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***U.S. v. Hoechst Celanese Corp.*: Challenging Inconsistent Interpretations by EPA  
Regions MAJ Lisa Anderson-Lloyd**

In a petition for certiorari that is attracting a great deal of interest, Hoechst Celanese Corp. is seeking reversal of a decision by the U.S. Court of Appeals for the Fourth Circuit<sup>1</sup> that found the corporation liable for violations of the Clean Air Act (CAA) and the National Emission Standard for Hazardous Air Pollutants (NESHAP) for benzene<sup>2</sup>. The petition concerns interpretation of the CAA fugitive emission standard for benzene, which applies to a facility that “uses” more than 1,000 megagrams of benzene a year.<sup>3</sup> Hoechst was cited for violations based on EPA Region IV’s interpretation of “use” that was contrary to the interpretation of Region VI that exempted a similar facility of Hoechst’s from the requirements.<sup>4</sup>

Region IV’s interpretation of benzene “use” was not limited to the amount consumed, but counted recycled benzene each time it cycled through two separate points in the system. Based on this, Region IV denied Hoechst an exemption from the regulations because its plant used more than 1,000 megagrams per year.<sup>5</sup> Region VI had exempted a similar plant, taking the position that “use” was measured by the total quantity of benzene in use at the facility.<sup>6</sup>

An issue for the 4<sup>th</sup> Circuit was the consistency and availability of Region IV’s interpretation. The court found that despite previous contrary interpretations of “use” by other EPA offices and state agencies, Region IV put Hoechst on actual notice of its interpretation by a letter.<sup>7</sup> The 4th Circuit decided that Region IV’s interpretation deserved deference because it was not inconsistent with the CAA or its regulations and was not created for litigation.<sup>8</sup>

Circuit Judge Niemeyer’s partial dissent recognized the problem with inconsistent EPA interpretations over a period of time and throughout different regions. The dissent asserted that Region IV’s notice of their interpretation should not constitute a definitive agency-wide EPA notice for which penalties could be assessed for noncompliance.<sup>9</sup> The

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Corporate Environmental Enforcement Council and seven other national trade associations have picked up the dissent’s reasoning in an amicus brief supporting Hoechst’s certiorari

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<sup>1</sup> United States v. Hoechst Celanese Corp, 128 F.3d 216 (4th Cir.1997))

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 219

<sup>4</sup> *Id.* at 228

<sup>5</sup> *Id.* at 222

<sup>6</sup> *Id.* at 232

<sup>7</sup> *Id.* at 229

<sup>8</sup> *Id.* at 221

<sup>9</sup> *Id.* at 233

petition. The brief filed April 22 says that EPA regional offices should apply consistent, publicly available interpretations of federal regulations. In addition, the brief supports the position that only published agency interpretations of nation-wide application should be given deference.<sup>10</sup>

This issue is of interest to any regulated entity that operates in more than one EPA Region. As different regulatory requirements are placed on facilities located in different parts of the country, the resulting confusion becomes a real operational impediment. When a federal appeals court upholds a regional interpretation that is then controlling in that circuit's jurisdiction, there may be a problem with conflicting regional interpretations because EPA's regions are not contiguous with federal judicial circuits.

### **ENFORCING EXECUTIVE ORDERS**

**Mr. Robert Lewis**

Many Executive Orders contain the proviso that the order does not create a private right of action. See e.g. Executive Order 12898, Section 6-609, which states that "[t]his order is intended only for internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any persons. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order."<sup>11</sup>

Recently, there was a challenge of the Environmental Assessment (EA) regarding Army construction activities in support of the Border Patrol along the Rio Grande River where the plaintiffs sought to enjoin these activities alleging, among other things, that the Army failed to comply with Executive Order 11988, Floodplain Management, 3 C.F.R. 117 (1978) and Executive Order 119909, Protection of Wetlands, 3 C.F.R. 121 (1978).<sup>12</sup> These Executive Orders do not contain the limiting language on judicial review cited above. These Executive Orders, which are very similar, require federal agencies to make certain determinations regarding the necessity of undertaking a project in a 100-year floodplain or wetland. The EA, according to the plaintiffs, lacked these determinations.

