The Environmental Counselor

WEST®

SEC Interpretive Guidance Addresses Climate-Change Disclosure Requirements*

*By Bobbi O'Connor, Linda L. Griggs, Howard A. Kenny, Ronald J. Tenpas, Deborah E. Quick***

On February 2, the Securities and Exchange Commission (SEC) issued interpretive guidance[1] for public companies regarding the application of the SEC's existing disclosure requirements to climate change (the Guidance). The SEC noted that, as an "interpretive release," the Guidance does not create any new legal requirements or modify existing ones. Nonetheless, the mere issuance of the Guidance is an indication that the SEC is focused on climate-change disclosure, and therefore companies need to consider the Guidance in analyzing whether their current climate-change disclosure is adequate and responsive.

The Guidance highlights the following topics for possible climate-change disclosure:

- **The impact of existing laws, regulations, and international accords related to climate change.** For example, capital expenditures for environmental control facilities resulting from existing or pending regulation of greenhouse gas emissions and costs to purchase, or opportunities to profit from the sales of allowances or credits under a "cap and trade" regime.
- **The indirect consequences of regulation or business trends po-**

continued on page 2

Letter from the Editor

Dear Subscribers,

At a February 21 meeting with governors from the Great Lakes states, EPA Administrator Lisa Jackson announced a five-year action plan for federal efforts to restore the Great Lakes. In addition to outlining the most serious threats to the Great Lakes, the plan consists of five priority areas to facilitate aggressive restoration activity: 1) protection and cleanup of the most polluted areas in the lakes; 2) combating invasive species; 3) protection of high priority watersheds and reduced runoff from urban, suburban, and agricultural sources; 4) wetlands and habitat restoration; and 5) implementation of accountability measures, learning initiatives, outreach, and strategic partnerships. The plan is being set forth for FY 2010 through 2014 and is a result of an inter-agency collaboration to help guide the Obama Administrations efforts to prioritize Great Lakes restoration.

We thank the authors of the articles in this month's issue and their firms for allowing us to share their expertise with our readers.

Very truly yours,
Marie-Joy Paredes
Senior Attorney Editor

ISSUE NO. 259
March 2010

IN THIS ISSUE:

Letter from the Editor..........1

SEC Interpretive Guidance Addresses Climate-Change Disclosure Requirements 1

U.S. Supreme Court to Review Standard for Permanent Injunctive Relief in NEPA Cases.......................3

States May Set Thermal Effluent Standards Stricter Than Federal Clean Water Act Standards.......................7

EPA Proposal for Numeric Nutrient Standards for Florida Waters Has National Implications...........9

UPDATES.............................12

TO CONTACT US:

Customer Service 1-800-328-4880
Product Info & Sales 1-800-344-5009

west.thomson.com

40818217

Board of Advisers

Bert Black
Diamond McCarthy Taylor Finley Bryant & Lee, L.L.P.
Dallas, Texas

F. William Brownell
Hunton & Williams LLP
Washington, D.C.

Heidi Hughes Bumpers
Jones Day
Washington, D.C.

Scott P. DeVries
Nossaman Guthner Knox & Elliott LLP
San Francisco, California

Jeffrey C. Fort
Sonnenschein Nath & Rosenthal LLP
Chicago, Illinois

Robert W. Frantz
Tyco International
Princeton, New Jersey

Jeffrey M. Gaba
Gardere Wynne Sewell LLP
Dallas, Texas

Kevin A. Gaynor
Vinson & Elkins L.L.P.
Washington, D.C.

Kenneth F. Gray
Pierce Atwood
Portland, Maine

Thomas C. Green
Sidley Austin Brown & Wood
Washington, D.C.

Michael L. Hardy
Thompson Hine LLP
Cleveland, Ohio

Jennifer L. Hernandez
Beveridge & Diamond, P.C.
San Francisco, California

Michael L. Hickok
Case, Knowlson, Jordan & Wright LLP
Los Angeles, California

Robin R. Lunn
Winston & Strawn LLP
Chicago, Illinois

Richard H. Mays
Environmental Legal Services
Little Rock, Arkansas

Kenneth C. Moore
Squire, Sanders & Dempsey L.L.P.
Cleveland, Ohio

Randy M. Mott
Lane & Mittendorf
Washington, D.C.

Lawrence P. Postol
Seyfarth Shaw LLP
Washington, D.C.

D. Alan Rudlin
Hunton & Williams LLP
Richmond, Virginia

Philip R. Sellinger
Greenberg Traurig, LLP
Newark, New Jersey

Harvey M. Sheldon
Hinshaw & Culbertson LLP
Chicago, Illinois

Thomas M. Skove
Roetzel & Andress
Cleveland, Ohio

Richard G. Stoll
Foley & Lardner LLP
Washington, D.C.

Members of the Board of Adviser to THE ENVIRONMENTAL COUNSELOR call our attention to items they believe will be of interest to our subscribers. Unless specifically noted, no statement in this newsletter should be attributed to a specific adviser, and adviser's firm or company, or the Board of Advisers as a whole.

tentially affected by climate change. For example, increased competition to provide goods with lower emissions and associated innovative technologies, increased demand for alternative energy sources and associated innovative technologies, and reputational costs associated with carbon-intensive industries.

- **The potential physical impacts of climate change.** For example, changes to profits or losses attributable to changing demand for goods and services due to the physical effects of climate change on suppliers or customers or the financial and operational effects associated with adapting to such climate-change effects as rising sea levels, water availability and quality, arability of farmland, and changes in weather patterns and intensity.

The SEC indicated that disclosure of climate-change issues in documents filed with the SEC may be required by the following existing disclosure requirements:

- Regulation S-K Item 101, Description of Business, which contains an express requirement to disclose material effects and costs of complying with environmental laws.
- Regulation S-K Item 103, Legal Proceedings, which requires disclosure of material pending legal proceedings in which the company itself is a party, or its property is at issue, and includes specific requirements for disclosure of certain environmental litigation.
- Regulation S-K Item 503(c), Risk Factors, which requires disclosure of the most significant factors that

Copyright 2010 Thomson Reuters. All rights reserved. *THE ENVIRONMENTAL COUNSELOR* (ISSN 1041-3863) is published monthly by Thomson Reuters/West, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Subscription Price: $663.00 annually. *This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional advice. If legal advice or other expert assistance is required, the service of a competent professional should be sought.* The information contained herein is based upon sources believed to be accurate and reliable—including secondary sources. Where cases, statutes, or other official materials have been reprinted, we have attempted to provide materials as close to the originals as possible, but we do not purport to publish any documents verbatim. While we have exercised reasonable care to ensure the accuracy of the information presented, no representation or warranty is made as to such accuracy. Readers should check primary sources where appropriate and use the traditional legal research techniques to make sure that the information has not been affected or changed by recent developments.

make investment in the company uniquely speculative and risky.

- Regulation S-K Item 303, Management's Discussion and Analysis of Financial Condition and Results of Operations, which requires disclosure of known trends, events, or uncertainties unless the company determines that the known trend, event, or uncertainty is not reasonably likely to occur or, if it does occur, is not reasonably likely to have a material impact on its financial condition.
- Form 20-F, Foreign Private Issuers, which contains various items that require disclosures analogous to those discussed above in Regulation S-K that are applicable to annual reports on Form 10-K, quarterly reports on Form 10-Q, and certain registration statements under the Securities Act of 1933 and the Securities Exchange Act of 1934.

Notably, all of the existing disclosure requirements discussed by the SEC require disclosure only upon a finding by the company that the information to be provided is material. The Guidance does not change the current "materiality" standard established by case law, which provides that information is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding how to vote or make an investment decision or, put another way, if the information would alter the total mix of available information.[2] However, the Guidance notes that while materiality standards should drive what information a company decides to disclose, they should not limit what information should be considered by a company in making its disclosure decisions.

Conclusion

The Guidance outlines topics that companies should consider in drafting their disclosure documents, but does not ultimately change the legal standards applicable to disclosure decisions. However, given the SEC's focus on the topic, companies may need to intensify their analysis of the potential impacts of climate change on their operations and financial conditions. The SEC noted that many companies voluntarily provide information to the public about the impact of climate change on their businesses, and reminded companies that this information needs to be reconsidered on a regular basis for possible disclosure under the existing disclosure requirements highlighted above.

As the SEC noted, "[C]limate change regulation is a rapidly developing area. Companies need to regularly assess their potential disclosure obligations given new developments."[3]

If you need information regarding the current state of climate-change regulation and related disclosure practices and trends, Morgan Lewis can assist.

The full Guidance document can be found at http://sec.gov/rules/interp.shtml, release number 33-9106.

ENDNOTES

* Copyright 2009. Morgan, Lewis & Bockius LLP. All Rights Reserved. This article is provided as a general informational service and it should not be construed as imparting legal advice on any specific matter.

** Bobbi O'Connor is a partner in Morgan Lewis' Business and Finance Practice. She can be reached at boconnor@morganlewis.com. Linda L. Griggs is a partner in Morgan Lewis' Securities Practice. She can be reached at lgriggs@morganlewis.com. Howard A. Kenny is a partner in Morgan Lewis' Securities Practice. He can be reached at hkenny@morganlewis.com. Ronald J. Tenpas is a partner in Morgan Lewis' Litigation Practice. He can be reached at rtenpas@morganlewis.com. Deborah E. Quick is an associate in Morgan Lewis' Real Estate Practice. She can be reached at dquick@morganlewis.com.

1. Release Nos. 33-9106; 34-61469; FR-82.
2. Guidance, page 11, citing *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976), and *Basic Inc. v. Levinson*, 485 U.S. 224, 231, 108 S. Ct. 978, 99 L. Ed. 2d 194, 24 Fed. R. Evid. Serv. 961, 10 Fed. R. Serv. 3d 308 (1988).
3. Guidance, page 24.

U.S. Supreme Court to Review Standard for Permanent Injunctive Relief in NEPA Cases*

*By Jessica Ferrell***

The U.S. Supreme Court has granted certiorari in *Monsanto Company v. Geertson Seed Farms* in order to determine, in part, whether the injunctive relief standard applied by the Ninth Circuit in a National Environmental Policy Act (NEPA) case—which may be more favorable to NEPA plaintiffs than intended by the Supreme Court—is appropriate.[1] The issue arises from *Geertson Seed Farms v. Monsanto Co.* (*Geertson Seed*),[2] a case in which the Ninth Circuit upheld a district court's decision to permanently enjoin the planting of genetically modified "Roundup Ready" alfalfa (RRA) nationwide, pending federal environmental review.

In the Supreme Court's last term, it reversed every Ninth Circuit opinion involving environmental laws, including *Winter v. Natural Resources Defense Council,* another NEPA case.[3] *See* S. Brandt-Erichsen, Supreme Court Rules

on Preliminary Injunction Standard in Environmental Cases, Marten Law Environmental News (Nov. 13, 2008). The Ninth Circuit issued its opinion in Geertson Seed before the Supreme Court reiterated the standard for preliminary injunctions in *Winter*; namely: (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) the balance of equities between the parties; and (4) the public interest. Petitioners in *Geertson Seed* allege that the Ninth Circuit deviated from fundamental principles underlying injunctive relief that the Supreme Court reiterated in *Winter*.

