

Environmental Crimes and Enforcement Committee Newsletter

Vol. 5, No. 1

January 2004

MESSAGE FROM THE CHAIR

Walter D. James III
Strasburger & Price, LLP
walter.james@strasburger.com

Greetings from Dallas, Texas. As you may already know, I have recently been appointed as the chair of the Environmental Crimes and Enforcement Committee of the ABA Section of Environment, Energy, and Resources. I am looking forward to serving the membership. So, at the outset, let me ask each of you to call me if you have any questions about the Committee, suggestions for the Committee or just want to get more involved.

I am ably assisted on the Committee this year by several good friends, Tom Kelly is handling *The Year in Review*; Norm Higley, Bob Collings, Bob Matthews and Charlie McElwee are taking care of the newsletters; Doug Arnold and Lloyd Landreth are the program vice-chairs; Liza Boswell and Michael Hatfield are the membership vice-chairs; Ari Levine is our public service vice-chair and Tracy Hester is handling technology. Bruce Pasfield is our Department of Justice liaison. Thanks to all for helping out.

We have an exciting year planned. We are starting a grass roots campaign to change the name of the Committee to more accurately reflect its mandate to provide coverage for

both criminal and civil enforcement issues. We think the name "Environmental Enforcement" should do just that (again, any comments and/or suggestions are appreciated). We are setting up a system for receiving regional reports for the newsletters (and still need reporters in various parts of the country). We are working on the Committee's submission for *The Year in Review* that is coming up shortly. We are working on newsletters (constantly). We are working on programs, both in conjunction with ABA Section of Environment, Energy, and Resources meetings and freestanding teleconferences (look for a teleconference on Environmental Crimes and Homeland Security in late January 2004). We are going to begin a project of member profiles, so look for those coming *via* the list serve.

While we have an exciting year planned, it will be better with your participation. I challenge you to get involved. After all, it is your Committee.

LOOK INSIDE FOR

**EPA'S RECENT NEW SOURCE REVIEW
ENFORCEMENT POLICY:
WHAT ARE THE RULES?**

See page 8

**Environmental Crimes and Enforcement
Committee Newsletter**
Vol. 5, No. 1, January 2004
Norman W. Higley, Editor

In this issue:

Message from the Chair
Walter D. James III 1

Technology Support Update
Tracy Hester 2

Application of Civil and Criminal Law to Passive
Migration of Toxic Chemicals in Colorado
Dana L. Eismeier 3

New Jersey's Policy Directive on Natural
Resource Damages
Bryan Ng 6

EPA's Recent New Source Review
Enforcement Policy: What Are the Rules?
Dennis Arfmann and Patrick D. Traylor 8

Attorney General and Secretary of
Transportation Announce Hazardous
Materials Transportation Initiative
Bruce Pasfield 11

OECA Enforcement Priorities Update
Robert L. Collings 14

Regional Reports:

Region 6
N. Tobias Smith 14

Region 8
Arthur P. Mizzi 15

© 2004. American Bar Association. All rights reserved.
The views expressed herein have not been approved
by the ABA House of Delegates or the Board of
Governors and, accordingly should not be construed as
representing the policy of the ABA.

This newsletter is a publication of the ABA Section of
Environment, Energy, and Resources, and reports on
the activities of the committee. All persons interested in
joining the Section or one of its committees should
contact the Section of Environment, Energy,
and Resources, American Bar Association,
750 N. Lake Shore Drive,
Chicago, IL 60611.



TECHNOLOGY SUPPORT UPDATE

Tracy Hester
Bracewell & Patterson, L.L.P.
thester@bracepatt.com

Welcome to the 2004 Environmental Crimes and Enforcement Committee (Enforcement Committee). We plan to aggressively use the ABA's technology resources to provide support for your practice with the goal of delivering materials and information to the largest possible audience. Some of our efforts in the upcoming year will include:

Hot Topics Teleconferences

We plan to host at least one Hot Topics teleconference session in 2004 (perhaps on recent changes to EPA's debarment program and their effect on environmental enforcement). The Hot Topics format allows us to distribute breaking information to you on a nationwide basis in as quickly as a few weeks. By sharing a phone link, several members from a single company or site can participate in a very cost-effective manner.

The Enforcement List Serve

The Enforcement Committee list serve can be accessed at no charge to you by posting messages and inquiries to:

environ-crimes_enfrc@mail.abanet.org

The list serve allows you to exchange messages with over three hundred other Enforcement Committee members on any environmental enforcement issue (hopefully with virtually no spam) to canvas your colleagues for updates and opinions. As an Enforcement Committee member, your e-mail address will be included on this list serve unless ABA does not have your current e-mail address or you have requested no e-mail communications from the ABA. If you need to

add or correct your e-mail address, please notify ABA Member Service Center by phone at 800/285-2221 or by e-mail at: www.abanet.org/members/join/coa2.html Also feel free to contact me directly to add your e-mail address to the list serve.

Electronic Newsletters

As you know, ABA now distributes our newsletter solely in electronic format. We hope that this new format will allow us in the future to add features such as hyperlinks, e-mail connections and embedded resources. The newsletter and links remain on the Enforcement Committee Web page as a future resource at:

<http://www.abanet.org/environ/committees/environcrimes/newsletter/>

The Enforcement Committee Web page will continue to serve as an important nexus for our activities and communications. Please be a frequent visitor to our home page at:

<http://www.abanet.org/environ/committees/environcrimes/home.html>

to keep up with developments in this field or learn of pending Hot Topics conferences and CLE events.

