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## Environmental Law Updates

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## *ENVIRONMENTAL UPDATES*

Winter v. Natural Resources Defense Council, 129 S.Ct. 365 (2008).

The United States' Navy regularly conducts training exercises – utilizing mid-frequency active (“MFA”) sonar – off the southern coast of California. A priority of these exercises is to certify strike groups, which consist of an aircraft carrier or amphibious assault ship, and accompanying groups of surface ships, submarines, and aircraft, for deployment; specifically, these exercises require the use of MFA sonar to detect modern diesel-electric submarines, which are employed by adversaries of the United States. The waters off the coast of southern California are ideal for these training exercises because of their proximity to land, air, and sea bases.

However, the waters used by the Navy for its training operations are home to at least 37 species of marine mammals. While it is agreed that MFA sonar affects marine mammals, the severity of such effects are disputed. The Navy claims that in the course of 40 years of training exercises involving MFA sonar, there have been no documented instances of sonar-related injury to marine mammals. The Navy qualifies this observation by recognizing that, at most, MFA sonar may cause marine mammals to experience temporary hearing loss or brief disruptions in the behavioral patterns. However, others contest that MFA sonar, which can be as loud as 2,000 jet engines, result in far more deleterious consequences than the Navy asserts, including permanent hearing loss, decompression sickness, and major behavioral disruptions.

These perceived dangers led a group of petitioners, including the National Resources Defense Council, to sue the Navy for not preparing an environmental impact statement prior to conducting a round of training exercises in violation of the National Environmental Policy Act of 1969. The District court granted plaintiffs' motion for a preliminary injunction and the Court of Appeals affirmed. The Supreme Court granted certiorari and, upon review, reversed and vacated the preliminary injunction.

The Supreme Court found the lower courts' standard for issuing a preliminary injunction – the possibility of irreparable harm – to be too lenient; instead, the Court insisted that a showing that irreparable injury is likely without an injunction is necessary. However, even with a showing of irreparable injury, the Court stressed that competing claims of injury must be weighed with particular regard to the public consequences of

granting an injunction. In addition, a court must grant deference to the professional judgment of military authorities concerning military interests.

Upon specific concerns of Navy officers that a preliminary injunction would reduce the effectiveness of the Navy's training exercises, the Court found that the District Court did not sufficiently balance equities and public interest. Furthermore, the District Court abused its discretion by prohibiting the Navy from using MFA sonar within 2,200 yards of a marine mammal because the court failed to recognize the burdens of such shutdowns. In addition, the District Court abused its discretion by requiring that the Navy power down its MFA sonar by six decibels in the event of surface ducting, a phenomenon where little sound penetrates the surface of the water. The unpredictability and infrequent occurrence of surface ducting underscores the importance for the Navy to train under this condition. For the foregoing reasons, the Supreme Court concluded that the consequences of a preliminary injunction in this case were too dire to be permitted; instead, the Court suggested other remedial judicial remedies, including declaratory relief or an injunction that is tailored to the preparation of an environmental impact statement.

MICHAEL RISBERG

## *ENVIRONMENTAL UPDATES*

Ackison, et al. v. Anchor Packing Comp., et al., 2008 WL 4601676 (Ohio 2008).

Linda Ackison filed suit in May 2004 on behalf of her deceased husband, Danny Ackison, alleging that Anchor Packing Company, her husband's former employer, along with several other defendants had exposed Mr. Ackison to asbestos, and that this exposure caused her husband's illness and ultimately his death. The only claim at issue in this case is a claim for nonmalignant asbestosis.

In response to finding that the "asbestos personal injury litigation system was unfair and inefficient" and that it "impos[ed] a severe burden on litigants and taxpayers alike," the Ohio legislature revised the state laws that governed asbestos legislation in September 2004. This legislation enacted House Bill 292 ("H.B. 292") which established threshold requirements for certain asbestos related claims including nonmalignant claims. According to the revised legislation a plaintiff must provide "qualifying medical evidence of physical impairment", and this qualifying medical evidence must be "supported by the written opinion of a competent medical authority stating that the claimant's exposure to asbestos was a substantial contributing factor to his medical condition", encompassed in R.C. 2307.92. Under R.C. 2307.93(C) if the threshold is not met the suit is dismissed, but the plaintiff is free to refile the claim once the threshold is met. Further, under R.C. 2307.93(A)(2) and (3) the legislature applied the new legislation to any pending cases, whether or not the case was filed prior to the effective date of the new legislation.

The trial court determined that no substantive rights were violated by the retroactive application of the revised asbestos legislation and, therefore, that the legislation did not violate the Ohio Constitution. It subsequently dismissed Ms. Ackison's claims since she had not filed the documentation required by the revised legislation. Ms. Ackison appealed this decision and the court of appeals, contradicting three twelfth district court of appeals cases, found the application of the revised legislation was unconstitutional, because it divested a vested substantive right granted by the statute that was in place at the time of her filing.

