corps violated 40 CFR § 230.10(b)(1), which provides that discharges cannot be permitted if they cause or contribute to violations of any applicable state water quality standard. Olmsted claimed that the permit violated Ohio's antidegradation policy. In finding that was not true, the court noted that the state environmental agency conducted an extensive analysis of the project. It pointed out that the agency indicated that the mitigation measures would exceed Ohio water quality standards.

The court concluded that there was no error in the Corps' finding that the airport expansion would not cause or contribute to a significant degradation of the waters of the United States.

A CLOSER LOOK

Antidegradation rule applies to states only

In *City of Olmsted Falls, Ohio, et al. v. U.S. Environmental Protection Agency, et al.*, No.02-02210 (6th Cir. 01/24/06), the court found that the **U.S. Army Corps of Engineers** did not err in issuing a permit for an airport expansion project. It rejected the petitioner's argument that the Corps should have decided whether the federal antidegradation rule, 40 CFR §131.12(a), was satisfied prior to issuing the permit. The court found that the rule only applied to states and, therefore, the Corps could not be liable for violations of a regulation under which they had no obligations.

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