

State and Regional Environmental Cooperation Committee Newsletter

Vol. 1, No. 2

January 2004

CHAIR'S MESSAGE: STATE AND REGIONALLY SPEAKING

Bill Penny, Committee Chair

I once had a trial in Federal Court in which my client challenged a city's flow control ordinance, which we ultimately won on appeal. The District Court judge ruled against us with the logic that "there is nothing more local than garbage." The State and Regional Environmental Coordination Committee seeks out like minded folks. If the truth be told, for the most part, environmental lawyers practice on a state and regional basis. Our committee is working to emphasize ABA activities on the state and regional levels. One of the staples of our committee continues to be the regional stand-alone conferences. On Dec. 3, 2003, the Committee sponsored a Region 3 program in Philadelphia, which was very well received. Many thanks to Region 3 Vice-Chair Neil Bigioni for coordinating this effort and to Bill Cluck who played an instrumental role in putting this together. The Region 2 conference is scheduled for June 18, 2004 and we are planning a teleconference for Region 8 in the late Spring 2004.

One of the important new projects the Committee has undertaken this year is to create a list serve for all State Bar Environmental Section Chairs and/or officers.

The list serve has already been created and we are finalizing the contacts so we can have a means to convey information among the state bars. One of the great things about our Committee is that we have several members who are former state bar chairs. As a former state bar environmental chair myself, I can tell you just hearing what other states are doing is extremely valuable. Thanks to Steve Stout, our technology vice-chair, for coordinating this effort.

The Committee has a number of great folks actively engaged in activities and projects as you will read elsewhere in this newsletter. Sarah Martin continues to do a great job in coordinating the newsletter. We encourage you to share any ideas you may have with the regional vice-chair for your region, or certainly any of the other officers. While there may be other things more local than garbage, the Committee will continue to provide programs and activities directed on a state and regional basis.

**Key Environmental Issues in
U.S. EPA Region 2
June 18, 2004
Fordham Law School, New York
*Save the Date!***

**State and Regional Environmental
Cooperation Committee Newsletter
Vol. 1, No. 2, January 2004
Sarah M. Martin, Editor**

In this issue:

Chair's Message 1

Regional Roundup-
Reports of Current Events from
Each Region 2

New From ABA Publishing and the
Section of Environment, Energy,
and Resources 6

Regional Policies on Blending Are
Not Final Agency Action 10

Announcement from the Committee's
Technology Vice-Chair 11

Like to Write? 11

Section Events 12

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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.



**REGIONAL ROUNDUP
Reports of Current Events from
Each Region**

Thanks to each of the regional vice-chairs for their assistance in developing these reports.

REGION 1

*New England Attorneys General Sue EPA
Over Clean Air Act*

Joined by six other states, the District of Columbia and several local governments, the attorneys general for Vermont, New Hampshire, Maine, Massachusetts, Rhode Island and Connecticut have filed suit in federal court seeking to block recent changes to the New Source Review (NSR) program. *New York v. EPA*, No. 03-1380 (D.C. Cir. Oct. 27, 2003). The states argue that the amendments violate the Clean Air Act and will weaken national air pollution protection. At issue are EPA's attempt to simplify the routine repair, maintenance and replacement (RMRR) exclusion to the NSR program. The new rule provides a bright-line test for many of the most common RMRR activities. Under the new rule, a replacement activity qualifies for an exemption if:

- It involves replacement of existing components of process units with components that are identical or functionally equivalent;
- The capital cost of the replaced components, plus the cost of any associated activity does not exceed 20 percent of the current replacement value of the process unit; and,
- The replacement does not alter the basic design parameters of the process unit or cause the unit to exceed any emission limitation or operational limitation that is legally enforceable with respect to that unit or any component of the unit.