The original defendants then appealed to the Supreme Court of Ohio for the determination of whether the retroactive application of the revised legislation was unconstitutional. The Court noted that while the

Ohio Constitution expressly denied the general assembly any power to enact retroactive laws, statutes that merely apply retroactively are different from those that do so unconstitutionally. In order to determine whether the retroactive application was unconstitutional the Court used a two-part test, the first part which considered whether the statute was expressly retroactive. If it was the court then had to determine whether that retroactive application was remedial, which would be constitutional, or substantive, which would be unconstitutional. The Court noted that the legislature expressly applied the revisions to any pending cases without regard to when the claim was filed, and therefore the legislation was expressly retroactive.

Having decided that the revised asbestos laws applied retroactively the Court then had to decide whether the retroactive application was remedial, affecting the remedy or procedure for the cause of action, or substantive, affecting a substantive right. The Court previously held two of the statutes at issue, R.C. 2307.92 and 2307.93, to be procedural in nature, and affirmed this in the instant case. Despite this conclusion Ms. Ackison continued to challenge the constitutionality as applied to the instant case, and as a result the Court noted she bore the burden of proof.

Ms. Ackison's chief argument was that prior to the enactment of H.B. 292 damages for asbestos-related conditions were recoverable if there was simply a change in the lungs due to the exposure, without any showing of impairment or disease. The Court noted that "pleural thickening" would be considered one such change. According to precedent the cause of action vests when the plaintiff is "informed by competent medical authority that he ha[d] been injured," and therefore the Court needed to determine whether pleural thickening constituted such an injury. The Court noted that two lower court precedents had found in the affirmative; however, the Ohio Supreme Court had not yet decided the issue. The Court found the reasoning of both lower court precedents was based on a misinterpretation of the Restatement Second of Torts when they applied a broad definition of harm that was meant for the intentional tort of battery. As a result the Court determined that recovery for merely showing pleural thickening was not settled common law, and therefore Ms. Ackison had not satisfied her burden of proving that retroactive application of the revised asbestos legislation was unconstitutional.

KEVIN DOTHAGER

## ENVIRONMENTAL UPDATES

### Wong v. Bush, 542 F.3d 732 (9<sup>th</sup> Cir. 2008)

*Wong v. Bush* arose out of an August 2007 protest that was broken up by the U.S. Coast Guard after it impeded the docking of the Hawaii Superferry in a Kauai, Hawaii harbor. Hundreds of people, concerned with the possible environmental impact of the ferry's operation, swam or surfed into the harbor and blocked its path for several hours. After the Coast Guard broke up the demonstration, protestors sued in district court seeking a preliminary injunction and alleging that use of a "security zone" to justify dispersal of the protest violated free speech rights and that the Coast Guard should have considered the environmental impact of the security zone and of the Superferry before acting. The district court held that the Coast Guard did not exceed its authority by breaking up the protest and that it did not have to consider the environmental impact of its actions. The protestors appealed and the 9<sup>th</sup> Circuit affirmed.

The Coast Guard broke up the protest under the authority of the National Environmental Policy Act (NEPA) and related regulations, which govern its authority to create security zones to safeguard U.S. waters. Security zones can be established to safeguard American waters against destruction, sabotage, subversive acts or accidents. The plaintiffs first argued that the use of a security zone in the harbor violated First Amendment free speech rights. The Coast Guard argued that because the security zone in question was no longer in place, the issue was moot, and that the First Amendment rights of protestors did not extend to their present conduct.

The court held that the issue was not moot because it was capable of repetition. The protestors had indicated their willingness to again block the Superferry if it attempted to reenter the harbor, and the Coast Guard had indicated that it would reestablish the security zone if this occurred. This was enough to establish a possibility of repetition. Next, the court considered the protestors' argument that the use of the security zone violated their First Amendment rights. The court held that the security zone was a reasonable, content-neutral restriction on speech and that it was therefore not barred by the First Amendment.

The court looked next to the protestors' contention that the Coast Guard failed to consider the secondary environmental effects of the security zone and of the ferry's operation. Because it found that the

agency's action was neither arbitrary nor capricious, the court held that it was excluded from the normal requirement under NEPA that a "no-action" alternative be considered before taking action. The 9<sup>th</sup> Circuit also rejected the plaintiffs' argument that the Coast Guard had to consider the environmental impact of the ferry before taking action. The scope of NEPA review is limited to activities authorized by federal action. The Superferry was operated by private actors and was therefore not subject to NEPA review.

