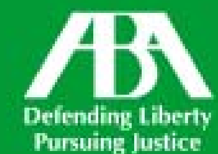

Environmental Enforcement and Crimes Committee Newsletter

Vol. 9, No. 1 November 2007

BATTLE GROUND FLORIDA: THINGS HEAT UP AS THE FLORIDA LEGISLATURE BRACES FOR THE DEBATE OVER GREENHOUSE GAS EMISSIONS

Teri L. Donaldson
Brian J. Cross
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Introduction

Over the past seven years the debate over global warming and the contribution of greenhouse gas (GHG) emissions has picked up steam as state after state pledges to cut their emissions. But pledges, or targets as they are commonly called, should not be confused with actual and enforceable caps on GHG emissions. Targets may be aspirational—great political fodder and certainly a powerful signal that potential legislation may follow—but arguably not enforceable absent express state legislation setting GHG emission caps. Only one state, California, has passed legislation mandating a specific statewide cap on GHG emissions.

In the last 90 days, Florida's governor, Charlie Crist, has taken center stage by setting aggressive GHG reduction targets in a series of executive orders, and by directing state agencies to initiate rulemaking based on existing statutory authority. Fla. Exec. Or. 07-127 (July 13, 2007) (available at http://www.flgov.com/orders_search). Gov. Christ has also established an advisory body to quickly recommend legislative action. Fla. Exec. Or. 07-128 (July 13, 2007) (available at http://www.flgov.com/orders_search). The recommendations of the advisory board will almost certainly include enforceable caps on GHG emissions.

Florida's 2008 legislative session may expereince the perfect storm. In a state burdened by shrinking revenues and budget woes caused by declines in the real estate market, property tax roll backs, and hurricane-related insurance issues, the Florida legislature will very likely be asked to cap GHG emissions to 2000 levels by the 2017, to 1990 levels by 2025, and to 80 percent of 1990 levels by 2050, as set forth in one of the executive orders. Fla. Exec. Or. 07-128.

Florida certainly presents a challenge to such a dramatic gubernatorial initiative. How can the dramatic reductions envisioned by Gov. Crist be accomplished in such a fast growing state? Florida's electricity usage is expected to rise by 33 percent by 2016. *Id.* According to utility insiders, such reductions are simply impossible. Florida also has an independent and conservative legislature. Furthermore, Florida has a very restrictive Administrative Procedures Act which gives executive agencies such as the Department of Environmental Protection (DEP) little room to maneuver without express legislative authority. Section 120.536(1), FLA. STAT. In short, it is not likely that the governor can force such dramatic reductions without the support of the legislature.

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Vol. 9, No. 1, November 2007
Teri L. Donaldson, Editor

In this issue:

Battle Ground Florida: Things Heat Up as the Florida Legislature Braces for the Debate Over Greenhouse Gas Emissions
Teri L. Donaldson and Brian J. Cross 1

The Continuing Fight Over the Continuing Violation: Another Battle at Bull Run
Carrick Brooke-Davidson 5

Prospective Purchasers Should Expand Due Diligence in the Wake of the *National Parks* Decision
Douglas A. McWilliams and John D. Lazzaretti 7

Regional Reports: 10
Region 1 *David Erickson and James Neet* .. 10
Region 2 *Kevin C. Murphy* 11
Region 3 *Bruce Pasfield* 12
Region 4 *Teri L. Donaldson* 12
Region 6 *Brian Collins* 14
Region 7 *David Erickson and James Neet* .. 15
Region 8 *Maki Iatridis* 16
Region 9 *Eric L. Hiser and Matthew Joy* 16
Region 10 *Michelle U. Rosenthal* 18

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State Wide Targets

There are currently twenty-one states that have established statewide targets to reduce GHG emissions. Beginning in August 2001, Connecticut, Massachusetts, Maine, New Hampshire, Rhode Island, and Vermont signed onto The Climate Change Action Plan. Climate Change Action Plan 2001, Prepared by The Committee on the Environment and the Northeast International Committee on Energy of the Conference of New England Governors and Eastern Canadian Premiers. By doing so, these states pledge to reduce their statewide GHG emissions. The next year New York established statewide GHG emission targets. 2002 State Energy Plan and Final Environmental Impact Statement (available at http://www.negc.org/documents/NEG-ECP%20CCAP.PDF). In 2005, California and New Mexico followed suit. Cal. Exec. Or. S-3-05 (June 1, 2005); N.M. Exec. Or. 05-033 (June 9, 2005). In 2006, Arizona took a similar pledge. Ariz. Exec. Or. 2006-13 (Sept. 7, 2006). And finally this year, Florida, Hawaii, Illinois, Minnesota, New Jersey, Oregon, and Washington have all joined the list of states to set targets for GHG emissions reductions. Fla. Exec. Or. 07-127 (July 13, 2007); Hawaii Act 234 (2007); Gov. Blagovich sets goal to dramatically reduce GHG emissions in Illinois (Feb. 13, 2007) (available at http://illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=2&RecNum=5715); Next Generation Energy Act of 2007, 2007 Minn. Sess. Law 136; N.J. Exec. Or. No. 54 (Feb. 13, 2007); Or. HB 235 (Aug. 6, 2007); Wash. SB 6001 (May 3, 2007).

Currently, the situation in the states is as indicated in Figure 1. Interestingly, only seven of these states have enacted legislation establishing these GHG emission targets. Of the five states to sign on to the Climate Change Action Plan, only Maine has adopted legislation commemorating its targets. The governors of Arizona, Florida, and New Mexico have issued executive orders but these states have not adopted legislation. It will be interesting to see whether these different states adopt legislation or other regulations to establish caps and enforce the levels of reductions they have targeted. Florida's governor clearly intends that the Florida legislature will to do exactly that, and soon.

States	State Wide Targets		
Arizona		2000 levels by 2020	50% below 2000 levels by 2040
California	2000 levels by 2010	1990 levels by 2020	80% below 1990 levels by 2050
Connecticut	1990 levels by 2010	10% below 1990 levels by 2020	75-85% below 2001 levels in long term
Florida	2000 levels by 2017	1990 levels by 2025	80% below 1990 levels by 2050
Hawaii		1990 levels by 2020	
Illinois		1990 levels by 2020	60% below 1990 levels by 2050
Massachusetts	1990 levels by 2010	10% below 1990 levels by 2020	75-85% below 2001 levels in long term
Maine	1990 levels by 2010	10% below 1990 levels by 2020	75-80% below 2003 levels in long term
Minnesota	15% below 2005 levels by 2015	30% below 2005 levels by 2025	80% below 2005 levels by 2050
New Hampshire	1990 levels by 2010	10% below 1990 levels by 2020	75-85% below 2001 levels in long term
New Jersey		1990 levels by 2020	80% below 2006 levels by 2050
New Mexico	2000 levels by 2012	10% below 2000 levels by 2020	75% below 2000 levels by 2050
New York	5% below 1990 levels by 2010	10% below 1990 levels by 2020	
Oregon	stop growth of emissions by 2010	10% below 1990 levels 2020	75% below 1990 levels by 2050
Rhode Island	1990 levels by 2010	10% below 1990 levels by 2020	75-85% below 2001 levels in long term
Vermont	1990 levels by 2010	10% below 1990 levels by 2020	75-85% below 2001 levels in long term
Washington	1990 levels by 2020	25% below 1990 levels by 2035	50% below 1990 levels by 2050

Figure 1.

