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I. CLEAN WATER ACT (CWA)

A. Jurisdictional Scope of the CWA

1. Supreme Court denies certiorari in Leslie Salt Co. v. U.S.:

Cargill Inc. v. U.S., 116 Sup. Ct. 407 (1995).

On October 30, 1995, the Supreme Court denied certiorari in the case of Leslie Salt Co. v. U.S. 55 F.3d 1388 (CA9 1995). In the original case, the district court held that the presence of migratory birds on the 153-acre tract did create a sufficient connection to interstate commerce to permit USACE regulation, and the Court of Appeals affirmed. Justice Thomas dissented, arguing that the so-called "migratory bird test" is, in his opinion, improper, as it "stretches Congress' Commerce Clause powers beyond the breaking point."

2. District court holds that "navigable waters" refers collectively to all the water of the U.S.:

Dubois v. U.S. Department of Agriculture, 1995 U.S. Dist. LEXIS 16608 (D.N.H. Nov. 2, 1995).

Following the preparation of an EIS, the Forest Service issued a Record of Decision (ROD), amending a special use permit for the Loon Mountain Recreation Corporation (Loon) that allowed expansion of Loon's ski area. Plaintiff, who was joined by an intervenor environmental group, filed a complaint seeking to compel the Forest Service to revoke any permits and approvals issued under the ROD pursuant to CWA and NEPA violations. Loon moved to dismiss, claiming that plaintiffs lacked standing. The court denied Loon's motion to dismiss, finding that at least one of the plaintiffs, the environmental organization, had standing to maintain each claim based on the fact that members of the group, who live and work in the vicinity of the ski area, would be harmed by the proposed expansion.

In the cross motion for summary judgement, plaintiffs argued that the defendant violated the CWA by allowing Loon to pump water from the East Branch of the Pemigewasset River through its snowmaking system into Loon Pond (to refill the pond each spring) without a NPDES permit, which is required for any action involving "any addition of any pollutant to navigable waters from any point source." 33 U.S.C.A. § 1362(12). Plaintiffs argued that "navigable waters" should be deemed to refer to specific bodies of navigable water and thus the releasing of East Branch water into Loon Pond constituted an addition of pollutants into navigable waters, as each are separate navigable bodies of water. The court rejected this argument, distinguishing this case from the facts in Committee to Save Mokelumne River v. East Bay Mun. Util. Dist., 13 F.3d 305 (9th Cir. 1993) (holding that an NPDES permit was required for water released from a reservoir into navigable waters where reservoir collected runoff with pollutants from mining operations), and in Dague v. Burlington, 935 F.2d 1343 (2nd Cir. 1991) (holding that defendant needed an NPDES permit for water passing through a culvert where pollutants from its landfill were released into the water prior to being discharged through the culvert). **The court stated that the "definition of "navigable waters" as a singular entity, 'the waters of the United States,' explains that the bodies of water are not to be considered individually in this context."** Plaintiffs also argued that the water drawn into Loon's pumping and snowmaking system lost its status as part of the navigable waters. **The court rejected this argument based on the fact that water need not be actually navigable to qualify as "navigable waters," (See U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)) and the fact that water does not lose its status as waters of the U.S. simply because it is exploited for a commercial purpose (citing to 40 C.F.R. § 122.21).** Based on the conclusion that the water drained from the East Branch retained its status as navigable waters and that Loon did not add pollutants to those waters, the court ruled that Loon was not required to obtain an NPDES permit.

Plaintiffs further claimed that the Forest Service accepted an erroneous state certification in violation of the APA. **The court rejected this claim, holding that the Forest Service is not required under the CWA to independently determine whether the proposed activity will comply with state water quality requirements.** Noting that the CWA expressly delegates to the states the duty to determine whether a proposed

activity violates state water quality standards, the court concluded that plaintiffs cannot circumvent state administrative remedies by raising a claim for the first time in federal court to challenge a state's certification. See Roosevelt Campobello Int'l Park Comm'n v. U.S. EPA, 684 F.2d 1041 (1st Cir. 1982).

B. Discharge of Pollutants

1. Fifth Circuit finds defendant's produced water from oil and gas well is a "pollutant":

Sierra Club v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. Jan. 11, 1996).

