REVIEW OF SELECTED RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

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I. WATER USE

On December 9, 2003, the Supreme Court decided a long-running dispute between Virginia and Maryland over ownership of the Potomac River and the right to use the water contained therein.[1] Maryland began issuing water with-

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drawal permits to Virginia entities in 1957 and water construction permits in 1968.[2] These permits were granted without objection until 1996 when the Fairfax County Water Authority (FCWA) applied to extend its water intake 725 feet from the Virginia shore, above the tidal reach of the Potomac, to improve the quality of water delivered to Fairfax County residents.[3] Various officials of Maryland objected based upon the belief that allowing this improvement to the FCWA water system would encourage growth and attendant sprawl.[4] In 1997, the Maryland Department of Environment (MDE) denied the FCWA permit application.[5] Failing to reach a satisfactory resolution of its dispute with Maryland and lacking a permit in 2000, Virginia filed with the Supreme Court for leave to be heard under the Court's original jurisdiction.[6]

In the majority opinion, authored by Chief Justice Rehnquist, the Court noted that control of the Potomac River had been a matter of dispute between Maryland and Virginia for almost 400 years.[7] The Court appointed a Special Master to review this lengthy and contentious history and to recommend a resolution of the dispute.[8] The Special Master recommended that Virginia be granted the relief that it requested, *i.e.*, that its right to withdraw water from the Potomac is free from any regulation by Maryland.[9] Maryland filed exceptions to that report.[10] The Supreme Court granted Virginia the relief sought, adopted the findings of the Special Master, and ordered the Special Master's proposed decree be entered.[11]

While this decision is narrowly applicable only to the dispute between Virginia and Maryland, there are two general lessons that may be drawn from this decision. Resolution of water disputes between states is complex and often requires review of the historical record extending back to the earliest days of the European conquest and colonization of North America. The second lesson, contained in dicta in the majority opinion and somewhat surprising, is one state may acquire territory of another state through prescription.[12] While the majority did

1. Virginia v. Maryland, 540 U.S. 56, 60 (2003).
2. *Id*. at 63.
3. *Id*. at 63-64.
4. *Id*. at 64.
5. *Id*.
6. *Id*. at 60, 64.
7. *Id*. at 60.
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*. at 79.
12. *Id*. at 76-77.

not find prescription, they indeed held that Virginia had not acquiesced in jurisdiction by Maryland.[13]

The notion that prescription could occur, even if the prescriptive period is a long one, between sovereign states is an interesting one. Such a rule does not promote cooperation between states that share a body of water as their border. Indeed, such states must take care that they do not acquiesce in another state's imposition upon those sovereign rights as those rights may be lost to prescription. While the majority decision resolved the immediate dispute, it did nothing to suggest how Virginia and Maryland might coordinate efforts to regulate use of Potomac River water to the greatest benefit of the public.[14] By leaving ownership of the water unresolved the Court has, perhaps inadvertently, encouraged each state to exploit the water as rapidly as possible and in a manner that may be inconsistent with maximizing the economic value, much less its value to the ecosystem, of the water.

II. CLEAN WATER ACT – NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMITS

A. *Transfers of Water Between Bodies of Water*

In *South Florida Water Management District v. Miccosukee Tribe of Indians,* the Supreme Court addressed regulation of water transfers under the National Pollutant Discharge Elimination System (NPDES) permit program established under the Clean Water Act (CWA).[15] The Miccosukee Tribe of Indians and the Friends of the Everglades brought the original suit in federal district court under the citizen suit provisions of the Clean Water Act.[16]

Over the past century a complicated array of canals, levees, and pumping stations were created in south Florida to control the movement of water.[17] Without this infrastructure, most of the inhabited, agricultural, and industrial areas of southeastern Florida would be part of the vast wetland that was once part of the Everglades.[18] An undeveloped remnant of the Everglades exists in the southwestern portion of Florida.[19] The citizen suit involved transfers of water between

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13. *Id*. at 76.
14. *See id*. (ruling only on Maryland's filed exception and adopting the report of the special master).
15. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 98-99 (2004).
16. *Id*. at 99.
17. *Id*.
18. *Id*. at 100-101.
19. *Id*.

a developed area of the Everglades, served by a canal designated as C-11, and an undeveloped wetland area, designated as WCA-3.[20] Levees prevented water from the undeveloped area from flowing into the developed area.[21] Water from canal C-11 is pumped to the undeveloped area, WCA-3, by pumping station S-9 as needed to maintain a constant water level in canal C-11.[22] The plaintiffs alleged that the water in C-11 is chemically different from the water in WCA-3 in that it contains phosphorus from agricultural runoff that stimulates the growth of algae and plants foreign to the Everglades.[23] The plaintiffs in this citizen suit sought to require the South Florida Water Management District to apply for and obtain a permit under the NPDES system, which would cover transfers of water from C-11 to WCA-3 by means of S-9.[24]

Both the district court and the Eleventh Circuit held that the South Florida Water Management District must apply for an NPDES permit.[25] The district court enjoined further pumping by S-9 and subsequently modified its injunction after it was brought to the attention of the court that much of the populated portion of western Broward County would flood within a few days after the cessation of pumping.[26] The South Florida Water Management District applied to the Supreme Court for a writ of certiorari, which was granted in part.[27] The Supreme Court vacated the Eleventh Circuit's judgment and remanded for further development of the factual record.[28]

In its Clean Water Act analysis, the Supreme Court rejected the first contention of the South Florida Water Management District that a point source must be the original source of the pollutant.[29] The Court noted that the Clean Water Act's definition of a point source defines such as a "discernable, confined, and discrete conveyance"[30] that adds a pollutant to a water of the United States.[31] A point source that requires a NPDES permit need not be the original source of the pollutant.[32] The Supreme Court declined to resolve the second argument raised

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20. *Id*.
21. *Id*.
22. *Id*.
23. *Id*. at 101.
24. *See id*. at 99, 100-01.
25. *Id*. at 96.
26. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 280 F.3d 1364, 1366, 1369-70 (11th Cir. 2002).
27. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 539 U.S. 957 (2003) (granting limited writ of certiorari to question 1 presented by the petition).
28. *Miccosukee Tribe of Indians*, 541 U.S. at 112.
29. *Id*. at 104-105 (stating that the initial argument is untenable).
30. 33 U.S.C. § 1362(14) (2000).
31. *See Miccosukee Tribe of Indians*, 541 U.S. at 105; 33 U.S.C. § 1362(7) (2000).
32. *Miccosukee Tribe of Indians*, 541 U.S. at 105.

by the United States as *amicus curiae*, which was that the Court should regard all waters involved as a unitary body of water.[33] If the Court had accepted this argument, the need for a NPDES permit would have vanished because there can be no conveyance of a pollutant from itself to itself. The United States and numerous other *amici* raised the issue that requiring permits under the circumstances in this case would be very costly as there are thousands of transfers of water from one navigable body of water to another.[34] The Supreme Court noted that the second issue was not raised with the Eleventh Circuit; however, as it decided to remand based upon the third issue, it invited the parties to address this second issue upon remand.[35] The third issue is whether C-11 and WCA-3 are two hydrologically indistinguishable parts of a single body of water.[36] The Court found that the factual issues were unresolved and that the district court applied its test prematurely.[37] It therefore vacated the order of the Eleventh Circuit and ordered the district court to make further factual findings.[38]

B. *Stormwater*

Environmental Defense Center, Inc. v. United States Environmental Protection Agency was a challenge to the Environmental Protection Agency's (EPA's) Phase II Rule governing stormwater discharges from small municipal separate stormwater sewer systems and construction sites between one and five acres in size.[39] The case was consolidated in the Ninth Circuit from the Ninth, Fifth, and D.C. Circuits. The Phase II Rule requires that these entities apply for NPDES permits.[40] The Ninth Circuit stated that the EPA's failure to make Notices of Intent (NOI) available to the public and to also make them subject to public hearings violated the CWA.[41] The Ninth Circuit remanded to the EPA on this aspect of the Phase II Rule and also directed the EPA to consider whether to regulate forest roads under the rule.[42] In all other respects, the Ninth Circuit af-

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33. *Id*. at 104-05, 109.
34. *Id*. at 108.
35. *Id*. at 109.
36. *Id*. at 108-12.
37. *Id*. at 111.
38. *Id*. at 112.
39. Envtl. Def. Ctr., Inc. v. EPA, 344 F.3d 832, 833, 840 (9th Cir. 2003), *cert. denied sub nom.* Tex. Cities Coalition on Storm Water v. EPA, 124 S. Ct. 2811 (2004).
40. *Envtl. Def. Ctr*., 344 F.3d at 842.
41. *Id*. at 879.
42. *Id*.

