

# The Digest of ENVIRONMENTAL LAW

**Recent  
Decisions  
of National  
Significance**

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Executive Editor: Amy K. Davis, Esq. Associate Editor: Zahna Ellis. Research/Database Editor: Plua Vue. Editorial Production Manager: Christina Sacco. Publisher: Richard M. Ossoff. Vice President: Jennifer F. Brown, Esq.

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**ADMINISTRATIVE LAW—NATIONAL POLLUTION FUNDS CENTER’S DENIAL OF BARGE OWNER’S REQUEST FOR REIMBURSEMENT OF CLEANUP EXPENSES FOLLOWING OIL SPILL UPHeld**

BUFFALO MARINE SERVS. INC. v. UNITED STATES  
 No. 10-41108 (Fifth U.S. Circuit Court of Appeals Nov. 22, 2011)

**ISSUE:** Did the Coast Guard’s National Pollution Funds Center (NPFC) err in denying a barge owner’s request for reimbursement of cleanup expenses under the Oil Pollution Act (OPA) following an oil spill?

**FACTS:** In August 2004, a barge and a tug owned by Buffalo Marine Services Inc. attempted to dock alongside the *TORM MARY*, a large tanker ship, in order to deliver fuel that had been ordered by entities responsible for the tanker ship (collectively, the *Torm*). The fuel delivery never took place. Buffalo Marine’s barge collided with the *TORM MARY*, rupturing the vessel’s skin and adjacent fuel-oil tank. As a result of the rupture, approximately 27,000 gallons of heavy fuel oil spilled into the Neches River. Buffalo Marine, the *Torm* and their insurers coordinated the cleanup effort, assessed at a cost of \$10.1 million.

The OPA creates a strict liability scheme for the costs of cleaning up oil spills: “each responsible party for a vessel ... from which oil is discharged ... is liable for the removal costs and damages ... that result from such incident.” The “responsible party” for a vessel is “any person owning, operating, or demise chartering the vessel.” The liability of the responsible party is capped at a dollar limit that is set by statute; the limit is based on the gross tonnage of the responsible party’s vessel. If the cleanup costs exceed the statutory limit, the responsible party can seek to have those excess costs reimbursed by the Oil Spill Liability Trust Fund. In this case, because the oil spilled from the *TORM MARY*, the *Torm* was the “responsible party” under the OPA’s strict liability scheme.

However, a responsible party may have a complete defense to liability under § 2703(a)(3) of the OPA if it “establishes, by a preponderance of the evidence,” that the oil spill was “caused solely by ... an act or omission of a third party, other than ... a third party whose act or omission occurs in connection with any contractual relationship with the responsible party.” Section 2703(a)(3) also requires a showing that the responsible party exercised due care with respect to the spilled oil and that it took precautions against the foreseeable acts or omissions of the third party to whom it is attempting to shift liability.

The owners and insurers of the three vessels involved in the spill jointly submitted a request for reimbursement of their cleanup expenses to the Coast Guard’s NPFC, which is the agency charged with administering the Oil Spill Liability Trust Fund. The request sought to declare Buffalo Marine the sole “third-party” cause of the spill, exonerate the *Torm*, substitute Buffalo Marine as the formal “responsible party” for cleanup costs, and limit Buffalo Marine’s liability to \$2 million—the approximate value of the barge—pursuant to the OPA.

The NPFC denied the claim, concluding the claimants had not established by a preponderance of evidence that Buffalo Marine’s acts were not “in connection with any contractual relationship with the responsible party.” The NPFC denied the claimants’ motion for reconsideration of its decision. Buffalo Marine and its insurers then sought judicial review of the NPFC’s decision. After the parties filed cross-motions for summary judgment, the district court granted the government’s motion for summary judgment and denied the plaintiffs’ motion for summary judgment. Buffalo Marine and its insurers appealed.

**HELD:** Affirmed.

The Fifth Circuit held that the NPFC’s interpretation of 33 U.S.C. § 2703 was entitled to deference and that the plaintiffs had not demonstrated that the NPFC’s denial of the third-party affirmative defense claim should be overturned under the standard set forth in the Administrative Procedure Act:

... The Administrative Procedure Act (“APA”) allows a federal court to overturn an agency’s ruling “ ‘only if it is arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence on the record taken as a whole.’ ”

This case turns on two issues: (1) whether the NPFC’s interpretation of 33 U.S.C. § 2703(a)(3) deserves deference and (2) whether the NPFC’s determination in this case,

given the NPFC’s interpretation of the statute, was arbitrary, capricious, not in accordance with law, or unsupported by substantial evidence. Because we find that the agency’s interpretation of the statute is entitled to deference and that its determination that the Torm is not entitled to a third-party defense was not arbitrary, capricious, or otherwise unreasonable, we need not reach the other arguments raised by the parties.

\* \* \* \* \*

We first consider whether the NPFC’s interpretation of the OPA deserves deference. To determine whether a “responsible party” is entitled to a complete defense based on the act or omission of a third party, the NPFC must evaluate whether the alleged third-party “act or omission occur[red] in connection with any contractual relationship with the responsible party.” The NPFC interprets the phrase “act or omission occur[ring] in connection with any contractual relationship” to include acts or omissions occurring in connection with an indirect contractual relationship with the responsible party. Thus, the NPFC has concluded that the phrase includes acts occurring in connection with a commercial fuel delivery even where “a chain of agents or contracts stands between the party delivering the fuel and the party receiving the fuel.” Direct privity of contract is not required.

\* \* \* \* \*

We conclude that the NPFC’s interpretation of the phrase “in connection with any contractual relationship with the responsible party” in 33 U.S.C. § 2703(a)(3) is based on a permissible construction of the statute.

\* \* \* \* \*

Having determined that the NPFC’s interpretation of the OPA is entitled to deference, we find that the agency’s determination that the Torm was not eligible for the third-party defense should be upheld, as it was supported by substantial evidence and not arbitrary, capricious, or otherwise not in accordance with law.

It was the claimants’ burden to establish by “a preponderance of evidence” that the Torm was entitled to a complete defense. ...