Specifically, Monsanto argued in its petition for certiorari that the Ninth Circuit applied the wrong standard for permanent injunctive relief in *Geertson Seed*, effectively affording project opponents with a presumption of irreparable harm under the four-factor test for such relief, and threatening to "make blanket injunctions all but automatic in NEPA cases arising in th[e] circuit." The company also argued that the district court's decision not to hold an evidentiary hearing before granting injunctive relief, and the Ninth Circuit's affirmance of that decision, runs counter to the trial-based adversarial system in place "[f]or nearly a millennium [of] Anglo-American jurisprudence."[4]

The parties will submit their briefing on an expedited schedule. Oral argument will likely occur in April 2010, and a decision is expected by June 2010.[5] Justice Stephen Breyer has recused himself because his brother, U.S. District Judge Charles Breyer of the Northern District of California, entered the injunction at issue.

Background to the Case

In *Geertson Seed*, the district court concluded, and appellants did not dispute, that the U.S. Department of Agriculture (USDA) violated NEPA by failing to adequately assess the environmental impacts of RRA before deregulating it. *The* Animal and Plant Health Inspection Service (APHIS) has since published the draft environmental impact statement (EIS) that the plaintiffs sought below, and is expected to finalize the EIS soon. The injunction could be lifted before the Court decides *Geertson Seed,* rendering questions about the proper scope of the injunction moot. The Supreme Court granted Monsanto's petition regardless, presumably because disposition of the questions presented will affect the prerequisites to granting injunctive relief in other NEPA cases and the issue of whether evidentiary hearings are required before lower courts grant such relief.

Monsanto's Petition to Deregulate RRA

In April 2004, Monsanto and Forage Genetics petitioned APHIS to deregulate RRA. Geertson Seed Farms and other alfalfa growers, along with the Center for Food Safety, Center for Biological Diversity, Western Organization of Resource Councils, Sierra Club and other nonprofit organizations, opposed the petition. The groups argued that: (1) RRA would contaminate conventional and organic alfalfa through gene transmission; (2) due to contamination, deregulation could prohibit farmers from marketing natural products as organic or nongenetically engineered; (3) contamination would also impact organic livestock sellers; and (4) RRA would negatively impact the export market. Following the biotech companies' petition, APHIS prepared an environmental assessment (EA) under NEPA, issued a Finding of No Significant Impact (FONSI) and granted Monsanto's deregulation petition.

In February 2006, Geertson Seed, another conventional alfalfa seed producer, and several environmental groups filed suit against the Secretary of the USDA, APHIS, and the U.S. Environmental Protection Agency, challenging the decision to deregulate RRA. The court allowed Monsanto, Forage Genetics, and three individuals to intervene as defendants.

Full articles on the district and appellate court decisions that followed are available in earlier editions of the Marten Law newsletter. *See* J. Ferrell, Ninth Circuit Upholds Permanent Injunction in NEPA Case Without Evidentiary Hearing, Marten Law Environmental News (Sept. 30, 2008); Faulty NEPA Analysis Results in Injunction Against Planting Genetically Modified Crops, Marten Law Environmental News (May 2, 2007). A synopsis of those opinions follows below.

The District Court Opinion in *Geertson Seed*

Plaintiffs in *Geertson Seed* brought claims under NEPA, the Endangered Species Act, and the Plant Protection Act. In a February 2007 order, Judge Breyer found that the petition raised "substantial questions" as to whether (1) "deregulation of RRA without any geographic restrictions will lead to the transmission of the engineered gene to organic and conventional alfalfa; (2) the possible extent of such transmission; (3) farmers' ability to protect their crops from acquiring the genetically engineered gene; [and (4)] the extent to which RRA will contribute to the development of Roundup-resistant weeds … and how farmers will address such weeds." He reserved consideration of plaintiffs' other claims pending APHIS' preparation of an EIS. With those findings, and without an evidentiary hearing, Judge Breyer vacated the federal defendants' decision deregulating RRA and enjoined all future planting of RRA nationwide, pending APHIS' completion of an EIS.[6]

The Ninth Circuit Opinion in *Geertson Seed*

Monsanto appealed the injunction to the Ninth Circuit, arguing that: (1) the district court should have held an evidentiary hearing before issuing a nationwide injunction; and (2) the district court "erred in ordering injunctive relief because it improperly presumed irreparable injury instead of applying the traditional four-factor test for the issuance of a permanent injunction, as required under *eBay v. MercExchange, L.L.C.*" and, as a result, ordered overbroad injunctive relief.[7]

The Ninth Circuit affirmed the lower court. It held that, under *eBay*, to obtain permanent injunctive relief a plaintiff must show: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."[8] The court held that this "traditional balancing of harms" also applies in the environmental context, and that courts cannot categorically grant or deny injunctive relief without applying the *eBay* test. The Ninth Circuit also found that the district court properly applied that test.[9]

In affirming the district court's decision not to hold an evidentiary hearing, the Ninth Circuit conceded that, "generally," a district court must hold such a hearing before issuing a permanent injunction "unless the adverse party has waived its right to a hearing or the facts are undisputed."[10] However, the Ninth Circuit found that the NEPA injunction at issue in the case "is not a typical permanent injunction." Instead, the court determined that because the injunction is designed to ensure compliance with NEPA, it is therefore more limited in "purpose and duration." Citing judicial economy and the district court's consideration of extensive documentary submissions in the remedy phase, the Ninth Circuit held that the district court did not err by declining to hold an evidentiary hearing before enjoining RRA planting nationwide. The court found that an evidentiary hearing would have required the district court "to engage in precisely the same inquiry it concluded APHIS failed to do and must do in an EIS," and that the appellants "in effect" asked the court "to accept its truncated EIS without the benefit of the development of all the relevant data and … without the opportunity for and consideration of public comment."[11]

Dissent to The Majority Ninth Circuit Opinion

Dissenting, Circuit Judge N. Randy Smith noted that the nationwide injunction has "severe economic consequences" for appellants, as well as farmers and distributors across the country. Judge Smith opined that, by affirming the district court's decision not to hold an evidentiary hearing, the majority effectively created "a third exception to the evidentiary hearing requirement." According to Judge Smith, a court may now forego an evidentiary hearing "simply because (1) the injunction may dissolve at some point and (2) the issues, to be raised at the hearing, overlap with the issues the agency must consider." Describing the majority's "deference" to the district court as a "mistake"—particularly in light of the district court's "wholesale rejection" of the agency's position—Judge Smith opined that "[t]here aren't many environmental cases that don't fit into the majority's newly-created exception."[12]

Monsanto petitioned the Ninth Circuit for panel rehearing and rehearing en banc. The Ninth Circuit amended its original opinion (as summarized above), but denied both petitions. Monsanto's petition to the Supreme Court followed.

Questions Presented to the U.S. Supreme Court

In its petition to the Supreme Court, Monsanto summarized the case as follows:

In this case, after finding a violation of NEPA, the district court imposed, and the Ninth Circuit affirmed, a permanent nationwide injunction against any further planting of a valuable genetically engineered crop, despite overwhelming evidence that less restrictive measures proposed by an expert federal agency would eliminate any nontrivial risk of harm.

Monsanto framed the questions presented as whether the Ninth Circuit erred:

1. in holding that NEPA plaintiffs are specially exempt from the requirement of showing a likelihood of irreparable harm to obtain an injunction.
2. in holding that a district court may enter an injunction sought to remedy a NEPA violation without conducting an evidentiary hearing sought by a party to resolve genuinely disputed facts directly relevant to the appropriate scope of the requested injunction.
3. when it affirmed a nationwide injunction entered prior to this Court's decision in *Winter* which sought to remedy a NEPA violation based on only a remote possibility of reparable harm.[13]

Monsanto's primary arguments in support of review are that the Ninth Circuit: (1) denied an evidentiary hearing on the ground that "the likelihood of irreparable harm is immaterial to the issuance of a NEPA injunction"; (2) denied an evidentiary hearing on the ground that NEPA injunctions—even if styled "permanent"—are in fact "temporary"; and (3) affirmed an injunction based on the "mere possibility of reparable harm[.]"[14] Monsanto argues that the Ninth Circuit, "freed from the discipline imposed by the traditional likelihood-of-harm standard … imposed an injunction that is so broad that it prohibits beneficial activities that pose no risk of harm whatsoever."

Monsanto further argues that, in its amended opinion issued after *Winter*, the Ninth Circuit gave the Supreme Court's decision in that caseshort shrift by merely citing it "as support for a preexisting sentence approving the district court's conclusion."[15] Emphasizing the "extraordinary" nature of injunctive remedies, Monsanto argues that the Ninth Circuit's "deprivation of an evidentiary hearing in the face of genuine disputes over material facts conflicts with centuries of common law and the holdings of numerous other courts of appeals[,]" and that failure to reverse *Geertson Seed* would "effectively nullify th[e Supreme C]ourt's holdings in *Winter*, *eBay* … , and *Amoco* [*Production Co. v. Village of Gambell*, 480 U.S. 531 (1987)], make

broad injunctive relief all but automatic … whenever a district court finds a NEPA violation in the Ninth Circuit, and impermissibly expand the scope of NEPA."[16]

Agbiotech company PhytaGro, LLC filed an amicus curiae brief in support of Monsanto's petition, alleging that: (1) genetically-modified alfalfa is safe and important to provide for world food needs; and (2) the Ninth Circuit's alleged presumption in favor of injunctive relief "chills scientific advancement in an industry that needs more technology, not less, and causes significant unjustified economic losses."[17] The American Farm Bureau Federation, Biotechnology Industry Organization, American Seed Trade Association, and National Corn Growers Association also filed a brief in support of Monsanto's petition, making arguments similar to PhytaGro's.[18] The Washington Legal Foundation, a nonprofit public interest law and policy center, also filed a brief in support of review out of "concern … that the decision below, if allowed to stand, will effectively limit *Winter* to cases raising NEPA issues in a national security context."[19]

The federal government and the Center for Food Safety (the Center) opposed Monsanto's petition. While the government agrees with Monsanto that the Ninth Circuit "erred in determining that the permanent injunction … was appropriately tailored and that the district court applied the correct legal standard[,]" it does not think further review is warranted because the Ninth Circuit "set forth the correct legal standard and its decision does not squarely conflict" with any Supreme Court or appellate court opinion.[20]

The Center argued that review is unwarranted because: (1) APHIS has published a draft EIS on RRA and will likely finalize it before the Court decides the case, rendering consideration of the proper scope of injunctive relief a moot issue;[21] and (2) the Ninth Circuit and lower court applied the correct standard for injunctive relief. The Center also takes issue with Monsanto's characterization of the Ninth Circuit's opinion as "brazen defiance" of *Winter*. The Center asserts that the Ninth Circuit did not apply a "mere possibility" of harm standard as alleged by Monsanto, nor did it otherwise fail to follow *Winter* or *eBay*. The Center argues that "Monsanto's depiction of a circuit in open revolt against [Supreme Court] rulings is not just hyperbolic but outright false."[22]

Conclusion

Since the Ninth Circuit amended its *Geertson Seed* opinion in June 2009, courts have cited it in five opinions, primarily in conjunction with a parallel citation to *eBay*, and have not applied it to categorically assume irreparable harm based on NEPA violations in the context of injunctive relief requests.[23] The four courts that cited the original opinion also did so with a citation to *eBay* and an application of the standard four-part test for injunctive relief.[24] However, Monsanto argues that the Ninth Circuit "invented a new special rule that will effectively permit district courts … to *presume* irreparable harm in NEPA cases."[25] If *Geertson Seed* indeed provides NEPA plaintiffs with a presumption of irreparable harm for purposes of injunctive relief requests, then the Supreme Court may well reverse that result by applying *eBay* and *Winter* in the pending *Monsanto* case. If the Court does not reverse that holding, then NEPA plaintiffs have a considerable advantage in requests for injunctive relief.