firmed the Phase II Rule "against the statutory, administrative, and constitutional challenges raised. . . ."[43]

C. *Intervention in Administrative Proceedings*

In *Rhode Island v. EPA,* which was decided on August 3, 2004, the First Circuit determined as a matter of first impression that the collateral order doctrine applies to agency adjudication.[44] In this litigation the state of Rhode Island was denied, without prejudice, permission to intervene in an NPDES permit proceeding before the Environmental Appeals Board (EAB).[45] The issue before the court was whether interlocutory review of agency determinations is available.[46] The relevant statute[47] does not provide for review until such time as EPA has issued or denied the NPDES permit.[48] The collateral order doctrine was developed to prevent overly strict application of the rule that district court orders could be appealed only once final.[49]

By applying the collateral order doctrine to administrative proceedings, the First Circuit remained consistent with those other circuits (Eleventh, Tenth, Sixth, Fifth, Fourth, and Second) that have addressed the issue.[50] In support of its holding, the First Circuit noted that the Supreme Court had once applied the collateral order doctrine, but with "only meager discussion."[51] Despite holding the collateral order doctrine applies to administrative proceedings in the First Circuit, the court declined to apply it because the denial of intervention did not meet the three prongs of the test for interlocutory review.[52] Those three requirements are 1) that the order conclusively determined the disputed question, 2) that the order resolved an important issue completely separate from the merits of the action, and 3) that the order would be effectively unreviewable at the conclusion of the agency action.[53] Since the EAB denied Rhode Island's motion to intervene

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43. *Id*.
44. R.I. v. EPA, 378 F.3d 19, 21 (1st Cir. 2004).
45. *Id*.
46. *Id*.
47. 33 U.S.C. §1369(b)(1)(F) (2000).
48. R.I. v. EPA, 378 F.3d at 23.
49. *Id*.
50. *See* Marshall v. Occupational Safety & Health Review Comm'n, 635 F.2d 544, 548 (6th Cir. 1980); Donovan v. Occupational Safety & Health Review Comm'n, 713 F.2d 918, 923 (2d Cir. 1983); Donovan v. Oil, Chemical, & Atomic Workers Int'l Union & Its Local 4-23, 718 F.2d 1341, 1346 (5th Cir. 1983); Jim Walter Res., Inc. v. Fed. Mine Safety & Health, 920 F.2d 738, 744 (11th Cir. 1990). *But see* Appalachian Energy Group v. E.P.A., 33 F.3d 319, 321 (4th Cir. 1994).
51. R.I. v. EPA, 378 F.3d at 24.
52. *Id*. at 29.
53. *Id*. at 25.

without prejudice, the first prong of the doctrine was not met.[54] The court found Rhode Island also failed to meet the third prong because it could appeal from the EPA's final permitting decision.[55]

D. *Citizen Suits*

In *WaterKeepers Northern California v. AG Industrial Manufacturing, Inc.*,[56] filed July 16, 2004, the Ninth Circuit addressed the sufficiency of the notice of claims in the plaintiffs' intent-to-sue letter that is required as a prerequisite to bringing a citizen suit to enforce provisions of the NPDES permit program.[57] The district court found the intent-to-sue letter provided insufficient notice of claims and granted summary judgment for lack of jurisdiction.[58] The defendant produces farm machinery and equipment for the wine grape industry and employs about forty people at its Lodi facility, which is at issue in this litigation.[59] WaterKeepers appealed the dismissal of its citizen suit, and AG Industrial cross-appealed the denial of its claim for attorney fees.[60] The Ninth Circuit noted the plaintiffs' letter was ten pages in length and provided more detail than that previously held to be sufficient.[61] While generally reversing the district court, the Ninth Circuit did affirm the dismissal as to those claims that were not listed in the intent-to-sue letter.[62] The decision stands for the importance of comprehensively listing each claim in the initial intent-to-sue letter. Because the Ninth Circuit reversed most of the claims the district court had dismissed, it found it could not hold AG Industrial Manufacturing to be a prevailing party entitled to attorney fees under the Clean Water Act.[63]

In *Ailor v. City of Maynardville*, which was decided May 17, 2004, the Sixth Circuit reaffirmed that a violation of the Clean Water Act must be a continuing violation to support a citizen suit under § 1365(a) of the CWA.[64] The City of Maynardville had a long history of discharges in violation of its NPDES permit.[65] The state of Tennessee began enforcement actions against Maynard-

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54. *Id*. at 25-26.
55. *See id*. at 26-29.
56. WaterKeepers N. Cal. v. AG Indus. Mfg., Inc., 375 F.3d 913, 914-15 (9th Cir. 2004).
57. *See* 33 U.S.C. §1365 (2000).
58. *WaterKeepers N. Cal.*, 375 F.3d at 915.
59. *Id*.
60. *WaterKeepers N. Cal.*, 375 F.3d at 914.
61. *Id*. at 917.
62. *Id*. at 921.
63. *Id*.
64. *See* Ailor v. City of Maynardville, 368 F.3d 587, 600 (6th Cir. 2004).
65. *Id*. at 591.

ville in 1993.[66] By November 2000, Maynardville had placed a new sewage treatment plant on line and had complied with all existing requirements placed upon it by Tennessee.[67] The plaintiffs first filed against Maynardville on January 30, 1998, and subsequently in federal district court on May 16, 2001.[68] Maynardville had violations of its NPDES permit in February, March, and May 2001, but was fully in compliance in November 2001 when the district court granted the City's motion for summary judgment.[69]

The Sixth Circuit noted in a footnote that the plaintiff, Ailor, clearly lacked standing because he no longer owned the property affected by the City's violations when he filed the citizen suit.[70] The Sixth Circuit gave the benefit of the doubt to the plaintiff, Lynch, although it did not think the argument that the violations were continuing was very strong.[71] The Sixth Circuit then moved to an analysis of mootness, the grounds upon which the district court granted summary judgment for the defendant.[72] The district court had found that even if Lynch could survive a challenge to standing, she could not survive a challenge based upon mootness because the injuries suffered in the complaint had been remedied and there was no reasonable likelihood that the injuries would recur.[73] The Sixth Circuit agreed with the district court.[74] With the history of state regulatory actions against Maynardville for violation of their NPDES permit, the plaintiff's suit was not compelled by state or federal inaction (the reason for the provision of citizen suits).[75] Rather, the Sixth Circuit noted that counsel for plaintiffs admitted that their primary motivation was expert costs and attorney fees.[76] However, the Sixth Circuit noted that the plaintiffs never had a valid claim for either civil penalties or injunctive relief. Therefore, they could not be prevailing or substantially prevailing parties entitled to costs and attorney fees.[77] The Sixth Circuit also rejected the plaintiffs' claim under the resource Conservation Recovery Act (RCRA) since the analysis under RCRA is the same as for the CWA.[78]

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66. *Id*.
67. *Id*. at 592.
68. *Id*. at 593.
69. *Id*. at 594.
70. *Id*. at 597 n. 5.
71. *Id*. at 599.
72. *Id*.
73. *Id*. at 600.
74. *Id*. at 601.
75. *Id*. at 600.
76. *Id*. at 601.
77. *Id*.
78. *Id*.