\* \* \* \* \*

Given the evidence on record and the concessions of the parties, we find no error in the NPFC’s conclusion that the claimants failed to establish by a preponderance of evidence that the acts or omissions of Buffalo Marine’s barge in approaching and colliding with the TORM MARY were other than those occurring in connection with a contractual relationship with the responsible party for the TORM MARY. Because the claimants failed to demonstrate by a preponderance of evidence that the sole cause of the spill was a third-party act or omission that did not occur in connection with any contractual relationship with the responsible party, the Torm’s third-party affirmative defense could not succeed. Thus, we also find no error in the NPFC’s failure to decide whether the claimants could satisfy the additional requirements in § 2703(a)(3)(A) and (B).

**ADMINISTRATIVE LAW—FOREST SERVICE’S ADOPTION OF NATIONAL FOREST TRAVEL MANAGEMENT PLAN IS UNLAWFUL**

MONT. WILDERNESS ASS’N v. McALLISTER  
 No. 09-36051 (Ninth U.S. Circuit Court of Appeals Dec. 1, 2011)

ISSUE: Does the national forest travel management plan prepared by the U.S. Forest Service violate the Montana Wilderness Study Act?

FACTS: The Hyalite-Porcupine-Buffalo Horn Wilderness Study Area, a 155,000-acre region within southwest Montana’s Gallatin National Forest, was managed under the Montana Wilderness Study Act of

1977 (Study Act). Until recently, the U.S. Forest Service administered the entire Gallatin National Forest, including the study area, under a forest plan prepared in 1987. Since the forest plan was prepared, however, recreation and travel uses of the Gallatin National Forest had evolved substantially.

In 2002, realizing that “the demand for some recreation opportunities” in the Gallatin National Forest might “be reaching the point of exceeding the capability of the land to provide them,” the Service began preparing the travel plan to balance travel and recreational uses with other management goals. In October 2006, the Service released the record of decision (ROD) for the travel plan, along with a final environmental impact statement (FEIS) prepared to satisfy the National Environmental Policy Act (NEPA).

To comply with the Study Act’s mandate that 1977 wilderness character be maintained, the Service examined which portions of the study area were available for motorized and mechanized recreational use in 1977, and compared the 1977 areas to the areas available in 2006, when the travel plan was prepared. After conducting this analysis, the Service restricted summer use of motorcycles and mountain bikes to 168 total trail miles, and restricted winter use of snowmobiles to an 11,000-acre open area surrounded by a 7000-acre buffer zone.

Although it reconfigured the area over which motorized and mechanized use occurred relative to 1977, the Service did not explicitly account for the increase in volume of use over time. The Service acknowledged that use volume had increased in the study area since 1977, but noted that accounting for the increase was somewhat problematic because there were no “reliable (statistically valid) recreation use data available.” The Service concluded, however, that the missing data were not relevant in any event because the Study Act required the Service to maintain only those physical characteristics that could affect a study area’s ability to provide a wilderness experience in the event of future wilderness designation. The Service did not attempt to maintain the area’s 1977 wilderness character, including the relatively low motorized use volumes that existed at that time, for the enjoyment of current users.

After the travel plan was finalized, the Montana Wilderness Association, et al. (MWA) brought an action under the Administrative Procedure Act (APA) alleging the travel plan and FEIS “allow motorized and mechanized activities [in the study area] to increase beyond the 1977 status quo,” in contravention of the Study Act. MWA also alleged the Service violated NEPA by failing adequately to disclose and analyze the impact of the travel plan on the study area’s wilderness character. Citizens for Balanced Use, et al., a coalition representing enthusiasts of motorized and mechanized recreation, brought a separate suit against the Service alleging just the opposite: that the travel plan unlawfully restricted motorized use in the study area. On appeal, however, Citizens supported the restrictions adopted by the Service and argued that the Service’s decision was entitled to deference.

The district court consolidated the two cases. It then granted MWA’s motion for summary judgment and denied the cross-motions of the Service and Citizens (see 21 **Dig. Env’tl.L.** 60, February 2000). The court concluded that the Service failed to adequately explain how the travel plan’s reconfiguration of the physical areas open to motorized and mechanized use satisfied the Study Act’s mandate to maintain 1977 wilderness character, in light of acknowledged increases in use volume. The court recognized that the Service lacked complete historical data that would allow it to quantify the volume of use increase precisely, but held that the Service was nonetheless not permitted to ignore increased volume of use altogether. The court found the Service had done so, and that the omission “render[ed] the decision arbitrary and capricious” in violation of the APA. The court also ruled that, by asserting that the missing historical volume of use data were not relevant to its Study Act analysis, the Service violated its NEPA obligation to include in the FEIS “a statement of the relevance of ... incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment.” The court enjoined the Service from continued implementation of the travel plan and remanded to the agency. The Service appealed.

HELD: Affirmed.

The Ninth Circuit held that the Service’s adoption of the travel plan was arbitrary and capricious in violation of the APA since the travel plan improperly ignored the impact of increased volume of motorized and mechanized use on users’ ability to seek quiet and solitude in the study area:

In 1967, the Forest Service undertook a nationwide inventory of large roadless areas within the National Forest System, “select[ing] areas with the most merit for specific study as possible additions” to the National Wilderness Preservation System. S. Rep. No. 95-163, at 2 (1977). Congress became concerned, however, that in conducting this review the Service may have “unjustifiably rejected from wilderness consideration” several large tracts in Montana. H.R. Rep. No. 95-620, at 3 (1977). In response, Congress passed the Study Act, which identified nine wilderness study areas in Montana for renewed evaluation. *See* Pub. L. No. 95-150, § 2(a), 91 Stat. 1243 (1977). The Study Act directed the Secretary of Agriculture to review these study areas’ “suitability for preservation as wilderness” and to advise Congress whether each study area should be designated as wilderness or removed from study area status. *Id.* § 2(a), (b). The Study Act also instructed that, pending congressional action on the Secretary’s recommendations, the study areas “be administered ... so as to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System.” *Id.* § 3(a). The Secretary, acting through the Service, has long since made these recommendations. Congress, however, has not yet acted on them. Accordingly, until Congress either designates the study areas as wilderness areas or removes their Study Act protection, the Service must continue to manage them to maintain their 1977 wilderness character and potential for wilderness designation.