Defendant purchased and began operation of an oil and gas well in 1991. In September 1992, the Railroad Commission transferred from the previous well owner to defendant a permit that set limitations only on the oil and grease content of the produced water discharged. In the transfer, the Railroad Commission noted that a NPDES permit could be required by EPA for the discharge of produced water. On October 15, 1992, defendant applied to EPA for a NPDES permit for its produced water discharges into Galveston Bay. Thereafter, EPA issued two general NPDES permits for discharge of produced water in Texas, neither of which applied to defendant.

Plaintiff brought a citizen suit against defendant requesting: (1) a judgement declaring that defendant's unpermitted discharges of produced water violated the CWA; (2) a permanent injunction prohibiting future unpermitted discharges; and, (3) penalties for past unpermitted discharges. Defendant counterclaimed for abuse of process. The district court granted summary judgement in favor of plaintiff on the issue of defendant's liability under the CWA and dismissed defendant's counterclaim. The district court denied defendant's motion on the issue of plaintiff's standing to sue and granted plaintiff's motion to strike defendant's experts. The district court assessed a penalty of $186, 070 against defendant and awarded attorneys fees to plaintiff. The court also enjoined the discharge of produced water from defendant's oil and gas operations without a NPDES permit. On January 9, 1995, EPA issued a final NPDES general permit that applied to defendant. Defendant motioned the district court for modification of the injunction to allow defendant to take advantage of the two-year grace period in the NPDES general permit for produced water discharges. The district court modified the injunction, allowing defendant to continue the unpermitted discharge. Both parties appealed.

In its appeal, defendant alleged: (1) plaintiff lacked standing to bring the action; (2) defendant failed to state a claim under the CWA's citizen suit provisions; (3) defendant's discharges of produced water did not violate the CWA; (4) the district court erred in striking defendant's designation of experts and excluding their testimony; (5) the district court erred in calculating the amount of the penalty imposed and in awarding attorneys' fees to plaintiff; and, (6) the district court erred in dismissing defendant's counterclaim. Plaintiff's appeal countered that: (1) the district court lacked jurisdiction to amend the injunction; and, (2) the district court abused its discretion in amending the injunction. The Fifty Circuit affirmed the judgement of the district court.

Relying on the low threshold injury requirement for citizen suits under the CWA established in Save Our Community v. U.S. EPA, 971 F.2d 1155 (5th Cir. 1992), the circuit court held that individuals in plaintiff's affidavits satisfied the "injury in fact" prong of the test for standing. The circuit court also held that plaintiff met the "fairly traceable" requirement for standing under the test delineated in Public Interest Research Group v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3rd Cir. 1990). And the court stated that their was “no question that an injunction would redress the injuries suffered by Sierra Club members...”

Defendant alleged that EPA's failure to promulgate effluent limitations meant defendant could not have violated the CWA. Rejecting defendant's argument as being contrary to the "plain language" of § 1311(a), § 1342, and § 1365(a) and (f) of the CWA, the court held that plaintiff stated a claim under the CWA citizen suit provisions. **In closely reviewing the CWA's legislative history and the holding in General Motors v. U.S., 496 U.S. 530 (199), the circuit court held that "a citizen may bring an action against a person allegedly**

discharging a pollutant without a permit, even if the discharger's illegal behavior results from EPA's failure or refusal to issue the necessary permit." The court further observed that "We see nothing impermissible with allowing the Government to enforce the Act by invoking § 1311(a), even if no effluent limitations have been promulgated for the particular business charged with polluting."

Defendant further claimed it did not violate the CWA by discharging produced water since produced water and its constituents are not "pollutants" within the meaning of the CWA. Defendant also contended that only EPA, and not the courts, could make the determination that a "non-listed" substance is a pollutant. **Noting other instances in which courts have made such determinations, the court held that the CWA allows a court in a citizen suit to find that a particular substance is a pollutant where it is not specifically listed under the CWA's definition of a pollutant and EPA has not promulgated an effluent limitation or permit regulating the discharge of the substance. Examining the CWA and EPA's guidance on the issue, the court concluded that defendant's produced water is a pollutant within the meaning of the CWA.** Based on these conclusions, the court found that the district court correctly held that defendant violated § 1311(a) of the CWA.