Since no federal claims remained, the Sixth Circuit also affirmed the district court's dismissal of pendant state law claims.[79]

The dissenting judge in *Ailor v. City of Maynardville* would have dismissed as to Ailor upon standing but would have proceeded to trial as to Lynch's allegations.[80] Judge Cole, in dissent, noted that the last violation occurred only six months prior to the district court's grant of summary judgment and that in the same month that summary judgment was granted the state warned that the new plant had only limited digester capacity.[81] Judge Cole also noted that applicable Sixth Circuit precedent held that agency determinations of compliance with the terms of an NPDES permit do not preclude citizen suits under the CWA.[82] Judge Cole was also disturbed by the majority's emphasis on the plaintiff's attorney's concern for attorney fees since Congress specifically provided for attorney fees in these suits to encourage attorneys to bring them.[83]

Sierra Club v. City of Little Rock, filed December 12, 2003, is another attorney fees case under the CWA.[84] The city of Little Rock appealed a grant of attorney fees against it and the denial of its request for expert fees.[85] The city of Little Rock operates a storm sewer system under an NPDES permit that prohibits non-storm water discharges into the storm sewer system that discharges into the Arkansas River.[86] The city delegated the operation of its sanitary sewage system to the Little Rock Sanitary Sewer Committee (the Committee).[87] The city retained the power to set rates and issue bonds.[88] The Committee operates pursuant to its own NPDES permit.[89] The Sierra Club entered into a settlement agreement with the Committee to address the sanitary sewer overflows; Sierra Club dismissed its other claims against the Committee.[90] The Sierra Club continued to pursue its claims against the city.[91] The district court found that there were violations of the city's permit related to sanitary sewer overflows but declined to issue

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79. *Id*. at 595, 601.
80. *Id*. at 602.
81. *Id*.
82. *Id*. (Cole, J., dissenting) (citing Jones v. City of Lakeland, 224 F.3d 518, 524 (6th Cir. 2000) (en banc)).
83. *Id.*at 602 (Cole, J., dissenting).
84. Sierra Club v. City of Little Rock, 351 F.3d 840 (8th Cir. 2003).
85. *Id*. at 842.
86. *Id*. at 842-43.
87. *Id*. at 843.
88. *Id*.
89. *Id*.
90. *Id*.
91. *Id*.

an injunction, although it retained jurisdiction.[92] The court found for the city on all other issues.[93]

The district court granted 50 percent of the attorney fees requested to the Sierra Club and denied the city's request for expert fees.[94] The reduction in attorney fees was made "to reflect the city's partly prevailing status."[95] (The Sierra Club was granted attorney fees from the Committee which was not part of this appeal.[96]) The Sierra Club argued that the city's 42% sewer rate increase to fund the Committee's obligations under its settlement with the Sierra Club supported its contention that it was a substantially prevailing party.[97] In its opinion, the Eighth Circuit found that the district court's retention of jurisdiction worked against the Sierra Club's request for attorney fees because jurisdiction was retained to address issues that might arise in the future.[98] The district court's judgment in no way changed the relationship between the Sierra Club and the city.[99] If the city refused the Committee's request for a rate increase, it would not have been in violation of the court's order nor could it have been found in contempt.[100] The Eighth Circuit found the district court's order in effect gave the Sierra Club no relief; therefore, it was not a substantially prevailing party due attorney fees under the CWA.[101] Nonetheless, the Eighth Circuit upheld the district court's finding that the Sierra Club's claim was not "frivolous, unreasonable or without foundation"[102] and upheld the district court's denial of the city's request for expert witness fees.[103] The Eighth Circuit noted the city's NPDES permit did not require that it incorporate its comprehensive master planning process into a single document.[104] Nonetheless, the city's failure to do so made it difficult for the Sierra Club to determine at the time it filed its suit whether the city was in compliance with its NPDES permit.[105]

Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District addresses the sometimes complex question of when a governmental enforcement action is commenced for purposes of determining when a citizen suit

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92. *Id*.
93. *Id*.
94. *Id*. at 844.
95. *Id*.
96. *Id*.
97. *Id*. at 845.
98. *Id*. at 845-46.
99. *Id*. at 846.
100. *Id*.
101. *Id*.
102. *Id*. at 847.
103. *Id*.
104. *Id*.
105. *Id*.

is barred under § 1365(b)(1)(B) of the CWA.[106] In this case, the plaintiffs filed their citizen suit only hours before the state filed its suit.[107] The situation was further complicated by a long history of violations by the Milwaukee Metropolitan Sewerage District (MMSD) together with attendant legal actions by the state.[108]

In determining that jurisdiction for the citizen suit existed, the Seventh Circuit concluded that "commence" should be given its plain meaning, and that non-judicial actions taken by the state did not commence a criminal or civil action by the state.[109] The Seventh Circuit also rejected the contention of the MMSD that its 2002 Stipulation entered into with the state constituted *res judicata*, barring the plaintiffs' citizen suit.[110] The Seventh Circuit rejected this argument based upon its concern that the state had not diligently prosecuted violations of the CWA.[111] It based this conclusion on evidence that the MMSD would continue to have discharges of sewage in violation of its NPDES permit and in violation of its agreements with the state, even if it fully complied with all the state had requested of it.[112] The Seventh Circuit remanded the case to the trial court with instructions to determine whether the 2002 Stipulation would, if fully complied with, eliminate the possibility of further violations.[113]

In *American Canoe Association, Inc. v. City of Louisa Water & Sewer Commission*, the Sixth Circuit addressed the question of standing to bring suit under the citizen suit provisions of the CWA.[114] The Sixth Circuit concluded the Sierra Club had representational standing to sue on behalf of one of its members that provided an affidavit supporting his particularized injuries.[115] It further held that injury to aesthetic and recreational values enjoyed by a member of the Sierra Club provided an actual injury sufficient to support standing to sue.[116] The Sixth Circuit also held that an unlawful failure to provide information, the disclosure of which is required by the CWA, provided standing to sue.[117] It found the Sierra Club's affiant was denied the information he needed to decide whether or not to

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106. Friends of Milwaukee's Rivers & Lake Michigan Fed'n v. Milwaukee Metro. Sewerage Dist., 382 F.3d 743, 751-52 (7th Cir. 2004). *See* 33 U.S.C. § 1365(b)(1)(B) (2000).

107. *Friends of Milwaukee's Rivers*, 382 F.3d at 748.

108. *Id*. at 748-49.

109. *Id*. at 756-57.

110. *Id*. at 764-65.

111. *Id*.

112. *Id*. at 764.

113. *Id*. at 765.

114. American Canoe Ass'n., Inc. v. City of Louisa Water & Sewer Comm'n, 389 F.3d 536 (6th Cir. 2004).

115. *Id*. at 540-42.

116. *Id*. at 541-42.

117. *Id*. at 542.

use the body of water into which the defendant had dumped its waste.[118] The American Canoe Association, though it provided no member affidavits, was also found to have organizational standing to sue.[119] The dissenting judge would have held that the American Canoe Association's allegations of injuries were inadequate to support standing.[120]

Parker v. Scrap Metal Processors, Inc. was a citizen suit brought under both the CWA and the Resource Conservation Recovery Act (RCRA).[121] The suit alleged violations of those acts, as well as their state equivalents, which were enacted by Georgia as the result of delegation of those programs by EPA included negligence, negligence *per se*, nuisance, and trespass.[122] *Parker* raised the issue of whether implementation of the CWA and the RCRA through state legislation enacted pursuant to delegation from EPA denies the federal courts jurisdiction because the claims no longer arise under federal law.[123] The court found all but a single federal decision had rejected this contention and that the Supreme Court had implicitly endorsed the notion that federal-question jurisdiction lies in actions to enforce state-issued NPDES permits.[124] Standing to sue under both the CWA and RCRA was also at issue because the plaintiffs had not raised even the question of an aesthetic injury.[125] Nonetheless, the Parkers had presented at trial pieces of solid waste recovered from their property and the court noted that an injunction against violating RCRA would likely end the damage of solid waste migrating to their property.[126] The court found that the issue under the CWA was similar in that an injunction requiring compliance with the terms of an NPDES permit would serve to control runoff that carried hazardous substances such as lead and PCBs onto the Parkers' property.[127]

The majority rejected the contention of the dissent, that the Parkers, in the absence of an allegation of an aesthetic injury, must either be riparian owners or show a hydrological connection to navigable waters of the United States.[128] This discussion is an important contribution to the law of standing under the CWA because, in the experience of the author, even some regulators fail to understand the distinction between navigable waters of the United States and waters

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118. *Id*.
119. *Id*. at 544-47.
120. *Id*. at 547-49.
121. Parker v. Scrap Metal Processors, Inc., 386 F.3d 993 (11th Cir. 2004).
122. *Id*. at 1000.
123. *Id*. at 1004-08.
124. *Id*. at 1007-08.
125. *Id*. at 1004 n.11.
126. *See id*. at 1003.
127. *See id*. at 1003-04.
128. *Id*. at 1004 n.11.

of the United States, the latter being the broader term and that which is protected under the CWA. Despite its lucid analysis in its section on standing, the court confused these terms in its analysis of specific CWA violations, illustrating the difficulty that this analysis under the CWA imposes.[129]

E. *Application of Pesticides to Water*

In *No Spray Coalition, Inc. v. City of New York*, the Second Circuit addressed the question of whether the Federal Insecticide Fungicide and Rodenticide Act (FIFRA) precluded the application of the CWA to aerial spraying for mosquitoes that included discharges (including direct application) of insecticide into waters of the United States.[130] Specifically, the plaintiffs requested an injunction requiring the defendants to apply for an NPDES permit prior to conducting any spraying operations.[131] The defendants argued, and the district court agreed, that because FIFRA contained no citizen suit provision, its application to the insecticide at issue precluded the plaintiffs from using the citizen suit provision of the CWA.[132] The Second Circuit disagreed, holding that each statute stands on its own.[133] It remanded the case to the district court.[134]

The Second Circuit's prior unpublished decision on this issue (not cited in this opinion) left open the question of whether a pesticide, properly applied under the requirements of FIFRA, can be a pollutant for purposes of the CWA and its NPDES permitting requirement.[135] In *Altman,* the Second Circuit invited EPA to clarify its position on the issue.[136] The EPA responded with an *Interim Statement and Guidance on Application of Pesticides to Waters of the United States in Compliance with FIFRA* that addressed whether an application for a NPDES permit is required for the intentional application of pesticides directly to, or over, water to control aquatic pests.[137] The view of the EPA is that the CWA does not require a permit where the application of the pesticide complies with FIFRA.[138] The EPA's position is contrary both to Ninth Circuit, and now Second

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129. *See id*. at 1009.