ROBERT NOCE

## ENVIRONMENTAL UPDATES

The Ass'n of Int'l Auto. Mfrs. v. Sullivan, No. 06-70T, 2008 U.S. Dist. LEXIS 96212 (D. R.I. Nov. 25, 2008).

The United States District Court in Rhode Island recently dealt another body blow to Detroit's struggling automakers. General Motors and DaimlerChrysler ("automakers")—along with two automobile manufacturers' associations and several Rhode Island automobile dealers—sought declaratory judgment against a Rhode Island state regulation which set emissions standards for new automobiles. In an effort to prevent higher emissions standards, automakers claimed Rhode Island's state regulation was preempted by federal law. In response, Sullivan (the relevant state Rhode Island director) argued that the doctrine of issue preclusion barred automakers from claiming preemption because preemption had already been decided in cases brought in United States District Courts in California and Vermont.

Automakers claimed Rhode Island's state regulation was preempted by the Clean Air Act ("CAA") and Energy Policy and Conservation Act ("EPCA"). The CAA sets federal emissions standards for new automobiles and expressly preempts any differing state emissions standards, except California. If California obtains a waiver under the CAA, it can establish a more strict emissions standard, which other states may then adopt in identical form. The EPCA sets federal fuel economy standards for new automobiles. Like the CAA, the EPCA expressly preempts state regulation of fuel economy standards. However, unlike the CAA, the EPCA does not contain any waivers allowing states to establish a different fuel economy standard.

In 2005, California sought a waiver under the CAA to establish a stricter state emissions standard. Before California was granted a waiver, Rhode Island and several other states adopted California's stricter emissions standard for their own states, realizing they could not enforce their stricter standard unless California was granted the waiver. California's waiver request was ultimately denied and California's appeal of the denial is currently pending in the Court of Appeals for the D.C. Circuit.

Before seeking declaratory judgment in Rhode Island, automakers had brought suit in United States District Courts in California and Vermont arguing the same preemption issues under the CAA and EPCA.



The Vermont court reached a decision first and rejected automakers' preemption arguments. Automakers appealed the Vermont decision, which is currently pending before the 2nd Circuit Court of Appeals. Subsequent to the Vermont court's decision, the California court granted summary judgment against automakers, likewise rejecting automakers' CAA and EPCA preemption arguments.

On the basis of the Vermont and California courts' decisions, the United States District Court in Rhode Island dismissed automakers' action because automakers were collaterally estopped (or issue precluded) from arguing preemption. After providing a thorough explanation for why the doctrine of issue preclusion applied to automakers' arguments, the Rhode Island court determined there was little benefit in allowing the automakers another opportunity to challenge state regulations regarding emissions standards. If automakers were allowed to reargue preemption issues, it would lead to vexatious and costly litigation, potential inconsistent decisions, and wasted judicial resources. Therefore, the Rhode Island court dismissed automakers' declaratory judgment action.

The concluding point is that the Rhode Island court's ruling has little current impact on automakers because California has not yet been granted a waiver for stricter emissions standards. Until California is granted a waiver, no state can establish higher emissions standards than federal law provides. However, automakers are concerned because they suspect President-elect Barack Obama's administration—unlike that of President George Bush's—will grant California a waiver to promulgate stricter emissions standards regulation. The upshot is that time will tell how much of an impact the Rhode Island decision will have on the future of emissions standards.

WILLIAM PETERSON

## ENVIRONMENTAL UPDATES

Sycamore Indus. Park Assoc. v. Ericsson, Inc., 2008 WL 4613874 (7th Cir. 2008)

In 1984, Ericsson, Inc. agreed to sell its 28-acre industrial property to Sycamore Industrial Park Associates, a company organized by former Ericsson employees in order to turn the specific property into an industrial park. The property was heated by boilers. These boilers were large units attached to the floor of the buildings that held them. The large units were connected to other buildings through a pipe system, most of which ran near the ceiling of the buildings and were connected to the building by “metal fasteners.” Before the transfer to Sycamore was complete, Ericsson installed natural gas unit heaters to the entire facility and ceased to use their old boiler-based heaters, but left the system in tact in the facility and did not remove the boiler-based system when the sale to Sycamore was complete. In 2004, Sycamore founded asbestos in the insulation that covered the steam boiler system and its piping. Sycamore sued Ericsson to compel it to do away with the asbestos. Sycamore claimed that by suspending use of the boiler system, but not removing it from the property violated Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) and the Resource Conservation and Recovery Act (“RCRA”). On January 9, 2008, the district court granted Ericsson’s motion for summary judgment. Sycamore appealed to the Seventh Circuit.

The Seventh Circuit stated in order for a plaintiff to establish CERCLA liability, they must prove the site is a “facility” as defined by CERCLA; the defendant is a responsible party; there has been a release or threatened release of a hazardous substance; and the plaintiff has incurred costs because of the release of the hazardous material. The Seventh Circuit held the second and third elements were at issue in this case.