On the civil penalty issue, the circuit court affirmed the district court's decision to base its assessment solely on the economic benefit to defendant in not disposing of its produced water in a reinjection well. The circuit court upheld the district court's use of the Eleventh Circuit's procedural framework for calculating penalties under the CWA. See Atlantic States Legal Found. v. Tyson Foods, Inc., 897 F.2d 1128 (11th Cir. 1990) (holding that courts should start with the statutory maximum and should determine if the penalty should be reduced by reference to the statutory factors in 309(d). The court noted that the process of weighing the statutory factors in calculating civil penalties under the CWA is "highly discretionary" with the trial court (See Tull v. U.S., 481 U.S. 412 (1987)) and that a court need only make a "reasonable approximation" of economic benefit when calculating a penalty under the CWA.

The circuit court also affirmed the district court's dismissal of defendant's counterclaim. The court concluded that the facts alleged by defendant did not demonstrate an "illegal, improper or perverted" use of the CWA's citizen suit provisions. Specifically, the court held that plaintiff's settlement of suits against other oil and gas operators in the Galveston Bay did not indicate illegal use of the citizen suit provision.

2. **District court rules that the discharge of acid mine drainage from mine sites constitutes a discharge of pollutants from a point source within the meaning of the CWA:**

Beartooth Alliance v. Crown Butte Mines, 904 F. Supp. 1168 (D. Mont. Oct. 13, 1995).

Several environmental groups filed a two-count complaint seeking declaratory and injunctive relief and the imposition of civil penalties, alleging that defendants were responsible for unpermitted discharges of pollutants into several creeks near Cooke City, Montana in violation of the CWA.

With regard to the plaintiffs' motion for partial summary judgement as to standing, the court noted that it was undisputed that three of the plaintiffs had standing, and the court found that it need not consider the standing issue as to the other six plaintiff organizations asserting the same grounds for relief. As to the plaintiffs' motion for partial summary judgement with respect to liability under the CWA, the court found that defendants discharged or added a pollutant (acid mine drainage) into navigable waters (specified creeks) from specified point sources without a permit. Accordingly, the motion was granted.

The defendants had argued that acid mine drainage was not a pollutant, contending that it existed at the site prior to any human disturbances. In rejecting this argument, the court noted that the Ninth Circuit had already found that the discharge of acid mine drainage

constitutes the discharge of a "pollutant" under the CWA. See Mokelumne River v. East Bay Util., 13 F.3d 305 (9th Cir. 1993), *cert. denied* 115 Sup. Ct. 148 (1994). The court also noted that acid mine drainage is composed, at least in part, of copper and zinc, which are pollutants subject to effluent limitations established by EPA for active mines. The court found further that the mine sites, from which acid mine drainage was discharged, were "`discernable, confined, and discrete' conveyances constituting point sources." Finally, the court found that the fact that defendants had applied to the state for a general storm water permit, did not relieve defendants from liability under the Act.

3. ALJ holds that testing facility requires an NPDES permit although no chemicals are directly added to flow through sea water, where Respondent's sampling analysis shows the presence of pollutants in effluent:

In the Matter of Battelle Memorial Inst., Inc., Docket No. CWA-IV 94-509 (Vanderheyden July 1, 1995) *Order Granting Complainant's Motion for Summary Determination of Liability*.

EPA Region 4 brought a Class I administrative penalty action against Battelle Memorial Institute, Inc. (Battelle) for alleged unlawful discharges of pollutants into the Halifax River in violation of § 301 of the Clean Water Act (CWA) at Battelle's testing facility in Ponce Inlet, Florida. At this facility, Battelle tests the effect of sea water on concrete and painted metal samples to aid in the development of less toxic anti-fouling agents. Water is pumped from the Halifax River, then flowed through tanks containing the samples, and finally discharged back into the River. No chemicals are directly added to the effluent. Battelle's NPDES permit for this facility had expired. Battelle had applied for a renewal of the permit, however the application was returned as being incomplete. Battelle then failed to resubmit an application or receive a permit renewal prior to the expiration of the existing permit, and Region 4 initiated a this penalty action..

