Environmental Laissez-Faire: How is the Department of Defense Being Held Accountable Under the Superfund Act for its Pollution?

Dana Camilleri

Interagency Regulation

Since the Supreme Court decided Heckler v. Chaney in 1985, an agency’s decision not to start an enforcement action under a statute has a presumption of unreviewability. In Heckler, the Supreme Court reasoned that, because the Food, Drug and Cosmetic Act (FDCA) gave discretion to the Food and Drug Administration (FDA) Commissioner to decide when to undertake an enforcement action, Congress did not intend to impose an enforcement obligation on the agency. Since then, Heckler has been pivotal in protecting agency decisions not to take action from judicial review.

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In Memoriam: Kathy Rae Frahm
May 14, 1967 – September 14, 2007

It is with great sadness and a profound sense of loss that we share the news of the passing of Kathy Frahm, past Chair of the Environmental Law Section of the Virginia State Bar, and a cherished friend and colleague.

Kathy, a native of Virginia, was raised in Oklahoma, and returned to Virginia after graduating from Oklahoma State University in 1989. She earned her J.D. from the Marshall-Wythe School of Law at the College of William & Mary in 1992, and began her career in service to the Commonwealth in January 1993, as a policy analyst for the former Department of Waste Management. At the time of her death, Kathy was Director of Policy for the Department of Environmental Quality, a position she had held since May 2003.

It is hard to imagine DEQ without Kathy. She impressed all who met her with the breadth of her expertise and the wisdom of her judgment. For members of the General Assembly – and for the five Governors in whose administrations she served – she was an invaluable resource. Kathy was a passionate and sincere listener, someone who worked hard to appreciate all points of view. Perhaps because of that, politicians and practitioners across the political and ideological spectra viewed her as their trusted ally within DEQ.

But most of all, Kathy is best remembered for her humility, sense of humor, and, of course, cheerfulness. It came as no surprise to learn from her family that Kathy won a smiling contest in the 2nd grade, as it was her smile that first won us over.

She is survived by her parents, Richard R. and Joyce L. Farmer Frahm of Blacksburg; her sister, Lorinda Frahm Straley; brother-in-law, D. Patrick Straley; niece and nephew, Erin L. Straley and Chapman P. Straley of Christiansburg; and by her life companion, Steven E. Frazier of Richmond. She is also survived by numerous uncles, aunts and cousins.

Caleb Jaffe
Chair
From the Editor

This is the first issue of *ELN* for this year’s editorial board. Because our primary audience is practitioners, and not academia, we make sure to summarize the most relevant cases and regulations for an attorney practicing environmental law in Virginia. We hope this issue helps inform you of the recent advancements in Virginia, the Fourth Circuit, and in the United States’ Supreme Court.

In addition, we hope that the articles address legal topics that are of particular importance to you, as practitioners. If there are any legal issues that you would like the *ELN* to address, please send those topic ideas to Christopher Colby (WLU ’08), at colbye@wlu.edu.

We would also like to thank last year’s editorial board and staff for the coordination that has made this issue come together. In particular, the outgoing Editor-in-Chief Garren Laymon has helped me immensely in this process.

Joshua Autry  
Editor-in-Chief

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Heckler is especially significant in the context of agency decisions not to undertake enforcement actions against other agencies. This article discusses the issues Heckler has created with interagency enforcement. The question is, how is the government policing itself under a system in which there are no ways of challenging agency decisions not to take action against other agencies and no significant consequences for agency misbehavior? More specifically, how are the Department of Justice (DOJ) and the Environmental Protection Agency (EPA) enforcing the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as the Superfund Act, against one of the largest polluters in the United States: the Department of Defense (DOD). The DOD is generally viewed as one of the biggest polluters in the United States, past and present. The post-Cold War environment in the 1990s and the current post-9/11 military buildup create unique and difficult problems with continued pollution and cleanup of existing sites. Without ample EPA authority or resources to inspect sites and bring enforcement actions, the DOD has not been held accountable for its massive polluting or for the steep cleanup costs.

It is very difficult to prove that an agency isn’t taking action against a particular entity. It has proven even more difficult in this area because the EPA does not offer up much enforcement information about CERCLA. However, there are many facts from which it is fair to infer that the DOD is not being held accountable for its hazardous waste as often or as fully as it should be. First, with regard to statutes other than CERCLA, the EPA states that since 1991, the level of compliance at federal facilities has declined, and the number of federal facilities not cited for violations has increased.

Additionally, 80% of all EPA inspections during the same time period were conducted at DOD sites. Of those inspected facilities, 51% were found to be in violation of at least one environmental statute. However, the number of actual cleanups and civil enforcement cases does not seem to match those percentages. In its 2003–2004 report on the state of Federal Facility Compliance, the EPA hardly mentions CERCLA. In those two fiscal years, only five remediation agreements were reached (four of which involved DOD sites). Moreover, the report states that hazardous waste compliance continues to decline at federal facilities. And when the government does commence enforcement actions against federal facilities, the penalties are comparatively lower than in the private sector. There is an emphasis on getting the federal facilities to begin cleanups right away, as opposed to imposing penalties on the transgressors.

Not only are the EPA and the DOJ insulating the DOD by declining to file enforcement actions against it, but they also avoid starting actions against parties who could have potential contribution claims against the DOD. This behavior may be leading to actual law-breaking. This article will examine the problems and issues hindering interagency CERCLA enforcement and set forth several possible solutions.

The Statute

Congress passed CERCLA and its amendments in the 1980s to address the cleanup of hazardous waste sites throughout the country. Among other things, the Act gives the executive branch the authority to require the Attorney General to take the necessary steps to clean up a polluted site if there “may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility.” Section 106 of the Act authorizes the executive to bring civil enforcement actions. These § 106 actions may be brought by the government against any potentially responsible party to seek response cleanup costs for the polluted sites and to force them to begin remediation.

CERCLA §120 waives sovereign immunity and opens federal agencies’ sites, among others, to the jurisdiction of the Act. The statute makes clear that federal facilities are to be held to the same standards as private facilities. Section 120 also outlines the protocol for dealing with polluted federal facilities. First, federal agencies must place their own polluted facilities on the Federal Agency Compliance Docket. The EPA is then charged with conducting a study of the polluted site and preparing a report called a remedial investigation and feasibility study (RI/FS), which details the level of contamination. The EPA uses the RI/FS to develop a proposed remedy, which is then made available to interested parties for comment. After the notice and comment stage, the EPA evaluates the comments and makes a decision regarding the type of remedial action to be used. This is called a record of decision (ROD) and is also made available to the public before the agency commences the remedial action. At this point, the administrative record becomes very important as courts will limit judicial review of any response action to the record and will require that the EPA have strong documentation to support its position. As part of its decision making process, the EPA has the option of adding a polluted site to the National Priorities List (NPL). The NPL contains the worst-polluted sites. Once a site is
placed on the NPL, the EPA must take immediate action to secure cleanup and can contribute Superfund monies to the remediation cost. EPA and DOJ Policies on CERCLA

Any discussion of the government’s decisions in enforcement actions under CERCLA must begin with a look at the EPA and DOJ policies on the matter. In 1989, Edward Reich, the EPA’s Acting Assistant Administrator for Enforcement and Compliance Monitoring, sent out a memo describing the criteria that should be considered before bringing § 106 enforcement actions (also known as “judicial actions”) against Potentially Responsible Parties (PRPs). PRPs are those parties that are allegedly responsible for the polluted sites, and they can include past or current owners or operators. The EPA can only consider bringing an enforcement action when either the PRPs refuse to participate in negotiations for cleanup or the negotiations fail. When this occurs with a private party, the EPA has the option either to refer the case to the DOJ for suit or to issue an Administrative Order (AO) against the PRP. In the case of a federal facility, however, because any action would be interagency action, the EPA is required to give notice to the agency defendant before taking any action. According to the Reich memo, there are eight other criteria for the EPA to consider in deciding whether to take an enforcement action. First, the PRP must have the financial means to conduct a response action. In order to ascertain this information, the EPA may issue a CERCLA § 104(e) request to gain access to the PRP’s financial records. Second, if Superfund will not cover the cleanup, this should strongly influence the government to sue. Under some circumstances, even if the government could use Superfund money to pay the cleanup costs, it may be appropriate to take civil action because of the nature of the offense. Third, the decision maker must consider the amount of proof of the PRP’s § 106 liability and there must be evidence of liability against each individual PRP being sued. There must be an examination of the PRPs’ potential defenses under § 107(b) to make sure that none of them could absolve the PRP of responsibility. Fourth, the decision-maker must conduct an endangerment or risk assessment of the site and consider the relevant case law to ensure that the § 106 requirement of evidence of imminent or substantial endangerment is satisfied. Fifth, there must be a strong administrative record of the pollution and other relevant documents to support the litigation. Sixth, there should be a specific response action that the PRPs can implement to cleanup the site. Seventh, the EPA prefers to sue as few PRPs as possible because of the complexities of the litigation process. Eighth, the polluted site should also not constitute an emergency situation. Although there is nothing in the criteria to suggest immunity for government agencies, the memo contains a disclaimer that it is not agency rulemaking and that the agency retains its discretion in enforcement decisions. If the EPA chooses to refer a case to the DOJ for civil judicial enforcement, the DOJ attorneys then review the case themselves, carefully examining the administrative record. Before filing anything in court, the DOJ gives notice to the defendant and tries to engage in negotiations. The DOJ gives priority to cases involving severe health risks or where the potentially responsible party is about to file bankruptcy. Although it gives deference to the EPA’s decision to bring an enforcement action because of the EPA’s expertise, the DOJ has the ultimate discretion of whether or not to file suit. The issue that concerns this article, however, is EPA decisions not to bring enforcement actions, and in 1996, an EPA memo specifically addressed the claim that federal agencies seem to be exempt from § 106 suits. The stated policy for federal agencies is that they will be issued notice letters and AOs as the first step for enforcement. In addition, the DOJ must concur with any EPA enforcement decision, and the EPA must document its reasons for not bringing an enforcement action against an agency in the same way that is required for non-agency PRPs. Political Issues

The George W. Bush administration’s staffing and policy changes since taking over the White House have caused major interagency enforcement setbacks. First, there are funding issues which have shifted the EPA’s focus to cost recovery actions and made it reluctant to list new hazardous waste sites on the NPL. Listing new sites on the NPL forces to EPA to either negotiate or litigate a solution, as opposed to spending their time recouping costs for cleanups that have already occurred. In addition, the EPA has undertaken fewer cleanups of hazardous waste sites under President Bush, at least in part because of funding and staff shortages. For example, after the creation of the Department of Homeland Security, many EPA investigators and other staff were reassigned to focus on Homeland Security. Whenever there is a drop in staff in any department, the functions of that department are going to suffer, and it is doubtful that the EPA is any exception.
Congressional budget cuts have also caused difficulties. In the 2003 Budget Report, Congress granted all the requested sums of money to the DOD and Homeland Security. This is not surprising information. What is interesting about this report is that the Senate expressed concern that the Superfund should be at a “level sufficient to significantly increase the number of toxic waste sites” cleaned up. The Senate Budget Committee stated that, under this budget, the Superfund program would be over 50% funded by general revenues, however, despite this statement, the Committee granted the President’s request that Superfund funding decline by $72 million. Additionally, the President requested that 1.7% of the EPA’s proposed budget go to homeland security, in addition to the $12.5 million of EPA’s 2002 budget that went to homeland security, and this was granted.

The administration’s budget requests not only fall short for EPA funding, but they are also startlingly low for the DOD’s environmental cleanup funds. There are two DOD environmental cleanup accounts to which Congress appropriates money. Of the proposed $261 billion DOD budget for FY 2000, a mere $1.7 billion was proposed to be set aside for these environmental cleanup accounts. This problem is then compounded by the fact that Congress does not give the DOD even the relatively small amounts it requests for funding for their cleanup projects. Between 1992 and 1997, Congress under-funded DOD’s cleanup budget requests by a total of $1.349 billion. Without the requisite funds to undertake the major cleanup actions necessary, the DOD would have an uphill battle cleaning up their polluted sites, even if this was a high priority.