Last, and most important, we hope to hear your ideas and suggestions on ways to improve our use of technology and improve the Web page. Please e-mail me at thester@bracepatt.com if you have any proposals or ideas that you'd like for us to try. We look forward to working with you.

TO LEARN MORE ABOUT
SECTION BOOKS VISIT
<http://www.abanet.org/environ/pubs/books/catalog/home.html>

APPLICATION OF CIVIL AND CRIMINAL LAW TO PASSIVE MIGRATION OF TOXIC CHEMICALS IN COLORADO

Dana L. Eismeier
Burns, Figa & Will, P.C.
deisemeier@bfw-law.com

Earlier this year the Colorado Supreme Court issued two significant opinions regarding the passive and continuing migration of toxic chemicals through groundwater. One case involved civil liability, the other criminal. Both cases involve the question of whether the applicable statute of limitations bars either civil or criminal liability when chemicals are found to be migrating to adjoining properties through groundwater many years after the chemicals were initially released to soil. The court, however, resolved the issue differently in the two cases. This article reviews the two cases and discusses the policy reasons behind the superficially inconsistent decisions of the court.

Hoery v. United States

In *Hoery v. United States*, 64 P.3d 214 (Colo. 2003), the Colorado Supreme Court held that the continuing migration of and ongoing presence of toxic chemicals on another's property constitutes a continuing nuisance and trespass. The import is that a new statute of limitations accrues each day that the intruding contamination continues, allowing a plaintiff to bring suit for contamination years or even decades after the initial release of contamination to soil.

Hoery arose from contamination emanating from a former Air Force base in Denver which closed in 1994. Prior to that time, solvents, including trichloroethelene (TCE), were released to soils, migrated to groundwater and moved downgradient to an adjoining neighborhood. A resident, Robert Hoery, who had a well on his property, discovered the

contamination in 1995. In 1998, Hoery filed suit against the United States in Colorado federal district court under the Federal Tort Claims Act (FTCA), alleging trespass and nuisance because contamination existed on and continued to migrate to his property. The federal district court dismissed Hoery's claim, stating that the claims, as pled, constituted a "permanent" and not a "continuing" trespass; therefore, they were barred by the applicable two-year statute of limitations under the FTCA. On appeal, the Tenth Circuit Court of Appeals determined that there was no controlling Colorado precedent as to whether the continued migration and presence of TCE on Hoery's property, in and of themselves, constitute a "continuing" or "permanent" tort under Colorado law. Therefore, it certified questions to the Colorado Supreme Court as to whether the continued migration of toxic chemicals from a defendant's property to a plaintiff's property and the ongoing presence of those chemicals constitute continuing trespass and nuisance under Colorado law.

The Colorado Supreme Court noted that trespass is a physical intrusion on the property of another without permission from the person legally entitled to possession of the property. *Id.* at 217. Private nuisance results from a substantial invasion of another's interest in the use and enjoyment of the individual's property. *Id.* Relevant to this case is the distinction between continuing and permanent trespass and nuisance. The court stated "the typical trespass and nuisance is complete when it is committed; the cause of action accrues and the statute of limitations begins to run at that time." *Id.* at 218. However, the court recognized Colorado case law that provided that, with respect to trespass and nuisance which could be discontinued, "the continuing of the trespass or nuisance from day to day is considered in law a several trespass on each day." *Wright v. Ulrich*, 91 P. 43, 44 (Colo. 1907) (citation omitted). Permanent trespass and nuisance, on the other hand, results when

the trespass or nuisance "would and should continue indefinitely." *Hoery, supra*, at 219. For example, in *Middelkamp v. Bessemer Irr. Ditch Co.*, 103 P. 280 (1909), the defendant's ditch, obviously a permanent structure, seeped water through its bottom and sides, thereby flooding adjacent properties. Because the irrigation ditch was intended to be a permanent structure and seeped by necessity, the seeping would continue indefinitely, absent extraordinary measures. The court held that even though the seepage could possibly have been abated (potentially rendering the trespass continuing rather than permanent), the defendant would not be required to abate the nuisance because such ditches were vital to the development of Colorado. *Id.* at 284. Therefore, this trespass was deemed permanent and, unlike a continuing trespass, the plaintiff was required to bring the claim during the statute of limitations period after his property was first visibly affected, *i.e.*, from the date the seepage first occurred. In sum, the *Hoery* court determined that a continuing tort results when a trespass or nuisance may be abated, but is not. The only exception to this situation occurs when the trespass will and should continue indefinitely because the defendants construct a beneficial structure intended to be permanent. *Hoery, supra*, at 220.

Based on this analysis, the court answered the certified questions in the affirmative. It held that a claim for continuing trespass and nuisance exists so long as contamination either (i) continues to migrate to plaintiff's property from defendant's property, or (ii) continues to exist on plaintiff's property. Therefore, a new statute of limitations accrues each day the contamination continues to migrate to and exist on plaintiff's property. Of particular significance the court noted that there was no evidence in the record that the presence of contaminants in groundwater migrating to the Hoery property will or should continue indefinitely or that the contamination

could not be abated. It held that tort law is intended to encourage socially beneficial conduct and to deter wrongful conduct. Therefore, public policy dictated stopping the continuing migration of toxic chemicals to Hoery's property. *Id.* at 223.