ENDNOTES

* © 2009 Marten Law Group. All rights reserved. Reprinted with permission. Marten Law Group provides the material and information contained in this article for informational purposes only. This article is not a substitute for legal advice. Please contact your legal counsel for specific advice and/or information.

** Jessica Ferrell practices environmental and natural resource litigation at Marten Law Group. She can be contacted by telephone at 206-292-2636, or by e-mail at jferrell@martenlaw.com.

1. U.S. Supreme Court Docket No. 09-475 (cert. granted Jan. 15, 2010).
2. *Geertson Seed Farms v. Johanns,* 570 F.3d 1130 (9th Cir. 2009), cert. granted, 2010 WL 144075 (U.S. 2010).
3. *Winter v. Natural Resources Defense Council, Inc.,* 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). The other opinions are: *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 173 L. Ed. 2d 1, 72 Fed. R. Serv. 3d 1183 (2009) (analyzed by D. Till in U.S. Supreme Court Limits Rights of Environmental Groups to Challenge Federal Agency Decisions, Marten Law Environmental News (March 5, 2009)); *Burlington Northern and Santa Fe Ry. Co. v. U.S.,* 129 S. Ct. 1870, 173 L. Ed. 2d 812 (2009) (analyzed by B. Marten in U.S. Supreme Court Holds That Superfund Liability Is Not Joint and Several Where A Reasonable Basis for Apportionment Exists; Court Also Narrows Arranger Liability, Marten Law Environmental News (May 4, 2009)); and *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council,* 129 S. Ct. 2458, 174 L. Ed. 2d 193 (2009) (analyzed by S. Jones in Supreme Court Finds No Permitting Role for EPA When Corps Issues Fill Permits Under Clean Water Act, Marten Law Environmental News (June 23, 2009)).

   The Supreme Court overturned almost every other opinion issued by the Ninth Circuit during its last term as well. *See* D. Carlson, Supreme Court 2008-09 Term Highlights, Cornell Univ. Law School Legal Information Institute (2010); C. Williams, Supreme Court overturning numerous 9th U.S. Circuit Court of Appeals rulings, LA Times (July 5, 2009).
4. *Monsanto Co. v. Geertson Seed Farms*, Supreme Court Docket No. 09-475, Pet. for Writ of Cert. at 24, filed Oct. 22, 2009 (Monsanto Petition). The petition for certiorari, briefs in opposition, petitioner's reply, amici briefs, and Ninth Circuit opinion are all available at http://www.scotusblog.com/2010/01/todays-orders-52/.
5. For details on the case schedule, see the U.S. Supreme Court docket for the case.
6. *Geertson Farms Inc. v. Johanns,* 65 Env't. Rep. Cas. (BNA) 1318, 2007 WL 776146 (N.D. Cal. 2007), order and scope of injunctive relief modified (upon Rule 59(e) motion by defendants and defendant-intervenors), *Geertson Farms Inc. v. Johanns,* 2007 WL 1839894 (N.D. Cal. 2007).

7. *Geertson Seed,* 570 F.3d at 1136 (citing *eBay Inc. v. MercExchange, L.L.C.,* 547 U.S. 388, 126 S. Ct. 1837, 164 L. Ed. 2d 641, 27 A.L.R. Fed. 2d 685 (2006)).
8. *Geertson Seed,* 570 F.3d at 1136 (quoting *Northern Cheyenne Tribe v. Norton,* 503 F.3d 836, 843 (9th Cir. 2007); *eBay*, 547 U.S. at 391).
9. The lower court found the following: (1) with respect to harm, genetic contamination of organic and conventional alfalfa had already occurred; (2) the harm was sufficient to merit "broad injunctive relief"; (3) the harm to growers of nongenetically engineered alfalfa (and consumers) outweighed the financial hardships to Monsanto, Forage Genetics, and growers; and (4) it would be in the public interest to enjoin use of RRA before the USDA studies its impact, as failing to do so could make non-genetically engineered alfalfa unavailable in the marketplace. *Geertson Seed,* 570 F.3d at 1136.
10. *Geertson Seed,* 570 F.3d at 1139.
11. *Geertson Seed,* 570 F.3d at 1139.
12. *Geertson Seed,* 570 F.3d at 1141-42 (Smith, J., dissenting).
13. Monsanto Petition at 1.
14. Monsanto Petition at 15-35.
15. Monsanto Petition at 14-15.
16. Monsanto Petition at 16-17, 20-21.
17. Br. of *Amicus Curiae* Phytagro, LLC in Supp. of Pet. at 9-17.
18. Br. of *Amicus Curiae* Amer. Farm Bureau et al. in Supp. of Pet. at 5-15.
19. Br. of *Amicus Curiae* Wash. Legal Found. in Supp. of Pet. at 5.
20. Br. for the Fed. Resp. in Opp. at 10.
21. APHIS began a 60-day public comment period on the draft EIS on December 18, 2009. The agency will issue a final EIS when that period expires.
22. Br. in Opp. of Resp. Geertson Seed Farms et al. at 5-23.
23. *See Center for Food Safety v. Vilsack,* 2009 WL 3047227, *2 (N.D. Cal. 2009); *California ex rel. Lockyer v. U.S. Dept. of Agriculture,* 575 F.3d 999 (9th Cir. 2009); *Apple Inc. v. Psystar Corp.,* 93 U.S.P.Q.2d 1272, 2009 WL 4981139, *5 (N.D. Cal. 2009); *Hawaii v. U.S. Dept. of Educ.,* 2010 WL 145282, *1 (D. Haw. 2010); *In re Western Asbestos Co.,* 416 B.R. 670, 692 (N.D. Cal. 2009) (all discussing, citing or mentioning *Geertson Seed*, primarily in applying the standard four-part *eBay* test for injunctive relief).
24. *Brown v. Hawaii*, 2009 WL 3818233, *6 (D. Haw. 2009); *TM Computer Consulting, Inc. v. Apothacare, LLC*, 2008 WL 4238913, *3 (D. Or. 2008); *Perez-Farias v. Global Horizons, Inc*, 2009 WL 1011180, *17+ (E.D. Wash. 2009); *Pesticide Action Network North America v. U.S. Environmental Protection Agency*, 2008 WL 5130405, *7 (N.D. Cal. 2008) (all discussing, citing or mentioning the original opinion in *Geertson Seed Farms v. Johanns*, 541 F.3d 938 (9th Cir. 2008), cert. granted, 2010 WL 144075 (U.S. 2010), primarily in applying the standard four-part eBay test for injunctive relief).
25. Monsanto Petition at 15 (emphasis in original).

States May Set Thermal Effluent Standards Stricter Than Federal Clean Water Act Standards*

*By Jeff Kray***

The Vermont Supreme Court recently affirmed issuance of a variance allowing the Vermont Yankee Nuclear Power Station to increase the temperature of its summer cooling water discharges. The Supreme Court agreed with the environmental plaintiffs in *In re Entergy Nuclear Vermont Yankee Discharge Permit*[1] that states may set thermal effluent standards stricter than the federal CWA standards contained in Clean Water Act (CWA) § 316(a),[2] but upheld a variance issued by the state of Vermont from the stricter state thermal effluent requirements.

Entergy's Thermal Effluent

Entergy operates the Vermont Yankee Nuclear Power Station, a boiling water nuclear reactor located on the Connecticut River in Vernon, Vermont. Nuclear and fossil-fuel plants generate electricity by heating purified water to create steam. The steam is used to drive turbines, which in turn drive the generators that produce electricity. Steam that has passed through the turbines must be condensed, requiring Entergy to remove heat and cool the station. The Vermont Yankee facility utilizes a cooling water system in which water drawn from the Connecticut River flows to the plant and removes heat as it travels through the condenser. Such a facility can discharge heated water in one of two ways: (1) through closed cycle cooling, in which the heated cooling water is circulated in cooling towers and mechanically cooled or; (2) through a "once through" open cycle cooling, in which the heated cooling water is discharged into the river where it mixes with the river water and dissipates. Water discharged from the plant is warmer than the water taken in, and the temperature difference may be large enough to affect aquatic life. Such thermal discharges are regulated under the federal Clean Water Act (CWA).[3]

The Entergy Variance and American Shad

In 2003, ANR issued an amended National Pollution Discharge Elimination System (NPDES) discharge permit allowing Entergy to bypass Vermont Yankee's cooling towers, increase its thermal discharge, and raise the temperature of a portion of the Connecticut River known as the "Vernon Pool" by 1°F between June 16 and October 14 each year. The period of the temperature increase ANR granted Entergy

overlaps with the spawning season for the American shad, an anadromous species of fish native to the Connecticut River and the focus of a major recovery effort. Adult shad spawn in the Connecticut between April and July. Juvenile shad remain in the river until August or September before beginning their journey to the Atlantic Ocean. River temperature has a bearing on both spawning and rearing success, which in turn determines the productivity and viability of the shad population in the Connecticut River. The reach of the Connecticut River affected by this discharge is designated as a "coldwater fishery" under Vermont Water Quality Standards (VWQS). These standards specify that "[t]he total increase from the ambient temperature due to all discharges and activities shall not exceed 1ºF."[4]

Procedural History

Plaintiff Watershed Council appealed the Vermont Environmental Court's decision granting in part and denying in part Entergy Nuclear Vermont Yankee's (Entergy) request for a permit amendment under the CWA. Entergy and ANR cross-appealed the Environmental Court's decision to impose monitoring and additional temperature conditions on the amended permit. The Vermont Supreme Court affirmed ANR's decision to grant Entergy a variance but reversed the additional conditions the Environmental Court sought to impose on Entergy.