68 Fed. Reg. 61,248 (Oct. 27, 2003).

EPA Region 1 Enforcement Remains High

EPA Region 1 has announced yet another year of near-record setting totals paid to settle enforcement cases in 2003. In fiscal year 2003, violators paid more than \$12.24 million, including a record \$8.7 million on Supplemental Environmental Projects (SEPs). Region 1 states that the totals paid for settlements in fiscal years 2002 and 2003 are the highest figures in the last decade. Contributing to these totals, the region settled twenty-nine judicial cases, a record number, and forty-five administrative matters.

The \$8.7 million figure for SEPs is 19 percent of the total SEP value across the country. Key SEPs included requiring more than \$5 million in air pollution control measures at a landfill in Johnston, Rhode Island, and \$2.3 million in air pollution control measures at a new transfer station for a major Boston trash hauler. Other SEPs were devoted to improving hazardous materials training for Connecticut fire departments, installing diesel particulate filters on all of Rhode Island's public transit buses, and restoring fifty-four acres of freshwater wetlands in southern Maine.

REGION 2

On Oct. 9, 2003, Gov. George Pataki signed into law a bill, A. 9120, that comprehensively amends the state's 1979 Superfund law, N.Y. Env'tl. Conserv. Law (ECL) §27-1301 *et seq.*, and creates a statutory Brownfield Cleanup Program at ECL §14-1403 *et seq.*

Key aspects of the legislation include:

- Adds statutory Innocent Purchaser and Third Party Defenses to the state Superfund Law as well as a liability for secured creditors, fiduciaries and local governments taking title pursuant to their

eminent domain authority. While the Innocent Purchaser defense includes the same on-going obligations added by the 2002 amendments to CERCLA, the legislation did not add a bona fide prospective purchaser defense or a contiguous property owner defense.

- Requires the New York Department of Environmental Conservation (DEC) to promulgate standards for establishing "all appropriate inquiry."
- Expands the definition of "hazardous waste" under the State Superfund program to include CERCLA hazardous substances. The New York approach is the opposite of that used in CERCLA, where hazardous wastes are included within the definition of hazardous substances.
- Amends the state Oil Spill Prevention, Control and Compensation Law, N.Y. Nav. Law. §12-170 *et seq.*, to include a third party defense and secured creditor exemption.
- Establishes a statutory Brownfield Cleanup Program (BCP) for hazardous waste and petroleum-contaminated sites. The BCP replaces the existing administrative voluntary cleanup program (VCP). Volunteers enrolled in the VCP have until March 31 to decide to transfer to the BCP. Sites contaminated with hazardous wastes and petroleum are eligible for the BCP unless they have been classified as a Class 1 or 2 site on the Registry, are on the National Priorities List (NPL), are permitted RCRA sites, subject to an enforcement action or subject to a cleanup order under Article 12 of the Navigation Law. An application can also be rejected if the applicant has engaged in certain prohibited or illegal acts, or for "public interest" reasons. Under the state Superfund program, DEC may place inactive hazardous waste sites that have

“consequential” amounts of hazardous waste on the Registry. The legislation contains an amnesty provision that “volunteers” who own Class 1 or 2 sites to enroll their sites into the BCP prior to July 1, 2005. After that date, those parties will be subject to the traditional Superfund enforcement process. Participants that own Class 1 or 2 sites are not eligible for the amnesty process.

- Two kinds of applicants are eligible to apply for the BCP. Applicants will have different obligations under the BCP depending on their classification. The first category of eligible applicant is a “volunteer.” This is any person not responsible for the contamination at the time of the BCP application, or who is considered a potentially responsible party (PRP) solely on the basis of its ownership of site that was contaminated prior to the time the applicant acquired title to the property. A volunteer must investigate and clean up contamination at the site but is not required to “chase the plume” or remediate contamination migrating off the site. However, if contamination is migrating off a site, a volunteer will be required to perform a qualitative exposure assessment to assess the risk to public health and the environment of the off-site contamination. The second category of eligible applicant is a “participant.” This category includes any applicant that does not qualify as a volunteer, such as a PRP. A participant must investigate and characterize the nature and extent of contamination both on-site and emanating from the brownfield site. In addition, a participant may also be required to remediate contamination migrating off-site. A volunteer who fails to exercise “appropriate care” by not taking reasonable steps will be treated as a “participant.” When a volunteer is remediating a site, DEC will be responsible for either

remediating the off-site contamination or having PRPs address such contamination.