State Wide Caps

Only one state, California, has established by legislation statewide caps on GHG emissions. In September 2006, the California legislature established the first statewide regulatory program to mandate an economy-wide cap on GHG emissions. California Global Warming Solutions Act of 2006 (AB 32). The legislation, known as AB 32, establishes a greenhouse emissions cap for 2020 based on 1990 emission levels. California's Air Resources Board has until Jan. 1, 2008 to determine what the 1990 emissions level is and establish that level as the state limit for the year 2020. *Id.*

The situation in Florida is different. The Florida DEP currently estimates that the governor's executive orders compel a 6 percent reduction in GHG emissions below 2004 emission levels by 2017, a 30 percent reduction below 2004 levels by 2025, and an 86 percent reduction below 2004 levels by 2050. Electric Utility Greenhouse Gas Reduction Program, Florida DEP—Division of Air Presentation (August 22, 2007) (available at http://www.dep.state.fl.us/ Air/rules/

specialprojects/global_chng/electric.htm). Both the Florida DEP and the Florida Public Service Commission have already initiated the processes that will result in action implementing these requirements. While Florida has yet to adopt any laws mandating that utilities or any other sources of GHG emissions meet emission caps, Florida's DEP has recently published notice and conducted its first workshop where it announced that it intends to promulgate regulations adopting the provisions set forth in the governor's executive orders. 33 Fla. Admin. Weekly at 3302 (July 27, 2007).

So far, DEP has indicated that it will adopt these new regulations under the authority of **existing** state law. This presents an interesting legal question of administrative law under the Florida Administrative Procedures Act. It is arguable whether the Florida legislature's existing general grants of authority to DEP to protect the air and water will be enough to sustain this rulemaking effort. There is considerable authority in Florida suggesting that such general grants of authority may not be the basis for such specific rulemaking as would be required to establish caps on GHG emissions. *Dept. of Bus. And Professional Regulation v. Calder Race Course, Inc.*, 724 So. 2d 100 (Fla. 1st DCA 1998) (general grant of rulemaking authority, while necessary, was not sufficient to validate proposed rule, a specific law to be implemented was also required); *State, Bd. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696 (Fla. 1st DCA 2001). Such issues are decided on appeal by the courts, although some deference is given to a state agency's interpretation of its statutes and adopted rules. *State Contracting & Engineering Corp. v. Dept. of Transp.*, 709 So. 2d 607 (Fla. 1st DCA 1998).

Conclusion

The legal issue of DEP's administrative authority may disappear if the 2008 Florida legislature enacts legislation that more clearly sets out Florida DEP's rulemaking authority to adopt and enforce the GHG emissions caps described in the governor's executive orders. Such legislation, however, may be hard to come by given industry assertions that such ambitious targets are economically unattainable and would create a heavy financial burden on Florida's citizens.

The second possible outcome is that if new legislation is not passed, and the issue of Florida DEP's administrative authority under the Florida Administrative Procedures Act is successfully raised to challenge any new rules purporting to establish GHG emission caps in Florida, then such rules may be invalidated. The third possible outcome is that such rules may be found to be within the existing administrative authority of the Florida DEP, in which case the rules may be upheld, in whole or in part.

The fourth and perhaps most likely outcome is that the Florida legislature will craft its own solution in the 2008 legislative session. Advocates on all sides of the issues are preparing for a rigorous debate in the 2008 legislative session. During this debate, consensus may or may not emerge and result in the passage of legislation. Even if consensus emerges, however, the prospect of a veto looms. The Florida legislature will be mindful of the fact that Gov. Crist vetoed the legislature's 2007 Energy Bill. In his letter explaining that veto, Gov. Crist mentioned GHG emissions and concluded that, "We can do better."

Meanwhile, if the Florida DEP stays the course, rules will be adopted with or without new legislation on the books. These rules will almost certainly be challenged. For this reason, the most significant Florida forum to watch may well be the courts.

Environmental Enforcement and Crimes Committee List Serve

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THE CONTINUING FIGHT OVER THE CONTINUING VIOLATION: ANOTHER BATTLE AT BULL RUN

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This spring another battle at Bull Run was waged in the U.S. Court of Appeals for the Sixth Circuit. *National Parks Conservation Association, Inc. v. Tennessee Valley Authority,* 480 F.3d 410 (6th Cir. 2007). This battle, unlike its historic predecessors, involved the application of the "continuing violation" doctrine to a limitations defense in a Clean Air Act (CAA) enforcement action. The Sixth Circuit found that the enforcement action could proceed and was not time-barred. This is an important decision with ramifications for all enforcement actions, not just the CAA.

Framing Issue—The Five Year Statute Of Limitations

Federal law provides for a five-year statute of limitations for an action for civil penalties. 28 U.S.C. § 2462. This five-year limitation applies to actions under the CAA (and other environmental statutes which do not have statute specific-limitations) seeking imposition of civil penalties. *See United States v. Murphy Oil USA, Inc.,* 143 F. Supp. 2d 1054 (W.D. Wis. 2001).

The issue confronting the Sixth Circuit was whether this five-year limitation period applied to CAA civil penalty claims based on failure to obtain proper pre-construction permits under the Prevention of Significant Deterioration (PSD) provisions of the CAA, when the unpermitted construction complained of occurred more than five years before the action was commenced.

The Bull Run Battle

The Tennessee Valley Authority (TVA) overhauled its Bull Run power plant in 1988. TVA did not obtain pre-construction permits and the Bull Run plant has continued to operate since the overhaul. The Environmental Protection Agency (EPA) determined that the overhaul triggered the PSD pre-construction permitting requirements, as well as the requirements to employ Best Available Control Technology (BACT) to control emissions from the modified plant. *See TVA v. Whitman*, 336 F.3d 1236, 1244 (11th Cir. 2003). (The constitutional issues presented by this decision are analyzed in the Vol. 8, No. 2, February 2007, <u>Environmental Enforcement and Crimes Committee Newsletter</u>, "Fallout from *TVA v. Whitman*: When Do EPA Orders Deny Due Process?")

Due to concerns about its ability to bring a court action against TVA, EPA declined to pursue an enforcement action. Consequently, several environmental groups took up the Bull Run battle, filing a complaint in the U.S. District Court for the Eastern District of Tennessee on Feb. 13, 2001. TVA successfully argued to the district court that the action was time barred by 28 U.S.C. § 2462. *National Parks Construction Association, Inc. v. TVA,* No. 3:01-CV-71, 2005 WL 5165704 (E.D. Tenn. Mar. 11, 2005). The court reasoned that failure to obtain a permit was a one-time violation, and an action for failure to obtain a permit was time-barred by 28 U.S.C. § 2462 if brought more than five years after the construction commenced.