CWA § 316(a)

Thermal pollution occurs when any process increases or decreases ambient water temperature sufficiently to harm fish, plants, or other aquatic organisms. Under the CWA, thermal effluent—such as cooling water discharged during open cycle cooling—is a pollutant, and facilities wishing to discharge thermal effluent into a water source must apply for a NPDES permit.[5] The CWA's statutory scheme embraces a cooperative federalism approach to environmental regulation and carves out a joint role for federal and state oversight and enforcement.[6]

CWA § 316(a) allows a thermal discharger to obtain a thermal effluent variance by demonstrating that less stringent thermal effluent limitations would still protect aquatic life.[7] A substantial portion of U.S. steam electric generating capacity operates under § 316(a) variances.

To receive a § 316(a) variance, a discharger must demonstrate to the appropriate regulatory agency that alternative thermal limits will not cause significant harm to the aquatic life in the receiving waters. The effort required to make this case varies greatly, depending on state requirements and the site-specific potential for impacts. In nearly all cases, however, the demonstration involves extensive evaluation of potential impacts and characterization of local aquatic populations. A regulatory agency can reject a demonstration or ask the discharger to study certain issues in more detail.

CWA § 316 sets forth specific criteria used to evaluate the discharge of heat (as opposed to other pollutants) in the NPDES permit context.[8] Under this section, a permit applicant may apply for a variance from otherwise applicable thermal discharge limitations if the applicant can demonstrate that it will nonetheless "assure the protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife."[9] EPA refers to this standard as "BIP." The "BIP" standard is generally more flexible than the numeric temperature criterion for a waterway.

It is this type of thermal variance request that was the subject of the permit amendment before the Vermont Supreme Court. Section 316(a) demonstrations are comprehensive studies which include evaluation of historical data and predictive impact modeling. The review and evaluation of these demonstrations is coordinated by the appropriate state regulatory agency, the U.S. Fish and Wildlife Service, and any interested basin compacts or interstate basin commissions. A successful § 316(a) demonstration results in alternative thermal effluent limitations for a specific discharger, but does not change the water quality standards for the receiving water body.

The Entergy Decision

The Watershed Council contended that, among other arguments, the Environmental Court erred in failing to: "analyze the appropriate 'body of water'; require the necessary demonstration under § 316(a); consider 'cumulative effects' of the discharge; require Entergy to demonstrate that prior discharges have not caused 'prior appreciable harm' to the ecosystem; and consider appropriate representative important species."[10] The Court held that "[g]iven the statutory and regulatory language set forth in the CWA, the applicable body of water is only that which is affected by Entergy's thermal plume."[11] The Court further held that the Environmental Court properly considered Entergy's "entire history," took into account the cumulative effects of Entergy's discharge when affirming the permit amendment, and that its conclusion Entergy met the BIP standard was supported by the evidence.[12] The Supreme Court also found that the Environmental Court's conclusion that there was no evidence that Entergy's thermal effluent discharges prior to the permit amendment was not clearly erroneous. Finally, the Court rejected the Watershed Council's arguments that the Environmental Court failed to consider additional cold water species of fish, such as brook trout, brown trout, and rainbow trout, among the nine "representative important species" (RIS) Entergy identified in its 2004 § 316(a) demonstration project performed in support of the variance application. As to this latter issue, the Court found the Watershed Council's experts' arguments that the RIS favored warm water species at the expense of more sensitive cold water species to be without merit.

The Watershed Council also argued that "the Environmental Court was required to apply the Vermont Water

Quality Standards (VWQS) to the proposed permit amendment, and that it failed to do so." The Supreme Court agreed with the Watershed Council that the VWQS are applicable to a thermal variance application, but concluded that the Environmental Court correctly applied these standards to Entergy's variance. On this point, the Court held that "Federal requirements for the content of state water quality standards represent a floor; state standards may, therefore, be stricter."[13] The Court did not interpret the CWA's thermal discharge variance provisions "as completely obliterating the standards set forth in the VWQS." Because federal regulations promulgated under the CWA[14] make explicit reference to the applicable state thermal effluent standards and thus incorporate those standards into the variance analysis, the Court held that the VWQS standards apply to Entergy's variance application.[15]

The Vermont Supreme Court's holding stands for the proposition that state water quality standards apply even under a § 316(a) thermal variance process. States may impose thermal effluent requirements stricter than would be required under the federal CWA § 316(a) standard alone.[16] In this case, however, the court held that states may also waive those requirements, and held that Vermont had properly done so.

ENDNOTES

* © 2010 Marten Law Group. All rights reserved. Reprinted with permission. Marten Law Group provides the material and information contained in this article for informational purposes only. This article is not a substitute for legal advice. Please contact your legal counsel for specific advice and/or information.

** Jeff B. Kray is a partner at Marten Law Group. His practice focuses on water resources, water quality, and complex environmental litigation, including CERCLA site remediation. He can be contacted by telephone at 206-292-2608 or by e-mail at jkray@martenlaw.com.

1. *In re Entergy Nuclear Vermont Yankee Discharge*, 2009 VT 124, 2009 WL 4878507 (Vt. 2009).
2. *In re Entergy Nuclear Vermont Yankee Discharge*, 2009 VT 124, 2009 WL 4878507 (Vt. 2009).
3. *In re Entergy Nuclear Vermont Yankee Discharge*, 2009 VT 124, 2009 WL 4878507 (Vt. 2009).
4. *In re Entergy Nuclear Vermont Yankee Discharge*, 2009 VT 124, 2009 WL 4878507 (Vt. 2009).
5. 33 U.S.C.A. § 1342; see also 40 C.F.R. § 122.2 (defining pollutant as including "heat").
6. See 33 U.S.C.A. § 1251(b).
7. *In re Entergy Nuclear Vermont Yankee Discharge*, 2009 VT 124, 2009 WL 4878507 (Vt. 2009).
8. 33 U.S.C.A. § 1326.
9. 33 U.S.C.A. § 1326(a); 40 C.F.R. § 125.71(c).
10. *In re Entergy Nuclear Vermont Yankee Discharge*, 2009 VT 124, 2009 WL 4878507 (Vt. 2009).
11. *In re Entergy Nuclear Vermont Yankee Discharge*, 2009 VT 124, 2009 WL 4878507 (Vt. 2009).
12. *In re Entergy Nuclear Vermont Yankee Discharge*, 2009 VT 124, 2009 WL 4878507 (Vt. 2009).
13. *In re Entergy Nuclear Vermont Yankee Discharge,* 2009 VT 124, 2009 WL 4878507 (Vt. 2009), *citing* 33 U.S.C.A. § 1370; 40 C.F.R. § 131.4(a); see also *Petition of Town of Sherburne,* 154 Vt. 596, 601 n.6, 581 A.2d 274, 277 n.6 (1990) (noting that "[b]ecause state regulations may impose more rigorous standards than the federal counterparts, state agencies should first look to the state regulations for guidance"); *Natural Resources Defense Council, Inc. v. U.S.E.P.A.,* 859 F.2d 156, 174 (D.C. Cir. 1988) (noting that "[i]n fashioning its guidelines … EPA endeavored to reconcile the competing objectives of regulatory uniformity and state autonomy by establishing a floor for … state enforcement authority, while ensuring that states have the maximum possible independence").
14. 33 U.S.C.A. § 1326(a).
15. *In re Entergy Nuclear Vermont Yankee Discharge*, 2009 VT 124, 2009 WL 4878507 (Vt. 2009).
16. *In re Entergy Nuclear Vermont Yankee Discharge,* 2009 VT 124, 2009 WL 4878507 (Vt. 2009).

EPA Proposal for Numeric Nutrient Standards for Florida Waters Has National Implications[*]

By Meline MacCurdy[**]

In a rule with national implications, EPA has proposed numeric nitrogen and phosphorus standards for the state of Florida.[1] The rule could have potentially costly implications for any dischargers to Florida waters, including municipal wastewater utilities, industrial dischargers, and agriculture, among others. Nutrient discharges generally do not impact human health, but, in sufficiently high concentrations, can have ecological impacts by increasing algae blooms and robbing fish and other aquatic creatures of dissolved oxygen. Industrial and municipal dischargers dispute the level at which nutrient discharges produce adverse effects in varied water bodies, and have argued that the Florida rule fails to reflect the high variability of ecosystems, and could result in potentially huge costs to dischargers without a certain corresponding environmental benefit. Although strictly applicable to Florida only, EPA's proposed numeric standards are widely seen as precedential for imposing similar standards nationwide. EPA has already pursued efforts to reduce nutrient loadings across the country and in concert with states under the total maximum daily load (TMDL) program.

Technical and Legal Background to Nutrient Water Quality Standards

Nutrients, such as nitrogen and phosphorus, are necessary for all properly functioning biological communities. However, excessive nitrogen and phosphorus in water bodies can cause algae blooms, encourage the growth of nuisance vegetation, and reduce dissolved oxygen concentrations, which can harm fish and wildlife and damage or reduce habitat. Properly regulating nutrients requires a highly technical understanding of the unique nutrient balance within highly varied ecosystems. Unlike most water quality criteria, which are based on a toxicity threshold determined using laboratory tests, the variability of ecosystem responses makes developing a cause/effect relationship between nutrient concentrations and ecological attributes much more difficult. Additionally, effective nutrient management requires methods to control discharges from a range of sources, such as those associated with urban land use and development, municipal and industrial wastewater discharge, agriculture, and atmospheric deposition that may be increased by production of nitrogen oxides in electric power generation and internal combustion engines.

Clean Water Act (CWA) § 303(c) requires states to develop water quality standards and review and update those standards every three years.[2] Water quality standards must include designated uses of water bodies, water quality criteria that are necessary to protect those uses, expressed in either numeric or narrative form, and antidegradation components.[3] States must submit their water quality standards to EPA for review and approval.[4] If EPA finds that a state's proposal for one or more criteria is inadequate, it must notify the state, which then has 90 days to revise its standards in response to EPA's concerns.[5] If the state does not do so, EPA is required to propose a federal standard that will apply to that state. Similarly, if EPA, independent of any state proposal, determines that a state needs a new or revised standard, and the state fails to act, the CWA directs EPA to propose the new or revised standard for that state.[6] If the state proceeds to develop its own standard while EPA is engaged in the rulemaking process, and the state standard is acceptable to EPA, then the CWA allows EPA to approve the state standard and abandon its own effort.

Background to EPA's Proposal

Florida's growing population, flat topography, robust agricultural community, and warm, wet climate impact the effect that nutrient discharges have on Florida waters.[7] Florida currently implements a narrative nutrient criterion, which provides that "in no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna."[8] Florida implements this criterion through site-specific detailed biological assessments together with outreach to stakeholders when deriving NPDES wastewater discharge permit limits, developing and implementing TMDLs, and assessing whether specific water bodies are "impaired" under CWA § 303(d).