The Colorado Supreme Court did not specifically rule as to what relief is available for continuing trespass and nuisance. Based on case law in Colorado and other states, it is not clear whether damages for diminution of property value or stigma, sometimes known as permanent damages, will be available. See *Miller v. Cudahy Co.*, 858 F.2d 1449, 1457 (10th Cir. 1988), *cert. denied*, 492 U.S. 926 (1989); compare to *Walker Drug Co., Inc. v. La Sal Oil Co.*, 972 P.2d 1238, 1247 (Utah 1998). However, lost rent, lost use and, most significantly, special damages, are generally available. See *Miller, supra*, at 1457. Special damages may include remediation or monitoring costs. See 58 Am. Jur. 2D Nuisances § 293, 1989). After receiving the ruling of the Colorado Supreme Court, the Tenth Circuit Court of Appeals remanded the case to the federal district court for further proceedings consistent with the Colorado Court's opinion.

People v. Thoro Products

In *People v. Thoro Products Company, Inc.*, 70 P.3d 1188 (Colo. 2003), decided three months after *Hoery*, the Colorado Supreme Court interpreted a statute of limitations in a criminal context. At issue was whether the respondent's failure to remediate contaminated soil and prevent passive migration of waste spilled many years before was barred by the applicable statute of limitations. In juxtaposition to *Hoery*, the court answered yes.

Thoro Products was a bulk distributorship of chlorinated solvents for Dow Chemical. For years during the 1970s and early 1980s Dow

pumped chemicals from rail cars to Thoro's aboveground storage tanks. Thoro thereafter pumped solvents into trucks for delivery to the ultimate customers. Hundreds of gallons of solvents were lost over the years and released to soil. The conduct appeared to have continued until the spring of 1985, the year following the enactment of Colorado's Hazardous Waste Management Statute, C.R.S. § 25-15-301 *et seq.* (the "Hazardous Waste Act"). The company's fortunes declined and Thoro was officially dissolved as a Colorado corporation in 1997. *Thoro, supra*, at 1190-91.

In 1995 high concentrations of chlorinated solvents were discovered at a water well approximately one mile from the Thoro facility. Subsequently, criminal charges were brought against Thoro Products and its president for unpermitted disposal of hazardous waste and unpermitted storage of hazardous waste under the Hazardous Waste Act and for criminal mischief. After a two-week trial, Thoro was convicted on all charges and the company's president was convicted on the first two charges. *Id.* at 1191.

The Court of Appeals reversed the trial court, ruling that the statute of limitations barred prosecution. The statute of limitations section in the Hazardous Waste Act, C.R.S. § 25-15-308(4)(a), provides that criminal charges must be brought within two years after discovery of the violation or within five years after the date on which the alleged violation occurred, whichever date occurred earlier. The question then became did the "disposal" of chemicals under the Hazardous Waste Act occur in 1985 when releases to soil occurred or did the disposal continue to occur to the present due to passive migration of contamination in soil or groundwater?

The Colorado Supreme Court first considered the doctrine of continuing offense. In certain circumstances, a crime continues beyond the first moment when all its substantive elements

are satisfied. *Toussie v. United States*, 397 U.S. 112, 115 (1970). “A continuing offense is one which is not complete upon the first act, but instead continues to be perpetrated over time.” *United States v. De La Mata*, 266 F.3d 1275, 1288, (11th Cir. 2001), *cert. denied*, 535 U.S. 989 (2002). The court noted that it found no relevant case in which the doctrine of continuing offenses has been applied to impose criminal penalties for the unpermitted disposal of hazardous waste. Further the Colorado Hazardous Waste Act does not contain language which compelled the court to conclude that the unpermitted disposal of hazardous waste is a continuing offense. After engaging in an extensive analysis of the Act itself, the legislative intent contained in the Act, as well as its legislative history, the Court determined that the statute did not answer the question of whether the legislature intended that the wrongful disposal be considered a continuing offense. It stated, “In summary, this case presents two competing policy interests. On the one hand, a passive migration interpretation of disposal would seem to more fully implement the legislative intent of ensuring protection of the environment. However, that interpretation thwarts the General Assembly’s intent to limit the time during which criminal charges may be brought. Thus, we conclude that an analysis of the statute’s purposes does not answer the question of whether the legislature intended that unpermitted disposal be deemed a continuing offense.” *Thoro, supra*, at 1196.

The court also found no clear guidance in federal environmental statutes – RCRA and CERCLA – regarding the meaning of the term “disposal” in the context of continuing passive migration of chemicals. It found that the meaning affixed to the term “disposal” under both those statutes is dependent less on precise language in the statutes and more on the specific facts of each case in the context of the statute under which the term “disposal” was interpreted. *Id.* at 1198. Thus, the court

held the federal statutes did not shed any more light than did state law. *Id.*

Because the court found no clear guidance in the statute, legislative history or federal law, the court looked to the rule of immunity. The court stated it is axiomatic that criminal law must be sufficiently clear so that a citizen will know what the law forbids. Ambiguity, in the meaning of a criminal statute, must be interpreted in favor of the defendant under the rule of immunity. *Id.* at 1198. Although the rule of immunity should not be applied to defeat the evident intent of the General Assembly, because the court did not find such obvious intent, it concluded that the respondents did not have adequate notice of the conduct the statute was intended to prohibit. Specifically, respondents did not have notice that their failure to remediate contaminated soil and prevent passive migration of previously-spilled waste would constitute a continuing crime, such that they would be subject to the possibility of criminal charges twelve years after the last affirmative conduct (*i.e.*, spill or release) occurred. As such, the charges were time barred. *Id.* at 1199.

