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Environmental Enforcement Developments in 2003

by Kevin A. Gaynor and Benjamin S. Lippard

Despite a change in the presidential administration in 2001, the U.S. Environmental Protection Agency's (EPA's) enforcement activity continues at the pace of the late 1990s. Much has been made of a decline in civil and criminal fines from fiscal year (FY) 2001 to FY 2002.[1] Civil penalties collected by EPA declined from $101.6 million in FY 2001 to $55.6 million in FY 2002; criminal fines have declined from $94.7 million in FY 2001 to $62.2 million in FY 2002.[2] This decline seems to reflect a fluctuation in penalty levels, as opposed to any material change in EPA enforcement policy under the Bush Administration.[3] Indeed, the evidence supports this, with similar fluctuations in fines occurring in the late 1990s. Criminal fines have varied in recent years but remain well above 1980s levels, with a record $169.3 million in FY 1997, a decrease to $61.5 million in FY 1999, and $121.9 million in FY 2000.[4] Similar fluctuations have occurred in civil penalties, with $141 million in FY 1999, a decrease to $54 million in FY 2000, and an increase to $101 million in FY 2001.[5] It would be incorrect to conclude from the declines in penalty assessments from FY 2000 to FY 2001 that environmental enforcement had been rolled back.

EPA remains committed to criminal enforcement as its most powerful enforcement weapon. As former Assistant Administrator Steven A. Herman said in 2000, EPA views tough criminal sentences as an important deterrent to environmental crimes because a "prison sentence is personal—it's not a cost of business that can be passed onto the consumer."[6] This is confirmed in the number of EPA referrals of criminal cases to the U.S. Department of Justice (DOJ), which have steadily and dramatically increased from 20 in FY 1982 to 107 in 1992 to a record 278 in FY 1997. These high numbers remain consistent under President George W. Bush's EPA, which has made 256 and 250 criminal case referrals in FY 2001 and 2002, respectively.[7] The criminal enforcement program remains efficient, posting two of its most successful years ever in 2001 and 2002 in terms of sentencing (a record 256 years of jail time imposed on criminal defendants in 2001 and 215.9 years in 2002).[8] EPA criminal investigators are likely to appear in any enforcement effort by EPA. It has reached the point where it is impossible to counsel clients on what kinds of violations will *not* be treated criminally. While EPA may revel in this lack of predictability, it is becoming increasingly difficult for companies, plant managers, and environmental professionals to operate from day to day without fear of being indicted.

There has, however, been a significant drop in environmental criminal matters since the terror attacks of September 11, 2001, as the U.S. Federal Bureau of Investigation has been concentrating on anti-terrorism and is doing little or no environmental criminal investigations. Further, many EPA criminal investigators have been redeployed to anti-terrorism activities. Similar redeployment has occurred at the state and local levels. Undoubtedly critics of the Bush Administration will use the decline to attack the Administration's environmental record without explaining the underlying cause. With more limited resources at its disposal, it is hoped that EPA will choose its criminal cases with far greater care than it has in the past, focus its efforts on truly egregious activities, and reverse a decade-long trend to criminalize environmental violations with little environmental impact or those occurring in areas of regulatory uncertainty or complexity where multiple credible interpretations of the regulations at issue exist, even if contrary to the interpretation being asserted in the enforcement action by the government.[9]

EPA civil enforcement under the Bush Administration is active. Overall, EPA referred 342 civil cases to the DOJ in FY 2002, down from FY 1998's high of 411 referrals,[10] but still a 16% increase over FY 1996. And while EPA only issued 1,441 administrative complaints in FY 2002 (compared to a record 1,763 in FY 2000), this number is far above the 870 administrative penalty complaints issued in FY 1996. Additionally, EPA is forcing defendants to spend more money correcting violations and protecting the environment, posting a record $4.4 billion in injunctive relief in

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1. *See, e.g.*, *EPA Figures Show Sharp Decreases in Criminal, Civil Penalties for Fiscal 2002*, 34 Env't Rep. (BNA) 314 (Feb. 7, 2003).
2. U.S. EPA, Highlights of EPA Enforcement and Compliance Program Accomplishments: Enforcement and Compliance Program Numbers at a Glance, Fiscal Years 2002-1998 (2003) [hereinafter EPA FY 2002 Report].
3. John Peter Suarez, director of EPA's Office of Enforcement and Compliance Assurance (OECA), noted that these numbers represented "cyclical variations." *EPA Figures Show Sharp Decreases in Criminal, Civil Penalties for Fiscal 2002*, *supra* note 1, at 315.
4. EPA FY 2002 Report, *supra* note 2.
5. *Id.*
6. U.S. EPA, Enforcement and Compliance Assurance Accomplishments Report FY 1999 (2000), at *"Message From Assistant Administrator."*
7. Press Release, U.S. EPA, EPA Sets Records for Enforcement While Expanding Program for Industry to Disclosure and Correct Violations (Dec. 22, 1997) (on file with author); U.S. EPA, Enforcement and Compliance Assurance Accomplishments Report FY 1996, at A-4 (1997); EPA FY 2002 Report, *supra* note 2.
8. EPA FY 2002 Report, *supra* note 2.
9. This trend is explored in Kevin Gaynor & Tom Bartman, *Fourth Circuit Says "Knowingly Violates" Means What It Says: Another Boost for Intent Standard for Crimes Under Clean Water Act*, 28 Env't Rep. (BNA) 1736 (Jan. 9, 1998).
10. EPA FY 2002 Report, *supra* note 2.

FY 2001, and over $3.9 billion in injunctive relief in 2002—well above the $1.5 billion in FY 2000.[11] Also, the complexity of the cases being pursued appears to have increased, as the coal-fired utility initiative discussed below illustrates. And the small declines in complaints issued and civil penalties collected might also be reflective of the improved performance of EPA's compliance assistance program, which has more than doubled the number of entities it has assisted since 1998.[12] In theory, a maturing regulatory regime should result in less, not more, enforcement actions, as the regulated community conforms its behavior to the regulatory regime. Alternatively, this decline could be attributable to the significant commitment of enforcement resources EPA has made to its coal-fired utility initiative,[13] which remains ongoing, as well as some diversion of resources to counter-terrorism after the events of September 11, 2001.

EPA also measures enforcement by qualitative measures such as pollutant reduction.[14] In FY 1999, over 6.8 billion pounds of pollutants were eliminated due to EPA enforcement actions (this number is so large due to EPA's settlement in FY 1999 of a claim against seven major diesel engine manufacturers alleging that they had installed illegal computer software on heavy diesel engines; recent pollution reductions of 660 million pounds in FY 2001 and 261 million pounds in FY 2002 are more typical).[15] As part of this effort, EPA and the DOJ are using the leverage of settlements to force defendants to agree to improvements in environmental management systems and the institution of preventive actions that are not only burdensome and costly to the facility at issue, but may extend to all of a company's facilities, not merely the facility that committed the violation. These measures far exceed what the government could obtain in relief if it obtained a favorable verdict in court.

Over the past few years, EPA has also identified industry sectors requiring special attention. Since FY 1996, EPA has selected 11 sectors as priorities.[16] In theory, this allows EPA to marshal resources and think comprehensively about how it intends to use its enforcement tools to achieve certain results. EPA's coal-fired power plant enforcement initiative is its most ambitious and controversial. Notwithstanding EPA's recent rule clarifying the scope of the new source review (NSR) "routine maintenance, repair, and replacement" provision,[17] the lawsuits against the originally named utility defendants continue, although a number of settlements have occurred. A recent trial decision and several other preliminary decisions have also complicated this already complex area of the law.

To counteract perceived government excesses, some courts are taking harder looks at agency actions. Other courts have affirmed broad EPA powers with little reservation. As a result, a number of ongoing cases and issues will be significant in defining the scope and limits of environmental enforcement in the years to come. For example, in *Tennessee Valley Authority v. Whitman*,[18] related to EPA's coal-fired utility initiative, the U.S. Court of Appeals for the Eleventh Circuit blasted EPA for its enforcement practices and held that certain parts of the Clean Air Act (CAA),[19] which purported to allow EPA to unilaterally issue compliance orders to sources with little or no judicial review, were unconstitutional.[20] EPA has vigorously challenged this ruling, seeking rehearing en banc as well as raising the issue before the U.S. Supreme Court in *Alaska Department of Environmental Conservation v. U.S. Environmental Protection Agency*,[21] a separate case addressing EPA authority to set aside state permitting decisions. Courts have also split over the merits of EPA's claims in the coal-fired utility initiative, with *United States v. Ohio Edison Co.*[22] representing a major EPA victory and *United States v. Duke Energy Corp.*[23] reflecting a major pretrial defeat for EPA (although the case remains ongoing).

The district court in *General Electric Co. v. Whitman*[24] reaffirmed EPA's authority to issue administrative orders under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[25]—similar to those rejected by the Eleventh Circuit—denying General Electric's constitutional challenge to EPA's routine use of the extraordinary power of CERCLA §106, under which EPA can force a company to expend hundreds of millions of dollars to comply with a cleanup order before the company can obtain judicial review of the order.[26] General Electric has appealed the case to the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit. Should the D.C. Circuit reverse the district court, it will have a dramatic effort on how EPA runs the Superfund program.

Several Court decisions initially appeared to establish major limits on environmental enforcement authority, but subsequent decisions have backed off the broader implications of those rulings. In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*,[27] the Court cut back the government's authority to regulate isolated wetlands, which may have a carry-over effect on the breadth of EPA's authority to regulate under the Clean Water Act (CWA),[28] for example in cases where EPA cannot demonstrate a direct connection to navigable waters. The fallout from *SWANCC* is interesting, and this area of the law remains largely unsettled. Courts are divided, with some reading *SWANCC* as a major limit on the CWA, and others read-

11. *Id.*
12. *Id.* In 1998, EPA only reached 246,596 entities with compliance assistance; in 2001, it reached 551,340; and in 2002, it reached nearly 590,000.
13. *See Resource Limits Slow DOJ's Environmental Enforcement to FY 2003*, Inside EPA, Apr. 4, 2003, at 8.
14. *See supra* note 6, at 4.
15. EPA FY 2002 Report, *supra* note 2.
16. These are concentrated animal feeding operations, automotive service and repair shops, coal-fired power plants, dry cleaning, industrial organics, chemical preparations, iron and steel, municipalities, petroleum refineries, primary nonferrous metals, and pulp mills.
17. 68 Fed. Reg. 61247 (Oct. 27, 2003). Documents related to this rulemaking are available at U.S. EPA, *New Source Review*, *at* http://www.epa.gov/nsr (last visited Oct. 29, 2003).
18. 336 F.3d 1236, 33 ELR 20231 (11th Cir. 2003).
19. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.
20. 336 F.3d at 1236.
21. 244 F.3d 748 (9th Cir. 2001).
22. 276 F. Supp. 2d 829, 2003 WL 21910738, 33 ELR 20253 (S.D. Ohio 2003).
23. 278 F. Supp. 2d 619, 2003 WL 22024780 (M.D.N.C. 2003).
24. 257 F. Supp. 2d 8, 33 ELR 20167 (D.D.C. 2003).
25. 42 U.S.C. §§9601-9675, ELR Stat. CERCLA §§101-405.
26. *See id.* §9606(a).
27. 531 U.S. 159, 31 ELR 20382 (2001).
28. 33 U.S.C. §§1251-1387, ELR Stat. CWA §§101-607.

ing it as a minor limit. The circuit courts have also divided on the "overfiling" issue, where a circuit split has materialized on the question of whether or not EPA may bring a second enforcement action for alleged environmental violations when it is dissatisfied with the result of an earlier enforcement action brought by a state agency.

Similarly, the Court's decision in *Steel Co. v. Citizens for a Better Environment*[29] initially appeared to create a major bar to citizen enforcement of environmental laws on grounds of Article III standing. A later Court decision, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,[30] largely rolled back these limitations, as shown by recent decisions in the lower federal courts.

In *United States v. American National Can Co.*,[31] a federal district court substantially restricted what EPA pronouncements will be entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*.[32] At the same time, recent Court decisions have arguably expanded the scope of *Chevron* deference more generally. Recent decisions coming out of the coal-fired enforcement initiative have also limited the "fair notice" defense, a powerful check on EPA's ability to enforce interpretations of law not made clear to the regulated community. These developments will be very important to EPA enforcement in the future, since judicial deference will give EPA a powerful weapon to use in winning enforcement cases.[33]

This Article explores these and other areas. Specifically, it addresses the following:

- coal-fired power plant initiative;
- wetlands enforcement;
- CWA enforcement;
- CERCLA enforcement;
- overfiling;
- statute of limitations;
- citizen suits;
- changes in agency interpretations and fair notice;
- environmental justice;
- the mens rea requirement for criminal liability;
- parent-subsidiary liability; and
- civil penalties and fines.

Coal-Fired Power Plant Initiative

This section presents a general sketch of some of the issues in EPA's current enforcement initiative targeting coal-fired electric utilities. EPA has alleged that these utilities violated the NSR provisions of the CAA when they allegedly modified their plants without obtaining proper permits or installing appropriate emission control equipment. Many legal theories at the heart of this initiative are equally applicable to other industries, as the NSR program applies to all major emitting facilities. In fact, similar enforcement initiatives have occurred in both the pulp and paper and petroleum refining industries.

As of August 2003, EPA had won a major victory at trial in its NSR case against the Ohio Edison Co., had lost an equally significant pretrial ruling in its case against Duke Energy, had received a stern reprimand from the Eleventh Circuit in the Tennessee Valley Authority's (TVA's) appeal of an administrative order issued by EPA, and had finalized a rule defining "routine maintenance" under the NSR program in a way that, if applied to the projects it is challenging in the utility lawsuits, would exempt most of those projects from NSR. Because EPA does not view the new "routine" rule as applying to past projects,[34] it has attempted to preserve its ability to sue for activities that would have been violations under the narrow interpretation it has been advocating in the lawsuits. Recent statements from enforcement personnel have suggested that EPA will not be bringing new lawsuits for projects under the old rules.[35] This is significant because EPA was investigating a large number of facilities or future lawsuits. It also raises the issue of a level playing field for those companies that have settled with EPA or are in litigation with EPA based on the narrow interpretation of "routine" EPA had been trying to apply, as compared to their competitors, who have engaged in similar conduct. Certainly the better alternative would be to discontinue its NSR initiative but that may be politically infeasible. EPA is still pursuing the existing lawsuits, however. Needless to say, the coal-fired utility initiative is quite interesting from an enforcement perspective—and the legal issues remain unsettled, to say the least.

In the fall of 1999, EPA commenced this enforcement initiative by suing seven coal-fired electric utilities in various federal courts and issuing an administrative compliance order to the TVA. To date, two utilities have settled lawsuits with EPA (Tampa Electric Company and Southern Indiana Gas & Electric). Other utilities (Wisconsin Electric Power Company (WEPCO), Virginia Electric Power Company, and PSEG Fossil, Ltd. Liability Corporation, which were not sued in the initial round of 1999 lawsuits) have also settled with EPA. Two trials have been completed: EPA prevailed in the liability phase of the Ohio Edison trial, with a court finding Ohio Edison liable for NSR violations in connection with all 11 projects challenged by EPA.[36] The remedy phase of the Ohio Edison trial is scheduled to take place in April 2004. Closing arguments in the Illinois Power case were held on September 29, 2003. Finally, three utilities are still actively and aggressively litigating EPA's claims (these utilities are American Electric Power, Duke Energy, and Southern Company and its subsidiaries).[37] In the *Duke Energy* case, EPA recently received a major setback when the court issued a summary judgment ruling rejecting EPA's theories and basically adopting Duke's.[38] Consequently,

29. 523 U.S. 83, 28 ELR 20434 (1998).
30. 528 U.S. 167, 30 ELR 20246 (2000).
31. 126 F. Supp. 2d 521 (N.D. Ill. 2000).
32. 467 U.S. 837, 14 ELR 20507 (1984).
33. The tension between *Chevron* deference, due process, and fair notice is explored in Kevin A. Gaynor & Benjamin S. Lippard, *TVA Decision Calls EPA's Unilateral Enforcement Authorities Into Question*, 34 Env't Rep. (BNA) 1894 (Aug. 22, 2003).
34. This is stated in EPA's preamble to the new "routine rule," 68 Fed. Reg. 61247, 61272 n.15 (Oct. 27, 2003) [hereinafter U.S. EPA, Routine Rule Preamble].
35. Christopher Drew & Richard A. Oppel Jr., *Lawyers at EPA Say It Will Drop Pollution Cases*, N.Y. Times, Nov. 6, 2003, at A1.
36. United States v. Ohio Edison Co., 276 F. Supp. 2d 829, 2003 WL 21910738, 33 ELR 20253 (S.D. Ohio 2003).
37. Vinson & Elkins represented Southern Indiana Gas & Electric Co. (SIGECO) in its NSR litigation and Kevin Gaynor was lead counsel. Ben Lippard was also extensively involved in the case.
38. United States v. Duke Energy Corp., 278 F. Supp. 2d 619, 2003 WL 22024780 (M.D.N.C. 2003).

