RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLEAN WATER ACT: STANDING TO SUE FOR PAST VIOLATIONS

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 120 S. Ct. 693 (2000)

The United States Supreme Court reversed a decision by the United States Court of Appeals for the Fourth Circuit concerning the citizen-suit provision of the Clean Water Act (CWA). The circuit court held that where a defendant has come into compliance with the terms of its permit after the commencement of litigation, an award of

civil penalties payable to the government is rendered moot because the penalties cannot redress the plaintiff's injuries. The Supreme Court reversed the Fourth Circuit's decision, holding that voluntary cessation of an unlawful activity is not sufficient to moot a case and that civil penalties can be imposed to deter future violations and redress the plaintiff's injuries.

On April 10, 1992, pursuant to the requirements of CWA section 505, plaintiff Friends of the Earth (FOE) sent a letter to defendant Laidlaw Environmental Services (Laidlaw), informing the company of FOE's intention to file a citizen suit at the end of the mandatory sixty-day notice period. Since 1986, Laidlaw had owned and operated a hazardous waste facility in South Carolina that included a wastewater treatment plant. Pursuant to "National Pollutant Discharge Elimination System" (NPDES) regulations, Laidlaw applied for and was granted a permit by the South Carolina Department of Health and Environmental Control (DHEC) to discharge treated water into the North Tyger River. However, Laidlaw's discharges frequently exceeded the limits allowed under the permit.

After receiving FOE's notice of intent to file suit, Laidlaw contacted the DHEC to determine if the agency had any intention to sue. The DHEC and Laidlaw reached a settlement on final day of the sixty-day notice period. The settlement required Laidlaw to pay a civil penalty of $100,000 and to make "every effort" to comply with the permit obligations. Two days later, FOE filed suit in the United States District Court for the District of South Carolina, under CWA section 505, alleging noncompliance with the permit and seeking declaratory judgment, injunctive relief, and an award of civil penalties. Evidence showed that Laidlaw continued to violate the terms of the permit after FOE filed suit. The district court rejected Laidlaw's argument that the matter had been "diligently prosecuted" and found that the DHEC's prior action was not sufficient to bar the citizen suit from proceeding.

The district court, however, denied FOE's request for injunctive relief because Laidlaw had begun to comply with the permit requirements. Nevertheless, because the court found that Laidlaw had gained a substantial economic benefit from its period of noncompliance the court, levied a large civil penalty against the company. The court reasoned that the penalty would deter future violations; moreover Laidlaw would be saddled with the cost of FOE's attorney fees, as well as its own attorney fees.

FOE appealed the amount of the penalty on grounds that it was inadequate. Laidlaw cross-appealed, challenging FOE's standing to bring suit and alleging that the DHEC's settlement of the matter qualified as "diligent prosecution" sufficient to preclude FOE's citizen suit. The Fourth Circuit, in July 1998, held that the award of penalties was rendered moot when Laidlaw came into compliance with the terms of its permit prior to trial. Relying on the Supreme Court's opinion *Steel Co. v. Citizens for a Better Environment*, the circuit court decided that the payment of civil penalties to the government was not a sufficient remedy to redress any injury that FOE might have suffered. The court reasoned that the elements of Article III standing must exist at every stage of review and that the mootness doctrine, which has been described as "the doctrine of standing placed in a time frame," required a continuing, redressable injury. Because the only remedy that remained, civil penalties, could not redress the alleged injury after the company came into compliance with the permit, the case had been rendered moot.

Finding that the Fourth Circuit had assumed initial standing, the Supreme Court first inquired as to whether initial Article III standing was satisfied. The Court stated that because FOE averred that they had suffered diminished recreational and aesthetic activities due to the water pollution resulting from the violations, they had properly alleged an injury-in-fact arising from the defendant's actions. The Court reasoned that civil penalties also provided a form of redress to FOE's injury because of their deterrent effect and ability to discourage future violations. Thus, the requirements of initial standing were met.