Lack of Deterrents
Another difficulty in enforcement is the fact that there are no real deterrents for agency violators. Federal facilities fall as much as 10–15% behind the private sector in compliance with environmental laws. Unlike in the private sector, where public opinion and consumer spending can have consequences for a company, agencies and their employees are accountable to the public only indirectly. Despite case law that suggests even workers low on the hierarchical totem pole will be held accountable for environmental law-breaking, this is generally the exception to the rule. Except in rare cases, government workers do not lose their jobs over environmental issues. Moreover, the risk that an agency will lose funding for environmental violations is virtually nonexistent. In particular, Congress is not going to cut funding for the DOD because some of its sites are contaminated. National security is a constant priority, and this helps insulate the DOD from any consequences for its actions.

Complicating matters further, some courts have held that despite CERCLA’s waiver of sovereign immunity, the federal government is still immune from civil or criminal penalties arising from its actions. In Maine v. Department of Navy, the First Circuit held that the sovereign immunity waiver in CERCLA does not waive the federal government’s immunity from civil and criminal penalties or unreasonable fees. In that case, the state of Maine sued the Navy to force them to comply with CERCLA and RCRA at one of their shipyards. The State also sought to obtain civil penalties under state law for noncompliance, and state’s fees associated with the shipyard’s hazardous waste status. The Navy moved for summary judgment on the basis of sovereign immunity, but the district court denied the request finding that CERCLA effectively waived sovereign immunity. On appeal, the court looked to the part of the sovereign immunity waiver that reads: “State laws concerning removal and remedial action, including state laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States.” Finding this language to be vague as to the extent of the waiver of sovereign immunity, then-Chief Judge Breyer, writing for the majority, held that CERCLA did expose the government to liability for “reasonable fees, but not for civil or criminal penalties.

The holdings in Maine and other cases like it are unfortunate because they divest states of any power to create deterrents of their own. If the federal government is unable to police itself, states could be in a unique position to enforce environmental laws against military sites within their jurisdiction. State environmental laws that would assess additional fees on noncomplying federal facilities could have helped encourage compliance.

Interagency Power Plays
There are also interagency problems between the DOJ and the EPA. Each agency wants to have a bigger piece of the pie and feel like the “stronger” agency. The EPA feels like some of its decisions are completely disregarded by the DOJ and that they are regularly second-guessed. This does not foster interagency partnership. The DOJ also has its own personnel shortages, and these can delay the filing of enforcement lawsuits.

A related problem is that the same Deputy Attorney General oversees both the Environmental Enforcement Section and the Environmental Defense Section (EDS). The EDS defends client agencies who have
been sued for violating environmental laws. Because of the DOJ’s management structure, it is possible for lawyers in one department to litigate against lawyers in a related department, with both representing clients having directly adverse interests, and with the attorneys and their clients all belonging to the same entity: the executive branch of the U.S. government. This constitutes a fundamental conflict of interest and would never be allowed in the private sector.

The culture at the DOD compounds the interagency problem. The DOD is known for having a culture that is resistant to change, that values secrecy, and that is extremely hierarchical. In 1996, the DOD attempted to get rid of environmental oversight entirely by asking Congress to give the Secretary of Defense oversight of DOD environmental compliance, control over funds for environmental cleanup, and the enforcement power to make sure the department meets the required standards. The DOD wants to be as autonomous as possible and does not like having other agencies looking over its shoulder.

What have these policies and realities meant practically for Superfund cleanup at military sites? Because of funding limitations and understaffing, the EPA has to rely on self-reporting. To encourage self-reporting, the EPA has a policy of eliminating or reducing the civil penalties for pollution at facilities that report or correct the damage within sixty days. There is no evidence, however, that this policy has caused the DOD to report the violations at its own sites. Because the cleanup costs for sites are in the billions of dollars, it is simply not in the DOD’s best interest to report violations of CERCLA.

### Possible Solutions

The ultimate goal of the following solutions is to create true opposition to the DOD within the government. There needs to be a real adversary to the DOD which has the power to bring the military to task for its environmental law-breaking. There are two ways to try to achieve this end result: through a state solution or through a federal bureaucratic and funding solution.

The states are in a unique position in that they have the power to hold the military accountable. This is because states have a wider range of options to address federal facility environmental violations. According to one commentator, there are four advantages to state enforcement: it is effective because states are not subject to federal unitary executive doctrine when there has been a waiver of sovereign immunity, it is the least expensive way to litigate and win, it is a balance-of-powers strategy, and it forces agencies to confront funding deficiencies. Because the executive and the legislature have not taken any real action to confront this problem, state judiciaries, through litigation, can step in and force the DOD to comply with environmental laws. Judicial orders would force the DOD to request adequate funds to complete all cleanup plans.

The Virginia Avtex Superfund case is a perfect example of how this goal can be attained through state litigation. In 1997, Virginia brought a Superfund enforcement and cost recovery action against all the identified responsible parties, including the DOD and the Air Force, regarding the Avtex Fibers site in Front Royal, Virginia, which had been placed on the National Priorities List. The Office of Enforcement at the Virginia Department of Environmental Quality had conducted a thorough investigation of the site and found that the military had effectively sanctioned and ordered the pollution of farmland. Virginia was able to settle the case and recover the $1.3 million it had already spent to clean up the site. Virginia has had success with other similar cases as well.

The federal government could also provide a solution. First, the DOJ must be empowered to take on the DOD. Immunizing the DOD from responsibility for its pollution cleanup has been implicitly supported by the highest levels of the government. The President and his administration must make environmental cleanup a priority. This would need to go beyond paying lip service to the idea of being responsible. With the President’s authority behind this kind of initiative, the EPA and the DOJ would have more latitude and firepower against the historically powerful DOD. Along with this “backing,” however, the President must ask Congress for more funding for the EPA and DOJ’s Environment and Natural Resources Division so that they can hire the staff of investigators and attorneys needed to oversee and inspect the DOD’s facilities.

### Conclusion

The status quo in Superfund enforcement against the DOD is unacceptable. Under the current system, the federal government has proven that it cannot, or will not, police itself. The watchdog organizations of the EPA and the DOJ have not been given the resources or funding necessary to investigate and litigate every Superfund violation. In addition, the culture and priorities at the DOD do not lend themselves to environmental cleanup. The military has no inherent motivation to self-report nor do they want to begin cleanups that will consume billions of dollars of their budgets. Any solution must create a real adversary to
the DOD that has the power and funding to enforce the law.

2 Id. at 835.
6 Id.
7 Id. at 3-4.
9 Id. at 1.
11 Id.
12 CERCLA § 106, 42 U.S.C § 9606(a) (2000).
13 Id.
14 Id. § 9607. “Response cleanup costs” are the costs of returning the land to its original, unpolluted state.
15 Id. § 9620.
16 Id.
17 Id.
18 Id.
20 Id. at 13–14.
21 Id. at 14. “Remedial action” refers to the actual cleanup process; it is remedial because the goal is to return the land to its “pure” state.
22 Id.
24 Id. at 3.
26 Cruden, supra note 19, at 12.
27 See generally Reich, supra note 23.
28 Id. at 2.
29 Id. at 7.
31 Reich, supra note 23, at 2.
32 Id.
33 Id. at 3.
34 Id.
35 Id.
36 Id. at 4. The § 107(b) defenses are limited to acts of God, acts of war, and acts or omissions of a third parties who are not employees or agents of the defendant, and this includes [contractual relationships (what do you mean by “contractual relationships”?)
if the PRP proves that it exercised due care while handling the hazardous substance and that it took precautions against foreseeable acts or omissions.
42 U.S.C.A §9607 (b) (2000).
37 Reich, supra note 23. Case law dictates that a threatened or potential harm to the public health or environment can be considered “imminent” even if it might take years for the factors to give rise to actual danger, and the endangerment can be substantial if there is reasonable cause to believe that people will be harmed after exposure to the site if action is not taken. Cruden, supra note 19, at 14.
38 Reich, supra note 23, at 5.
39 Id.
40 Id.
41 Id. at 6.
42 Id. at 8.
43 Cruden, supra note 19, at 70.
44 Id. at 73.
45 Joel Mintz, Treading Water: A Preliminary Assessment of EPA Enforcement During the Bush II Administration, SK057 ALI-ABA 183 (2005).
46 Cruden, supra note 19, at 71.
47 Clifford, supra note 30, at 3.
48 Id.
49 Id.
50 Mintz, supra note 45, at 195.
51 Id.
52 Id.
54 Id. at 50.
55 Id. at 62.
56 Id. at 62.
57 Kelso, supra note 10, at 8.
58 Id. at 10.
59 Id.
60 Id.
61 Id.
62 May, supra note 4.
63 Sarah Stafford, Does Self-Policing Help the Environment? EPA’s Audit Policy and Hazardous Waste Compli-

65 See The White House, United States of America National Security, http://www.whitehouse.gov/infocus/nationalsecurity; see also President Bill Clinton, *Remarks on Departure for New York City and an Exchange With Reporters* (Oct. 25, 1999) (“Last February I sent to the Congress a balanced budget that maintains our fiscal discipline, pays down the debt, saves Social Security, strengthens and modernized Medicare with a prescription drug coverage, and meets our most pressing priorities—putting 100,000 teachers in the classroom, another 50,000 community police on our street, protecting the environment, and strengthening our national security”); President Bill Clinton, *Statement on Appointments to the Commission on the Roles and Capabilities of the United States Intelligence Community* (Feb. 2, 1995) (“Our objective is to strengthen U.S. intelligence, to ensure it has the management, skills, and resources needed to successfully pursue our national security interests through the next decade and beyond. It is an effort to which I attach the highest personal priority.”).

66 Maine v. Dep’t of Navy, 973 F.2d 1007 (1st Cir. 1992).

67 Id. at 1009.

68 Id.

69 Id.

70 Id. at 1010.

71 Id. at 1010–11.

72 Mintz, *supra* note 45, at 197.

73 Id.


75 Id.

76 MODEL RULES OF PROF’L CONDUCT R. 1.7.


78 Id.


80 Id.

81 See Renee Collier, *Department of Defense Affirmative Cost Recovery Against Third Parties*, 58 A.F.L. REV. 125, 125 (2006) (“Department of Defense . . . is involved in the cleanup of hundreds of past or presently-owned military facilities, many of which are on the National Priorities List, representing billions of dollars in expended and projected cleanup costs.”).

82 Kelso, *supra* note 10, at 13 n.34

83 Id. at 14.

84 Id.

85 Id.

86 Id. at 16.

87 Id. at 15.

88 Id.

89 Id.

90 Id. at 16.

91 Mintz, *supra* note 45, at 199.
Precautionary Regulation of Nanoparticle Production, Proliferation, and Disposal Within the United States
Garren R. Laymon

Introduction to Nanotechnology

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unique toxicity that cannot be explained by differences in particle size alone."24

In 2005, Science, a prominent scientific journal, published an article recommending funding for nanotoxicity research be increased from 4% of the total federal funding of nanotechnology research to 10%.25 The article warned that "commercialization of nanomaterials is rapidly overtaking efforts to study their impact on human and environmental health."26 Other scientists seeing the potential dangers of nanoparticles made similar recommendations.27 Further, EPA recently published an extensive review of the safety of nanoparticles. EPA’s research found a “paucity of data describing the toxicity of chemically defined ultrafine particles and, to an even greater extent, that of intentionally produced nanomaterials.”28 The report expressed a need for additional toxicological studies in order to assess and predict the toxicity of intentionally produced nanomaterials.29 Despite these warnings, next year only 4.1% of federal funds for nanotechnology will be applied to environmental, health, and safety implications of nanotechnology.30

Because of the potential dangers of nanoparticles, they will need to be regulated similarly to other toxic chemicals. However, current regulatory frameworks cannot effectively address the dangers of nanoparticles, and because of the lack of research into the toxicity of nanoparticles, current regulations cannot be amended to address the risks nanoparticles pose.31 To ensure the benefits of nanotechnology outweigh risks posed by nanoparticles, Congress should enact comprehensive legislation aimed directly at the production of nanoparticles.

Current Measures Promoting the Safe Manufacture and Proliferation of Nanoparticles

Existing Regulation Potentially Applicable to Nanoparticles

Regulations currently in place appear to regulate sufficiently every possible vector of danger for nanoparticles. The strengths and weaknesses of various environmental regulations currently in place have been analyzed thoroughly in several reports commissioned by the American Bar Association (ABA)32 and in Clarence Davies’ report for the Woodrow Wilson International Center for Scholars.33 Davies also reviewed the applicability of Occupational Safety and Health Act, and the Food, Drug, and Cosmetic Act to nanoparticles. This article will summarize briefly these authorities’ assessments of the applicability of existing law to nanoparticles.