- The legislation authorizes DEC to establish four cleanup tracks providing for different levels of cleanup geared to site conditions and current or reasonably anticipated future site use.
- At the conclusion of a BCP cleanup, a party will receive a Certificate of Completion (COC) that will contain a liability release and covenant not to sue (CNTS). The CNTS will effectively “run with the land” provided successors and assigns and to persons who develop or occupy brownfield site provided they use “due care” and in “good faith” adhere to BCA and the COC. The CNTS does not apply to persons responsible under statutory or common law unless they were parties to the BCA and must be recorded within 30 days of issuance of the COC or within 30 days of acquiring title. An applicant will not be liable under statutory or common law arising out of contamination that was present when the application for the BCP was approved. Participants will not be released from liability for natural resource damages under CERCLA. The release will also provide contribution protection against third-party claims for matters addressed by the BCA but does not include third-party claims for personal injury or wrongful death arising out of that person’s acts or omissions. As is typical under the federal Superfund law and the remedial programs of other states, the COC will contain reopeners for: environmental conditions at the site no longer being protective of public health or the environment; non-compliance with BCA, workplan or COC; fraud in participation in the BCP; a change in standards that renders the remedy no longer protective; a change in use of the site subsequent to the issuance of a COC; and failure to make “substantial progress”

towards completion of proposed development within three years, or an unreasonable delay by the applicant.

- The bill also establishes environmental easements in favor of the DEC to help enforce land use controls imposed as part of a remedy.
- The BCP will have extensive opportunities for public participation.
- The legislation establishes important financial incentives for brownfield redevelopment including grants and tax credits. The law also infuses the depleted state superfund with \$120 million, and will make available \$15 million for Technical Assistance Grants (TAGs), Brownfield Opportunity Area (BOA) grants and state oversight of the Brownfield Cleanup Program.
- The law also amends the Environmental Restoration Program (ERP) that has been used to fund cleanups of municipal-owned sites. The definition of municipality has been expanded to include certain community-based organizations (CBOs), and the state share of cleanups costs is increased to 90 percent for on-site cleanups and 100 percent for off-site contamination. In addition, the proceeds from the sale of property no longer have to be shared with state so that the municipality can recover its costs before the state is entitled to any proceeds of the sale. The local government will be able to retain any remaining funds.

Even though this measure has now become law, technical amendments will be required to correct errors in the text of the law when the legislature reconvenes in January.

REGION 3

On Dec. 3, 2003, the ABA Section of Environment, Energy, and Resources sponsored the “Key Issues in U.S. EPA Region 3” conference at the Park Hyatt hotel in Philadelphia. Four panels discussed regional and national developments under the Clean Air Act, brownfields, public interest group litigation and the Clean Water Act. Speakers included representatives of EPA Region 3, industry, various state environmental agencies and the private bar. Section Chair Ken Warren gave brief opening remarks.

On Dec. 16, the region announced its plan for establishing four PCB Total Maximum Daily Loads (TMDLs) for the Delaware River. The plan divides the river from Trenton, N.J., downstream to the head of the Delaware Bay, into four segments, each with its own TMDL, and addresses potential sources of PCBs, including stormwater runoff, runoff from Superfund sites, and 142 permitted discharges from municipal wastewater and industrial facilities along the river. These sources will be required to identify how and where the PCBs are entering their systems, and then devise a strategy to prevent the PCBs from discharging to the river.