The Court next addressed the mootness issue. The Court found that mootness could conceivably be based on either Laidlaw's compliance with the permit requirements prior to trial or its recent closing of the facility. To determine if a case has been mooted by the defendant's voluntary conduct, the Court adopted the standard set forth in its *United States v. Concentrated Phosphate Export Assn.* decision: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not be reasonably expected to recur." This places a heavy burden on the party asserting mootness to prove that the challenged conduct can be reasonably expected to recur.

The Court found that, in relying on *Steel Co.*, the Fourth Circuit had confused standing with the doctrine of mootness. The Court reasoned that the definition of mootness as "standing set in a time frame" is not comprehensive. Whereas the burden is placed on the defendant to prove mootness, the plaintiff must establish that it meets

the Article III standing requirements. Consequently, the Court found that there may be circumstances where a defendant's harmful action may be too speculative to establish standing, yet sufficient to overcome mootness.

The Fourth Circuit's mootness definition was also deemed inadequate because, where the defendant has ceased its violating actions, but the possibility remains that these violations will recur, initial standing would be denied. However, the mootness doctrine contains an exception for such violations: Given the possibility of future violations, the defendant will be unable to prove that the violations cannot be reasonably expected to recur.

Laidlaw also contended that FOE's failure to appeal the denial of injunctive relief rendered the civil penalty claim moot. The Court found that this argument misconstrued the statutory scheme; it is left to the discretion of courts how to best abate current violations and deter future problems. Merely because the court denied injunctive relief does not mean that it decided that there would be no future violations to deter. In fact, in this instance, the district court properly exercised its own discretion to impose civil penalties as a deterrent.

Lastly, Laidlaw argued that the closure of the facility, which happened after the Fourth Circuit rendered its decision, rendered the case moot. However, because Laidlaw retained its NPDES permit it was not absolutely clear that the permit violations could "reasonably not be expected to recur." Ultimately, the Court found that the prospect of future violations remained a disputed issue of fact and should be remanded for decision by the district court in accordance with the standard of mootness as set forth by the Court.

Christopher Wilson

II. CLEAN AIR ACT: PREVENTION OF SIGNIFICANT DETERIORATION PERMITS

Sur Contra La Contaminacion v. EPA, 202 F.3d 443 (1st Cir. 2000)

Sur Contra la Contaminacion (SCC), a community organization made up of residents of Guayama, Puerto Rico, challenged a Prevention of Significant Deterioration (PSD) permit issued by the federal Environmental Protection Agency (EPA) that authorized construction of a power plant by AES Puerto Rico L.P (AES) in the ward of Jobos. The United States Court of Appeals for the First

Circuit accepted jurisdiction pursuant to 42 U.S.C. § 7607(b). The standard of review applied by the court was arbitrary and capricious.

PSD permits are required under the Clean Air Act (CAA) when a facility will be a new stationary source of certain pollutants. These permits are designed to insure that pollutants emitted by the facility do not exceed either the allowable increments of air pollutants or the National Ambient Air Quality Standards (NAAQS) in certain areas. Thus, the PSD program serves to balance economic growth with preservation of existing clean air sources.

In order to obtain a PSD permit, a facility must satisfy two important prerequisites. First, the facility must demonstrate that "emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess" of the increments or NAAQS. In this case, AES used air quality monitoring techniques that predicted sulfur dioxide levels lower than the threshold levels. Additionally, AES conducted a full impact analysis on fine particulate matter emissions, which indicated the plant would not exceed the increments or NAAQS. Second, the facility must demonstrate that it is "subject to the best available control technology [(BACT)] for each pollutant subject to regulation." In this case, AES proposed a novel combination of three control technologies: circulating fluidized bed boilers with limestone injection, low sulfur coal, and a dry scrubber. Though it had never been used before, the EPA accepted the combined technologies as the BACT.

When the EPA published notice announcing its intention to issue a PSD permit to AES, a number of individuals and groups, including SCC, challenged the petition before the Environmental Appeals Board (EAB). The EAB denied the review, which led to the present appeal.

