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2005 Environmental Law Update

by

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I. Air Quality

EPA's Air Quality Consent Agreement for Dairy, Hog, and Poultry AFOs¹

Dairy, hog, confined beef and veal, and poultry farms are Animal Feeding Operations (AFOs) and may be subject to reporting requirements under the Comprehensive Environmental Response Compensation and Liability Act² (CERCLA) and the Emergency Planning and Community Right-to-Know Act³ (EPCRA) and regulation under the Clean Air Act⁴ (CAA). Reporting under CERCLA and EPCRA is required for both episodic and continuous releases of regulated substances. Episodic releases require immediate reporting by telephone followed by a paper report. Continuous releases are covered under a different reporting regimen and do not require immediate reporting. Each failure to report an episodic release is a separate violation. For continuous releases, each 24-hour period not covered by report is a separate violation. Each CERCLA violation carries a maximum civil penalty of \$25,000 (\$75,000 for repeat violators). There are also criminal penalties (a maximum of 3 years incarceration for first-time offenders and 5 years for repeat offenders) available to the government. Similar civil and criminal penalties are also available under EPCRA for the failure to report. Ammonia and hydrogen sulfide are the chemicals that are typically emitted by livestock and/or poultry farms that must be reported under CERCLA and EPCRA. The reportable quantities for both are releases of 100 pounds in any 24-hour period.

In addition to regulating ammonia and hydrogen sulfide, the CAA also regulates two other air emissions from livestock and poultry farms: particulates of a certain size and volatile organic compounds (VOCs). The level of regulation will depend upon whether the livestock or poultry farm is in an attainment or a nonattainment area for a given pollutant and the details of the state implementation plan (SIP) for the state in which the farm is located. Some farms, particularly new farms, may find that they face expensive technology requirements in order to comply with the CAA. Details of the regulation of livestock and poultry farms under the CAA present many complex issues and a discussion of those details is beyond the scope of this article. VOCs and ammonia may be precursors to regulated particulates and so may themselves be regulated in nonattainment areas for particulates. VOCs are also a precursor for ozone. VOCs emissions and ammonia emissions are subject to more stringent regulation in nonattainment areas for particulates, as are VOCs in nonattainment areas for ozone. Substantial areas of North Carolina have been designated

¹ Dr. Geoff Benson, Extension Specialist, Department of Agricultural & Resource Economics, North Carolina State University, contributed to this section.

² 42 U.S.C. § 9603 (2005).

³ 42 U.S.C. § 11004 (2005).

⁴ 42 U.S.C. §§ 7401 - 7671q (2005).

nonattainment areas for ozone.⁵ Nonattainment areas for particulates are more limited.⁶ Very few major agricultural production areas do not include some nonattainment area so this is a national issue for the livestock and poultry industries. These laws have been on the books for many years but only now is EPA enforcing them against livestock and poultry producers. One of the major impediments to both compliance and enforcement has been a lack of information on air emissions from AFOs, along with better tools to determine compliance. EPA has agreed to conduct the proposed two-year monitoring study to help provide information on four aspects of air quality: ammonia, hydrogen sulfide, particulates of a certain size, and volatile organic compounds (VOCs). The monitoring will take place at livestock and poultry housing and manure storage sites and will be conducted by an independent contractor, not EPA.

The EPA's proposal has three components of interest to individual producers. Operators of AFOs who enter into a consent agreement with EPA agree to:

- (1) pay a penalty, in return for which EPA agrees not to sue for certain past violations of air quality laws. Potential fines that could be levied for violations of these laws are sizable. The producer does not admit guilt. Penalties range from \$200 for a small farm to \$1,000 for large operations with multiple AFOs (such as integrated hog operations);
- (2) pay into a fund to finance the collection of air quality data at a rate that is the lesser of a pro-rated share of the total cost or \$2,500 per farm; and
- (3) be one of the monitoring sites if selected. The number of sites selected will be small and if many producers sign up that will reduce the chances of being selected.

After several extensions, the opportunity to enter the consent agreement closed, effective the close of business, Friday, August 12.

This EPA initiative raised many concerns for individual producers and for the livestock and poultry industries as a whole. Industry concerns included:

- Cattle feeding operations were excluded from participation.
- The proposed study (and the consent agreement) addressed only emissions from production areas and waste storage areas. Land application areas are excluded.
- The proposed methodology for collecting data from livestock and poultry farms calls for few to be included in the study. Total numbers in each category are considered by most as being far too few to represent the diversity of livestock and poultry farms across the country and to provide reliable data upon which to regulate.
- The difficulty of measuring air quality attributes in the open sided barns that are used on most dairy farms.
- The cost of the research and how to fund this as an industry so that the burden does not fall on individual producers. The hog and poultry (egg) industry are using check off money but dairy is not allowed to do this under the terms of the dairy check off program.
- Low participation by livestock and poultry producers that may jeopardize the agreement for particular categories of producers. EPA may reject a particular sector's participation and develop rules for that sector based upon other information that is more restrictive and less favorable to the industry.

⁵ U.S., EPA, 8-HOUR GROUND-LEVEL OZONE DESIGNATIONS, <http://www.epa.gov/ozonedesignations/regions/region4desig.htm> (last visited June 12, 2006).

⁶ N.C. DEP'T OF ENVTL. AND NATURAL SCI., DIV. OF AIR QUALITY, http://daq.state.nc.us/planning/pm2dot5/pm2.5_final_nonattainment_areas.pdf (last visited June 12, 2006).

Producer issues included:

- The financial cost of participating.
- The loss of anonymity once a farm is on EPA's list of participants.
- The disruption to the farm operation if the farm is selected as a monitoring site and the possibility that the farm will be found out of compliance based upon the data collected.
- The immunity granted by the consent agreement could forestall serious financial penalties but the amount and probability of incurring a penalty is unknown.
- The potential loss of immunity if a producer expands herd size during the period of the monitoring study.
- The potential loss of immunity if a producer fails to comply with all provisions of the consent agreement.
- The stigma and possible collateral legal and financial consequences of agreeing to pay a penalty (even though signing the agreement involves no admission that any violations have occurred). Farmers who are not citizens have questioned whether signing the agreement would impact their visa statuses. All farmers must be concerned that signing this agreement might adversely impact existing credit arrangements as well as jeopardize the ability to obtain credit in the future.
- The likelihood that EPA may impose significant and costly control measures at the conclusion of the study and that, having signed the consent agreement, farmers may have compromised their ability to challenge EPA's conclusions and new requirements based upon those conclusions.

Factors that livestock and poultry producers considered when deciding whether or not to participate included:

- The size of their operation and the technologies that they employ including those that tend to reduce emissions of the regulated pollutants discussed above.
- Whether industry moneys are available to cover the costs of the study.
- If under contract with an integrator, whether the integrator is participating. No producer should sign the consent agreement without first discussing it with their integrator. If the integrator is participating, the farms that contract with them will likely be included in the public record and so will lose their anonymity even if they do not participate.
- Whether the farm is covered under a current NPDES permit. If so covered, the farm is already subject to public scrutiny that is not likely to be greatly increased by participating in the study.
- Whether the farm has a history of previous environmental violations of any type.
- Whether the farm has been the subject of complaints or threats of litigation. CERCLA, EPCRA, and the CAA all contain citizen suit provisions that allow any member of the public with standing to bring a suit to enforce the law. If a farm owner or operator loses such a suit it loses most or all of the ability that one ordinarily has to negotiate with EPA or the state to reduce the penalty amount. In addition, the prevailing plaintiff is entitled to recover his or her attorney fees from the farm's owner or operator.
- Whether the farm is located in an urban or urbanizing setting where more intensive land uses are likely to result in conflicts with the agricultural use.
- Whether the farm is located in an air quality nonattainment area.

The consent agreement is a legal contract, as well as a judicially approved and enforceable settlement, and, as such, producers were well-advised to seek qualified legal advice. Anecdotally, many did not.

EPA has provided a FAQ on its web site, "Animal Feeding Operations Monitoring Study Frequently Asked Questions."⁷ It has not been updated to reflect the close of the signup period.⁸ According to EPA's August 15, 2005, press release, over 2000 producers in 37 states signed the agreement.⁹ On January 27, 2006, the EPA's Environmental Appeals Board (EAB) approved the first 20 agreements, 10 from the swine industry and 10 from the egg industry. The remainder of applications are pending; action is expected soon.