The district court in *National Parks* was in good company, as several district courts around the nation had made similar rulings. *See NPCA v. TVA*, No. CV-01-0403-VEH (N.D. Ala. Nov. 22, 2005); *New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650 (W.D.N.Y. 2003); *United States v. Ill. Power Co.*, 245 F. Supp. 2d 951, 957 (S.D. Ill. 2003) ("[T]hese provisions cannot reasonably be construed to mean that building or altering a machine without a permit is a violation that continues as long as the machine exists or is operated."); *United States v. S. Ind. Gas & Elec. Co.*, No. IP 99-1692-C-M/F, 2002 WL 1760752, at 5 (S.D. Ind. July 26, 2002) (SIGECO) (violation "does not continue on past the date when construction is completed"), adhered to in *United States v. Cinergy Corp.*, 397 F. Supp. 2d 1025, 1030 (S.D. Ind. 2005); *United States v. Westvaco Corp.*, 144 F. Supp. 2d 439, 443 (D. Md. 2001) ("preconstruction permit violations occur only at the time of the construction or modification of the emitting facility"); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1084 (W.D. Wis. 2001)

(statute of limitations "begins to run at the time of construction and does not continue through the operational life of the modified source"); *United States v. Coastal Lumber Co.*, Case No. 4:01-cv238-SPM (N.D. Fla. Dec. 23, 2001) (rejecting continuing violation doctrine); *United States v. Brotech Corp.*, No. Civ. A. 00-2428, 2000 WL 1368023, at 2 (E.D. Pa. Sept. 19, 2000) (same); *United States v. Campbell Soup Co.*, No. CIV-S-95-1854 DFL, 1997 WL 258894, at 2 (E.D. Cal. Mar. 11, 1997) ("[T]he regulation cannot reasonably be construed to mean that building or altering a machine without a permit is a violation that continues as long as the machine still exists or is operated.").

The Court of Appeals Reverses

The plaintiffs appealed this ruling to the Sixth Circuit. The Sixth Circuit analyzed the "continuing violation doctrine," and decided that it need not apply the doctrine in overruling the district court. Instead, the court determined that TVA had committed a series of "discrete violations" and these violations occurred within the five-year limitation period. *National Parks* 180 F.3d at 417.

The violations found by the Sixth Circuit were twofold. First, the Sixth Circuit determined that the requirement to apply BACT was an on-going obligation, and everyday that the plant operated without the use of BACT, commencing five years prior to the complaint was filed, i.e., Feb. 13, 2001, was actionable. *Id.* at 418-19. Secondly, and in similar fashion, the court held that the requirement to obtain a construction permit continued after construction. Like the BACT requirement, each day of operation after Feb. 13, 1996 subjects TVA to civil penalty liability. *Id.* at 419. The court was not troubled by the numerous district court cases to the contrary; in fact, they were not even discussed.

Immediate Fallout

Shortly after the Sixth Circuit decision, the United States prevailed in a case presenting the identical issue addressed by the Sixth Circuit in the *National Parks* case. In *United States v. East Kentucky Power Cooperative*, No. 04-34-KSF, 2007 WL 954753 (E.D. Ky. Mar. 27, 2007), the district court, following the *National Parks* decision, granted summary judgment for the United States on a statute of limitations defense. The court rejected the defendants attempts to distinguish the Kentucky regulations from the Tennessee regulations, holding that the *National Parks* holding applied despite the different wording of the two state regulations.

The portent of the *National Parks* decision is significant. It is a clear pronouncement by an appellate court disallowing a defense that, as demonstrated by the district court case cited above, was successfully asserted in numerous cases by CAA defendants. The limitation defense in the context of enforcement actions for failure to obtain pre-construction permits may have limited vitality after the *National Parks* decision, and practitioners should be aware of the ramifications of the decision, not only in CAA actions, but in any case in which the five-year limitations may apply to on-going conduct.

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Section members are now able to view the newsletter *Trends* in .pdf format in the Section Members Only portion of the Section Web site. Issues dating back to September/October 2006 are archived. As a member of the Section, you have access to view *Trends* after logging onto the Web site with your ABA Member ID number and password.

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PROSPECTIVE PURCHASERS SHOULD EXPAND DUE DILIGENCE IN THE WAKE OF THE *NATIONAL PARKS* DECISION

Douglas A. McWilliams
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When a purchaser buys equipment that is subject to a Title V Clean Air Act Operating Permit, the permit provides a convenient environmental due diligence outline because it is meant to contain all of the applicable air quality requirements. One notable obligation that may not be included in the Title V Permit, however, is the requirement arising from an erroneous determination that a physical or operational change made did not trigger New Source Review (NSR) permitting, either in the form of a Prevention of Significant Deterioration (PSD) permit in an attainment area, or an NSR permit in a non-attainment area. These determinations are made routinely at major stationary sources without any correspondence with a regulatory agency, and often without detailed records of the internal emission evaluation supporting the applicability determination. Even seemingly appropriate non-applicability determinations sanctioned by a state permit have generated liability in this changing area of law as courts narrow the scope of NSR exceptions. These are hidden risks that, if not identified and allocated properly in the transaction, can generate expensive obligations for the buyer to install new state-of-the-art emission controls above and beyond the applicable requirements identified in the Title V Permit.

Up until recently, prospective purchasers could focus NSR due diligence on the emission units that lacked up-to-date control technology. As a practical matter, regulatory agencies would not pursue NSR enforcement actions unless the injunctive relief was expected to generate significant emission reductions. Civil penalties were more difficult to win in NSR cases, particularly against a new purchaser who was not involved in the failure to obtain the NSR permit. Moreover, courts applied the 5-year statute of limitations to actions for civil penalties, which eliminated penalties from consideration for many of the older NSR applicability determinations. A recent court decision in the 6th Circuit has altered this calculus by holding that the violation for failing to obtain an NSR permit recurs each operating day. The opportunity to pursue significant civil penalties for recurring violations associated with old decisions may increase the number of NSR applicability determinations that are at risk of enforcement actions. Further, since the court's analysis could apply to anyone operating the emission unit, prospective purchasers should expand the scope of their NSR due diligence to address this expanded risk.

The *National Parks* Decision

In *National Parks Conservation Assoc., Inc. v. Tennessee Valley Authority*, 480 F.3d 410 (6th Cir. 2007), the Tennessee Valley Authority (TVA) performed a "major overhaul" of its boilers, replacing over one quarter of their tubing in 1988. TVA considered the project exempt from attainment area NSR (PSD) permitting as a routine maintenance, repair and replacement project and did not seek a PSD permit before the overhaul. EPA later notified TVA that it considered this maintenance a major modification that triggered Tennessee's PSD provisions. While the Environmental Protection Agency (EPA) pursued the matter administratively, two interest groups, National Parks Conservation Association and Sierra Club (later joined by Our Children's Earth Foundation) pursued enforcement via a Clean Air Act citizen suit in 2001.

TVA raised the statute of limitations as one of its defenses, arguing that the violation of a requirement to obtain a construction permit ends when construction ends and, therefore, the citizen suit was filed too late. The Sixth Circuit held that under Tennessee's State Implementation Plan (SIP) rules, if TVA performed a major modification without obtaining a proper permit, it must obtain the construction permit after the fact. Similarly, if TVA had failed to install the Best Available Control Technology (BACT), which would have been required by its PSD construction permit, TVA must retrofit the modified emission unit with BACT. These obligations, the Court decided, recur every operating day with each violation of a duty triggering a new 5-year statute of limitations period.

Applying Recurring NSR Operating Obligations to New Owners

The court did not address how this obligation might apply to new owners/operators who purchase the modified, NSR-deficient emission unit. However, by creating a new violation each day the emission unit operates without a proper permit or BACT, the court has left the door wide open for subsequent courts to impose this duty on any operator, even those unrelated to the owner/operator who decided not to obtain an NSR permit. If the prior owner had properly obtained the NSR permit, BACT as defined in that permit would be an applicable requirement for the emission unit even after ownership transfers. As such, when a prior owner is found in violation of the NSR permit requirements, it must arrange with the current owner/operator for the installation of BACT and the current owner's permit will be revised to include the ongoing obligation to operate and maintain the emission unit in compliance with the BACT emissions limit. Owners will look to their contractual representations, warranties, and indemnification provisions to determine who is responsible to pay for the additional operating costs associated with BACT. *National Parks* raises the possibility that the new owner bears some direct responsibility for operating the unit without the required NSR permit and BACT in place. There are many strong reasons, however, to limit *National Parks'* recurring violation holding to situations, like the TVA facts, where the entity operating the modified unit is also the entity that failed to obtain the NSR permit.