In its analysis, the court first considered SCC's argument that the EPA should have required AES to conduct a full impact study of its sulfur dioxide emissions. SCC supplemented this argument by stating that the EPA had never before accepted this combination of controls. Thus, because the efficiency of this particular combination of controls was untested, the EPA should have conducted a full impact study before granting the final permit. The EPA countered that AES's permit still required them to limit the facility's sulfur dioxide emissions rate to extremely low levels. Moreover, the agency did not have to accept the modeling relied upon by SCC in determining possible emission rates.

The court determined that the EPA was not arbitrary and capricious in its decision to accept the novel combination of controls sought by AES in order to attain BACT. Since each component used

by AES had been tested and used previously, the EPA did not arbitrarily accept the new combination of controls. The court further noted that it was rational for the EPA to accept its own modeling rather than the modeling of SCC, which showed sulfur dioxide levels above threshold levels.

SCC next argued that the EPA erred when it required AES to conduct a full impact analysis after issuance of the permit. The court noted the oddity of this argument, but surmised that it was in accord with SCC's belief that a full impact study should be required before, rather than after, issuance of a permit. SCC was not given the opportunity to comment on the data collected in the full impact study. However, the court found no existing legal requirement that public comment be allowed for a post-permit analysis of the data.

Next, the SCC argued that the EPA relied on outdated, 1983 air quality data when it evaluated the current air conditions in Guayama. It wanted the EPA to rely on more recent data collected by the Puerto Rico Environmental Quality Board in 1990. Furthermore, it wanted the EPA to conduct an ambient air quality analysis in order to determine if Guayama was in fact in attainment. The EPA countered that its data was not outdated, as no new major sources of pollutants had been constructed in the area since 1983, which was the last time it had collected data on attainment. Moreover, the agency maintained that the data collected by the Environmental Quality Board would have been rejected had it been given to the EPA. In addition, the EPA claimed that ambient air quality is required once a facility is in operation, not before it begins operation.

The court accepted the EPA arguments. First, the court found no legal requirement that ambient air monitoring be conducted before issuance of a permit. Second, the court found no evidence to cast doubt on the EPA's findings that the area was still in attainment even though it used data from 1983.

SCC next argued that AES used old and unrepresentative data in its analysis of fine particulate matter. SCC wanted AES to use more recent data, which would demonstrate that the fine particulate matter standard in the area would be exceeded by the new facility. In response, the EPA argued that AES used the most recent data available prior to its permit application. Furthermore, AES was not required to consider post-application data.

The court found that the EPA acted rationally when it excluded the most recent data, as it was unrepresentative. Additionally, the EPA acted properly when it asked AES to submit and take into account the revised limits on fine particulate matter.

Finally, SCC argued that AES's permit should be revoked under the President's Executive Order on Environmental Justice. This order required each federal agency, to the greatest extent possible, to achieve environmental justice by ensuring that environmental effects do not disproportionately injure minority and low-income populations. However, the court found this order to be more of an internal control for the government; it did not grant a right to judicial review, thus the permit could not be reviewed on this basis.

Additionally, the court, at the end of its opinion, noted that the residents of Guayama might have valid concerns about the air quality in their region. However, SCC's petition provided no valid basis to conclude that the EPA's actions were arbitrary or capricious. Moreover, the court stated that the EPA was the expert in this area and its findings should be given deference. Finally, the court noted, in what could be labeled a hollow victory for SCC, that the stringent conditions of the permit "may be due in large part to the participation of the area residents."

Darin Flagg

III. CLEAN AIR ACT: VEHICLE EMISSIONS STANDARDS

Association of International Automobile Manufacturers, Inc. v. Commissioner, Massachusetts Department of Environmental Protection, 208 F.3d 1 (1st Cir. 2000)

Section 209(a) of the Clean Air Act (CAA) expressly preempts all state regulation of new motor vehicle emissions. However, as an exception to preemption, the EPA may grant California a waiver of preemption for its emissions standards if they are no less protective of public health than the federal regulations. Under another limited exception to section 209(a) preemption, provided for in CAA section 177, any state may adopt vehicle emissions standards if: (1) the standards are "identical to California standards for which a waiver has been granted" and (2) such standards are adopted at least two years before commencement of the particular model year to which they apply.