The region recently made available on its Web page links to the whole text of all regulations that have actually been approved by EPA as part of the Clean Air Act State Implementation Plan for all of the states (including the District of Columbia) in Region 3. Until now this information was only available as hardcopy documents. The Web address for the links is <http://yosemite.epa.gov/r3/r3sips.nsf/MidAtlanticSIPs?openform>.

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

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:

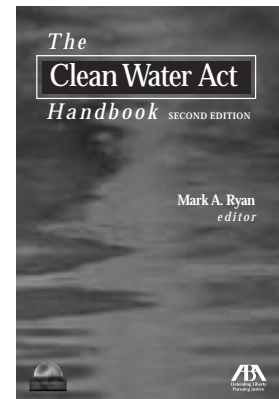
- NPDES permits
- Control of publicly owned treatment works
- Requirements applicable to indirect discharges
- The regulation of wetlands and the impact of recent judicial decisions
- Oil and hazardous substance spills
- Enforcement options under Section 309
- Judicial review

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



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REGION 4

Greetings from Region 4. EPA's Web site includes a plethora of useful materials and information on the region's programs. Check it out at <http://www.epa.gov/region4/index.html>. One area that continues to take a lot of the region's time is the restoration of the Everglades. The Everglades area is located in southeastern Florida and the Comprehensive Everglades Restoration Program authorized by Congress in 2000 is well under way. To address the issues surrounding the South Florida ecosystem, EPA is working in partnership with several local, regional, state and federal agencies. The goal is to assure the long-term sustainability of the region's varied natural resources while providing for the coexistence of extensive agricultural operations and a continually expanding human population. Two good Web sites for information are: <http://www.sfrestore.org/> and <http://www.evergladesplan.org/>.

Also in the news for our region is the upcoming Jan. 14, 2004 oral argument before the U.S. Supreme Court in a case from Florida involving the federal Clean Water Act, which could have a nationwide impact. The case is *South Florida Water Management District v. Miccosukee Tribe of Indians, et al.*, Supreme Court Case No. 02-626. The issue that the Supreme Court has agreed to decide is whether South Florida Water Management District's (SFWMD's) pumping of water from a canal in western Broward County across a levee into the Everglades requires a federal National Pollutant Discharge Elimination System (NPDES) permit under Section 402 of the Clean Water Act (33 U.S.C. § 1342(a)), when the pump diverts water containing pollutants that do not originate from SFWMD's pumps.

The case, while appearing to be limited on its facts to one facility, has captured national attention. Over forty entities on each side of

the dispute, including states, local governments and public and private associations, have submitted or joined in *amicus curiae* briefs. While various states and environmental groups are supporting the decisions of the courts below, many states (especially in the western United States), local governments and associations have asked the Supreme Court to overturn the lower courts' decisions arguing that the provision of the Clean Water Act at issue was designed to prevent the introduction of pollutants into the nation's waters from industrial plants and other direct sources of pollution; not to prevent governments from simply moving water from one body to another for flood control, drinking supply and other governmental purposes. The U.S. government, through the office of the Solicitor General, initially submitted a brief in opposition to the Supreme Court hearing the case. However, now that the Court has accepted the case, the Solicitor General has submitted a brief in support of overturning the lower court decisions. For copies of all briefs please see the SFWMD Web site: http://www.sfwmd.gov/gover/s_9final/c_filings/c_filings.html.

Two recent court of appeals decisions are also worth reviewing. In *Sierra Club v. Hankinson*, (11th Cir.), on Dec. 5, 2003, the Eleventh Circuit unanimously affirmed the award of attorneys' fees for the plaintiffs' monitoring of performance under a consent decree that had mandated a schedule for the establishment of TMDLs for impaired waters in Georgia. The court affirmed the district court decision that time spent reviewing the content and validity of the TMDLs was necessary to meaningful enforcement of the decree, and therefore that time was relevant to the rights established by the decree and related to the terms of the judgment. The court also approved the award of the expense of a nontestifying expert witness as necessary for the protection of the rights established under the decree. See <http://www.ca11.uscourts.gov/opinions/ops/200311263.pdf>.