130. *See generally* No Spray Coalition, Inc. v. City of New York, 351 F.3d 602 (2nd Cir. 2003) (discussing whether the FIFRA precluded the application of the CWA).

131. *Id*. at 603.

132. *Id*. at 603-04.

133. *Id*. at 605.

134. *Id*. at 604, 606.

135. Altman v. Town of Amherst, 47 F. App'x. 62, 67 (2nd Cir. 2002).

136. *Id*.

137. *See* Memorandum from EPA's G. Tracy Mehan, III and Stephen L. Johnson on Interim Statement[s] and Guidance on Application of Pesticides to Waters of the United States in Compliance with FIFRA to Regional Administrators, Regions I-X, 1 (July 11,2003).

138. *Id*. at 2.

Circuit, precedent.[139] The Ninth Circuit has concluded that a pesticide may be a pollutant under the CWA and that a NPDES permit is required even where the pesticide (in this case an aquatic herbicide) is applied in accord with its label.[140] The Ninth Circuit has also held that aerial application of pesticides by the U.S. Forest Service is a point source that requires a NPDES permit.[141] Neither of these two Ninth Circuit opinions were cited by the Second Circuit in its opinion in *No Spray Coalition, Inc. v. City of New York.*[142]

F. *Concentrated Animal Feeding Operations (CAFO)*

Since the EPA CAFO Final Rule was published in the *Federal Register* on February 12, 2003,[143] it has been subject to challenge by both producer and environmental organizations.[144] All challenges to the CAFO Final Rule have been consolidated before the Second Circuit.[145] On January 31, 2005, EPA published an *Animal Feeding Operations Consent Agreement and Final Order* in the Federal Register.[146] The purpose of the Final Order is to provide the EPA an opportunity to study air emissions from egg, broiler chicken, turkey, dairy, and swine animal feeding operations (AFOs).[147] Eligible AFOs may participate on a voluntary basis, and those participating sign an Air Compliance Agreement with the EPA.[148] In return for providing the EPA with air quality data, each participant is granted a limited, conditional covenant not to sue by the EPA.[149] The effort is funded through an assessment of each participating producer that contributed to a nonprofit organization set up by the participating producers.[150] The Air Compliance Agreements do not absolve participating AFOs from responsibility for criminal violations of federal environmental law, civil violations of the CWA, or

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139. *See* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 527 (9th Cir. 2001); *No Spray Coalition*, 351 F.3d at 603.

140. *Headwaters*, 243 F.3d at 528.

141. League of Wilderness Defenders/Blue Mountain Biodiversity Project v. Forsgren, 309 F.3d 1181, 1192-93 (9th Cir. 2002).

142. *See No Spray Coalition*, 357 F.3d 602.

143. National Pollution Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176 (Feb. 12, 2003) (to be codified at 40 C.F.R. pts. 9, 122, 123, & 412).

144. *See* Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486 (2d Cir. 2005).

145. *Id*. at 490.

146. *See* Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4957 (Jan. 31, 2005).

147. *Id*. at 4959.

148. *Id*. at 4958.

149. *Id*. at 4959.

150. *See id*. at 4960.

criminal or civil violations of state law.[151] However, the agreements do limit the participants' liability for civil violations of the Clean Air Act (CAA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and the Emergency Planning and Community Right-to-know Act (EPCRA).[152]

G. *Coal Mining*

In 1987, Congress amended the CWA to exempt coal remining from certain effluent limitation guidelines that would otherwise be applicable.[153] The purpose of this amendment, known as the Rahall Amendment,[154] was to make coal remining cost-effective so that existing, abandoned mining sites could be remined with subsequent reductions from existing discharge levels.[155] The Rahall Amendment allows the NPDES permit writer, either EPA or the state under a delegated program, to waive certain pre-amendment requirements as long as the remining operation would not result in any higher level of discharges than existed before the remining operation was begun.[156] The Rahall Amendment also required applicants for NPDES permits for remining operation discharges to show that the remining operation had the potential to improve water quality in the surrounding bodies of water and that the operation complied with all applicable state water quality requirements.[157]

The court evaluated EPA's final rule under an abuse of discretion standard.[158] The court held that the Rahall Amendment did not create a generally applicable regulatory scheme for coal remining operations, but rather an option for remining operations to opt-out of that regulatory scheme.[159] Because the Rahall Amendment is an opt-out provision, provisions in the regulations generally applicable to remining operations that are contrary to the Rahall Amendment are not in conflict with it.[160] Therefore, the EPA's approach to promulgation of regulations under the Coal Remining Subcategory were reasonable.[161] Nonetheless, the Sixth Circuit held that the Final Rule for the Coal Remining Subcategory was

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151. *See id.* at 4961.
152. *See id.* at 4959.
153. 33 U.S.C. § 1311(p) (2000).
154. *Id.*
155. *See* Citizens Coal Council, Inc. v. E.P.A*.*, 385 F.3d 969, 974 (6th Cir. 2004).
156. *See id.*
157. *See id.*
158. *See id.* at 976-77.
159. *See id.* at 980.
160. *See id.*
161. *See id.*

invalid because EPA failed to follow the five-step process for establishing effluent limitation guidelines that is mandated by the CWA.[162] The court further held that although the EPA has broad discretion in establishing effluent limitation guidelines, it must address all of the factors that the CWA requires it to evaluate, and its failure to consider a particular factor is grounds for invalidating its final rule.[163] The court applied a similar analysis to hold that the EPA's regulations as to the *Western Alkaline Coal Mining* Subcategory were invalid.[164]

III. WETLANDS PROTECTION

A. *Jurisdictional Wetlands*

Since the Supreme Court decision in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, there has been considerable ferment over the Corps' jurisdiction to regulate wetlands under § 404 of the CWA.[165] Unresolved is the question of how far jurisdiction under the CWA extends.[166] A majority of circuits that have addressed the issue have determined that jurisdiction extends to those inland waters that share a hydrological connection to navigable waters. *Treacy v. Newdunn Associates, LLP* decided September 10, 2003, is one of these decisions.[167]

In *Treacy*, the Fourth Circuit found that an isolated wetland indisputably hydrologically connected, albeit intermittently, through more than two miles of natural and manmade channels, to a traditional navigable water is a jurisdictional wetland for purposes of § 404 of the CWA.[168] *Treacy* is actually two cases, a federal enforcement action brought by the Corps and an enforcement action by the Commonwealth of Virginia that was removed to federal court by Newdunn.[169] The Fourth Circuit found that the state action, based as it was on state law and not grounded upon the CWA, had been improperly removed to federal court.[170] The Fourth Circuit remanded that case back to the state court from which it had been improperly removed.[171] It remanded the federal enforcement action back to

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162. *See id*. at 980-82.
163. *See id*. at 982-83.
164. *See id*. at 984.
165. Solid Waste Agency of N. Cook County (SWANCC) v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001).
166. *Id*.
167. Treacy v. Newdunn Assocs., 344 F.3d 407 (4th Cir. 2003).
168. *Id*. at 409.
169. *Id*.
170. *Id*. at 414.
171. *Id*.

federal district court.[172] The Fourth Circuit reached a similar conclusion in an earlier June 12, 2003 decision in *United States v. Deaton* where it found a hydrological connection provided by a manmade ditch sufficient to confer jurisdiction under § 404 of the CWA.[173]

The Seventh Circuit has taken a similar position as to jurisdiction in its July 10, 2003 decision in *United States v. Rueth Development Co.*[174] In *Rueth*, the hydrological connection to navigable waters was provided in part through a manmade ditch; however, the issue was never tried because Rueth had entered into a consent decree prior to SWANCC.[175] Nonetheless, the Seventh Circuit expressed the opinion that there was ample evidence that the wetlands at issue were jurisdictional.[176] In *United States v. Phillips*, the Ninth Circuit rejected a criminal defendant's argument that a body of water must be navigable-in-fact to support a criminal conviction and accepted the broader view that wetlands need only have a hydrological connection to navigable waters to be jurisdictional.[177]

The Fifth Circuit's view of the definition of "waters of the United States," as set forth in *In re Needham*, stands in sharp contrast to the other circuits that have addressed the issue.[178] *Needham* held that tributaries of navigable waters that are not themselves navigable nor truly adjacent to navigable waters do not fall within the Supreme Court's definition of navigable waters set forth in SWANCC.[179] Nonetheless, the Fifth Circuit held that wetlands that are adjacent to navigable waters are within federal regulatory jurisdiction pursuant to the OPA.[180]

On July 26, 2004 the Sixth Circuit decided the latest installment in the *Rapanos* saga.[181] The criminal proceedings, including their journey to the Su-

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172. *Id*. at 418.