\* \* \* \* \*

We agree with the district court that the travel plan does not adequately address the Service’s Study Act obligation to maintain the study area’s 1977 wilderness character. The Service first erroneously determined that the Study Act does not require it to maintain the 1977 wilderness character of the study area for the enjoyment of the area’s current users. Then, based on its misinterpretation of the Study Act, the Service ignored the obvious impact of increased volume of motorized and mechanized use on current users’ ability to enjoy the study area’s 1977 wilderness character. Because the Service entirely failed to consider this important aspect of its Study Act obligation, the travel plan is arbitrary and capricious.

\* \* \* \* \*

The Service’s failure to appreciate the relevance of the historical increase in volume of use for purposes of its Study Act analysis also resulted in a failure to comply with NEPA regulations requiring acknowledgment that relevant data are unavailable or incomplete. ...

\* \* \* \* \*

We hold that the travel plan improperly ignores the impact of increased volume of motorized and mechanized use on current users’ ability to seek quiet and solitude in the study area. Because the Service entirely failed to consider this important aspect of its duty to maintain the study area’s 1977 wilderness character, its decision is arbitrary and capricious. We affirm judgment in favor of MWA and against the Service and Citizens.

**CERCLA—COURT REJECTS EXCESSIVE RAIN AS AN ACT OF GOD AS AFFIRMATIVE DEFENSE TO CERCLA CLAIM**

UNITED STATES v. STERLING CENTRECORP INC.  
 No. 08-2556 (United States District Court, Eastern District of California Dec. 8, 2011)

ISSUE: Is the current owner of a mine site entitled to plead the affirmative defense that an “act of God” caused arsenic and lead contamination at the site in an action seeking contribution under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)?

FACTS: Mining operations at the Lava Cap Mine site began in 1861. Between 1934 and 1943, mining was conducted at the site by the Lava Cap Gold Mining Corp. (LCGMC). In 1938, LCGMC built a tail-

ings dam to stop mine tailings from polluting the waters of the Bear River. Waste products included within the mine-generated tailings contained elevated concentrations of naturally occurring arsenic.

In 1952, LCGMC entered into a purchase and sale agreement with New Goldvue Mines Ltd., whereby LCGMC's assets and liabilities were transferred to Keystone Copper Corp., a subsidiary of LCGMC. Once the transfer was complete, Keystone became a wholly-owned subsidiary of New Goldvue. New Goldvue became Sterling Centrecorp. Inc. in 2001.

In 1979, a partial log dam collapse led to a release of mine tailings which, in turn, caused downstream neighbors to complain about pollution from the resulting silt. In response to those complaints, the California Regional Water Quality Control Board issued a cleanup and abatement order to Keystone.

In 1989, Keystone sold the site to Banner Mountain Properties Ltd., an entity controlled by Stephen Elder, who owns four of the seven parcels comprising the former mine site. The remaining three parcels are owned by Elder Development Inc. Elder had an engineering firm prepare a preacquisition site assessment before his purchase of the mine site that revealed hazardous substance contamination, primarily arsenic.

The U.S. Environmental Protection Agency (EPA) completed a preliminary assessment on the mine site in April 1993, after Banner Mountain's purchase of the mine site. Sediment and soil samples revealed elevated concentrations of both arsenic and lead.

In 1993, heavy rainstorms washed mine waste downstream. In 1997, the EPA began cleanup operations and the site was ultimately designated a Superfund site. The EPA and the California Department of Toxic Substances (collectively, the plaintiffs) filed an action for contribution against Sterling Centrecorp, Elder and Elder Development (collectively, the defendants) to remediate arsenic contamination at the site. The plaintiffs filed a motion for partial summary judgment with respect to Elder's liability.

HELD: Motion granted.

The district court granted the plaintiffs' motion on the grounds that the plaintiffs established all four components of CERCLA liability and that no statutorily authorized affirmative defenses to CERCLA liability existed:

In granting Plaintiffs' concurrently filed Motion for Partial Summary Judgment as to the first three of the above-enumerated four requirements for imposition of CERCLA liability, this Court has already found that Plaintiffs have established that a "release" or "threatened release" of a "hazardous substance" occurred from a "facility" as that term is defined under CERCLA, and that Plaintiffs incurred response costs as a result thereof.

\* \* \* \* \*

It is undisputed that Elder is a current owner of four of the seven parcels that incorporate the former Lava Cap mine site. As such a current owner, Elder qualifies as a "covered person" for purposes of CERCLA liability under Section 107(a), 42 U.S.C. § 9607(a)(1) ("covered person" includes the owner and operator of a "facility"); *see also California Dept. Of Toxic Substances Control v. Hearthside Residential Corp.*, 613 F.3d 910, 912-13 (9th Cir. 2010) ("covered person" refers "to 'current' owners or operators"). Consequently, because Plaintiffs have established that all four prerequisites of CERCLA liability apply to Defendant Elder, he is liable for all costs of removal or remediation incurred by the Plaintiffs. *Hearthside Residential*, 613 F.3d at 912-916.

Importantly, recoverable expenses include both existing costs and costs to be borne in the future. In any action under section 107 of CERCLA, in addition to entering judgment on liability for costs already incurred, "the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages. 42 U.S.C. § 9613(g)(2).

\* \* \* \* \*

Examination of Elder's Answer (ECF No. 38) indicates that Elder pled four affirmative defenses. Because the first two defenses asserted, which allege issues of estoppel and offset, re-

spectively, are not included within the available list of CERCLA defenses outlined above, they need not be considered in assessing Elder’s liability. As a Third Affirmative Defense, however, Elder does allege that “the harm alleged was caused by an act of God.” Def. Elder’s Answer, ECF No. 38, 9:1-2.

CERCLA defines an act of God to mean “an unanticipated grave natural disaster or other natural phenomena of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.” 42 U.S.C. § 9601(1). The only event that even arguably may fall within this definition is the partial collapse of the original log dam at the site in January of 1997, during a winter storm. SUF No. 87. That collapse released over 10,000 cubic yards of tailings into Little Clipper Creek. *Id.* Elder does not dispute this characterization of what happened, but indicates only in his response to Plaintiffs’ Statement of Undisputed Facts that the storm was a severe one, and one of the worst to affect the region in recent times. Def. Elder’s Response to Pls.’ SUF No. 87.