Most obviously, new owners should not be penalized for operating without an NSR permit that they could not have obtained because they did not own the emission unit when it was modified. In *State of New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650 (W.D.N.Y. 2003), the Western District of New York, in rejecting an argument that a subsequent purchaser could be liable for its predecessor's failure to obtain a PSD permit, held "[i]t is simply counterintuitive to construe the Clean Air Act in such a way as to impose liability for failure to follow the Act's preconstruction requirements on a person for whom compliance would have been impossible." *Id.* at 669. The *Niagara Mohawk* court rejected the argument that preconstruction permit violations could be ongoing, and had held instead that the subsequent purchaser was only liable for violations of its operating permit. Under this court's analysis, if the agency wants to remedy an NSR deficiency by a prior owner, the agency must reopen the operating permit to update the purchaser's ongoing obligations.

This is like the approach advocated in Judge Batchelder's dissent in *National Parks*, where she reasoned that the failure to obtain a construction permit "constitutes a series of discrete harms and not a series of discrete violations." *National Parks*, 480 F.3d at 420 (finding the failure to install BACT to be a continuing harm arising from the single violation of the preconstruction permit requirement). Under Judge Batchelder's analysis, NSR violations are singular and occur only at the time of construction. This was in fact the clear majority position in the federal courts before the Sixth Circuit's opinion. *See, e.g. Pennsylvania v. Allegheny Energy, Inc.*, 2006 U.S. Dist. LEXIS 38377 (W.D. Penn. 2006); *New York v. Niagara Mohawk Power Corp.*, 263 F. Supp. 2d 650, 661 (W.D.N.Y. 2003). This approach ensures that the burden of the failure remains with the operator at the time the permit was avoided and does not become the burden of a subsequent purchaser who could not have obtained the proper preconstruction permit.

There are also procedural concerns with imposing duties on new owners without notice or opportunity to participate in a process for establishing a source-specific enforceable limit like BACT. The *National Parks* analysis suggests that new owners could be liable for NSR and BACT violations each day they operate the BACT-deficient emission units. The duty to hold a valid construction permit and/or apply BACT, since it recurs every day, could become the duty of a new owner on the first operating day after transfer of ownership. Civil penalties could accrue for many days (at $32,500 per day) before the new owner receives notice that his predecessor violated NSR and BACT requirements. Penalty without notice or opportunity to comply runs afoul of basic due process protections. As indicated above, operating permits may be reopened and new applicable requirements may be added but only after providing the permittee with notice and an

opportunity to comment on the agency action and, if needed, a right to judicial review of the agency's final decision. In the end, the new owner may need to install the BACT that would have been required had its predecessor obtained the proper NSR permit, but he should not be subject to civil penalties for the operating days prior to the agency issuing a revised operating permit containing those requirements.

It is also unreasonable to place the burden on prospective purchasers to discover and correct all NSR deficiencies before accepting ownership. Following the 1990 Clean Air Act Amendments, U.S. EPA directed all major stationary sources to audit their facilities and certify in the Title V Permit application that all federally applicable requirements had been included. U.S. EPA soon concluded that NSR/PSD applicability determinations did not have to be revisited when Title V Permit applications were being developed because that would put an unreasonable burden on the applicant. *See* White Paper for Streamlined Development of Part 70 Permit Applications, from Lydia N. Wegman, Deputy Director, Office of Air Quality Planning and Standards to Director, Air, Pesticides and Toxics Management Division, Regions I and IV, *et al.*, 24 (July 10, 1995). NSR applicability often turns on whether a change is "routine" or on the outcome of a complex and often counterintuitive formula for determining if the net emissions increase is significant. Given the uncertainty inherent in these determinations, it is unreasonable to expect that a prospective purchaser has constructive notice of a deficient NSR applicability determination at the time the emission unit is transferred.

The Effect of *National Parks* on NSR Due Diligence

Transferring the ownership of major air emissions sources has always benefitted from some degree of NSR due diligence. The focus of such diligence should continue to be on the physical and operational changes to emission units that do not have state-of-the-art controls, because they are more likely to be the focus of agency attention. However, in the Sixth Circuit, and perhaps elsewhere, it is now prudent to examine other physical and operational changes because the potential for recovering civil penalties may make agencies more willing to pursue NSR enforcement cases against new owners when the injunctive relief would otherwise be insufficient to justify agency action. Also, as we saw in the *National Parks* case, the action against TVA came not from an agency, but from citizen suits. Citizen suit motivations are more diverse and less predictable, which increases the risk that a flawed NSR applicability determination could become a future target for actions seeking civil penalties and/or injunctive relief.

The expanded potential risk associated with NSR deficiencies justifies additional NSR due diligence when purchasing major emission sources. Following the analysis in *National Parks*, civil penalties for NSR deficiencies could accrue each operating day (at $32,500 per day) for up to five years. The maximum civil penalty is nearly $60 million and it would theoretically apply to any operating major source that failed to obtain an NSR permit arising out of a physical or operational change occurring more than five years prior to resolution of the claim. This is in addition to the significant cost of BACT emission controls that the agency could win as injunctive relief under the prevailing statute of limitations interpretation in NSR enforcement cases prior to *National Parks.* Potential risks of this magnitude will be of interest in most transactions and should be identified and quantified as part of the NSR due diligence effort so that they can be rationally addressed and allocated among the parties to the transaction. Failure to properly identify and define this liability could be particularly onerous for assets purchased out of bankruptcy where sellers are typically unavailable to share late-discovered risks.

Conclusion

While the Sixth Circuit's *National Parks* decision opened the door for direct NSR liability when operating a newly purchased asset, this door need not remain ajar. Courts should resist extending the *National Parks* holding to new owners because: (1) they did not and could not participate in the flawed pre-construction permitting decisions of the prior owners; (2) imposing an immediate duty on the purchaser to operate with BACT controls in place

undermines procedural protections that guarantee an affected operator an opportunity to participate in the process that determines applicable limits and a right to judicial review of such determinations; and (3), as a matter of policy, imposing millions of dollars of potential liability on a new owner that cannot be adequately identified and defined prior to purchase is an unreasonable due diligence burden on the prospective purchaser that discourages investment in assets that are part of a major stationary source. Until subsequent court decisions narrow the extent of the Sixth Circuit's ruling, however, purchasers of major emission sources should expand their NSR due diligence efforts to identify potential liability and to properly allocate the risk among the parties to the transaction.

AMERICAN BAR ASSOCIATION SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

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24th Annual Water Law Conference
Feb. 21-22, 2008
San Diego

37th Annual Conference on Environmental Law
March 13-16, 2008
Keystone, Colorado

16th Section Fall Meeting
Sept. 17-21, 2008
Phoenix

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REGIONAL REPORTS

REGION 1

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Federal/Regional Developments

A federal court in New Hampshire approved a comprehensive settlement agreement with 101 potentially responsible parties which will ensure cleanup actions at the 41-acre Beede Waste Oil Superfund Site in Plaistow, New Hampshire. The agreement provides for site-wide cleanup estimated to cost approximately $48 million, payment of over $9 million for future federal and state oversight costs, and recovery of over $17 million in past response costs incurred by federal and state agencies at the site. The Beede Site is located in a residential Plaistow neighborhood that is served entirely by private drinking water supply wells. The site is contaminated primarily with waste oil that seeped into the ground from a variety of sources, including a former unlined lagoon, underground storage tanks, aboveground storage tanks, and numerous drums located throughout the property.