Other EPA Action on Air Quality

On August 31, 2005, EPA published its *Draft Air Quality Criteria for Ozone and Related Photochemical Oxidants*.¹⁰ All comments were to be submitted by December 6, 2005. The notice of the availability of the final document was published on February 28, 2006.¹¹ This document represents the most extensive review since 1996 of scientific information related primarily to environmental and health effects of ozone and related photochemical oxidants. While the document represents neither the views of the EPA nor the government, it represents an important step that is likely to culminate in revision of the National Ambient Air Quality Standards (NAAQSs) for ozone. These consist of a primary NAAQS to protect human health with an adequate margin of safety and a secondary NAAQS to protect against welfare effects, including impacts on crops, forests, visibility, manmade materials, and other ecosystem effects, with an adequate margin of safety. Volatile organic compounds (VOCs) are important ozone precursors that are regulated under the CAA. AFOs are a significant source of VOCs; therefore, any change in the NAAQSs for ozone are likely to have an impact upon livestock and poultry producers. On November 17, EPA published a notice of availability of its *Draft Staff Paper* on ground-level ozone.¹² The comment period on the *Draft Staff Paper* closed on December 30, 2005, but was extended to January 17, 2006.¹³

EPA continues to review state implementation plans (SIPs) for various criteria pollutants, including ozone, carbon monoxide, and PM₁₀.¹⁴ SIPs are required where criteria pollutants are not in attainment. As efforts continue to control criteria pollutants in nonattainment areas, agriculture can expect an increased level of enforcement actions. VOCs (precursors to ozone), hydrogen sulfide, and particulates are important issues for agriculture.

⁷ U.S., EPA, AIR & RADIATION, ANIMAL FEEDING OPERATIONS MONITORING STUDY FREQUENTLY ASKED QUESTIONS, http://www.epa.gov/air/oaqps/airlinks/afo_monitoringqa.html (last visited June 12, 2006).

⁸ However, there is a contact person: Sharon Nizich, Office of Air Quality Planning and Standards, EPA (919) 541-2825. A copy of the consent agreement may be found at <http://www.epa.gov/compliance/resources/agreements/caa/cafo-agr-0501.html>.

⁹ U.S., EPA, EPA NEWSROOM, THOUSANDS SIGN UP FOR ANIMAL FEEDING OPERATIONS AIR COMPLIANCE AGREEMENT, <http://yosemite.epa.gov/opa/admpress.nsf/d9bf8d9315e942578525701c005e573c/518e0d3417e2488d8525705e0052da43!OpenDocument> (last visited June 12, 2006).

¹⁰ Draft Air Quality Criteria for Ozone and Related Photochemical Oxidants, 70 Fed. Reg. 51,810 (Aug. 31, 2005).

¹¹ Air Quality Criteria for Ozone and Related Photochemical Oxidants, 71 Fed. Reg. 10,030 (Feb. 28, 2006).

¹² Draft Staff Paper for Ozone, 70 Fed. Reg. 69,761 (Nov. 17, 2005).

¹³ Draft Staff Paper for Ozone; Extension of Comment Period, 70 Fed. Reg. 77,155 (Dec. 29, 2005).

¹⁴ U.S., EPA, STATE AND LOCAL TRANSPORTATION SOURCES, <http://www.epa.gov/oms/transp/conform/adequacy.htm> (last visited June 12, 2006).

EPA also addressed pollution from diesel engines this year and has made available an unofficial copy of its direct final rule, *Control of Emissions of Air Pollution from Diesel Fuel*.¹⁵ The direct final rule was published in the Federal Register on July 15, 2005.¹⁶ The direct final rule was modified to extend certain deadlines on November 22, 2005.¹⁷ This action revised the January 18, 2001, Highway Diesel Rule¹⁸ and the June 29, 2004, Nonroad Diesel Rule.¹⁹ This is part of the overall effort to make the transition to ultra-low sulfur diesel fuel. On July 11, 2005, EPA proposed new standards for stationary diesel engines.²⁰ The comment period closed on September 9, 2005. Most of the requirements under the proposed rules fall upon engine manufacturers. However, for those who purchase new engines, the proposed rule requires additional recordkeeping of owners and operators of these engines and places notice requirements on owners and operators of some the larger engines.

Selected Federal Air Quality Decisions

A risk to the livestock and poultry producers who did not avail themselves of the air quality consent agreement discussed above is that they will become a defendant in a citizen suit. *Idaho Conservation League v. Boer*²¹ is such a decision. Adrian Boer, the defendant in the case, obtained a siting permit from Gooding County on October 1, 1999, that authorized him to construct a dairy for up to 6,600 animal units. He thereafter began construction of the lagoon for the dairy. State court actions were filed against Boer; however, he prevailed in these. On August 19, 2003, the Idaho Conservation League (ICL) notified the Idaho Department of Environmental Quality (IDEQ) that Boer was in violation of the CAA for failure to obtain a Permit-to-Construct (PTC). The IDEQ responded by letter that it was of the opinion that emissions from the K&W Dairy were below the level triggering a permit requirement. On January 9, 2004, ICL notified Boer that it intended to sue under the CAA and filed suit on May 26, 2004.

The court construed Boer's response as a motion for summary judgment. It rejected each of Boer's contentions. The court found that, although the EPA's language approving Idaho's SIP and IDEQ's interpretation thereof was confusing, ammonia and hydrogen sulfide should be considered part of the Idaho's SIP (for certain particulates) enforceable under the CAA. Second, the court determined that the applicable statute of limitations is five years, not the two alleged by Boer. Third, it found that the letter from IDEQ to ICL presented no administrative remedies to be exhausted. Fourth,

¹⁵ Control of Emissions of Air Pollution from Diesel Fuel, <http://www.epa.gov/otag/regsfuels/diesel/directfinalrule.pdf> (unofficial version of rule).

¹⁶ Control of Emissions of Air Pollution from Diesel Fuel, 70 Fed. Reg. 40,889 (July 15, 2005) (codified at 40 C.F.R. Part 80).

¹⁷ Control of Air Pollution From New Motor Vehicles; Revisions to Motor Vehicle Diesel Fuel Sulfur Transition Provisions; and Technical Amendments to the Highway Diesel, Nonroad Diesel, and Tier 2 Gasoline Programs, 70 Fed. Reg. 70,498 (Nov. 22, 2005) (codified at 40 C.F.R. Part 80).

¹⁸ Control of Air Pollution from New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements, 66 Fed. Reg. 5002 (Jan. 18, 2001) (codified at 40 C.F.R. Parts 69, 80, and 86).

¹⁹ Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel, 69 Fed. Reg. 38,958 (June 29, 2004) (codified at multiple parts of 40 C.F.R.).

²⁰ Standards of Performance for Stationary Compression Ignition Internal Combustion Engines, 70 Fed. Reg. 39,870 (July 11, 2005) (codified at 40 C.F.R. Parts 60, 85, 89, 94, 1039, 1065, and 1068).

²¹ 362 F. Supp. 2d 1211 (D. Idaho 2004).

that it was not improper to aggregate all emissions from the dairy, including fugitive emissions, when determining the need for a permit. Fifth, where the IDEQ's interpretation of its own regulations conflict with the plain language of those regulations, the court must follow the plain language of the regulations. It is interesting that no reporting violations under CERCLA or EPCRA were alleged, as this would have provided ICL with an independent basis for liability that was not dependent upon violations Idaho's SIP. *Boer* was cited in *Association of Irrigated Residents v. Fred Schakel Dairy*²² in support of the district court's denial of the defendant's motion to dismiss.