173. United States v. Deaton, 332 F.3d 698, 702 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1874 (2004).

174. United States v. Rueth Dev. Co., 335 F.3d 598 (7th Cir. 2003).

175. *Id*. at 600.

176. *Id*. at 607.

177. United States v. Phillips, 367 F.3d 846 (9th Cir. 2004), *cert. denied,* 125 S. Ct. 479 (2004).

178. *In re* Needham, 354 F.3d 340, 346 (5th Cir. 2003) (stating that "[t]he term 'navigable waters' is not limited to oceans and other very large bodies of water").

179. *Id*. at 345 (noting also that the definition of navigable waters is the same in the OPA and the CWA).

180. *See id*. at 347 (finding that "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway . . . [r]ather, adjacency necessarily implicates a 'significant nexus' between the water in question and the navigable-in-fact waterway").

181. United States v. Rapanos, 376 F.3d 629 (6th Cir. 2004).

preme Court, are set forth in this opinion.[182] This opinion addresses the civil action filed at the same time as the criminal action.[183] In affirming the judgment of the district court, the Sixth Circuit adopted the more expansive definition of jurisdictional wetlands used by the Fourth, Seventh, and Ninth Circuits[184] and that it had applied in the companion criminal proceedings.[185] The Sixth Circuit rejected the more expansive reading given to *SWANCC* by the Fifth Circuit.[186]

B. *Other Section 404 Issues*

Greenfield Mills, Inc. v. Macklin involved allegations of a § 404 violation, a constitutional takings claim, and a violation of plaintiffs' due process rights.[187] The Indiana Department of Natural Resources (DNR) operates a fish hatchery near the Fawn River.[188] The plaintiffs are riparian owners along the Fawn River downstream from a supply pond used in the operation of the hatchery.[189] The supply pond was largely filled with silt and choked with aquatic vegetation.[190] In 1994 and 1995, the DNR applied chemicals to the supply pond and destroyed most of the aquatic vegetation.[191] In 1996, the defendants noticed a problem with the supply pond's flow control structure.[192] In 1997, defendants obtained funds for repairs.[193] On May 18, 1998, the defendants began a drawdown of the supply pond in order to make repairs to the pump.[194] The supply pond drained entirely, dredging much of the accumulated silt out of the pond and into the Fawn River where the silt caused dramatic and undesirable changes to the river.[195] Despite immediate complaints from the plaintiffs, the defendants

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182. *See id*. at 632-34.
183. *See id*. at 634.
184. *See* Treacy v. Newdunn Assocs., 344 F.3d 407, 415 (4th Cir. 2003); *Rueth*, 335 F.3d at 604; Headwaters v. Talent Irrigation Dist., 243 F.3d 526, 533-34 (9th Cir. 2001).
185. *See Rapanos*, 376 F.3d at 636-39.
186. *See id*. at 639 (stating that "[t]he Fifth Circuit requires that the non-navigable water be 'truly adjacent to navigable waters' in order to qualify for CWA jurisdiction. The majority of courts, including this one, however, construe *Riverside Bayview* and *SWANCC* to hold that, while a hydrological connection between the non-navigable and navigable waters is required, there is no 'direct abutment' requirement").
187. *See generally* Greenfield Mills, Inc. v. Macklin, 361 F.3d 934 (7th Cir. 2004).
188. *See id*. at 939.
189. *Id*.
190. *Id*.
191. *Id*.
192. *See id*.
193. *See id*. at 939-40.
194. *See id*. at 940.
195. *See id*. at 942-43.

refused to close the gates to the supply pond.[196] Ultimately, the gates to the supply pond were closed without affecting repairs to the pump.[197] The pump was eventually repaired by a diver without draining the supply pond again.[198] The plaintiffs sued in federal district court, which granted summary judgment to the defendants as to all claims.[199] The Seventh Circuit reversed for the reasons discussed below.[200]

The Seventh Circuit held that the transfer of material from the supply pond into the Fawn River constituted the addition of dredged spoil for purposes of § 404.[201] The court then addressed whether the defendants' activities fell into the maintenance exception to the requirement of a permit under § 404.[202] The Seventh Circuit determined that the draw-down did not affect the character, scope, or size of the dam, but this conclusion did not mean that the defendants had engaged in maintenance.[203] The court found that there were genuine issues of material fact as to whether repairing the pump was a pretext for removing the silt from the pond, which the defendants had conceded would require a permit, and whether the dredging that occurred was necessary to the maintenance that was performed.[204] The Seventh Circuit then addressed the question of whether the recapture provisions of the CWA would bring the defendants' activities back within the § 404 permit requirement.[205] The court noted that there is a two prong test:

> [I]f the defendants can establish as a matter of law either that their purpose was not to "bring[] any areas of navigable waters into a use to which it was not previously subject" or that the activity did not impair the flow or reduce the reach of navigable waters, their actions are not "recaptured" by § 1344(f)(2).[206]

The Seventh Circuit held that the facts alleged, viewed in a light most favorable to the plaintiffs, could support a finding that the recapture provision applied to the defendants' actions, triggering the requirement of a permit under § 404.[207]

As to the takings claim, the Seventh Circuit found that there was a reasonable avenue available to the plaintiffs to pursue this claim in state court.[208]

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196. *See id*. at 941.
197. *Id*.
198. *Id*. at 944.
199. *Id*.
200. *Id*. at 945.
201. *Id*. at 949.
202. See *id*. at 949-53.
203. *Id*. at 953.
204. *See id*. at 950-52.
205. *See id*. at 956-57.
206. *Id*. at 955.
207. *Id*. at 957.

The plaintiffs failed to pursue this remedy prior to their federal filing so the Seventh Circuit determined that they were absolutely barred from pursuing this theory in federal court.[209] Likewise the Seventh Circuit determined that the plaintiffs must pursue and exhaust their due process claims in state court prior to jurisdiction for a claim based upon this theory being available in federal court.[210]

United States v. Appel is a brief unpublished decision in an appeal from a conviction based upon violations of the CWA.[211] Although it cannot be cited as precedent, its analysis of the methods for determining the boundaries of navigable waters is instructive.[212] The ordinary high water mark (OHWM) method looks at water levels absent those produced by flood levels.[213] It is instructive that something that is relatively uncertain forms the basis for whether a person keeps his freedom.

Save Our Sonoran, Inc. v. Flowers is an August 26, 2004 opinion that illustrates just how little water is required to find jurisdiction under CWA.[214]

In this appeal, the management of the waterways in Arizona's Sonoran desert is considered. This, of course, inevitably brings to mind the exchange between Claude Rains and Humphrey Bogart in *Casablanca* (Warner Bros. 1942), which aptly distills this dispute to its essence:

> Captain Renault: What in heaven's name brought you to Casablanca?
> Rick: My health. I came to Casablanca for the waters.
> Captain Renault: The waters? What waters? We're in the desert.
> Rick: I was misinformed.

In this case, it was not Rick Blaine, but the United States Army Corps of Engineers that came to the desert for the waters. An aspiring desert developer, 56th & Lone Mountain, L.L.C. ("Lone Mountain"), sought and obtained a Clean Water Act ("CWA") dredge and fill permit from the Corps for the construction of a gated community near Phoenix. The permit was required and the Corps' jurisdiction invoked because water courses through the washes and arroyos of the arid

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208. *See id*. (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), quoting Pumpelly v. Green Bay Co., 80 U.S. 166, 181 (1812), "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.").

209. *Id*. at 961.

210. *Id*. at 961-62.

211. United States v. Appel, 91 Fed. Appx. 20, 21 (9th Cir. 2004).

212. *Id*. at 21-23.