The first CERCLA element at issue was whether Ericsson was the responsible party. The court held in order for Sycamore to establish Ericsson was the responsible party, it must establish that when Ericsson owned the property in question “it discharged, deposited, injected, dumped, spilled, or leaked a solid or hazardous waste or placed it into or on any land or water.” This came directly from the definitions of responsible party and disposal in CERCLA. The court interpreted the statute to mean that in order for Ericsson to be the responsible party,

Sycamore must also establish that Ericsson disposed of the hazardous material. The next issue the court considered was whether the asbestos-infested boiler system was hazardous material. Again, the court looked to the definition of "hazardous waste" under CERCLA, which read that hazardous waste must be solid waste, which happens to also be defined by CERCLA. However, the court assumed that asbestos is solid waste, but held Ericsson's actions were not "disposal" because it did not place the asbestos on or into any land or water so it would enter the environment, as the CERCLA definition of disposal requires. However, Sycamore argued that by selling the property that the asbestos was contained on constituted disposal. However, the court followed precedent from their own circuit, as well as the Ninth Circuit, to hold that simply selling property containing hazardous material was not a disposal as required by CERCLA. The court reasoned that there was no evidence showing that Ericsson simply sold the property to dispose of the hazardous material, and therefore, could not be held liable for the disposal of the asbestos as CERCLA requires.

In determining the second issue, whether there was a release or threatened release of the hazardous substance, the court again turned to definitions provided by CERCLA. The court looked to the statutory definitions of both release and environment, and then held because there was no emission into the environment, and instead the asbestos was confined to the inside of the buildings, that there could be no "release" as required by CERCLA. Therefore, Ericsson could not be held liable under CERCLA.

Next, the court addressed Sycamore's RCRA claim. In order to determine if Sycamore could establish a prima facie case for a RCRA claim, the court looked straight to the definition of "disposal" under the statute. The definition of disposal is the same under RCRA as it is under CERCLA; therefore, the court again held that Sycamore could not prove that the asbestos was placed on or in the outside environment, and was instead contained inside buildings on the property. In addition, the court held that the RCRA requires active involvement with the hazardous material in question to determine liability and looked to other courts interpretation of this requirement. The majority of other courts had held that affirmative action, rather than a passive manner was required to place liability with an entity. The court held there was no evidence that Ericsson had any knowledge of the asbestos, let alone any affirmative action with

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the hazardous substance. Therefore, unable to find Ericsson liable under either CERCLA or RCRA, the Seventh Circuit affirmed the district court's summary judgment for Ericsson.

NICOLE HUTSON

Sierra Club v. Franklin County Power of Illinois, LLC, Case No. 06-4045

The Sierra Club filed suit against Franklin County Power of Illinois (Franklin) to enjoin the company from building a coal fired power plant in southern Illinois. Because the power plant would emit a significant amount of air pollution, Franklin was required to obtain a "Prevention of Significant Deterioration" (PSD) permit from the Illinois Environmental Protection Agency (IEPA) (the agency designated by the federal Environmental Protection Agency to issue such permits in Illinois) Sierra Club alleged that Franklin's PSD permit expired because it did not begin construction in an 18 month period required by the permit and that the permit was invalid because Franklin discontinued construction for 18 months. The district court agreed with Sierra Club, granting summary judgment and permanently enjoining Franklin from constructing the power plant. Franklin appealed to the United States Court of Appeals, Seventh Circuit, which affirmed the district court's ruling.

In August, 2000, Franklin applied to the IEPA for a permit to build a 600 megawatt coal power plant (a major emitting facility) on land on which it had a 99-year lease. Because the power plant would be a "major emitting facility," Franklin was required to apply for a PSD permit. The PSD contains emissions limitations established by the IEPA and represents the "best available control technology" for pollution. The agency issued the permit on July 3, 2001. The permit stipulated that if construction of the boilers did not begin within 18 months of the issuance of the permit or if construction discontinued for 18 months or more or if construction was not completed within a reasonable time, the permit would become invalid.

On December 2, 2002, Franklin entered an agreement with Black & Veatch (B & V), an engineering and construction firm, to work together to develop an engineering, procurement, and construction (EPC) contract. On December 18, Franklin contracted with Alberici Constructors, which would excavate the work site. In January 2003, Alberici workers delivered equipment and began excavating the site, but on February 14, after a payment dispute, Alberici stopped working.

In July 2004, Franklin's landlord filled in the hole on the site after Franklin missed a lease payment. In September 2004, Franklin signed a new excavation contract and work began again later that month.

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In November, 2004, IEPA made a preliminary finding that Franklin's permit had expired. Finally, in May, 2005, Sierra Club commenced this suit.