EPA has little, if any, chance of prevailing on any of the violations alleged in that case. The trial is expected in the first or second quarter of 2004. Additionally, the Eleventh Circuit has rejected EPA's compliance order to TVA, instructing EPA to sue TVA in federal district court if it chooses to proceed against alleged NSR violations at TVA's plants. EPA has sought rehearing of this ruling en banc.

Legal Background

In the NSR initiative, EPA has alleged that the coal-fired utilities violated the NSR provisions of the CAA by undertaking "major modifications" of their plants without obtaining necessary prevention of significant deterioration (PSD) permits or complying with the new source performance standards (NSPS). Significantly, EPA alleges that the utilities failed to install the best available control technology (BACT) when they modified their facilities, as required by these programs. The utilities contend that their activities were not major modifications, but rather were "routine maintenance, repair, and replacement" that is exempt from NSR. The utilities also contend that the projects did not cause emissions increases and that EPA's current legal position represents a change in the law of which they did not have fair notice.

At the heart of this litigation is the CAA's definition of "modification." The term "modification" means "any physical change, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."[39] Thus, to be a "modification," a project must be (1) a physical change (2) that causes (3) an emissions increase. Remarkably, prior to this litigation, EPA never articulated a detailed methodology for calculating whether a particular project caused an emission increase. While the basic determination of whether there was an actual physical change at a source is simple, the more difficult issue is determining whether one of the several regulatory exclusions to the definition of "physical change" applies. The key exclusion from the regulatory definition of physical change is for "routine maintenance, repair and replacement" projects (hereinafter referred to as "routine maintenance").[40] Under the applicable regulations, routine maintenance projects are not "physical changes" within the meaning of the NSPS and PSD programs, so the requirement to install upgraded pollution controls does not apply.

This routine maintenance provision is a critical legal issue controlling the dispute between the targeted electric utilities and EPA. What complicates this issue is that there is very little EPA guidance on what constitutes routine maintenance. In a 1992 *Federal Register* notice, EPA wrote that the

> determination of whether the repair or replacement of a particular item of equipment is "routine" under the NSR regulations, while made on a case-by-case basis, must be based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the relevant industrial category.[41]

EPA also promised to issue guidance on this issue, recognizing that what is routine is not self-evident, but had never done this prior to the litigation.[42] During the course of the litigation, EPA elaborated that the routine maintenance exclusion required "a case-by-case determination by weighing (1) the nature [and] extent, (2) purpose, (3) frequency, and (4) cost of the work, as well as other relevant factors, to arrive at a common sense finding."[43] This list of factors follows from the U.S. Court of Appeals for the Seventh Circuit's 1990 decision in *Wisconsin Electric Power Co. (WEPCO) v. Reilly*.[44] While the utilities generally agree that these factors are relevant criteria, they vigorously dispute how these criteria should be interpreted. EPA has argued that "routine" is determined by what is "routine" for an individual plant or facility; industry has argued that in determining what is "routine" a court must consider what is "routine" for an industry. Courts have split on this issue.

The other major legal issue is how emissions increases are to be calculated. In 1992, EPA promulgated a rule establishing that for utility sources, the PSD emissions test compares past actual to future actual emissions.[45] This is in contrast to other industries, where EPA had traditionally argued that the proper test is comparing past actual emissions to the maximum potential future emissions, a test that most sources automatically fail.[46] This "actual to potential" test was rejected in the *WEPCO* case,[47] and in response EPA promulgated the "WEPCO rule," setting the "actual to actual" test for utilities. The WEPCO rule does not specify precisely how emissions projections are to be made, merely that all relevant information must be considered.[48]

Unsurprisingly, this has also been a point of contention in the utility litigation. EPA has developed an emissions test that basically argues that if a project allows a unit to potentially be run for more hours as a result of a project, that establishes an emissions increase. Utility defendants have strongly challenged this view on factual and legal grounds, arguing that the EPA test assumes, rather than proves, an emissions increase, and that the EPA test is inconsistent with the regulations. There are numerous complexities associated with the emissions argument, which will not be explored at length here, including the choice of "baseline period"; the "demand growth" exclusion, under which hours of operation arguably need to be held constant before and after the project; EPA's attempt to resurrect the "actual to potential" test for utilities; and the "causation" requirement contained in the statute. Additional case law addressing all of these important issues is likely to emerge from the utility initiative.

Additionally, industry asserted and the court adopted in the *Duke Energy* case a test based on the language of the CAA and 1980 regulations that is based on the hourly emissions rate from the facility. Under this test, the hours of operation are held constant when comparing the pre-project to

39. 42 U.S.C. §7411(a)(4).
40. *See, e.g.,* 40 C.F.R. §52.21(b)(2)(iii)(A).
41. 57 Fed. Reg. 32314, 32326 (July 21, 1992).
42. *Id.*
43. In re Tennessee Valley Auth., CAA Docket No. 00-06, slip op. at 48 (EPA EAB Sept. 15, 2000).
44. 893 F.2d 901, 20 ELR 20414 (7th Cir. 1990).
45. 40 C.F.R. §52.21(b)(21).
46. Note that use of "actual to potential" for other industries appears somewhat inconsistent with the *WEPCO* decision. Still, few sources have challenged the "actual to potential" approach.
47. *WEPCO*, 893 F.2d at 917-18.
48. 40 C.F.R. §52.21(b)(33)(i).

the post-project emissions. PSD would not be triggered unless the modification increased the facility's capacity, and most modifications at issue in the NSR litigation would not trigger PSD. Moreover, the WEPCO rule would not apply to pre-1992 projects, and thereafter its application would be at the utility's option. The court in Ohio Edison rejected this test and instead adopted EPA's test, which assumes utilization of a facility will increase after a maintenance project and virtually always results in an emission increase for any project done to correct a problem that results in unit downtime.

Additionally, industry has asserted a "fair notice" defense to EPA's current legal position. The fair notice doctrine is a due process doctrine under which a person or company may not be held liable for violating the law, or applicable regulations implementing that law, until the agency has made the obligations of that person or company clear.[49] Thus, EPA cannot enforce its regulatory interpretation of the "modification" definition, specifically its view of routine maintenance and of the appropriate emissions test, unless it first provided fair notice of the meaning of these terms. Industry is arguing that EPA has never formally defined what maintenance practices are "routine." The coal-fired generating industry argues that it has always understood that maintenance practices that are standard within the industry, such as the projects described in EPA's complaints in the enforcement initiative cases, were routine. Industry claims to have acted in accordance with this understanding for years. Further, industry believes that EPA had full knowledge of the types of projects conducted throughout the electric utility industry and that EPA's silence was essentially an acceptance of the industry view that these projects were routine. Several courts have rejected industry's claims so far, but others have allowed them to proceed.[50] Given the significant number of documents that arguably support industry's claims, it is likely that these rulings are not the final word on the fair notice issue.

In 2000, EPA also issued a decision purporting to administratively "adjudicate" the TVA matter. The EPA Environmental Appeals Board (EAB) issued an order that accepted EPA's arguments in the TVA administrative proceeding and adopted a narrow view of the "routine maintenance" provision and EPA's proposed emissions test.[51] While some courts relied heavily on the EAB decision, the Eleventh Circuit held that it had no legal significance,[52] and the *Duke Energy* court referred to it as "potentially self-serving" and refused to accord the EAB reasoning deference as it was not a "long-standing" agency interpretation.[53] Needless to say, the question of whether EPA's view of the law is entitled to deference from courts will be an important issue in future cases. This issue is particularly interesting, since the rationale of the new rule calls into question the legal underpinning of EPA's litigation position in these cases.

Ohio Edison

On August 7, 2003, a federal district court in Ohio issued the first ruling on the merits in one of the cases comprising EPA's controversial NSR enforcement initiative against the coal-fired utility industry. Although likely to be appealed, the district court's decision in *Ohio Edison* represents a victory for EPA and the DOJ, as the court found Ohio Edison liable for NSR violations for all 11 activities alleged by EPA to be violations. The remedy trial in *Ohio Edison* is scheduled to commence in April 2004. In fashioning equitable relief, which will involve emissions controls, penalties, and other damages, the court has signaled that it will perform a broad equitable analysis considering the environmental, public health, economic, and employment consequences of Ohio Edison's actions and EPA's inconsistent enforcement of the CAA.[54] Ohio Edison will no doubt appeal this ruling, which accepted EPA's positions almost in their entirety.

There were two major issues before the *Ohio Edison* court. The first issue was how to interpret the rule exempting projects that are "routine maintenance, repair, or replacement" from the NSR requirements. At the *Ohio Edison* trial, the arguments centered on the proper interpretation of the *WEPCO* decision, the leading case on the "routine" issue. EPA argued that what is "routine" depends on how often an activity is performed at a particular facility, while Ohio Edison argued that the prevalence of a particular type of project throughout an industry is the key factor in deciding what is "routine" and inform each factor of the four-part test. Although past EPA statements provided support for Ohio Edison's position,[55] the court found that the plain language of the CAA and the relevant regulations made it clear that the "routine" exemption is narrow.[56] Significantly, the court gave deference to EPA's current legal interpretation of the routine provision.[57] The court went on to explain that there are a number of factors that weighed against finding the Ohio Edison projects to be routine, including the fact that the projects required several months of downtime to complete, the projects extended the lives of the generating units, the projects were performed only once or twice during the life of a particular unit, and the projects involved capital expenditures.[58] The court also observed that the routine maintenance provision was not designed to permanently exempt existing sources from NSR, and that the effect of accepting Ohio Edison's arguments would be exactly that.[59] Taken on its own terms, the *Ohio Edison* court adopted a view of "routine maintenance" that is very narrow and could

49. *See, e.g.,* Trinity Broad. of Fla., Inc. v. Federal Communications Comm'n, 211 F.3d 618 (D.C. Cir. 2000); United States v. Hoescht Celanese Corp., 128 F.3d 216, 28 ELR 20236 (4th Cir. 1997); General Elec. Co. v. EPA, 53 F.3d 1324, 25 ELR 20982 (D.C. Cir. 1995).

50. The defendant's fair notice claims were rejected in United States v. Ohio Edison Co., 276 F. Supp. 2d 829, 2003 WL 21910738, 33 ELR 20253, at *54-56 (S.D. Ohio 2003), and United States v. Southern Ind. Gas & Elec. Co., 245 F. Supp. 2d 994 (S.D. Ind. 2003). The *Duke Energy* court did not express an opinion on this issue, but denied the plaintiff's motion for summary judgment on fair notice. However, by adopting Duke Energy's standards for what activities are "routine" and for the proposed emissions test, the court has implicitly acknowledged that Duke Energy did not have notice of the standards the government was advocating. United States v. Duke Energy Corp., 278 F. Supp. 2d 619, 2003 WL 22024780, at *8 n.10 (M.D.N.C. 2003).

51. In re Tennessee Valley Auth., CAA Docket No. 00-06 (EPA EAB Sept. 15, 2000).

52. Tennessee Valley Auth. v. Whitman, 336 F.3d 1236, 33 ELR 20231 (11th Cir. 2003).

53. *Duke Energy*, 2003 WL 22024780, at n.8.

54. *Ohio Edison*, 2003 WL 21910738, at *2.

55. *See infra* notes 66-83 and accompanying text.

56. *Ohio Edison*, 2003 WL 21910738, at *25.

57. *Id.*

58. *Id.*

59. *Id.*

impose NSR requirements on large classes of maintenance projects industry has long considered exempt from NSR. It should be noted, however, that the recent EPA rulemaking on routine maintenance is substantially broader in application than the approach of the *Ohio Edison* court and undercuts the court's conclusion that the CAA mandates the routine exclusion to be very narrow.[60] In recent pleadings in *United States v. Illinois Power Co.*,[61] the government has had to recant its assertions that the exemption must be very narrow and acknowledge that the new rule provides for a broad exemption.

The second major issue in *Ohio Edison* related to whether or not the projects challenged by EPA significantly increased emissions. The PSD emissions test compares emissions before a project to emissions after a project, although the details of that calculation have never been specified by EPA. The *Ohio Edison* court squarely rejected EPA's attempt to use the "actual to potential" test—a test virtually any activity would fail—finding it "not legally supportable."[62] Under the "actual to actual" test also preferred by EPA and adopted by the court,[63] EPA offered calculations developed by outside experts that were determined by taking the amount of time that the unit could not operate due to equipment failure and then projecting how much time the unit would operate after the equipment had been replaced.[64] EPA argued that because the challenged projects reduced the amount of breakdown time, it could be presumed for PSD projection purposes that the generating units would run for more hours per year and thus cause increased emissions. Ohio Edison disputed that these alleged increases in the amount of time the unit could be operated should be considered in calculating whether an "emissions increase" occurred within the meaning of the CAA, since the regulations expressly exclude "increases in hours of operation" from triggering NSR.[65] Ohio Edison also argued that EPA developed its emissions increase formula expressly for purposes of litigation. The court, however, accepted EPA's view, relying largely on the fact that the PSD regulations specify a "tons per year" measurement, which it believed implicitly includes some accounting for the hours of operation.[66] The court's ruling that reducing equipment breakdowns caused an increase in emissions has obvious implications for any industrial operation that performs maintenance to improve the reliability of its facilities. The court's decision bolsters EPA's recent arguments regarding what triggers NSR and may lead to other enforcement actions against many types of facilities where maintenance projects can affect the number of hours per year that a facility operates.

Duke Energy

Interestingly enough, what the *Ohio Edison* court gave to the government, the *Duke Energy* court has taken away. In a dramatic reversal of the government's fortunes, Judge Frank W. Bullock Jr. of the U.S. Court of Appeals for the Middle District of North Carolina issued a thoughtful opinion that in most respects is the exact opposite of the *Ohio Edison* decision.[67] In *Duke Energy*, the court issued a preliminary decision on the two key legal issues controlling the question of NSR applicability: the "routine" provision and the proper method of calculating an emissions increase.

On the "routine" issue, the court concluded, based on a review of the *WEPCO* decision as well as other applicable precedents and public pronouncements of EPA, that the question of whether a given activity is routine is to be determined based on what is routine for the entire source category—in this case, the electric utility industry.[68] In doing so, the court relied on the Seventh Circuit's *WEPCO* decision and EPA's own initial applicability determination for WEPCO, both of which considered what was commonplace at WEPCO's own plants and what was commonly done in the industry.[69] In the *Duke Energy* court's view, the only test that would require consideration of both what happened at a particular plant and what happened elsewhere in the industry is the "routine in the source category" test advanced by the defendants,[70] a conclusion that the court found to be bolstered by the U.S. Congress' intent in passing the PSD program.[71] Tellingly, the court observed that while industry practices were addressed in both the *WEPCO* case and EPA's applicability determination, in EPA's litigation position "this aspect of the *WEPCO* analysis has completely disappeared."[72] Because EPA had established its view of the law in past interpretations, those interpretations must be applied in the current enforcement actions.[73] Significantly, the court held that EPA could not change its mind regarding past interpretations without notice-and-comment rulemaking.[74] Although there is authority for this proposition, it is a relatively controversial proposition of administrative law.[75]

Ultimately, the court did not decide the "routine" issue, holding that there were genuine issues of fact regarding whether or not the challenged activities were routine for the utility industry.[76] The *Duke Energy* court's ruling on the relevant legal standard takes a broader view of the "routine maintenance" exemption than the *Ohio Edison* court, and adopts the position taken by the utilities. This decision also represents the first time a court in the utility initiative has rejected EPA's primary argument for the narrowness of the "routine" exemption. In the utility cases, EPA has argued that the D.C. Circuit's decision in *Alabama Power Co. v. Costle*[77]—the case challenging the initial 1978 PSD regulations—stands for the proposition that EPA only has authority to exempt the most minor, de minimis activities from the scope of NSR, due to the broad statutory language govern-

60. U.S. EPA, Routine Rule Preamble, *supra* note 34, at 61272.
61. No. 99-833-MJR, at 3-6 (S.D. Ill. Sept. 5, 2003).
62. *Ohio Edison*, 2003 WL 21910738, at *32.
63. *See* Wisconsin Elec. Power Co. v. Reilly, 893 F.2d 901, 20 ELR 20414 (7th Cir. 1990).
64. *Ohio Edison*, 2003 WL 21910738, at *36-37.
65. 40 C.F.R. §52.21(b)(2)(iii)(F).
66. *Ohio Edison*, 2003 WL 21910738, at *44-45.
67. *Duke Energy*, 2003 WL 22024780.
68. *Id.* at *13.
69. *Id.* at *10.
70. *Id.* at *12.
71. *Id.* at *9.
72. *Id.* at *13.
73. *Id.*
74. *Id.* at *14.
75. *See generally* William R. Anderson, *Informal Agency Advice: Graphing the Critical Analysis*, 54 Admin. L. Rev. 595, 603 n.17 (2002).
76. *Duke Energy*, 2003 WL 22024780, at *15.
77. 636 F.2d 323, 400, 10 ELR 20001 (D.C. Cir. 1979).

ing "any physical change." While *Alabama Power* is a daunting case, due primarily to the complexity of the regulations at issue, it is fair to say that EPA's argument is not the only reasonable reading that the language of this case supports. Indeed, EPA appears to have made no public statements articulating this position before the NSR cases. Several courts, however, have accepted EPA's view, including the *Ohio Edison* court.[78] It should be noted that this legal issue has major significance, because if EPA's ability to exempt activities from NSR is limited in the way that its litigation position suggests, that could have ramifications for many CAA regulations, including, most significantly, the Bush Administration's recent rulemaking on the "routine maintenance, repair, and replacement" provision of the NSR regulations. In fact, EPA has expressly disavowed this view of *Alabama Power* in the preamble to the new routine rule.[79] Those regulations are certain to be challenged, and it is likely that the D.C. Circuit will ultimately have to decide many of these legal issues in connection with that challenge.