The ABA report on the regulation of nanoscale materials under the Toxic Substances Control Act (TSCA) concludes that “nanomaterials include chemical substances and mixtures that EPA can regulate pursuant to TSCA.”34 The report finds that EPA has no reason to treat nanoscale substances any differently from any other potentially dangerous chemical under TSCA and the agency has full authority to regulate the introduction of nanoparticles into the environment.35 Clarence Davies, senior advisor to the Project on Emerging Nanotechnologies, agrees that TSCA is the most appropriate law currently in place to regulate nanoparticles but argues that most nanoparticles fall under one of TSCA’s regulatory exclusions and are therefore not covered by the Act.

With regard to the Clean Air Act (CAA) and the Clean Water Act (CWA), the ABA reports conclude that EPA has sufficient authority to regulate emissions from the manufacture of nanoparticles and the emission of nanoparticles themselves, but would need to amend current regulations in order to do so.36 “The technology-based parts of [CAA and CWA] would be inoperable because there is no agreement upon best available technology . . . for the removal of [nano]particles from air, water, or waste streams.”37 Additionally, before regulating a class of nanoparticles under CWA or CAA, EPA must show that the class of nanoparticles has the potential for adverse effect on human health or the environment.38 Because of these shortcomings, a significant quantity of nanoparticles may be released into the environment before EPA gathers sufficient evidence of their dangers to regulate them under CAA or CWA.

EPA has implemented an ambient air quality standard under CAA aimed specifically at particularate matter 2.5 micrometers (µm) or smaller (PM2.5 Rule), which would apply to suspended nanoparticles.39 However, in addition to the technological problems in applying this rule to nanoparticles,40 the PM2.5 rule applies only to nanoparticles that are the byproducts of manufacturing and combustion, not to intentionally manufactured nanoparticles,41 leaving a large gap in nanoparticle regulation.

The ABA’s report on the application of the Resource Conservation and Recovery Act (RCRA) to the manufacture, use, and disposal of nanoparticles also concludes that EPA has expansive authority under
RCRA to regulate nanomaterials, in the form of nanoparticulare waste. However, although RCRA can and should be applied to nanoparticulare waste from manufacturers, it cannot apply to the disposal by consumers of products that contain nanoparticles. This leaves another gap through which nanoparticles escape regulation because the majority of nanoparticulare waste will come from the disposal of products by consumers, rather than from manufacturers of nanoparticles.

The Department of Labor, according to Davies, may also have the authority under the Occupational Safety and Health Act (OSH Act) to regulate the dangers of nanoparticles in the workplace, but OSH Act suffers the same limitations as federal environmental statutes. The ability of the Department of Labor to regulate the dangers depends on its ability to measure the particles and assess the associated level of danger. Without the ability to measure quantities of airborne nanoparticles, and without any scientific basis upon which to assess the amount of danger posed by a given class of nanoparticles, it is impossible to regulate nanomaterials through OSHA. Davies adds that the Department of Labor is significantly underfunded and likely could not enforce an even greater amount of regulation than that with which it is already charged.

Finally, according to Davies, the Food and Drug Administration (FDA) has sufficient authority to regulate the use of nanoparticles with regard to the end users of foods and drugs, and there is no need for other regulation to intrude on FDA’s territory in this regard. FDA has very little control, however, over dietary supplements and cosmetics before they hit the mass market, and has no control over manufacturing dangers in the workplace of any product it regulates.

Current regulations were not designed with nanoparticles in mind and, for the most part, will not be able protect Americans from the risks they present.

**Current Proposals for Nanoparticle Regulation**

Several proposals exist for regulating the manufacture and proliferation of nanoparticles, as well as criticisms of those proposals. The following is a compilation of the most prominent proposals for nanoparticle regulation.

**Revisions to Current Regulations**

Although EPA has the authority to mend the shortcomings of TSCA regulations to better account for nanoparticles, the changes would be difficult to make. “TSCA implicitly assumes that no knowledge about a chemical means that there is no risk.” Without evidence of a chemical’s risk, EPA has no authority to regulate that chemical. TSCA requires all regulations promulgated under the Act to be “supported by substantial evidence in the rulemaking record.” Precedent suggests that, given the relative infancy of nanotoxicity research, EPA will not be able to easily obtain the evidence required to amend TSCA to account for nanoparticles.

Proposed amendments to other laws have similar shortcomings. Winning the appropriate approval for changes would be a significant challenge, and even with approval, “one still would be left with the weaknesses contained in these laws. . . . TSCA still would lack authority to require risk data. FDA still would not be able to review and regulate the ingredients of cosmetics. OSHA still would lack resources.”

**New Legislation**

Davies suggests that, given the problems with regulating nanoparticles under existing laws, new legislation aimed specifically at nanoparticles would most effectively allow for their safe control. One such proposed law would require special labeling for products containing nanoparticles, thereby allowing consumers to make informed choices regarding their use of nanoparticles. Studies show, however, that labeling does not significantly impact consumer behavior. Another proposal bans the use of nanoparticles altogether due to their theoretical ability to damage the human body. An outright ban, however, would be difficult for the government to implement because of the difficulty in defining nanoparticles. Additionally, Davies notes that “[m]ost knowledgeable observers believe that the benefits of nanotechnology will outweigh the adverse consequences, especially if steps are taken to minimize adverse effects.”

According to Davies it would be difficult to gather political support for a new law, and would be similarly difficult to acquire support for amendments to current regulations— amendments which would suffer from many inadequacies in their application to nanoparticles. Therefore, energies would be better spent promoting a new law rather than less effective amendments.

Small nanotechnology companies tend to disfavor the comprehensive regulation of nanoparticles, as suggested by Davies, because the cost of compliance can be very high, giving favor to larger companies. Greg Schmergel, CEO of a small company working with nanotubes, suggests that innovation will come
more slowly if only large companies can afford to innovate new nanomaterials. Pulling in the other direction, however, scientists continue to warn of the potential for danger presented by nanoparticles.

**Proposed Solution—A New Environmental Law**

This article proposes a law similar to TSCA that comprehensively regulates the use of nanoparticles. It builds upon Clarence Davies’ model, addressing concerns of scientists and nanotechnology businesses with a proposed enforcement mechanism and a means of aiding small nanotechnology companies in coping with the costs of compliance.

First, the law should govern all manufactured materials that, under the proposed method of manufacture, will probably contain particles smaller than 100 nm in at least one dimension. The law will also govern all products with one or more ingredients fitting this definition. This definition covers all possible nanoparticles and products using nanoparticles, but also arguably includes particles that would be unreasonably difficult to regulate, such as individual water molecules. This should be offset by a list of specific particles or classes of particles fitting this definition that the governing agency may amend as needed to add or remove particles from regulation. This method of specifying which particles will be governed as nanoparticles is less preferable to using a proper scientific definition of “nanoparticle,” but would suffice to serve as a definition of governed nanoparticles until scientists agree on nomenclature that may be used to define nanoparticles more aptly.

Next, the proposed law should ban the use or production of all covered nanoparticles by manufacturers, except in accordance with the law. The Act should provide general guidelines for safety testing procedures to be performed by the manufacturer, with the regulating agency entrusted to detail more specific guidelines. These guidelines should be very flexible, taking into account the current infancy of nanoparticle and nanotoxicology research—they must leave room for changes based on future scientific findings. The testing requirements also need to take into account that nanoparticles may pose different risks when combined with different substances. Further, the law should allow room for scientists to develop new nanoparticles, and allow for reasonable experimentation with those particles in order to determine their utility.

After the specified testing is completed, the Act should require manufacturers to submit a Sustainability Plan (SP) thoroughly describing their material or product, including proposed labeling and limitations, risks associated with the product through its entire life cycle, an explanation of why associated risks, if any, are acceptable, and safety precautions recommended during manufacture of the material or product. The SP would provide the regulating agency with information needed to determine the level of regulation required for a given product.

The approval process should be a risk-benefit analysis taking into account all possible paths of exposure. The risk-benefit analysis should include all three considerations posited by Davies:

- The manufacturer should predict likely risks of the product, and describe why they are unlikely to occur, or explain that actual damage would be minimal;
- Relatively high risks may be acceptable if the benefits clearly outweigh the risks; and
- Relatively high risks may be acceptable if the product or material is a safer alternative to another product already on the market.

Before Agency review, there will be a public comment period regarding the application of the above factors to the approval of a given SP. After comments are closed, the Agency’s review should rely heavily on the SP and comments. This places a large burden on the public to critique SP submissions but should provide for a faster and less expensive review process than if the law required the regulating agency to critique each SP with its own resources. The Act should then provide for review as needed based on new uses of an already approved product or new information calling into question the safety of an approved product and give the Agency the authority to recall a product immediately for safety reasons.

The law also should contain measures to ensure compliance with the described guidelines. For example, civil penalties should apply for companies that do not comply with the testing and reporting requirements of the law. This should be applied on a strict liability basis in order to give executives of nanotechnology companies reason to ensure their companies’ compliance with the law. Further, corporate executives should be personally civilly and criminally liable when they knowingly conceal information regarding the safety of a product.
Small nanotech companies are concerned that strict regulations on nanoparticles could be very costly, creating an unmanageable burden. In combination with developmental research costs, the financial burden of following this regulation would be so high that it essentially forces small companies to partner with larger ones for survival. Davies posits that such a result is acceptable because most start-up nanotechnology companies partner with larger companies. Legislators may, however, determine that small nanotechnology companies are crucial to the rapid pace of innovation, in which case the law should provide methods to aid safety research in small companies—perhaps through safety research training or subsidized loans.

There is a danger that testing requirements that keep innovative nanoparticles off the market until proven sufficiently safe may stifle innovation by rendering patents impotent. If long testing requirements become necessary for some products, the Act could provide an incentive for innovation, such as a patent extension or a period of exclusivity similar to that which FDCA provides for new drugs. However, this may not be necessary, because the time required for safety testing will not likely use up most of the patent period.

Conclusion

Nanoparticle research suggests that manufactured nanoparticles will provide for significant advancements in medicine, structural design, computing, and many other areas of technology. The attributes that make nanoparticles so promising, however, also make the particles potentially dangerous, with each type of nanoparticle displaying its own unique risks. The “paucity of data describing the toxicity of... intentionally produced nanomaterials” makes regulation difficult under current regulatory frameworks. But given the high theoretical dangers of nanoparticles, it would be unwise to refrain from regulating nanotechnology products until after the dangers are empirically proven because they could potentially cause a significant amount of long-term damage before their dangers are proven. The most appropriate measure to prevent severe damage to the environment and the human population is to enact legislation that hedges the dangers posed by these new potentially useful but potentially dangerous nanoparticles.

1 Speech of Erich Pica, in Public Meeting on Nanotechnology Materials in FDA Regulated Products (Oct. 10, 2006), available at http://www.fda.gov/nanotechnology/meetings/transcript.html. It seems counterintuitive that an invisible barrier could block the sun. This result is possible because the tiny particles of titanium dioxide are significantly smaller than the wavelength of visible light, but not significantly smaller than the wavelength of ultraviolet light. Because of this, the particles are “invisible” to the human eye, but opaque to the ultraviolet radiation that sunscreen is intended to block.

2 One nanometer is equal to one billionth of a meter.

3 U.S. ENVTL. PROT. AGENCY, NANOTECHNOLOGY WHITE PAPER 6 (2007), available at http://www.epa.gov/osaa/pdfs/nanotech/epa-nanotechnology-white-paper-final-february-2007.pdf. With red blood cells (RBCs) averaging 7500 nm in width, and some estimates of the size of the titanium nanoparticles used in sunscreens ranging as low as 15 nm, it may be that as many as 500 nanoparticles of titanium dioxide could fit across a single RBC. See HENRY GRAY, ANATOMY OF THE HUMAN BODY (20th ed. 1918); Speech of Pascal Delrieu, in Public Meeting on Nanotechnology Materials in FDA Regulated Products, supra note 1.