213. *Id*. at 21 (quoting United States v. Claridge, 416 F.2d 933, 934 (9th Cir. 1969) which stated "…from the ordinary flow of the river and does not extend to the peak flow or flood stage so as to include overflow on the flood plain…").

214. Save Our Sonoran, Inc. v. Flowers, 381 F.3d 905 (9th Cir. 2004).

development site during periods of heavy rain. The desert washes are considered navigable waters, and therefore fall under the jurisdiction of the federal government.

At some point, a non-profit environmental organization, Save Our Sonoran ("SOS"), became aware of the project. It was not, shall one say, the beginning of a beautiful friendship. SOS eventually filed this action against the Corps and Lone Mountain, alleging violations of the National Environmental Policy Act ("NEPA") and the CWA. The district court issued a preliminary injunction suspending development during the pendency of the litigation.[215]

Nonetheless, the decision stands for more than that some judges have a sense of humor. The developer, Lone Mountain, made applications for some sixty-six permit sites that the district court analyzed in its totality as 31.3 acres of washes.[216] The Ninth Circuit observed that the district court's analysis was proper and the Corps' jurisdiction could not be limited by the applicant's choice to submit "a gerrymandered series of permit applications."[217] If it needs illustration, the decision also illustrates the great difficulty faced by any party seeking to challenge a preliminary injunction.[218]

C. *Land Use*

In *Norton v. S. Utah Wilderness Alliance*, three claims were presented based upon the failure of the Bureau of Land Management (BLM) to protect certain areas under their management from off-road vehicles.[219] The district court dismissed all three claims, and the Tenth Circuit reversed.[220] The Supreme Court found that the federal courts could not compel the BLM to take certain actions to protect lands under its management from off-road vehicles.[221] The Court expressed great reluctance to decide the case in a manner that would require federal courts to become involved in the details of the operations of federal agencies.[222] The Court also rejected a claim under NEPA, holding that once a land use plan has been approved, NEPA does not require that it be supplemented.[223]

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215. *Id*. at 909.
216. *Id*.
217. *Id*. at 912.
218. *See id*. at 912-15.
219. Norton v. S. Utah Wilderness Alliance, 124 S. Ct. 2373 (2004).
220. *Id*. at 2378.
221. *Id*. at 2384.
222. *Id*.
223. *Id*.

In *Bedroc Ltd., L.L.C. v. United States*, the Supreme Court determined that under the applicable statutes under which the land patent at issue was made, sand and gravel were not "valuable minerals" reserved to the United States.[224]

IV. EMINENT DOMAIN/TAKINGS

A. *Public Use*

On July 30, 2004, the Michigan Supreme Court decided what is likely to be the most important eminent domain case of the year in *County of Wayne v. Hathcock.*[225] Central to its decision in the case, the Michigan Supreme Court revisited the definition of "public use."[226] Although the case interpreted the Michigan eminent domain statutes and constitution, the decision is likely to influence other courts both because the Michigan Supreme Court's analysis was very thorough and lucid and also because the issue of taking private property and transferring it to another private party for the public purpose of enhancing the local economy or tax base has become a contentious issue in many states.[227]

In *County of Wayne v. Hathcock*, the underlying dispute involved Wayne County's attempt to condemn private property for incorporation into its 1,300 acre business and technology park.[228] Wayne County had previously purchased about 500 acres in nonadjacent parcels near the Metropolitan Airport through voluntary sales made in response to noise complaints.[229] Wayne County then decided to purchase additional land and use all of it to develop the business and technology park.[230] After the 500 acres were purchased, the county determined that it needed an addition 46 parcels distributed within the proposed project area.[231] It determined that it could not obtain any of these through voluntary purchases and began to take steps to seize the remaining parcels.[232] Once the park was completed, it was the intent of Wayne County to re-convey the land to private parties.[233]

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224. Bedroc Ltd. v. United States, 541 U.S. 176 (2004).
225. County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).
226. *Id*.
227. *See*, *e.g.*, DANA BERLINER, INSTITUTE OF JUSTICE, *Eminent Domain Without Limits? IJ Asks U.S. Supreme Court to Decide*, 13 Liberty & Laws 10 (Aug. 2004), *available at* http://www.ij.org/publications/liberty/2004/13_4_04_d.html.
228. *Hathcock*, 684 N.W.2d at 769.
229. *Id*. at 770.
230. *Id*. at 771.
231. *Id*.
232. *Id*.
233. *Id*. at 770.

In its analysis of Michigan's eminent domain statutes and Wayne County's compliance therewith, the Michigan Supreme Court determined that Wayne County had complied with all statutory requirements and that the taking was authorized by statute.[234] It next turned to an analysis of the Michigan constitution.[235] It also noted that the parties did not disagree that the project would benefit the public.[236] The parties disagreed as to whether the condemnation met the requirement of "public use" in the Michigan constitution.[237] The Michigan Supreme Court framed the issue as whether "the condemnation of defendants' properties and the subsequent transfer of those properties to private entities … [are] consistent with the common understanding of 'public use' at ratification [in 1963]?"[238]

The Michigan Supreme Court essentially adopted the analysis in Justice Ryan's dissent in *Poletown Neighborhood Council v. Detroit*[239] in deciding this case and in overruling its *Poletown* decision. The Michigan Supreme Court, adopting dissenting Justice Ryan's argument, held that there are only three situations under which it is permissible for a government to use its eminent domain powers to take private property to transfer to another private entity.[240] The first situation involves private entities that are public utilities that operate highways, railroads, canals, power lines, gas pipelines, and other instrumentalities of commerce.[241] Without the power to compel blocking property owners, these facilities would be impossible or impracticable to construct.[242] The second circumstance where condemned property may be transferred to a private entity is where the property remains under the control or supervision of the governmental entity.[243] Finally, the Michigan Supreme Court approved of condemnations where the public concern is accomplished by the condemnation itself and the ultimate use of the property is a secondary consideration.[244] Such a situation exists where blighted housing has become a threat to the public health and safety and condemnation is used to remove it. The Michigan Supreme Court concluded "that no one sophisticated in the law at the 1963 Constitution's ratification would have understood 'public use' to permit the condemnation of defendants' properties for

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234. *Id*. at 779.
235. *Id*. at 778.
236. *Id*.
237. *Id*. at 779.
238. *Id*. at 781.
239. *See* Poletown Neighborhood Council v. Detroit, 304 N.W.2d 455 (Mich. 1981).
240. *Hathcock*, 684 N.W.2d at 781.
241. *Id*.
242. *Id*. at 782.
243. *Id*.
244. *Id*. at 783.

the construction of a business and technology park owned by private entities."[245] It noted that "[t]o justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain."[246]

Justice Weaver concurred in the majority's result in *County of Wayne v. Hathcock*, but took strong exception to their application of the standard of "one sophisticated in the law."[247]

> I dissent from the majority's holding that "public use" must be interpreted as it would have been by those "sophisticated" or "versed in the law" at the time of the 1963 Constitution's ratification and from their application of that holding to the facts of this case. Unlike the majority, I would employ the long-established method of constitutional interpretation that restrains judges by requiring them to ascertain the common understanding of the people who adopted the constitution. The majority's focus on the understanding of those "sophisticated in the law" is elitist; it perverts the primary rule of constitutional interpretation—that constitutions must be interpreted as the people, learned and unlearned, would commonly understand them. It invites the erosion of constitutional protections intended by the Michigan voters who ratified the 1963 Constitution.[248]

Justices Cavanagh and Kelly concurred in the result but dissented from the retroactive application of the decision.[249]

In a July 20, 2004 eminent domain decision, the Michigan Supreme Court determined that the purchase of property under threat of eminent domain should be subject to rescission where it was later determined that the property was not needed.[250] In its March 9, 2004 decision in *Kelo v. City of New London,* the Supreme Court of Connecticut found that neither the United States nor the Connecticut constitution barred taking private property by eminent domain for transfer to private parties "in furtherance of a significant economic development plan that is projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas."[251] The United States Supreme Court granted a writ of certiorari on September 28, 2004.[252]

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245. *Id*. at 784.
246. *Id*. at 786.
247. *Id*. at 788.
248. *Id*. at 788-89.
249. *Id*. at 799.
250. Alibri v. Detroit Wayne County Stadium Authority, 683 N.W.2d 147 (Mich. 2004).
251. Kelo v. City of New London, 843 A.2d 500, 507 (Conn. 2004).
252. Kelo v. City of New London, 125 S. Ct. 2655 (2004) (holding that the city's exercise of eminent domain power in furtherance of economic development plan satisfied constitutional "public use" requirement).