The *Duke Energy* court also rejected the government's position on emissions increases, holding instead that for purposes of the PSD program, there is an emissions increase caused by a project only if the project increases the short-term/hourly emissions rate from the facility.[80] In doing so, the court applied the plain language of the "hours of operation" exclusion as well as EPA guidance memoranda from the early 1980s,[81] both of which were explicitly rejected by the *Ohio Edison* court. Moreover, the court held that there was no indication in the PSD regulations (prior to the WEPCO rule in 1992) that the "actual to actual" test argued for by EPA (and applied by the *Ohio Edison* court) was the law.[82] This is a radically different approach than that taken by the *Ohio Edison* court, which found an emissions increase for projects even where the hourly emissions rate did not change if those projects were projected to allow the unit to run for more hours per year. The practical effect of the *Duke Energy* decision is that only projects that caused an increase in fuel input capacity on an hourly basis will trigger PSD. Obviously this is a favorable development for industry because few activities affect that type of short-term capacity. Because the government's arguments in *Ohio Edison* and other cases was based primarily on an increased-hours-of-operation theory, this ruling represents a major setback for the government. Still, the *Duke Energy* court has not decided these issues either, holding that there were issues of material fact on the emissions issue as well,[83] and it remains to be seen how the government will respond to this setback. Because the question of what causes an emissions increase is a fundamental issue regarding NSR applicability, the rationale of the *Duke Energy* decision could be potentially applicable to other NSR situations outside the coal-fired utility initiative.

The trial in another NSR case, *United States v. Illinois Power Co.*,[84] concluded this summer, and closing arguments were held on September 29. 2003. It will be interesting to see whether the court hearing that case follows the *Ohio Edison* approach, the *Duke Energy* approach, or chooses another approach entirely. It will also provide a first view of how the new rulemaking affects a court's view of EPA's litigation position in the NSR lawsuits. Similarly, the *Ohio Edison* remedy trial raises into question what impact the new rule will have on a court fashioning equitable relief.

Tennessee Valley Authority

In *Tennessee Valley Authority*,[85] another decision arising out of the utility initiative, the Eleventh Circuit issued a major decision holding the CAA unconstitutional to the extent it allowed for civil and criminal penalties to be imposed on a source for violating an administrative order issued by EPA. These orders are known as administrative compliance orders (ACOs) and are issued pursuant to a provision of the CAA that provides that the Administrator of EPA may issue an order on the basis of "any information" suggesting a violation of the Act.[86] As the Eleventh Circuit read the Act, once the ACO was issued, violation of the ACO was a violation of the Act itself regardless of the merits of EPA's conclusions—much like an injunction.[87]

This issue was raised because EPA chose not to sue the TVA in federal district court, unlike the other utilities targeted in the enforcement initiative, because of the TVA's status as a federal agency. Rather, EPA chose to issue an ACO to the TVA. The dispute between EPA and the TVA was adjudicated in a proceeding before the EAB—a proceeding that the Eleventh Circuit criticized in very sharp terms. In the Eleventh Circuit case, EPA had initially argued that the TVA was not entitled to challenge the order, but rather was required to use intra-executive branch dispute resolution procedures. The Eleventh Circuit disagreed, and in an earlier order determined that the TVA had independent litigating authority, and because the ACO was "final agency action," the court had jurisdiction over the case.[88]

This earlier conclusion that the ACO was final agency action over which it had jurisdiction was ultimately reversed by the Eleventh Circuit. The court concluded that because the ACO procedure was constitutionally invalid, the ACO itself was not a final agency action and the court therefore had no jurisdiction.[89] The decision not to reach the merits of the CAA issues came as a major surprise, since there had been more than a year of briefing on those issues and a full oral argument. It was widely predicted based on the oral argument that if the court reached the merits the opinion would be negative for EPA. Instead, the decision transcended the coal-fired power plant initiative and went to the heart of EPA's enforcement authority. The court made it clear that it was very concerned about EPA's enforcement practices, rejecting the EAB proceeding as inconsistent with the "rule of law"[90] and sharply criticizing EPA for tak-

78. *Ohio Edison*, 2003 WL 21910738, at *58; United States v. Southern Ind. Gas & Elec. Co., 245 F. Supp. 2d 994, 1014 (S.D. Ind. 2003).

79. U.S. EPA, Routine Rule Preamble, *supra* note 34, at 61273.

80. *Duke Energy*, 2003 WL 22024780, at *16.

81. *Id.* at *17.

82. *Id.* at *22.

83. *Id.* at *24.

84. No. 3:99cv00833 (filed Nov. 3, 1999).

85. 2003 WL 21452521.

86. 42 U.S.C. §7413(a)(4).

87. *Tennessee Valley Auth.*, 2003 WL 21452521, at *3.

88. Tennessee Valley Auth. v. EPA, 278 F.3d 1184, 1198-99, 32 ELR 20407 (11th Cir. 2002).

89. *Tennessee Valley Auth.*, 2003 WL 21452521, at *18.

90. *Id.* at *6.

ing inconsistent positions with industry and with courts regarding the effect of its administrative orders:

> Why does EPA stake out a position in court that differs from the position it takes when it issues an ACO to a regulated party? One possibility is that the EPA likes to have its cake and eat it too[,] employing the harsh provisions of the CAA when confronting a potentially recalcitrant party, but hesitant to reveal the legal significance of ACOs in court for fear of the very part of the CAA that makes ACOs so effective will be struck down.[91]

In any event, the *Tennessee Valley Authority* court's decision that the CAA was unconstitutional to the extent that it authorized EPA to issue unilateral compliance orders of this sort represents a significant reining-in of EPA's enforcement authority.

EPA is also aggressively challenging the *Tennessee Valley Authority* court's ruling on the constitutional question, having sought en banc review by the full Eleventh Circuit and strongly criticizing the *Tennessee Valley Authority* court's ruling in a brief filed before the Court in the appeal of another case, *Alaska Department of Environmental Conservation*,[92] which presents the issue of whether or not a state permitting decision under the CAA can be overturned by EPA. The *Tennessee Valley Authority* decision raises complex issues of administrative law and could be significant in all manner of cases regarding EPA administrative orders under a variety of environmental statutes.[93] Should the new rule be rejected, it is uncertain if EPA will renew its efforts to target past activities.

Conclusion

The decisions so far in the utility initiative have not clarified the scope of the NSR program. EPA won what appeared to be a major victory in the *Ohio Edison* case, but that victory was short-lived and the decision in *Duke Energy* has taken the exact contrary view on the important legal issues. The only circuit court with jurisdiction over the issues chose not to address the merits of EPA's claims, but did hold that the decision of the EAB, which arguably stated EPA's position and had already been relied on by the court in *United States v. Southern Indiana Gas & Electric Co. (SIGECO)*,[94] was without any legal force. This will deprive EPA of an important foundational support of its legal theories going forward. Similarly, so does the new routine rule, as it disavows EPA's Alabama Power-based de minimis authority argument, which both the *SIGECO* and *Ohio Edison* courts found persuasive. In short, the merits of these claims remain unsettled, and NSR law remains regrettably unclear as a result. This state of affairs is likely to remain for several years, as courts have split on these important legal issues. EPA's new "routine maintenance, repair, and replacement" rule could provide some much-needed clarity, but those rules will likely be aggressively challenged by both environmental groups and certain states, and a final decision in that matter may take years as well.

Wetlands Enforcement

Ongoing developments in the field of wetlands enforcement have been a mixed bag for both the government and the regulated community. The most important recent developments are those related to the Court's decision in *SWANCC*.[95] Although courts have divided on the meaning of this case, the trend appears to be reading this case as a minor, but important, limitation on the jurisdiction of the U.S. Army Corps of Engineers (the Corps). In another important development, an equally divided Court affirmed without opinion the U.S. Court of Appeals for the Ninth Circuit's decision in *Borden Ranch Partnership v. U.S. Army Corps of Engineers*,[96] which took a broad reading of the CWA and an aggressive approach to the calculation of penalties.

SWANCC

The United States suffered a defeat in the significant CWA case *SWANCC*,[97] where the Court held that the Corps' jurisdiction over wetlands did not extend to isolated wetlands. For many years, the Corps had asserted jurisdiction over isolated wetlands—those not adjacent to navigable waters or their tributaries—on the basis of the migratory bird rule,[98] which purported to extend the Corps' jurisdiction under CWA §404 to isolated wetlands used as habitat by migratory birds, endangered species, or used to irrigate crops sold in interstate commerce. This migratory bird rule represented an attempt by the Corps to extend §404 jurisdiction to the very limit of Congress' power under the U.S. Commerce Clause of the U.S. Constitution.[99]

The *SWANCC* court did not reach the constitutional question regarding whether the Commerce Clause would allow Congress to assert federal jurisdiction over isolated wetlands. Instead, it reviewed the statutory language contained in the CWA and held that the language of that statute did not authorize the Corps to assert jurisdiction over wetlands in such a broad manner. In doing so, the Court relied on the Act's use of the term "navigable" waters and found that Congress' use of this term showed an intent to rely on "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[100] This is significant because the statutory language of the Act gives no clear indication that Congress intended for the CWA to reach as far as the Commerce Clause might allow. As a result, the Court held that although the term "navigable" is of "limited import" in the CWA—justifying the Court's extension of §404 jurisdiction to wetlands adjacent to navigable waters in *United States v. Riverside Bayview Homes*[101]—this term does not allow §404 to extend to isolated wetlands, since that reading of the CWA would give the term "navigable" no effect whatsoever.[102]

91. *Id.* at *11 n.26.
92. 244 F.3d at 748.
93. While the issues cannot be treated here in more than a summary fashion, interested parties are directed to another article by the authors addressing these issues in more depth. *See* Gaynor & Lippard, *supra* note 33.
94. 2002 WL 1760752 (S.D. Ind. July 26, 2002).
95. 531 U.S. at 159.
96. 261 F.3d 810, 32 ELR 20011 (9th Cir. 2001).
97. 531 U.S. at 159.
98. *Id.* at 164.
99. *See id.* at 172-73.
100. *Id.* at 172.
101. 474 U.S. 121, 16 ELR 20086 (1985).
102. 531 U.S. at 172.

Thus, the Court held that CWA §404 did not apply to wetlands or ponds "not adjacent to open water."[103] In doing so, the Court relied on a number of interesting legal principles. First, the Court rejected the Corps' argument that a series of failed efforts to pass legislation designed to rein in the Corps' expansive reading of the CWA indicated congressional acquiescence to the Corps' view of the law. In rejecting this argument, the Court noted that "failed legislative proposals are a potentially dangerous ground on which to rest an interpretation of a past statute."[104] The Court also rejected the Corps' claim for *Chevron* deference, stating that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result," based on the Court's prudential desire not to reach unnecessary constitutional issues and an assumption that Congress does not "casually authorize administrative agencies to push the limit of congressional authority."[105] Thus, to avoid the constitutional issues regarding whether or not the Commerce Clause would support a reading of the CWA that regulated isolated wetlands, the Court "read the statute as written" and rejected the Corps' interpretation.[106]

The dissent sharply criticized this decision on policy grounds, arguing that Congress' intent was to protect all wetlands from environmental degradation, making the majority's reliance on the term "navigable" suspect.[107] As a textual matter, the dissent argued that since the CWA defines "navigable waters" to include "all 'waters of the United States,'" the use of the term "navigable" does not limit the reach of §404 jurisdiction.[108] The dissent also relied on CWA §404(g)(1), which includes a provision allowing states to develop regulatory programs regarding navigable waters other than those that may be used to transport interstate commerce (and their adjacent wetlands).[109] In the dissent's view, this provision suggests that the CWA applies to something more than navigable waters and adjacent wetlands, and that the only thing this could possibly mean is isolated wetlands. The dissent also heavily relied on legislative history and suggested that the regulation of isolated wetlands is well within Congress' Commerce Clause jurisdiction.[110]

Given the *SWANCC* opinion, the battle has shifted to what, exactly, is an "adjacent" wetland (subject to §404 jurisdiction) and what is an "isolated" wetland (most likely not subject to §404 jurisdiction). Indeed, the dissent's characterization of the wetland at issue in *Riverside Bayview Homes*, which was held to be "adjacent to" navigable waters for purposes of §404, as not having a hydrological connection to waters of the United States suggests that the question of whether a wetland is adjacent to navigable waters will be an important issue for the lower courts to resolve in the future.[111] Moreover, in a post-*SWANCC* memorandum, EPA and the Corps have taken the position that *SWANCC* is limited only to isolated wetlands where jurisdiction arises from the presence of migratory birds, but that "other connections" with interstate commerce may still support §404 jurisdiction.[112] More to the point, this memorandum describes CWA jurisdiction as "basically intact" after *SWANCC*.[113] Thus, the ultimate meaning of *SWANCC* will most likely be a point of contention in many enforcement actions and Corps permitting decisions in the near future.

Some courts have taken a very broad view of the *SWANCC* holding. In *Rice v. Harken Exploration Corp.*,[114] the U.S. Court of Appeals for the Fifth Circuit held that groundwater was not a navigable water for purposes of the Oil Pollution Act (OPA),[115] and that a spill of oil to land that entered groundwater was not covered by the OPA. In doing so, the *Rice* court relied on the *SWANCC* decision as "limit[ing] the scope of the [CWA]" and held that *SWANCC* limited CWA jurisdiction to waters that are "actually navigable or [ ] adjacent to an open body of navigable water."[116] The court went on to hold that groundwater was not covered by the OPA since, as in *SWANCC*, the OPA was not intended to exert Congress' Commerce Clause power "to the fullest possible degree."[117] The court also concluded that "intermittent streams" were not subject to the OPA, since there was no record evidence that they were "sufficiently linked to an open body of navigable water[.]"[118] This case represents a significant narrowing of federal jurisdiction under the OPA and, by implication, under the CWA, based largely on the Court decision in *SWANCC*.

The majority of the post-*SWANCC* cases, however, have taken a more limited view of that holding, allowing Corps jurisdiction over wetlands that have a hydrological connection to navigable waters, based on a view that Congress intended to regulate tributaries of navigable waters as well as those waters themselves. The first major case addressing this issue was *Headwaters, Inc. v. Talent Irrigation District*,[119] where the Ninth Circuit held that a series of irrigation canals that flowed intermittently into navigable waters were subject to CWA jurisdiction.[120] The court distinguished *SWANCC*, apparently interpreting that decision as primarily concerned with the migratory bird rule and not limiting the CWA jurisdiction that applies to tributaries of navigable waters.[121] The court held that because the irrigation canals received water from natural streams and lakes and divert water to natural streams and lakes, CWA jurisdiction was appropriate.[122] Importantly, the *Headwaters* court rejected the defendant's argument and held that even if the irrigation canals were separated from navigable waters by a system of "waste gates," the canals were still "wa-

103. *Id.* at 168.
104. *Id.* at 169-70 (internal quotations and citations omitted).
105. *Id.* at 172-73.
106. *Id.* at 174.
107. *Id.* at 178-80 (Stevens, J., dissenting).
108. *Id.* at 180-81 (Stevens, J., dissenting).
109. *Id.* at 188-89 (Stevens, J., dissenting).
110. *Id.* at 185-90, 192-96 (Stevens, J., dissenting).
111. *Id.* at 176 n.2 (Stevens, J., dissenting).
112. Memorandum of Gary S. Guzy, U.S. EPA General Counsel, and Robert M. Andersen, Chief Counsel, U.S. Army Corps of Engineers, Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters 4 (Jan. 19, 2001) (available from the ELR Guidance & Policy Collection, ELR No. AD04596).
113. *Id.* at 5.
114. 250 F.3d 264, 31 ELR 20599 (5th Cir. 2001).
115. 33 U.S.C. §§2701 et seq.
116. 250 F.3d at 269.
117. *Id.*
118. *Id.* at 271.
119. 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001).
120. *Id.* at 533-34.
121. *Id.*
122. *Id.*

ters of the United States" for purposes of the CWA. This case is important both for its limited reading of *SWANCC* and its broad understanding of the tributary issue, which is potentially relevant to the question of what "adjacent to" means after *SWANCC*.