5 See U.S. ENVTL. PROT. AGENCY, supra note 3, at 13 (mentioning quantum forces’ tendency to heighten the reactivity of nanoparticles); Wilson, supra note 4, at 705.


9 U.S. ENVTL. PROT. AGENCY, supra note 3, at 59.

10 The term “nanoparticle” refers to particles that are smaller than 100 nm in at least one dimension. “Nanotechnology” is the manufacture and manipulation of these materials. See U.S. ENVTL. PROT. AGENCY, supra note 3, at 5; J. CLARENCE DAVIES, WOODROW WILSON INT’L CTR. FOR SCHOLARS, MANAGING THE EFFECTS OF NANOTECHNOLOGY 7 (2006), available at http://www.nanotechproject.org/index.php?s=file_download&id=30.

11 See SAMSUNG, SILVERCARE, at http://www.samsung.com/silvercare/index.htm (describing how the clothes washing machine that uses nanosized particles of silver to provide...
antimicrobial abilities without the use of bleach).
12 See U.S. ENVTL. PROT. AGENCY, supra note 3, at 7. Nanotubes are actually grown, similar to growing crystals.
13 See, e.g., The Royal Society of Chemistry, Buckyballs Use Antibody to Target Cancer: Carbon Footballs are Potential Drug Delivery System for Immunotherapy, 1 CHEMICAL BIOLOGY B31(2006).
17 U.S. ENVTL. PROT. AGENCY, supra note 3, at 59.
18 Eva Oberdörster, Manufactured Nanomaterials (Fullerenes, C60) Induce Oxidative Stress in the Brain of Juvenile Largemouth Bass, 112 ENVTL. HEALTH PERSPECTIVES 1058, 1061 (2004).
19 See U.S. ENVTL. PROT. AGENCY, supra note 3, at 52.
20 MagicNano, a product on the market for three days in Germany that purported to contain nanoparticulate ingredients, caused severe pulmonary problems in several users. However, upon subsequent investigation, researchers discovered that the nanoliquid in MagicNano had conglomerated into larger particles. Wilson, supra note 4, at 705.
21 See U.S. ENVTL. PROT. AGENCY, supra note 3, at 54.
22 See Wilson, supra note 4, at 707.
23 Id.
24 See U.S. ENVTL. PROT. AGENCY, supra note 3, at 54.
26 Id.
28 U.S. ENVTL. PROT. AGENCY, supra note 3, at 52.
29 Id. at 53.
33 DAVIES, supra note 10.
34 BELL ET AL., supra note 32, at 21.
35 See id.
36 See Barker et al., supra note 32, at 3; TERNES & MEADE, supra note 32, at 4.
37 See DAVIES, supra note 10, at 14–15.
38 BARKER ET AL., supra note 32, at 14.
39 EPA classifies particulate matter in the air according to its size. “Particulate matter” includes all particles less than 10 µm in diameter (PM10); “fine particulate matter” is less than 2.5 µm in diameter (PM2.5), and “ultrafine particulate matter” is less than 0.1 µm, or 100 nm, in diameter (PM0.1). Only PM2.5 are specially regulated.
40 With nanoparticles’ enhanced toxicity but negligible mass in comparison to microparticles, nanoparticles would remain unregulated if the PM2.5 Rule measured particles in terms of mass or volume. DAVIES, supra note 10, at 15. The ABA report recommends measurements of nanoparticles be quantified in terms of the number of particles but large technological advances will be required to make this possible. TERNES & MEADE, supra note 32, at 10–11.
41 U.S. ENVTL. PROT. AGENCY, supra note 3, at 52.
42 See HESTER ET AL., supra note 32, at 4–5. The authors clarify that EPA may need to alter some RCRA regulations to avoid unintended consequences. Id.
43 See DAVIES, supra note 10, at 14.
44 Id. at 12.
45 Id. at 12–13.
46 See id. at 13.
47 Id.
48 DAVIES, supra note 10, at 11 (referring to TSCA § 5(e)).
49 Id. at 11 (quoting TSCA § 19(c)(B)(i)).
50 See, e.g., Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1207 (5th Cir. 1991) (overturning EPA ban on asbestos products, partially due to inadequate analysis on the part of EPA, even though the ban was based on ten years of research). EPA has
released for public comment a paper explaining its decision to treat nano-
scale and bulk forms of the same material as identical. See U.S. ENVTL.
PROT. AGENCY, TSCA Inventory Status of Nanoscale Substances - Gen-
eral Approach at 6 (July 12, 2007), available at http://epa.gov/oppt/nano/nmsp-
inventorypaper.pdf. The period for comment ended on September 10,
2007.  
51 See id. at 17.  
52 Id.  
53 See DAVIES, supra note 10, at 18.  
54 Id. at 23. The FDA has decided to review on a case by case basis the pos-
ible benefits of special labeling for products that include nanomaterials,
but does not currently plan to require labeling for all products containing
nanomaterials. See U.S. FOOD AND
DRUG ADMINISTRATION, Nanotechnology: A Report of the U.S. Food and Drug
Administration Nanotechnology Task
Force at 34-35 (July 25, 2007), available at http://www.fda.gov/ nanotech-
55 Friends of the Earth recommends a moratorium on engineered nanomate-
rials. See GEORGIA MILLER,
NANOMATERIALS, SUNSCREENS AND
CO. (http://www.technologyreview.com/articl
e/16323/page1.  
62 See id. at http://www.technologyreview.com/articl
e/16323/page2.  
63 See DAVIES, supra note 10, at 18. Manufactured nanoparticles often vary
in size. This article does not recommend defining regulated nanoparticles
using the average size of the particles
in a manufactured substance because a
manufacturer could theoretically avoid regulation by producing particles with
an average size of 101 nm. Such a
substance would contain a substantial percentage of particles smaller than
100 nm, and nearly all the particles
would still be near 100 nm in diameter,
and therefore still potentially extremely potent.  
64 This article does still use the arbitrary
100 nm limit to define nanoparticles,
but does not recommend such a path be-
cause these other acts do not require
safety testing for the full life cycle of the
product. For example, neither FDCA
nor FIFRA require testing regarding the
safety of manufacturing workers of
covered products, and FDCA does not
require environmental testing of cov-
ered products.  
66 Davids recommends fully exempting
from nanoparticle regulation any parti-
cles that are tested for safety under
other laws, such as FDCA or the Fed-
eral Insecticide, Fungicide, and Roden-
ticide Act (FIFRA). Id. at 19. This article
does not recommend such a path be-
cause these other acts do not require
safety testing for the full life cycle of the
product.  
67 See id. at 19.  
68 Id. at 20.  
69 See id.  
70 See id.  
71 See id. at 19.  
72 The law proposed in this article
would not be the first to open corporate
executives to personal liability for ac-
tions they take on behalf of the com-
pany they work for. For example, the
Sarbanes-Oxley Act of 2002 opens
officers of corporations to similarly se-
vera personal civil and criminal liability
for misrepresenting corporate financial
statements. See 15 U.S.C. § 7241; 18
U.S.C. § 1350. In a realm such as
nanotechnology, where lives rather than
money are at stake when a corpo-
rate executive misreports the safety of a
product, personal liability seems even
more appropriate.  
73 DAVIES, supra note 10, at 21.  
74 If the government does apply civil
penalties to a corporation for noncom-
pliance, the funds could be applied to
programs for small nanotechnology
companies. More than likely, however,
the funds from civil penalties will not be
sufficient to fund this program on their
own.  
75 U.S. Food and Drug Administration,
Center for Drug Evaluation and Re-
search, Frequently Asked Questions on
the Patent Term Restoration Program,
http://www.fda.gov/cder/about/smallbiz/
patent_term.htm (last updated July 22,
2005).  
76 By way of comparison, safety testing of
new drugs usually takes less than fi-
five years. See FOOD AND DRUG
ADMINISTRATION, NEW DRUG
DEVELOPMENT TIMELINE,
77 U.S. ENVTL. PROT. AGENCY, supra
note 3, at 52.
Tax Court Strikes Down Bogus Deduction: Building Back Public Confidence in Private Land Conservation

Virginia Kelly

Introduction

C onservation easements are one of the fastest growing instruments used to protect private property for public benefit. The last survey by the non-profit Land Trust Alliance estimated that land trusts alone have protected 37 million acres across the United States. Conservation easements, which are legal devices that place restrictions on the use of land, are attractive conservation tools because they are voluntary, flexible, and offer significant tax benefits. Unfortunately, the increased profile of conservation easements has led to a few problems of abuse. One such example is found in the recent decision, Turner v. Commissioner of Internal Revenue, which also illustrates the manner in which the Internal Revenue Service and Tax Court deal with such abuse.

In Turner, the IRS had disallowed the deduction for the conservation easement donation, finding a deficiency in the income tax return of a Northern Virginia real estate developer and his wife. Turner had claimed a deduction after purporting to place a conservation easement on land he was subdividing and developing. The court found that the taxpayers did not make a valid contribution of a qualified conservation easement under I.R.C. § 170(h)(1) because Turner erected twenty-nine homes on the land, protecting nothing of conservation value. Mr. Turner’s transparently greedy actions resulted in a finding by the Court that Mr. Turner was not entitled to a deduction for the easement donation and that he was liable for the twenty percent accuracy-related penalty. The Tax Court’s seminal decision in Turner highlights the tough posture the IRS is taking in granting an income tax deduction for a conservation easement.

This article explores the federal law and tax treatment of conservation easements as interpreted in the Turner case. The court appropriately distinguished between fraudulent donations and deductions that erode public confidence and genuine easement donations which protect open space and natural resources. Turner v. Commissioner of Internal Revenue is one of the most important conservation easement cases in years and will serve as a lesson to opportunists who seek to abuse tax benefits in the future. The article also highlights Virginia’s new easement legislation and innovative tax incentive program.

Federal Estate & Income Tax Benefits

Federal law provides significant estate and income tax benefits to encourage landowners to protect land. The following is a summary of the requirements that must be met in order for a contribution to qualify as a valid conservation easement.

Three Strict Requirements

The easement must be (1) a contribution of a qualified real property interest, (2) made to a qualified organization, (3) for a valid conservation purpose. In order to meet the first requirement the conservation easement must be a contribution of a qualified real property interest in perpetuity.

Second, the conservation easement donation must be made to a “qualified organization.” Code Section 501(c)(3) lists the requirements for a qualified organization. The organization must have a commitment to protect the purposes of the donation and have the financial resources to enforce the restrictions. In practice, most qualifying organizations are land trusts and government agencies.

The third requirement dictates that the easement be used “exclusively for conservation purposes.” This language is ambiguous, and most questions about interpretation arise in this area. The test for conservation purposes determines whether one of the following purposes is present: (1) preservation of land for public outdoor recreation or education, (2) protection of natural habitat of wildlife or plants, (3) preservation of open space, or (4) preservation of historically important land or a certified historic structure.

Federal Estate Tax Benefits

Landowners may wish to leave property to their heirs, but in order to pay estate taxes they may be forced to sell land with development potential. For example, a family may wish to retain ownership of the family farm for generations to come; however, hefty estate taxes may force the family to sell the land. Placing a conservation easement on the land can provide significant reductions in estate tax due.

If a conservation easement is placed on land before the landowner passes away, it will reduce the value of the land, thereby reducing the value of the estate and the amount of estate tax due. Upon death, the decedent’s estate will be reduced by the value of the conservation easement. Also, Code Section 2031(c)
provides an additional 40% reduction in the value of the land. This exclusion is capped at $500,000, but may be used to reduce the land value even further. This reduction in estate taxes due is a real incentive for landowners to preserve land.

**Federal Income Tax Benefits**

Tax Code Section 170(a)(1) allows an income tax deduction on any charitable contribution that is made within the taxable year. Although § 170(f)(3) does not permit a deduction for a charitable gift of property consisting of less than the donor’s entire interest, § 170(f)(3)(B)(iii) provides an exception to this rule in the case of a qualified conservation easement. A donor of a conservation easement may place an easement on a portion of his or her land and receive an income tax deduction.

The Tax Code allows for an income tax deduction up to 50% of the donor’s contribution base. A donor’s contribution base is the donor’s adjusted gross income. For example, if the landowner’s adjusted gross income is $100,000, then the maximum deductible amount is $50,000. Any unused portion of a charitable deduction may be carried forward five years after the donation takes place. This income tax deduction is a significant incentive for protecting land with conservation value.