That distinction has already been rejected. In *United States v. Stringfellow*, 661 F. Supp. 1053, 1059 (C.D. Cal. 1987), the Defendants in a CERCLA suit involving toxic waste raised a similar act of God defense based on heavy rainfall. *Id.* at 1061. The Central District repudiated that defense, stating that “rains were not the kind of ‘exceptional natural phenomena’ to which the narrow act of God defense of section 107(b)(1) applies.” *Id.* As the court explained, “rains were foreseeable based on normal climatic conditions and any harm caused by the rain could have been prevented through design of proper drainage channels.” *Id.* Even excessive rainfall has been deemed insufficient to establish the “exceptional, inevitable, and irresistible” nature of a viable act of God defense. *United States v. Atlantic Richfield Co.*, 1996 U.S. Dist. LEXIS 22885 at \*15 (D. Mont. 1986).

**CLEAN AIR ACT—CLEAN AIR ACT DOES NOT PROHIBIT APPLICATION OF DOCTRINE OF SUCCESSOR LIABILITY UNLESS SPECIFIC EXEMPTION APPLIES**

UNITED STATES v. LOUISIANA GENERATING L.L.C.  
 No. 09-0100 (United States District Court, Middle District of Louisiana Dec. 1, 2011)

ISSUE: Is the U.S. Environmental Protection Agency (EPA) entitled to summary judgment on the issue of successor liability in its claim seeking injunctive relief and civil penalties for a coal fired power plant’s alleged violation of the Clean Air Act (CAA)?

FACTS: The Big Cajun II (BCII) power plant, a coal fired electric utility steam generating plant in New Roads, La., began operation in 1981 and consists of Unit 1, Unit 2 and Unit 3. In 1994, Cajun Electric, BCII’s then-owner, filed for Chapter 11 bankruptcy protection. As part of its reorganization plan, most of Cajun Electric’s assets, including BCII, were put up for sale through auction. NRG Energy was involved in the auction process from the beginning of 1994. During the six-year process, there were various asset purchase agreements entered between NRG and the Chapter 11 trustee. The Fifth Asset Purchase Agreement (Fifth APA), signed in September 1999, was the last and the one whose terms embody the parties’ agreement. Part of the Fifth APA called for NRG to assume any environmental liabilities that attached to the owner of the acquired assets by operation of law. The sale was completed on Apr. 1, 2000, by which time NRG had formed Louisiana Generating L.L.C. (LaGen) as a subsidiary. LaGen is the full owner of BCII.

In 1998 and 1999, Cajun Electric replaced portions of the primary boiler reheaters in Unit 1 and Unit 2 (the 1998/99 work). This work was done without a permit. The cost of each project was estimated at \$5 million. The trustee notified all of the bidders, including NRG, about this project. NRG did not perform any due diligence on potential CAA liability for this work.

In September 2001, LaGen submitted a revised CAA Title V permit application for BCII. In February 2005, while the application was still pending, the EPA issued a notice of violation (NOV) regarding the 1998/99 work. This NOV was forwarded to the Louisiana Department of Environmental

Quality (LDEQ), which issued the permit in August 2005. LDEQ renewed the permit in 2011. Despite the NOV, the EPA did not formally object to the issuance of the permit or its renewal.

The EPA filed a complaint against LaGen alleging violations of the CAA and seeking injunctive relief and civil penalties. The LDEQ intervened, and the plaintiffs filed a motion for summary judgment on the issue of successor liability arguing that LaGen expressly assumed Cajun Electric's CAA liability. LaGen filed two cross-motions for summary judgment arguing that it has no direct liability under the CAA for potential violations committed by its predecessor and disputing any Title V operating permit violations.

HELD: Plaintiffs' motion granted, in part, and defendant's motions denied.

The district court granted the plaintiffs' motion on the issue of successor liability, holding that the CAA does not prohibit the application of the common law doctrine of successor liability unless a specific exception applies and concluding that LaGen expressly assumed all environmental liability it knew about or reasonably expected at the time of the Fifth APA:

. . . Defendant provides no support for its assertion that unless the CAA expressly provides for assignment, successor liability cannot be employed. Rather, the Court is persuaded by the case law that suggests the doctrine is so well established that Congress would have to expressly exclude its application in a statute. In *United States v. Mexico Feed and Seed Co. Inc.*, the Eighth Circuit concluded:

In fact, corporate successor liability is so much part and parcel of corporate doctrine, it could be argued that Congress would have to explicitly exclude successor corporations if it intended its use of a legal term of art, "corporation," not to include established conceptions of the extent, life span, and path of corporate liabilities.

980 F.2d 478, 486 (8th Cir. 1992). Indeed, every circuit that has addressed this issue has come to the same conclusion. See *North Shore Gas v. Salomon Inc.*, 152 F.3d 642 (7th Cir. 1998) (compiling cases) (*revers'd on other grounds*). And though these cases deal with CERCLA, the Court finds no reason not to apply the analysis to this case. Just as in CERCLA, the CAA defines "person" to include corporations and associations. 42 U.S.C. § 7602(e), see also 42 U.S.C. 9601(21). Congress has directed that when using the word "company" or "association" in reference to a corporation, it "shall be deemed to embrace the words 'successors and assigns of such company or association.'" 1 U.S.C. § 5. The Court finds nothing in the statute to suggest the ordinary rule of statutory construction should not apply to the definition of corporation in the CAA.

\* \* \* \* \*

In summary, the Court finds there is nothing in the CAA itself that prohibits the application of the common law doctrine of successor liability. The decision whether to apply it will depend on whether the exception to the general rule against successor liability applies.

The traditional common law rule of successor liability in a corporate setting is that when a corporation acquires the manufacturing assets of another, it does not acquire the liabilities of the predecessor corporation. 13 A.L.R. 6th 355 at § 2. There are four recognized exceptions to this rule: (1) when the successor expressly or impliedly agrees to assume the liabilities of the predecessor; (2) when the transaction may be considered a de facto merger; (3) when the successor may be considered a "mere continuation" of the predecessor; or (4) when the transaction was fraudulent. *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 174 (5th Cir. 1985). New York law, which the parties agreed would govern their transaction, allows for the same four exceptions. *In re Seventh Judicial District Asbestos Litig.*, 788 N.Y.S.2d 579, 581 (Sup. Ct. 2005). Plaintiffs do not argue that any other than the first exception applies to this matter. They argue that the terms of the Fifth APA show an express assumption of CAA liability. Defendant claims it did not assume such liability from Cajun Electric.