A recent decision of the U.S. Court of Appeals for the Fourth Circuit also adopted this approach. In *United States v. Deaton*,[123] the Fourth Circuit addressed the question of whether its earlier decision[124] imposing liability under the CWA for digging a drainage ditch and placing the excavated material alongside that ditch (sidecasting) in a wetland was affected by the *SWANCC* decision. In *Deaton*, the wetland at issue was unquestionably not "adjacent to" a "navigable water."[125] Rather, the wetland was adjacent to a roadside ditch that, through a series of non-navigable culverts and ditches, eventually flowed into navigable waters. The defendant argued that *SWANCC* means that the Corps only has jurisdiction over wetlands adjacent to "navigable waters" and the connection between the intermittently flowing roadside ditch and those navigable waters was too attenuated to support Corps jurisdiction over the wetland. The Fourth Circuit disagreed, holding that the Commerce Clause of the Constitution was broad enough to give Congress powers to regulate non-navigable tributaries of navigable waters because such regulation was necessary to achieve the goal of protecting those navigable waters.[126]

Because the Corps' regulation over tributaries was thus within Congress' power, the court found no constitutional defect with the regulation itself.[127] Thus, the court accepted the Corps' interpretation of its regulation as covering a tributary like the roadside ditch. Then, the court found that the Corps' interpretation of the regulation was entitled to deference—"in short, the word 'tributaries' in the regulation means what the Corps says it means"[128]—and because that interpretation was a permissible reading of the statute and not foreclosed by the *SWANCC* decision, it was entitled to *Chevron* deference.[129] The Fourth Circuit apparently read *SWANCC* as being a narrow decision that does not call into question CWA jurisdiction over wetlands that are hydrologically connected to navigable waters. This case is significant both because of the attenuated hydrological connection that was sufficient to support CWA jurisdiction, as well as the very deferential approach the Fourth Circuit took toward the Corps. If other courts adopt the Fourth Circuit's reasoning, *SWANCC* will eliminate CWA jurisdiction over only a very narrow class of wetlands lacking any hydrological connection to navigable waters at all.

This narrow reading of *SWANCC* appears to be the trend. Several recent court cases have read *SWANCC* in a similarly narrow fashion. For example, in *United States v. Rapanos*,[130] the U.S. Court of Appeals for the Sixth Circuit followed *Deaton* and held that the Corps has jurisdiction over wetlands that are not directly adjacent to navigable waters where there is a hydrological connection between a non-navigable water (that a wetland is adjacent to) and navigable waters. The *Rapanos* court reasoned that because contamination in such a wetland can reasonably be seen to "affect" the navigable waters, it should be covered by the CWA. This reasoning is arguably even broader than *Deaton*, although the non-navigable tributary at issue in the case was similar. Additionally, a recent district court opinion, *Carabell v. U.S. Army Corps of Engineers*,[131] does a thorough job of cataloging the post-*SWANCC* cases, and notes that there is a split among the courts. That court also adopted the reasoning of those courts taking a narrow view of *SWANCC*, arguing that the hydrological connection to navigable waters is enough to support CWA jurisdiction.[132] This case contains a useful, detailed discussion of the state of the law on this issue as of the date of the decision. Later cases, such as *Deaton* and *Rapanos*, tilt the balance of case law in favor of the narrow view of *SWANCC*, with the Fourth, Sixth, and Ninth Circuits adopting that view. A contrary view has been taken only by the Fifth Circuit.

Defendants confronting this issue should recognize that the question of CWA jurisdiction over wetlands not directly adjacent to navigable waters is very much alive in jurisdictions that have not yet weighed in on this issue. It is also possible that a sufficiently attenuated hydrological connection to navigable waters may be sufficient to defeat CWA jurisdiction even in those jurisdictions that have taken a narrow view of *SWANCC*, particularly if the hydrological connection involves groundwater, which many courts have held to be excluded from CWA jurisdiction.[133] In January 2003, EPA and the Corps issued a guidance memorandum that asserted a broad view of CWA jurisdiction as including tributaries.[134] In future litigation, EPA and the Corps may seek judicial deference to this position under the *Chevron* doctrine. EPA and the Corps have also issued a notice of proposed rulemaking regarding potential clarification of this issue as well.[135] Ongoing developments in this muddled area of the law should be closely monitored by interested parties.

Borden Ranch

In another significant wetlands case, an equally divided Court affirmed without opinion the Ninth Circuit's decision in *Borden Ranch*.[136] This is a significant development because the Ninth Circuit's decision in *Borden Ranch* takes a very expansive view of what constitutes the "addition of a pollutant" to a wetland. The Ninth Circuit held that a technique called "deep ripping"—essentially a form of plowing—requires a §404 permit because "soil was wrenched up, moved around, and redeposited somewhere else" in a

123. 332 F.3d 698, 33 ELR 20223 (4th Cir. 2003).

124. United States v. Deaton, 209 F.3d 331, 30 ELR 20508 (4th Cir. 2000). This case took a very broad view of the definition of a "pollutant," finding that it was "entirely unremarkable" that the digging up and redeposit of wetland soil could be the addition of a pollutant under the CWA. *Id.* at 335-36.

125. *Deaton*, 332 F.3d at 702.

126. *Id.* at 707.

127. *Id.* at 707.

128. *Id.* at 711.

129. *Id.*

130. 339 F.3d 447, 33 ELR 20249 (6th Cir. 2003).

131. 257 F. Supp. 2d 917 (E.D. Mich. 2003).

132. *Id.* at 931-32.

133. *See, e.g.*, Rice v. Harken Exploration Corp., 250 F.3d 264, 31 ELR 20599 (5th Cir. 2001).

134. *See* 68 Fed. Reg. 1991, 1995, app. A (Jan. 15, 2003); Memorandum from Robert E. Fabricant, General Counsel, U.S. EPA, and Steven J. Marcello, General Counsel, U.S. Army Corps of Engineers Regarding CWA Jurisdiction (Jan. 10, 2003).

135. U.S. EPA & U.S. Army Corps of Engineers, Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991 (Jan. 15, 2003).

136. 261 F.3d at 810, *aff'd*, 537 U.S. at 99.

wetland."[137] The Ninth Circuit's opinion relies heavily on the Fourth Circuit's original opinion in *Deaton*, although it neglects the important role the *Deaton* court gave to the inclusion of dredged spoil in the definition of a "pollutant." The effect of *Borden Ranch* is to make subject to §404 any activity that, in the court's view, adversely effects the ecology of a wetland:

> These cases recognize that activities that destroy the ecology of a wetland are not immune from the [CWA] merely because they do not involve the introduction of material brought in from somewhere else.[138]

This represents a radically broad reading of the §404 permitting requirement. This approach is controversial. Not only was the Court evenly divided in its resolution of this case without opinion, but the *Borden Ranch* decision itself was 2-1, with the dissent arguing that plowing like that at issue in the case could not be considered the "addition of a pollutant" under the CWA.[139] Given this controversy, future decisions should be interesting.

It should also be noted that the *Borden Ranch* court held that each pass of the "[deep] ripper" was a separate violation of the CWA.[140] Thus, this case is best understood as not only broadening the scope of §404, but substantially increasing the penalty exposure associated with wetlands activities. Given the equally divided nature of the Court's decision, due to the recusal of Justice Anthony M. Kennedy, it seems likely that the Court will revisit this issue in the future.

CWA Enforcement

The most interesting recent CWA development is the Court's decision granting certiorari in a case that took a broad view of what constitutes the discharge of pollutants into waters of the United States.

Miccosukee Tribe of Indians of Florida v. South Florida Water Management District[141]

In a significant recent development, the Court granted certiorari in *Miccosukee*, a case where the Eleventh Circuit held that a water management pumping station that moved water from one body of water to another that had lower concentrations of certain pollutants required a national pollutant discharge elimination system (NPDES) permit.[142] Because the utility district did not have such a permit, its operation of the pumping station constituted a violation of the CWA. The CWA makes it illegal to discharge pollutants into a navigable water from a point source. While the pumping station at issue in *Miccosukee* did not add any pollutants not already present in the water that it was pumping, the court held that because those pollutants only entered the navigable water into which the water was discharged because the pumping station moved it there, that was sufficient to constitute the discharge of pollutants.[143] The fact that the pollutants were already present in another navigable water was not relevant.[144] The Eleventh Circuit also applied a very lenient "cause in fact" standard, holding that if the pollutants would not have been present in the water "but for" the action of the pumping station, an addition of pollutants had occurred.[145]

The most significant aspect of *Miccosukee* is that it relies on the fact that the water pumped by the pumping station "contains higher levels of phosphorous than that naturally occurring" in the receiving water body.[146] There does not appear to be any limiting principle in the view of the *Miccosukee* court, and given the CWA's broad definition of "pollutant," any pumping of water from one navigable water to another may well require an NPDES permit, especially if those two water bodies differ in their concentration levels of various substances. It should be noted, however, that the district court in *Miccosukee* observed that there were "significant" differences in water quality between the two bodies of water at issue.[147] To the extent there were meaningful differences in water quality between the two bodies of water, the *Miccosukee* approach may be reasonable; to the extent that the most minute differences in water quality trigger NPDES permitting, the *Miccosukee* approach would create a broad permitting requirement having little or no environmental benefit. Presumably, this issue will be briefed before the Court, and it will be interesting to see if the Court is receptive to this kind of argument, which may not make a difference on the facts of *Miccosukee* but could be important in other, closer cases.

Finally, it should be noted that although the Eleventh Circuit vacated the district court's injunction ordering the water quality district to cease operating the pumping station until an NPDES permit was issued—because, as the court put it, such an injunction "would cause substantial flooding in western Broward [C]ounty which, in turn, would cause damage to and displacement of a significant number of people"[148]—ongoing operation of the pumping station is a felony violation of the CWA. The operators of the station are knowingly discharging pollutants into a navigable water without an NPDES permit.[149] Under the reasoning of cases like *United States v. Weitzenhoff*[150] and *United States v. Hanousek*,[151] any of the employees operating the pumping station are exposed to criminal liability. While it appears to be unlikely that a criminal case will be brought on these facts, it is a telling illustration of just how radical environmental criminal laws have become.

CERCLA Enforcement

The most important recent decision in CERCLA enforcement is a district court's opinion rejecting General Electric's constitutional challenge to EPA's ability to issue unilateral enforcement orders under §106 of CERCLA. The court's

137. *Borden Ranch*, 261 F.3d at 815.
138. *Id.* at 814-15.
139. *Id.* at 819-20 (Gould, J., dissenting).
140. *Id.* at 818.
141. 123 S. Ct. 2638 (2003).
142. Miccosukee Tribe of Indians of Fla. v. South Fla. Water Management Dist., 280 F.3d 1364, 32 ELR 20475 (11th Cir. 2002).
143. *Id.* at 1368.
144. *Id.*
145. *Id.* "Cause-in-fact" is the most lenient legal standard for causation; "proximate cause," the normal tort law standard, requires a more demanding showing of connection between cause and effect.
146. *Id.* at 1366.
147. Miccosukee Tribe of Indians of Fla. v. South Fla. Water Management Dist., 1999 WL 33494862, at *1 (S.D. Fla. 1999).
148. *Miccosukee*, 280 F.3d at 1370.
149. *See* 33 U.S.C. §§1311(a), 1319(c)(2).
150. 35 F.3d 1275, 24 ELR 21504 (9th Cir. 1993).
151. 176 F.3d 1116, 29 ELR 21049 (9th Cir. 1999).

decision that there is no constitutional problem with such orders is a significant victory for EPA, as this kind of order is central to many of its CERCLA enforcement priorities. In another interesting decision, the U.S. Court of Appeals for the Tenth Circuit held that the statute of limitations begins to run at a CERCLA site when construction of a remedial action begins, a decision that could be significant for future cost recovery actions by responsible parties under CERCLA.

General Electric

A significant constitutional challenge to CERCLA is being made by General Electric, which is challenging EPA's authority to issue unilateral administrative orders under CERCLA §106 in *General Electric*.[152] EPA won the first round of this battle, though, as the U.S. District Court for the District of Columbia held that it lacked jurisdiction over General Electric's claim due to CERCLA §113(h), which removes jurisdiction over preenforcement review of §106 orders from the district courts.[153] This decision has been appealed to the D.C. Circuit, and the decision of that court will be an important precedent under CERCLA.

To understand the issues at stake in the *General Electric* case, it is necessary to review the statutory scheme governing CERCLA §106 orders. Section 106 provides that EPA may issue an order to a private party requiring them to clean a site where hazardous substances have been released, usually at significant cost.[154] The *General Electric* court observed the salient features of the statutory scheme but may not have appreciated their practical significance. For instance, the *General Electric* court noted that §106 orders are available only when EPA finds an "imminent and substantial endangerment," and because the danger is imminent, "CERCLA does not require EPA to provide a hearing prior to issuing a [§]106 order."[155] Absent from this discussion is any recognition that EPA has interpreted the "imminent" requirement in such a broad way as to cover many situations where there is indisputably time to allow a hearing to proceed. This omission is particularly glaring since it was in the forefront of the arguments made by General Electric in its briefing.

Similarly, the *General Electric* court observed that while the penalties associated with noncompliance with a §106 order are "very strong," those penalties are "not automatic" and a party receiving a §106 order has the opportunity to present all its defenses to the §106 order in an enforcement proceeding, including challenges to EPA's chosen remedy at a site and claims that a party is not liable for the site.[156] Again, this discussion does not appear to recognize the realities that parties receiving a §106 order face—EPA's choice of remedy is reviewed on the administrative record under the "arbitrary and capricious" standard,[157] which provides little chance of setting aside the remedy, and a party is liable for the contamination at a site even if it sent only minimal quantities of hazardous substances there.[158] Moreover, this challenge cannot occur until after the party complies with the order, possibly many years and hundreds of millions of dollars later, or in the enforcement proceeding where it faces huge penalties. And given the massive liabilities associated with noncompliance with the §106 order, there is a substantial deterrent to asserting even a strong constitutional challenge as "reasonable cause" for noncompliance, since the consequences of a court disagreeing are so great. This is the "Hobson's choice" alleged by General Electric and is potentially a constitutional violation under the doctrine of *Ex parte Young*.[159]

In any event, the *General Electric* district court relied on the clear congressional intent to preclude preenforcement judicial review of a §106 order manifested by the addition of §113(h) in 1986.[160] Because constitutional challenges like General Electric's are not one of the enumerated exceptions to §113(h) and its explicit removal of jurisdiction from the district courts, the court found itself obligated to apply the plain language of the statute.[161] While it is difficult to contest the *General Electric* court's view that Congress intended to deny preenforcement judicial review of §106 orders, the court appears to be on shakier ground when it flatly states that General Electric will be able to obtain "meaningful review" of the §106 order in an enforcement proceeding.[162] Under the *General Electric* court's reasoning, the theoretical availability of a hearing before imposing a penalty on a defendant is enough to avoid a constitutional problem,[163] even if the prospect of massive penalties makes this review meaningless as a practical matter.

This result appears inconsistent with *Ex parte Young*—a case that General Electric argued controls this issue, and which the district court inexplicably did not even mention. The district court relied on *Thunder Basin Coal Co. v. Reich*,[164] where the Court held that the Federal Mine Safety and Health Amendments Act, did not pose a constitutional problem even though it precluded preenforcement review of constitutional challenges to compliance orders issued by the Secretary of Labor.[165] While the *General Electric* court spent significant time drawing analogies between *Thunder Basin* and General Electric's challenge,[166] it neglected to address what appears to be the most important distinction. In *Thunder Basin*, the Court explicitly stated that "the record . . . contains no evidence that petitioner will be subject to serious harm if it complies"[167]; in *General Electric*, the cost of

152. 257 F. Supp. 2d at 8.

153. *See* 42 U.S.C. §9613(h).

154. *Id.* §9606; *see also* 257 F. Supp. 2d at 13-14.

155. 257 F. Supp. 2d at 14.

156. *Id.*

157. 42 U.S.C. §9606(b)(2)(D).

158. *Id.* §9607(a).

159. 209 U.S. 123 (1908). In this landmark decision, the Court held that because the penalties associated with violation of a state railroad case law were so severe—including imprisonment—the plaintiff did *not* have to wait for an enforcement action to assert a constitutional challenge.