**Turner v. Commissioner of Internal Revenue**

The Tax Court’s May 2006 decision in Turner v. Commissioner of Internal Revenue held that a real estate developer’s claimed donation “did not protect open space or a historically important land area” and was not a valid conservation easement. The holding makes clear that tax benefits will be granted only to those who fulfill the specific standards of the tax law.

**Facts and History**

James Turner was a practicing attorney and was involved in the real estate business in Northern Virginia. A company in which Turner owned a majority interest, FAC Co., L.C., purchased 29.3 acres of land in a historical overlay district, 15.04 acres of which were in a floodplain. This tract of land was unique because it was the largest undeveloped portion of land near Mount Vernon. The proximity to the first president’s home and the fact that it was undeveloped made the property subject to strict zoning requirements. As zoned at the time, Turner was able to build houses on a maximum of thirty lots; if he wanted to develop more, he needed to obtain approval from the Fairfax County Board of Supervisors. Turner never obtained approval to build additional houses.

In 1999, Turner argued that he was entitled to develop up to sixty-two lots on the land. FAC Co., L.C. executed and recorded a deed conveying a conservation easement to Fairfax County, at the time of sale of the property to a developer. There was no evidence that the County accepted the easement. The deed purported to limit development to thirty residences.

To make the determination whether Turner made a donation of a qualified conservation easement, the court looked to whether he fulfilled the three-prong test, focusing on his failure to satisfy the third requirement: a valid conservation purpose. Turner failed to satisfy the conservation purposes test because the purpose of his donation was neither open space preservation nor historical preservation. (The court only looked at those two prongs of the conservation purposes test because those were the only purposes Turner claimed he was fulfilling).

Satisfaction of the open space preservation requirement requires preserving land in its natural state and creating a public benefit. Turner argued that limiting development to thirty lots instead of sixty-two created an open quality which fulfilled the open space requirement. Even if Turner had been able to build the sixty-two lots and limit development to thirty, the court found that there were still no qualifying re-
restrictions placed on the land. Simp-ly limiting the number of houses developed does not qualify as protecting open space. Moreover, the floodplain prevented residential development on half of the land.

Turner also argued that he was protecting the historic value of the land because it preserved the historic nature of the Grist Mill property. But the court found that this purpose was not fulfilled because there were no historic structures to preserve on the land. Just because the land was located near Mount Vernon did not make it independently significant as historically important land.

Holding
The Tax Court held that the taxpayer and his wife did not make a contribution of a qualified conservation easement under § 170(h)(1) of the Internal Revenue Code. The grant failed to satisfy a valid conservation purpose. In addition, because Turner knowingly violated these requirements, the court found that taxpayer and wife were liable for a 20% negligence penalty under I.R.C. § 6662.

The holding in Turner sends the message to the public that the IRS and the courts are taking aggressive steps to deter abuse and strengthen conservation easement programs. Turner is a cautionary note for taxpayers, who are increasingly pursuing conservation easement deductions. It advises these taxpayers that their primary motivation must be for public benefit. Even with Turner’s striking down of a tax deduction, however, there is growing support for the continued expansion of federal and state tax incentives for conservation easements.

Federal and State Expansion of Tax Incentives

Federal Expansion of Tax Incentives
On August 17, 2006, President Bush signed into law the Pension Protection Act of 2006. The law significantly expanded tax benefits, including allowing qualifying farmers to deduct up to 100% of their income and lengthening the carryforward basis to fifteen years. The Bill also includes reforms that affect the appraisal process and tighten rules for easements on historic buildings. Passage of this Act reflects a general consensus among a broad political spectrum that conservation easements are effective tools for protecting valuable land.

Virginia’s Conservation Easement Program
Virginia is leading the way in creating a successful conservation easement program with generous tax incentives. The state’s goal is to preserve the unique natural areas of the Commonwealth. Under the Virginia Land Conservation Incentives Act of 1999, every landowner who donates a conservation easement is entitled to a dollar-for-dollar credit against their state income tax. The credit is worth 50% of the fair market value of the land, and it is capped at $100,000 per year. If the credit is not fully used in the year of the donation, it can be carried forward for an additional five years. In 2002, Virginia enacted a law that allows for the direct sale of tax credits from one taxpayer to another. Individuals and corporations may both buy and sell conservation tax credits.

As of January 2007, the credit claimed may reach up to 40% of the fair market value of the land. Tax credit claims for easement or fee interest donations can be claimed in the year of the gift and the subsequent ten years.

Most conservation easements in the state are donated to the Virginia Outdoors Foundation (VOF). This state agency was created by the Virginia General Assembly to hold easements for the public trust. The VOF holds easements on over 400,000 acres in ninety-three local jurisdictions, illustrating how aggressive the state has been in protecting land. Virginia is pioneering the conservation easement field and has set an example across the nation of how to create an active market for trading conservation credits.

Conclusion
Conservation easements are powerful tools for encouraging landowners to protect private property. Unfortunately, a few profit-motivated taxpayers have abused the tax incentive program, and the credibility of the land trust community has been called into question. The Turner case illustrates that the IRS is actively policing abuse. Mr. Turner erected twenty-nine houses while purporting to protect $1,248,000 worth of conservation value. The Tax Court found that nothing of conservation value was protected. The Turner decision should be applauded for striking down a fraudulent donation that threatened to erode public confidence in conservation easement programs. After the decision in Turner, the state of Virginia has continued to pioneer this field and is setting an example for the nation of how to create a successful tax incentive program. Turner is one of the most important conservation easement cases in years and bolsters public confidence in private land conservation.

2 See id.


4 Id. at 300.

5 See id. at 309.

6 Id. at 317.

7 See id.

8 26 C.F.R. § 1.170A-14(a).

9 See id.

10 See id.


12 26 C.F.R. § 1.170A-14(c).

13 Id.

14 Id. § 1.170A-14(d)(2)(ii).

15 Id. § 1.170A-14(d)(3)(i).

16 Id. § 1.170A-14(d)(4)(i)(B).

17 Id. § 1.170A-14(d)(5)(i), (ii).


19 See id.

20 Id. § 2031(c).

21 Id. § 2031(c)(3).

22 Id. § 170(a)(1).

23 Id. § 170(f)(3)(B)(iii).


25 Id. § 170(b)(1)(E)(i).

26 See id. § 170(b)(1)(G).

27 Id. § 170(b)(1)(D)(ii).


30 See id.

31 See id.

32 See id.

33 See id. 300–308.

34 See id. at 308.

35 See id. at 306.

36 See id. at 308.

37 See id. at 313–316.

38 See id. at 309.

39 See id. at 309–310.

40 See id. at 307.

41 See id. at 311–317.

42 See id. at 301.

43 See id. at 317–318.

44 See id. at 312.

45 See id. at 299–301.

46 See id. at 313.

47 See id.

48 See id. at 314.

49 See id.

50 See id. at 299–301.

51 See id. at 314–315.

52 See id.

53 See id. at 316.

54 See id.

55 See id.

56 See id.

57 See id.

58 See id. at 316–321.

59 See id. at 316.


61 See id. § 1206(a)(1)(E)(ii), (iv)–(v).

62 See id. § 1213.


64 VA. CODE ANN. § 58.1–512 (2000).

65 See id.

66 See id.

67 See id.


69 See id.

70 See id.

71 See id.


73 See id.

74 See id.


76 See id. at 317.
United States Supreme Court

Case Digest

United States Supreme Court Holds Fourth Circuit’s Decision Implicitly Invalidates PSD Regulations under the Clean Air Act


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The United States (joined by intervenor Environmental Defense) brought enforcement proceedings against Duke Energy Corporation (Duke) for replacing tube assemblies in coal-fired electric generating units without permits in violation of the Prevention of Significant Deterioration (PSD) provisions of the Clean Air Act (Act). The district court granted summary judgment for Duke, because none of Duke’s projects increased “hourly rate of emissions,” and therefore, are not “major modifications” triggering PSD permit requirements. The United States Court of Appeals for the Fourth Circuit affirmed, holding that Congress’s use of identical statutory definitions of “modification” in the New Source Performance Standards (NSPS) and PSD provisions of the Act required EPA to interpret “modification” the same under their respective regulations. Justice Souter, writing for the United States Supreme Court, vacated and remanded the Fourth Circuit’s decision, reasoning that the Fourth Circuit’s attempt to conform PSD regulations to their NSPS counterparts amounted to an implicit invalidation of PSD regulations, and therefore, did not comport with the Act’s limits on judicial review of the validity of EPA regulations.

The Court first addressed whether Congress’s decision to define the term “modification” in PSD by cross-reference to the NSPS definition of “modification.” EPA regulations, however, interpret “modification” differently under NSPS and PSD. NSPS regulations require a source to use the best available pollution-limiting technology when a “modification” increases the “hourly rate of emissions” of pollutants. “PSD regulations require a permit for a modification only when it is a major one and only when it would increase the actual annual emission of a pollutant....” Environmental Defense, at *6. Because of the statutory definitional identity, the Fourth Circuit determined that EPA must interpret “modification” in terms of “hourly rate of emissions” under both regulations. Moreover, the Fourth Circuit asserted that PSD regulations are susceptible to such an interpretation.

The Court next considered whether the text of PSD supported the Fourth Circuit’s interpretation of “modification.” “On its face, the definition in PSD regulations specifies no rate at all....” Id. at *10. Because PSD regulations clearly do not define “major modification” in terms of an increase in the “hourly emissions rate,” the Court found that the Fourth Circuit’s interpretation implicitly invalidated PSD regulations. As a result, the Fourth Circuit’s holding implicated §307(b) of the Act, which provides a procedural hurdle to judicial review of the validity of a regulation. The Court vacated and remanded the Fourth Circuit’s decision for further proceedings in accordance with its opinion.

United States Supreme Court Holds that Clean Air Act Authorizes EPA to Regulate Greenhouse Gases, Finds States have Standing to Sue to Enforce

Massachusetts v. Environmental Protection Agency, No. 05-1120, 2007 WL 957332 (U.S. April 2, 2007)

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In response to the well-documented rise in global temperatures that has coincided with a significant increase in the concentration of at-
mospheric greenhouse gases, a group of nineteen private organizations filed a rulemaking petition asking the EPA to regulate greenhouse gas emissions from new motor vehicles. The EPA denied the rulemaking petition, stating that, contrary to previous EPA statements, the Clean Air Act (CAA) does not authorize the EPA to address or to redress global climate change. In addition, the EPA observed that, even if it had the authority to regulate greenhouse gases, it would not have done so at that time. The petitioners, joined by several state and local governments, sought review of the EPA’s conclusions in the U. S. Court of Appeals for the D. C. Circuit, which in a split decision upheld the EPA’s conclusions.

In a five-four decision written by Justice Stevens, the Supreme Court ruled that the petitioners had standing, that the appropriate level of review allows courts to rule on the dispute, that the CAA’s definition of an “air pollutant” is expansive, and that the EPA’s refusal to take further action based on the rulemaking petition was erroneous.

The Court stated first that sovereign states do not suffer from any of the usual shortcomings that would prevent another party from having standing. Additionally, “the harms associated with global warming are serious and well recognized.” Mass., at *15. As Massachusetts owns substantial property, it was subject to “particularized injury in its capacity as a landowner,” such that it met the requirements of standing. Id. The EPA conceded a causal connection between greenhouse gases and global warming, but averred that its decision not to regulate had only a de minimus effect on the petitioners. However, the Court rejected this argument, ruling that a small step is not by that fact immune from judicial review. Finally, the Court decided that, although the EPA could not reverse global warming, it could nonetheless slow or reduce it, and therefore petitioners sought a remedy that the EPA could provide. Based on these arguments, the Court ruled that the petitioners had standing.

While recognizing that agency decisions are accorded broad deference under the decision of Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984), the Court nevertheless drew a distinction between denial of a petition for rulemaking and an agency decision not to initiate an enforcement action. The Court decided that it could overturn the EPA’s conclusions if they were found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 42 U.S.C. 7607(d)(9).