In response to the Administrative Complaint, Battelle argued that it was not in violation of the CWA, asserting that its facility was not discharging pollutants as that term is defined in the Clean Water Act. Battelle asserted that it did not add chemicals to the flow through sea water that was discharged to the Halifax River, and that only low toxicity anti-fouling agents are incorporated in the paints on the metal samples being tested. Battelle's revised permit application, however, had listed discharges of conventional and toxic pollutants, and sampling analysis results submitted with the permit application and from its DMRs showed pollutant discharges in excess of background levels in the receiving stream. Battell argued, that the pollutants, with two exceptions, were discharged in amounts less than or equal to background for the River, and that as they did not directly add chemicals to the flow through water, and that its DMRs were not determinative. **The ALJ, relying on NRDC v. Texaco Refining, 719 F. Supp. 281 (D. Del 1989), did not give credence to Battelle's questioning of its own sampling results, and instead held that the DMRs along with the permit renewal application and correspondence established the discharge of pollutants from this facility.**

Battelle also argued that its process was analogous to a dam and therefore fell within the exception set out in National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) in that a pollutant was not introduced into the water from the outside world. The ALJ rejected this argument as well, finding that, in evaluating the effects of sea water on concrete samples and in assisting in the development of less toxic anti-fouling agents, Battelle did introduce pollutants in to the Hailifax River. Thus, regardless of how admirable Battelle's research efforts were, under the strict liability scheme of the Clean Water Act it was liable under § 301 of the CWA for discharging pollutants without a permit.

4. Disposal of used tires into wetlands without a permit constitutes a discharge of fill material into waters of the United States:

In the Matter of Belcastro, Docket No. CWA-VIII-94-01-PI (Mar. 3, 1995).

In a proceeding under § 309(g) of the Clean Water Act, EPA filed motions for summary determination and accelerated decision, after Respondent's failed to file a timely response. In its complaint, EPA alleged that Respondent had violated § 301 of the Act by discharging fill material, in the form of approximately 2200 used tires, into Hunter Wash, a navigable waters of the United States. In issuing a summary determination and accelerated decision for the complainant, the Region 8 Regional Administrator ruled that the disposal of used tires into Hunter Wash without a permit constituted a discharge of pollutants in violation of § 301 of the CWA. In assessing a penalty, the Regional Administrator accepted the complainant's position that economic benefit was equivalent to the cost of disposing of the tires in a county landfill.

C. Point Sources

1. District court holds that seepages allowing subsurface water, including traces of acid mine drainage, to enter drainage gully are non-point sources:

Friends of Santa Fe v. LAC Minerals, Inc., 892 F. Supp. 1333 (D.N.M. July 14, 1995).

Friends of Santa Fe, a local environmental advocacy group, brought a citizen suit under the Federal Water Pollution Control Act 33 U.S.C. §§ 1251-1387 and the Resource Conservation and Control Act 42 U.S.C. §§ 6901-6992k against the past and present operators of the Cunningham Hill gold mine located south of Santa Fe. Defendant Gold Fields Mining Corp. (Gold Fields) owned and operated the mine until June of 1990, at which time its interest was sold to a joint venture of defendants LAC Minerals Incorporated (LAC) and Pegasus Gold Corporation (Pegasus). The court was presented with ten separate motions, six by the defense and four by plaintiffs.

With respect to counts 1 through 4, the court stated that the permitting and regulatory provisions of RCRA and the Clean Water Act apply only to present owners and operators. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 59, 108 S. Ct. 376, 386, 98 L. Ed. 2d 306 (1987). **The court held that inasmuch as Gold Fields had transferred its interest in the Cunningham Hill mine in 1990 to defendants LAC and Pegasus, counts 1 through 4 should be dismissed against it.**

Count 1 alleged that defendants violated section 404 of the CWA, 33 U.S.C. § 1344, by discharging overburden into the Dolores Arroyo (an intermittent creek bed) and depositing additional fill or dredged material from the Arroyo itself following deposition of the overburden, all without a permit. **In rejecting plaintiffs' allegations that the overburden material was either "dredge" or "fill," the court, citing to 33 C.F.R. §§ 323.2(c) and (e) respectively, held that because the materials are not defined as either dredge nor fill they are not subject to section 404 regulation.**