160. 257 F. Supp. 2d at 16.

161. *Id.* at 19.

162. *Id.* at 26.

163. *See id.* ("GE can obtain judicial review of its due process challenge *before* any injunctions, fines, penalties, or punitive damages are imposed—and hence before there is any deprivation of a property interest.") (emphasis in original).

164. 510 U.S. 200 (1994).

165. 30 U.S.C. §801 et seq.; 257 F. Supp. 2d at 17.

166. 257 F. Supp. 2d at 17.

167. 510 U.S. at 216. Indeed, all that compliance would require was for the mining company to allow two representatives chosen by its employees—to whom the mining company objected because they were union representatives, and the mine was a non-union mine—to participate in safety inspections.

compliance with the order is hundreds of millions of dollars. Also, the Court in *Thunder Basin* explicitly noted that more significant deprivations of property might trigger the doctrine of *Ex parte Young*:

> Thus, this case does not present the situation confronted in *Ex parte Young*, in which the *practical effect* of coercive penalties for noncompliance was to foreclose all access to the courts. Nor does this approach a situation in which compliance is sufficiently onerous and coercive penalties sufficiently potent that a constitutionally intolerable choice might be presented.[168]

In this regard, the district court's reliance on *Thunder Basin* without grappling with the *Ex parte Young* question—particularly its disregard of the practical realities of challenge to a §106 order—appears legally suspect. Compliance was easy for Thunder Basin; it will be anything but for General Electric, and the *Ex parte Young* analogy appears to be a much better fit than the *Thunder Basin* analogy relied on by the *General Electric* district court.

Given the stakes of this case to both sides—hundreds of millions of dollars to General Electric, and the most significant CERCLA enforcement weapon to EPA—it is likely that the appeal to the D.C. Circuit will be well and thoroughly litigated, and a decision against EPA is likely to have a substantial impact in its operation of the Superfund program. With Superfund dollars diminishing, EPA has been increasing its use of §106 orders even more than its historically generous reliance on this authority. Should EPA lose, its routine use of its extraordinary authorities under §106 will be dramatically curtailed.

Colorado v. Sunoco, Inc.[169]

In *Colorado*, the Tenth Circuit recently held that the six-year statute of limitations for cost recovery associated with remedial actions under CERCLA runs from the time the first remedial action is commenced. CERCLA §113(g)(2)(B) provides that an action for recovery of costs must be brought "within 6 years after the *initiation* of physical on-site construction of the remedial action."[170] The statute of limitations for a "removal action" is "3 years after *completion* of the removal action."[171] Colorado argued that there could be multiple removal or remedial actions at a single site and that the statute of limitations applied to each one separately.[172] Thus, if there are multiple remedial actions at a site, a party could seek cost recovery for those remedial actions for which the statute has not run, even if the statute had run for other actions at the site. The court disagreed, however, and held that the plain language of CERCLA—specifically the definite article "the" as opposed to the indefinite article "a" in the key statutory provision—establishes that there can only be one remedial action at a given site.[173] Moreover, the statute provides for recovery of "further response costs" for the remedial action, convincing the court that there is but a single remedial action at a site. If the initial action for cost recovery is brought within the six-year period from the initial construction of the remedial action, a party may seek cost recovery for "further response costs" in later actions; if not, then it may not.

In an effort to avoid having its claims foreclosed on these grounds, Colorado (supported by the United States as an amicus) argued that the actions at issue were "removal" actions, for which the statute of limitations begins running from the completion, not the initiation, of the action. The court agreed. The court did not find that EPA's characterizations of the actions were entitled to *Chevron* deference since there was no evidence that Congress intended EPA to be able to speak with the force of law on whether an action is a "removal" or "remedial" action for statute-of-limitations purposes. This "force of law" issue is a key element of recent Court jurisprudence on deference to agency interpretations of law.[174] The court did, however, apply the so-called *Skidmore v. Swift & Co. (Skidmore)*[175] deference, which provides an unspecified amount of additional "weight" to the views of an expert agency. This kind of "*Skidmore* deference" is also contemplated by recent Court precedent.[176] The distinction between a "removal" (essentially short-term) and a "remedial" (permanent) action is not entirely clear, and will no doubt figure prominently in future CERCLA statute-of-limitations litigation. The bottomline, however, is that the court allowed Colorado's cost recovery claims to proceed based on its view that the actions were "removal" actions not "remedial" actions.

The *Colorado* case will be significant to parties bringing or defending against cost recovery actions under CERCLA §107 in cases where a significant amount of time has run after the construction of a response action. Significant liabilities could turn on subtle points of fact and the near-metaphysical distinction between "response" and "remedial" actions, a distinction the *Colorado* court itself characterized as "overlap[ping]" and "semantic[ ]."

Overfiling

In 1999, the U.S. Court of Appeals for the Eighth Circuit decided *Harmon Industries, Inc. v. Browner*,[177] which held that under the Resource Conservation and Recovery Act (RCRA),[178] once EPA delegates program authority to a state, EPA can only enforce violations if the state is inactive. If EPA disagrees with a state's resolution of an enforcement matter, RCRA only gives it the authority to withdraw its overall program delegation but not the authority to bring a second, competing enforcement action, known as "overfiling." The court also based its decision on grounds of res judicata, finding that the state and EPA were in privity. Thus, the state's resolution of the matter bound EPA. EPA has long maintained that it is allowed to "overfile" in any case where a state's resolution of an enforcement matter was not acceptable to it, and this case called that authority into question. While the overfiling issue remains an open one, the trend of the cases appears to be in favor of EPA's ability to overfile; few courts have followed *Harmon*.

168. *Id*. at 218 (citations omitted) (emphasis added).
169. 337 F.3d 1233, 33 ELR 20251 (10th Cir. 2003).
170. 42 U.S.C. §9613(g)(2)(B) (emphasis added).
171. *Id*. §9613(g)(2)(A) (emphasis added).
172. 337 F.3d at 1239.
173. *Id.*
174. *See* United States v. Mead Corp., 533 U.S. 218 (2001).
175. 323 U.S. 134 (1994).
176. *Id.*
177. 191 F.3d 894, 29 ELR 21412 (8th Cir. 1999).
178. 42 U.S.C. §§6901-6992k, ELR Stat. RCRA §§1001-11011.

The Eighth Circuit primarily grounded its decision on the plain language of RCRA, which provides that a state program, once approved by EPA, is to operate "in lieu of" the federal program in all respects, including enforcement.[179] Moreover, the court also noted that state actions under a delegated RCRA program are to be given the same force and effect as federal ones, further supporting the court's ruling that RCRA does not authorize EPA overfiling.[180] The court went on to evaluate the legislative history of RCRA and found nothing that authorized EPA to conduct a competing enforcement action under the state program.[181] The court also upheld the lower court's ruling on res judicata, applying Missouri state law to determine that EPA was bound by the state's resolution of the enforcement action against Harmon, and rejected EPA's assertion of sovereign immunity as a defense to res judicata.[182] The *Harmon* decision did not appear to be based on a misunderstanding of the role overfiling currently plays in EPA enforcement policy. In fact, the Eighth Circuit explicitly noted that overfiling is a frequent practice of EPA.[183] Thus, the Eighth Circuit's opinion appears to recognize that EPA practices, no matter how well established, cannot trump the plain language of the statutes that EPA is charged with administering.

Almost immediately, *Harmon* met a chilly reception in the district courts. Later decisions generally emphasized the specific "in lieu of" language contained in RCRA, reading *Harmon* as the interpretation of specific statutory language rather than a generalized limitation on EPA's ability to overfile. For example, in *United States v. Murphy Oil USA*,[184] a federal district court observed that the CAA does not contain the same language relied on by the Eighth Circuit in *Harmon*.[185] Another district court, in *United States v. LTV Steel Co.*,[186] refused to apply the Eighth Circuit's rationale in *Harmon* to the CAA because it found that "the [CAA] contains language in its enforcement section which seems to anticipate overfiling."[187] The *LTV* court also found no res judicata because the judgment in that case was based on a local ordinance and EPA was bringing a claim under federal law.[188] The court also noted that EPA and the municipality that resolved the earlier claim were not the same party for res judicata purposes.[189]

Similarly, another district court concluded in dicta that while a civil resolution of alleged environmental violations may foreclose subsequent civil enforcement actions, state civil resolutions of RCRA violations do not bar subsequent federal *criminal* enforcement actions for the same violations: "Had the state of California previously prosecuted Defendants *criminally* for the same conduct alleged in the Indictment, *Browner* [*Harmon*] might have been applicable by analogy—as California did not, it is not."[190] While it is unclear whether or not this statement will be endorsed by other courts in the future, it makes it possible that EPA could seek criminal penalties for violations that are resolved civilly in jurisdictions following the Eighth Circuit's rationale in *Harmon*. This makes it important for entities in such jurisdictions to seek a global, i.e., civil and criminal, resolution of state claims when attempting to resolve environmental violations with state agencies in an effort to take advantage of *Harmon*.

In a decision of the Tenth Circuit, the criticisms of these district courts became a full-blown circuit split. In *United States v. Power Engineering Co.*,[191] the court squarely rejected the reasoning of *Harmon*. The *Power Engineering* court held that the term "program" in RCRA was ambiguous, and therefore that EPA's interpretation of the statute as allowing overfiling was entitled to deference.[192] In essence, the key textual issue, as identified by the *Power Engineering* court, is whether the term "program" is ambiguous—if it is, EPA wins under *Chevron*. The *Power Engineering* court believed that "program" is ambiguous as to whether or not "enforcement" is included; in contrast, the *Harmon* court believed that "enforcement" was inextricably tied to the "administration" of the program (and, implicitly, was therefore not ambiguous). In support of its view, the *Power Engineering* court found that interpreting the "in lieu of" language as applying to the term "enforcement" would create a statutory redundancy because "in lieu of" is contained in the first clause of RCRA §3006(b) and "enforce" is contained in the second clause of that provision.[193] This reasoning is suspect because if the Tenth Circuit is correct, EPA could also issue competing permits as well as overfiling under RCRA, a result that does not make much sense given the statutory structure. In fact, the Tenth Circuit later admitted that "states act in lieu of the EPA" with respect to the "issuance of permits."[194] This is critical because the term "issue" is located right next to the term "enforce" in §3006(b)—it is difficult to see why "in lieu of" applies to the language "issue and enforce permits" differently for the terms "issue" and "enforce."[195]

The *Power Engineering* court also relied on the title of subsection §3006(d), "Effect of a State Permit," to limit the effect of that provision's text, which provides that "any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as an action taken by the [EPA] under this subchapter."[196] This result is in some tension with the general principle that section titles are not part of the law, a principle recognized by the *Power Engineering* court itself.[197] The *Power Engineering* court also rejected the argument that EPA was bound by the result of a state enforcement action under the doctrine of res judicata. This again disagreed

179. *Id.* at 899.
180. *Id.*
181. *Id.* at 902.
182. *Id.* at 903-04.
183. *Id.* at 898.
184. 143 F. Supp. 2d 1054 (W.D. Wis. 2001).
185. *Id.* at 1091 (collecting cases).
186. 118 F. Supp. 2d 827 (N.D. Ohio 2000).
187. *Id.* at 833.
188. *Id*. at 836.
189. *Id*. at 836.
190. United States v. Flanagan, 126 F. Supp. 2d 1284, 1289 (C.D. Cal. 2000) (emphasis added).
191. 303 F.3d 1232, 33 ELR 20027 (10th Cir. 2002).
192. *Id*. at 1237-38.
193. *Id*. at 1238.
194. *Id*. at 1241.
195. *Compare* 303 F.3d at 1238, *with* RCRA §3006(b).
196. 303 F.3d at 1239 (alteration in original).
197. *Id*.

with *Harmon* and was based on basically the same difference in approach.

In any event, the textual arguments regarding whether RCRA is, in fact, ambiguous, are quite complicated, and the reasoning of the *Power Engineering* court appears (to the authors) to be somewhat contrived. Whatever the merits of the overfiling question under RCRA, the view of the *Power Engineering* court is certainly open to debate. Thus, despite the trend against *Harmon*, defendants in EPA enforcement actions involving overfiling should certainly consider making the *Harmon* argument.

It should also be noted that the doctrine of res judicata may also be available to foreclose state actions if there has been a previous federal enforcement action regarding the same violations. In *State Water Control Board v. Smithfield Foods, Inc.*,[198] the Supreme Court of Virginia held that a state agency's claims for violations of a state-issued NPDES permit were barred by res judicata due to a previous federal enforcement action regarding the same permit in which the state agency had been given the opportunity to participate but had declined. The court relied on the fact that the state and federal governments' interest in enforcing the terms of the permit was mutual enough, based on the regulatory structure and the similar interest in environmental protection, to find that the two governments were in privity, making them functionally the same party for res judicata purposes.[199] This holding was based, in part, on the state agency's concession before the lower court that the only issue to be resolved was that of privity, allowing the Supreme Court of Virginia to avoid a potentially complex legal issue regarding another element of res judicata, the requirement of an identity of the claim or cause of action.[200] It appears possible that allegations of *different* violations of the state permit might not be barred by res judicata, but the Supreme Court of Virginia left that more difficult issue for another day.

Statute of Limitations

This issue is the subject of heated litigation arising out of EPA's recent enforcement initiatives against the electric utilities and the pulp and paper industry. The government has taken the position in these enforcement actions that it is entitled to both civil penalties and injunctive relief for alleged PSD/NSR violations that occurred as many as 20 years ago. The government's position builds on the important victory for the United States in *United States v. Telluride Co.*,[201] where the Tenth Circuit reversed a district court decision and held that U.S. claims for injunctive relief are not actions for a penalty within the meaning of 28 U.S.C. §2462, which bars judicial claims for penalties brought five years after a violation occurred. The issue in *Telluride* was a demand by the United States that the defendant restore 45 acres of wetlands that it illegally filled from 1981 to 1989. The defendant argued the injunctive relief was punitive and thus barred by the statute of limitations. The court concluded, however, that the injunction, although potentially costly, was remedial and therefore not barred.

This position has been largely accepted by the federal courts, which have held that injunctive relief is generally not barred by the statute of limitations applicable to enforcement actions, notwithstanding the *Telluride* court's recognition that there may be a difference between punitive and remedial injunctive relief.[202] For instance, several courts in the utility initiative have held that injunctive relief is not barred by the statute of limitations.[203]

In *Telluride*, the United States had originally sought penalties as well, but it later conceded the penalties were time barred. This is contrary to its sometimes asserted "continuing violation" theory. Under the continuing violation theory, the five-year statutory period does not begin to run until the violation is corrected. The government's concession in *Telluride* on this point raises into question the viability of the government's continuing violation theory, at least where the act—the placement of the fill—occurred five years prior to the enforcement action.[204] Notwithstanding this concession in *Telluride*, the United States has aggressively pursued penalties for very old projects in the utility enforcement cases and appears to have settled on the position that the statute of limitations acts to limit the number of days of violation for which the United States can obtain penalties to the five years prior to bringing suit, no matter how old the violation. Needless to say, given the astronomical penalties available under this view of the law, §2462 gives little comfort to defendants.

EPA appears to be winning the continuing violation argument in the context of wetlands and hazardous waste disposal; courts appear to be holding that filling a wetland is a continuing violation, as is "disposal" under RCRA.[205] EPA, however, has had several setbacks in the CAA context in the utility initiative. For instance, in *SIGECO*,[206] the U.S. District Court for the Southern District of Indiana concluded that "modification" of a major source without obtaining a PSD permit was not a continuing violation, and that even if the continuing violation doctrine applied, the violation only continued for as long as the construction continued. Operating such a source was not a continuing violation, and thus civil penalty claims were barred for projects completed more than five years before the complaint was filed.[207] This and other decisions coming out of the refinery and pulp and paper initiative[208] are favorable to potential defendants on the statute of limitations. Still, EPA has obtained some victories, most recently in the *Duke Energy* case, where a court has held that alleged PSD violations are continuing viola-

198. 542 S.E.2d 766, 31 ELR 20502 (Va. 2001).

199. *Id.* at 770.

200. *Id.* at 769.

201. 146 F.3d 1241, 28 ELR 21334 (10th Cir. 1998).

202. *Id.* at 1246.

203. United States v. American Elec. Power Serv. Corp., 137 F. Supp. 2d 1060 (S.D. Ohio 2001); United States v. Murphy Oil USA, Inc., 143 F. Supp. 2d 1054 (W.D. Wis. 2001).

204. *See* 28 U.S.C. §2462. EPA successfully argued this theory in Harmon Indus., Inc. v. Browner, 19 F. Supp. 2d 988, 29 ELR 20035 (W.D. Mo. 1998), but the case involved a continuing pattern of illegal disposal of waste solvents, with the latest illegal disposal within the five-year period.