Bailey v. Myers is an October 1, 2003 decision of the Arizona Court of Appeals that blocked the City of Mesa's attempt to condemn the plaintiffs' property (used as a brake service) for redevelopment and sale to private parties (including an owner of an Ace Hardware store who desired to relocate to the site).[253] The Arizona Court of Appeals found that the condemnation violated the Arizona Constitution because the proposed use of the property was not public.[254]

In *Members of the Peanut Quota Growers Ass'n. v. United States*, the United States Court of Federal Claims confirmed that peanut quota holders have no constitutionally protected property interest in their peanut quotas.[255] Since the 1930s, growers of peanuts have been able to market peanuts only if they had quota, provided by the federal government, which allowed them to do so.[256] Marketing peanuts without quota carried heavy civil and criminal penalties.[257] Subject to certain restrictions imposed by the federal government, peanut quotas were widely bought, sold, rented, or leased.[258] With the passage of the 2002 Farm Bill, Congress abolished the quota program in favor of a program similar to that used for other commodities.[259] The decision, although not surprising, has broad implications for the many conservation programs upon which farmers rely for cost-sharing and other payments.

B. *National Environmental Policy Act (NEPA)*

Washington County, North Carolina v. United States Department of the Navy is an April 19, 2004 decision granting a preliminary injunction to agricultural and other landowners in northeastern North Carolina, governments in the affected area, and environmental organizations.[260] The Navy is seeking to purchase or condemn about 30,000 acres for the purpose of constructing an outlying landing field (OLF).[261] The plaintiffs have alleged violations of the Administrative Procedures Act (APA) and NEPA.[262] The proposed site of the OLF is adja-

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253. Bailey v. Myers, 76 P.3d 898 (Ariz. Ct. App. 2003).
254. *Id*. at 903.
255. Members of the Peanut Quota Growers Ass'n. v. United States, 60 Fed. Cl. 524, 531 (2004).
256. *See id*. at 525.
257. *See id*.
258. *See id*. at 526.
259. *See* Farm Security and Rural Investment Act of 2002, 7 U.S.C. §§ 7951-7960 (2004); *Peanut Quota*, 60 Fed. Cl. at 526.
260. Washington County, North Carolina v. United States Dep't. of the Navy, 317 F. Supp. 2d 626, 637 (E.D.N.C. 2004).
261. *Id*. at 629.
262. *Id*.

cent to a national wildlife refuge that supports approximately 20,000 migrating tundra swans and 44,000 migrating snow geese.[263]

The court conducted a balancing of the harms analysis and found that a balance of the harms tipped decidedly in favor of the plaintiffs.[264] At this stage of the litigation, the plaintiffs were not required to show a likelihood of success on the merits, but simply that they had raised "grave and serious questions."[265] The court noted that questions of national security do not necessarily trump the requirements of NEPA.[266] In January 2005, the Fourth Circuit granted the Navy's motion to stay the preliminary injunction.[267] Arguments on the permanent injunction were heard before the district court on January 19, with arguments on the preliminary injunction heard on February 1.[268] On February 18, 2005, the district court granted a permanent injunction against the Navy.[269]

C. *Right-to-Farm Laws as a Taking*

The Iowa Supreme Court has once again weighed in on the right-to-farm laws in *Gacke v. Pork Xtra, L.L.C*.[270] The Court addressed the question of whether the Iowa statute that gives immunity from nuisance actions to animal feeding operations is constitutional in light of its earlier decision in *Bormann v. Board of Supervisors.*[271] The Iowa Supreme Court held that *Bormann* applies to the extent that the immunity creates an easement to impose a nuisance upon one's neighbors.[272] However, it noted that "state takings jurisprudence requires us to invalidate the statutory immunity only insofar as it prevents property owners subjected to a nuisance from recovering damages for the diminution in value of their property."[273] It held that the legislature could prohibit plaintiffs from recovering expenses such as trial preparation expenses, attorney fees, and expert witness fees.[274] Since the Iowa Supreme Court based its decision upon the Iowa Constitution, *Gacke* is unlikely to have any more impact outside of Iowa than *Bormann* has had.

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263. *Id*.
264. *Id*. at 633.
265. *Id*. at 635.
266. *Id*. at 637.
267. *See* Washington County, North Carolina v. U.S. Dept. of the Navy, 357 F. Supp. 2d 861 (E.D.N.C. 2005).
268. *Id*. at 864.
269. *Id*. at 878.
270. Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168 (Iowa 2004).
271. *Id*. at 170. *See* Bormann v. Board of Supervisors, 584 N.W.2d 309 (Iowa 1998).
272. *Gacke*, 684 N.W.2d at 173-74.
273. *Id*. at 175.
274. *Id*.

D. *Regulatory Takings*

In *Rose Acre Farms, Inc. v. United States,* the Federal Circuit reversed a Court of Federal Claims decision that awarded compensation for the diminution in value of healthy eggs diverted from the fresh market to the breaking market and for healthy hens seized and destroyed for testing.[275] The U.S. Department of Agriculture (USDA) restricts the sale of eggs and also tests laying hens from farms that test positive for the salmonella bacteria, a cause of serious illness in humans.[276] Rose Acre Farms, Inc. asserted claims for regulatory takings both as to diverted eggs and hens seized for testing.[277] The Federal Circuit ordered the Court of Federal Claims, upon remand, to determine whether to measure the economic impact of diverting the eggs based upon a decline in value or upon a profitability decrease[278] and then to apply the *Penn Central Transportation Co. v. New York City* factors to a balancing of the private and public interests.[279] According to the Federal Circuit, the trial court can only determine whether compensation is due once it correctly determines the severity of the economic impact of the government's actions.[280] The Federal Circuit applied a similar analysis to the destroyed hens.[281] The decision is far from a model of clarity. If anything, the decision illustrates the difficulty in applying precedents developed primarily in the context of real property to a business context.[282]

Seiber v. United States is another Federal Circuit decision that addresses a question of a temporary taking in the context of a Fish and Wildlife Service (FWS) denial of a federal incidental take permit (ITP) needed to log a forty acre tract in Oregon.[283] The Court of Federal Claims determined that the issue was not ripe. However, even if the issue was ripe, the Court determined that there was no taking.[284] The Federal Circuit reversed as to ripeness but affirmed that there was neither a physical nor a regulatory taking.[285]

Bass Enterprises Production Co. v. United States is another Federal Circuit temporary takings decision.[286] In *Bass Enterprises Production Co.*, the Fed-

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275. Rose Acre Farms, Inc. v. United States, 373 F.3d 1177 (Fed. Cir. 2004).
276. *Id*. at 1180.
277. *Id*. at 1183.
278. *Id*. at 1198.
279. *Id*. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).
280. *Rose Acre Farms*, 373 F.3d at 1188-90.
281. *Id*. at 1196-98.
282. *See, e.g., id*. at 1186-87 (discussing the problems in applying takings case law to business contexts).
283. Seiber v. United States, 364 F.3d 1356, 1359 (Fed. Cir. 2004).
284. *Id*.
285. *Id*.
286. Bass Enters. Prod. Co. v. United States, 381 F.3d 1360 (Fed. Cir. 2004).

eral Circuit upheld a Court of Federal Claims decision that found that there was no taking.[287] At issue were oil and gas leases held by the plaintiffs for which the Bureau of Land Management temporarily withdrew drilling rights due to the proximity of the leased area to a proposed underground nuclear waste storage facility.[288] The Court of Federal Claims determined, and the Federal Circuit affirmed, that the delay occasioned by the government's study was not so extraordinary as to constitute a temporary taking.[289]

In *DLX, Inc. v. Commonwealth of Kentucky*, the denial of a mining permit by the Commonwealth of Kentucky was the source of the plaintiff's complaint that its property had been taken without constitutionally required compensation.[290] The district court dismissed for plaintiff's failure to exhaust its state remedies.[291] The Sixth Circuit affirmed the dismissal on grounds of Kentucky's Eleventh Amendment immunity from suit in federal court.[292]

V. SOLID AND HAZARDOUS WASTE

Safe Air for Everyone v. Meyer addresses the burning question of "whether grass residue remaining after a Kentucky bluegrass harvest is 'solid waste' within the meaning of the Resource Conservation and Recovery Act ('RCRA')."[293] Safe Air for Everyone (Safe Air) is a non-profit corporation formed by individuals in northern Idaho, Washington, and Montana, whose objectives include putting an end to open burning.[294] The defendants are a group of 75 individuals and corporations who produce bluegrass seed commercially in Idaho.[295] After bluegrass seed is harvested, the straw and stubble are left in the field and burned.[296] This process is repeated over several years until the bluegrass field is no longer productive and must be replanted.[297]