Cases Reconciled

At first glance, the two opinions appear inconsistent. Indeed, both cases involve similar facts (migrating subsurface contamination) and similar legal issues (application of statute of limitations to such passive migration). Policy considerations may explain the divergence. *Hoery* teaches that to the extent subsurface contamination exists and can be remediated, plaintiffs should not be barred by the statute of limitations in filing suit to enforce cleanup or for payment for cleanup by the contaminating party. Thus, *Hoery* encourages private civil actions to effect remediation of subsurface contamination in soil and groundwater. This is a particularly important consideration in states – primarily

western states – in which water resources are scarcer. Therefore, the statute of limitations does not begin to run when the offending conduct itself ends, but rather when the effect of that conduct ends.

Conversely, in circumstances in which criminal misconduct is alleged by virtue of soil and groundwater contamination, the statute of limitations begins to run when the conduct causing the offending activity ends, not when the effects of that conduct, *i.e.*, continued migration of contaminants, ends. Apparently, the policy of punishing offending activities is not as important as the policy of encouraging cleanup activities. Indeed, it could be argued that criminal prosecution of persons or entities which caused contamination years or decades in the past can actually impair or hinder private actions to require those entities to cleanup the contamination. After all, criminal penalties – jail or heavy fines – could drain resources of polluters otherwise available to litigants suing the polluters for cleanup costs.

Why are these two cases in Colorado significant for other areas of the country? The policy considerations described in *Hoery* and *Thoro* are applicable anywhere. All state legislatures and courts are charged with striking a balance between certainty in the criminal process versus efficiency and environmental consciousness in the civil sector. Certainly, other courts have and will continue to wrestle with the issues recently addressed by the Colorado courts. How that balance is struck may well depend upon the abundance, or lack thereof, of water resources in each respective state and the corresponding value in maintaining a clean water supply.

NEW JERSEY'S POLICY DIRECTIVE ON NATURAL RESOURCE DAMAGES

Bryan Ng
Robertson, Freilich, Bruno & Cohen, LLC
BNg@rfbclaw.com

On Sept. 24, 2003, the New Jersey Department of Environmental Protection (NJDEP) issued Policy Directive 2003-07 regarding Natural Resource Damages (NRD). NRD are injuries to natural resources such as the loss or impairment of ecological function or the deprivation of natural resource services such as water supply and recreation resulting from the release of hazardous substances. Under the new policy directive, NJDEP will no longer issue No Further Action Letters closing environmental remediation cases involving ground water cleanup unless and until NRD is addressed. The policy directive expresses a preference for restoration or substitution of natural resources, but also includes a provision for payment of monetary damages. There are more than 4,000 sites in New Jersey with potential NRD claims. In an unusual move, the State Attorney General's Office has retained outside counsel to prosecute these claims on a contingency basis. S New Orleans law firm associated with plaintiff's attorney Allan Kanner will receive at least 20 percent of the first \$10 million recovered, 17.5 percent of the next \$15 million recovered and 15 percent of any amount recovered over \$25 million for each NRD case that is settled after the state has initiated a lawsuit.

NJDEP has also issued a Natural Resource Injury Assessment and Interim Compensatory Restoration of Natural Resource Injuries Directive to 66 responsible parties at 18 contaminated sites along 17 miles of the Lower Passaic River. The directive, which could cost as much as \$950 million, requires the respondents to enter into an administrative consent order within 45 days, conduct an

assessment of NRD and restore any economic and ecological services injured by contamination. Should the recipients of the directive fail to comply with its terms, NJDEP has threatened to file suit seeking reimbursement and treble damages.

Finally, NJDEP announced a settlement with Honeywell International, PPG Industries and Tierra Solutions, Inc. for \$17 million in NRD relating to chromium contamination throughout Hudson and Essex Counties. The NRD settlement involved 210 chromium waste sites and associated ground water contamination. Investigation and cleanup work are being conducted at 182 of the sites under consent decrees separate from the recent NRD settlement; so far 58 sites are complete while 124 are still ongoing. The NRD settlement is the largest ever in New Jersey and brings the total amount recovered for NRD by the McGreevey administration in just two years to \$24 million, more than had been recovered under the NRD program in the eight years since its inception in 1993.

A New Jersey District Court has dismissed as moot a citizens suit under the Clean Water Act brought by the Public Interest Research Group (PIRG) against Hercules, Inc. for discharges to the Delaware River. The court ruled that the case, brought in 1989, was moot even at the time of trial in 1997. Citing the Supreme Court decision in *Friends of the Earth v. Laidlaw*, Judge Simandale held that the defendant's pattern of regulatory compliance since 1990, despite the imposition of stricter effluent limitations under an Administrative Consent Order, and the installation of advanced placement technology, made it absolutely clear that allegedly wrongful behavior could not reasonably be expected to recur. Further, the court ruled that a \$600,000 penalty for over 100 separate violations imposed by NJDEP was sufficient to abate and deter violations, and that the Department's decision-making process employed a meaningful

degree of citizen participation, was careful, individualized and based on all relevant facts, giving it a presumption of adequacy that was not overcome. Accordingly, any civil penalties imposed as a result of the citizen suit would constitute an unfair double recovery. *Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, Civ. Nos. 89-2291, 93-2381 (D.N.J. Oct. 27, 2003).