Not satisfied with these narrative standards, environmental groups sued EPA in July 2008 to force the agency to adopt numeric nutrient criteria for Florida. Initially, the environmental groups based their argument in part on a 1998 EPA document that opined that numeric nutrient criteria were necessary under the CWA, and that the agency would require states to develop numeric criteria if the states did not do so themselves by the end of 2003.[9] Plaintiffs alleged that EPA's determination obligated the agency to propose numeric criteria for Florida under CWA § 303(c)(4), because Florida had not done so. On January 14, 2009, EPA issued a determination under Clean Water Act § 303(c)(4)(B) that numeric nutrient water quality standards were necessary for Florida to meet the requirements of CWA § 303(c), because, despite Florida's "proactive and innovative program to address nutrient pollution, the narrative criterion is insufficient to ensure protection of applicable designated uses...."[10] The environmental groups amended their complaint to base their claim on that 2009 determination.

EPA and the environmental groups resolved their lawsuit in an August 2009 consent decree,[11] which a federal court approved in November 2009. EPA's proposed rule fulfills the agency's obligation under the consent decree to propose numeric nutrient criteria for lakes and flowing waters by January 14, 2010. Under the consent decree, EPA must finalize these criteria by October 15, 2010, propose criteria for estuaries and coastal water by January 14, 2011, and finalize those rules by October 15, 2011, unless Florida submits its own numeric nutrient criteria acceptable to EPA before a final EPA action.[12]

Foundation for Numeric Criteria in EPA's Proposal

EPA's proposal provides a lengthy description of the technical bases for the numeric limits it is proposing for lakes, streams and rivers, springs, and canals in Florida. One aspect of the proposal that could be of particular relevance to other states is the agency's description of its concerns with Florida's narrative standards. In the proposal, EPA acknowledges that Florida has spent over $20 million collecting and analyzing data related to nutrients and biological health in Florida waters, and that Florida "is one of the few states that has in place a comprehensive framework of accountability that applies to both point and nonpoint sources and provides the enforceable authority to address nutrient reductions in impaired waters based upon the establishment of site-specific total maximum daily loads."[13] Despite these efforts, according to EPA, degradation of Florida's water quality due to nutrient over-enrichment remains widespread, and could increase because of Florida's expanding urban communities, agriculture development, and rapidly increasing population.[14]

EPA refers to Florida's regulatory nutrient accountability system as an "impressive synthesis of technology-based standards, point source control authority, and authority to establish enforceable controls for nonpoint source activities," but states that it is "insufficient to ensure protection of applicable designated uses."[15] EPA's primary criticism of Florida's approach mirrors EPA's opinion of narrative criteria generally: "Reliance on a narrative criterion to derive NPDES permit limits, assess water bodies for listing purposes, and establish TMDL targets can often be a difficult, resource-intensive, and time-consuming process that entails conducting case-by-case analyses to determine the appropriate numeric target value based on a site-specific translation of the narrative criterion."[16] EPA's assessment of narrative criteria as generally insufficient to control nutrient pollution could have broad implications for many states that do not themselves have numeric nutrient standards.

Reactions to and Impacts of EPA's Proposed Rule

Because water quality standards are used in determining permit limits, EPA's proposal is of immediate concern to Florida entities that discharge nitrogen or phosphorus into regulated water bodies, including industrial dischargers, municipalities with POTWs, stormwater management districts, and, potentially, nonpoint sources. Florida municipal and industrial dischargers have generally opposed the rule. A statement issued by a coalition of businesses, citizens, and associations opposed to the numeric standards refers to the proposed rule as a "de facto water tax from Washington that will impose major economic hardship on Florida's battered economy with questionable benefits to our environment," and asserts that "the federal government is imposing new regulations overnight on Florida and only on Florida—with no regard for the technical feasibility, the massive costs, or the devastating effects they will create for Florida's struggling economy."[17]

Beyond Florida, the proposal could be a harbinger of similar federal action in states that do not have numeric nutrient limits, a prospect that has certainly caught the attention of national stakeholders. For example, the spokesperson for the National Association of Clean Water Agencies referred to the proposal as a "one-size-fits-all approach" that it is "based on a statistical analysis of what the concentration of the nutrients are in a particular water body, and then applies it to all the water bodies," which does not link "concentrations to impacts."[18] EPA has for some time endorsed and supported state development of numeric nutrient criteria,[19] but many states have resisted their adoption. By 2008, half the states had not adopted numeric nutrient criteria, seven states had adopted numeric nutrient standards for at least one nutrient parameter for at least one entire waterbody type, and 18 states had adopted numeric nutrient standards for one or more parameters for part of one or more waterbody types.[20] In an August 2009 report, EPA's Office of Inspector General criticized EPA's efforts to encourage state adoption of numeric nutrient standards, and called on EPA to set and enforce such criteria in some circumstances.[21] Most recently, in an internal memorandum, EPA Administrator Lisa Jackson identified the challenge of addressing nutrient loadings as a priority in 2010, and stated that EPA will "work with states to develop nutrient limits."

Some have suggested that, by investing the resources to develop the Florida rule, EPA now has a template that could be tailored to other states.[22] Even if EPA elects not to impose numeric nutrient standards, the success of the environmental groups' lawsuit in Florida could pave the way for similar suits that will compel EPA to act in other states.[23] Last November, shortly after the Florida consent decree was finalized, environmental groups issued a notice of intent to sue EPA based on its failure to require numeric standards in Wisconsin, relying in part on the same 1998 document as the original Florida complaint.

EPA is accepting comments on the proposal until March 29, 2010, and is holding a series of public hearings on the rule in Florida.[24] Public comments on the proposal will likely come from stakeholders within and outside Florida, as stakeholders grapple with the potential impacts of EPA's action, and will be reflected in EPA's final rule later this year.

ENDNOTES

* © 2010 Marten Law Group. All rights reserved. Reprinted with permission. Marten Law Group provides the material and information contained in this article for informational purposes only. This article is not a substitute for legal advice. Please contact your legal counsel for specific advice and/or information.

** Meline G. MacCurdy focuses her practice on environmental litigation as well as environmental permitting and review of facilities in the Pacific Northwest. She can be reached by telephone at 206-292-2620 or by e-mail at mmaccurdy@martenlaw.com.

1. 75 Fed. Reg. 4174 (Jan. 26, 2010).
2. *See* 40 C.F.R. § 131.20.
3. 40 C.F.R. §§ 131.6, 131.10-12; 33 U.S.C.A. § 1313(c)(2)(A).
4. 33 U.S.C.A. § 1313(c)(2)(A).
5. 33 U.S.C.A. § 1313(c)(3).
6. 33 U.S.C.A. § 1313(c)(4).
7. *See* 75 Fed. Reg. at 4180.
8. 75 Fed. Reg. at 4181 (quoting Florida Administrative Code (F.A.C.) 62-302-530(47)(b)).
9. *See* EPA, National Strategy for the Development of Regional Nutrient Criteria, 63 Fed. Reg. 34648 (June 25, 1998); *see also* EPA, Clean Water Action Plan, 63 Fed. Reg. 14,109 (Mar. 24, 1998).
10. 75 Fed. Reg. at 4181.
11. For additional information regarding the August 2009 consent decree and related issues, *see* S. Brandt-Erichsen & J. Kray, EPA to Set Water Quality Criteria For Phosphorus and Nitrogen in Florida Waters, Paving the Way for Other States to Follow,

Marten Law Group Environmental News (Sept. 15, 2009).

12. *See* 75 Fed. Reg. at 4182.
13. 75 Fed. Reg. at 4175.
14. *See* 75 Fed. Reg. at 4175.
15. 75 Fed. Reg. at 4175; *see also* 75 Fed. Reg. at 4181-82.
16. 75 Fed. Reg. at 4181; *see* 75 Fed. Reg. at 4175 (identifying the same concerns with respect to Florida's approach).
17. Don't Tax Florida.Com, Press release, U.S. EPA announces new water regulations Don't Tax Florida coalition releases joint statement (Jan. 15, 2010); *see also* Florida First State for EPA Nutrient Limits in Surface Waters, Environmental News Service (Jan. 18, 2010).
18. T. Luntz, EPA Proposes Freshwater Nutrient Limits for Fla., a National First, New York Times (Jan. 15, 2010).
19. *See* EPA, Water Quality Criteria for Nitrogen and Phosphorus Pollution (stating that EPA's "goal is to assist in the adoption of numeric nitrogen and phosphorus criteria, which will help states, territories, and tribes move toward establishing water quality standards for nitrogen and phosphorus"); EPA, State Adoption of Numeric Nutrient Standards 1998-2008, 3 (Dec. 2008) (stating that "EPA has made protecting and restoring the nation's waters from nitrogen and phosphorus pollution a top priority," describing EPA's efforts to assist states in developing numeric nutrient standards, and stating that "EPA believes that numeric nutrient water quality standards provide an important foundation to accelerate, guide, calibrate, and evaluate the implementation of" other tools to address nutrient pollution, such as TMDLs, BMPs, trading, economic incentives, and technology-based controls).
20. EPA, State Adoption of Numeric Nutrient Standards 1998-2008, 6 (Dec. 2008).
21. EPA, Office of Inspector General, EPA Needs to Accelerate Adoption of Numeric Nutrient Water Quality Standards (Aug. 26, 2009).
22. T. Luntz, EPA Proposes Freshwater Nutrient Limits for Fla., a National First, New York Times (Jan. 15, 2010) (quoting David Guest, the attorney who brought the plaintiffs' case, as saying that the Florida rule "is a prototype that will be followed by other states," and that, if states do not follow, "EPA will be able to do this rather quickly, because they've done the hard work now"); Earthjustice, Judge Approves Historic EPA Settlement: EPA and Florida Must Set Limits on Fertilizer and Animal Waste Pollution in State Waters (Nov. 16, 2009).
23. D. Guest, Earthjustice, Historic Decision to Limit Poisoning of Waterway (Nov. 18, 2009).
24. EPA, Proposed Water Quality Standards for the State of Florida's Lakes and Flowing Waters.

UPDATES

Climate Change

Sixteen States Seek to Intervene in Challenge to EPA's Endangerment Rule

Coalition for Responsible Regulation v. EPA

Note: The following appeared in the February 17, 2010, Andrews Environmental Litigation Reporter, 30 No. 15 Andrews Envtl. Litig. Rep. 2. Copyright © 2010 Thomson Reuters.

Sixteen states have moved to intervene on the side of the Environmental Protection Agency in a challenge to its finding that greenhouse gas emissions endanger public health and the environment. *Coalition for Responsible Regulation Inc. et al. v. Environmental Protection Agency*, No. 09-1322, *motion to intervene filed* (D.C. Cir. Jan. 22, 2010).

The finding is the first step in the federal regulation of GHG emissions that contribute to climate change.

The states' motion, filed in the U.S. Court of Appeals for the District of Columbia Circuit, is mainly concerned with their standing to intervene in the case. It does not address the challenge to the finding filed by the National Cattlemen's Beef Association and other industry groups and energy companies.