The Ninth Circuit found that the defendants' challenge to RCRA was not a facial challenge but a factual challenge.[298] The defendants challenged Safe Air's contention that grass residue is solid waste.[299] Where the factual and juris-

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287. *Id*. at 1370-71.
288. *Id*. at 1362-63.
289. *Id*. at 1365-66.
290. DLX, Inc. v. Commonwealth of Kentucky, 381 F.3d 511, 513-14 (6th Cir. 2004).
291. *Id*. at 514.
292. *Id*. at 526.
293. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1037 (9th Cir. 2004).
294. *Id*. at 1038.
295. *Id*.
296. *Id*. at 1037.
297. *Id*.
298. *See id*. at 1039.
299. *See id*. at 1038.

dictional issues are so entwined as to be inseparable, the Ninth Circuit held that it is inappropriate to dismiss for lack of jurisdiction but proper to construe the motion for dismissal as a motion for summary judgment.[300] The Ninth Circuit affirmed the action of the district court in dismissing the action, but it did so as a grant of a motion for summary judgment on the merits.[301] While RCRA includes agricultural wastes among the wastes within the jurisdiction of RCRA, a material must first be discarded before it can be waste.[302] The Ninth Circuit held that grass residue cannot be considered discarded for four reasons: 1) open burning extends the life of the bluegrass field and grass residue is vital to that process; 2) open burning restores the nutrients in the grass residue to a usable form; 3) open burning reduces insect pesticides; reducing the need for pesticides; and 4) open burning blackens the soil, increasing sunlight absorption that increases the yield of the following crop.[303] The majority of the Ninth Circuit rejected Safe Air's argument that these benefits are incidental to the primary purpose of open burning, which is the disposal of grass residue.[304] In a strongly worded dissent, Judge Paez would have found that grass residue is a solid waste regulated under RCRA for substantially the reason advanced by Safe Air—the primary purpose of open burning is to dispose of grass residue.[305]

In *Safe Food and Fertilizer v. EPA*, the D.C. Circuit addressed a challenge to EPA's rule that certain recycled zinc fertilizer products are exempt from regulation under RCRA.[306] The essence of the action that EPA took was to exempt all recycled zinc fertilizer products for which contaminates, including lead, arsenic, mercury, cadmium, chromium, and dioxins, fell below certain threshold levels.[307] The EPA claimed that the results of its risk assessment were equivalent to the results of The Fertilizer Institute (TFI) study that it apparently did not consider in the rulemaking process.[308] The D.C. Circuit remanded to EPA to explain, in a manner that a reviewing court can understand, why the TFI study and EPA's own risk assessment are equivalent.[309]

National Solid Waste Management Ass'n. v. Pine Belt Regional Solid Waste Management Auth. was a challenge to flow control ordinances under the

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300. *Id*. at 1040.
301. *Id*. at 1047.
302. *Id*. at 1046.
303. *Id*. at 1043-44.
304. *Id*. at 1044.
305. *See id*. at 1052-53 (stating that dissent would reverse the district court's judgment because there exists a genuine dispute as to material facts).
306. Safe Food and Fertilizer v. E.P.A., 365 F.3d 46, 47 (D.C. Cir. 2004).
307. *Id*.
308. *Id*.
309. *Id*. at 48.

Dormant Commerce Clause.[310] Flow control ordinances are designed to control the movement of waste to ensure that the governmental units enacting the ordinances receive sufficient waste to make their landfills financially viable.[311] The plaintiffs' challenge failed in the first instance because no shipper alleged that they either shipped waste out of state or planned to do so.[312] Therefore, they lacked standing to mount a challenge to the flow control ordinances as being facially discriminatory against interstate commerce.[313] Under an analysis of whether the ordinances excessively burden interstate commerce, the Fifth Circuit held that the plaintiffs had standing but failed to meet their burden under the *Pike* balancing test.[314] Under this test, a facially neutral ordinance will meet this test if the governmental interest protected is more compelling than the burden imposed upon the challengers.[315] The defendants' interest was in the economic viability of their landfill.[316] The Fifth Circuit held that the burdens imposed upon interstate commerce were no greater than those imposed upon intrastate commerce.[317]

VI. FEDERAL INSECTICIDE FUNGICIDE AND RODENTICIDE ACT PREEMPTION

Oken v. The Monsanto Co. stands for the continuing viability of the doctrine of Federal Insecticide Fungicide and Rodenticide Act (FIFRA) preemption of state tort claims based upon the inadequacy of labeling.[318] This tort action based upon the alleged inadequacy of a pesticide label was originally filed in Florida state court and subsequently removed to federal court by the defendant.[319] The Eleventh Circuit held that tort actions based upon state law are preempted by FIFRA where the state claim is based upon the alleged inadequacy of an EPA-approved label.[320]

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310. Nat'l Solid Waste Mgmt. Ass'n. v. Pine Belt Reg'l Solid Waste Mgmt. Auth., *389 F.3d 491, 493 (5th Cir. 2004).*
311. *Id*. at 494.
312. *Id*. at 499.
313. *Id*. at 498-500.
314. *Id*. at 501-03. See *Pike v. Bruce Church, 397 U.S. 137 (1970).*
315. *Pine Belt, 389 F.3d at 501.*
316. *Id*. at 502.
317. *See id*. at 502-03.
318. Oken v. Monsanto Co., 371 F.3d 1312, 1313 (11th Cir. 2004).
319. *See id*.
320. *See id*. at 1314-15.

VII. ENVIRONMENTAL INSURANCE

Zurich American Insurance Co. v. Whittier Properties, Inc. distinguishes between rescission of an insurance contract and cancellation.[321] The district court held that EPA's regulations governing underground storage tanks (USTs) prohibit cancellation but not rescission.[322] Zurich sued to rescind the insurance contract based upon the insured's material misrepresentation as to the condition of the site, made prior to the issuance of the insurance policy.[323] The Ninth Circuit held that EPA's regulations provide the exclusive remedy for prospective cancellation of a UST insurance policy since Alaska had no EPA-approved UST program in place at the time this action arose.[324] It further held that cancellation is the exclusive remedy under those regulations.[325] On this basis, the Ninth Circuit vacated the district court's grant of summary judgment based upon rescission.[326]

The Fifth Circuit in *Nat'l Union Fire Insurance Co. of Pittsburgh v. United States Liquids, Inc.,* an unpublished opinion, gave broad scope to an environmental exclusion to deny all claims.[327] In another unpublished decision, the Fourth Circuit reversed a grant of summary judgment, finding that the pollution exclusion in the relevant policy did not serve as a complete bar to all claims.[328]

VIII. AIR QUALITY

The Supreme Court has been busy in addressing air quality issues. In *Alaska Department of Environmental Conservation v. EPA,* the Supreme Court held that EPA retains authority under the CAA's Prevention of Significant Deterioration program to block projects that have been approved by a state under delegated authority.[329] This opinion and lower court decisions herein illustrate the continuing tension between delegate state authority and the retained authority of EPA to provide oversight. In *Engine Manufacturers Ass'n v. South Coast Air Quality Management Dist.,* the Supreme Court addressed the limits that the CAA imposes upon the ability of states to regulate air quality.[330] It held that rules de-

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321. *See* Zurich Am. Ins. Co. v. Whittier Props., 356 F.3d 1132 (9th Cir. 2004).
322. *Id*. at 1134-35.
323. *Id*. at 1134.
324. *Id*. at 1136.
325. *Id*. at 1137.
326. *Id*. at 1137-38.
327. *See* Nat'l Union Fire Ins. Co. of Pittsburgh v. U.S. Liquids, 88 Fed. Appx. 725, 730-31 (5th Cir. 2004).
328. Auto-Owners Ins. Co. v. Potter, 105 Fed. Appx. 484, 486 (4th Cir. 2004).
329. Ala. Dep't. of Envtl. Conservation v. EPA, 540 U.S. 461 (2004).
330. *See* Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246 *(*2004).

veloped by California to reduce pollution from private and public motor fleets are preempted by the CAA.[331] In *DOT v. Public Citizen,* the Supreme Court held that neither NEPA nor the CAA mandate evaluation of environmental impacts of allowing cross-border operations of Mexican motor carriers as required under U.S. obligations pursuant to the North American Free Trade Agreement (NAFTA).[332]

331. *Id*.
332. *See* DOT v. Public Citizen, 541 U.S. 752 (2004).