*Center for Energy and Economic Development v. EPA*²³ is a continuation of long-running litigation over regulatory requirements for SIPs, in this case, those for haze. In 1999, the EPA adopted its Regional Haze Rule that required states to impose best available retrofit technology (BART) on a specified class of large stationary sources. In its previous decision in *American Corn Growers Ass'n v. EPA*²⁴ the court found that the EPA's method for determining BART was inconsistent with the CAA in that it might force a state to require some large stationary sources to adopt BART when there would be no appreciable impact upon haze in the targeted area. To date the EPA has not issued a final regulation to replace the regulation that the court held invalid in *American Corn Growers*. However, the affected states attempted to adopt their own regional EPA-approved rule. The Center for Energy and Economic Development, a group of large polluters, petitioned for review, arguing that this was, in essence, a back door approach to implement the rule that the court had already disapproved. The D.C. Circuit granted the petition for review. Standing was a key issue that the D.C. Circuit decided in favor of the Center for Energy and Economic Development. The court found that the Center's members would immediately be subject to substantial reporting requirements that carried severe penalties for failure to report. It found that this was sufficient to provide standing. The plaintiff in *Legal Environmental Assistance Foundation, Inc. v. EPA*²⁵ was not so favored. The Legal Environmental Assistance Foundation challenged EPA's decision not to take enforcement action against Florida and Alabama's Title V CAA programs (state-operated programs for large stationary sources that are approved by EPA). The court held that the Legal Environmental Assistance Foundation could not show an injury-in-fact to support its standing to sue.

In *Association of Irrigated Residents v. EPA*²⁶ the Ninth Circuit upheld EPA's decision to approve a SIP. On May 26, 2004, the EPA granted final approval to the San Joaquin Valley's 2003 PM-10 Implementation Plan. PM-10 pollutants are fine particles of less than 10 microns in diameter that, in the San Joaquin Valley, are generated primarily by agricultural operations and road use (dust kicked up by vehicle traffic). EPA extended the deadline for full implementation to 2010 despite the 2006 deadline in the CAA. It was the contention of the petitioners that EPA lacked authority under the CAA to extend this deadline. The Ninth Circuit disagreed and denied the petition for review. It pointed out that EPA's interpretation of the scientific data is entitled to a great deal of deference.

²² No. CIVF0540707, 2005 WL 3299508 (E.D. Cal. Dec. 2, 2005).

²³ 398 F.3d 653 (D.C. Cir. 2005).

²⁴ 291 F.3d 1 (D.C. Cir. 2002).

²⁵ 400 F.3d 1278 (11th Cir. 2005).

²⁶ 423 F.3d 989 (9th Cir. 2005).

II. Water Use

Conflict over water use continues to be a rich source of conflict. In *In re: Operation of the Missouri River System Litigation*²⁷ the Eighth Circuit dealt with part of the continuing conflict over the use of water in the Missouri River system. North Dakota sued the U.S. Army Corps of Engineers in federal district court, alleging that the Corps' releases of water from Lake Sakakawea in support of downstream navigation violated state law water quality standards established to comply with the Clean Water Act (CWA). The state of Nebraska intervened as a defendant and South Dakota intervened as a plaintiff. The district court granted summary judgment for the defendants, holding that the Corps' actions were protected by sovereign immunity. The state of Missouri intervened on appeal on behalf of the appellee, the Corps. The Mandan, Hidatsa and Arikara Nation filed an amicus brief on behalf of the appellants. The Eighth Circuit affirmed that the Corps' action to support navigation were immune from suit. The Eighth Circuit also agreed with the district court that preemption could be an alternative ground for granting summary judgment. Issues related to consultation with the Fish and Wildlife Service on Endangered Species Act (ESA), applicable to endangered species in the Missouri River system, as well as other issues, including compliance with NEPA, were considered in the related decision, *In re: Operation of the Missouri River System Litigation*.²⁸ These two decisions, decided on the same day by the Eighth Circuit, illustrate the complexity of water use disputes.

The decision in *Brady v. FERC*²⁹ illustrates how what is essentially a local land use dispute becomes a federal case when that land is located on a lake created as part of a federally regulated hydroelectric project within the jurisdiction of the Federal Energy Regulatory Agency (FERC). Two lakefront homeowners objected to the expansion of a commercial marina. In a well-reasoned opinion, written by Judge Roberts, that illustrates both the complexity of federal regulation of hydropower projects and the wide discretion given to FERC in the decision making process, the D.C. Circuit denied the petition for review. In his concurring opinion, Judge Williams illustrated the difficulty and risk entailed in administratively allocating resources without the benefit of market discipline.

The impact of impoundments on downstream landowners has also been a continuing source of controversy. The Skokomish Indian Tribe sued the federal government, Tacoma Public Utilities, and the City of Tacoma over aggradation of the Skokomish River as the result of the city-owned hydroelectric project upstream from the Tribe's land.³⁰ As aggradation (the gradual increase in the level of the river bed from siltation) raised the level of the river bed it has resulted in harm to the Tribe that is alleged to include "flooding of the Tribe's reservation, failure of septic systems, contamination of water wells, blocking of fish migration, damage to the Tribe's orchards and pastures and silting over of many of the Tribe's fisheries and shellfish beaches."³¹ The issues raised by the Tribe are typical of the complex mix of federal and state law claims found in water use disputes. In an opinion authored by Judge Kozinski, the Ninth Circuit, sitting *en banc*, held that the Tribe had improperly attempted to claim monetary damages for violation of its treaty rights under the Federal Tort Claims Act (FTCA). The court held that monetary claims for violations of treaty rights were contractual in nature rather than tortious. Therefore, the court lacked subject matter jurisdiction to hear these claims as jurisdiction lies solely in the U.S. Court of Federal Claims under the Indian Tucker Act. The court ordered those claims transferred to the Court of Federal Claims. As to the claims against Tacoma

²⁷ 418 F.3d 915 (8th Cir. 2005).

²⁸ 421 F.3d 618 (8th Cir. 2005).

²⁹ 416 F.3d 1 (D.C. Cir. 2005).

³⁰ Skokomish Indian Tribe v. U.S., 410 F.3d 506 (9th Cir. 2005).

³¹ *Id.* at 509-10.

Public Utilities and the City of Tacoma based upon violations of treaty rights, the court held that the Treaty of Point No Point (Treaty) was essentially a contract between two sovereign nations that, being self-executing, became law of the United States upon ratification by the Senate. As the Treaty contained no provision for monetary claims against third parties who violated treaty rights no action for damages could be maintained. The court noted that the Tribe might be able to maintain an action for equitable relief against third parties based upon violations of federal law. The court also held that the Tribe is not a person for purposes of 42 U.S.C. § 1983, and, therefore, not entitled to seek monetary damages under that provision. The court affirmed the district court's grant of summary judgment to the defendants on issues arising from alleged violations of treaty rights. The Ninth Circuit also affirmed the district court's dismissal of a host of state law claims and a motion for recusal of the district court judge based upon his status as a utility customer. In affirming the district court's dismissal of the plaintiff's claims, the Ninth Circuit found no need to address the district court's denial of class certification. Judge Berzon, in his dissent to parts of the majority opinion, raises issues that suggest that this decision is unlikely to be the final chapter in this dispute.

III. Clean Water Act - NPDES Permits

On August 16, 2005, EPA published a proposed rule, *Guidelines Establishing Test Procedures for the Analysis of Pollutants; Analytical Methods for Biological Pollutants in Wastewater and Sewage Sludge*.³² The comment period closed after October 17, 2005. The proposed rule would add analytical techniques for enumerating E. coli and enterococci in waste water, and coliforms and Salmonella in sewage sludge. By adding additional analytical techniques to the approved list EPA will give NPDES permit writers additional options.

Water Quality Standards

*Florida Public Interest Research Group Citizen Lobby, Inc. v. EPA*³³ was a challenge to a state administrative rule (the Impaired Waters Rule) affecting Florida's water quality standards. Under the CWA, states have primary responsibility for adopting water quality standards, subject to approval by EPA. If a state fails to adopt water quality standards that comply with the CWA, then the EPA must adopt such standards for the state's waters. This procedure may be enforced against EPA via a citizen suit. Here, the plaintiffs alleged that Florida had modified its water quality standards without going through the appropriate approval process. The district court, where the action was filed, held that the Impaired Waters Rule neither created new water quality standards nor modified existing water quality standards. The district court concluded that since no water quality standard was created or modified, there was no nondiscretionary duty on the part of EPA to review the Impaired Waters Rule. There being no nondiscretionary duty, the court had no jurisdiction to hear the matter, and summary judgment for defendants was appropriate. On appeal, the appellees argued that the plaintiffs lacked standing, and that the appeal was moot because the EPA had reviewed the list of impaired waters developed under the Impaired Waters Rule. The Eleventh Circuit rejected these arguments, holding that the plaintiffs had standing, that the appeal was not moot, and that the failure of the Florida Department of Environmental Protection (FDEP) to follow its own procedures and the EPA's subsequent failure to review did not mean that FDEP had not modified its water quality standards. Individual plaintiffs provided detailed affidavits describing their use of the bodies of water removed from the impaired list under the Impaired Waters Rule, and the impact upon their recreational activities resulting from the removal of these bodies of water from pollution control. Impacts included

³² Guidelines Establishing Test Procedures for the Analysis of Pollutants; Analytical Methods for Biological Pollutants in Wastewater and Sewage Sludge; Proposed Rule, 70 Fed. Reg. 48,255 (Aug. 16, 2005) (to be codified at 40 C.F.R. Part 136).