In 1993, Massachusetts adopted a set of automobile emissions standards. The Massachusetts standards were based on the California's 1990 standards, which targeted zero emissions vehicles (ZEV) as part of its low emission vehicle (LEV) program. The EPA

exempted California's standards from section 209(a) preemption in 1993. In 1996, California repealed the ZEV portion of its standards for model years 1998-2002 and entered into agreements with seven major auto manufacturers wherein the manufacturers agreed to introduce ZEVs into the California market following the 2002 model year. In turn, California agreed to provide infrastructure support for the ZEVs. Massachusetts then amended its ZEV standards to reflect the manufactures commitments to California regarding the ZEVs, but did not promise similar infrastructure support.

The auto manufactures filed a complaint challenging the Massachusetts amended standards on the basis that they were preempted by federal law. The United States District Court for the District of Massachusetts granted summary judgment in favor of the manufacturers, holding that the Massachusetts regulations were preempted by the CAA. Massachusetts appealed the district court's decision. The United States Court of Appeals for the First Circuit stayed it's determination and referred several key issues to the EPA. In its response letter to the court, the EPA concluded that the Massachusetts regulations were not preempted by the CAA. First, the EPA reasoned that the Massachusetts ZEV mandates were "standards" under the CAA, as were the California agreements with the auto manufactures. The EPA also found that the Massachusetts standards were identical to the California standards. Finally, the EPA believed that the California agreements with the manufacturers fell within the scope of the original 1993 exemption granted California under CAA section 209(a).

The manufacturers challenged the EPA's authority to issue its opinion in the United States Court of Appeals for the District of Columbia Circuit. The D.C. Circuit transferred the manufacturers' petition for review to the First Circuit, whereupon it was consolidated with the original appeal.

The First Circuit began it's holding by admitting that its referral of the issue to the EPA without accepting briefs from the parties was probably not appropriate. The court noted that it had intended to allow the EPA to issue binding rulings or decisions on the questions referred to the agency. However, the court admitted that in hindsight the agency apparently was not in a position to determine the issues "authoritatively." The court reasoned that the EPA's opinion letter was an advisory opinion, with no independent impact on the parties. The court further reasoned that the opinion letter was not a "final agency action" subject to judicial review. Therefore, since the EPA's opinion letter was not intended to be a definitive statement of the

EPA's position and had no impact on the parties, the court held the EPA's letter was not reviewable and dismissed the manufacturers petition for review. The court further held that because the EPA's letter was just an opinion and not a final agency action it does not command any particular deference under the *Chevron* doctrine.

Regarding Massachusetts' original appeal, the court analyzed each of the issues that it had previously submitted to the EPA. The court first held that the Massachusetts ZEV mandates are "standards" within the meaning of the CAA. Massachusetts had originally argued that the ZEV mandates were enforcement provisions and not standards. However, the term "standards" under CAA sections 209 and 177 refers to state actions which cause reductions in emissions levels. Since the Massachusetts ZEV mandates would reduce overall emissions levels, even though the impact might be small, they could be properly termed "standards" under the CAA.

The court next held that the ZEV mandates were not identical to the California standards. Since the Massachusetts ZEV mandates are properly termed "standards," and therefore subject to the requirements of CAA section 177, the mandates would need to be identical to the California ZEV mandates. However, the agreements that California entered into with the auto manufacturers were voluntary contractual agreements and not legislation or formal administration. As such, sections 209 and 177 did not govern those agreements; federal preemption is limited to formal state laws and regulations and not applicable to contracts and other voluntary agreements.

Since California eliminated it's ZEV requirements, states cannot receive exemption from preemption for similar standards. Further, since the agreements California entered into with the manufacturers do not constitute new "standards" within the meaning of section 209, states cannot use such agreements to impose their own ZEV requirements.