Turning to the merits of the case, the Court had little difficulty deciding that the CAA’s language authorizes the EPA to regulate greenhouse gases. The Court declared that the CAA unambiguously gives the EPA the power to regulate greenhouse gases, noting that the CAA’s “sweeping definition” of “air pollutant” includes “any air pollution agent [that] enters the air.” Mass., at *18. In response to the EPA’s decision that it would be unwise to regulate greenhouse gases, the Court stated that this conclusion “rest[ed] on reasoning divorced from the [CAA] statutory text.” Id. at *20. The Court ruled that, once the EPA responds to a petition for rulemaking, it can avoid further action “only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.” Id. Therefore, the Court reversed the Court of Ap-

peals, and remanded to allow the EPA an opportunity to provide a reasonable explanation for refusing to regulate greenhouse gases.

Six-year Statute of Limitations for Government Contract Actions Does Not Apply to Administrative Payment Orders Assessing Royalty Underpayments on Oil and Gas Leases


Jason Barrett, Class of 2008, Washington & Lee University School of Law

Petitioner BP America Production Co.’s (BP) holds gas leases from the Federal Government which it acquired from Amoco Production Co. (Amoco). Amoco sued Respondent Burton, Assistant Secretary of the Interior, for declaratory judgment and injunction against an administrative order issued by the Department of the Interior’s Minerals Management Service (MMS) assessing gas royalty underpayments. Amoco argued, inter alia, that the payment order was barred by the 6-year statute of limitations set out in 28 U.S.C. § 2415(a). The United States District Court for the District of Columbia held that § 2415(a) did not govern the administrative order. On appeal, the Court of Appeals for the District of Columbia Circuit affirmed. The United States Supreme Court granted certiorari to resolve a conflict between that decision and the contrary holding of the United States Court of Appeals for the Tenth Circuit in OXY USA, Inc. v. Babbitt, 268 F.3d 1001, 1005 (2001) (en banc).
Justice Alito wrote the opinion of the unanimous Court and affirmed the D.C. Circuit’s decision. The Court held that the six-year statute of limitations for government contract actions was not applicable to administrative payment orders issued by MMS for the purpose of assessing gas royalty underpayments on oil and gas leases and that § 2415(a) applies only to court actions—abrogating OXY U.S.A., at 1001.

The gas leases BP acquired from Amoco, require a minimum 12.5 percent royalty payment under 30 U.S.C. § 226(b)(1)(A). Until 1996, Amoco had calculated the royalty value of the gas as it left the well. In 1996, MMS sent Amoco, and other lessees, a letter indicating that royalties should be based on the value of the gas after the gas was treated and ready for introduction into the nation's mainline pipelines. Consistent with this position, in 1997, MMS ordered Amoco to pay additional royalties for the period from January 1989 through December 1996, in order to cover the difference between the lesser value of the gas at the well, and the increased value of the treated gas. Amoco appealed this order.

The primary issue for the Court was whether the six-year statute of limitations for Government contract actions applied to MMS administrative payment orders concerning pre-September 1, 1996, production. Starting with the statutory text, the Court noted that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning. Perrin v. United States, 444 U.S. 37, 42 (1979). The Court stated that when “read in this way, the text of § 2415(a) is quite clear. The statute of limitations imposed by § 2415(a) applies when “the Government commences any ‘action for money damages’ by filing a ‘complaint’ to enforce a contract.” BP, at 643.

Citing both Black’s Law Dictionary and case law, (see Unexcelled Chemical Corp. v. United States, 345 U.S. 59, 66 (1953)), the Court noted that “the key terms in this provision—action and complaint—are ordinarily used in connection with judicial, not administrative, proceedings.” BP, at 643, 644. As a result, the Court held that administrative proceedings are not the type of “action” referred to in § 2415(a), nor is an MMS letter or payment order a “complaint” within the meaning of § 2415(a). In ruling against the petitioner, the Court was also assisted by the corollary of the rule from E.I. Du Pont De Nemours & Co. v. Davis, 44 S. Ct. 364 (1924), that a sovereign, when subjecting itself to a statute of limitation, is given the benefit of the doubt if the statute’s scope is ambiguous.

Federal Circuit Court

Secretary of Interior’s Approval of West Virginia Coal Program Amendments Vacated


Teddie Arnold, Class of 2008, Washington & Lee University School of Law

Several environmental organizations alleged the Secretary of the Interior violated the Administrative Procedure Act (APA) and the Surface Mining Control and Reclamation Act (SMCRA) when it approved amendments to West Virginia’s coal mining regulations. The U.S. District Court for the Southern District of West Virginia granted summary judgment for the plaintiffs and vacated the Secretary’s approval of the state’s amendments. The United States Court of Appeals for the Fourth Circuit affirmed. In an opinion by Circuit Judge Williams, the court held that 1) SMCRA does not preempt APA’s notice and rulemaking requirements; 2) approval of the state amendments constituted rulemaking under APA; and 3) and approval of the amendments was arbitrary and capricious.

West Virginia submitted a state program amendment to the OSM seeking to delete the term “cumulative impact” from its regulations, and insert the term “material damage.” Despite evidence that the proposed changes may weaken the program, the Secretary approved the proposal. Contrary to APA requirements, the Secretary failed to publish a written statement that explained the findings for approving the amendment.

The Fourth Circuit first held that APA notice and rulemaking procedures govern the amendment approval process. The Secretary alleged that APA standards do not apply because SMCRA provides procedures for approval of such amendments. Rejecting this argument, Judge Williams noted that APA expressly covers “agency action made reviewable by statute.” In addition, in enacting SMCRA, Congress showed no intent to preempt APA requirements. Although SMCRA only expressly requires written notice of findings for denial of proposed programs, the court found that the statute works “in concert” with APA procedures. The court then held that approval of state program amendments constitutes rulemaking. 5 U.S.C.A. §551(5) provides a broad definition of rulemaking as “formulating, amending or repealing a rule.” The Court of Appeals found that this
broad language must include rule-making related to local standards, not just a national standard.

The circuit court held that the Secretary’s approval of the amendments, which deleted the “cumulative impact” definition, was arbitrary and capricious. Williams explained that the Secretary based its decision solely on the lack of a definition in the federal regulations, rather than on the actual effect on the state’s program. This is contrary to APA procedures, which would at least require the Secretary to address the potential impact on program effectiveness. The Fourth Circuit concluded that the Secretary erred in approval of the state’s proposed amendments and affirmed the decision of the district court.

Court Finds Blanket Exemption from Safe Drinking Water Act for Apartment Housing and Denial of Same for Manufactured Housing is Supported by Rational Basis

Manufactured Hous. Inst. v. EPA, 467 F.3d 391 (4th Cir. 2006)

David Francis, Class of 2008, Washington & Lee University School of Law

A trade association representing the manufactured housing industry challenged the adequacy of notice and comment procedures for an EPA regulation. The association also contested EPA’s conclusion that categorically exempted apartment buildings were distinguishable from mobile-home parks. The association appealed to the Circuit Court of Appeals for the Fourth Circuit for a holding that EPA’s ruling was arbitrary and capricious. The court, in an opinion by Judge Widener, held there was adequate notice and EPA’s regulation was supported by a rational basis.

EPA exempted apartment buildings and other similar dwellings from regulations under Safe Water Drinking Act. The exemption allows apartment building owners to submeter water to tenants without regulation as a conservation mechanism. EPA did not authorize “the same categorical exemption for manufactured homes communities because, as a category, it could not say that the distribution system in the manufactured homes communities was free from pollution.” Manufactured Hous., at 401.

The association petitioned for review of the EPA policy as arbitrary and capricious. Petitioner argued that EPA’s interpretation of the phrase “sell water” as related to submetering was arbitrary. EPA contested the ripeness of the petition and petitioner’s standing to bring it. The court found that petitioners satisfied both requirements because they were prevented from submetering because of the exemption and the policy was binding and in effect.

Petitioner argued EPA’s ruling was a final policy, not just a “suggestion.” They argued that it departed from EPA’s proposed policy because of the distinction between large mobile home parks and apartment buildings. EPA argued that the policy had ‘no legally binding consequences,’ nor was it codified in the Code of Federal Regulations or internally characterized as a legislative rule. Id., at 399.

Court found that because “EPA’s prior interpretation existed chiefly in memorandum form, the issuance of the new policy in the Federal Register reflected a more formal agency action than anything that preceded it, and thus an equally binding one.” Id. The policy was not a “suggestion” but effective law; however, the court found that notice and comment procedures were followed.

The court noted that EPA requested comments on the distinction challenged by the association. The court further noted the final rule’s intermediate category, the subsequent distinction, was a “logical outgrowth of the notice and comments,” balancing safety with promoting water conservation. Id., at 400. The court denied the association’s petition for review having found EPA’s ruling was neither arbitrary nor capricious.

Federal District Court

The Dominican Republic Has Standing to Sue in the U.S. for Environmental Damages


Sarah Shyr, Class of 2009, Washington & Lee University School of Law

The Dominican Republic (DR) sought monetary damages from an American company, AES, which it alleged had polluted its land and water by dumping coal ash on its beaches. The Court held that: 1) DR had standing to sue in the United States (U.S.); 2) DR’s Racketeer Influenced and Corrupt Organizations Act (RICO) claims were deficient; 3) the extraterritorial application of RICO was not an issue; 4) DR law applied to this suit; 5) coal ash was not a product under DR law; and 6) the act of state doctrine did not bar DR’s claims.

DR alleged that Defendants formed a conspiracy to illegally dispose coal ash in order to avoid the costs of proper removal. The conspiracy involved government corruption including bribes and murder threats,
and Defendants acquired a permit from DR without the proper review process. The coal ash pollution harmed the environment, injured nearby residents, some of whom were hospitalized, and led to a decline in tourism. DR brought suit in the U.S. for environmental damages, economic damages arising from the decline in tourism, and to recover costs related to the hospitalization of its citizens.

Judge Lee of the District Court for the Eastern District of Virginia held that DR had standing to bring suit in the U.S. because DR was not at war with the U.S. and DR met all three traditional standing requirements. DR could show that 1) the injury was actual and concrete, 2) the injury was traceable to Defendants’ conduct, and 3) the injury was likely to be redressed by the court. However, DR had no standing for the tourism claim because the injury was not concrete enough. The healthcare claim was also deficient because injuries were suffered by specific persons. These individuals, not DR, had standing to sue.

DR failed to establish a pattern of racketeering to prevail on its RICO claim under Count One, alleging a pattern of racketeering activity, and Count Two, alleging a conspiracy. Under a RICO claim, a plaintiff had to prove a pattern of racketeering activity which required a showing of either open-ended or close-ended continuity, and relatedness. The court found, under the close-ended test, that acts extending at most over one year did not meet the minimum two year time period requirement. Because DR did not indicate in its complaint that it anticipated illegal dumping activities and bribes would occur again in the future, DR failed the open-ended test as well. In the alternative, even if DR had established a pattern of racketeering, the court found DR had failed to establish proximate cause. The injury to DR’s land was not directly caused by bribery and murder threats, but rather by the dumping itself. The court thus dismissed both counts of DR’s RICO claims and found the extraterritorial application of RICO inapplicable.

Next, the court held that the law of DR applied to its claims of nuisance, conspiracy, and aiding and abetting. Virginia choice of law provisions applied the law of the place where the injury was suffered—DR. The court then dismissed the products liability claim because both parties agreed that coal ash was not a product under DR law.

Finally, the court denied AES’s motion to dismiss because the act of state doctrine did not apply. The doctrine applied if the foreign state’s act was 1) public and 2) completed within its territory. In this case, the doctrine did not apply because a public act was not at issue. The suit turned on whether AES had damaged the beaches, not on the validity of the issuance of the permit to Defendants.

Temporary Restraining Order Against Bear Hunt in GDSNWR Denied


Sarah B. Wong, Class of 2008, Washington & Lee University School of Law

Claiming irreparable damage to the black bear population and the improper use of rulemaking procedures, two Virginia citizens and several environmental organizations sought a temporary restraining order to prevent the Department of the Interior and the U.S. Fish and Wildlife Service (FSW) from permitting a limited bear hunt in the Great Dismal Swamp National Wildlife Refuge (GDSNWR). The U.S. District Court for the Eastern District of Virginia denied the Eastern District of Virginia denied the motion, holding that 1) the plaintiffs did not show that the bear hunt would cause irreparable harm, and 2) the plaintiffs failed to establish a likelihood of prevailing on the merits of the claims.