³³ 386 F.3d 1070 (11th Cir. 2004).

not being able to eat bass from a particular body of water because Florida had failed to control the mercury pollution in that body of water and by this action indicated that it had no intention of doing so. These are the types of injury that constitute ‘injury in fact’ required for standing. Turning to the issue of mootness, the Eleventh Circuit held that EPA’s review of Florida’s list of impaired waters was not the vigorous review of state water quality standards mandated under the CWA. As to the merits of the case, the Eleventh Circuit held that the district court had failed to conduct the thorough review needed to determine whether the Impaired Waters Rule had, as a practical matter, modified Florida’s water quality standards.

Stormwater

*Texas Independent Producers and Royalty Owners Association v. EPA*³⁴ was a consolidated challenge to EPA’s *Final National Pollutant Discharge Elimination System General Permit for Storm Water Discharges From Construction Activities*.³⁵ The Seventh Circuit held that the public notice and public hearing provisions of the general NPDES permit do not violate the CWA. It held that the provisions of the general permit comply with the requirements of the Endangered Species Act. It also stayed action on the issues raised by oil and gas interests pending a determination by the Fifth Circuit on the issue of whether the general permit applies to activities of those industries at all. The Seventh Circuit subsequently determined that the oil and gas petitioners lacked standing because the terms of the general permit do not apply to the oil and gas interests and Congress, in the Energy Policy Act of 2005 specifically exempted uncontaminated discharges from the oil and gas interests.³⁶ The Seventh Circuit held that the Natural Resources Defense Council (NRDC) lacked standing to present its substantive objections to the general permit because it alleged no specific violation, only objections to the general scheme that EPA proposed. It held that the NRDC had produced no injuries in fact that could be tied to the general permit. An interesting point made by the Seventh Circuit about *Environmental Defense Center, Inc. v. U.S. EPA*³⁷ and *Waterkeeper Alliance, Inc. v. U.S. EPA*,³⁸ discussed below, is that neither the Ninth nor the Second Circuits addressed the issue of standing. *Environmental Defense Center* was a challenge, consolidated from the 9th, 5th, and D.C. Circuits to EPA’s Phase II Rule governing stormwater discharges from small municipal separate stormwater sewer systems and construction sites between one and five acres in size. The Phase II Rule requires that these entities apply for NPDES permits. The 9th Circuit stated that the EPA’s failure to make Notices of Intent (NOI) available to the public and to make them subject to public hearings violated the CWA. The 9th Circuit remanded on to the EPA as to this aspect of the Phase II Rule and also directed the EPA to consider whether to regulate forest roads under the rule. In all other respects the 9th Circuit affirmed the Phase II Rule “against the statutory, administrative, and constitutional challenges raised” *Waterkeeper Alliance* addressed EPA’s CAFO rule and is discussed below.

Application of Pesticides to Surface Waters

The Ninth Circuit addressed the question of whether a pesticide intentionally applied to surface water to eliminate pestilent fish species is a “pollutant” for purposes of the CWA.³⁹ The lawsuit

³⁴ 410 F.3d 964 (7th Cir. 2005).

³⁵ Final National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges From Construction Activities, 68 Fed. Reg. 39,087 (July 1, 2003).

³⁶ *Texas Independent Producers and Royalty Owners Association v. EPA*, 435 F.3d 758 (7th Cir. 2006).

³⁷ 344 F.3d 832 (9th Cir. 2003).

³⁸ 399 F.3d 486(2nd Cir. 2005).

³⁹ *Fairhurst v. Hagener*, 422 F.3d 1146 (9th Cir. 2005).

arose from a program of the Montana Department of Fish, Wildlife and Parks (the Department) to reintroduce a threatened trout species to waters inhabited by non-native trout. The Department used the pesticide antimycin over several years to eliminate the non-native trout species. The Ninth Circuit held that the pesticide antimycin is not a pollutant under the CWA. For that reason no NPDES permit is required. The court distinguished this decision from its decision in *Headwaters, Inc. v. Talent Irrigation Dist.*⁴⁰ on the basis that the pesticide applied by the Department left no residue after it had performed its intended function whereas there was such a residue for at least several days after application of the pesticide in *Headwaters*. The Ninth Circuit gave deference to the EPA's position stated in its *Interim Statement and Guidance on Application of Pesticides to Waters of the United States in Compliance with FIFRA*,⁴¹ superseded by *Interpretive Statement and Notice of Proposed Rulemaking on the Application of Pesticides to Waters of the United States in Compliance with FIFRA*.⁴²

EPA's *Interpretive Statement and Notice of Proposed Rulemaking on the Application of Pesticides to Waters of the United States in Compliance with FIFRA*⁴³ lists two specific exceptions to the NPDES permit requirement for pesticides that are introduced into surface water. The proposed exceptions to the permit requirement are:

"Sec. 122.3 Exclusions.

* * * * *

(h) The application of pesticides to waters of the United States consistent with all relevant requirements under FIFRA (i.e., those relevant to protecting water quality), in the following two circumstances:

(1) The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds or other pests that are present in the waters of the United States.

(2) The application of pesticides to control pests that are present over waters of the United States, including near such waters, that results in a portion of the pesticides being deposited to waters of the United States; for example, when insecticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over, including near, water for control of adult mosquitos or other pests.⁴⁴

⁴⁰ 243 F.3d 526, 530 (9th Cir. 2001).

⁴¹ U.S., EPA, INTERIM STATEMENT AND GUIDANCE ON APPLICATION OF PESTICIDES TO WATERS OF THE UNITED STATES IN COMPLIANCE WITH FIFRA, (July 11, 2003), http://www.epa.gov/npdes/pubs/pesticide_interim_guidance.pdf.

⁴² Application of Pesticides to Waters of the United States in Compliance with FIFRA, 70 Fed. Reg. 5093 (Feb. 1, 2005) (to be codified at 40 C.F.R. Part 122).

⁴³ *Id.*

⁴⁴ *Id.* at 5100.

Concentrated Animal Feeding Operations (CAFO)

Since the EPA Confined Animal Feeding Operation (CAFO) Final Rule was published in the *Federal Register* on February 12, 2003, it has been the subject to challenge by both producer and environmental organizations. All challenges to the CAFO Final Rule were consolidated before the 2nd Circuit. In its February 28, 2005, decision, *Waterkeeper Alliance, Inc. v. U.S. EPA*,⁴⁵ the Second Circuit held portions of EPA's Final Rule governing CAFOs to be invalid, and upheld the remainder of the CAFO Rule.

The Second Circuit held that the CAFO Rule did not provide for any meaningful oversight over the nutrient management plans that CAFOs have developed and that the EPA must require that nutrient management plans be included within the NPDES permit. The Second Circuit also held that the CAFO Rule's failure to include the nutrient management plans within the NPDES permit resulted in a failure to provide for meaningful public comment as required by the Clean Water Act.

The Second Circuit held that the EPA lacked authority to require CAFOs that had never had a discharge, other than an exempt discharge of agricultural stormwater, to apply for an NPDES permit. This is an important clarification of the law because it had previously been assumed by many that an animal feeding operation (AFO) that met the definition of a CAFO had a duty to apply whether or not there was any actual history of discharges.