EPA'S RECENT NEW SOURCE REVIEW ENFORCEMENT POLICY: WHAT ARE THE RULES?

**Dennis Arfmann
Patrick D. Traylor
Hogan & Hartson L.L.P.
DArfmann@hhlaw.com
PDTraylor@hhlaw.com**

J.P. Suarez, EPA's assistant administrator for Enforcement and Compliance Assurance, announced to EPA enforcement staff on Nov. 4, 2003, that EPA will apply the 1980 and 1992 vintage Clean Air Act New Source Review (NSR) regulations only to construction projects in 1980 through 2003 that would also have violated EPA's revised NSR regulation announced on Oct. 27, 2003-the Equipment Replacement Project (ERP). See *Greenwire*, Nov. 5, 2003. In an amplification of Suarez's remarks, Bill Wehrum, counsel in EPA's Office of Air and Radiation, stated: "New enforcement against past conduct' will be undertaken only if the actions were 'inconsistent with the new rule,'" and further, that "The new rule is the yardstick to measure the cases." See *BNA Daily Environment Report*, No. 219 at A-1 (Nov. 13, 2003). This new enforcement approach comes within months of two inconsistent federal district court decisions: *United States v. Ohio Edison Co.*, 276 F. Supp.2d 829 (S.D. Ohio 2003) and *United States v. Duke Energy Corp.*, 278 F. Supp.2d 619 (M.D.N.C. 2003). The authors

will not analyze the equity or fairness, of the new enforcement policy. Rather this note will simply discuss the substance of EPA's new ERP rule as a screen for an enforcement case.

2003 New Source Review Regulatory Reform

For almost two decades, EPA broadly interpreted and applied a principle provision of the NSR regulations – the “routine maintenance, repair, and replacement” exclusion. The routine exclusion is central to the NSR program because it allowed companies to conduct “routine” maintenance, repair and replacement projects without undergoing a twelve to eighteen month permitting process and installing expensive emission controls. Under the 1980 and 1992 iterations of the NSR rules, EPA did not specifically define what constituted routine maintenance, and instead broadly interpreted the term through a series of informal guidance, memoranda and congressional reports. Within the past five years EPA has narrowly interpreted the routine exclusion in the NSR Enforcement Initiative. The *Ohio Edison* and *Duke* decisions are the first decisions under that initiative. More than any other single factor, the absence of a precise definition of the routine exclusions (and the changes in EPA interpretations) caused great confusion for permitting authorities and the regulated community regarding the applicability of NSR requirements.

On Oct. 27, 2003, EPA promulgated a revision to the NSR rules that specifically defined “equipment replacement” under the routine exclusion. See 68 Fed. Reg. 61,248 (Oct. 27, 2003). This rule became effective on Dec. 26, 2003, in certain states and local air quality control regions, and must be adopted into the State Implementation Plans to become effective in other states and air quality control regions. The rule is being challenged in the

D.C. Circuit Court of Appeals. See *State of New York, et al. v. EPA*, No. 03-1380 (D.C. Cir.). The 2003 rule exempts a project from NSR requirements if four conjunctive conditions are satisfied. First, the project cannot alter the basic design parameters of the process unit. See 68 Fed. Reg. at 61,258; 40 C.F.R. § 52.21(b)(2)(iii)(cc)(2). Second, the project must involve the replacement of an existing component with a functionally equivalent component. See 68 Fed. Reg. at 61,252; 40 C.F.R. § 52.21(b)(2)(iii)(cc). Third, the project cannot cost more than twenty percent of the replacement value of the process unit. See 68 Fed. Reg. at 61,255; 40 C.F.R. § 52.21(b)(2)(iii)(cc)(1). And fourth, the project must not cause the unit to exceed any applicable emission limitations. See 68 Fed. Reg. at 61,252; 40 C.F.R. § 52.21(b)(2)(iii)(cc)(3). Effective Dec. 26, 2003, EPA will target only those projects that fail to meet this new equipment replacement provision, or ERP.

EPA's November 2003 Enforcement Policy

EPA announced in November that new enforcement actions would be brought against past projects only if the project also would have violated the 2003 rule revisions. That is, EPA will exercise its enforcement discretion to perform an “ERP screen” to determine whether a past project at a process unit meets each of the four ERP conditions. If not, EPA will apply the narrow pre-2003 NSR rules and interpretive guidance in an enforcement action related to that process unit.

Initially EPA's regional offices perform the ERP screen. The screen process presumably involves the impacted industry and state. The regional offices are prioritizing their outstanding enforcement targets – both those that received Section 114 letters, and those that received notices of violation – though existing judicial enforcement actions will not be reviewed. In at least two instances since

the new enforcement policy was announced, EPA regions have sent new Section 114 information requests to utilities. Accordingly, a careful examination of the four-part ERP test is essential for industry to determine whether a particular project at a process unit complies with the ERP screen.