In ruling for Sierra Club, the court first noted that since the permit was issued on July 3, 2001, its "drop-dead date" was January 3, 2003. Next, the Court examined 40 CFR 52.21(r)(2), which states that a permit will expire if construction doesn't "commence" within 18 months of the permit's issuance or if construction is discontinued for 18 months or if construction is not completed within a reasonable time. 42 USC 7479(2)(A) defines "commence" as beginning "a continuous program of physical on-site construction of the facility" or "enter[ing] into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time."

The court disagreed with Franklin's contention that it prevented the permit from expiring by beginning a "a continuous program of actual construction" that included "conducting engineering studies [and] excavation work." The EPA, in 40 CFR 52.21.(b)(11) defines "begin actual construction" as "initiation of physical on-site construction activities on an emissions unit which are of a permanent nature." The court acknowledged that beginning actual construction might be different than beginning a continuous program of on-site construction as defined under 42 USC 7479(2)(A)(i), but found that the company did not do any construction work at all. The court observed that as of the "drop-dead date," Franklin had not laid a foundation, building supports, underground pipework, or permanent storage facilities. Also, in direct contravention to the explicit requirements of the PSD, Franklin had not begun work on the boilers before January 3. The only work performed was the hole dug by Alberici, but this was not "continuous" work because it ended on February 14, 2003, and it wasn't "permanent" because Franklin's landlord later filled in the hole.

The court further supported its conclusion by citing an EPA memorandum, which stated that site clearing and excavation work generally doesn't satisfy the commence construction requirements.

Finally, the court reasoned that even if Franklin had commenced construction, the permit became invalid because construction lapsed for

over 18 months. After Alberici discontinued work on February 14, 2003, it did no more work and the site appeared to lay dormant for over 19 months until September 29, 2004, when a different company began digging a hole. The 19 month lapse invalidated the PSD permit.

Next, Franklin argued that it "commenced construction" by signing a "construction memorandum" with B & V, which required the two companies to work together on an exclusive basis to draft and negotiate the Engineering, Procurement, and Construction Contract. In order for the construction memorandum to qualify as one that commences construction, per 42 U.S.C. § 7479(2)(A)(ii), it [could not] be canceled or modified without substantial loss to the owner or operator" and would have to "undertake a program of construction of the facility to be completed within a reasonable time."

The court found that even if the construction memorandum somehow commenced construction, the PSD permit had expired because of the 19 month lapse. However, the construction memorandum did not prevent the lapse from killing the permit. If the construction memorandum trumped the lapse provision, construction could be delayed indefinitely merely by entering a contract that commences construction.

However, the Court ruled that the construction memorandum was not a contract. It was a preliminary step toward agreeing on a contract for building the power plant. Indeed, the memorandum only required the two companies to reach a construction agreement, not begin actual construction. For example, the memorandum required the two companies to work together in good faith to draft and negotiate the contract. The memorandum further specified that upon termination of the memorandum, the construction company would have no liability to perform any work. In addition, the companies had not agreed on a price term. Further, the construction company indicated it could not meet Franklin's target 32-month completion time, instead settling on 45 months. However, the construction company said that if Franklin found a company to complete construction within 32 months and for a specified price, Franklin must work with that company. All of these facts, the court ruled, indicated that the memorandum was not a contract.

Finally, Franklin argued that "program of construction" should be interpreted more broadly. The court cited EPA material stating that "program" does not including planning and design of a unit. The court

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also cited EPA material stating that in order to comply with construction commencement requirements, contractual obligations must be site-specific. Site-specific activities include placement, assembly, or installation of materials, equipment, or facilities comprising the ultimate structure. Franklin and B & V, however, made no agreements for site-specific construction. They had merely agreed to create a contract.

The court agreed with this outcome. The PSD requirements prevent companies from sitting on permits for long periods of time. This helps ensure that emitting facilities comply with modern emissions regulations and don't use old technology. Interpreting "program of construction" broadly would greatly increase the time that companies could delay construction.

MATT ARENS



Northwest Coalition for Alternatives to Pesticides v. E.P.A., 544 F.3d 1043 (9<sup>th</sup> Cir. 2008).

The Environmental Protection Agency (“EPA”) has the authority to regulate the use of pesticides for agricultural purposes under two statutes; the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”) and the Federal Food, Drug and Cosmetic Act (“FDCA”). While FIFRA establishes the appropriate procedure for registering a pesticide, FDCA allows EPA to establish the maximum allowable amount of a pesticide that may remain in a commodity. In other words, FDCA requires EPA to determine the level of pesticide residue that may remain on the commodity without rendering the treated commodity unsafe for human consumption.