In support of their motion, the states say any failure or delay in implementing regulations to control greenhouse gas emissions will directly affect their economies. The motion says emissions can harm hardwood forests in New England, negatively affecting fall tourism and threatening the maple sugar industry.

The EPA issued the proposed finding last April and received more than 380,000 comments supporting and opposing the regulation.

In December, after considering public comments and examining the scientific evidence, the agency issued the final rule that greenhouse gas emissions threaten public health.

The EPA identified six greenhouse gases that potentially threaten human health: carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride.

The agency began the rulemaking process in response to the U.S. Supreme Court's 2007 determination that EPA has the authority to regulate greenhouse gases that contribute to global warming. *Massachusetts v. E.P.A.,* 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007).

The Supreme Court said the EPA must determine if the emissions cause or contribute to air pollution that endangers public health and welfare.

The challenge to the rule was filed December 23 by several industry groups in the D.C. Circuit. Their two-page petition did not make any legal arguments in support of the challenge.

However, the groups did issue a statement saying the issue of climate change should be addressed through the proper legislative process.

They said that although the endangerment finding does not in and of itself regulate greenhouse gas emissions, it is a critical step in the process for GHG regulation under the Clean Air Act, 42 U.S.C.A. § 7401.

The rule provides a foundation for the EPA to regulate GHGs from small and large sources in the national economy, including farms, hospitals, office buildings and schools, the groups said in the statement.

Increased energy costs associated with the agency's finding will be devastating for agriculture and the public, the groups said.

The states that joined in the motion are Arizona, California, Connecticut, Delaware, Iowa, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington.

Clean Water Act

Alaska Groups Claim Coal Stockpile Is Polluting Bay

Alaska Cmty. Action on Toxics v. Aurora Energy Servs.

Note: The following appeared in the February 3, 2010, Andrews Environmental Litigation Reporter, 30 No. 14 Andrews Envtl. Litig. Rep. 2. Copyright © 2010 Thomson Reuters.

Environmental groups have sued two companies they say are responsible for polluting a bay on the Gulf of Alaska with coal and coal dust from a nearby storage and off-loading facility. *Alaska Community Action on Toxics et al. v. Aurora Energy Services LLC et al.*, No. 3:09-CV-00255-JWS, *complaint filed* (D. Alaska Dec. 28, 2009).

In a suit filed in the U.S. District Court for the District of Alaska, Alaska Community Action on Toxics and the state's chapter of the Sierra Club claim that Aurora Energy Services and Alaska Railroad Corp. have violated the Clean Water Act, 33 U.S.C.A. § 1311.

The defendants are responsible for activities at the Seward Coal Loading Facility in Seward, Alaska, near Resurrection Bay, according to the suit.

The environmental groups claim the companies store coal at the SCLF and then load it onto ships for transport to out-of-state markets.

About 817,000 metric tons of coal moved through the site in 2009, and about 1 million metric tons will be stored and off-loaded there this year, the plaintiffs claim.

During storage and off-loading, wind often carries coal dust into Resurrection Bay, the suit says, and snow dirtied by the coal is frequently plowed into the bay.

The state's Department of Environmental Conservation has cited the defendants for "failing to control fugitive dust emissions," according to the suit.

The contamination is harmful to the health of Seward's population and its fishing and tourist industries, the plaintiffs allege.

They defendants are violating the CWA by discharging pollutants without a permit, they add.

The groups are seeking a declaration that the defendants are violating the law and an injunction prohibiting the discharge of pollutants without a permit.

Citing violations that go as far back as October 2004, the plaintiffs also seek an order requiring the energy and railroad companies to restore the bay to its condition before the contamination occurred.

The defendants should face fines of up to $32,500 per day for violations through January 12, 2009, and $37,500 for infractions occurring after that date, according to the plaintiffs.

Attorneys:

Plaintiffs: Austin Williams, Brian Litmans and Victoria Clark of Trustees for AK, Anchorage, AK.

No EPA Fine for Lack of Permit, Eighth Circuit Says

Serv. Oil Co. v. EPA

Note: The following appeared in the February 3, 2010, Andrews Environmental Litigation Reporter, 30 No. 14 Andrews Envtl. Litig. Rep. 3. Copyright © 2010 Thomson Reuters.

The Environmental Protection Agency has no authority to fine a company that failed to obtain a discharge permit in the absence of any unlawful discharge of pollutants, the Eighth U.S. Circuit Court of Appeals has ruled. *Service Oil, Inc. v. U.S. E.P.A.*, 590 F.3d 545 (8th Cir. 2009).

The EPA fined Service Oil Co. more than $36,000 for failing to obtain a storm water discharge permit related to construction of a highway service plaza in Fargo, N.D.

The firm began construction of the plaza in April 2002. When the EPA began a review of the project, Service Oil applied for and obtained a state permit for its work.

In 2004 the EPA began an administrative enforcement action claiming the company failed to obtain an NPDES (National Pollutant Discharge Elimination System) permit

for construction at the site, as required by the Clean Water Act, 33 U.S.C.A. § 1311.

Service Oil argued that its state permit sufficed to cover its activities at the plaza.

An administrative law judge said the company violated the Clean Water Act regardless of whether a discharge had occurred, but noted that dirt, sediment, and other material did wash away from the site during construction and would have reached a nearby river.

The Environmental Appeals Board affirmed the judge's analysis, and Service Oil petitioned the Eighth Circuit for review.

The appeals court noted Congress granted the EPA limited authority to assess monetary penalties for violations of the Clean Water Act. The panel said the statute is broadly worded to ensure proper monitoring of discharges of pollution, but the issue here is whether failure to timely apply for a permit violates the law.

In a case dealing with animal feeding operations, the Second Circuit found that companies are not statutorily obligated to seek or obtain NPDES permits "unless there is a discharge of any pollutant," the Eighth Circuit said, citing *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 504 (2d Cir. 2005).

While curtailing the EPA's authority to assess penalties for failure to submit timely applications for permits, the appeals court said this is not meant to allow unpermitted discharges to take place.

The panel said prudent builders will "apply and obtain permits before starting construction to avoid penalties for unlawful discharge that may prove to be severe."

The Eighth Circuit vacated the order assessing the penalty and remanded the case to the Environmental Appeals Board.

Attorneys:

Plaintiff: Michael D. Nelson, Ohnstad Twichell PC, West Fargo, ND.

Defendant: Adam J. Katz, U.S. Department of Justice, Washington, DC

Eleventh Circuit Nixes Mining Permits in Florida Wetlands

Sierra Club v. Van Antwerp

Note: The following appeared in the February 17, 2010, Andrews Environmental Litigation Reporter, 30 No. 15 Andrews Envtl. Litig. Rep. 6. Copyright © 2010 Thomson Reuters.

The Army Corps of Engineers' issuance of permits for mining limestone from a wetlands area in southern Florida violated the Clean Water Act, the Eleventh U.S. Circuit Court of Appeals has ruled. *Sierra Club v. Van Antwerp*, 2010 WL 200838 (11th Cir. 2010).

The panel said the Corps failed to make the companies seeking the permits demonstrate that there were no practical alternatives to mining in the environmentally sensitive area.

The Sierra Club and other environmental groups challenged the Corps on its issuance of the permits to several limestone mining corporations, including the Miami-Dade Limestone Products Association, Rinker Materials of Florida Inc. and Florida Rock Industries Inc.

The permits were issued under requirements set forth in the Clean Water Act, 33 U.S.C.A. § 1311, and allowed the companies to extract limestone from an area of wetlands in Florida known as the Lake Belt.

The plaintiffs said the Lake Belt provides about 40% of the drinking water used in Miami-Dade County. They said the ecology of the area has been increasingly threatened by limestone mining.

The mining companies said about half the statewide production of construction-grade limestone comes from the Lake Belt area.

The U.S. District Court for the Southern District of Florida found the Corps' decision to issue the permits was arbitrary and capricious and vacated the permits.

The mining companies, having intervened on the side of the Corps, appealed to the Eleventh Circuit.

The Corps did not appeal and is in the process of reconsidering its decision, the panel noted.

A three-judge panel affirmed the District Court's decision. The appeals court said the Corps is required to follow a two-step procedure in deciding to issue permits under the CWA.

After determining a project's basic purpose, the Corps must determine if the activity is "water-dependent," the court said.

If it is not, the Corps is to presume that a practical alternative that has a less adverse environmental impact is available, the panel added.

The mining companies conceded that the extraction of limestone in general is not water-dependent and that the Corps defined the project's basic purpose as the mining of limestone "in general," the court said.

The burden therefore shifted to the mining companies to show that no practical alternative to mining in the Lake Belt existed, the panel said.

The court said this does not mean the companies will be unable to show as much, but on the current record, the Corps' decision was arbitrary and should be vacated.

Attorneys:

Plaintiffs: Eric R. Glitzenstein, Meyer & Glitzenstein, Washington, DC

Defendants: Martin J. Alexander, Holland & Knight, West Palm Beach, FL

Maryland to Sue Mirant Over Coal Ash Pollution

Note: The following appeared in the February 3, 2010, Andrews Environmental Litigation Reporter, 30 No. 14 Andrews Envtl. Litig. Rep. 8. Copyright © 2010 Thomson Reuters.

The Maryland Department of the Environment has announced that it will sue power plant operator Mirant Corp. for violating state and federal water pollution laws at the company's Brandywine coal ash landfill.

The DEM said in a statement that it intends to file the lawsuit March 17 in the U.S. District Court for the District of Maryland. Under the Clean Water Act, 33 U.S.C.A. § 1311, the agency must give Mirant 60 days' notice of its intent to sue.

The department said it elected to file a citizen suit under the Clean Water Act because federal law authorizes higher penalties and may lead to a faster resolution of the case.

The DEM's letter of intent was sent to Mirant, U.S. Environmental Protection Agency headquarters and regional administrators, and U.S. Attorney General Eric Holder.

The state's action was prompted by five environmental groups that have also sent a joint citizen suit notice alleging groundwater and surface water contamination at the Brandywine site in Prince George's County.

Mirant owns and operates an electricity generation station in Prince George's County and disposes of the station's coal combustion byproducts, including fly ash, at the Brandywine landfill. The landfill is located near the Mataponi Creek and one of its tributaries, which flows into the Merkle Wildlife Sanctuary and the Patuxent River.

The DEM's letter says the coal combustion byproducts in the landfill contain high concentrations of aluminum, cadmium, copper, lead, mercury, selenium, zinc, and other hazardous substances that are toxic to humans, aquatic life, and wildlife.

In a statement Maryland Environmental Secretary Shari Wilson said that by allowing leachate from the landfill to seep into groundwater, Mirant is discharging pollutants without a permit.

New state regulations took effect in December 2008 that require leachate collection, groundwater monitoring, liners and increased analysis for coal combustion byproduct disposal facilities, according to the letter.