Test One: Basic Design Parameters. A project must not alter the basic design parameters (BDP) of the unit. For utilities, BDP is analyzed using either input- or output-based parameters. If a project changes the maximum fuel flow and heat input to a boiler, or changes the gross capacity of the turbine and peak steam flow from the boiler, EPA will consider the BDP of the process unit to have been changed. See 40 C.F.R. § 52.21(b)(2)(iii)(cc)(2)(i). Fuel or heat input, maximum rate of material input, or the maximum rate of product output are suggested for non-utility sources. See *id.* § 52.21(b)(2)(iii)(cc)(2)(ii). Of course, the technical and regulatory analysis of whether BDP actually changed can be complex and should be very carefully considered.

Test Two: Replacement of Functionally Equivalent Component. EPA recognizes in the new rule that the replacement of small and large components of industrial systems is a normal part of the process unit life cycle. The only effective limitation is that the new component must perform the same function as the old component, and may not perform a new function. So for example, the replacement of a coal pulverizer with an upgraded, more efficient model is a functionally equivalent change because the new component also pulverizes coal. A non-functionally equivalent change would be one that allows a new product to be formulated in a production line.

Test Three: Twenty-percent Replacement Cost. A project must not cost more than twenty percent of the total replacement cost of

the process unit. For most projects, this threshold will be comfortably above the cost of the project. For larger projects, or projects at smaller facilities, care should be exercised to review the definition of the covered process unit, and the method by which the replacement cost is calculated.

Test Four: Violations of Applicable Emission Limits. Last, the project may not cause the process unit to violate any applicable emission limits. The clearest example of applicable emission limits is those contained in a facility's operating permit, but may also include non-permit state implementation plan requirements. Care should accordingly be exercised to ensure that a project does not violate permitted or other applicable emission limits.

Conclusion

EPA's new ERP screen will apparently continue the agency's NSR enforcement initiative, though with a slightly different initial evaluation. This enforcement initiative will, over time, create a body of case law. The ERP rule will, over time, create another series of agency interpretations on issues such as "basic design parameters" and "functional equivalency." The case-by-case federal court decisions handed down over the coming years will ultimately determine the wisdom of setting national energy and air quality policy through administrative rulemaking or judicial decisions, as opposed to establishing such policy through legislation.

BACK ISSUES

Back issues of this Newsletter can be viewed on the Environmental Crimes and Enforcement Committee Web page at <http://www.abanet.org/environ/committees/environcrimes/newsletter/archive.html>.

**ATTORNEY GENERAL AND SECRETARY
OF TRANSPORTATION ANNOUNCE
HAZARDOUS MATERIALS
TRANSPORTATION INITIATIVE**

Bruce Pasfield
U.S. Department of Justice
Bruce.Pasfield@usdoj.gov

On Sept. 30, 2003, Attorney General John Ashcroft and Secretary of Transportation Norman Mineta announced the newest criminal environmental enforcement initiative: the Hazardous Materials Transportation or "Hazmat" Initiative. Hazardous material spills or intentional releases can have disastrous consequences such as fish kills, traffic shutdowns, community evacuations and human fatalities. These consequences are not just theoretical as over 1.5 billion tons of hazardous material are shipped across the United States annually. Certain hazardous material can also be used in potential terrorist attacks. Federal law enforcement recognized this threat and are taking action. Initiatives – in the context of federal criminal environmental law enforcement – are the pooling of investigative and prosecution resources to address a specific industry practice or environmental concern. Examples include the CFC anti-smuggling initiative, the vessel pollution initiative and the laboratory fraud initiative.

The Hazmat Initiative focuses Homeland Security, EPA, and Justice Department resources on national security and environmental threats posed by the illegal transportation of hazardous materials. A recent prosecution – announced during the joint Justice and Transportation Departments press conference – demonstrates the initiative's goals. In that case, the United States prosecuted Emery Worldwide Airlines, Inc.'s (Emery), for its willful failure to notify pilots of hazardous materials being transported on Emery's cargo planes. See:

United States v. Emery Worldwide Airlines, Inc., Cr_3-03-113 (S. D. Ohio 2003). Emery admitted guilt to twelve felony counts – for conduct spanning over a year's time – and agreed to pay a \$6 million dollar fine and institute a compliance program to prevent and detect future hazmat violations. Fortunately, Emery's illegal conduct did not result in injury, but the threat from such conduct was recently made abundantly clear. Seven weeks after Emery's guilty plea, the Department of Homeland Security and the FBI issued a public warning of "al-Qaeda's continued interest in aviation, including using cargo jets" in terrorist attacks. See Associated Press: *U.S. Warns Americans of Terror Risk* (Nov. 21, 2003), available at www.msnbc.com/news/996623.asp. The value of increased hazmat compliance counseling and better hazmat screening for all modes of transportation cannot be overstated. For more information on the Hazmat Initiative or the *Emery* case, please contact Blain Rethmeier in the Justice Department Office of Public Affairs at Blair.Rethmeier@usdoj.gov.

LIKE TO WRITE?