\* \* \* \* \*

The Court finds that while the 1998/99 work was of the type that might attach liability to Defendant under Section 2.4 of the Fifth APA, there exists a genuine dispute as to the material factual question of whether the Defendant knew or reasonably expected the 1998/99 work to BCII Units 1 and 2 created liability under the CAA. Thus, the discreet factual question of whether Defendant knew or reasonably expected the 1998/99 work to create CAA liability is inappropriate for summary judgment and will move forward to trial.

In conclusion to the issue of successor liability, Plaintiffs' motion is GRANTED in that the theory is available in this case and that the Defendant expressly assumed all environmental liability it knew about or reasonably expected at the time of the Fifth APA. However, the motion is DENIED in that there is a genuine dispute as to the material fact of whether Defendant knew or reasonably expected the 1998/99 work created liability under the CAA.

**CLEAN WATER ACT—IMPOSITION OF CRIMINAL PENALTIES FOR KNOWINGLY VIOLATING ANY REQUIREMENT IMPOSED IN PRETREATMENT PROGRAM NOT PLAIN ERROR**

UNITED STATES v. LONG

No. 09-1863 (Sixth United States Circuit Court of Appeals Dec. 2, 2011) *unpublished*

ISSUE: Was the evidence sufficient to support a jury's verdict that the defendant knowingly violated the pretreatment requirements of the Clean Water Act (CWA)?

FACTS: From 1997 to 2005, Charles Long worked at an industrial waste treatment facility near Detroit, Mich. The facility was owned and operated by Rich Coast Inc. until 2002, when it was sold to Comprehensive Environmental Solutions Inc. (CESI). Long worked first as plant manager and then as an oil reclamation and recovery manager.

Industrial waste pretreatment operations at the facility were subject to regulations under the CWA. The facility's operations also were subject to permitting requirements imposed by the Detroit Water and Sewerage Department and approved by the Environmental Protection Agency (EPA), which prohibited the bypass or diversion of wastewater around any portion of the approved pretreatment program for discharge directly into the municipal sewer system.

In January 2007, a grand jury returned an indictment charging Long and other CESI employees with knowingly violating EPA-approved pretreatment requirements by unlawfully discharging industrial wastewater into the Detroit sewer system and with conspiring to violate the law in relation to the unlawful discharges. Following a trial, the jury found Long guilty of both charges. The district court sentenced Long to two concurrent prison terms of 24 months. Long appealed.

HELD: Affirmed.

The Sixth Circuit affirmed the defendant's conviction, in part, on the grounds that the evidence was sufficient to support the jury's verdict that the defendant knowingly violated the pretreatment requirement of the CWA:

Long also challenges the sufficiency of the evidence to support the jury's verdict on the Count 2 charge that he knowingly violated the Clean Water Act pretreatment requirements during the period January 25, 2002 to June 2002. The jury was correctly instructed that to find defendant guilty of this offense, the jury had to be convinced that the government proved the following elements beyond a reasonable doubt:

(A), On or about the dates charged in the Indictment, the Defendant violated the requirement of a pretreatment program, that is, the bypass prohibition of the pretreatment program and (B), the pretreatment program was a program administered by a POTW ("publicly owned treatment works") that has been approved by the U.S. EPA or by a state, and (C), the Defendant acted knowingly.

R. 147, Trial Tr. vol. 11, p. 20. Long contends the government’s proofs failed to establish that he participated in unlawful discharges during the charged period and that he acted “knowingly.”

It is true that some of the evidence of Long’s participation in the unlawful discharges failed to identify a specific time frame. However, Long’s argument ignores the testimony of Special Agent Carol Paszkiewicz. Paszkiewicz testified that Long, during a December 4, 2006 interview, admitted participating in bypass discharges from three different sources in the CESI facilities during the charged period. R. 145, Trial Tr. vol. 9, pp. 95-97. Taken as a whole and viewed in the light most favorable to the prosecution, the proofs are clearly sufficient to support the jury’s finding that Long participated in unlawful discharges on or about January 25, 2002 until about June 2002.

Also unavailing is Long’s argument that the government did not prove that he acted “knowingly.” Long points to evidence that he was concerned about and reticent to engage in prohibited discharges. This demonstrates, he contends, that he did not intend to violate the law. Yet, the fact that Long appreciated the wrongfulness of his conduct and nonetheless persisted in it—however reluctantly—substantiates the jury’s conclusion that he acted “knowingly,” and not because of mistake or accident or some other innocent reason.

\* \* \* \* \*

Long contends the provision of the Clean Water Act under which he was convicted, 33 U.S.C. § 1319(c)(2)(A), is unconstitutionally vague because it prescribes criminal penalties for knowingly violating any requirement imposed in a pretreatment program without defining “knowingly” or “any requirement imposed in a pretreatment program.” Long did not raise this objection below and offers no case law authority supporting the challenge on appeal.

Reviewing for plain error, we find none. Even if we were to find that § 1319(c)(2)(A) fails to provide a person of ordinary intelligence with fair notice of what is prohibited (which we do not), we could hardly hold that such a defect is “plain” where the error has not been made clear under current law. *See United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (holding that court of appeals cannot correct error as “plain error” unless error is clear under current law).

**ENDANGERED SPECIES—NONPROFIT’S SUIT ALLEGING ENVIRONMENTAL OFFICIALS ACTED UNLAWFULLY IN MANAGING FLOW OF FRESH WATER INTO ECOSYSTEM MAY PROCEED**

ARANSAS PROJECT v. SHAW

No. 10-0075 (U.S. District Court, Southern District of Texas Dec. 5, 2011)

ISSUE: Did state environmental officials violate the Endangered Species Act (ESA) in their management of flow of fresh water into an ecosystem?

FACTS: The Aransas Project (TAP), a nonprofit corporation, brought an action pursuant to the ESA against several Texas Commission on Environmental Quality (TCEQ) officials (Bryan Shaw, Buddy Garcia, Carlos Rubinstein and Mark Vickery) and the South Texas Watermaster (Al Segovia). In essence, TAP alleged the defendants’ failure to adequately manage the flow of fresh water into the San Antonio Bay ecosystem during the 2008-2009 winter resulted in a “tak[ing]” of Whooping Cranes, an endangered species, in violation of § 9 of the ESA. TAP argued the reduced flow of fresh water into the ecosystem increased salinity, reducing the food and water supply for the Whooping Cranes, thus weakening and ultimately resulting in the death of 23 Whooping Cranes.