In 1996, Congress amended FDCA and required EPA to assume that pesticides posed a greater risk to infants and children. Specifically, EPA had to apply a ten-fold factor to establish a safety margin that would be ten times greater for infants and children. However, EPA could reduce the safety factor if EPA had reliable data that a lower safety margin was sufficient to protect infants and children.

In 2001 and 2002, EPA established seven tolerance levels for pesticides which were to be used on vegetables, fruits, nuts and cereal grains. EPA did not use the ten-fold safety factor in its determination of the pesticides’ tolerance levels. EPA established tolerance levels using a four-fold factor for four of the pesticides and no increased safety margin for three of the pesticides. The Northwest Coalition for Alternatives to Pesticides and the Natural Resources Defense Council each petitioned for review of EPA’s final order establishing the pesticides’ tolerance levels.

The petitioners argued that EPA did not have the necessary “reliable data” that would allow EPA to reduce the safety margin in its analysis of the pesticides’ effect on infants and children. Specifically, the petitioners argued that the EPA’s computer models were unreliable compared to actually taking samples of drinking water to determine the amount of pesticide residue that makes it to the water supply. The petitioners also argued that EPA’s failure to wait for the results of certain developmental neurotoxicity tests rendered EPA’s data unreliable.

The Ninth Circuit Court of Appeals applied the “arbitrary and capricious” standard under § 706 of the Administrative Procedure Act and

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rejected the petitioners' arguments. In doing so, the court gave EPA wide latitude on "questions of scientific judgment."

Despite rejecting the petitioner's first two arguments, the court found one of the petitioners' administrative objections persuasive. The petitioners' had previously argued that EPA had failed to justify its decision to apply a 3x safety margin as opposed to a factor between three and ten. For example, the petitioners wanted to know what made a 3x safety margin more appropriate than a 4x safety margin. The court found this argument to be persuasive and remanded the petition for review to EPA so that it could issue an explanation for selecting a reduced safety margin. The dissent agreed with the majority with the exception of the majority's treatment of the petitioner's administrative objections. The dissent noted that the petitioners did not seek review of EPA's action based on its failure to provide an explanation for a reduced safety margin. Instead, according to the dissent, the petitioner's relied on undermining the reliability of EPA's data. As such, the dissent felt the majority was relying on an objection not properly before the court.

R. CALEB COLBERT

Upper Big Blue Natural Res. Dist. V. State Dep't of Natural Res.,  
756 N.W.2d 145 (Neb. 2008).

The Nebraska Ground Water Management and Protection Act (hereinafter Act) grants the Nebraska Department of Natural Resources (hereinafter DNR) authority to determine when any river basin is fully appropriated. The DNR determined that the Upper Platte River Basin was in fact fully appropriated in December of 2005, including a portion of the Big Blue River Basin (hereinafter Big Blue) in that determination. On April 21, 2006 DNR published its final determination, articulating the inclusion of the small portion of Big Blue in the appropriation as due to a hydrological connection between Upper Plate River Basin surface water and Big Blue ground water.

Upper Big Blue Natural Resources District (District) challenged DNR's determination, averring that DNR exceeded its scope of authority by including the portion of Big Blue in its appropriation determination of the Upper Platte River Basin and in enacting 475 Neb. Code, ch. 24 setting forth regulations pertaining to appropriation determinations. After the district court affirmed DNR's promulgation of 475 Neb. Code, ch. 24 and the inclusion of Big Blue in its appropriation determination, the District appealed again to the Supreme Court of Nebraska.

The Supreme Court of Nebraska looked to the DNR enabling statute, finding that the Act permits DNR to "adopt and promulgate... rules and regulations as are necessary" to discharge assigned duties, including such regulations as are necessary to make determinations as to river basin appropriation. 475 Neb. Code, ch. 24 was one such appropriate regulation made pursuant to this grant of rulemaking authority. Furthermore, the Court found that the Nebraska Legislature explicitly required DNR to examine and consider hydrological connections between basins geographically located in different districts under the Act. Moreover, in the absence of any legislative limitations on DNR's definition of hydrological connections, the Court found it entirely appropriate that DNR promulgate 475 Neb. Code, ch. 24 in order to establish standards to be applied in such determinations.

The Court held that DNR acted pursuant to the Act in enacting 475 Neb. Code, ch. 24, and that DNR's inclusion of a portion of Big Blue in its

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determination of full appropriation of the Upper Platte River Basin was thus permissible.

CHELSEA MITCHELL

Fund for Animals v. Kempthorne, 538 F.3d 124 (2<sup>nd</sup> Cir. 2008).