The Environmental Crimes and Enforcement Committee welcomes the participation of members who are interested in preparing this Newsletter. If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact one of the co-editors:

Robert Collings (rcollings@schnader.com)

Norman Higley (normhigley@nwlaw.com)

Robert Matthews
(rmatthews@mckennalong.com)

Charles McElwee, II (cmcelwee@ssd.com)

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

Issues of Legal Ethics in the Practice of Environmental Law by Irma S. Russell

This new book is an essential guide for every environmental lawyer on representing industrial clients, government agencies, individuals, and public interest groups. It focuses primarily on the rules of ethics that raise significant concerns for the environmental practitioner. A proactive approach to ethics helps lawyers avoid problems by making reasoned decisions before ethical problems arise in urgent or complicated context. This book helps you anticipate and analyze these difficult ethics issues. This book also examines the American Bar Association's Model Rules of Professional Conduct (Model Rules), judicial decisions, formal and informal ABA Opinions, and opinions of state boards of professional responsibility. Contents Include:



- Regulation of Lawyers
- The Duty of Competence and the Lawyer's Duty of Diligence
- The Lawyer-Client Relationship
- Confidentiality
- Conflicts Concerns in Environmental Law
- Imputed Conflicts
- Duty of Candor
- The Lawyer's Duties to Non-Clients
- Alternative Dispute Resolution
- The Anti-Contact Rule
- Multi-Disciplinary Practice
- Multijurisdictional Practice
- Pro Bono Representations
- Lawyer Advertising
- Lawyer's Fees
- The Lawyer's Role in Working with Consultants
- The Lawyer Role in Working in Use of the Media
- Termination and Withdrawal from Representation

2003 6 x 9 480 pages

Product Code: 5350097

Price: Section of Environment, Energy, and Resources members \$64.95; Regular \$79.95

The Clean Water Act Handbook, Second Edition

Mark A. Ryan, editor

This updated guide is the definitive resource to the provisions and complexities of the federal Clean Water Act and how it continues to evolve. Recent court rulings and the change of administration have resulted in significant changes that dramatically affect practitioners working in the area. This new edition provides detailed explanations of these changes and considers the impact of recent court decisions, including the Supreme Court's decision in *SWANCC* and the Court of Appeals decisions in *American Mining Assoc.*, *Talent Irrigation*, and *Forsgren*, among others.

Beginning with an overview of the law's provisions and pertinent regulation and enforcement issues, the subsequent chapters address specific issues, such as:

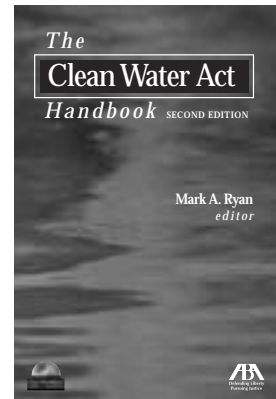
- NPDES permits
- Control of publicly owned treatment works
- Requirements applicable to indirect discharges
- The regulation of wetlands and the impact of recent judicial decisions
- Oil and hazardous substance spills
- Enforcement options under Section 309
- Judicial review

Chapters begin with a section on applicability and scope. Within each fully annotated chapter, clear explanations of specific statutory and regulatory provisions and court decisions applicable to the issue are presented in the order needed for full and accurate analysis – a virtual checklist of requirements and considerations. Making this new edition more useful than ever, the authors reference URL addresses for quick, up-to-the-minute information on government documents that are often difficult to locate.

2003 6 x 9 336 pages

Product Code: 5350099

Price: Section of Environment, Energy, and Resources members \$79.95; Regular \$95.00



**TO ORDER ABA BOOKS, CALL 1-800-285-2221 OR
VISIT THE ABA PUBLISHING
WEB SITE AT WWW.ABABOOKS.ORG
QUESTIONS? E-MAIL: SERVICE@ABANET.ORG**

OECA ENFORCEMENT PRIORITIES UPDATE

Robert L. Collings
Schnader Harrison Segal & Lewis LLP
rcollings@schnader.com

EPA's Office of Enforcement and Compliance Assurance (OECA) has solicited recommendations and comments for its triennial national enforcement and compliance priorities for fiscal years 2005- 2007 (beginning Oct. 1, 2004). The notice appears in the Dec. 10, 2003 *Federal Register* (68 Fed. Reg. 68893-68896). Recommendations and comments are invited until Jan. 12, 2004. The criteria include: significant environmental benefits based on known or estimated public health or environmental risks; economic or industrial sections, geographic areas, or facilities with serious patterns of noncompliance; and matters where a lead federal enforcement role is warranted.

Candidates from current priorities include wet weather flows, drinking water, NSR/PSD, air toxics, USTs, AHERA, financial responsibility, ports of entry, tribal issues, auto salvage, mineral processes, federal facilities, miscellaneous plastics, environmental justice, fuels management and significant noncompliance oversight.

If you feel that any of these issues deserve discussion by the committee, please contact Walter James at walter.james@strasburger.com.

33RD ANNUAL
CONFERENCE ON
ENVIRONMENTAL LAW
March 11-14, 2004
Keystone, Colorado

For more information, call 312/988-5724 or
visit <http://www.abanet.org/environ>.

REGIONAL REPORTS

The Committee is seeking additional contributing authors to serve as regional reporters to provide short updates on recent developments in each of the EPA regions. If you have an interest, please contact Norm Higley at normhigley@nwhlaw.com

REGION 1:

No report this issue. Regional reporters still needed.

REGION 2:

No report this issue. Regional reporters still needed.

REGION 3:

No report this issue. Regional reporters still needed.

REGION 4:

No report this issue. Regional reporters still needed.