Jason Kinzel

IV. CLEAN AIR ACT: NEW SOURCE PERFORMANCE STANDARDS

Lignite Energy Council Inc. v. EPA, 198 F.3d 930 (D.C. Cir. 1999)

Section 111 of the Clean Air Act (CAA) requires the Environmental Protection Agency (EPA or the agency) to establish "new source performance standards" for the emission of nitrogen

oxides from newly constructed, fossil fuel fired, steam generating units ("boilers"). These standards are to assume the "application of the best system of emission reduction which . . . has been adequately demonstrated." In the 1990 amendments to the CAA, Congress specifically directed the EPA to establish new nitrogen oxide emission standards that incorporate improved methods of emission reduction. Accordingly, the EPA promulgated a final rule reducing the nitrogen oxide new source performance standards to .15 lb/MMBtu for utility boilers and .20 lb/MMBtu for industrial boilers. The EPA concluded that these levels were demonstrably achievable by the use of selective catalytic reduction (SCR) in combination with combustion control technologies.

Lignite Energy Council and other utility and mining trade associations (the petitioners) petitioned for a review of the nitrogen oxide final rule. The petitioners' primary claim was that the EPA selected SCR as the "best demonstrated system" of emissions reduction without balancing the factors that CAA section 111 requires to be "taken into account." Prior to addressing the specific claims of the petitioners, the United States Court of Appeals for the District of Columbia Circuit noted that section 111 did not define the weight that the EPA should assign to each listed factor. Therefore, the court considered the petitioners' claims under the abuse of discretion standard: "Because section 111 does not set forth the weight that should assigned to each of these factors, we have granted the agency a great degree of discretion in balancing them; EPA's choice will be sustained unless the environmental or economic costs of using the technology are exorbitant."

The petitioners first argued that, given the factors that must be taken into account under section 111, SCR is not the "best demonstrated system" of emissions reduction because the incremental cost of reducing nitrogen oxides is substantially greater with SCR than with less expensive combustion controls. Although the court acknowledged that boilers utilizing combustion controls can attain emissions levels close to the EPA's SCR-based standards, the court concluded that the EPA did not exceed its "considerable discretion" under section 111, as the agency's uncontested findings showed that the new standards would only slightly increase production costs. Moreover, the court noted that the new source performance standards were not "technology-forcing." The petitioners' could employ combustion controls to reduce the amount of nitrogen oxide emissions that must be captured by the more expensive SCR technology.

The petitioners next argued that it was arbitrary and capricious for the EPA to issue uniform standards for all utility boilers, rather than adhering to the agency's past practice of setting a range of standards based on boiler and fuel type. The agency maintained that its decision to move to uniform standards was justified in light of the fact that SCR limits nitrogen oxide emissions after combustion, thereby greatly reducing the effects of boiler or fuel type on emissions reduction. The petitioners responded with specific concerns about the effectiveness of SCR on boilers burning high sulfur coals and the impact of alkaline metals on SCR performance. However, referencing the "high degree of deference" that must be shown to the EPA's scientific judgment, the court accepted the agency's competing determinations and sustained the uniform standard for utility boilers.

With regard to the .20 lb/MMBtu standard for industrial boilers, the petitioners claimed that SCR was not "adequately demonstrated" for any coal-fired industrial boilers. The court noted that the EPA was unable to collect emissions data for the application of SCR to such industrial boilers, but reasoned that the absence of data "is not surprising for a new technology like SCR, nor does it in and of itself defeat EPA's standard." The EPA may set section 111 standards in accordance with projected future technologies; the agency is not limited to present technologies. However, where such data are unavailable, the ability of a technology to achieve the promulgated standard must not be speculative or conjectural.

In the case at hand, the EPA properly compensated for the lack of data by extrapolating SCR's performance when applied to utility boilers, concluding from its study of utility boilers that SCR is "achievable" for coal-fired industrial boilers. Despite the petitioners' contentions to the contrary, the court concluded that "it was reasonable for EPA to extrapolate from its studies of utility boilers in setting an SCR-based new source performance standard for coal-fired boilers."