The Second Circuit held that, where there is an adequate nutrient management plan and it has been adequately implemented, discharges from the land application area as the result of stormwater runoff are not point sources as the result of the operation of the agricultural stormwater discharge exemption from point source treatment. The Second Circuit held that this is so even though those stormwater discharges contain manure, litter, or process wastewater. The Second Circuit rejected the contention that "uncollected" discharges from the land application area are covered under the agricultural stormwater exception. It noted that these discharges remain point source discharges if they are not primarily the result of stormwater. Where there is no nutrient management plan or the plan is inadequate or inadequately implemented, these "uncollected" discharges would be point source discharges. The Second Circuit concluded that runoff from a land application area, including "uncollected" discharges, can be discharges from a CAFO.

There were also challenges to the CAFO Rule Effluent Limitations Guidelines (ELGs). The challengers claimed that the ELGs reflecting the best available technology economically achievable ("BAT") violated the Clean Water Act in three ways: (a) EPA failed to consider the best-performing technology in the CAFO industry; (b) EPA improperly abandoned a more suitable BAT for beef and cattle; and (c) EPA improperly rejected a more suitable technology for swine, poultry, and veal. The Second Circuit rejected all of these challenges.

The Environmental Petitioners also challenged the ELG Rules for failure to adopt any requirements to specifically reduce pathogens from CAFO discharges. The Second Circuit agreed in part. The EPA is required by the CWA to adopt a best conventional pollution control technology (BCT) based effluent guidelines for at least one pathogen, fecal coliform. EPA's failure to adopt the best pollutant control technology for reducing pathogens means that it violated the requirements of the CWA in the ELG Rules that it adopted.

The Environmental Petitioners also challenged the new source performance standard for swine, poultry, and veal. As to the failure to include groundwater, the Second Circuit upheld the EPA; however, it found that EPA's decisions to allow CAFOs to comply with the "total prohibition" requirement for discharges from the production area by designing, operating and maintaining a facility

⁴⁵ 399 F.3d 486 (2nd Cir. 2005).

to contain a 100-year, 24-hour rainfall event, or to meet the “total prohibition” requirement through other alternative performance standards was unsupported in the record.

The Environmental Petitioners also challenged the EPA’s failure to impose water quality based effluent limitations (WQBELs). These are limitations based not upon the technology used but upon the failure of a receiving water to meet water quality standards. On remand, EPA was directed to explain why, or why not, WQBELs are needed to maintain water quality. The Second Circuit also found that the preamble was ambiguous as to whether the states can promulgate WQBELs for discharges other than agricultural stormwater discharges. EPA was directed to clarify this.

Safe Drinking Water

On August 22, 2005, the EPA proposed a rule on *Unregulated Contaminant Monitoring Regulation (UCMR) for Public Water Systems Revisions*.⁴⁶ All comments were to be submitted by October 21, 2005. The 1996 amendments to the Safe Drinking Water Act require that EPA identify unregulated contaminants in drinking water for further study and possible regulation. EPA must do this every five years. In this proposed rule, EPA is proposing to monitor 26 chemicals using 9 analytical techniques. As some of the chemicals that EPA proposes to monitor are used as agricultural chemicals it is possible that this action could ultimately have repercussions for agriculture even though the immediate impact will fall upon operators of public water supply systems.

Wetlands Protection

The ferment over the Corps’ jurisdiction to regulate wetlands under section 404 of the CWA resulting from the Supreme Court decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*⁴⁷ continues.⁴⁸ The question of how far jurisdiction under the CWA extends remains unresolved. A majority of circuits that have addressed the issue have determined that jurisdiction extends to those inland waters that share a hydrological connection to navigable waters. *Treacy v. Newdunn Associates, LLP*⁴⁹ is a September 10, 2003, that held that an isolated wetland indisputably hydrologically connected, albeit intermittently, through more than two miles of natural and manmade channels, to a traditional navigable water is a jurisdictional wetland for purposes of section 404 of the CWA. The Fourth Circuit confirmed its conclusion in *Treacy* in its June 12, 2003, decision in *United States v. Deaton*⁵⁰ where it found a hydrological connection provided by a manmade ditch sufficient to confer jurisdiction under section 404 of the CWA. The Seventh Circuit took a similar position as to jurisdiction in its July 10, 2003 decision in *United States v. Rueth Development Co.*⁵¹ In *Rueth*, the hydrological connection to navigable waters was provided in part through a manmade ditch; however, the issue was never tried because Rueth had entered into a consent decree prior to SWANCC. Nonetheless, the Seventh Circuit expressed the opinion that there was ample evidence that the wetlands at issue were jurisdictional. Judge Posner, writing for the Seventh Circuit, confirmed this position in *United States v. Gerke Excavating*,

⁴⁶ Unregulated Contaminant Monitoring Regulation (UCMR) for Public Water Systems Revisions, 70 Fed. Reg. 49,093 (Aug. 22, 2005) (to be codified at 40 C.F.R. 141).

⁴⁷ 531 U.S. 159 (2001).

⁴⁸ Pamela A. MacClean, *In Focus: Circuit Court Review: Circuits Split on Wetlands Control*, NAT’L L. J., Aug. 15, 2005, at S1.

⁴⁹ 344 F.3d 407 (4th Cir. 2003).

⁵⁰ 332 F.3d 698 (4th Cir. 2003).

⁵¹ 335 F.3d 598 (7th Cir. 2003).

Inc.,⁵² decided June 21, 2005. Gerke Excavating argued that the regulation, although applicable to the stumps and sand it dumped in a wetland, was either beyond the scope of the authority that Congress granted under the CWA or that the CWA itself exceeded Congress' constitutional authority. Judge Posner eloquently restated the common-sense basis for federal regulation of the environment, including wetlands, under the commerce clause. "Obviously, filling in a 5.8 acre tract (not all of it wetlands--we do not know how much of it is) is not going to have a measurable effect on the depth of the Wisconsin or Mississippi Rivers. But that cannot be the test. The sum of many small interferences with commerce can be large, and so to protect commerce Congress must be able to regulate an entire class of acts if the class affects commerce, even if no individual act has a perceptible effect."⁵³

The July 26, 2004, decision in *United States v. Rapanos*⁵⁴ placed the Sixth Circuit firmly with the majority of circuits. This opinion addresses the civil action filed at the same time as the criminal action. In affirming the judgment of the district court, the Sixth Circuit adopted the more expansive definition of jurisdictional wetlands used by the Fourth, Seventh and Ninth Circuits, and that it had applied in the companion criminal proceedings.⁵⁵ More recently, the Sixth Circuit, in *Carabell v. U.S. Army Corps of Engineers*,⁵⁶ confirmed the position that it took in *Rapanos*.⁵⁷ In *United States v. Phillips*⁵⁸ the Ninth Circuit rejected a criminal defendant's argument that a body of water must be navigable-in-fact to support a criminal conviction and accepted the broader view that wetlands need only have a hydrological connection to navigable waters to be jurisdictional. The Eleventh Circuit joined the majority of circuits in its definition of "waters of the United States" in *Parker v. Scrap Metal Processors, Inc.*⁵⁹ *Parker* was a citizen suit based in part on an alleged failure to obtain or failure to comply with an NPDES permit, not a violation of section 404 of the CWA. Nonetheless, the court's analysis of the definition of "waters of the United States" is consistent with the wetlands jurisdictional decisions discussed above.

The Fifth Circuit remains the circuit apart with its restrictive definition of waters of the United States, set forth in *In re Needham*.⁶⁰ The *Needham* decision stands in sharp contrast to the other circuits that have addressed the issue. The Fifth Circuit held that tributaries of navigable waters that are not themselves navigable cannot be held to be jurisdictional under the Supreme Court's decision in SWANCC.⁶¹ Nonetheless, the Fifth Circuit, holding that wetlands that are adjacent to navigable waters are jurisdictional, determined that one of the wetlands at issue in the case should be classified

⁵² 412 F.3d 804 (7th Cir. 2005).

⁵³ *Id.* at 806.

⁵⁴ 376 F.3d 629(6th Cir. 2004).

⁵⁵ *United States v. Rapanos*, 339 F.3d 447 (6th Cir. 2003).

⁵⁶ 391 F.3d 704 (6th Cir. 2004).

⁵⁷ *Id.*

⁵⁸ 367 F.3d 846 (9th Cir. 2004).