EPA Region 1 has agreed to a settlement with the Salem Housing Authority valued at nearly $235,000, including paying a fine and performing an environmental project, to resolve EPA allegations that the authority failed to properly notify tenants about potential lead paint concerns in housing. The Salem Housing Authority owns and managed 715 units of low-income housing scattered across Salem, Massachusetts, in twenty-three separate locations. Under the settlement, the Salem Housing Authority will pay a cash penalty of $25,000 and perform a "supplemental environmental project" valued at $209,000 to settle alleged violations of the Toxic Substances Control Act, the Residential Lead-Based Paint Hazard Reduction Act, and the federal lead paint disclosure rule.

EPA Region 1 may assess penalties of up to $107,300 against the waste removal company Capitol Waste Services, Inc. in eastern Massachusetts for excessive engine idling of its garbage trucks at the company's truck lot in Revere, Massachusetts. This action is part of an ongoing effort by EPA to reduce unnecessary idling, which wastes fuel, degrades air quality, and emits greenhouse gases that contribute to climate change. Four New England states have idling limits—Connecticut, Massachusetts, New Hampshire, and Rhode Island. EPA has authority to help enforce idling limits in Massachusetts and Connecticut.

State and Local Developments

Massachusetts

The Massachusetts Department of Environmental Protection has reached a settlement agreement with the Town of Billerica, Massachusetts, as a result of which the town will pay a $250,000 penalty and undertake additional projects for alleged violations of federal and state clean water laws and government-issued permits. The town allegedly discharged pollutants directly into the Concord River and into a tributary of the Concord River from its water treatment plant without a permit. The discharges contributed to degradation of water quality and impairment of the river habitat in the vicinity of the plant. The town also violated its discharge permit for its waste water treatment facility because it exceeded permitted effluent limits for phosphorous, fecal coliform bacteria, pH, and ammonia nitrogen. The town's discharges of phosphorous contribute to the excessive aquatic plant growth that characterizes the river system.

New Hampshire

The New Hampshire Department of Environmental Services is assessing penalties against an oil storage and distribution company with a bulk plant in Alton, New Hampshire, for allegedly failing to adequately plan for and guard against oil spills. The Irving Oil Company did not have an adequately prepared and implemented "Spill, Prevention, Control and Countermeasure" plan in place at its Alton petroleum bulk storage and distribution facility, as required by the federal Clean Water Act and federal Oil Pollution Prevention regulations. The company faces a maximum penalty of $157,500.

REGION 2

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State and Local Developments

New York State Fines Lender in Toxic Waste Matter

HSBC Bank USA (HSBC) will pay $850,000 to New York State to resolve allegations that it did not notify authorities about toxic waste located on a debtor client's property. The bank will also pay $68,000 to reimburse the state for costs incurred in the cleanup of the contaminated land.

The New York State Attorney General's Office sought civil penalties from HSBC after hazardous chemicals were discovered in February 2005 at the site of Westwood Chemical Corp. (Westwood) in Wallkill, New York.

Westwood made and sold a variety of chemicals for use in the cosmetics and water-treatment industries before HSBC seized the company's operating capital in 2004. After the bank froze Westwood's money, the factory was forced to close. Hundreds of drums of chemicals and toxic waste were left on the property.

Attorney General Andrew Cuomo said that the containers and tanks posed a substantial risk of explosion or fire and that HSBC was aware of the problem and took no action to have the chemicals removed from the property. Cuomo also said that the bank did not contact the New York State Department of Environmental Conservation (DEC) to report the threat, as required by law.

A Wallkill building inspector found the abandoned chemicals. DEC was notified of the waste and joined with the Environmental Protection Agency to remove the containers.

Cuomo said, "This settlement is groundbreaking in that it sends a strong message that lenders cannot ignore toxic cleanup laws by simply seizing a company's operating funds and leaving it without the financial ability to be in compliance with environmental laws and ensure public safety."

REGION 3

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EPA Negotiates Landmark Clean Water Act Settlement

Allegheny County Sanitary Authority (ALCOSAN) recently reached a settlement with federal, state, and county authorities in Pennsylvania agreeing to implement a comprehensive multi-year plan to significantly reduce the billions of gallons of untreated sewage discharged annually into local waterways. The settlement agreement also requires ALCOSAN to upgrade the problematic sewage systems serving Pittsburgh and eighty-two surrounding municipalities. ALCOSAN agreed to pay a $1.2 million penalty for past Clean Water Act violations and to commit $3 million to environmental projects.

The proposed consent decree was filed in district court on May 31, 2007, and awaits final court approval. The ALCOSAN settlement supplements a 2003 voluntary agreement by the eighty-three municipalities to monitor flows and implement controls to avoid sewage overflows throughout the regional sewer system. The judicial settlement along with the voluntary agreement represent one of the largest Clean Water Act settlements in terms of number of municipalities affected and extensiveness of the sewer system involved.

EPA Fines Companies for Pesticide Violations

The Environmental Protection Agency (EPA) has recently demonstrated its intent to strictly enforce the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Under FIFRA, no one may sell, distribute, or use a pesticide unless it is registered by EPA, or it meets a specific exemption as described in the regulations. Registration includes EPA's approval of the pesticide's label, which must give detailed instructions for its safe use. Recent cases FIFRA enforcement cases include:

- EPA's mid-Atlantic region recently filed a complaint alleging sale or distribution of unregistered pesticides against Ernest Clamar doing business as Interstate Products, Inc. and Ecco Industries, Inc. The companies are wholesalers of soaps and detergents based in Pennsylvania.
- Misco Products Corporation of Reading, Pennsylvania, recently agreed to pay a $55,450 fine for distribution of unregistered or misbranded pesticides. Misco manufactures cleaning and floor care products and, in settling with EPA, the company has certified that it is now in compliance.
- Chemcore Inc., an industrial cleaning and process chemicals company doing business in Virginia, agreed to pay a $3,900 penalty for a pesticide reporting violation. Chemcore has certified that they are in compliance with pesticide regulations.

REGION 4

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Federal/Regional Developments

In July, the Environmental Protection Agency (EPA) agreed to a consent decree estimated to cost more than $5.4 million for the cleanup of contaminated soil and groundwater at the Admiral Home Appliances Superfund site in Williston, South Carolina. Operations began at the site in 1966 when a freezer manufacturing plant was constructed, followed by a septic tank system company. The site is currently being operated by a soft drink vending machine manufacturer. The three defendants agreed to conduct and fund the cleanup and pay all of EPA's interim and future costs associated with the site.

The East Kentucky Power Cooperative agreed to pay $650 million and $750,000 in penalties for Clean Air Act (CAA) violations at three of its facilities. The lawsuit alleged that the company had illegally modified and increased air pollution at two of its facilities without have obtained the necessary pre-construction permits and installing proper pollution control equipment. These modifications allowed the company to increase the amount of electricity it produced and as a result emit greater amounts of air pollution. The company will be required to install state-of-the-art pollution control equipment that will result in a 50 percent reduction in emissions when fully installed.