The court likewise sustained the agency's application of the .20 lb/MMBtu standard to "combination boilers," which simultaneously combust a mixture of fuels. Here again, the petitioners claimed that the standard should vary by fuel type, with boilers burning natural gas and non-coal solid fuels being subject to a lesser standard. The court reasoned that the more stringent, uniform standard was reasonable in light of the significant advances in nitrogen oxide emissions technology that had occurred since the pre-existing standards were established in 1986. Moreover, the court reasoned that since the .20 lb/MMBtu standard was held achievable for boilers burning only coal,

the industrial boiler standard could not be held unreasonable as applied to combination boilers burning coal simultaneously with other fuels with lower nitrogen oxide emissions characteristics.

The petitioners' final objection concerned the EPA's valuation of steam energy produced by "co-generation facilities." The agency's adoption of an output-based standard for utility boilers presented the question of how to calculate the energy produced by such facilities, which generate both thermal steam energy and electrical energy. Due to inefficiencies in transporting and converting steam for industrial use, only a fraction of the steam energy produced by co-generation facilities is used in the industrial process. The EPA chose to resolve this problem by awarding a fifty-percent credit for steam energy when determining the output of a co-generation facility. The petitioners claimed that this was an "arbitrary and capricious 'discounting'" of the value of steam energy. However, the court noted an alternative view of the credit: The credit "just as easily could be called a subsidy." The conversion of steam to electrical energy only realizes a thirty-eight-percent efficiency rate, and the agency's fifty-percent credit was justified on grounds that it would encourage co-generation. The court concluded that the EPA's resolution of the issue was "acceptable" in light of the difficulties inherent in a unit-by-unit calculation of the useful energy of steam heat produced by co-generation facilities.

Bryan Moore

V. THE DORMANT COMMERCE CLAUSE: MUNICIPAL WASTE-PROCESSING REGULATIONS

U & I Sanitation v. City of Columbus, 205 F.3d 1063 (8th Cir. 2000)

U & I Sanitation (U & I), a private garbage hauler, brought suit against the City of Columbus, Nebraska (the City), under 42 U.S.C. § 1983, challenging the constitutionality of a City ordinance requiring that all garbage collected in the City and designated for in-state disposal be processed at the city-owned transfer station. U & I alleged that the regulation violated the dormant Commerce Clause and sought an injunction against the ordinance.

In 1996, the City constructed a common landfill with neighboring municipalities. Garbage collected by private haulers, like U & I, is "processed" at the City's transfer station before being sent to

the landfill. "Processing" includes removing hazardous waste materials from the solid waste, but does not include a sorting of recyclables. To help fund its expenses, the City charges haulers a $49 per ton "tipping fee" for garbage dumped at its transfer station.

U & I realized that it could dispose of waste more economically and in a more environmentally-friendly manner at the nearby Butler County Landfill (Butler). Butler only charged haulers a $23.25 per ton fee, and additionally separated recyclables from nonrecyclable solid waste. U & I's diversion of its business to Butler caused the City transfer station to lose a significant amount of revenues. In August 1997, the City enacted Ordinance No. 97-21, which mandated that all garbage collected within the City destined for disposal within Nebraska had to be processed at the City's station. U & I refused to comply with the regulation, and as a consequence, the City passed a resolution to suspend U & I's hauler license for one year.

U & I immediately brought an action against the City in the United States District Court for the District of Nebraska, alleging that the ordinance violated the dormant Commerce Clause. The court, however, held that: (1) the ordinance did not overtly discriminate against interstate commerce and (2) that, under the doctrine of *Pike v. Bruce Church*, the burdens imposed by the regulation were not in excess of the local benefits it procured. Therefore, the ordinance was upheld.

The United States Court of Appeals for the Eighth Circuit, upon review, reversed the decision of the district court. The circuit court, like the lower court, used two separate, alternate frameworks to evaluate U & I's claim, but ultimately reached a different conclusion. First, the court examined the City's ordinance to see if it overtly discriminated against interstate commerce on its face, in its purpose, or in its effects, under the United States Supreme Court's opinion in *C & A Carbone v. City of Clarkstown*. The court quickly found that because the City's regulation only applied to intrastate garbage, not garbage destined for other states, the regulation did not explicitly favor local interests over out-of-state interests, and thus did not overtly violate the Commerce Clause.