*Fund for Animals v. Kempthorne* is a case brought in federal court by the Fund for Animals and other animal advocacy groups against federal agencies, including the Fish and Wildlife Service. The Fish and Wildlife Service (hereinafter referred to as "FWS") promulgated a Depredation Order against double-breasted cormorants, migratory birds. This Order was issued after reports of the species' hindering commercial activities. It authorized state fish and wildlife agencies, Native American tribes, and State Directors of the Wildlife Services program to take (kill) a double-crested cormorant if it predated or is about to predate fish, wildlife, plants, and their habitats. The Plaintiffs claim that the Public Resource Depredation order violates federal statutes and treaties. The court considers three of the Plaintiffs' arguments: that the order violated the Migratory Bird Treaty Act (MBTA), that the Order conflicts with United States treaties with other countries, and that FWS acted arbitrarily and capriciously when promulgating the Depredation Order.

The MBTA gives agencies discretion to create Depredation Orders. Depredation Orders are generally formulated after evidence of a species damaging other species or habitats is submitted. The order is only issued on an emergency basis. It also must be specific when describing the correct manner for taking species.

Plaintiffs argue that FWS's Depredation Order violates the MBTA because the taking authorization is too unspecific and does not require prior permission to take the birds. In general, agencies are not allowed to delegate their responsibility to others because the agency may lose its decision-making abilities and because the delegates may not share the same goals and objectives as the agency. However, the court reasons that the order is narrow and specific enough that it serves not as a delegating function, but rather as a grant of permission to take the birds. Nowhere in MBTA does it state that FWS has to give prior permission to take the birds, but only that there should be specific directions for taking the birds. Therefore, the court concludes that the Depredation order does not violate MBTA.

Next, the Plaintiffs argue that FWS's failing to establish a close season violates the Mexico Convention and thus violates the MBTA. Plaintiffs stress that creating a close season is required for all migratory

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birds under the Mexico Convention. However, defendants argue that the wording of the treaty does not require formulation of a close season for game birds, and both parties agree that the cormorant is a game bird. The court determines that both interpretations are reasonable, but that it must defer to the agency interpretation. Therefore, the order does not violate the treaty nor the MBTA.

Finally, the Plaintiffs argue that the FWS acted arbitrarily and capriciously when formulating the depredation order because it allowed too many killings of cormorants. Defendants argue that the order is reasonable considering the restrictions placed on the killings and harm caused by the birds. Defendants also argue that the method chosen for regulating the birds is sensible. The court agrees with the defendants, noting how the restrictions placed upon those taking the birds form a correlation with the purpose of the Order: specifically, that the birds must be about to commit or are committing depredations in order to be taken. Finally, the court determines that the FWS's actions were reasonable after considering the harm caused by the birds. Even though the Plaintiffs argue that FWS should have considered other alternatives besides the order, the court notes that the agency considered seven solutions before deciding on the Depredation order. Thus, FWS reasonably considered many alternatives to the Order. Lastly, the Plaintiffs argue that the action violated the National Environmental Policy Act (NEPA) because it did not examine the environmental impact of the order, nor did it allow the public to comment upon the order. The court determines that since Depredation Order was not site-specific, NEPA did not require an examination of the order's environmental impact. The examination would have been wholly speculative.

Since again, all of the Plaintiffs' arguments failed, the court affirmed the district court's summary judgment.

ABBIE E. HESSE ROTHERMICH

Lincoln-Dodge, Inc. v. Sullivan, 1:06-cv-00069-T-LDA (D.R.I. Nov. 25, 2008)

Several automobile manufacturers, automobile associations, and automobile dealers ("Plaintiffs") sought declaratory relief against the Rhode Island Department of Environmental Management ("RIDEM") alleging that Air Pollution Control Regulation 37 ("Regulation 37") was invalid. The plaintiffs initially filed two separate actions, but the actions were consolidated. The basis of the Plaintiffs' claims was that the Clean Air Act ("CAA") and the Energy Protection and Conservation Act ("EPCA") pre-empts Regulation 37. RIDEM filed a motion for judgment on the pleadings through the theory of collateral estoppel. The Federal District Court of Rhode Island granted RIDEM's motion as applied to the manufacturers and associations, but denied the motion as applied to the dealers.

Regulation 37, which is virtually identical to California's "CARB" regulation, promulgates emission standards for new automobiles. The CARB regulation and Regulation 37 require more stringent standards for automobile emissions of greenhouse gases, including carbon dioxide, methane, nitrous oxide, and hydro fluorocarbons. The CAA requires the Administrator of the Environmental Protection Agency ("EPA") to establish regulations regarding the emission of air pollutants from automobiles. It expressly pre-empts the adoption of different standards by any state. However, it provides that California may adopt and enforce more stringent standards if it obtains a waiver from the EPA. Further, once California obtains a waiver, other states may adopt similar regulations.