A court grants temporary restraining orders based on four factors: 1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; 2) the likelihood of harm to the defendant if the injunction is granted; 3) the likelihood that the plaintiff will succeed on the merits; and 4) the public interest. The court must first apply a “balance of hardships” test between the plaintiff and defendant before examining the other factors. A plaintiff must show that the questions concerning the merits are “so serious, substantial, difficult and doubtful as to make them fair ground for litigation.” *Moore*, at 525. If irreparable hardship is established, a plaintiff must show that the questions concerning the merits are “so serious, substantial, difficult and doubtful as to make them fair ground for litigation.” *Id.* But if the probability of irreparable harm cannot be established, the plaintiff has the critical burden of demonstrating the likelihood of success on the merits.

Senior District Judge Morgan, writing for the court, first concluded that the plaintiffs failed to show “actual and imminent” irreparable harm. Because only two of the plaintiffs had actually visited GDSNWR and neither had ever seen a black bear, the bear hunt would not change their subsequent visits in any tangible way. Judge Morgan explained that visitors would not be vulnerable to safety concerns since the bear hunt would only occur in an isolated 20% of GDSNWR. The court also acknowledged that the public had sufficient opportunity to comment
given FSW’s extensive two month notice-and-comment period Three meetings were held during which the black bear hunt was discussed with FWS staff, and eight of the written comments received included arguments both for and against bear hunting in GDSNWR.

Second, the district court ruled that plaintiffs did not show a likelihood of success on the merits. Morgan determined FSW had complied with proper rulemaking procedures mandated by the Administrative Procedure Act. The court also accepted the scientific evidence prof- fered by expert biologists that the hunt would only have a nominal impact on the bear population. Accordingly, the district court denied the motion for a temporary restraining order.

**Virginia Supreme Court**

**County’s Interpretation of Zoning Ordinance as Preamble Reversed**


Erica Galusha, Class of 2007, Washington & Lee University School of Law

Renkey and other residents living near the First Baptist Church of Clarendon (the Church) challenged the Circuit Court of Arlington County’s grant of summary judgment to Arlington County. The County argued that language contained in the first paragraph of Arlington County Zoning Ordinance (ACZO) § 27A should be characterized as a preamble and not an essential part of the statute. Renkey argued that this language should be given effect, and barred the Church’s development plans.

Judge Cynthia D. Kinser of the Supreme Court of Virginia reversed the circuit court. The court held that the language at issue was not a pre-amble but a mandatory part of ACZO § 27A. The court further ruled that the County had violated the statute, rendering its rezoning action arbitrary and capricious and therefore void.

The church’s property was initially zoned “Semi-Public,” and it wanted to change the property to “Medium Density Mixed-Use” in order to build a multistory building that included church-related units as well as 116 residential units. This re-quired a re-zoning of the “C-3” portion of the property and a part of the “R-5” portion to a Commercial Re-development District (“C-R”). On October 23, 2004, the County Board of Arlington County approved the rezoning.

The statue in dispute stated that before an area could be zoned “C-R,” it had to be zoned “C-3.” The County violated the statute because it rezoned land owned by the church from “R-5” to “C-R” without first zoning it “C-3.” The County argued that the language in the statute containing this provision appeared as a general statement of intent or preamble, because it is located in an introductory paragraph of ACZO § 27A. The court disagreed, and distinguished this case from Smith, 76 Va. at 484, the case relied on by the circuit court. In Smith, the court held that the statute relied upon by the defendant was a preamble and that to apply it would amount to legislation by the court. The major difference between Smith and the current case is that the language of the instant statute is mandatory, stating, “the following regulations shall apply to all C-R Districts.” By including a mandatory “shall,” the statute is clear and unambiguous.

The County also argued that even if the language at issue was binding, the statute has been satisfied because a portion of the rezoned land had been zoned “C-3.” The court saw no merit in this argument, and found that the County had acted in direct violation of ACZO § 27A. The court found that the County’s rezoning of the property amounted to a legislative act. It further stated that legislative action is assumed to be reasonable, but if the reason-ableness of the act is challenged by evidence of unreasonableness, then evidence must be presented that the act was reasonable, and the act will be deemed proper if the “evidence is sufficient to make the issue fairly debatable.”

The court held that as the County’s action was not fairly debatable, it was void, and that the circuit court had erred by granting summary judgment to the County. The court reversed the judgment of the circuit court and entered judgment for the residents.

**Standing Water Did Not Constitute Damage for Statute of Limitations Purposes**

**Bethel Inv. Co. v. City of Hampton, 636 S.E.2d 466 (Va. 2006)**

Matthew Frisbee, Class of 2007, Washington & Lee University School of Law

Bethel Investment Company alleged that the City of Hampton’s conversion of city-owned land into wetlands caused the water table to rise on Bethel’s property, making it economically undevelopable. The Circuit Court of the City of Hampton held that Bethel’s claims were barred by the statute of limitations and dismissed the motion for judgment. In an opinion by Senior Justice Russell, the Supreme Court of Virginia held that 1) Bethel was entitled to a jury on the issue of when the damages occurred, and 2)
the city’s evidence is insufficient as a matter of law.

In 1998, the city entered into an agreement to convert a parcel of city-owned land into wetlands. Bethel sued the city in June of 2004. The city argued that Bethel’s claim is barred by the statute of limitations (three years and five years for inverse condemnation and property damage respectively) and that Bethel failed to give the city notice of its claim within six months after the cause of action accrued in accordance with Va. Code Ann. § 8.01-222. Hampton alleged that the initial damage occurred in March of 1999 when a witness saw surface water in a ditch that extended into Bethel’s land. Bethel demanded a jury on the issue of when the damage occurred and argued that the cause of action did not accrue until the land became economically undevelopable in 2004.

Virginia’s Supreme Court held that a right to jury trial exists in the disputes concerning whether the statute of limitations has run. § 8.01-336(A) states that the Virginia constitutional right to a jury applies in any action for recovery of any sum greater than $100. The court relied on Southern Railway Co. v. Watts, 114 S.E. 736 (Va. 1922), a similar dispute over gradual land damage. In Watts, the court held that when the damage actually began was an issue of fact for determination by the jury. Id. at 737–38. Accordingly, Justice Russell found that Bethel is also entitled to a jury.

Despite these findings, the Supreme Court held that the case would not be remanded for a jury trial because Hampton failed to present evidence sufficient to support the trial court’s finding. The city’s only evidence consisted of photos, maps, and testimony that of standing water in a ditch on Bethel’s property. Russell explained that water in a ditch does not constitute damage because the ditch carries water away from the land to avoid flooding. The Supreme Court held that Hampton’s evidence was insufficient as a matter of law and reversed the circuit court’s decision.

**Land Condemnation to Build Storm Water Box Culvert Upheld**

**Hoffmann Family, L.L.C. v. City of Alexandria, 634 S.E. 2d 722 (Va. 2006)**

Ellie Hindsley, Class of 2008, Washington & Lee University School of Law

The Hoffman Family L.L.C. alleged that the City of Arlington’s planned condemnation of their land is for a private purpose and invalid under the Virginia Constitution. The Circuit Court of the City of Alexandria denied Hoffman’s motion for a jury trial and held that the city’s intended condemnation to build a storm water box culvert was for a public use. The Virginia Supreme Court affirmed the circuit court’s holding. Justice Keenan, writing for the court, held that condemnation to relocate a storm water box culvert is a “public use,” which makes the condemnation valid.

The Supreme Court found that the condemnation was a valid exercise of Arlington’s eminent domain power under both statutory and constitutional authority. Under Article I, § 2 of the Virginia Constitution, private property shall not “be taken or damaged for public uses, without just compensation.” The General Assembly’s definition of “public use” gives local governments broad authority to acquire land for public utility purposes. Va. Code Ann. § 15.2-1900. Applying this statutory background, the court found that Arlington can properly take the land for eminent domain purposes. Justice Keenan noted that city officials testified that Arlington planned to build a storm water box culvert on the Hoffman’s land. In addition, the city intends the new box culvert to act as a part of the city’s storm water sewer management system, and §15.2-2109 specifically authorizes land acquisition for storm management systems. Arlington stated this permissible public use in their resolution authorizing the condemnation. The Supreme Court found that this statement of public use, coupled with the actual public use of the land for water management qualifies as a valid condemnation.

The court rejected Hoffman’s argument that Arlington was condemning the land for a private purpose. Hoffman alleged that the city is relocating the storm water box culvert their land in order to allow private development of the land where the box culvert is presently located. Keenan explained that the only issue is whether the property will be taken for a predominately public use. The court held that any incidental benefit to a private party does not render this condemnation improper. The validity of the condemnation is determined by how Arlington plans to use the condemned land, not potential hidden motives. The Supreme Court – with the exceptions of Chief Justice Hassell and Justice Koontz, who dissented - concluded that Arlington’s condemnation of the Hoffman’s land for a storm water box culvert is valid.

**Federal Regulation**

**Safe Drinking Water Act:**

**Ground Water**

**National Primary Drinking Water Regulations: Ground Water Rule, 40 C.F.R. pts. 9, 141 & 142 (November 8, 2006)**
Effective January 8, 2007, the EPA is promulgating a National Primary Drinking Water Regulation, the Ground Water Rule, to provide for increased protection against microbial pathogens in public water systems that use ground water sources. The Ground Water Rule establishes a risk-targeted approach to target ground water systems that are susceptible to fecal contamination, instead of requiring disinfection for all ground water systems. The occurrence of fecal indicators in a drinking water supply is an indication of the potential presence of microbial pathogens that may pose a threat to public health. This rule requires ground water systems that are at risk of fecal contamination to take corrective action to reduce cases of illnesses and deaths due to exposure to microbial pathogens.

Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)

Application of Pesticides to Waters of the United States in Compliance With FIFRA, 40 C.F.R. pt. 122 (November 27, 2006)

Effective January 26, 2006, the EPA is issuing a regulation stating that the application of a pesticide in compliance with relevant requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) does not require a National Pollutant Discharge Elimination System (NPDES) permit in two specific circumstances. The first circumstance is when the application of the pesticide is made directly to waters of the United States to control pests that are present in the water. The second circumstance is when the application of the pesticide is made to control pests that are over or near waters of the United States. This rulemaking is based on the Agency’s interpretation of the definition of the term "pollutant" under the Clean Water Act (CWA) as not including such pesticides. This final rulemaking replaces the EPA’s previously published Interim and Final Interpretive Statements on the Application of Pesticides to Waters of the United States in compliance with FIFRA.

Pesticides; Food Packaging Treated with a Pesticide, 40 C.F.R. pt. 180 (December 6, 2006)

Effective February 5, 2007, this rule exempts from the definitions of "pesticide chemical" and "pesticide chemical residue" under FFDCA section 201(q), food packaging (e.g. paper and paperboard, coatings, adhesives, and polymers) that is treated with a pesticide as defined in the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) section 2(u). As a result, such ingredients in food packaging treated with a pesticide are exempt from regulation under FFDCA section 408 as pesticide chemical residues. Further, a food that bears or contains such ingredients are not subject to enforcement by the Food and Drug Administration (FDA) under section 402(a)(2)(B) of the FFDCA since the ingredients are not pesticide chemical residues. Instead, such ingredients are subject to regulation by the FDA as food additives under FFDCA section 409. FDA generally regulates such food additives in food packaging as food contact substances under FFDCA, section 409(h). This rule expands the scope of the provision in 40 C.F.R. pt. 180.4 which currently applies only to food packaging impregnated with an insect repellent - one type of pesticide. This rule, as with the rule it amends, only applies to food packaging materials themselves; it does not otherwise limit the EPA’s FFDCA jurisdiction over pesticides or limit FDA’s jurisdiction over substances subject to FDA regulation as food additives.