⁵⁹ 386 F.3d 993 (11th Cir. 2004).

⁶⁰ 354 F.3d 340 (5th Cir. 2003).

⁶¹ The court noted that the definition of waters of the United States is the same in the Oil Pollution Act, the act whose violation is was alleged in this action, as it is in the CWA.

as a jurisdictional wetland. With its decision in *City of Shoreacres v. Waterworth*,⁶² decided on August 8, 2005 and revised on August 24, the Fifth Circuit cast doubt on whether its approach really splits it from the other circuits. In *City of Shoreacres* it upheld the Corps' jurisdiction under the CWA, albeit against a challenge that alleged that the Corps had failed to exert its jurisdiction to the full extent required by the CWA. The plaintiffs alleged that 102 acres of the site at issue were within Corps jurisdiction as compared to the 19.7 acres that the Corps found to be jurisdictional. The entire site consisted of 146 acres.

To date, the remaining circuits have not ruled on the issue; however, in *American Petroleum Institute v. Leavitt*,⁶³ the issue has been raised. By granting *certiorari* in *Rapanos* and *Carabell* the Supreme Court has agreed to once again wade into wetlands law. By the end of this term the Supreme Court may, if one is an optimist, have provided greater clarity, or, if a pessimist, led us farther into the swamp.

Submerged Lands

*Alaska v. United States*⁶⁴ is an original jurisdiction case arising from a dispute between Alaska and the United States over certain submerged lands. The decision is an interesting discussion of the law governing the transfer of federal lands to the states upon their entry into the Union. These original jurisdiction decisions require, as did *Virginia v. Maryland*,⁶⁵ discussed last year, extensive analysis of the existing historical record. However, it is unlikely that the decision, which awarded the lands in dispute to the United States, will have many immediate repercussions beyond Alaska. Had the Court decided the case for Alaska, however, there might have been significant repercussions if Alaska decided to deny Canadian and other nation's shipping innocent passage through the disputed areas.

Eminent Domain/Takings

In its March 9, 2004, decision in *Kelo v. City of New London*⁶⁶ the Supreme Court of Connecticut found that neither the U.S. nor the Connecticut constitutions barred taking private property by eminent domain for transfer to private parties "in furtherance of a significant economic development plan that is projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas."⁶⁷ It was conceded by the City of New London that the area to be taken was not blighted. The U.S. Supreme Court, in a majority opinion written by Justice Stevens, affirmed the decision of the Supreme Court of Connecticut.⁶⁸ The majority, that included Justices Kennedy, Souter, Ginsburg, and Breyer, rejected the petitioners' contention that including economic development among those uses that are public for purposes of the Fifth Amendment takings clause impermissibly blurred the boundary between public and private takings. The Court also rejected petitioners' arguments for a bright line test and for a requirement that there be a reasonable certainty that public benefits would

⁶² 420 F.3d 440 (5th Cir. 2005).

⁶³ No. 02-2247 (D.C. Cir.).

⁶⁴ 545 U.S. 75 (2005).

⁶⁵ 540 U.S. 56 (2003).

⁶⁶ 843 A.2d 500 (Conn. 2004).

⁶⁷ *Id.* at 507.

⁶⁸ *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

accrue. The Court cited its recent decision in *Lingle v. Chevron U.S.A. Inc.*⁶⁹ for the proposition that courts should not substitute their judgment for those of elected legislatures and ‘expert’ agencies.

If ever there were such a thing, *Lingle* is a pure regulatory takings case. In *Lingle*, Chevron challenged the Hawaii law that limited the rent that it could charge lessees on filling stations that it owned. Speaking for a unanimous Court, Justice O’Connor laid to rest the notion that a Fifth Amendment takings claim could ever be upheld solely because the regulation at issue failed to substantially advance legitimate state interests. She noted that the phrase was first introduced into takings jurisprudence in *Agins v. City of Tiburon*,⁷⁰ but has never served as the basis for finding a taking in any Supreme Court decision. The Court held in *Lingle* that the ‘substantially advance legitimate state interests’ test has no place in takings jurisprudence because it is an inquiry in the nature of due process. She conceded that the Court has, in the past, used language that “was regrettably imprecise.”⁷¹ However, she concluded that there was no need to overrule any prior takings decisions of the Court as they could be distinguished. In the exactions decisions⁷² and *Dolan v. City of Tigard*⁷³ the metric that the Court applied was whether there was a rough equivalency between the permit condition sought and the exaction required; there was no broad test of whether the exaction substantially advance legitimate state interest. In reversing the Ninth Circuit’s finding that a taking had occurred, Justice O’Connor stated that to do otherwise would require the Court “to choose between the views of two opposing economists as to whether Hawaii’s rent control statute would help to prevent concentration and supracompetitive prices in the State’s retail gasoline market.”⁷⁴ The Court did not address the question of due process because Chevron voluntarily dismissed it without prejudice. In his concurrence, Justice Kennedy noted that *Lingle* “does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process.”⁷⁵

*San Remo Hotel, L.P. v. City and County of San Francisco*⁷⁶ is the third in the trio of takings cases from the 2004 term. The decision addressed the narrow question of whether there exists a judicial exception for takings claims to the full faith and credit statute, 28 U.S.C. §1738, that precludes relitigation of claims in federal court that have already been resolved in state court. The Court held that there is no such exception. In this complex litigation that proceeded in both state and federal courts for over a decade, the petitioner sought to avoid the application of *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*⁷⁷ that held that a takings claim is not ripe until all state remedies including application to state courts has been had. The Supreme Court granted certiorari to resolve a conflict between the Ninth Circuit’s holding that issue preclusion is applicable and the Second Circuit which held it to be inapplicable in its decision in *Santini v. Connecticut*

⁶⁹ 125 S. Ct. 2074 (2005).

⁷⁰ 447 U.S. 255 (1980).

⁷¹ *Lingle*, 125 S.Ct. at 2083.

⁷² *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987).

⁷³ 512 U.S. 374 (1994).

⁷⁴ *Lingle*, 125 S. Ct. at 2085.

⁷⁵ *Id.* at 2087.

⁷⁶ 545 U.S. 323 (2005).

⁷⁷ 473 U.S. 172 (1985).

Hazardous Waste Management Service.⁷⁸ Writing for a unanimous Court, Justice Stevens commented there is no right to have federal claims adjudicated in a federal forum. The Court held that where identical state law claims are adjudicated in state court, issue preclusion will prevent the federal claims from being heard in federal court. In his concurrence, Chief Justice Rehnquist, joined by Justices O'Connor, Kennedy and Thomas, expressed concern that *Williamson County* may not have been correctly decided to the extent that it requires that exhaustion of remedies include seeking compensation in state court. He encouraged the Court, in an appropriate case, to reconsider whether claimants asserting Fifth Amendment takings claims against state and local governments must first litigate those claims in state court. Nonetheless, as the law now stands, the only route available to such claimants is through a state supreme court and directly to the Supreme Court by writ of certiorari. If this result stands, it means, as a practical matter, given the few state supreme court decisions heard by the Supreme Court in a term, that state and local governments are virtually free of federal judicial oversight at least in so far as the Fifth Amendment takings clause is a restriction on their power.

Before local land use regulators and planners break out the bubbly they should note that the majority decision in *Kelo* held that states may place greater restrictions on condemnations than required by the federal Constitution. As a result, state-law decisions such as *Bailey v. Myers*⁷⁹ remain good law. In *Bailey*, the City of Mesa attempted to condemn the plaintiffs' property (used as a brake service) for redevelopment and sale to private parties, including an owner of an Ace Hardware store who desired to relocate to the site. The Arizona Court of Appeals found that the condemnation violated the Arizona constitution because the proposed use of the property was not public. Similarly, the Michigan Supreme Court in *County of Wayne v. Hathcock*⁸⁰ set limits on eminent domain that are more restrictive than the federal. In that decision the Michigan Supreme Court held that the transfer of property from one private party to another did not qualify as a public use. Since that decision the Michigan Supreme Court has had to construe its decision in *Hathcock*. In *City of Novi v. Robert Adell Children's Funded Trust*,⁸¹ the court held that condemnation of land to build a public road that primarily benefited one private party, and to the construction of which the private party contributed, was nonetheless a public use. The road was a "spur" road to a major employer that was designed to relieve traffic on another road that had been the access point for the private party's employees. The City of Novi was able to show that construction of the spur would reduce accidents on the other road. Many states have restrictions on condemnation greater than the federal restrictions. Not all of these restrictions have been judicially imposed. Local land use regulators and planners should note that the people have the political process available to them to correct land use regulations that are viewed as oppressive by a majority of the voters. Oregonians have celebrated this power with their enactment of a ballot measure, Measure 37, that reigned-in, if in an awkward fashion, a system of land use regulation that was widely deemed to be the most comprehensive in the nation.⁸²

⁷⁸ 342 F.3d 118 (2nd Cir. 2003).