205. *See, e.g.,* United States v. White, 766 F. Supp. 873, 887, 22 ELR 20050 (E.D. Wash. 1991); United States v. Reaves, 923 F. Supp. 1530, 1533, 26 ELR 21394 (M.D. Fla. 1996).

206. 2002 WL 1760752. The authors represented SIGECO in this proceeding.

207. *Id.*

208. United States v. Westvaco, 144 F. Supp. 2d 439. 441 (D. Md. 2001); *Murphy Oil*, 143 F. Supp. 2d at 1084.

tions so penalties are not barred.[209] A key element of the *Duke Energy* decision was the fact that the state construction permit not obtained by the defendant ultimately would have become the operating permit if it had been obtained.[210] Statute-of-limitations arguments in this context will depend on specific features of the regulations at issue.

More decisions on this issue should emerge from the ongoing enforcement initiative in the near future. For now—like so many other issues implicated by the utility initiative—the law remains unclear, with courts divided.

Citizen Suits

The ongoing wrangling over citizen suits and standing has not resulted in the dramatic limitation on citizen suits that some commentators originally anticipated when the Court addressed this issue in *Steel Co.*[211] This 1998 decision held that citizens did not have Article III standing to bring a suit for wholly past violations of environmental law. While this decision appeared to be a substantial limitation on the ability of a citizens group to bring suit for civil penalties, a later Court case, *Laidlaw*,[212] has substantially limited the effect of *Steel Co.* In *Laidlaw*, the Court held that if violations of environmental law continue after the filing of the complaint, the citizens have standing for Article III purposes; that the deterrent effect of civil penalties is sufficient "redressability" for Article III standing; and that specific allegations that individuals are prevented from using an environmental resource due to fears of pollution resulting from violations of environmental law is sufficient "injury-in-fact" for Article III standing. The practical effect of *Laidlaw* appears to be that, so long as alleged violations of environmental law continue after the filing of a citizen suit, the citizens have Article III standing to seek civil penalties.

Steel Co. considered the Article III standing of a citizens group that had filed suit for alleged violations of the Emergency Planning and Community Right-To-Know Act (EPCRA) of 1986,[213] which had ceased by the time the group had filed suit. Standing requires a showing of three things: (1) injury-in-fact; (2) causation; and (3) redressability.[214] In finding that the citizens group, Citizens for a Better Environment, had no standing to bring its citizen suit, the Court relied on the lack of redressability for its alleged injuries.[215] To resolve this issue, the Court turned to a specific analysis of the remedies sought by Citizens for a Better Environment. Citizens for a Better Environment had asked for six different remedies in this case: (1) a declaratory judgment that the defendant violated EPCRA; (2) an order authorizing Citizens for a Better Environment to inspect the defendant's operations and records; (3) an order requiring the defendant to provide Citizens for a Better Environment with copies of all compliance reports submitted to EPA; (4) an order requiring the defendant to pay civil penalties to the U.S. Treasury; (5) an award of the costs of investigation and litigation; and (6) any other appropriate relief. The Court considered each potential remedy to determine whether the redressability component of the standing test was met and found that it was not. Significantly, the Court held that the payment of civil penalties for a wholly past violation was not sufficient to support standing.[216]

One area of the law left in doubt after the *Steel Co.* decision concerned situations where violations were continuing at the time the suit was filed but were corrected during the pendency of the lawsuit. In *Laidlaw*, the Court had an opportunity to deal with such a situation. The way the Court resolved this issue dramatically limited the effect of *Steel Co.* In *Laidlaw*, a citizen plaintiff alleged both continuing and historical violations of the CWA. At trial, the district court imposed civil penalties on the defendant for past violations but found that the defendant had been in "substantial compliance" with the Act for the past several years and therefore did not grant any injunctive relief. The Fourth Circuit reversed the district court and dismissed the case as moot because of the defendant's compliance. The court held that as a result of this procedural posture, the plaintiffs no longer had redressability and therefore no standing. The court noted that the only remedy available to the plaintiff was a civil penalty, and a civil penalty could not redress the plaintiff's injuries as a matter of law, citing *Steel Co.*

The Court reversed the decision of the appeals court. The Court departed from its *Steel Co.* rationale and concluded that in some instances civil penalties alone could redress a citizen's injuries due to their deterrent effect.[217] The Court stated that civil penalties can serve as a sanction that effectively abates or deters future harm because they encourage violators to cease their illegal activity. While failing to go so far as to state that civil penalties provide sufficient deterrence to support redressability in all circumstances, the Court held that, in the case before it, the deterrent effect of $405,800 in civil penalties would serve to redress the plaintiff's injuries because the district court had reasonably found so when it originally imposed the penalties.[218] The Court clarified that the *Laidlaw* decision was not in conflict with *Steel Co.* because *Steel Co.* did not address citizen standing to seek civil penalties for violations *ongoing* at the time of the complaint.[219] Turning to mootness, the Court held that the defendant's substantial compliance did not automatically moot the plaintiff's claims on the basis of the Court's well-settled "voluntary cessation" doctrine. The Court noted that a defendant arguing mootness faces a tough standard and that "a case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[220] The Court left that decision open for consideration on remand.

There are several key features of the *Laidlaw* decision that suggested that standing would be less of a problem for citizen plaintiffs than many originally thought after *Steel Co.* If the deterrent effect of civil penalties can be sufficient to meet the redressability prong of the Article III standing test—a point that *Laidlaw* implies is a factual question to be

209. 2003 WL 22024780, at *28. *See also American Elec. Power,* 137 F. Supp. 2d at 811.

210. 2003 WL 22024780, at *28.

211. 523 U.S. at 83.

212. 528 U.S. at 167.

213. 42 U.S.C. §§11001-11050, ELR Stat. EPCRA §§301-330.

214. 523 U.S. at 103.

215. *Id*. at 105.

216. *Id* at 106-07.

217. *Laidlaw*, 528 at 186-87.

218. *Id.* at 187.

219. *Id.* at 188.

220. *Id*. at 170 (citing United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968)).

resolved by the district court[221]—and if individual plaintiffs may use fear of pollution resulting from violations as injury-in-fact—which appears to be another factual question[222]—it will be very difficult for defendants to dismiss citizen suits at an early stage on standing grounds. Indeed, in dissent Justice Antonin Scalia predicted that the combination of a broad reading of the injury-in-fact requirement and allowing the deterrent effect of civil penalties to meet the redressability requirement will turn Article III standing into a "mere pleading requirement."[223] If the Court's *Laidlaw* opinion means what it says, this prediction may well be correct. At a minimum, it appears to be much more difficult for defendants to dispose of citizens' suits on early motions to dismiss, since the law now appears to be, at least in some circumstances, that the standing analysis may turn on factual issues to be resolved by the district courts.

Indeed, Justice Scalia's prediction appears to have come to fruition in recent lower court jurisprudence. Lower courts have interpreted *Laidlaw* as partially overturning *Steel Co.* and limiting its effect to suits brought for wholly historical violations.[224] Thus, under *Laidlaw*, a plaintiff who brings a citizen suit seeking civil penalties for continuing or future violations can have standing because, as long as the suit was filed before the violations ceased, the deterrent effect of civil penalties satisfies the redress requirement in the Article III standing test. Two recent cases, *San Francisco Baykeeper, Inc. v. Tosco Corp.*[225] and *Mississippi River Revival Inc. v. City of Minneapolis, Minnesota*,[226] demonstrate that courts following *Laidlaw* have relaxed the redressability requirement by holding that suits seeking civil penalties for continuing and future violations provide adequate redress to satisfy standing requirements. In both *Tosco* and *Mississippi River*, the court also applied the very high *Laidlaw* standard for mootness. Under this standard, a citizen suit seeking civil penalties is moot only if the defendant satisfies the "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again."[227]

In *Tosco*, an environmental group brought a claim against Tosco under the CWA for discharges from a chemical plant. After the suit was filed, Tosco sold the polluting facility, mooting the plaintiff's claims for injunctive relief. Following *Laidlaw*, the Ninth Circuit held that plaintiffs seeking only civil penalties could still satisfy standing requirements because "civil penalties serve as a deterrent to future violations."[228] According to the court, suits seeking civil penalties for continuing and future violations satisfy standing requirements because they provide "redress to the injuries that prompted the citizen suitor to commence litigation."[229] In *Mississippi River*, three environmental organizations brought citizen suits seeking civil penalties against two cities that were discharging stormwater without a permit. While the suit was pending, the cities obtained the required permits, mooting the injunctive and declaratory relief sought by the plaintiffs. The Eighth Circuit, before concluding that the civil penalties claim was moot on other grounds, held that a suit for continuing or future violations seeking civil penalties can satisfy the redressability requirements of the Article III standing test. According to the court, "in *Laidlaw*, limiting the no-standing rule of *Steel Co.* to past violations, the Court held that citizen suit plaintiffs do have standing to seek civil penalties for continuing and future violations."[230] These cases illustrate generally that if a citizen suit is brought while violations are still ongoing, courts will not find a lack of standing under *Steel Co.* even in factual situations where deterrence is minimal.

Courts following *Laidlaw* have also made it easier for plaintiffs to bring citizen suits for civil penalties by relaxing the injury-in-fact requirement in the Article III standing test. Specifically, courts have relaxed the injury-in-fact requirements by holding that a reasonable fear of aesthetic or recreational harm—even in the absence of environmental damage—satisfies standing requirements. *Ecological Rights Foundation, Inc. v. Pacific Lumber Co.*[231] and *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*[232] illustrate this result. In *Pacific Lumber*, two environmental groups brought suit against a logging company for discharging pollutants into a waterway. The plaintiffs alleged that although they did not live near or use the waterway regularly, illegal runoff from a lumber facility was limiting their ability to participate in certain activities in and around the waterway. The Ninth Circuit held that this alleged harm satisfied the injury-in-fact requirement of the Article III standing test. According to the court, *Laidlaw* makes it clear that "the 'injury in fact' requirement is not reducible to inflexible, judicially mandated time or distance guidelines."[233] *Pacific Lumber* can even be said to be an extension of *Laidlaw* because minimal allegations of damage to recreational and aesthetic interests, rather than significant damage to these interests or economic harm, satisfied the injury-in-fact requirement in this case. In *Gaston Copper*, several environmental organizations brought citizen suits against the owner of a smelting facility for releasing pollutants into a waterway. The Fourth Circuit, hearing the case en banc and citing *Laidlaw*, held that the injury-in-fact element of the standing test had been satisfied because, rather then present generalized grievances common to the general public, the members alleged specific harm to their "recreational, aesthetic, and economic interests."[234] This is true even if there is no environmental impact: the court noted that the "relevant showing for purposes of Article III standing is not injury to the environment, but injury to the plaintiff."[235] Finally, also following *Laidlaw*, the en banc court also held that reasonable threats, in addition to actual harm, "adequately document 'injury in fact.'"[236]

The relaxation of the injury-in-fact requirement and the redressability requirement, as well as the very high standard for mootness, will lead to fewer cases being dismissed on

221. *See id.* at 187.
222. *See id.* at 183.
223. *Id.* at 215 (Scalia, J., dissenting).
224. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 28 ELR 20434 (1998).
225. 309 F.3d 1153, 33 ELR 20098 (9th Cir. 2002).
226. 319 F.3d 1013, 33 ELR 20143 (8th Cir. 2003).
227. *Laidlaw*, 528 U.S. at 189.
228. *Tosco*, 309 F.3d at 1160.
229. *Id.* at 1159.
230. *Mississippi River*, 319 F.3d at 1016.
231. 230 F.3d 1141, 31 ELR 20246 (9th Cir. 2000).
232. 204 F.3d 149, 30 ELR 20369 (4th Cir. 2000).
233. *Pacific Lumber*, 230 F.3d at 1148.
234. *Gaston Copper*, 204 F.3d at 154.
235. *Id.* at 160-61.
236. *Id.* at 159.

standing grounds because a claim may not be dismissed if it alleges a reasonable threat of recreational or aesthetic harm, which satisfies the injury-in-fact requirement. Demonstrable environmental harm is not required. These injury-in-fact developments are significant changes to environmental law. Judge Paul V. Niemeyer, commenting on the far-reaching effects of *Laidlaw* in a concurring opinion in *Gaston Copper*, called the Court decision "a sea change in constitutional standing principles."[237] It should be noted that while this appears well settled as a matter of federal law, not all states agree. In *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*,[238] the North Carolina Court of Appeals held that injury to recreational or aesthetic interests was insufficient to establish standing as a matter of state law.

Changes in Agency Interpretation/Fair Notice

EPA suffered a significant defeat in an enforcement action brought under the asbestos national emissions standard for hazardous air pollutants (NESHAP), *United States v. American National Can Co.*[239] In that case, EPA alleged that unauthorized scavenging at a vacant manufacturing facility that resulted in the disturbance of friable asbestos-containing materials was "renovation" for purposes of the asbestos NESHAP and brought a judicial enforcement action against the owner of this facility, American National Can Company, for failure to comply with work practice standards for asbestos removal during renovation.[240] American National Can Company argued that since the unauthorized scavenging was not "renovation," these work practice standards did not apply. The court rejected EPA's claims that "the term 'renovation' does, and always has, encompassed unauthorized scavenging."[241] Instead, the court held that the asbestos NESHAP does not apply to unauthorized scavenging.

In reaching this conclusion, the court acknowledged that EPA's interpretation of an ambiguous statutory scheme is entitled to deference under *Chevron*, and also recognized that an agency's construction of its own regulations is entitled to even greater deference and must be followed by a court unless it is "plainly erroneous or inconsistent with the regulation."[242] But the court noted that an agency litigating position is not entitled to any deference in the absence of an official agency interpretation.[243] Even applying the standard deference for an agency's interpretation of law, however, the court found that it was confronted with "one of those unusual cases in which an agency's construction of its own regulation cannot survive judicial review."[244]

The court first turned to the plain meaning of the term "renovation" and relied on dictionary definitions to conclude that scavenging did not fall within the meaning of this term.[245] The court also looked to the underlying regulatory structure and found that because many of the regulatory requirements—such as the requirement of advance notice before renovation activities, which obviously cannot be complied with in advance of unauthorized scavenging—were nonsensical as applied to unauthorized scavenging, the proper interpretation of the regulation was that scavenging was not covered.[246]

The court also rejected EPA's arguments based on a provision in the NESHAP that defined "renovation" as including activities that alter a facility "in any way."[247] The court concluded that because the language "in any way" was added during a revision of the regulation that was not meant to increase the stringency of the regulation, the effect of this change was not to include unauthorized scavenging in the regulation.[248] Significantly, the court also looked to the enforcement history of the NESHAP, which did not contain a single instance where EPA had ever assessed a civil penalty for unauthorized scavenging, and concluded that the "lack of enforcement speaks volumes" regarding the actual meaning of the regulation at issue.[249] This rationale is significant, as it may be used to challenge EPA's ongoing attempts to broaden the scope of existing regulation through aggressive new interpretation of regulatory terms.

The court also observed that the salutary public purposes of environmental statutes cannot justify EPA's attempts to broaden the reach of its regulations through an aggressive litigating strategy:

> While we are constrained to disagree with the EPA's position in this case, we are not unmindful of the environmental hazards posed by unauthorized scavenging in asbestos-tainted buildings. Nor do we disregard the laudable policy behind the CAA, which was enacted "to protect and enhance the quality of the nation's air resources." However, the EPA cannot enforce unforseen interpretations of the asbestos NESHAP simply by invoking the spirit of the CAA, and is particularly forbidden from doing so for the first time in the course of a litigation. The regulated public must be informed in advance of the rules of the game.[250]

This perhaps reflects a judicial sentiment that is more concerned with fundamental fairness issues and less concerned with the advancement of environmental policy goals whatever the unfairness to specific defendants. As such, it is probably very different than EPA's perspective on these issues, and defendants advancing these types of arguments as part of an enforcement defense strategy can expect significant opposition from EPA.

Finally, it should also be noted that the *American National Can* decision builds on a decision of the D.C. Circuit, *Appalachian Power Co. v. U.S. Environmental Protection Agency*,[251] which held that EPA may not broaden the substantive requirements of agency regulations by issuing informal guidance. The *American National Can* court noted that EPA is not allowed to change its regulations in this manner and by doing so evade the notice-and-comment requirements of the Administrative Procedure Act:

> Indeed, with respect to agency action, the regulated public also must have an opportunity to participate in setting

237. *Id.* at 164 (Niemeyer, concurring).
238. 574 S.E.2d 48 (N.C. Ct. App. 2002).
239. 126 F. Supp. 2d 521 (N.D. Ill. 2000).
240. *Id.* at 524.
241. *Id.* at 525.
242. *Id.*
243. *Id.*
244. *Id.* at 526.
245. *Id.*
246. *Id.* at 526-27.
247. *Id.* at 528.
248. *Id.*
249. *Id.*
250. *Id.* at 530 (citations and footnotes omitted).
251. 208 F.3d 1015, 30 ELR 20560 (D.C. Cir. 2000).