The court in the Rio Grande did not rule on plaintiffs' assertion that the Army needed to comply with the Executive Orders. Instead, the court found that the non-compliance, if any, was minor and that the balance of harm tipped to the Army completing the project.<sup>13</sup> The court, in a footnote, did, however, analyze whether a private right of action existed.<sup>14</sup> The court expressed doubt that these Executive Orders could be enforced by private parties. It relied on Facchiano Constr. Co. v. U.S. Dep't of Labor,<sup>15</sup> which held that generally there

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was no private right of action to enforce obligations imposed on executive branch officials by executive orders. The Rio Grande court noted that agency action would be reviewable only if the executive order in question had the force and effect of law and was intended to create a private right of action.<sup>16</sup> Executive Orders have the force and effect of laws when issued pursuant to a statutory mandate or delegation from Congress. The Rio Grande court gave two reasons for expressing doubt that the two Executive Orders could not be enforced

<sup>10</sup> High Court Brief Argues Interpretation of EPA Rules Must Agree With one Another, 12 TOX.L. Rep. 48, 1407 (1998)

<sup>11</sup> Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations, 59 Fed Reg. 7629 (Feb 11 1994),

<sup>12</sup> ). See Rio Grande International Study Center et al., v. U.S. Department of Defense, et al., No. L-98-9 (S.D. TX, Feb 13, 1998).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at No. L98-9, n8

<sup>15</sup> Facchiano Constr. Co. v. U.S. Dep't of Labor, 987 F.2d 206, 210 (3d Cir. 1993)

<sup>16</sup> See Independent Meat Packers Ass'n v. Butz, 526 F. 2d 228,236 (8th Cir. 1975).

privately. First, the court noted that both Executive Orders rely on the "the authority vested in [the President] by the Constitution and statutes of the United States of America and as President of the United States of America, in furtherance of the National Environmental Policy Act . . . .",<sup>17</sup> which the court viewed as a broad invocation of the constitution and laws of the United States. Citing Independent Meat Packers,<sup>18</sup> the court said that the force and effect of law is not conferred by such broad invocations. Second, relying on Watershed Assoc. Rescue v. Alexander,<sup>19</sup> the Rio Grande court also noted that none of the statutes invoked by these Executive Orders directed the President to issue orders having the force and effect of law.

There is authority, however, in the Fifth Circuit contrary to the position expressed by the Rio Grande court in its footnote. Specifically Harris v. U.S.,<sup>20</sup> has held that Executive Order 11990 had the force and effect of law. This case was not addressed by the court even though plaintiffs cited to it. While Harris v. U.S. offers no analysis on why it finds this order has the force and effect of law, it certainly leaves open the question of its enforceability.

The lesson to be learned from Rio Grande International Study Center et al. v. U.S. Department of Defense, is that the enforceability of Executive Orders 11988 and 11990 is not settled. More importantly, in the NEPA context, it does not need to become an issue. Section 2 (a) (1) of Executive Order 11988 and Section 2(a) of Executive Order 11990 set out the findings an agency must make to proceed with activities in a floodplain or wetlands, respectively. Reviewers of EAs and EISs that involve activities in, or affecting, floodplains or wetlands, must ensure that these environmental documents articulate the requirements of Section 1(a)(1) and/or Section 2 (a) and how they are satisfied.

### **ALTERNATIVE DISPUTE RESOLUTION WORKING GROUP RECONVENES Ms. Carrie Greco**

The DOD Environmental Alternative Dispute Resolution Working Group has reconvened. The first action of the working group was to develop a charter. The members agreed upon the charter as follows:

To promote and encourage the understanding and use of Alternative Dispute Resolution (ADR) by Department of Defense components in environmental planning, compliance, restoration, and litigation matters in conjunction with development of partnering relationships with Federal, State, and local environmental regulators and stakeholders. To identify procedures for and barriers to: timely and efficient implementation of environmental

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ADR processes; effective oversight within DoD components of environmental ADR initiatives; and expanding availability and access among DoD components of information and training relating to environmental ADR initiatives.

After finalizing the charter, the working group attendees discussed the various ADR initiatives being undertaken by Department of Justice and EPA, and recognized a need to become more familiar with similar initiatives that might be underway within their own component.

You may review further how ADR can assist you in your work as well. Copies of the following can be provided upon request: DoJ's Policy on the Use of ADR and Case

<sup>17</sup> Rio Grande International Study Center et al., v. U.S. Department of Defense, et al., No. L-98-9 (S.D. TX, Feb 13, 1998).

<sup>18</sup> Independent Meat Packers Ass'n v. Butz, 526 F. 2d 228,235 (8th Cir. 1975).