TAP requested declaratory and injunctive relief to ensure that the Whooping Cranes had sufficient water resources to prevent future “takings.” In essence, TAP sought a declaration that the defendants’ actions resulted in a “taking” of Whooping Cranes in violation of § 9 of the ESA, an injunction impacting current and future water diversions that resulted in takings of Whooping Cranes, and

a court order requiring the defendants to develop a process to ensure that Whooping Cranes were protected. The defendants, including defendant-intervenor Guadalupe-Blanco River Authority (GBRA), moved for summary judgment.

HELD: Motions denied.

The district court held that TAP presented enough factual material to survive summary judgment on the issue of the defendants' liability under the ESA:

... Defendants' and GBRA's arguments for summary judgment fall into three broad categories: (1) ESA Section 9 does not allow actions against regulators for "takings," (2) the relief Plaintiff requests is outside the scope of the ESA's citizen-suit provision, and (3) Plaintiff has not presented evidence of a take under the ESA that enables it to survive a motion for summary judgment. ...

\* \* \* \* \*

As an initial matter, the Court rejects Defendants' argument that ESA Section 9 does not extend to suits brought against regulators whose actions indirectly result in a taking of an endangered species. Defendants' interpretation belies both the purposes of the ESA itself and consistent legal precedent.

\* \* \* \* \*

In this case, Plaintiff seeks (1) injunctive relief; (2) declaratory relief under the Declaratory Judgment Act, and (3) a court order requiring Defendants to take several affirmative steps to protect the Whooping Cranes and their habitat. The parties do not dispute that the ESA's citizen-suit provision allows for injunctive relief. *See* 16 U.S.C. 1540(g)(1)(A) ("Except as [otherwise provided] any person may commence a civil suit on his own behalf-to enjoin any person, including the United States or any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of [the ESA] ....") (emphasis added). GBRA contends, however, that what TAP seeks is not, in fact, injunctive relief and that injunctive relief is all that is permitted by the ESA's citizen-suit provision.

To the first argument, the Court merely notes that the Complaint specifically requests two forms of injunctive relief: (1) an injunction preventing Defendants from approving or allowing water diversions that destroy or alter the Whooping Crane habitat until the State provides reasonable assurances that such diversions will not take Whooping Cranes in violation of the ESA; and (2) an injunction preventing Defendants from approving new water permits absent assurances that future water diversions will not take Whooping Cranes. The citizen-suit provision of the ESA clearly provides for such relief.

Moreover, GBRA's argument that injunctive relief is all that is permitted by the ESA's citizen-suit provision is unpersuasive. ...

\* \* \* \* \*

Having established that ESA Section 9 allows for a cause of action against the TCEQ Defendants, and that the relief sought by Plaintiff is within the scope of the ESA, the Court now turns to GBRA's argument that it is entitled to summary judgment because Plaintiff fails to present evidence establishing a "taking" under Section 9.

In this case, the Court concludes that Plaintiff provides enough evidence of a "taking" of Whooping Cranes, both in terms of deaths and non-fatal harm, such as malnourishment, to survive a motion for summary judgment. Plaintiff presents evidence of the following facts: (1) 23 Cranes died in Texas during the 2008-2009 winter, (2) the flock size declined from 270 to 247 Cranes by the end of the season, including the loss of sixteen juveniles, (3) one juvenile died during the 2009-2010 season in Texas, and (4) the Cranes experienced breeding difficulties. These estimates are based on scientific studies highlighted in the December 7, 2009

letter attached to the Complaint. For example, the flock size decline is based upon the report of Tom Stehn, a U.S. Fish and Wildlife Service official.

Second, the Court concludes that there are genuine issues of fact as to Defendants' actions being the proximate cause of a "take" of Whooping Cranes. The Court therefore finds that Plaintiff has presented enough factual material to survive summary judgment on the issue of Defendants' liability under the ESA. For these reasons, both Defendants' and GBRA's motions for summary judgment are DENIED as to Plaintiff's claims under the ESA.

**HAZARDOUS MATERIALS—DEPARTMENT OF TOXIC SUBSTANCES CONTROL REGULATION IMPOSES A CONSTITUTIONALLY VALID TAX**

MORNING STAR CO. v. BD. OF EQUALIZATION  
No. C063437A (California Court of Appeal Dec. 7, 2011)

**ISSUE:** Is a California Health and Safety Code statute that imposes an annual charge on certain businesses that use, generate, store or conduct activities in the state related to hazardous materials a constitutionally valid tax?

**FACTS:** Morning Star Co., a California corporation, offers labor services to companies involved in the tomato processing business. A regulation adopted by the Department of Toxic Substances Control pursuant to California Health and Safety Code § 25205.6 imposes an annual charge on businesses with at least 50 employees that use, generate, store or conduct activities in California related to hazardous materials. Morning Star paid the annual charges for the years 1993 through 1996 and 2003 through 2005 under protest. Morning Star then sought refunds from the California Board of Equalization (the board). Morning Star filed suit when the board rejected its demand for a refund and sought an injunction preventing collection of the charge, a declaration that the regulation conflicts with § 25205.6, and a declaration that § 25205.6 is a regulatory fee that violates equal protection and substantive due process. The trial court rejected Morning Star's position and denied it relief. Morning Star appealed.

The California Supreme Court concluded that the Department's interpretation of § 25205.6 constituted a regulation subject to the formal rulemaking procedures of the Administrative Procedure Act (APA). On remand, the appellate court concluded that the regulation is consistent with § 25205.6, that § 25205.6 imposes a tax rather than a regulatory fee, and the tax does not violate equal protection or substantive due process. On appeal, the supreme court directed the appellate court to vacate and reconsider its decision.

**HELD:** Affirmed.

The court of appeal upheld the validity of a regulation adopted by the Department of Toxic Substances Control, which interprets Health and Safety Code § 25205.6 and concluded that § 25205.6 imposes a constitutionally valid tax:

“Government Code section 11342.2 provides the general standard of review for determining the validity of administrative regulations. That section states that ‘[w]henever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless [1] consistent and not in conflict with the statute and [2] reasonably necessary to effectuate the purpose of the statute.’