The agency says that, to date, Mirant has not agreed on a schedule to fully investigate and clean up groundwater and surface water contamination to meet the requirements of the new regulations.

Commenting on the DEM's action, the Environmental Integrity Project said in a statement that the group was pleased to see the state do something to stop pollution at the Brandywine landfill.

"So-called dry coal ash landfills across the country are slowly leaching toxic pollution into creeks, rivers and groundwater," the group said.

Superfund

Raytheon, Not Army, Is Liable for TCE Cleanup, Tenth Circuit Says

Raytheon Aircraft Co. v. United States

Note: The following appeared in the February 3, 2010, Andrews Environmental Litigation Reporter, 30 No. 14 Andrews Envtl. Litig. Rep. 4. Copyright © 2010 Thomson Reuters.

Raytheon Aircraft Co. cannot recover costs from the United States for the cleanup of a World War II-era airfield because a federal court's finding of sole liability was not clearly erroneous, the Tenth U.S. Circuit Court of Appeals has ruled. *Raytheon Aircraft Co. v. U.S.,* 590 F.3d 1112 (10th Cir. 2009).

The ruling means Raytheon is responsible for the entire $3.1 million judgment that the U.S. District Court for the District of Kansas ordered for TCE contamination caused by Raytheon's corporate predecessor, Beech Aircraft Corp.

At the center of the dispute is the mid-1990s discovery by Kansas' Department of Health and the Environment of TCE pollution near the Tri-County Public Airport in the city of Herington. The site, known as Herington Field in the 1940s, was used by the Army to operate B-29 bombers during World War II.

Tricholroethylene, or TCE, is a solvent used to remove oil and grease from metal parts. According to the Environmental Protection Agency, studies have associated TCE exposure with cancer in humans.

The Kansas Department of Health forwarded its findings to the EPA, which sought information from the Army and Raytheon, the current operator of the airport.

Raytheon admitted that Beech had used TCE at the site, but the Army denied ever using it.

The EPA ordered cleanup of the pollution. Raytheon complied but sued the federal government for cost recovery under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9601.

Following a 10-day bench trial, the District Court ordered Raytheon to pay $3.1 million for cleanup, saying the company failed to meet its burden of establishing that the Army had ever used TCE.

Raytheon sought review in the Tenth Circuit. The appeals court found that circumstantial evidence suggesting that the Army may have used TCE at the site does not compel such a finding.

"The most important consideration before the District Court was whether the Army actually used TCE at Herington Field, which Raytheon was unable to conclusively establish," the three-judge panel said.

The panel noted the testimony of war veterans who said only soap and water were used to clean the B-29s, and evidence that TCE was only used at Army sites with special authorization, which Raytheon did not show existed.

The District Court made a reasonable choice in not crediting the testimony of witnesses who said the Army did use TCE at the airfield, the Tenth Circuit said.

There was no evidence so strong as to compel a verdict in Raytheon's favor, and the District Court's judgment was not clearly erroneous, the panel concluded.

Attorneys:

Plaintiff: Robert M. Jackson, Honigman Miller Schwartz & Cohn, Detroit, MI.

Defendant: Brian C. Toth, Department of Justice, Washington, DC.

High Court Won't Review Superfund Contribution Case

Friedland v. TIC-The Indus. Co.

Note: The following appeared in the February 3, 2010, Andrews Environmental Litigation Reporter, 30 No. 14 Andrews Envtl. Litig. Rep. 5. Copyright © 2010 Thomson Reuters.

The U.S. Supreme Court will not review a Tenth U.S. Circuit Court of Appeals ruling that a mine operator cannot seek contribution from other potentially liable parties under the Superfund law because insurance payments covered the entire cleanup bill. *Friedland v. TIC-The Industrial Co. et al.*, No. 09-551, *cert. denied* (U.S. Jan. 11, 2010).

Robert Friedland, president of the defunct Summitville Consolidated Mining Co., petitioned the high court last fall, arguing that the spirit and intent of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9601, requires polluters to pay their fair share of cleanup costs.

The petition said the collateral-source rule, which in tort actions allows a double recovery for some parties that received compensation from a third party so wrongdoers will not escape liability, should apply in CERCLA actions as well.

In 1996 the Environmental Protection Agency sued Friedland to recover response costs related to the cleanup of contaminated water near a gold mine that Summitville operated near Del Norte, Colorado, in the 1980s and 1990s.

Friedland settled the claim for more than $20 million, which his insurers covered in full, court records say.

However, Friedland brought a CERCLA contribution act against TIC-The Industrial Co. and GeoSyntec Consultants Inc. in the U.S. District Court for the District of Colorado. He said the defendants were potentially responsible for the contamination.

The defendants successfully moved for summary judgment, arguing that Friedland was not entitled to contribution under CERCLA because he had recovered from his insurers.

When the Tenth Circuit agreed that the defendants' contributions should be set off by Friedland's insurance recovery, he filed a *certiorari* petition with the Supreme Court.

Friedland argued that although the rule had never been applied in a CERCLA case, it has been used in environmental-response-costs cases brought under state laws.

The high court denied the petition January 11.

Clean Air Act

Kansas Utility to Spend $500 Million to Settle CAA Violations

United States v. Westar Energy

Note: The following appeared in the February 17, 2010, Andrews Environmental Litigation Reporter, 30 No. 15 Andrews Envtl. Litig. Rep. 11. Copyright © 2010 Thomson Reuters.

Westar Energy Inc. will spend $500 million to install pollution control equipment under a settlement with the federal government and the state of Kansas to resolve violations of the Clean Air Act. *United States v. Westar Energy Inc.*, No. 09-2059, *consent decree entered* (D. Kan. Jan. 25, 2010).

Under a consent decree filed in the U.S. District Court for the District of Kansas, the company also agreed to pay a $3 million civil penalty and to spend $6 million on environmental mitigation projects.

The Justice Department filed the complaint a year ago, alleging that Westar modified all three units at the Jeffrey Energy Center near St. Marys, Kansas, without installing required pollution control equipment or complying with

applicable emission limits under the Clean Air Act, 42 U.S.C.A. § 7401.

The agency said it discovered the violations through an information request submitted to Westar. The pollution control equipment is expected to reduce combined emissions of sulfur dioxide and nitrogen oxides by roughly 78,600 tons per year, the Justice Department said.

Sulfur dioxide and nitrogen oxides can cause severe harm to human health and the environment and are significant contributors to acid rain, smog, and haze.

The Environmental Protection Agency has said that air pollution from power plants can drift great distances downwind and degrade air quality in nearby areas.

Westar also agreed to surrender surplus sulfur dioxide allowances. Because these allowances cannot be used again, the emissions will be permanently removed from the environment, the Justice Department said.

As part of the settlement, Westar agreed to fund the retrofitting of diesel engines on vehicles owned by or operated for public entities in Kansas with emission control equipment. The company also will install infrastructure to aid in the use of plug-in hybrid vehicles.

Lead Contamination

Supreme Court Is Asked to Hear Shooting Range Suit

Pollack v. U.S. Dep't of Justice

Note: The following appeared in the February 17, 2010, Andrews Environmental Litigation Reporter, 30 No. 15 Andrews Envtl. Litig. Rep. 1. Copyright © 2010 Thomson Reuters.

An Illinois man and an environmental organization are asking the U.S. Supreme Court to reinstate their lawsuit over the Coast Guard's alleged discharge of lead bullets into Lake Michigan. *Pollack et al. v. U.S. Department of Justice et al.*, No. 09-836, *petition for cert. filed* (U.S. Jan. 12, 2010).

In their petition for review, Stephen Pollack and the Blue Eco Legal Council argue that the Seventh U.S. Circuit Court of Appeals' ruling that they failed to show they were injured by the Coast Guard's conduct leaves no individual or group with standing to sue.

In the trial court, Pollack presented evidence that his drinking water was contaminated with lead above acceptable standards.

The plaintiffs filed suit in the U.S. District Court for the Northern District of Illinois, alleging violations of the Clean Water Act, 33 U.S.C.A. § 1311; Resource Conservation and Recovery Act, 42 U.S.C.A. § 321; and Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9601.

The suit said the Coast Guard discharged 62,500 bullets made primarily of lead from a North Chicago firing range into Lake Michigan, resulting in lead contamination.

Pollack said the contamination has "lessened" his enjoyment of watching the migration of waterfowl because of his concern that the lead munitions will harm the birds.

The plaintiffs also argued that the lead bullets will degrade as long as they remain in the lake. The Coast Guard said the plaintiffs lacked standing to sue.

The District Court ruled that the plaintiffs offered no evidence to support their claims and that recent reports showed that the amount of lead in the area's drinking water was acceptable.

Pollack did not make the "requisite showing" of injury based on his assertion of lessened enjoyment of the area because of the lead contamination, the court ruled.

Had he characterized his activities as "tarnished by fear" or "stopped" because of the defendants' actions, he would have standing to sue, the court said.

The court also said Blue Eco lacked standing to sue because the record is "equally barren" of evidence that the Coast Guard's actions harmed the group's members.

The plaintiffs appealed to the Seventh Circuit, which affirmed. The panel said Pollack's intention to drink water and his fear that his water has been contaminated by lead from bullets do not confer standing.

The plaintiffs then petitioned the Supreme Court January 12 for review of the case. They argue that the Clean Water Act and the Resource Conservation and Recovery Act allow citizen suits for any illegal discharge into the environment "without regard to the effect on the environment." However, the petition says, the District Court's holding leaves no one with standing to bring suit for these violations.

The Supreme Court needs to address this conflict with congressional authority in light of the District Court and Seventh Circuit rulings, the plaintiffs say.

Attorneys:

Petitioners: Steven Pollack, Highland Park, IL

Low-Carbon Fuel Standard

Ethanol Producers Sue Over California's Low-Carbon Rule

Rocky Mountain Farmers Union v. Goldstene

Note: The following appeared in the February 3, 2010, Andrews Environmental Litigation Reporter, 30 No. 14 Andrews Envtl. Litig. Rep. 6. Copyright © 2010 Thomson Reuters.

Groups representing the ethanol industry are challenging a California rule that will mandate a reduction of the

carbon content of fuel sold in the state, arguing the measure is unconstitutional and will eliminate Midwestern producers from the California market. *Rocky Mountain Farmers Union et al. v. Goldstene et al.*, No. 09-02234, *complaint filed* (E.D. Cal. Dec. 23, 2009).

Growth Energy, the Renewable Fuels Association, the Rocky Mountain Farmers Union and others filed the lawsuit in the U.S. District Court for the Eastern District of California.

In a statement Growth Energy said the low-carbon fuel standard builds new regulatory obstacles to the use of ethanol.

"Additionally, by closing California's borders to corn ethanol from other states, the LCFS will change how corn is farmed and ethanol is produced all over the country," the group said.

In 2006 the California Legislature passed the Global Warming Solutions Act to reduce greenhouse gas emissions from cars and trucks.