Pollution Prevention Act: Toxics Release Inventory (TRI) reporting


Effective January 22, 2007, the EPA is revising the Toxics Release Inventory (TRI) reporting requirements to reduce burden while continuing to provide valuable information to the public, and promote recycling and treatment as alternatives to disposal and other releases. TRI reporting is required by section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) and section 6607 of the Pollution Prevention Act (PPA). This rule expands non-Persistent Bioaccumulative and Toxic (non-PBT) chemical eligibility for Form A by raising the eligibility threshold to 5,000 pounds of total annual waste management (i.e., releases, recycling, energy recovery, and treatment for destruction) provided total annual releases of the non-PBT chemical comprise no more than 2,000 pounds of the 5,000-pound total waste management limit. This rule also allows, for the first time, limited use of Form A for PBT chemicals when total annual releases of a PBT chemical are zero and the total annual amount of the PBT chemical recycled, combusted for energy, and treated for destruction does not exceed 500 pounds. This rule, however, retains the current exclusion of dioxin and dioxin-like compounds from Form A eligibility. By structuring Form A eligibility for both PBT chemicals
and non-PBT chemicals in a way that favors recycling and treatment over disposal and other releases, today’s rule encourages facilities to reduce their releases and ensures that valuable information will continue to be provided to the public pursuant to the purposes of section 313 of EPCRA and section 6607 of PPA. Further, to guard against situations where large non-production related amounts are not reported on Form R and to provide greater consistency between PBT chemical and non-PBT chemical Form A eligibility, this rule redefines the non-PBT Form A eligibility threshold to include non-production related amounts reported in Section 8.8 of Form R.

**Energy Policy Act of 2005**

**Fuel Economy Labeling of Motor Vehicles: Revisions To Improve Calculation of Fuel Economy Estimates, 40 C.F.R. pts. 86 & 600 (December 27, 2006)**

Effective January 26, 2007, the EPA is finalizing changes to the methods used to calculate the fuel economy estimates that are posted on window stickers of all new cars and light trucks sold in the United States. This final rule will greatly improve the EPA fuel economy estimates to more accurately inform consumers about the fuel economy they can expect to achieve. The new test methods take into account several important factors that affect fuel economy in the real world, but are missing from the existing fuel economy tests. Key among these factors are high speeds, aggressive accelerations and decelerations, the use of air conditioning, and operation in cold temperatures. Under the new methods, the city miles per gallon (mpg) estimates for the manufacturers of most vehicles will drop by about 12 percent on average relative to today’s estimates, and city mpg estimates for some vehicles will drop by as much as 30 percent. The highway mpg estimates for most vehicles will drop by about 8 percent, with some estimates dropping by as much as 25 percent relative to today’s estimates. These changes will take effect starting with 2008 model year vehicles, available at dealers in 2007. The EPA is also adopting a new fuel economy label design with a new look and updated information that should be more useful to prospective car buyers. The new label features more prominent fuel cost information, an easy-to-use graphic for comparing the fuel economy of different vehicles, clearer text, and a Web site address for more information. Manufacturers will be phasing in the new design during the 2008 model year. Finally, for the first time the EPA is requiring fuel economy labeling of certain passenger vehicles between 8,500 and 10,000 lbs gross vehicle weight rating. Because of the Department of Transportation’s recent regulation that brings medium-duty passenger vehicles into the Corporate Average Fuel Economy program starting in 2011, the EPA is now statutorily obligated to include these vehicles in the fuel economy labeling program. Medium-duty passenger vehicles are a subset of vehicles between 8,500 and 10,000 lbs gross vehicle weight that includes large sport utility vehicles and vans, but not pickup trucks. Vehicle manufacturers are required to post fuel economy labels on medium-duty passenger vehicles beginning with the 2011 model year.

**CAA: New SIP Plan Approval**

**Approval and Promulgation of Air Quality Implementation Plans; Virginia; Identification of the Northern Virginia PM2.5 Nonattainment Area, 40 C.F.R. pt. 52 (January 8, 2007)**

Effective March 9, 2007, the EPA is taking direct final action to approve revisions to the Virginia State Implementation Plan (SIP). The revision consists of the addition of counties in Northern Virginia which were designated as nonattainment for the fine particulate (PM2.5) national ambient air quality standard (NAAQS). The EPA is approving this revision in accordance with the requirements of the Clean Air Act. The Commonwealth of Virginia is amending 9 VAC 5-20-204.A.3 to include the previously designated counties and local jurisdictions into the Northern Virginia portion of the Washington, DC PM2.5 nonattainment area. The counties and local areas included in the nonattainment area are Arlington County, Fairfax County, Loudon County, Prince William, Alexandria City, Fairfax City, Falls Church City, Manassas City, and Manassas Park City. This SIP revision approves the addition of these counties and local jurisdictions to the planning areas listed in the Virginia Code (9 VAC 5-20-204.A.3).

**CAA: Nonattainment New Source Review Program**

**Nonattainment New Source Review (NSR), 40 C.F.R. pt. 51 (March 8, 2007)**

Effective on May 7, 2007, the EPA finalized regulations governing the nonattainment new source review (NSR) program mandated by section 110(a)(2)(C) of the Clean Air Act. These revisions implement changes to the preconstruction review requirements for major stationary sources in nonattainment areas in interim periods between designation of new nonattainment areas and adoption of a revised State Implementation Plan (SIP). The revisions conform the nonat-
tainty permitting rules that apply during the SIP development period following nonattainment designations before SIP approval to the Federal permitting rules applicable to SIP-approved programs. The changes are intended to provide a consistent national program for permitting major stationary sources in nonattainment areas under section 110(a)(2)(C) and part D of title I of the Act. In particular, these changes conform the regulations to the NSR reform provisions that the EPA promulgated, except that these changes do not include the NSR reform provisions for "clean units" or "pollution control projects," which the U.S. Court of Appeals for the D.C. Circuit vacated in New York v. EPA, 413 F.3d 3 (D.C. Cir. 2005).

CAA: Exceptional Events

Treatment of Data Influenced by Exceptional Events, 40 C.F.R. pts. 50 & 51 (March 22, 2007)

Effective May 21, 2007, this action finalizes a rule to govern the review and handling of air quality monitoring data influenced by exceptional events. Exceptional events are events for which the normal planning and regulatory process established by the Clean Air Act is not appropriate. In this rulemaking action, the EPA is finalizing the proposal to: Implement section 319(b)(3)(B) and section 107(d)(3) authority to exclude air quality monitoring data from regulatory determinations related to exceedances or violations of the National Ambient Air Quality Standards (NAAQS) and avoid designating an area as nonattainment, redesignating an area as nonattainment, or reclassifying an existing nonattainment area to a higher classification if a State adequately demonstrates that an exceptional event has caused an exceedance or violation of a NAAQS. The EPA is also requiring States to take reasonable measure to mitigate the impacts of an exceptional event.

Virginia Regulation


Effective November 1, 2006, this regulation establishes the registration and permitting of total nitrogen and total phosphorus loads discharged into the Chesapeake Bay Watershed, and establishes procedures by which those loads may be exchanged among those permittees located in the respective Chesapeake Bay tributary watersheds. The regulation includes registration requirements, effluent limitations, compliance plan and schedule requirements, monitoring and reporting requirements, conditions under which nutrient trading is permitted, conditions applicable to new and expanded facilities, and conditions applicable to all facilities covered under this permit. This permit differs from other VPDES general permits in that (i) the compliance schedule focuses on the aggregate performance of all of the facilities within a tributary watershed as opposed to the individual facilities themselves, (ii) the permit will be issued in addition to the individual VPDES permits that the affected facilities are already required to hold, and (iii) rather than outlining facilities that may register for permitting major stationary sources, it incorporates all VPDES dischargers by rule and requires specific categories of facilities to register for coverage under the general permit and comply with the requirements therein.


Effective November 29, 2006, these amendments modify, add, and repeal definitions; establish procedures for the use, reuse, and reclamation of coal combustion byproducts (CCB); establish appropriate standards for siting, design, construction, and operation of projects using CCB; and update the regulation to recognize fossil fuel combustion products that will eliminate the need for a variance petition without detrimental impact to human health or the environment. The proposed regulation was amended to include designations of how required submittals are to be made and text was added in 9 Va. Admin. Code § 20-85-150 to provide that if no deficiencies are identified nor approval is given by day 30 of the documents submitted under that section, the applicant can proceed with construction.


Effective December 15, 2006, this regulation authorizes the director to take measures to prevent, control or eradicate the spread of diseases...
whenever (i) such diseases threaten wildlife; (ii) a disease in wildlife has implications for human, domestic or agricultural animal health; or (iii) a disease is confirmed in wildlife held in captivity that threatens wildlife, human, domestic or agricultural animal health.


Effective March 21, 2007, these regulations include requirements in the form of incorporated federal regulatory text at Title 49 of the Code of Federal Regulations. Since Virginia regulations incorporate the federal regulations, with certain exceptions, it is only necessary to change one section to bring Virginia’s regulations up to date with the federal changes. The amended section is 9 Va. Admin. Code § 20-110-110, which specifies the date of the federal regulations that are incorporated into Virginia regulations. For the ease of use by the regulated community, this date is always October 1; however, the text is amended to change the year, thus incorporating federal changes from October 1 of the previously incorporated year through September 30 of the newly specified year. Immediate Final Rule 2006 covers three years, October 1, 2003, through September 30, 2006, and there are 48 changes. Also, statutory penalties for violation of the board’s regulation have changed; this caused a deletion of a note in 9 Va. Admin. Code § 20-110-90 B that is no longer correct.


Effective April 4, 2007, these regulations add a new part, Hg Trading Program for Coal-Fired Electric Steam Generating Units, which addresses the following substantive provisions: applicability, permitting, allowance methodology, monitoring, banking, and compliance determination. Virginia’s Hg annual trading budgets are 1,184 pounds in 2010 through 2017 and 468 pounds in 2018 and thereafter. Beginning January 1, 2010, coal-fired electric generating units with a nameplate capacity greater than 25 MWe will be subject to the provisions of this part. To accommodate the Hg emissions from the affected units, the units are allocated from the budget a specific limited number of allowances (measured in ounces per year) during the months of January 1 through December 31, otherwise known as the control period. The Hg allocations are determined through a methodology based upon heat input for existing units and electrical output for new units. January 1, 2001, is the cutoff for determining whether a unit is new or existing. An initial set-aside of 4.0% of the Hg trading budget is provided for use by new units for each control period in the first five years, dropping to 1.0% in subsequent years. A set-aside for new energy efficiency/renewable energy units consisting of 1.0% of the Hg trading budget is provided for use by new units for each control period. Procedures are included for the allocation of the allowances in the set-aside budget. The allocated allowances must be retired permanently, are not capable of being lawfully traded under the Hg Budget Trading Program, and are not to be submitted to EPA; the unallocated allowances expire after three years. If a unit does not use all of its allowances for a specific control period, those extra ounces may be banked for future use or sold. If a unit exceeds the allocated allowances, additional allowances may be purchased or the source may use banked allowances to offset the amount of Hg generated above the allocated allowances. Sources found to be out of compliance will be forced to surrender allowances for the next year on a ratio of 3:1; i.e., for every ounce over its allocations, three ounces will be forfeited from the next year’s allocation. Emissions will need to be monitored according to 40 C.F.R. pt. 75 for all sources subject to the regulation and for any sources wishing to opt into the program.


Effective April 4, 2007, the amendments eliminate a provision allowing a party to be represented in formal hearings before the board by an individual of their choice, whether or not that individual is an attorney. The amendment specifies instead that each party has the right to be represented by legal counsel in formal hearings before the board. This change is necessary to comply with UPL Opinion No. 209 of the Supreme Court of Virginia, which states that Virginia Unauthorized Practice of Law Rule 1-101(A) applies to representation before a board of the Department of Mines, Mineral and Energy. The rule states that a non-lawyer shall not represent another before a tribunal. A DMME board meets the definition of “tribunal” “...when it determines the rights and obligations of parties in proceedings before it, as opposed to promulgating rules and regulations of general applicability." The amendment makes allowable repre-
sentation before the BCME consistent with Rule 1-101(A).


Effective upon filing the notice of the EPA with the Register of Regulation, the amendments to the state’s Water Quality Standards regulation add new numerical and narrative criteria to protect designated uses of man-made lakes and reservoirs as well as the two natural lakes in the state from the impacts of nutrients. The rulemaking also clarifies that the existing dissolved oxygen criteria during times of thermal stratification should only apply to the upper layer (epilimnion) in man-made lakes and reservoirs where nutrient enrichment is controlled by applicable nutrient criteria in 9 Va. Admin. Code 25-260-187. Since publication of the proposal, the following changes have been made: (1) the clarification that water quality assessment of nutrient criteria (chlorophyll A and total phosphorus) will be based on the two most recent monitoring years with available data, and (2) the addition of a process for confirmation of use impairments when the criteria are exceeded.
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