The EPCA establishes Corporate Average Fuel Economy ("CAFE") standards that require manufacturer's fleet of new vehicles' average mileage to be at least 27.5 miles per gallon. Additionally, Congress passed the Energy Independence and Security Act ("EISA") in December 2007 increasing the CAFE standards for models manufactured in 2011 and after. Like the CAA, the EPCA, and the subsequent EISA, contain pre-emption provisions disallowing states from adopting and enforcing emission standards different from the Federal standards. Unlike the CAA, however, the EPCA and the EISA, do not contain waiver provisions.

Pursuant to the CAA waiver provision, California applied for a waiver, in regard to its CARB regulation, from the EPA. After California applied

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for the waiver, several states promulgated regulations virtually identical to California's CARB regulation, including Rhode Island's Regulation 37. Subsequently, the EPA denied California's waiver application. California's petition for review of the denial is currently pending in the Court of Appeals for the D.C. Circuit. After the waiver denial, the manufacturers and associations of the instant case, accompanied by different dealers, initiated similar actions in California and Vermont. These cases were decided against the manufacturers, associations, and dealers and were heavily relied upon by the Rhode Island District Court.

The Vermont Case, *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295 (D. Vt. 2007), was decided first. The *Green Mountain* Court held a regulation promulgated pursuant to a waiver authorized by federal law would not be considered a state law subject to EPCA pre-emption. Further, the Court held even if the regulation were considered subject to EPCA pre-emption, it would not be pre-empted because emission standards are not related to or conflict with mileage requirements. Additionally, the Court held the CAA does not prohibit adoption of regulation but only the enforcement of the regulation leaving the claim moot, as the regulation could not be enforced until California obtained the waiver.

Next, the California case, *Central Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007) was decided. The Court entered summary judgment in favor of the Defendant. The Court's reasoning was, because the undisputed facts established that at least partial compliance could be achieved with only incidental impact upon fuel economy standards, the regulation was not a *de facto* restriction on automobile mileage and, therefore, not pre-empted by EPCA. Similar to the Vermont Court, the California Court held the CAA claim as moot because the CARB regulation was unenforceable until California received the waiver and, as such, the mere adoption of the regulation does not lead to pre-emption.

The Court in the instant case ruled on RIDEM's motion for judgment on the pleadings. RIDEM based their motion upon the theory of issue preclusion. It argued the manufacturers and associations were re-litigating issues, which had already been adjudicated in both the Vermont and California decisions. The manufacturers and associations argued the issues presented are pure questions of law not precluded by collateral estoppel



and the application of issue preclusion would freeze the development of law with respect to important national issues. The Court found the unmixed question of law argument less than compelling because, as shown by the California and Vermont decisions, the issues raised are mixed questions of law and fact. Further, the unmixed question of law exception only applies where the question of law involves unrelated subject matter. The Court held the action was brought by the same manufacturers and associations, based on essentially the same facts, challenging the same standard for the same reasons, alleging the same harm, and seeking the same relief and, therefore, involves the same subject matter. Consequently, the Court applied non-mutual, defensive collateral estoppel.

The Court also rejected the public interest argument because the Supreme Court has decreed issue preclusion to only be abrogated by a public interest if it is applied to the government and where the question is purely legal. For these reasons, the Rhode Island Court granted RIDEM's motion for judgment on the pleadings in its favor.

As to the dealers, the Court denied RIDEM's motion for judgment on the pleadings. RIDEM argued issue preclusion was applicable to the dealers because they are in privity with the manufacturers and had been virtually, or adequately, represented by the manufacturers and associations in the previous cases. More specifically, RIDEM relies upon the franchisee-franchisor relationship between the manufacturers and dealers making the dealers' interests derivative of the manufacturers. The Court found Supreme Court precedent rejected any virtual representation argument and suggested the privity argument applies issue preclusion too broadly. The Court found RIDEM failed to carry their burden of proof in showing appropriate non-party preclusion requirements, such as the formation of a substantive legal relationship by the franchisee-franchisor relationship, the existence of adequate representation in the previous cases, or the occurrence of the dealers as proxies for the manufacturers and associations. Therefore, the Court denied RIDEM's motion for judgment on the pleadings and held in favor of the dealers.

While the instant decision was decided upon procedural issues, its significance is compelling in conjunction with the Vermont and California cases. The promulgated, state regulations would impose stricter emission standards on new automobiles than current federal regulation does.

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Consequently, any automobile sold in the states, which have adopted such regulations, would be required to conform to them. So, manufacturers would be left with two choices: produce all automobiles in conformance with the regulations or produce two sets of automobiles, one set conforming with the state regulations, and the other conforming with the federal regulation. For efficiency's sake, the manufacturers would choose the former. Therefore, the desires of only a few states for strict emission standards would affect the emission standards of the entire Nation. Such a result is of some concern because it is within the Federal government's authority to regulate interstate commerce. A reason for that grant is to facilitate and encourage interstate commerce without fear of differing laws among the several states.

DAVID LAPEE