Defendants contended that Count 2 is barred by 33 U.S.C. § 1319(g)(6)(A)(ii) because the New Mexico Department of the Environment (NMED) had issued defendants a state discharge permit (DP-55) which was amended to include overburden management issues. **The court rejected defendants motion for summary judgement, and held that § 1319(g)(6)(A)(ii) is narrowly drawn; its preclusionary effect applies only when the EPA, the Army Corps of Engineers, or a state is in the process of collecting or has already collected administrative penalties.**

Plaintiffs sought summary judgement on the issue of defendants' liability for their alleged unpermitted discharges of acid mine drainage from the overburden pile, from the remediation and collection system, and from various seeps and springs at the mine site, in violation of 33 U.S.C. § 1342. Defendants contested whether they were continuing to discharge pollutants; disputed the Arroyo's status as a regulated water of the United States; maintained that groundwater is not regulated by the CWA, or if it is, only if it has a direct hydrological connection to surface waters, which they denied; and asserted that seepage points in the Arroyo were not point sources. **The**

court held that the plaintiffs had failed to establish, for purposes of summary judgement: that discharges were ongoing in keeping with Gwaltney; that the portion of the Arroyo containing the overburden, an area which is an intermittent stream, was in fact a regulated water of the United States within the meaning of the CWA and that the surface waters were hydrologically connected to the groundwaters. The court also held that the seeps in question were non-point source carriers of pollutants similar to stormwater, and were thus not subject to the Act's permitting requirements.

2. **District court rules that discharge of acid mine drainage from mine sites constitutes "point source" discharge of pollutants:**

Beartooth Alliance v. Crown Butte Mines. See page 3 or case summary.

D. NPDES Permits

1. **Storm Water:**

a. **District court holds construction project required to have storm water permit even where construction halted, and that operating without such permit is a continuing violation:**

Molokai Chamber of Commerce v. Kukui, Inc., 891 F. Supp. 1389 (D. Haw. May 23,4, 1995) aff'd 58 F.3d 35 (2nd Cir. May 23, 1995).

The plaintiffs in a citizen suit action alleged that defendant construction companies violated the Clean Water Act with regard to the construction of a 9-mile water pipeline on Molokai. Construction began before the state had issued a Notice of General Permit Coverage (NGPC) for the activity, and before 90 days had elapsed from the defendant's filing of a Notice of Intent (NOI) to be covered by a general permit. Construction had halted some six months before plaintiffs' complaint was filed.

Specifically, the plaintiffs alleged: (1) failure of the defendants to obtain a proper and timely storm water permit before and during construction; (2) failure to comply with the state's general storm water permit conditions; and (3) discharges of pollutants into the waters of the U.S. without a storm water permit. The defendants sought summary judgement, and argued that the action was barred by absence of any ongoing violation at the time plaintiffs filed their complaint and by diligent prosecution by state authorities, with regard to the plaintiffs' suit for civil penalties. Moreover, they claimed that work stoppage and eventual permit issuance mooted the plaintiffs' claims.

The court noted that the crux of the plaintiffs' argument was that when a project lacks a permit, any construction is in continual violation until a permit is obtained, even if construction is halted. Defendants claimed that an NGPC was not required for construction to begin. After examining state law on the issue, the court concluded that issuance of an NGPC was, in fact, required before construction could legally begin. Moreover, even if interpretation allowed general permit coverage after 90 days of filing an NOI, in this case, there had been no indication from the state that the defendants' Best Management Plan (a required component of an NOI) had been accepted; hence, the 90-day period would not have run. Therefore, the court concluded that the defendant's project lacked permit coverage at the time plaintiffs filed their complaint.

Citing Gwaltney v. Chesapeake Bay Found., 484 U.S. 49 (1987), the court clarified that operating without a permit indeed constitutes a continuing violation, until a permit is obtained or remedial measures are put in place that clearly eliminate the cause of the violation. Regarding the cessation of work on the pipeline, the court noted that it is the discharge of water without a permit that violated the Act, not the construction activity itself, and that once a person created a conduit for pollutants, if permit coverage is required for that conduit and is not obtained, the conduit is in continual violation of the Act. Therefore, summary judgement on this issue was denied.