The second recent court of appeals decision was issued on the same day the U.S. EPA announced it would not issue a rule interpreting the 2001 Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*. In *United States of America, et al. v. James Hamilton Needham, et al.*, 2003 U.S. App. Lexis 25318 (Dec. 16, 2003), the court of appeals reversed a bankruptcy court and district court on appeal, finding that the discharge of oil occurred in waters of the United States and therefore the Neehams were liable for the costs associated with the spill under OPA. In discussing the scope of jurisdiction, the appellate court found that a broad definition of navigable waters is not sustainable under *SWANCC* and jurisdiction should be limited to “bod[ies] of water that are actually navigable or adjacent to an open body of navigable water.” (citing *Rice v. Harken Exploration*, 250 F. 3d. 264, 269. n9 (5th Cir. 2001).

REGION 5

An issue that has been emerging in Region 5 is the growing use of the vapor intrusion pathway to drive environmental cleanups. In this exposure pathway, groundwater plumes containing volatile organic compounds like trichloroethylene (TCE) and benzene can release vapors which migrate through the soil into the basements and lower rooms of buildings. For example, vapors released from groundwater contamination in a residential neighborhood in Region 8 caused the relocation of many residents of apartments and homes beginning in 1993, and became one of the largest indoor air investigations taken so far.

The recent increase in activity in Region 5 stems in part to the issuance of EPA’s draft Subsurface Vapor Intrusion Guidance (Nov. 2002, <http://www.epa.gov/correctiveaction/eis/vapor.htm>). Embedded in the guidance and

the methods to calculate indoor air goals are Cancer Slope Factors for various volatile compounds. The document includes Cancer Slope Factors for TCE and perchloroethylene that are provisional and still undergoing review by the scientific community, yet are used to calculate acceptable indoor air concentrations. These concentrations can be orders of magnitude below background concentrations and at the level of the lowest available analytical detection limits.

One of the effects of the growing evaluation of this pathway is that sites whose cleanup approaches were thought to be complete are now being reopened during the five-year review. At some sites, the pathway suggests a lowering of the cleanup objectives and another round of investigation and remediation. At other sites, EPA Region 5 has requested millions of dollars of indoor air sampling and analysis. The sampling alone frightens the residents, but this is compounded when positive readings are detected often as the result of household sources like paint storage, cigarette smoke and deodorants. A random sampling of a few residences can turn into an uncontrolled frenzy as the neighbors demand sampling in their houses, too. This issue will continue to be monitored for implications outside the region.

REGION 6

Region 6 Announces Consent Agreement on Tar Creek Superfund Site

On Dec. 9, 2003, Region 6 announced an agreement between EPA, the Department of Interior and two mining companies to coordinate the process of cleaning up the large chat piles and mill pond mining waste at the Tar Creek Superfund site in Oklahoma. This agreement is a blueprint for cleanup at one of the nation’s largest Superfund sites. The agreement, a legally binding Administrative Order on Consent, was issued

in conjunction with the recently announced compact among the federal partners to speed up efforts to clean up the site and a large scale plan put forward by U.S. Senator James Inhofe, the state of Oklahoma and tribal leaders.

8-hour Ozone Non-attainment Tentative Boundaries Announced

On Dec. 4, Region 6 responded to the states of Texas, Oklahoma, Arkansas and Louisiana on the proposed non-attainment boundaries for the new 8-hour ozone standard. The region generally agreed with the boundaries suggested by the state governors, including the acknowledgment that the cities of Tulsa and Oklahoma City did not violate the new standard. In Texas, however, the region suggested the entire 12-county MSMA region surrounding Dallas-Ft. Worth metroplex be designated non-attainment rather than the seven counties suggested by Texas. Texas will have one final opportunity to respond to EPA prior to the final promulgation of the boundaries in April 2004.