> those rules. That is the essence of notice-and-comment rulemaking. The EPA cannot escape the strictures of the notice-and-comment process by cloaking a substantive addition to the asbestos NESHAP (such as regulating scavenging) in the guise of a mere interpretation of an extant regulation . . . . EPA attempts to broaden the scope of the asbestos NESHAP in a substantive manner without engaging in notice-and-comment rulemaking, and thereby violates a basic canon of administrative law.[252]

Cases like *American National Can* and *Appalachian Power* perhaps represent a growing judicial discomfort with EPA's attempts to broaden regulatory obligations through enforcement actions or the issuance of informal guidance. While the administrative law issues related to this question are complex, they should be investigated fully by counsel involved in environmental enforcement actions where changes in the interpretation of EPA regulations are at issue.

At the same time, some courts also seem willing to defer to EPA's interpretations of regulations in a very significant way. The Court's recent decision in *United States v. Mead Corp.*[253] clarified that agency legal interpretations are entitled to *Chevron* deference from reviewing courts in cases where Congress intended to allow the agency to speak with the force of law regarding a given issue. An earlier case, *Christensen v. Harris County*,[254] had suggested that deference was only appropriate for agency interpretations developed through notice-and-comment rulemaking or formal adjudication. *Mead Corp.* rejected this apparent limitation, holding that *Chevron* deference extended to an unspecified, broader class of agency actions.[255] At the same time, the *Mead Corp.* court also gave renewed life to an older kind of deference, established in the *Skidmore* case,[256] which provides that agency interpretations that "have power to persuade" are entitled to some (unspecified) level of deference. Justice Scalia, in dissent, pointed out the inherent vagueness of this formulation, an administrative law issue of great importance, which will not be addressed in detail here.[257]

What is important, from an environmental enforcement perspective, is that the Court's recent emphasis on deference to administrative agencies has encouraged lower courts to pay more attention to this issue. The lower court decisions in the coal-fired utility initiative all paid great attention to *Chevron* and *Mead Corp*. Significantly, two district courts rejected defendants' arguments that EPA had not provided fair notice of its interpretation of law, explicitly relying, to a greater or lesser degree, on *Chevron* deference.[258] The fair notice defense appeared to be gaining momentum in the 1990s as a way of limiting the authority of administrative agencies—particularly EPA—to impose liability on defendants based on new or unclear interpretations of laws and regulations.[259] If the Court's recent jurisprudence on administrative deference induces lower courts to narrow the "fair notice" doctrine, EPA's enforcement power will be greatly strengthened as a practical matter.

Environmental Justice

A Court decision undermined the viability of environmental justice litigation, particularly with respect to Title VI's applicability to unintentional discriminatory effects or disparate impacts. In *Alexander v. Sandoval*,[260] the Court held that there is no implied private cause of action under §602 of Title VI of the Civil Rights Act of 1964 to enforce disparate impact regulations in order to prevent federally funded state and local agencies from actions that have a disparate impact on minority groups. One federal district court immediately questioned the analysis in the *Sandoval* decision by holding that although claims for disparate impact discrimination may not be brought under §602 of Title VI, they may still be brought under 42 U.S.C. §1983. In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*,[261] the court upheld, despite *Sandoval*, an earlier preliminary injunction on the basis that the New Jersey Department of Environmental Protection's failure to consider the potentially adverse and disparate impacts of an air permit for St. Lawrence Cement Company's proposed blast furnace slag processing facility was actionable under §1983. This decision was reversed on appeal,[262] and since that time there has been minimal legal development on the environmental justice issue.[263]

In a related development, former EPA Administrator Christine Todd Whitman created a special task force under the Office of Enforcement and Compliance Assurance (OECA) to resolve the 68-case backlog of Title VI civil rights complaints over the next two years. Even though environmental justice is normally not an enforcement issue, by creating this special task force under the auspices of the OECA, EPA might begin to direct some of its enforcement efforts toward facilities located in minority areas in which residents have filed Title VI complaints. Further, considering the backlog and its attendant sensitivity and political frustration within minority communities, companies operating in these areas can expect a harsh enforcement response to any environmental incidents associated with one of these facilities. In the end, many fear that this temporary task force will provide EPA with stronger, and more politically attractive, enforcement tools.

Recently, environmental justice issues received more attention due to EPA's Office of Civil Rights' review of whether state environmental agencies are upholding their obligations under the Civil Rights Act in permitting deci-

252. 126 F. Supp. 2d at 530 (internal citations omitted).

253. 533 U.S. 218 (2001).

254. 529 U.S. 576 (2000).

255. *Mead Corp.*, 533 U.S. at 229.

256. 323 U.S. at 134.

257. *See* Richard J. Pierce, Administrative Law Treatise §3.5, at 7 (2003 Supp.).

258. United States v. Ohio Edison Co., 276 F. Supp. 2d 829, 2003 WL 21910738, 33 ELR 20253, at *25 (S.D. Ohio 2003).

259. *See, e.g.*, Trinity Broad. of Fla., Inc. v. Federal Communications Comm'n, 211 F.3d 618 (D.C. Cir. 2000); United States v. Hoescht Celanese Corp., 128 F.3d 216, 28 ELR 20236 (4th Cir. 1997); General Elec. Co. v. EPA, 53 F.3d 1324, 25 ELR 20982 (D.C. Cir. 1995).

260. 532 U.S. 275, 121 S. Ct. 1511 (2001) (class action suit under Title VI by driver license applicant for discriminatory impact of state's English-only driver's license examination).

261. 145 F. Supp. 2d 505, 508-09, 31 ELR 20675 (D.N.J. 2001).

262. South Camden Citizens in Action v. New Jersey Dep't of Envtl. Protection, 274 F.3d 771, 32 ELR 20425 (3d Cir. 2001).

263. A good introduction to environmental justice issues is Julia B. Latham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?*, 27 B.C. Envtl. Aff. L. Rev. 631 (2000). Julia Latham is an associate in Vinson & Elkins' Washington, D.C., environmental group.

sions.[264] It is unclear what the results of this effort will be, but if the environmental justice issue is revitalized, it would be significant for many facilities and organizations.

The Mens Rea Requirement for Criminal Liability

Following on the heels of *United States v. Ahmad*,[265] which was the first circuit court case to find that the intent standard routinely used by the United States in prosecuting environmental criminal cases was inadequate, was *United States v. Wilson*,[266] decided in late December 1997. *Wilson* involved a land development company and its president appealing their convictions for discharging dredged and fill material to wetlands without a permit. The trial court had instructed that they could be convicted based on proof of four elements of the offense: (1) that the defendant knowingly discharged a pollutant; (2) that the pollutant was discharged from a point source; (3) that the pollutant entered a "water of the United States"; and (4) that the discharge was unpermitted.[267] The Fourth Circuit held that "Congress intended that the defendant have knowledge of each of the elements constituting the proscribed conduct even if he were unaware of their legal significance."[268] There, the court held that even though the CWA is a public welfare statute, that status does not eliminate the availability of a mistake-of-fact defense.[269] This is significant, as the intent standard applied by many courts to environmental defenses approaches strict liability.

The Fourth Circuit's strengthening of the intent standard for conviction of a CWA offense goes beyond the decision in *Ahmad* in clearly requiring the government to prove a defendant's knowledge of even jurisdictional facts. The *Ahmad* court had left an unclear dividing line between "purely jurisdictional" elements of an offense, as to which the government is not required to prove knowledge, and factual elements, for which proof is required. Also, the Fourth Circuit has added an offense element for wetlands prosecutions, namely proof that the defendant was aware of the facts establishing the required link between the wetland and the waters of the United States.[270]

The Fourth Circuit has also provided a new basis for its construction of the CWA as requiring proof of knowledge of each element of a criminal offense, namely that the structure of the Act and the position of the term "knowingly violates" means that "knowingly" applies to each element of the offense. As a related matter, the Fourth Circuit's departure from the Fifth Circuit in concluding not that the public welfare offense doctrine should be narrowed, but that even if it applies, it still does not relieve the government of the need to prove knowledge of each element of the offense, is a proper reading of *United States v. International Minerals*,[271] which is the bedrock for the government's public welfare arguments in environmental cases, and should, accordingly, be more difficult for the government to attack.[272]

Moreover, the fact that a second circuit court has given significant weight to the statutory wording of "knowingly" violates suggests that other courts will see that *Ahmad* is not simply an aberration and that the statutory language should be carefully applied. In environmental cases involving violation of permits, the government will continue to argue that no proof of knowledge of permit limits is required since these requirements are an issue of law; mistake-of-fact cases would be governed by *Ahmad* and *Wilson*. However, what is an issue of fact and which is of law is often difficult to distinguish. To the extent defense counsel can characterize an issue one of fact, *Ahmad* and *Wilson* come into play. *Wilson*, for example, may support that factual issues connected with a permit, such as whether a discharge exceeds particular permit limits, is also subject to proof. Finally, as was the case with *Ahmad*, *Wilson* may support arguments concerning the intent standard under other similarly worded environmental criminal provisions, such as that under the CAA.[273]

It continues to surprise that otherwise fair-minded people feel that when it comes to the environment, the end fully justifies the means—that with regard to environmental violations, the government needs to brandish criminal sanctions, even to the extent of compromising the intent standard that is fully accorded to defendants, including drug dealers, under other statutes. *Wilson* pays close and justified attention to the wording of the CWA's criminal provision and arrives at a well-reasoned result that should influence future judicial decisions in the area of environmental criminal enforcement. In an unpublished opinion, the Fourth Circuit reaffirmed the rationale of the *Wilson* decision but upheld a conviction under the CWA because the facts of the case established the requisite intent.[274]

Wilson and *Ahmad* have created a split in the circuits. The Eighth Circuit in *United States v. Sinskey*,[275] the Ninth Circuit in *Weitzenhoff*,[276] and the U.S. Court of Appeals for the Second Circuit in *United States v. Hopkins*,[277] have accepted the government's minimal intent standard—that a defendant acted with sufficient mens rea if it did the act (discharged the material) and the defendant knew the material was not innocuous without regard to whether the defendant knowingly acted with regard to each of the specific elements of the crime. Interestingly, the United States chose not to file a petition for writ of certiorari in *Ahmad* or *Wilson*, apparently hoping to limit their impact to the Fifth and Fourth Circuits.

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264. *See EPA Initiates Landmark Civil Rights Review of State Permitting*, Clean Air Rep. (Inside EPA), June 19, 2003, at 12.

265. 101 F.3d 386, 27 ELR 20557 (5th Cir. 1996). For a fuller explanation of *Ahmad*, see Kevin Gaynor & Tom Bartman, *Was* United States v. Ahmad *Wrongly Decided?*, 28 Env't Rep. (BNA) 290-93 (June 6, 1997). Vinson & Elkins assisted on the appeal of the district court conviction, handling the successful briefing of the mens rea issue.

266. 133 F.3d 251, 28 ELR 20299 (4th Cir. 1997). For a fuller discussion of Wilson, see Gaynor & Bartman, *supra* note 9.

267. 133 F.3d at 260.

268. *Id*. at 262.

269. *Id*.

270. *Id*. at 264. Although the court repeatedly seeks to exclude a basis for mistake-of-law arguments, it is unclear whether, with this element, it opens the door to arguments about the need to prove knowledge of the regulatory status of particular wetlands.

271. 402 U.S. 558 (1971).

272. In seeking rehearing in *Ahmad*, the government attacked the Fifth Circuit's narrowing of the public welfare offense doctrine as "extreme" and "unprecedented." The public welfare offense doctrine allows a relaxation of the mens rea requirement ordinarily required by the Due Process Clause of the Constitution.

273. 42 U.S.C. §7413(c).

274. United States v. Ellis, 172. F.3d 864, 29 ELR 20621 (4th Cir. 1999).

275. 119 F.3d 712, 27 ELR 21468 (8th Cir. 1997).

276. 35 F.3d at 1275, *cert. denied sub nom.* Mariani v. United States, 115 S. Ct. 939 (1995).

277. 53 F.3d 533, 25 ELR 21178 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 773 (1996).

The Sixth Circuit has weighed in the mens rea debate siding with the government. In *United States v. Kelley Technical Coatings, Inc.*,[278] the Sixth Circuit upheld the district court's jury instructions in a RCRA enforcement case, even though they did not require that the government prove that the defendant knew the materials in question were regulated as a hazardous waste or that a permit was required to transport or dispose of the materials. Apparently the defendants argued that they could not be convicted unless they were found to have knowingly violated the law. The Sixth Circuit determined that earlier Sixth Circuit precedent was controlling and had rejected that "knowledge of illegality" was necessary. In so doing, it distinguished two Court cases, *United States v. X-Citement Video*[279] and *Staples v. United States*,[280] as well as *Ahmad* as cases focusing on knowledge of facts, not knowledge of the law. As the Sixth Circuit stated: "The instructions adequately required that the defendant have knowledge of the facts that made the conduct a crime."[281] The court, however, never distinguishes *Wilson*. Nor does it adequately explain why knowledge of a permit is a legal requirement, as opposed to a factual requirement. The Sixth Circuit also considered and rejected the argument that after *Staples* the public welfare offense may not be applied to a statute imposing felony-level penalties. In reviewing *Staples*, it conceded the opinion raised the issue of whether felony-level penalties are incompatible with the theory of public welfare offenses but noted that it specifically did not resolve the issue.[282] Thus, rather than joining the Fifth Circuit, the Sixth Circuit joins the Second, Eighth, and Ninth Circuits in finding that environmental statutes can be public welfare offenses, notwithstanding the heavy penalties imposed on violators.

A more recent decision of the Eleventh Circuit appears consistent with this trend. In *United States v. Hansen*,[283] a defendant appealed convictions for CWA and RCRA violations at a Georgia industrial plant, arguing that the lower court erred in denying his motion for acquittal because the government did not prove the requisite "knowledge" of the CWA and RCRA violations.[284] The Eleventh Circuit, however, found the government's evidence sufficient to show that the defendant acted "knowingly" because he "permitted the plant employees to process the hazardous wastes as they had in the past despite his knowledge that the procedures were in violation of environmental regulations."[285] Perhaps more importantly, the Eleventh Circuit affirmed its earlier *United States v. Goldsmith*[286] decision and held that the government needs only to prove that a defendant "had knowledge of the general hazardous character of the chemical and 'knew that the chemicals have the potential to be harmful to others or the environment'" to obtain conviction for "knowing endangerment" under RCRA.[287]

The Ninth Circuit continued its trend of supporting minimal mens rea for environmental crimes in connection with criminal negligence. In *Hanousek*,[288] the Ninth Circuit upheld a jury instruction that the government was required to prove only that the defendant acted negligently, which the district court had instructed was the "failure to use responsible care," rather than criminal negligence, which is defined in the Model Penal Code as a "gross deviation from the standard of care that a reasonable person would observe in the situation."[289] The defendant was charged under CWA §309(c)(1)(A) for the discharge of a harmful quantity of oil into a navigable water of the United States.[290]

The facts demonstrate how easy it is for government prosecutors to obtain a criminal conviction for the negligent violation of the CWA. The defendant in *Hanousek* was a road master for the White Pass and Yukon Railroad in Alaska. His duties included overseeing a six-mile project to straighten a curve in the railroad track. The railroad hired an independent contractor to do the job, which involved blasting rock outcroppings and using a backhoe to load the fractured rock onto rail cars for disposal. When the work commenced, the contractor covered a petroleum pipeline running adjacent to the tracks with protective cover (railroad ties, sand, and ballast). The contractor also created a work platform from which the backhoe operated. The backhoe operators knew where the pipeline was located and the need to avoid damaging it. In an area of the track where the work had been finished several weeks earlier, a backhoe operator noticed several rocks had fallen and decided to remove them, driving the backhoe off the work platform to an unprotected area, as the covering had been removed with the completion of the work. In removing the rocks, he punctured the pipeline causing a release of 1,000-5,000 gallons of oil into the Skagway River.

Meanwhile, Hanousek was off duty and at home at the time of the accident. The contractor and the operator of the backhoe testified at trial that the backhoe driver's decision to drive off the work platform was contrary to his instructions to stay on the work platform. Nevertheless, the government presented evidence that after Hanousek took responsibility for the project, he had discontinued the installation of the protective covering for the pipeline, rocks sometimes fell in completed areas, and there was no policy prohibiting backhoe drivers from operating off of the work platform. The Ninth Circuit also alluded to a failure to take certain precautions "as was customary."[291] The ultimate significance of the relationship between industry custom or standard practices and the mens rea concept of negligence is not explored by the *Hanousek* court, but it is something that will be an important consideration in determining what, exactly, constitutes negligence for purposes of the criminal provisions of the CWA. Hanousek, a first time offender, was sentenced to six months in prison, six months in a halfway house, and six months of supervised release.

