

**FILED**

APR 11 2007

CLERK, U.S. DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
BY \_\_\_\_\_  
DEPUTY CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MORTON L. FRIEDMAN; et al.,

Plaintiffs - Appellants,

V.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Defendant - Appellee.

No. 05-15664

D.C. No. CV-04-00517-WBS

**JUDGMENT**

Appeal from the United States District Court for the Eastern District of California (Sacramento).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 02/15/07

A TRUE COPY  
CATHY A. CATTERSON  
Clerk of Court  
ATTEST  
  
APR 10 2007  
  
by: \_\_\_\_\_  
Deputy Clerk

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

**FEB 15 2007**

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

MORTON L. FRIEDMAN; et al.,

Plaintiffs - Appellants,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,

Defendant - Appellee.

No. 05-15664

D.C. No. CV-04-00517-WBS

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of California  
William B. Shubb, Chief District Judge, Presiding

Submitted February 13, 2007\*\*  
San Francisco, California

Before: REINHARDT, RYMER, and SILVERMAN, Circuit Judges.

Plaintiffs Morton Friedman and Schmitt Construction appeal the district court's grant of summary judgment upholding the decision of the Environmental Appeals Board. The Board had found plaintiffs' removal of asbestos from their

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

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demolition site violated the Clean Air Act, 42 U.S.C. §§ 7412, 7414, and the National Emissions Standards for Hazardous Air Pollutants (NESHAP), 40 C.F.R. Part 61, subpart M. Plaintiffs contend that they did not have fair notice of the NESHAP regulations. We now affirm.

We review de novo the district court's grant of summary judgment upholding agency action. *See Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 778 (9th Cir. 2006). We do not afford deference to an agency's determination that it has properly respected plaintiffs' due process rights. As a result, we review de novo plaintiffs' fair notice claim. *See Carpenter v. Mineta*, 432 F.3d 1029, 1032 (9th Cir. 2005); *Gilbert v. National Transp. Safety Bd.*, 80 F.3d 364, 367 (9th Cir. 1996).

Due process requires that the EPA give "fair notice of what conduct is prohibited before a sanction can be imposed." *Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996). Plaintiffs had fair notice of the federal regulation at issue. First, that regulation – 40 C.F.R. § 61.145(a) – was published in the *Federal Register*. Such publication satiates any notice concerns. *See State of California ex rel. Lockyer v. F.E.R.C.*, 329 F.3d 700, 707 (9th Cir. 2003). Second, the regulation was not so nebulous as to prevent the reasonably prudent person from identifying the standards at issue. In 40 C.F.R. § 61.145(a), NESHAP defines the precise

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amount of asbestos-containing material necessary to trigger enforcement and identifies the manner in which that amount shall be calculated. Plaintiffs cite to no conflicting interagency rules or interpretations that diverge from its plain meaning.

Plaintiffs' argument that an inconsistent local air pollution rule defeats any conclusion of fair notice is without merit. The Due Process Clause does not impose a duty on the EPA to inform plaintiffs that Sacramento's local standards were inconsistent with its own. The EPA is responsible only for ensuring that its standards were properly published and reasonably ascertainable in the *Federal Register*.

Furthermore, although NESHAP provides a mechanism for states and localities to seek federal recognition of a regional air pollution program, *see* 40 C.F.R. §§ 63.90, 63.91(b), there is no evidence that such mechanism was invoked here. Plaintiffs had fair notice that NESHAP's standards governed their conduct in full force, and were not supplanted by any local rules.

Finally, the Clean Air Act announces that "[n]othing in this subsection shall prohibit the Administrator from enforcing any applicable emission standard or requirement under this section." 42 U.S.C. § 7412(l)(7); *see also* 40 C.F.R. § 63.90(d)(2) (same). Plaintiffs had fair notice that the EPA explicitly reserved the authority to enforce NESHAP independently of any contrary local rules.

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AFFIRMED.

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