Despite this finding, the ordinance could not pass the second test: the Supreme Court's *Pike v. Bruce Church* balancing test. Under the *Pike* balancing test, even if a law does not overtly discriminate against interstate commerce, it still can be struck down if the burden it imposes is "clearly excessive in relation to the putative local benefits." The court's ultimate decision to invalidate the ordinance under the *Pike* test hinged on its thorough examination of the situation

created by the ordinance. Initially, the court stated that, in assessing the extent of the burden of the ordinance, the analysis should not be limited to the burdens suffered only by the parties before the court, but should involve an aggregate assessment of the interstate effect on the recyclables market if other cities were to adopt similar laws. A key factor in this aggregate analysis was the fact that as much as sixteen percent of U & I's waste could be recycled if taken to Butler, and that the City agreed that these recyclables entered the stream of interstate commerce by going to various country-wide recyclable markets. The ordinance and others like it would limit the ability of goods to be recycled in such a manner.

However, the court was more influenced by the insufficiency of legitimate local purposes that the ordinance served, as well as the fact that the City had feasible alternatives available to it to address its purposes aside from the ordinance. Although the City claimed that the ordinance both ensured the economic viability of the City's waste disposal program, as well as prevented hazardous waste accidents, the court found that, although legitimate, both of these purposes were not persuasive enough to justify the regulation's validity. The first purpose was clearly an economic one, identical to a purpose deemed insufficient to uphold such a regulation by the Supreme Court in *C & A Carbone*. The second purpose was not even advanced by the ordinance, as there was no evidence that the City's facility somehow mitigated hazardous waste accidents. U & I's facility of choice, Butler, was as thoroughly compliant with environmental standards as was the City's transfer station. The court found that because the City's interest in the ordinance was obviously limited to a desire to raise funds to support its waste program, the City could achieve that goal through taxation or higher licensing fees for haulers. Moreover, if the City were indeed concerned with hazardous waste practices, it could adopt safety regulations with which all haulers in the City would have to comply.

The court concluded that the ordinance's effects upon interstate commerce were far from trivial. If other cities were to enact such ordinances, the interstate market for recyclables would be crippled. Although the ordinance might have been upheld had the City forwarded a strong legitimate local interest that could only be effectuated by such a regulation, the court found no such overriding interest and remanded the case to the district court so that it could grant injunctive relief to U & I Sanitation.

Kristin Reyna

VI. ATTORNEY FEES: CONSIDERATION OF NONFINANCIAL ENVIRONMENTAL INTERESTS

Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Board of Supervisors, 79 Cal. App. 4th 505, 94 Cal. Rptr. 2d 205 (Cal. Ct. App. 2000)

In the case below, the California Superior Court, County of El Dorado, denied the plaintiffs' motions requesting that the defendants pay attorney fees arising out of an environmental land-use dispute. In this case, the California Court of Appeal, Third District, reversed the trial court's denial of attorney fees and remanded the case for further consideration.

In reaching its decision, the appellate court began by considering the general principles governing the case. The court noted that this was a case under section 1021.5 of the California Code of Civil Procedure, which codifies the "private attorney general" doctrine. This doctrine allows attorney fees to be awarded to litigants when the case vindicates an important public right, confers significant benefit on the public or a large class of people, is necessary, and creates a financial burden for the plaintiffs disproportionate to their individual stake in the case. The court pointed out that the "private attorney general" doctrine is designed to provide an incentive for potential public-interest-minded plaintiffs to pursue litigation that might otherwise be too expensive.