In July, Zane H. Fennelly, a commercial fishing boat captain, was indicted by a federal grand jury for violations of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The Magnuson-Stevens Act regulates fishing activities in the waters extending from a state's seaward boundary out to 200 miles. The act provides that commercial and recreational fishing for spiny lobster is open between Aug. 6 and March 31 in the exclusive economic zone off Florida's coast. The indictment alleges the captain knowingly disposed of spiny lobster tails upon being approached by U.S. Coast Guard and Florida Fish and Wildlife Conservation officers.

A Greek-based shipping company was required to pay $1.3 million and sentenced to 30 months probation for illegally dumping bilge and wastewater into the ocean, after the Coast Guard received a tip from several crew members. International and United States law prohibits the discharge of waste oil without first being treated by an oil water separator and requires all overboard discharges be recorded in an oil record book. Under a federal statute, the court provided a monetary award to the crew members who provided the information that led to the conviction.

On July 20, E.I. Du Pont de Nemours & Co. (Du Pont) agreed to pay $4.125 million in civil penalties for alleged violations of the CAA at facilities located in Kentucky, Louisiana, Ohio, and Virginia. Du Pont also agreed to spend $66 million on air pollution controls to meet new, lower sulfur dioxide emissions standards at its Darrow, Louisiana facility. Additionally, the company agreed to either install additional air pollution controls or cease operating its facilities located in Wurtland, Kentucky; North Bend, Ohio; and Richmond, Virginia. It is estimated that the costs of these additional pollution controls will cost at least $87 million.

On Sept. 28, 2007, the Hunt Refining Co. and Hunt Southland Refining Co. agreed to pay a $400,000 civil penalty and spend more than $48.5 million for new and upgraded pollution controls at three refineries. The settlement resolves alleged violations of the CAA and is expected to reduce more than 1,250 tons of harmful emissions annually from the company's refineries in Tuscaloosa, Alabama, and Sandersville and Lumberton, Mississippi.

The agreement requires new pollution controls to be installed that will reduce annual emissions of nitrogen oxide by approximately 150 tons per year and sulfur dioxide by almost 1,100 tons per year when fully implemented. The new controls also will result in additional reductions of volatile organic compounds and particulate matter from each of the refineries. The three refineries covered by today's settlement have the capacity to produce nearly 70,000 barrels of oil per day.

In addition, Hunt will spend $475,000 on projects to benefit the community and environment. Hunt has agreed to upgrade controls to reduce volatile organic compound emissions from the wastewater systems at the Tuscaloosa refinery and will also buy emergency preparedness equipment and train mutual aid responders in Vicksburg, Mississippi, and Choctaw County, Alabama.

REGION 5: No report this issue.

REGION 6

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Federal Enforcement

In August, two city officials of Elk City, Oklahoma, were found guilty in a jury trial on charges of negligently allowing the release of asbestos. The officials used inmates from a city work center to remove asbestos from an old railroad depot in 2003. The railroad depot had been built in the early 1900's and still contained asbestos insulation. Elk City had purchased the building to renovate it and use it for city business. The city manager and a building superintendent organized the inmates for work on the building and failed to provide protective clothing and other required protective measures. As a result, the jury found that the city manager was guilty of negligent endangerment by release of a hazardous air pollutant, a violation of 42 U.S.C. § 7413(c)(5)(A). In addition to the negligent endangerment count, the Elk City building superintendent was convicted of a criminal false statement under 18 U.S.C. § 1001 for lying to Oklahoma Department of Environmental Quality investigators about the disposal of asbestos from the site. Both men were acquitted of charges of illegally disposing of hazardous asbestos.

Two oil and gas distributors in Houston, Texas, agreed to a fine of $2.8 million for dumping oil and gas into several rivers in Texas, Arkansas, and Oklahoma. The complaint alleged that TEPPCO discharged over 2500 barrels of jet fuel into the Neches River in Texas on Nov. 27, 2001; 500 barrels of unleaded gasoline into a tributary of Moro Creek in Arkansas on March 12, 2004; 2497 barrels of jet fuel in a tributary of Sabine Creek in Texas on Feb. 28, 2005; and over 800 barrels of crude oil into a tributary of the Red River in Oklahoma on May 13, 2005. In addition to the fines, TEPPCO agreed to undertake $2.6 million in pipeline upgrades and continued monitoring of the affected areas.

A federal jury in Corpus Christi, Texas, convicted CITGO Petroleum Corporation on two counts of operating two large storage tanks without proper emission controls as required by the Clean Air Act. The tanks were used as wastewater storage tanks, but oil/water separating equipment upstream of the tanks did not function properly, allowing approximately 4.5 million gallons of oil to enter the tank. Since the tanks were intended for wastewater storage, they had not been fitted with a fixed-roof ventilation system or a floating roof to prevent the emission of volatile organic compounds from the oil. The jury found that CITGO was aware that the oil/water separator was not working within two months of when the tanks went into operation. For over ten years, CITGO simply removed accumulated oil with the use of vacuum trucks. Sentencing in the case is scheduled for Oct. 18, 2007. CITGO's environmental manager was also indicted on charges relating to the operation of these tanks, but the charges against him as well as Migratory Bird Treaty Act charges against the manager and CITGO were severed for separate trial. Some of those charges have been dismissed by the government and the remaining charges are pending in the U.S. District Court for the Southern District of Texas.

State Enforcement

New Mexico's Environment Department (NMED) entered into a settlement agreement with Los Alamos National Laboratory (LANL) to resolve charges relating to chromium contamination of groundwater at the site. Operated by the U.S. Department of Energy, LANL was operating under a Hazardous Waste Facility Permit and a Consent Order which governed environmental cleanup at the lab. The charges stemmed from samples taken from groundwater monitoring wells in 2004 and 2005 which showed large increases in hexavalent chromium contamination, with concentrations up to four times the drinking water standard and eight times the state groundwater standard. LANL failed to report those results to the NMED until late 2005 in violation of the lab's Hazardous Waste Permit and the Consent Order it entered into in March 2005. In addition to the fine, LANL is required to constantly monitor groundwater analytical date, and to verbally report contamination that exceeds the drinking water standards within one business day. LANL is also required to continue to

fund the Risk Analysis, Communication, Evaluation and Reduction (RACER) project, which provides environmental data to the public concerning lab operations, including soil and groundwater monitoring.

The NMED also recently issued an environmental compliance order against Savoy Travel Center, a facility that provides fuel, shower, and restaurant services to the public. The compliance order carries potential fines of up to $257,158 for violations related to Savoy's handling of sewage effluent. The order contends that Savoy modified its sewage discharge pipes so that the sewage effluent was diverted to a stormwater impoundment. The order alleges various violations of the New Mexico Water Quality Act, including discharging wastewater without a permit, failing to report a spill, and modifying an existing sewage system without notifying the NMED. The company has until Sept. 7 to respond to the compliance order.

In Texas, following up on HB 3960, which would have abolished the Texas Commission on Environmental Quality's Compliance History program, did not pass in the 80th Legislative session. The controversial Compliance History rule requires the TCEQ to evaluate a facility's compliance history as part of its regulatory and enforcement decisions. Consequently, any changes to the program will have to be taken up in the next legislative session.