\* \* \* \* \*

Section 25205.6 directs the Department to inform the Board annually, through a list of business classification codes referenced in the section, of the types of businesses that use, generate, store, or conduct activities in California related to “hazardous materials,” as that term is

defined in section 25501, subdivision (p). (§ 25205.6, subd. (b).) In the Regulation, the Department has provided the Board with all of the business classification codes referred to in section 25205.6 (except for nonprofit residential care facilities) based on the Department’s view that all modern businesses with at least 50 employees use, generate, store, or conduct activities related to common products that contain hazardous material, such as copy machines, fax machines, printers, computers, fluorescent lights, batteries, and cell phones. In this most basic sense, then, the Regulation is “consistent and not in conflict with” section 25205.6: The Regulation carries out the task the statute directed it to do.

\* \* \* \* \*

As the trial court found, the Department’s view that all modern businesses, in some way, use, generate, store, or conduct activities related to hazardous materials is supported by substantial evidence in the rulemaking record for the Regulation. That record disclosed that products used by virtually all California businesses in their normal operations—e.g., batteries, computers, personal data assistants, cell phones, copy machines, fax machines, toner cartridges, and fluorescent lights—contain materials which have been identified as hazardous within the meaning of section 25501. In short, the Regulation simply recognizes that virtually all modern businesses are surrounded by modern business equipment containing hazardous material. Given this hazardous material ubiquity in the modern economy, the Regulation is “consistent and not in conflict with” section 25205.6’s standard of hazardous material *significance* (incorporated from § 25501, subd. (p)), because the statute applies only to relatively large businesses—those with *at least 50 employees*.

\* \* \* \* \*

The Company contends that section 25205.6 imposes a regulatory fee rather than a tax. Based on this premise, the Company argues (as we shall see in pt. III of this opinion, *post*) that this fee violates equal protection and substantive due process because it is not reasonably related to the regulatory purposes of section 25205.6. We conclude section 25205.6 imposes a tax rather than a regulatory fee.

\* \* \* \* \*

Thus, the section 25205.6 charge to the Company is not regulatory because it does not seek to regulate the Company’s use, generation or storage of hazardous material but to raise money for the control of hazardous material generally. The charge is therefore a tax. At its most basic level, the section 25205.6 charge is not a regulatory fee because it is not regulatory. It is monetary.

\* \* \* \* \*

The Company claims the section 25205.6 charge violates equal protection and substantive due process. Having determined that section 25205.6 imposes a tax, we reject these claims under the deferential standard of review used to assess the constitutionality of a tax.

**HAZARDOUS MATERIALS—REGULATIONS RELATING TO THE RESTORATION OF INACTIVE HAZARDOUS WASTE DISPOSAL SITES DO NOT EXCEED DEPARTMENT’S AUTHORITY**

IN RE N.Y. STATE SUPERFUND COAL. INC.  
No. 189 (New York Court of Appeals Dec. 15, 2011)

ISSUE: Did the appellate division err in reversing the lower court’s order and concluding that regulations enacted by the New York State Department of Environmental Conservation do not exceed the authority granted to it by the New York Environmental Conservation Law?

FACTS: The New York State Superfund Coalition Inc. is a not-for-profit corporation whose members consist of commercial entities that own land within the state of New York that is listed on a registry of sites subject to regulation by the New York State Department of Environmental Conservation (DEC).

The Superfund Coalition challenges DEC regulations concerning remedial programs that are implemented to clean inactive hazardous waste disposal sites following their identification under the “significant threat” standard set forth in the New York Environmental Conservation Law.

The Superfund Coalition brought suit against the DEC seeking to annul regulations 6 NYCRR 375-2.8(a), 6 NYCRR 375-1.8(f)(9)(i), 6 NYCRR 375-2.2(i)(7) and 6 NYCRR 375-1.8(g)(5) on the grounds that their adoption was in excess of the DEC’s jurisdiction and was arbitrary and capricious. The New York Supreme Court granted the petition in part, invalidating 6 NYCRR 375-2.8(a) and 6 NYCRR 375-1.8(f)(9)(i) as null and void. The appellate division reversed the portion of the supreme court’s order that annulled the two regulations. The appellate division found that the enabling legislation was ambiguous, deferred to the DEC’s interpretation and concluded that the regulatory goal is consistent with the statutory definition of an inactive hazardous waste disposal site remedial program, which is broad enough to allow the use of a variety of methods and may address potential hazards once the DEC has made a threshold determination that remediation is necessary. The Superfund Coalition appealed.

HELD: Affirmed.

The court of appeals affirmed the appellate division’s opinion on the ground that the DEC did not exceed its authority or act contrary to law in enacting regulations regarding the restoration of inactive hazardous waste disposal sites:

As an initial matter, we note that section 27-1313(5)(d), in fact, addresses only those situations where DEC has determined that it is “cost-effective” for the Department itself to develop and implement a remedial program at a site. Put another way, this provision—unlike 6 NYCRR 375-2.8(a) and 6 NYCRR 375-1.8(f)(9)(i)—does not apply where, for example, DEC orders a responsible party to implement a remedial program (*see* ECL 27-1313 [3] ); or undertakes a remedial program itself because a responsible party is unwilling or unable to do so, or DEC is unable to timely identify a responsible party (27-1313[5][a], [b], [c] ). Notably, the factors to be considered by the Department in determining whether it is “cost-effective” for it to act under ECL 27-1313(5)(d) in the first place include “the ability of the department to determine, through the exercise of its scientific judgment, whether the elimination of the imminent danger of irreversible or irreparable damage to the environment” posed by the significant threat “can be achieved through *limited actions* ”; and “the extent to which” remedial action undertaken by DEC “would *reduce* such danger to human health or the environment or would otherwise benefit human health or the environment” (ECL 27-1313[5][d][i], [iv] [emphasis added] ). These factors support our view that the stated goal of a “complete” cleanup under section 27-1313(5)(d) is aspirational since the statute recognizes that DEC may implement limited actions that reduce rather than completely eliminate dangers.