On appeal, the Ninth Circuit rejected Hanousek's argument that the negligence standard in the CWA required a criminal, or gross, negligence standard. Relying on the plain

278. 157 F.3d 432, 29 ELR 20022 (6th Cir. 1998).

279. 513 U.S. 64 (1994).

280. 511 U.S. 600 (1994).

281. 157 F.3d at 438.

282. *Id*. at 439.

283. 262 F.3d 1217, 1248 (11th Cir. 2001).

284. *Id.* at 1247.

285. *Id.* at 1248.

286. 978 F.2d 643, 23 ELR 20281 (11th Cir. 1992).

287. *Id.* at 1243 (quoting *Goldsmith*, 978 F.2d at 645-46).

288. 176 F.3d at 1116.

289. *See* American Law Institute, Model Penal Code §2.02(2)(d) (1985).

290. 33 U.S.C. §1319(c)(1)(A).

291. 176 F.3d at 1119.

language of the statute, the Ninth Circuit reasoned that if Congress had wanted a heightened negligence standard it could have provided it.[292] For support, the court pointed to CWA §311(b)(3) where Congress had provided increased civil penalties for violations that resulted from gross negligence as evidence that Congress provided a heightened standard when it wanted. In so doing, it rejected Hanousek's argument that this change was only recently added to the statute: "Congress is presumed to have known of its former legislation and to have passed new laws in view of the provisions of the legislation already enacted . . . [.]"[293]

Unfortunately, the Ninth Circuit failed to cite to any legislative history showing that Congress in fact considered the negligence standard in §309 when it adjusted the standard for civil penalties in §311. The reality is Congress has provided little guidance on the mens rea standard for environmental crimes. Moreover, it is at least equally plausible to presume that Congress was aware of the Model Penal Code's heightened standard for criminal negligence and assumed courts would apply this standard, rather than the standard for simple negligence, which is traditionally used in the civil context.

The Ninth Circuit also relied on the public welfare offense doctrine, which allows a relaxation of the mens rea requirement ordinarily required by the Due Process Clause of the Constitution, in rejecting Hanousek's argument that the Due Process Clause forbids the imposition of criminal liability based on ordinary, rather than gross, negligence.[294] The Ninth Circuit appeared to base this decision on the fact that Hanousek knew that he was dealing with dangerous materials—in this case, a high-pressure petroleum products pipeline—and thus should have been aware of the probability of "strict regulation."[295] This expansive reading of the public welfare offense doctrine is potentially a very significant development, both by stripping away much of the mens rea requirement for CWA violations and by opening the door for felony-level strict liability environmental crimes. The logical implication of the Ninth Circuit opinion in *Hanousek* is that Congress, if it so chooses, can create strict liability crimes with felony-level penalties for ordinary industrial activities.

Hanousek demonstrates the ease of a criminal conviction for negligence under the CWA and calls into question case selection by prosecutors in this area. It demonstrates that when an environmental incident occurs, prosecutors will look hard for scapegoats and will push for the lowest mens rea possible to ensure they get convictions. In so doing, more traditionally innocent conduct is criminalized, as prosecutors apply after-the-fact judgments to field decisions that were benign at the time they were made.

On August 20, 1999, Hanousek filed a petition for a writ of certiorari from the Court. While this petition was denied, Justice Clarence Thomas and Justice Sandra Day O'Connor took the unusual step of dissenting from the denial of certiorari.[296] The primary criticism of the *Hanousek* decision that these Justices made was its reliance on the public welfare offense doctrine. Justice Thomas wrote that the federal courts "should be hesitant to expose countless numbers of construction workers and contractors to criminal liability for using ordinary devices to engage in normal industrial operations."[297] Justice Thomas also observed that the public welfare offense doctrine originally applied only to offenses with minor penalties and that the long terms of imprisonment authorized by the CWA suggests that the application of the public welfare offense doctrine is not appropriate.[298] That Justice O'Connor, an important swing vote in recent Court decisions, joined in this dissent suggests that the Court may, at some point in the future, be inclined to rein in the broad reading of the public welfare offense doctrine.

Parent-Subsidiary Liability

In *United States v. Bestfoods*,[299] the Court handed the government a major defeat in ruling that the traditional common-law principles of limited corporate liability apply to cases decided under the Superfund law. A parent's control over its subsidiary does not make it an "operator" of a facility subject to Superfund liability owned and operated by the subsidiary unless the corporate veil can be pierced using traditional standards of veil piercing. The sole exception to this general rule is where the parent's activity cause it to be an "operator." According to the Court, 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.[300] In the context of parent and subsidiary corporations that share officers or directors, the Court created a presumption that the shared directors act for the subsidiary, not the parent, when exercising normal responsibilities, consistent with the norms of corporate behavior.[301] *Bestfoods* does not, however, provide individual corporate employees protection from liability. Individual defendants who actively participate or exercise control over activities resulting in criminal violations appear to remain personally liable as operators.[302]

While the Court vacated and remanded the Sixth Circuit's ruling in *United States v. Cordova Chemical Co. of Michigan*,[303] which had held veil piercing was the only avenue to parent liability, for a determination of whether the parent, Bestfoods, could be held liable as an operator, it was a hollow victory for the government; it lost the liberal *United States v. Kayser-Roth Corp.*[304] standard pursuant to which "active involvement" by the parent over the subsidiary's operations generally would be sufficient to cause the parent to become an operator. It is the *Kayser-Roth* standard, which arguably could be satisfied by showing a traditional parent-

292. *Id.* at 1120-21.
293. *Id.*
294. *Id.* at 1121.
295. *Id.* at 1122.
296. 528 U.S. 1102, 120 S. Ct. 860 (2000).
297. 120 S. Ct. at 861.
298. *Id.*
299. 524 U.S. 51, 28 ELR 21225 (1998).
300. The Court's *Bestfoods* decision resolved an issue that had long divided the federal courts. For a complete analysis of the *Bestfoods* decision in this context, see George C. Hopkins, United States v. Bestfoods: *The U.S. Supreme Court Sets New Limits on the Direct Liability of Parent Corporations for Polluting Acts of Subsidiaries*, 29 ELR 10545 (Sept. 1999).
301. *Bestfoods*, 524 U.S. at 69 n.13.
302. *See*, *e.g.*, Norfolk S. Ry. Co. v. Gee Co., 1999 WL 286287 (N.D. Ill. Apr. 23, 1999).
303. 113 F.3d 572, 27 ELR 20949 (1997).
304. 910 F.2d 24, 20 ELR 21462 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991).

subsidiary relationship, that the government had heavily relied on to establish parental liability. While later courts have found sufficient involvement in some cases to impose CERCLA liability for parent corporations, the *Bestfoods* doctrine gives parent corporations real protection in this regard, particularly when corporate formalities are meticulously observed and where the parent-subsidiary interaction appears to be normal corporate practice.

Thus, in *Browning-Ferris Industries of Illinois, Inc. v. Ter Maat*,[305] the court imposed CERCLA operator liability on two affiliates that shared the same director, but did so in a context where the director had held out the affiliate that did not officially operate the site as the actual operator.[306] Those facts appeared particularly suitable to finding such liability. In most cases, courts have found no parent liability. For example, in *Datron v. CRA Holdings*,[307] the court concluded that parent liability was not appropriate in a case where dual officers had some responsibility over environmental matters because the function of the dual officers "falls soundly within the parameters of normal oversight" by a parent corporation.[308] In a recent decision, the Tenth Circuit adopted an approach that is even more favorable to parent corporations. In *Raytheon Co. v. ASARCO, Inc.*,[309] the court gave heavy weight to the *Bestfoods* presumption that a dual officer acts for the subsidiary rather than the parent, holding that "[a]s long as [the dual officer] acted as an executive and board member of [the subsidiary], *Bestfoods* tells us that his actions cannot be attributed" to the parent.[310] This strict reading of *Bestfoods* makes it difficult for plaintiffs to overcome the presumption against parent liability.

As these and other cases indicate, most courts appear to have applied *Bestfoods* to required plaintiffs to either pierce the corporate veil or establish that the parent was an "operator" under this relatively demanding standard[311] so the government or other plaintiffs will have difficulty in establishing liability on parent companies under the Superfund law. The piercing requirement of *Bestfoods* is strengthened not only by its application in lower courts but also by the support the Court's analysis has received in other aspects of both CERCLA and parental liability. For example, in *Commander Oil Corp. v. Barlo Equipment Corp.*,[312] the court applied *Bestfoods*' analysis of the term "operator" to define the term "owner."[313] Similarly, the Eighth Circuit cited *Bestfoods* when it held that liability will not "be imposed on the parent corporation merely because directors of the parent corporation also serve as directors of the subsidiary."[314] Thus, the piercing requirement will significantly hinder the government's ability to establish liability on parent companies that exert some control over a subsidiary but insufficient control to pierce the corporate veil under the applicable law.[315] It remains unclear, however, whether the relevant veil-piercing standards are controlled by federal or state law.[316]

Thus, *Bestfoods* provides strong protection for parent companies in most cases. Such protection is not guaranteed, however. For example, the U.S. Court of Appeals for the First Circuit, in the post-*Bestfoods* appeal of *Kayser-Roth*, held that the facts of that case were sufficient to justify imposing liability on the parent corporation because of its involvement in environmental policies.[317] Given the fact-intensive nature of parent-subsidiary relationships, the outcome of a given fact pattern is difficult to predict. Parent corporations seeking to avoid liability should pay careful attention to how they structure their interactions with their subsidiaries. Perhaps the greatest source of potential exposure is when a parent corporation's employee or officer, who has no defined position with the subsidiary, is involved in environmental decisionmaking at the subsidiary—courts in such circumstances have had no trouble finding parent liability.

Civil Penalties and Fines

Several recent developments regarding the calculations of civil penalties and fines are worthy of note.

Agency of Natural Resources v. Deso[318]

In *Deso*, the Supreme Court of Vermont squarely rejected the "wrongful profits" theory of environmental penalty calculation. Environmental statutes typically require that the economic benefit an alleged violator obtained as a result of noncompliance with environmental law be taken into account in assessing a civil penalty.[319] While many courts have recognized that this assessment should focus on the costs avoided as a result of noncompliance, certain courts, most notably the U.S. Court of Appeals for the Third Circuit, have endorsed a "wrongful profits" approach, also known as the "Dean Dairy" approach.[320] This approach argues that merely operating in noncompliance with environmental law makes all profits obtained during the period of noncompliance "wrongful" and, therefore, the penalty amount should require surrender of those profits.[321] Obviously, this can yield a very large economic benefit component. This approach, however, has been strongly criticized as being inconsistent with sound economic analysis.[322]

305. 13 F. Supp. 2d 756, 29 ELR 20142 (N.D. Ill. 1998).

306. *Id.* at 764-65.

307. 42 F. Supp. 2d 736 (W.D. Mich. 1999).

308. *Id.* at 748.

309. 2003 WL 984624 (10th Cir. Mar. 11, 2003).

310. *Id.* at *4.

311. *See* Carter-Jones Lumber Co. v. LTV Steel Co., 237 F.3d 745, 31 ELR 20406 (6th Cir. 2001); Norfolk S. Ry. Co. v. Gee Co., 1999 WL 286287 (N.D. Ill. Apr. 23, 1999).

312. 215 F.3d 321, 30 ELR 20679 (2d Cir. 2000).

313. *Id.* at 327.

314. Pearson v. Component Tech. Corp., 247 F.3d 471, 484 (8th Cir. 2001).

315. The issue of whether state or federal common law governs piercing the corporate veil in cases that apply *Bestfoods* has not been addressed by the Court. In *Carter-Jones Lumber Co.*, 237 F.3d at 746 n.1, the court held that state common law applies.

316. *Compare* Browning-Ferris Indus. of Ill., Inc. v. Ter Maat, 13 F. Supp. 2d 756, 765, 29 ELR 20142 (N.D. Ill. 1998) (state common law), *with* United States v. Exide Corp., 2002 WL 319940, at *5 (E.D. Pa. Feb. 27, 2002) (federal common law).

317. United States v. Kayser-Roth Corp., 272 F.3d 89, 103, 32 ELR 20354 (1st Cir. 2001).

318. 824 A.2d 558 (Vt. 2003).

319. *See, e.g.*, 33 U.S.C. §1319(d).

320. *See, e.g.,* United States v. Municipal Auth. of Union Township, 150 F.3d 259, 28 ELR 21415 (3d Cir. 1998).

321. *Id.* at 266.

322. *See, e.g.*, Kenneth T. Wise & M. Alexis Maniatis, *The Life Cycle of a Flawed Concept*, 34 Env't Rep. (BNA) 1569 (July 11, 2003).

The Supreme Court of Vermont rejected the wrongful profits approach primarily on economic grounds. In the *Deso* case, a gas station operator was found to have violated a state requirement that gas pumps be fitted with a vapor recovery system to capture fugitive emissions from the gas pumping process. The vapor recovery system cost approximately $13,000.[323] The trial court held that the economic benefit of noncompliance was not $13,000, but rather was $160,000, the total profits earned by the gas station during the 10 months it was required to have installed the vapor system but had not.[324] The Supreme Court of Vermont reversed this decision, reasoning that the correct measure of economic benefits is the costs avoided by noncompliance and that "[u]sing a wrongful profits approach significantly overinflates the economic benefit to the violator[.]"[325] Significantly, the court rejected the argument of the state environmental agency that deterrence required a wrongful profits approach. The court recognized that environmental enforcement must have a deterrent component, but that this need did not excuse poor economic reasoning: "While we agree that such a deterrent may be necessary—indeed, Vermont's environmental programs would cease to function if permittees were allowed to unilaterally disregard permit requirements . . . we do not think so-called 'wrongful profits' can be calculated as an economic benefit."[326]

It is refreshing to see a court refuse to accept irrational agency positions on an end-justifies-the-means basis, which happens all too often in environmental enforcement. Rather, the court took a principled approach to this issue, neither accepting the unsound reasoning of the wrongful profits theory nor giving environmental violators a free pass. In cases where profits directly result from a violation, such as where noncompliance allows a violator to increase market share, some profits can reasonably be considered an economic benefit. "There must be at least some evidence of cause and effect between the misconduct and an unfair economic advantage gained from the misconduct—for example, if Deso had obtained higher profit margins or increased market share by selling cheaper gas."[327] As the commonsense reasoning of the Supreme Court of Vermont illustrates, effective environmental enforcement does not require the abandonment of time-tested legal principles that have worked in many other contexts. Nor does it require courts to accept irrational positions adopted by agencies alleging that their enforcement efforts require departures from sound reasoning. It is to be hoped that other courts draw a lesson from this decision.

EPA is pushing ahead with efforts to codify the Dean Dairy approach. In January 2003, it was reported that the OECA is developing penalty guidelines to account for illegal competitive advantage (ICA) that a violator received from its failure to comply with environmental laws.[328] Unsurprisingly, it was anticipated that these guidelines would "dramatically increase the amount levied by the agency" in penalty proceedings.[329] The ICA guidelines are anticipated to build on the Dean Dairy approach and would address such advantages as: (1) selling illegal products; (2) manufacturing at higher-than-permitted levels; (3) selling products prior to approval; and (4) gains in market share associated with noncompliance.[330] EPA issued a "white paper" exploring these issues in March 2003.[331] While there are certainly situations where competitive advantage is a relevant economic benefit, EPA's efforts to apply the Dean Dairy approach more generally may well inflate the alleged economic benefit far beyond what a rational economic analysis would suggest.

Conclusion

As this Article illustrates, many key environmental enforcement issues remain unsettled, and the near future should hold important developments that interested parties should monitor closely. Although the future of specific issues remains unclear, it is certain that environmental enforcement issues will continue to be important to regulated entities and citizens alike. Contrary to popular perception, there has been no major rollback of environmental regulation under the Bush Administration. Rather, the open disputes address technical issues at the margins of a significant body of regulatory law, or, like the new NSR rulemaking, bring clarity to a program that, despite the claims of those challenging the new rule, was fundamentally ambiguous in the first place. Nothing that has happened over the past few years has displaced the importance of environmental law for regulated entities, and it seems likely that the future will hold ongoing and increasing enforcement of existing programs as well as new regulations to address emerging environmental issues.

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323. 824 A.2d at 562.

324. *Id.*

325. *Id.*

326. *Id.* at 563.

327. *Id.*

328. *OECA Expanding Fines to "Recapture" Competitive Advantage*, Inside EPA, Jan. 31, 2003, at 7-8.

329. *Id.* at 7.

330. *Id.* at 8.

331. U.S. EPA, Identifying and Calculating Economic Benefit That Goes Beyond Avoided and/or Delayed Costs (2003), *available at* http://www.epa.gov/Compliance/resources/publications/civil/programs/econben-costs.pdf (last visited Nov. 3, 2003).