REGION 7

The Kansas Department of Health and Environment (KDHE) has begun a program to audit the implementation of institutional controls as a part of the closure requirements for construction and demolition landfills in the early 1990s. In several instances, the KDHE has found that required institutional controls had not been put in place.

The Nebraska Department of Environmental Quality (NDEQ) and EPA Region 7 have been negotiating a memorandum of agreement regarding the NDEQ's voluntary clean up program as a Superfund alternative under the 2003 Brownfield amendments to CERCLA. There is not, however, a reliable timetable for completion.

Almost 50 percent of all ethanol producing plants in the United States are located in Region 7. Region 7 has been implementing an initiative to address potential Title V and PSD shortcomings in clean air permits issued to existing ethanol production facilities.

In April 2003, the Iowa Environmental Protection Commission, on recommendation from the Iowa Department of Natural Resources (IDNR) adopted ambient air standards for hydrogen sulfide and ammonia earlier. The Iowa legislature overruled these standards. In December 2003 the IDNR has returned to the Environmental Protection Commission quickly a new proposed hydrogen sulfide ambient air standard.

The Missouri Department of Natural Resources (MDNR) continues to work on its corrective action draft rules. In November, the MDNR estimated a revised version will become publicly available by January 2004.

REGION 8

The Regional Council for the Region 8 states of Colorado, Montana, North and South Dakota, Utah and Wyoming is rounding out its membership with some additional state bar and agency representatives. This Regional Council plans to host a short conference call in January to discuss a teleconference or brown bag program in the first half of 2004.

Air quality issues are of significant concern in the Region 8 states of Colorado and Utah. Colorado has circulated a draft ozone SIP for reaching attainment of the ground-level ozone standard in the Denver Metro region and adjacent areas to the north and west. Utah has just finalized a regional haze SIP that becomes effective Dec. 31, 2003, to protect visibility in its five national parks on the Colorado Plateau.

Montana and Wyoming are both focused on the regulation of coal bed methane (CBM),

which has grown rapidly, especially in the Powder River Basin. Water quality impacts and the beneficial use of produced water from CBM development remain primary concerns. Both states have Web pages devoted to this issue.

North Dakota recently confirmed its compliance with federal and state air quality standards, and is urging citizens to focus on indoor air quality during the long, cold winter months. South Dakota adopted a new general permit for stormwater discharges associated with industrial activity last August, has promoted training for visible emission evaluation for air emission sources this past fall, and is planning courses on proper manure management over the winter.

No Regional Roundups were submitted from Regions 9 and 10.

REGIONAL POLICIES ON BLENDING ARE NOT FINAL AGENCY ACTION

William L. Penny
Wyatt, Tarrant & Combs LLP
Nashville, Tennessee

The District Court for the District of Columbia recently ruled that EPA regional guidance documents pertaining to the so-called wastewater blending and other related issues were not final agency actions, and, therefore did not violate the Administrative Procedures Act. See *Pennsylvania Mun. Auths. Ass'n v. Horinko*, 2003 WL 22734303 9 (DDC). The case was brought by several state and local municipal wastewater organizations as well the Association of Metropolitan Sewerage Agencies. The plaintiffs sued the acting EPA administrator, as well as the Region 3, 4 and 6 administrators (including this Committee's Region 6 Vice-Chair Greg Cooke, who was the regional administrator for Region 6 at the time).

The plaintiffs contended that these EPA regions, contrary to national EPA rules and guidance followed in other regions, were prohibiting "blending" which occurs when peak wet weather flows exceed the capacity of a waste water treatment unit, and the permittee routes excess flow around the unit and mixes or recombines them with treated water. The combined waters at the point of discharge meet the effluent limitations contained in the permit. The regional administrators argued that they were simply interpreting the definition of bypassing; however, plaintiffs insisted that EPA had long-standing policies that it would not dictate processes as long as end of the pipe limits were met. Apparently, Regions 2, 5, 7 and 9 had explicitly approved blending. The impact of prohibiting blending, of course, was big. All the excess water would have to be directed into treatment units which could compromise their effectiveness, or simply make it impossible to function properly. In addition, according to the plaintiffs, the defendant regions were prohibiting emergency sanitary sewer overflow discharges, which were said to be needed in high flow conditions. Finally, plaintiffs claimed that sanitary sewer overflows were not subject to secondary treatment contrary to EPA regulations.