\* \* \* \* \*

Thus, while the cleanup of an inactive hazardous waste disposal site is triggered by a finding of a “significant threat,” as discussed in the prior *Matter of New York State Superfund Coalition* (75 N.Y.2d) case, that standard does not limit the scope of the ensuing remedial program when a more thorough cleanup is justified. The direction to clean up to “pre-disposal conditions, *to the extent feasible* ” (emphasis added) is a shorthand way of saying the same thing and so accords with the aims of article 27, title 13 and the statutory language.

\* \* \* \* \*

In sum, there is no discernible difference between the use of the phrase “complete cleanup” in section 27-1313(5)(d) and “pre-disposal conditions, to the extent feasible” in DEC’s regulations. A remedial program may encompass measures that run a gamut from removal of wastes to institutional controls, implemented to address harms that range from potential to actual hazards. Contrary to the Superfund Coalition’s contention that a standard of “pre-disposal conditions, to the extent feasible” would compel a reversion to pristine environmental conditions, there is no statutory authority, or indication in the regulations that DEC is empowered to arbitrarily fashion a remedial program.

\* \* \* \* \*

Consequently, DEC is not empowered to unilaterally fashion a remedial program without due consideration of the practicalities of such a measure as the statutory scheme expressly ties the scope of such programs to the particular characteristics for each regulated site. Accordingly, the phrase “to the extent feasible” in the DEC regulation is a reasonable incorporation of the considerations within the statute and a limit on the scope of remedial programs.

**PERMITS—COUNTY PROPERLY GRANTED SPECIAL USE PERMIT FOR OPERATION OF URANIUM AND VANADIUM MILL AND TAILINGS DISPOSAL FACILITY**

SHEEP MOUNTAIN ALLIANCE v. MONTROSE COUNTY BD. OF COMM’RS  
 No. 11CA0588 (Colorado Court of Appeals Dec. 8, 2011)

**ISSUE:** Did a board of county commissioners abuse its discretion in conditionally granting an energy company a special use permit (SUP) to operate a uranium and vanadium mill and tailings disposal facility within the county?

**FACTS:** In March 2008, Energy Fuels Resources Corp. publicly introduced its plan to construct a uranium and vanadium ore processing mill and disposal facility in the Paradox Valley in southwestern Colorado. It then filed an application with the Montrose County Board of County Commissioners (the Board) in July 2008 to construct and operate this facility, the Piñon Ridge Project, as a special use within the general agricultural district in which the project was to be located.

Due to mounting concerns regarding water availability to operate the proposed mill, the county hired an independent engineering consultant to review and opine on Energy Fuels’ hydrology data. In March 2009, the consultant reported to Steve White, the county planner, that the proposed wells would fall “pitifully short” of the water supply needed for full operation of the project. In response, Energy Fuels procured a commitment from the nearby town of Naturita for additional water rights, planned to construct two additional wells in the vicinity of the mill, and amended its application to halve its daily processing rate from 1,000 tons per day (tpd) of ore to 500 tpd. In May 2009, the consultant submitted to White a new opinion based on review of these changes that water quantity and quality would be sufficient for operation of the mill at 500 tpd of ore.

White also issued a staff report on Energy Fuels’ application to the Planning Commission in May 2009, advising it that the Piñon Ridge Project constituted a permissible special use as a “new mineral resource development and extraction operation and facility” under the Montrose County Zoning Resolution. The Planning Commission and the West End Planning Advisory Committee then publicly noticed and held joint public hearings on Energy Fuels’ application. At the joint hearings, White testified in support of the Planning Commission’s staff report. Numerous interested citizens also testified, including members and representatives of Sheep Mountain Alliance (SMA), a citizens organization committed to preserving southwest Colorado’s resources and natural environment.

Consistent with discussions at the hearings, White revised his staff report and added 16 conditions, some of which SMA helped draft. On July 1, 2009, the Planning Commission voted to recommend approving Energy Fuels’ SUP with these conditions. Thereafter, the Board held public hearings on the application, at which it heard public comment and testimony by White, Energy Fuels and others. The Board then closed the public hearing but advised the public it could submit written comments until a final decision was made.

On Sept. 30, 2009, the Board approved Resolution No. 98-2009, granting Energy Fuels a SUP to construct and operate the Piñon Ridge Project, conditioned upon Energy Fuels’ compliance with 19 enumerated conditions. SMA sought judicial review of the Board’s decision. The trial court affirmed the Board’s decision, and SMA appealed.

**HELD:** Affirmed.

The appeals court held that the record clearly supported the Board's grant of the SUP:

SMA contends the Board violated the Zoning Resolution, and therefore abused its discretion, because it did not record and prepare minutes of three separate public hearings relating to the SUP. Because we disagree that the Board held public hearings on the dates in question, we discern no such abuse of discretion.

\* \* \* \* \*

SMA next contends the Board abused its discretion in classifying the Piñon Ridge Project as an authorized, listed special use in a general agricultural district. We disagree.

\* \* \* \* \*

Because the Board's determination that this use constituted a listed use was based on evidence in the record and a reasonable interpretation of the terms, and was not the result of a procedural defect that denied due process, we discern no abuse of discretion.

\* \* \* \* \*

SMA maintains the Board erred in granting Energy Fuels the conditional SUP because the Piñon Ridge Project involves the on-site disposal of hazardous waste in violation of the Zoning Resolution. Because we conclude that uranium and vanadium tailings from the proposed mill are not "hazardous waste" within the meaning of the Zoning Resolution, we disagree.

\* \* \* \* \*

Thus, because the Board did not err in interpreting the ordinance and its decision was supported by competent evidence in the record, the Board did not abuse its discretion in concluding the proposed mill tailings do not constitute hazardous waste in this context.

\* \* \* \* \*

Finally, SMA contends that the Board abused its discretion by permitting Energy Fuels to operate at a maximum annualized, as opposed to daily, average rate of processing ore. We disagree.

Before granting Energy Fuels' application, the Board added several conditions to the SUP in addition to those conditions recommended by the Planning Commission. Condition 18 prohibits the mill from operating in excess of a rate of 500 tpd of ore, averaged annually. It provides that Energy Fuels or the mill operator must seek an amendment of the SUP to operate at rates above this annual limit.

\* \* \* \* \*

... we discern no abuse of discretion by the Board in limiting the mill's operation to 500 tpd averaged annually as a condition to the SUP.

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