⁷⁹ 76 P.3d 898 (Ariz. Ct. App. 2003).

⁸⁰ 684 N.W.2d 765 (Mich. 2004).

⁸¹ 701 N.W.2d 144 (Mich. 2005).

⁸² *Measure 37 proclaims: Subdivide and conquer. The dismantling of Oregon's land-use laws creates heroes and hope nationally for legions of property rights advocates*, THE OREGONIAN, June 12, 2005.

Takings Cases from Lower Federal Courts

*Lions Raisins, Inc. v. United States*⁸³ is a consolidated case that addresses issues arising from actions taken by the Raisin Administrative Committee (RAC). The RAC was created under the Agricultural Agreement Marketing Act of 1937. Dismissal of all claims by the Court of Federal Claims was upheld; however, the Federal Circuit did hold that the federal courts have jurisdiction to hear these and other claims that arise under federal marketing orders.

*Caldwell v. United States*⁸⁴ was a class action seeking compensation for land allegedly taken under the National Trail Systems Act. The Federal Circuit upheld a Court of Federal Claims decision that held that the applicable statute of limitations barred the suit.

NEPA

The Navy has sought to purchase or condemn about 30,000 acres for the purpose of constructing an outlying landing field (OLF) in Washington and Beaufort Counties, in northeastern North Carolina. The plaintiffs, who include those counties and several environmental organizations, alleged violations of the Administrative Procedures Act (APA) and the National Environmental Policy Act (NEPA). The proposed site of the OLF is adjacent to a national wildlife refuge that supports approximately 20,000 migrating tundra swans and 44,000 migrating snow geese. In *Washington County v. U.S. Department of the Navy*⁸⁵ the district court granted a permanent injunction on proceeding until the requirements of NEPA were met. The Fourth Circuit decided the appeal from the district court decision on September 7, 2005, in *National Audubon Society v. The Department of the Navy*.⁸⁶ The Fourth Circuit agreed with the district court that the Environmental Impact Statement (EIS), as required by NEPA, was deficient and required that the Navy prepare a Supplemental EIS (SEIS) to address those deficiencies. Nonetheless, the Fourth Circuit remanded to the district court to narrow the scope of the permanent injunction to allow the Navy to conduct some steps in the process of developing the landing field.

The Fourth Circuit noted that NEPA is procedural and does not serve as a limitation on agency action so long as its procedural requirements are met. What NEPA requires is a “hard look” at the environmental impacts of a proposed agency project, and dissemination of information to the public and other agencies, with an opportunity for comment, at appropriate stages of the process. There is no firm definition of a “hard look”; what is required is determined by the scope of the project and a holistic examination of the project in context. Both the Fourth Circuit and the district court were troubled by the Navy’s attempt to “reverse engineer” the EIS to produce the desired outcome. The Fourth Circuit noted that “hallmarks of a ‘hard look’ are thorough investigation into environmental impacts and forthright acknowledgment of potential environmental harms.”⁸⁷ However, the Fourth Circuit held that the district court erred by inquiring into the subjective intent of the Navy, including analysis of e-mails that indicated that the conclusions of the EIS were determined in advance. It held that the evaluation of the adequacy of the EIS must be an objective one based upon its contents. While NEPA prohibits using the EIS to justify decisions that have already been made that conclusion must be based upon the environmental analysis itself. The Fourth Circuit also admonished the district

⁸³ 416 F.3d 1356 (Fed. Cir. 2005).

⁸⁴ 391 F.3d 1226 (Fed. Cir. 2004).

⁸⁵ 357 F. Supp. 2d 861 (E.D.N.C. 2005).

⁸⁶ 422 F.3d 174 (4th Cir. 2005).

⁸⁷ *Id.* at 187 (citation omitted).

court that it must not base its decision on “the necessity or wisdom of the proposed action.”⁸⁸ It noted that the courts are particularly unqualified to address questions of military preparedness.

The Fourth Circuit held that the district court erred in issuing a sweeping injunction that failed to limit itself to those environmental harms that might actually occur if the Navy proceeded. The Navy requested that the injunction be modified to permit five specific categories of activities:

“First, the Navy seeks to conduct a site-specific Wildlife Hazard Assessment and a site-specific BASH Plan. ...

Second, the Navy wishes to undertake activities preliminary to land acquisition, including property surveys and appraisals, title searches, relocation surveys, and hazardous material surveys. ... [including] temporary easements or rights of entry onto land owned by private individuals.

Third, the Navy desires to purchase land from willing sellers. ...

Fourth, the Navy seeks to proceed with architectural and engineering work ...

Fifth, once the design is far enough along to make this possible, the Navy requests permission to apply for the permits it will require before breaking ground on the OLF. . . .⁸⁹

The Fourth Circuit remanded to the district court to modify its injunction to allow these activities.

Perhaps ironically, a recent decision of the Defense Base Closure and Realignment Commission (BRAC) may have rendered this entire litigation mute. The BRAC has recommended that if local governments around the Oceana Naval Air Station cannot enact ordinances to prevent civilian encroachment that it be closed and its functions transferred to Cecil Field, Florida. (Motion Number: 193-4A, BRAC, August 24, 2005.). The OLF is designed to serve the Oceana Naval Air Station and would be superfluous if that field were closed.

Solid and Hazardous Waste

*Cooper Industries, Inc. v. Aviall Services, Inc.*⁹⁰ is addressed the interpretation of section 113(f)(1) of CERCLA.⁹¹ Section 113(f)(1) states:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.⁹²

Cooper Industries owned four aircraft engine maintenance sites in Texas until 1981 when Aviall Industries purchased them. Upon discovering that the sites had been contaminated by both Cooper and Aviall with CERCLA hazardous waste, Aviall notified the Texas Natural Resource

⁸⁸ *Id.* at 199.

⁸⁹ *Id.* at 204.

⁹⁰ 543 U.S. 157 (2004).

⁹¹ 42 U.S.C. § 9613(f)(1) (2005).

⁹² *Id.* at § 9613(f)(1) (2005).

Conservation Commission (Commission) as required under CERCLA. Under threat of enforcement action, Aviall voluntarily remediated the sites. Aviall sued Cooper in federal district court for contribution under section 107(a) of CERCLA, section 113(f)(1) of CERCLA, and under state law. The district court granted summary judgment for Cooper Industries, holding that Aviall had abandoned its section 107(a) claim and sought contribution only under section 113(f)(1). (As the Supreme Court noted in its opinion, Aviall would have been unlikely to prevail under section 107 because the numerous opinions of the circuit courts holding that a PRP may not sue under that section.) It held that contribution was not available under section 113(f)(1) because no suit had been filed under sections 106 or 107 of CERCLA. A divided panel of the Fifth Circuit then affirmed, and, after hearing the appeal *en banc*, reversed, holding that for purposes of section 113(f)(1) it did not matter whether a suit had been filed. Writing for the Court, Justice Thomas held that section 113(f)(1) authorizes suits for contribution claims only 'during or following' a civil action. He declined to address whether Aviall could have proceeded under section 107 of CERCLA since that issue was not raised below. He declined to apply the savings clause in the last sentence of section 113(f)(1) because to do so would negate the restriction in the first sentence of that section. Writing for the Court, he held that the purpose of the savings clause is to negate any argument that section 113(f)(1) is the exclusive remedy for contribution available to a potentially responsible party (PRP).