<sup>19</sup> Watershed Assoc. Rescue v. Alexander, 586 F. Supp. 978, 987 (D. Neb. 1982)

<sup>20</sup> Harris v. United States, 19 F. 3d 1090, 1093 (5th Cir. 1994)

Identification Criteria for ADR; EPA's Guidance on the Use of ADR in EPA Enforcement Cases; EPA's Status Report on Use of ADR in Enforcement and Site Related Action (1995-1996); EPA's Superfund Enforcement Mediation- Regional Pilot Project Results; DoD ADR Program Components DoD Directive 5145.5 (April 22, 1996) on ADR; Executive Order 12988 - Civil Justice Reform; and White House Memo, Designation of Interagency Committees to Facilitate and Encourage Agency Use of Alternative Means of Dispute Resolution and Negotiated Rulemaking (1 May 1998). Please contact Carrie Greco at (703) 696-1566 if you would like a copy of any of these documents.

The Working Group is currently reviewing their components' initiatives and also on areas where barriers that may exist to broader use of ADR can be removed or lowered. If you have any questions about the use of ADR in your case or project you may call the Army Dispute Resolution Points of Contact Gary E. Bacher, Assistant to the General Counsel who may be contacted at (703) 697-5155 and Colonel Nicholas P. Reston, Chief, Contract Appeals Division, U.S. Army Litigation Center who may be contacted at (703) 696-1511, the Dispute Resolution Specialist Lawrence M. Baskir, Principal Deputy General Counsel who may be contacted at (703) 697-4807, or the Army's representative for the Working Group, Carrie Greco, who may be contacted at (703) 696-1566.

**CWA Services Steering Committee to Examine MP&M Survey**  
**MAJ Silas DeRoma**

The Clean Water Act Services Steering Committee (SSC) is examining issues involving Department of Defense responses to a federal facility survey sent to DoD from the EPA. The purpose of the survey is to collect information and data to assist EPA as the agency drafts regulations that will set effluent limitations for metal products and machinery activities. EPA has advised the SSC that it is primarily concerned with gathering data pertaining to the following areas: process waste discharges, pretreatment units, pollution prevention, and costs. Members of the SSC have reviewed the survey and concluded that while it will help provide useful information to EPA, some modifications are required. For the most part, these changes will either tailor particular questions more closely to DoD activities or clarify what types of information may be used to answer the survey questions (e.g., rough estimates vs. detailed effluent sampling and analysis). SSC members will meet to begin drafting the DoD-proposed version of the survey late this month with the aim of sending it to selected installations in June 1998.

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**Emission Reduction Credit (ERC) Guidance**  
**LTC Rich Jaynes**

The 1990 Amendments to the Clean Air Act (CAA) mandate that State Implementation Plans include market based incentive programs in order to meet National Ambient Air Quality Standards. ERC programs provide major market based incentives that allow the regulated community to acquire ERCs if sources reduce their air emissions lower than what is required by law. These sources can then sell, trade, or bank their ERCs. Other sources may acquire ERCs to meet CAA requirements, e.g., to use as offsets under the New Source Review program. Federal agencies may also take advantage of the ERC program. The federal property disposal statute, however, requires that proceeds from selling ERCs be deposited into the U.S. Treasury rather than going to the Service (or installation) that produced them. As a result, without special legislation, there would be little incentive for installations to reduce air emissions in order to obtain ERCs. DoD successfully pursued an ERC legislative initiative that allows proceeds from selling ERCs to go to the installation

that acquired the ERCs (to be used by the installation for its pollution prevention program). Section 351 of P.L. 105-85 (National Defense Authorization Act for FY 1998) authorizes a two-year pilot program that allows installations to be reimbursed for transaction costs to complete ERC sales, and may retain net sale proceeds as well. The ability to retain net sale proceeds is subject to a DoD-wide cap of \$500,000 per fiscal year.

The CAA Services Steering Committee prepared proposed DoD guidance for implementing the ERC sales program, and has staffed it through the Service Secretariats. The guidance document tracks closely with the statute, authorizes delegation of authority to approve ERC sales, and addresses how ERC sales are to be processed. Given the brief period that P.L. 105-85 authorized the pilot program, DoD is interested in implementing the guidance in the near future. Once the ERC policy is approved by the DoD Comptroller, it will be forwarded to the field. The Deputy Undersecretary for Defense (Environmental Security) has expressed interest in seeing that DoD's ERC sales program is implemented expeditiously. Installations are encouraged to explore opportunities to benefit from the ERC policy.