A year later Governor Arnold Schwarzenegger ordered the establishment of separate state regulations to govern the use of ethanol in gasoline. In 2009 the California Air Resources Board approved the low-carbon fuel standard governing the marketing of gasoline-ethanol blends sold in the state.

The focus of the CARB standard is the "carbon intensity" of all feedstocks and fuel sources used in California.

As part of the regulations CARB assigned carbon intensity values to different fuels according to the agency's assumptions about their "fuel pathway."

"As part of the assumptions underlying the ... [rule], CARB purported to gauge the so-called indirect land use or other indirect effect from the production of corn itself, predominately in the Midwest, ascribing a penalty to all corn ethanol based on its assumed indirect contribution to worldwide GHG emissions," the complaint says.

The lawsuit says CARB assigned a higher total carbon intensity value to corn ethanol originating in the Midwest than to identical corn ethanol from California.

The regulation will effectively bar Midwest-produced ethanol from the California market, the groups say.

Since the low-carbon fuel standard regulates conduct and commerce occurring outside California, it interferes with interstate commerce and violates the supremacy cause of the U.S. Constitution, the suit says.

The groups wants the court to declare that the regulation is unconstitutional and enjoin the state from implementing it.

They said their lawsuit should help fix a serious mistake with the low-carbon fuel standard.

In a joint statement Growth Energy and the Renewable Fuels Association said that if California succeeds in discriminating against corn-based ethanol producers, it would give other states permission to defy the intent of Congress.

Those states could "establish a patchwork of fuel regulations that would greatly complicate the nation's fuel infrastructure and potentially limit the trade of fuel and fuel components between states," the statement said.

Attorneys:

Plaintiffs: Timothy Jones and John Kinsey, Jones Helsley, Fresno, CA.

Company: Rocky Mountain Farmers Union

Mountaintop Mining

Scientists Call for Moratorium on Mountaintop Mining

Note: The following appeared in the February 3, 2010, Andrews Environmental Litigation Reporter, 30 No. 14 Andrews Envtl. Litig. Rep. 11. Copyright © 2010 Thomson Reuters.

A group of scientists is calling on the federal government to stay all permits for mountaintop mining, in which the tops of mountains are blasted off and stream valleys are buried under rocks.

In an article published in the journal Science January 8, the scientists argue that peer-reviewed research shows irreversible environmental damage from this type of mining. Mountaintop mining also exposes local residents to a higher risk of serious health problems.

Mountaintop mining is widespread throughout eastern Kentucky, West Virginia, and southwestern Virginia.

Lead author Margaret Palmer of the University of Maryland Center for Environmental Science said in a statement that the effects of mountaintop mining are "pervasive and long-lasting," and there is no evidence that mitigation practices can successfully reverse the damage it causes.

The authors are hydrologists, ecologists and engineers, including several members of the National Academy of Sciences.

In the article they say severe environmental degradation is taking place at mining sites and downstream.

Mountaintop mining destroys extensive tracts of deciduous forests and buries small streams that are essential in the overall health of entire watersheds, the article says.

Additionally, the authors say there are serious health impacts associated with surface mining for coal in the Appalachian region, including elevated rates of mortality, lung cancer, and chronic heart, lung and kidney disease in coal-producing communities.

The authors conclude that new mountaintop mining permits should not be granted until peer-reviewed, scientific evidence shows that it is possible to remedy the environmental threat.

The environmental group Earthjustice said the Obama administration should take note of the study.

According to the group's statement, the Environmental Protection Agency announced last month it was planning to allow mining to go ahead at the Hobet 45 mine, one of the largest sites in West Virginia.

The EPA said it approved the permit after extensive discussions with Hobet Mining Inc. resulted in additional protections against environmental harm. The operation is expected to employ 460 coal miners, the agency said.

Insurance

Insurer Must Defend Oregon Rifle Club in Contamination Suit

Douglas Ridge Rifle Club v. St. Paul Fire & Marine Ins. Co.

Note: The following appeared in the February 17, 2010, Andrews Environmental Litigation Reporter, 30 No. 15 Andrews Envtl. Litig. Rep. 9. Copyright © 2010 Thomson Reuters.

An insurer has a duty to defend a rifle club against claims that lead emanating from a shooting range has polluted nearby waterways, an Oregon federal magistrate has ruled. *Douglas Ridge Rifle Club v. St. Paul Fire & Marine Ins. Co.,* 2010 WL 98942 (D. Or. 2010).

U.S. Magistrate Judge John V. Acosta of the District of Oregon rejected St. Paul Fire & Marine Insurance Co.'s argument that the remedies sought in the lawsuit do not constitute "damages" covered under the policy.

The suit could result in a court-ordered environmental cleanup, forcing the club, in turn, to incur cleanup costs, which, according to numerous cases, are recoverable under a policy's property damage clause, the magistrate said.

The ruling stems from a citizen suit brought against Douglas Ridge Rifle Club under the federal Clean Water Act and Resource Conservation and Recovery Act. The suit also includes a state public nuisance claim.

The citizen suit alleged that hundreds of thousands of pounds of lead and other materials from the club's operations have contaminated nearby land and waters. The suit asked the court to require the rifle club to "abate the violations" of the environmental laws.

After St. Paul denied that it had any duty to defend or indemnify Douglas Ridge, the club filed a declaratory judgment action in the District Court to resolve the coverage dispute.

Judge Acosta agreed with the rifle club that "damages" within the meaning of its insurance policy were a potential outcome of the lawsuit.

The court has the authority to issue a mandatory injunction requiring the club to clean up any contamination it caused, the magistrate said. An injunction, in turn, would require Douglas Ridge to incur cleanup costs, he noted.

In light of prior decisions holding that environmental cleanup costs constitute covered property damage, the judge determined that the underlying complaint seeks relief that could qualify as damages under the St. Paul policy.

Moreover, he found no support for St. Paul's contention that the alleged contamination of the land and water surrounding the gun club was intentional, rather than accidental.

St. Paul would have no duty to defend under the policy if the harm in question was not "caused by accident."

However, Judge Acosta found it reasonable to read the underlying complaint as alleging accidental conduct.

Consequently, the allegations in the citizen suit triggered St. Paul's duty to defend, he concluded.

Attorneys:

Plaintiff: Brian D. Chenoweth, Jesse S. Abrams and Brooks M. Foster, Chenoweth Law Group, Portland, OR

Defendant: Aaron K. Stuckey and Everett W. Jack Jr., Davis Wright Tremaine, Portland, OR

Pollution Exclusion Did not Bar Coverage for Paint-Fume Exposure

NGM Ins. Co. v. Carolina's Power Wash & Painting

Note: The following appeared in the February 17, 2010, Andrews Environmental Litigation Reporter, 30 No. 15 Andrews Envtl. Litig. Rep. 10. Copyright © 2010 Thomson Reuters.

An "absolute" pollution exclusion in a painting contractor's insurance policy does not relieve the insurer of having to cover claims of injuries from inhaling paint fumes in a building the contractor was painting, a South Carolina federal judge has ruled. *NGM Ins. Co. v. Carolina's Power Wash & Painting, LLC,* 2010 WL 146482 (D.S.C. 2010).

Saying the issue was a matter of first impression in South Carolina, U.S. District Judge David C. Norton rejected the insurer's argument that the exclusion "unambiguously" bars coverage for claims outside the realm of "traditional" environmental pollution.

The decision stems from a negligence lawsuit two U.S. Postal Service employees brought against Carolina's Power Wash & Painting, the contractor the agency hired to paint the post office building where the plaintiffs worked.

The employees alleged they suffered serious injuries as a result of their exposure to fumes from the painting company's work.

NGM Insurance Co., which issued a commercial general liability policy to Carolina's, denied coverage, citing the policy's "absolute" pollution exclusion.

The exclusion precluded coverage for bodily injury arising from the "discharge, dispersal, seepage, migration, release or escape of pollutants" and defined "pollutants" as an "irritant or contaminant," including vapor and fumes.

NGM filed a declaratory judgment action in the U.S. District Court for the District of South Carolina against the painting contractor and the postal employees who brought the suit. The insurer argued that paint fumes clearly equate to "pollutants" under the exclusion.

Judge Norton noted a split among the nation's courts as to the scope of what is known in the industry as the "absolute" or "total" pollution exclusion.

Some courts have held that the exclusion is limited to incidents of "traditional" environmental pollution, while others have applied the exclusion broadly to bar coverage for damages caused by the release of such substances as fumes from paint, glue or roofing products.

Judge Norton concluded that the exclusion in the painting contractor's policy is subject to "more than one reasonable interpretation." Thus, he said, the exclusion is ambiguous and, under South Carolina law, he is required to construe any ambiguities in an insurance contract in favor of the insured.

Consequently, the judge denied the insurer's motion for summary judgment and granted summary judgment to the contractor and postal employees.

Class Actions

Missouri Property Owners Say Pipe Leaks Contaminated Property

Henke v. ARCO Midcon

Note: The following appeared in the February 3, 2010, Andrews Environmental Litigation Reporter, 30 No. 14 Andrews Envtl. Litig. Rep. 7. Copyright © 2010 Thomson Reuters.

Two Missouri residents have filed a class action filed January 15, alleging that underground pipelines that cross their property leaked hundreds, "if not thousands," of times. *Henke et al. v. ARCO Midcon LLC et al.*, No. 10-00086, *complaint filed* (E.D. Mo. Jan. 15, 2010).

Plaintiffs Glen Henke and Linda Kluner sued defendants ARCO Midcon LLC, Magellan Pipeline Co. and Wiltel Communications LLC in the U.S. District Court for the Eastern District of Missouri.

According to the complaint, filed January 15, the pipeline is made of cast iron and was used to transport gasoline products from the early 1960s until the early 1990s. It is currently used for telecommunications cables.

The pipeline was located on an easement under the property.

Oil products, including benzene, leaked from the pipeline, contaminating the properties of the named plaintiffs and purported class members.

Wiltel currently owns the pipeline and easement, according to the suit.

The defendants owed the class members a duty to stop any leaks or migrations from the pipeline, clean up the contaminants and repair the leaks, the plaintiffs say.

Missouri's Department of Environmental Resources told residents that a property adjacent to the named plaintiffs that their drinking water well and portions of their land were contaminated with several petroleum compounds, including benzene. The source of the contamination was the pipeline, the complaint says.

Additionally, readings from a test well on the plaintiffs' property shows benzene concentration levels are higher than levels deemed acceptable by the Environmental Protection Agency, the suit says.

The complaint asserts claims of nuisance, trespass, negligence, strict liability, and breach of contract.

The plaintiffs are seeking compensatory, consequential, incidental and punitive damages, as well as medical monitoring.

Attorneys:

Plaintiffs: John Simon, Erich Vieth and John Campbell of the Simon Law Firm, St. Louis; Robert Schultz of Schultz & Associates, St. Louis, MO.