For the practitioner, *Cooper Industries* presents a conundrum. Should the PRP agree to voluntary remediation or should the PRP force the state or federal agency to file suit, seeking remediation? As neither section 106 nor section 107 of CERCLA contain an express right of contribution by PRPs, relying on those sections as a basis for recovering costs of voluntary remediation is risky, especially in light of Justice Thomas' discussion of the Court's reluctance to find implied rights-of-action in federal statutes and the uncertain availability of section 107 to PRPs.⁹³ Indeed it was this reluctance that caused Congress to amend CERCLA in 1986 to add section 113(f)(1).⁹⁴ Relying upon state law as authority for contribution is also risky and dependent upon the laws of a particular state as well as whether the party from contribution is sought is available for suit in that state. Although settlement of disputes outside of litigation has generally been promoted as both good public policy and good individual strategy, it could constitute malpractice, after *Cooper Industries*, to so advise a client faced with CERCLA cleanup liability if there is more than a remote possibility that another PRP might be forced to contribute. Indeed the existence of an administrative order to cleanup a site is probably insufficient, under the Court's reasoning, to trigger a right of contribution under section 113(f)(1). Caution would dictate forcing the agency to bring suit to enforce its administrative compliance order. In conclusion, *Cooper Industries* may establish a policy that will end most attempts at voluntary cleanup; however, it may well be a correct interpretation of Congress' words, if not the intent of Congress. And as Justice Thomas noted, "[G]iven the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all. As we have said: '[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'"⁹⁵

Cooper Industries has already spawned progeny at the appellate level. In *Factory Mutual Insurance Co. v. Bobst Group USA, Inc.*,⁹⁶ Judge Easterbrook cited *Cooper Industries* as authority for the principle that contribution is impossible where there is no underlying liability. In dismissing Bobst's claim for contribution (which was not based upon CERCLA), Judge Easterbrook, writing for the Seventh Circuit stated, "[R]esolution of disputes about contribution and indemnity usually should wait

⁹³ *Cooper Industries*, 543 U.S. at 556-57.

⁹⁴ *Id.*

⁹⁵ *Id.* at 560 (citation omitted).

⁹⁶ 392 F.3d 922 (7th Cir. 2004).

until the underlying claim has been decided.”⁹⁷ In *Syms v. Olin Corp.*,⁹⁸ the Second Circuit applied *Cooper Industries* to bar a claim based upon section 113(f)(1) of CERCLA. The Fifth Circuit applied *Cooper Industries* in support of jurisdiction under section 113(f)(1) in *Honeywell International, Inc. v. Phillips Petroleum Co.*⁹⁹ *Consolidated Edison Co. of NY, Inc. v. UGI Utilities, Inc.*¹⁰⁰ is the Second Circuit’s attempt to reconcile *Cooper Industries* with its existing precedent governing CERCLA contribution actions. It held that section 107(a) provides a basis independent of section 113(f)(1) for CERCLA contribution actions. The Second Circuit found no basis for making a distinction between innocent parties and PRPs in allowing section 107 as the jurisdictional basis for a CERCLA contribution action.

Pesticides

EPA has initiated a comprehensive review of soil fumigants through its Office of Pesticide Programs.¹⁰¹ Fumigants under review are chloropicrin, dazomet, metam sodium, methyl bromide, and a new active ingredient, iodomethane. EPA is also reviewing 1,3-Dichloropropene (1,3-D), commonly referred to as telone, although it was reregistered in December 1998. EPA is doing this to ensure that its risk assessments of soil fumigants are consistent. The comment periods for dazomet,¹⁰² metam sodium,¹⁰³ methyl bromide,¹⁰⁴ and 1,3-D (telone)¹⁰⁵ closed on September 12. EPA expects to publish its revised risk assessment late in 2005 and provide a 60-day public comment period on the revised risk assessment in late 2005 or early 2006. The time frame for developing final risk management assessments is 2006-2007.

On July 13, 2005, EPA issued a proposed rule and request for comments, *Pesticides; Procedural Regulations for Registration Review*.¹⁰⁶ The purpose of the proposed rule is to implement provisions of the Food Quality Protection Act (FQPA) of 1996 that amended FIFRA to require that every pesticide be reviewed on a 15-year cycle. The comment period closes on October 11, 2005 and EPA has indicated that it expects to publish a final rule in the spring of 2006.¹⁰⁷ Two items in the proposed rule are particularly noteworthy, the first is the extent of EPA’s efforts to promote public participation, and the second is the proposal to consider the effects of ‘inert’ ingredients in pesticide products.

⁹⁷ *Id.* at 924.

⁹⁸ 408 F.3d 95 (2nd Cir. 2005).

⁹⁹ 415 F.3d 429 (5th Cir. 2005).

¹⁰⁰ 423 F.3d 90 (2nd Cir. 2005), *suppl’ op’n at*, 153 Fed. Appx. (2d Cir. 2005).

¹⁰¹ U.S. EPA, PESTICIDES: REREGISTRATION, http://www.epa.gov/oppsrrd1/reregistration/soil_fumigants/ (last visited June 12, 2006).

¹⁰² Dazomet Risk Assessment, 70 Fed. Reg. 40,339 (July 13, 2005).

¹⁰³ Metam Sodium Risk Assessment, 70 Fed. Reg. 40,333 (July 13, 2005).

¹⁰⁴ Methyl Bromide Risk Assessment, 70 Fed. Reg. 40,336 (July 13, 2005).

¹⁰⁵ 1,3-Dichloropropene Risk Assessment, 70 Fed. Reg. 40,342 (July 13, 2005).

¹⁰⁶ Pesticides; Procedural Regulations for Reregistration Review, 70 Fed. Reg. 40,251 (2004).

¹⁰⁷ U.S., EPA, PESTICIDES: REGULATING PESTICIDES, http://www.epa.gov/oppsrrd1/registration_review/rule-making.htm (last visited June 12, 2006).

In *Bates v. Dow Agrosciences LLC*,¹⁰⁸ the Supreme Court addressed the question of whether FIFRA preempts state tort and other claims arising under state law. This litigation was initiated by 29 Texas peanut farmers whose peanuts were severely damaged by the Dow herbicide, Strongarm®. Although Strongarm® was unsuitable for peanuts grown on high pH soils, the Strongarm® label for the period at issue stated that it was suitable for all peanuts wherever grown. The district court held that all claims, except one that was dismissed on state law grounds, were preempted by FIFRA, specifically 7 U.S.C. § 136v(b). The Fifth Circuit affirmed. In a prior decision, upholding a local permit requirement for the aerial application of pesticides that was not required by either FIFRA or EPA regulation, the Court held that FIFRA was not a comprehensive federal regulatory scheme such that it occupied the entire first to the exclusion of state law.¹⁰⁹ Indeed, the Court in *Bates* took note of the substantial role that FIFRA explicitly provides for state regulation of pesticides. The Supreme Court held that plaintiffs' claims for defective design, defective manufacture, negligent testing, and breach of express warranty were not preempted by FIFRA. The Court held that although the express warranty was included on the Strongarm® label that cannot cause state law warranty claims to be preempted. The Fifth Circuit had used a test of whether Dow would be induced to change its label as the result of an adverse verdict. The Supreme Court held that this test for preemption was too broad. The Court found that the fraud and negligent failure-to-warn claims were more closely related to the labeling requirement and remanded for a determination of whether the state law duties imposed were equivalent to the FIFRA misbranding standards. The Court directed that section 136v(b) be interpreted narrowly.

*Anderson v. Minnesota*¹¹⁰ is an appeal by migratory commercial beekeepers whose bees were killed by the application of the pesticide, Sevin XLR Plus. They placed their bees on private land near large plantations of poplar that were either owned or managed by the Department of Natural Resources and International Paper. The bees foraged on these commercial plantations and brought pesticide back to the hives which killed the hives. The plaintiffs alleged, and provided documentation to that effect, that the defendants knew of the presence of the bees and chose to apply the pesticide without regard to the impact upon the bees. The Supreme Court of Minnesota held that the plaintiffs had raised sufficient questions of material fact to avoid summary judgment. The Supreme Court of Minnesota cited the Fifth Circuit's opinion that was reversed in *Bates v. Dow Agrosciences* as a limitation on the relief available to the plaintiffs.

¹⁰⁸ 544 U.S. 431 (2005).

¹⁰⁹ *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991).

¹¹⁰ 693 N.W.2d 181(S. Ct. Minn. 2005).