REGION 5:

No report this issue. Regional reporters still needed.

REGION 6

Region 6 Participation in Expedited Settlement Offer Enforcement Initiative for NPDES Violations

N. Tobias Smith

Strasburger & Price, L.L.P

Tobias.Smith@Strasburger.com

Region 6 recently announced its intent to participate in EPA's Construction Storm Water Expedited Settlement Offer (ESO) Enforcement Initiative with publication of a Sept. 19, 2003, Commitment Letter. The Commitment Letter was issued in response to EPA's Aug. 26, 2003, ESO Memorandum, which invited each region to adopt and implement the construction storm water ESO program developed by the Office of Enforcement and Compliance Assurance. EPA's stated goal of the ESO program is to

achieve timely correction of violations as well as provide deterrence from subsequent violations. With implementation of the ESO program, traditional enforcement mechanisms will still be employed where EPA's ESO is rejected by the respondent or where warranted by the level of alleged non-compliance or nature of the violator. EPA's ESO program criteria limit ESO eligibility to sites meeting the following requisite conditions:

1. Construction site must be less than 50 acres (exceptions approved on a case-by-case basis by the Water Enforcement Division);
2. ESO penalty calculation is not more than \$15,000;
3. Site has no evidence of significant environmental impact;
4. Site operator is a first-time violator; and
5. Site has no unauthorized storm water discharges.

For entities operating within Region 6 (and other regions that may subsequently agree to participate), the accelerated resolution attained by the ESO program may be an attractive alternative to protracted settlement negotiations under traditional enforcement actions. In considering whether to accept an ESO, the cost benefit of avoiding prolonged enforcement negotiations and accepting the lessened penalty offered in an ESO should be weighed against the consequences of losing the opportunity to dispute inaccurate or unsupportable allegations, as well as forgoing the ability to claim first-time offender status in the future. Additional information on Region 6's implementation of the ESO program is available on the EPA's Web site at: <http://www.epa.gov/region6/6en/w/eso.htm>.

REGION 7: No report this issue. Regional reporters still needed.

REGION 8

North Dakota "SIP" Dispute Escalates

Arthur P. Mizzi
Senn Visciano Kirschenbaum P.C.
amizzi@sennlaw.com

Although no areas in North Dakota are designated as non-attainment or attainment/maintenance, the state has a long-running dispute with EPA regarding alleged violations of the PSD SO₂ increments. The basis of this dispute is the difference between monitoring data that show no increment violations and modeling analyses that show numerous violations.

This dispute began in 1999 when the state conducted a draft modeling analysis that showed numerous violations of PSD increments in four Class I areas. Those areas included: Theodore Roosevelt National Park, the Lostwood Wilderness Area, the Medicine Lake Wilderness Area and the Fort Peck Class I Indian Reservation. The state committed to refining its modeling analysis, and if necessary, to revising its SIP to address the violations.

Although the state and EPA could not agree on a revised modeling protocol, the state released its revised modeling in April 2000. Those results continued to suggest violation of PSD increments in all four Class I areas. Once again the state committed to refining its modeling and, if necessary, to revising its SIP. And once again the state and EPA disagreed over the modeling protocol. Specifically, EPA felt that the state's modeling would underestimate increment consumption through the use of an insufficient period of meteorology data and an inadequate characterization of the source emissions. Consequently, EPA conducted its own modeling analysis.

EPA's draft analysis was released for public comment in January 2002. During the comment period, EPA received several comments suggesting that EPA's analysis was too lax because it used several state assumptions which conflicted with the standard regulatory approach. Nevertheless, EPA's results showed violations of PSD increment in all four Class I areas. In light of the comments, EPA revised its modeling analysis and issued a revised report in May 2003 that showed increment violations in all four Class I areas.

Subsequent to EPA first modeling analysis, the state released its revised modeling results in April 2002. Those results showed no increment violations. However, that analysis was based on a number of alternative methodologies that conflicted with the regulatory requirements. Consequently, in light of its own analysis and the associated public comments, EPA was unwilling to accept the state's analysis as determinative of the increment consumption.

The latest development is the filing a CAA citizen's suit by Dakota Resource Council to force EPA to issue a SIP call with regard to the increment violations. That suit is captioned *Dakota Resources Council v. United States EPA and Horinko*, United States District Court for the District of Colorado Case No. 03CV1939.

REGION 9:

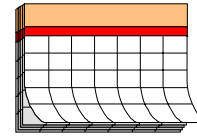
No report this issue. Regional reporters still needed.

REGION 10:

No report this issue. Regional reporters still needed.

**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

Calendar of Section Events



ABA Midyear Meeting

February 6, 2004
San Antonio, Texas

22nd Annual Water Law Conference

February 19-20, 2004
San Diego, California

**33rd Annual Conference on
Environmental Law**

March 11-14, 2004
Keystone, Colorado

**Sixth Annual Dispute Resolution
Conference**

April 15-17, 2004
New York, New York
(Co-sponsored with the ABA Section of
Dispute Resolution, for information call
202/662-1690)

Eastern Water Law Conference

May 6-7, 2004
Hollywood, Florida

12th Section Fall Meeting

October 6-10, 2004
San Antonio, Texas

***For more information, see the
Section Web site at
<http://www.abanet.org/environ>
or contact the Section
at 312/988-5724.***