REGION 7

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Federal/Regional Developments

A federal court in St. Louis assessed penalties of $590,000 against St. Louis Developers for polluting waterways with runoff from three construction sites. J.H. Berra Construction Co. and several other defendants will adhere to a strict compliance program at future construction projects, clean up past pollution, and pay one of the largest environmental penalties of its kind in state history. Half of the penalty will go to the United States and the other half will go to the state of Missouri. In addition, the defendants will implement remedial plans for the pollution caused by the runoff and reimburse more than $52,000 to the state of Missouri and the City of Wildwood for their costs of investigation and enforcement.

EPA Region 7 assessed penalties of $146,833 for Clean Water Act violations against developers of the Wal-Mart Supercenter and shopping center on Grindstone Parkway in Columbia. The developer and contractor will plant native trees, shrubs, and grasses along the northern bank of Hinkson Creek in Columbia, and will pay the penalty for environmental harm they caused to the stream and a tributary. The administrative penalty is one of the largest for construction-related violations of the Clean Water Act ever imposed by EPA Region 7.

EPA Region 7 proposed a penalty of up to $434,260 July 24,2007, against ChemCentral in Kansas City, Missouri, for alleged violations of the federal Clean Air Act and the federal Emergency Planning and Community Right to Know Act. An explosion and fire occurred at a ChemCentral facility that was transferring "Indopol," a fuel additive used in sealants, coatings, lubricants, cling film, and adhesives. EPA's investigation found that ChemCentral violated the Clean Air Act by failing to identify chemical hazards and failing to design and maintain a safe facility. EPA also found that ChemCentral violated the Emergency Planning and Community Right to Know Act by failing to submit a chemical inventory form for Indopol to the local emergency planning committee, the state emergency response commission, and the local fire department.

State and Local Developments

Missouri

Under a consent judgment obtained by Attorney General Jay Nixon in St. Louis County Circuit Court, the owner of the Peerless Landfill in Valley Park must complete installation of a gas management system to adequately control methane and other gases migrating

from the demolition waste landfill. The waste in landfills often generates gases below the surface; these gases include methane, which is explosive in low concentrations and poses a threat if it accumulates in enclosed structures. Owner George Behnen installed a gas management system that began operating in 2001, but monitoring wells at or near the property boundary for the Peerless Landfill show that the gas is migrating from the landfill and into adjacent properties. In May 2005, the Missouri Department of Natural Resources approved a design for expanding the gas management system to improve its effectiveness, but Behnen had not installed the system.

REGION 8

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In May 2007, EPA settled with the Kerr-McGee Corporation for alleged air pollution violations at the company's natural gas production facilities in Colorado and Utah. Kerr-McGee will spend $18 million on pollution control technology. The company also will pay a $200,000 penalty and spend $250,000 on supplemental environmental projects, including identifying pollution-belching cars in Denver and repairing them or taking them off the streets. EPA says the settlement will reduce air pollution in Colorado by more than 3,000 tons.

In December 2006, the Colorado Department of Public Health and Environment resolved a significant air quality enforcement matter with CEMEX, Inc. for $1.5 million. The penalty stems from alleged permit violations at the CEMEX portland cement manufacturing plant in Lyons, Colorado. These include conditions relating to dust and opacity, as well as operating temperatures at the facility which can affect air emissions. Of the total settlement, $950,000 will be dedicated towards supplemental environmental projects to improve environmental performance at the facility or to otherwise benefit the community. The settlement also requires that a cash penalty be paid, that ambient air quality monitors be installed at the facility and imposes a moratorium on the burning of tires as a fuel source for the facility through 2007. This is one of the largest enforcement matters the Air Pollution Control Division at Colorado Department of Public Health and Environment has ever completed.

REGION 9

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Federal/Regional Developments

In a settlement with EPA Region 9, the city of San Diego will spend $1 billion dollars over the next six years to upgrade and improve its sewer system. The settlement requires San Diego to continue to make capital improvements to prevent future spills of raw sewage from San Diego's system. The settlement arises from a 2003 complaint issued by the Department of Justice. In 2000, San Diego's sewage system averaged one spill of raw sewage a day.

EPA Region 9, and Kinder Morgan, LP have reached a settlement to resolve cleanup liability under the Clean Water Act, the Oil Pollution Act, the Endangered Species Act, and California's Port-Cologne Water Quality Control Act and Oil Spill Prevention and Response Act for three spills that occurred in 2004 and 2005. Under the agreement, Kinder Morgan will pay a $3.7 million civil penalty and $1.3 million to the U.S. Fish and Wildlife Service and the California Department of Fish and Game for natural resource damages. In addition, Kinder Morgan has agreed to fund restoration projects, implement stringent oil spill prevention policies and re-designate pipelines in the eastern Sierras to apply additional precautionary measures that will minimize potential damage if future spills occur. The settlement arises out of three spills that resulted in more than 200,000 gallons of petroleum (diesel fuel, jet fuel, and gasoline) released into waters and wetlands which impacted endangered species.

In what EPA's Air Division Director for the Pacific Southwest region declared was "one of the worst

asbestos-related violations we have ever seen," EPA Region 9 filed a complaint against the city of Winslow, Arizona, a former city administrator, and a former apartment complex owner for improper asbestos removal and demolition. The city, the city administrator, and the apartment owner were responsible for demolition activities that included breaking up, collection, transport, and burning of asbestos-containing materials from an apartment complex. The apartment owner agreed to remove asbestos-containing siding and pay the city $3,000 in return for city-employed crews to demolish structures on the site. Neither the city nor the owner notified the Arizona Department of Environmental Quality of the demolition. Upon inspection, Arizona Department of Environmental Quality ordered demolition to stop. The city administrator, acting on behalf of the city, refused to comply with the stop work order. Removed asbestos was improperly disposed of in a nearby landfill and was transported to city-owned land and burned. The parties involved face at least five alleged violations of the National Emissions Standards for Hazardous Air Pollutants for asbestos.

State and Local Developments

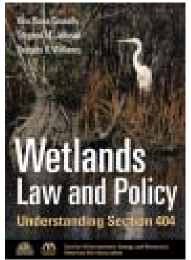
California

The California Air Resources Board collected on a $13 million settlement with Sierra Pacific Industries, to settle allegations of air quality violations at four company sites. Among the numerous allegations in the complaint, filed in 2004, were: falsification of emissions reports caused by the operator tampering with monitoring equipment, failure to report emissions exceedances, permit exceedances, and failure to operate and maintain air pollution control equipment. The settlement includes a payment of $8.5 million to compensate the agency for costs, fees, and penalties and $4.5 million for programs to benefit air quality (such as facility improvements).

Nevada

The Nevada Division of Environmental Protection, together with EPA, has entered into a $60.7 million Clean Air Act settlement with Nevada Power Company that requires the company to reduce emissions of nitrogen oxides from its Clark Generating Station. The settlement calls for a reduction of 2,300 tons of nitrogen oxides per year. EPA and Nevada Division of Environmental Protection alleged that Nevada Power violated the New Source Review provisions of the Clean Air Act by modifying combustion turbines and increasing nitrogen oxides emissions without installing appropriate emissions controls. This is the first New Source Review settlement entered into with an electric utility arising from alleged violations at a gas-fired power plant. Under the agreement, Nevada Power is to install pollution controls to reduce nitrogen oxides, pay a $300,000 fine, and fund a $400,000 environmental mitigation project.