The court also stated that the determination of whether the criteria for an award of attorney fees have been met is a question left to the discretion of the trial court. Accordingly, the standard of review on appeal is abuse of discretion. The defendants did not and, according to the court, could not dispute the fact that the plaintiffs' case enforced an important public right while conferring a public benefit, and that private enforcement was necessary – when suits are brought against governmental agencies, private enforcement is obviously necessary. That left only the "financial burden" portion of the analysis to be reviewed by the appellate court for abuse of discretion by the trial court.

In analyzing the trial court's ruling, the appellate court first looked at the motion for attorney fees during the appeal of the case, then discussed the motion for attorney fees during the trial. The requisite "financial burden" is shown when the cost of the plaintiffs' legal victory outweighs their personal interest in the lawsuit. The

burden is placed on the plaintiffs to prove that they meet the requirements.

The court had to decide whether nonfinancial environmental interests could be factored into the analysis of the plaintiffs' personal interests to weigh against their financial burden. The court analyzed the relevant precedents and concluded that nonfinancial environmental interests could, in fact, be included in the consideration of the plaintiffs' interests in the case. The court reasoned that an aesthetic interest can function much like a financial interest under certain conditions. For example, this would occur when the aesthetic interest is tied to decreased property values or a blocked view which, again, would affect property values. The court stated that if an aesthetic or environmental interest is to be considered sufficient to prevent an award of attorney fees, it must be significant, concrete, and specific, and that conclusion must be based on objective evidence. Though not specifically stated, all of the court's examples were cases wherein aesthetic interest was tied to some quantifiable benefit, such as property value. The court specifically stated that a "vaguely-grounded aesthetic interest, even if 'heart-felt,' will not be considered sufficient; nor will a mere abstract interest in aesthetic integrity or environmental preservation." The court went on to say that the so-called "not in my back yard" personal interest was insufficient to block an award of attorney fees. This approach, if followed, would threaten the private enforcement of environmental laws and undermine the very purpose of the attorney fees provision. The requirement that the suit must enforce an important public right is, according to the court, sufficient to prevent abuse of the attorney fees provision by plaintiffs who do not truly have the public interest at heart.

The court concluded that the trial court abused its discretion in holding, as it had, that the plaintiffs failed to show that their financial burden was disproportionate to their financial interest. None of the plaintiffs had a significant financial stake in the outcome of the litigation. While there might be a taking by eminent domain of some plaintiffs' property, such property would be merely a small strip of land taken for the purpose of widening a road, and the taking would be compensated at fair market value. There was no significant threat to property values, and in fact, there was evidence that the value of the property owned by those plaintiffs would increase. The only relief sought was an order forcing the defendants to comply with constitutional and environmental laws in considering the project in dispute. On the other side of the scale, the plaintiffs' financial burden

consisted of approximately $120,000 in attorney fees for the appeal alone, and $240,000 in fees for the trial itself. The issues of attorney fees for the trial and the appellate portions of the case were remanded for further consideration in light of the court's holding that nonfinancial environmental interests could be considered.

The court briefly addressed two other in an effort to provide guidance on remand. First, the court stated that the fact that one of the attorneys in the case was a personal beneficiary, and in fact the largest personal beneficiary, of the litigation did not preclude an award of attorney fees in this situation. Second, the attorneys had waived their fees unless the court awarded fees to be paid by the other side, hence the plaintiffs were not actually responsible for such fees. The court stated that such a waiver did not preclude an award of the waived fees.

One judge, Judge Sims, concurred in part and dissented in part. Judge Sims agreed with the courts decision to remand, but did not agree with the conclusion that nonfinancial environmental interests could be considered. Judge Sims pointed out that only one California case had so held, and further expressed the belief that that one case was wrongly decided. The judge was of the opinion that the only environmental interests that should be considered in a request for attorney fees were those of such a nature that they could properly be characterized as a property interest, such as diminution in value of property due to an impaired environmental interest. The types of cases mentioned appear to be ones in which the majority would consider nonfinancial environmental interests a valid issue. But, Judge Sims would only allow such consideration when it was, in fact, also a property interest or tied to other financial interests, and would not leave room for courts to widen that meaning to include more illusory and public-minded environmental interests.

Julia Gutreuter