The case presents the situation which sometimes occurs when the state agencies are captive to EPA regional office policies and guidelines. The typical scenario occurs during the renewal of an NPDES permit. EPA requires a change after its review of a draft permit, or after the region has issued guidance documents to states. The state agency then imposes the new requirement without even questioning whether it is contrary to national policy or regulation. If the state agency does not follow the guidance, they are afraid (justified or not) that EPA will either overfile or otherwise strain their relationship with the region. So, it becomes easier to simply impose the requirements and hope no one appeals.

In dismissing the case, the D.C. District Court stated that these regional policies did not constitute final agency action. In determining whether the policy constituted final action, the courts have established a two-prong test. First, it must mark the “consummation of the agency’s decision making process” and not be merely “tentative” or “interlocutory” in nature. Second, the action “must be one by which rights or obligations have been determined, or from which legal consequences will flow,” quoting *Bennett v. Spear*, 520 U.S. 154 (1997). The court cited a number of cases, including *Appalachian Power v. EPA*, 208 F.3d 1021 (DC Cir. 2000), where national guidance documents were determined to constitute final agency action. However, the court determined that the *regional* guidance documents are not the same character as the *national* guidance documents, and the plaintiffs did not challenge national guidance documents.

The court determined that the regional guidance documents were not final agency action, and until something more happened, such as permit denials or a national guidance document, the plaintiffs could not claim final agency action by EPA. The regional guidance documents were therefore not binding, and the plaintiffs could continue to operate under their permits until they expire or are challenged by state or federal permitting authorities.

If nothing else, this case provides some good fuel for fodder in permit appeals of permits issued by state agencies that have imposed requirements based only upon regional guidance documents. Regional applications and interpretations will always be present in regulating the environmental programs (witness EPA Region 9 vs. Region 3 preliminary remediation goals, or PRGs). It remains to be seen whether a court will one day strike down a purely regional policy, however, absent some action by the state to further the policy.

ANNOUNCEMENT FROM THE COMMITTEE’S TECHNOLOGY VICE-CHAIR

The technology vice-chair, Steven Stout, is currently working with regional vice-chairs to compile a list of all State Bar Environmental Section chairs in the regions. This will include not only the current chair, but also the heir apparent (such as chair-elect) so that we can assure some continuity. Mike Gerrard, the Section of Environment, Energy, and Resources chair-elect, has asked this Committee to create a list serve with the State Bar chairs. The list serve has now been created. Once we get the list finalized, we will publicize the list serve and make an effort to recruit state leadership participation.

Each regional vice-chair should identify a person in their regional council who will be responsible for working with the technology vice-chair on two matters:

- a. maintaining and updating the nationwide links tied into the map;
- b. keeping the committee Web page current.

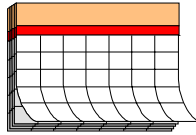
We now have a separate page for each region to upload information, links or other items of interest for the region. It is also a good place to list state bar leaders. Finally, there are currently plans to make separate Web pages for each of the regions to provide a better opportunity to communicate messages of interest within the regions. This should be done soon.

LIKE TO WRITE?

The State and Regional Environmental Cooperation 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 the editor Sarah Martin at smartin@rc.com.

**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 Resources: Law, Policy and Technology

May 6-7, 2004
Hollywood, Florida

Wetlands Law and Regulation

May 19-24, 2004
Washington, D.C.
(Co-sponsored with ALI-ABA and ELI, for information call 800/253-6397)

Key Environmental Issues in U.S. EPA Region 2

June 18, 2004
New York, New York

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.***