In the first enforcement action under the state's new mercury air pollution control regulations, Nevada Division of Environmental Protection issued five Notices of Alleged Violation and an enforcement order against Queenstake Resources' Jerritt Canyon gold mine. The Notices of Alleged Violations and order involve leaks in the mine's ore processing systems that prevent particulate and mercury emissions from reaching the appropriate pollution control devices. The enforcement order requires Queenstake to take several steps to minimize risks due to potential mercury exposure to employees and reduce fugitive emissions from the systems. The steps include, among others, determining the total mercury emissions from the leaks and submitting a plan to repair all leaks and submitting a plan to install continuous opacity monitoring systems on the ore roaster.



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REGION 10

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Federal Developments

Federal Court Accepts Shipping Company's Guilty Pleas

On Aug. 22, 2007, the U.S. District Court for the District of Alaska approved a plea agreement under which Singapore-based IMC Shipping Co. Pte Ltd. entered three guilty pleas for violations of the Refuse Act and the Migratory Bird Treaty Act. IMC Shipping also agreed to pay $10 million in criminal penalties for causing the worst oil spill in Alaska since the Exxon Valdez disaster. *United States v. IMC Shipping Co. Pte Ltd*., D. Alaska, No. 3:07-cr-96, Aug. 22, 2007. The oil spill occurred on Dec. 8, 2004, when the cargo ship Selendang Ayu ran aground on the coast of Unalaska Island, broke into two pieces, and discharged more than 335,000 gallons of fuel oil and 60,000 metric tons of soybeans. As part of the plea agreement, the shipping company will remain on probation for three years, conduct an operations audit, and appoint a corporate official who will be responsible for ensuring the company's compliance with the agreement. In addition, $3 million of IMC's fines will be used to conduct a risk assessment along the shipping corridor where the ship ran aground, while another $1 million will be used to support projects in the Alaska Maritime National Wildlife Refuge. In addition to criminal penalties, IMC faces civil penalties, which federal and state officials are still calculating, and possible negligence claims.

Ninth Circuit Affirms Idaho Developer's Conviction for Clean Water Act Violations

On Aug. 3, 2007, the Ninth Circuit Court of Appeals upheld the conviction of a developer for knowingly discharging pollutants from a point source in violation of the Clean Water Act, dredging and filling a stream without a permit, and ignoring federal warnings issued by the U.S. Environmental Protection Agency and the U.S. Corps of Engineers. *United States. v. Moses,* — F.3d —, 2007 WL 2215954 (9th Cir. 2007). For more than 25 years, Charles L. Moses ignored federal warnings by rerouting, reshaping and controlling the flow of Teton Creek, a seasonal subsidiary of the Teton River. Invoking the U.S. Supreme Court's ruling in *Rapanos*, the Ninth Circuit held that intermittent streams can be "waters of the United States." *Rapanos v. United States*, 126 S. Ct. 2208 (2006). Moses, who was convicted in 2005, was sentenced in 2006 to 18 months in prison for each count, which he will serve concurrently, and to pay $9,000 in penalties.

Greek Shipping Company Fined $1 Million for Illegal Dumping Oily Waste

On June 25, 2007, Greek shipping company Calypso Marine Corp. pleaded guilty in the U.S. District Court for the Western District of Washington to illegally dumping oily waste at sea through the use of hidden pipes that were used to bypass the ship's oil water separator and pump large quantities of contaminants into the ocean while in transit. Under a plea agreement reached with the U.S. Attorney, Calypso agreed to pay $1 million in fines, $400,000 of which will be used for the restoration and protection of marine habitats in the Columbia River estuary and along the Washington and Oregon coasts. The chief engineer, who directed the illegal activity, pleaded guilty to making false statements to the U.S. Coast Guard in the ship's oil record book.

State and Local Developments

Alaska

The Alaska Office of Special Prosecutions settled with Fairweather, Marine LLC to resolve water quality and critical habitat violations as a result of sandblasting of a ship's desk during low tide that dispersed paint and sandblast grit into environmentally sensitive mudflats. Under the settlement, Fairweather Marine agreed to: pay a $12,500 fine to the Alaska Department of Fish and Game; pay $10,000 to Cook Inlet Keeper, Inc.; pay $5,000 to the Western States Project, which sponsors training programs for environmental regulators; reimburse the Alaska Department of Environmental Conservation and the Alaska Department of Fish and Game for costs associated

with the agencies' response to the incident; and accept a suspended civil fine of $50,000 that could be imposed if Fairweather commits additional violations in the next three years.

Washington

The Washington Department of Ecology (Ecology) fined U.S. Oil and Refining Co. $10,000 for a cracked pipeline that released 6,552 gallons of crude oil in 2005 at its refinery near the Blair Waterway marine terminal in Tacoma, Washington. A similar leak occurred in 2004 when a corroded fuel line discharged jet fuel that saturated the ground and precipitated a cleanup that recovered and captured more than 14,000 gallons of jet fuel. Because of the relatively high groundwater table in the area of the refinery, leaks from buried pipes have the potential of causing extensive groundwater contamination. As such, Ecology is requiring U.S. Oil to identify and inspect all buried pipelines.

Ecology imposed penalties of $76,000 against Philip Services Corp. of Kent, Washington, for improperly handling, transporting and disposing of an 18,000-pound shipment of dangerous waste from a local wood products company in 2006. The waste, which contained methyl ethyl ketone, xylene, and benzenes, was shipped to an Idaho treatment facility designed for lower risk wastes. The waste, however, was subsequently recovered and properly disposed. Philip quickly responded to the incident by implementing procedural changes to mitigate future errors.

Oregon

The Oregon Department of Environmental Quality (DEQ) issued $41,747 in fines to Bing's Restaurant of St. Helens, Oregon, for repeated, long-term sewage discharge problems caused by a deficient sewage disposal system that resulted in the release of untreated and partially treated sewage. A significant portion of the fine was based on the economic benefits that Bing's gained as a result of its failure to invest in a discharge system upgrade. DEQ also levied $3,400 against Bing's for its failure to collect monitoring data as required by its Water Pollution Control Facilities permit.

LIKE TO WRITE?

The Environmental Enforcement and Crimes Committee welcomes the participation of members who are interested in preparing this newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact one of the co-editors:

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BACK ISSUES

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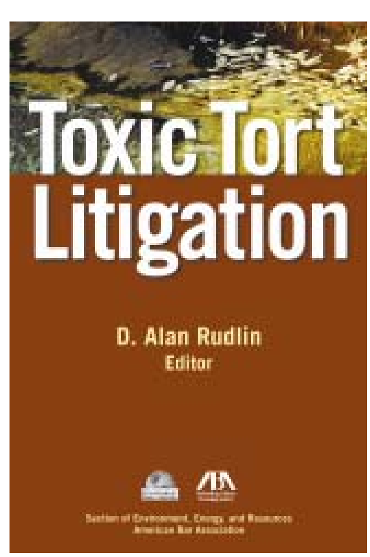
New from ABA Publishing and The Section of Environment, Energy, and Resources

Toxic Tort Litigation

D. Alan Rudlin, Editor



Trying a toxic tort case is very different from other high-stakes litigation. Cases are complex, involving large numbers of plaintiffs and defendants with multiple lawsuits brought in more than one jurisdiction, and can entail difficulties in identifying the source of the claimed harm. Toxic tort cases require innovative complex litigation procedures and heavily rely on establishing scientific concepts to resolve causation issues. **Toxic Tort Litigation** is a new, practice-focused guide that explores the specific and often unique elements that distinguish this type of litigation.

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