With regard to the state's enforcement action as a bar to the citizen action, the court noted that the state had sent a notice to defendants specifying violations and requiring a response, but that the notice itself clearly stated that it was not a notice of impending penalties. "The commencement of an action for penalties is not signaled by a letter stating that penalties may be sought under a separate statutory section." Summary judgement on this issue was also denied.

Finally, on the issue of the mootness of injunctive relief premised upon the failure of the state to issue an NGPC, the court stated that dismissal of such a complaint is possible when the defendant complies with the Act subsequent to the filing of the complaint. In order to prove mootness, however, "the defendant must show that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" To allow for extended discovery by the plaintiffs on this issue, the court continued the defendants' motions with respect to mootness.

b. Magistrate Judge recommends enjoining airport from continuing storm water discharge not included in its permit:

Buchholz v. Dayton Int'l Airport, 1995 U.S. Dist. LEXIS 9490 (S.D. Ohio June 26, 1995).

Plaintiffs in this case sought a preliminary injunction under both the CWA and RCRA. Plaintiffs are citizens whose residential property lies along Mill Creek downstream of the airport, and who obtain water used for drinking, bathing, washing clothes and dishes, and other household uses from private groundwater wells on their respective properties. Mill Creek receives storm water runoff along its entire length, including from the City of Vidalia, the airport, the plaintiffs' properties, and numerous farm properties.

The airport maintains a storm water detention basin that routinely discharges into Mill Creek, collecting runoff that contains deicing chemicals, including ethylene glycol, propylene glycol, potassium acetate and urea. Biological (fish and crayfish kills) and nuisance (odors and foaming) effects of the discharge of these chemicals into Mill Creek were documented since 1986. The airport was issued an NPDES permit covering this discharge in 1994. Since that time, however, numerous discharges of deicing chemicals continued, causing water quality standards to be exceeded in the Creek. Consequently, the state issued a report concluding that the airport's discharges before permit issuance resulted in violations of law, including state water quality standards, and those occurring after permit issuance constituted violations of the permit's General Effluent Limitations.

With regard to CWA violations, the court noted that the airport had no obligation to apply for a storm water permit until October 1, 1992, absent a specific request from the state, and that it did not unlawfully discharge without a permit prior to its permit's effective date of April 1, 1994. The court went on to say that the post-April discharges that caused foaming, odors, discoloration, harm to aquatic life, growth of sewage fungus, and impairment of downstream uses did constitute violations of the airport's permit.

The court acknowledged steps taken by the airport since 1994 to mitigate the effects of deicing, and also noted a strong public interest in safe air travel, in addition public interest in a cleaner environment. Moreover, the court emphasized that the public interest in a cost- efficient solution is also important, as funds needed for remediation would be public funds. **Consequently, the Magistrate Judge's final recommendations for an order were for the airport to cease any further discharge to Mill Creek by way of the spillway, and to discharge in the future only through the sluice gate, which is covered by its permit. The City is to submit a working plan to bring the sluice gate discharge within the terms of the permit on a permanent basis, and monitoring and sampling should be initiated and continued as outlined by the court.**

E. State Water Quality Standards

1. District court rules that state's objective failure to submit TMDLs constitutes "constructive submission" of no TMDLs:

Natural Resources Defense Council, Inc. v. Fox, 909 F. Supp. 153 (S.D.N.Y. Dec. 11, 1995).

Plaintiffs brought a citizen suit under CWA § 1365(a)(2) against EPA alleging that EPA failed in its duty under the CWA to promulgate water-quality based pollution limits, Total Maximum Daily Loads (TMDLs), for New York State's waters. Plaintiffs further alleged that EPA acted in an arbitrary and capricious manner and thus violated the APA by approving New York State's 1992 revisions of its water quality standards. Both sides moved for partial summary judgement on the issue of liability.

Plaintiffs contended that New York's failure to promulgate TMDLs constituted a "constructive submission" of no TMDLs, triggering EPA's duty to establish TMDLs for New York. Defendants argued that a subjective decision (i.e., one based on subjective intent) on the part of the state not to submit TMDLs is required to constitute a "constructive submission" of no TMDLs. **Rejecting defendants' argument, the court held, based on the specific deadlines set forth in the statute and the importance of TMDLs as a foundation for creating cohesive water-quality-based limitations, that "[m]ere objective failure to submit TMDLs for water-quality-limited segments is enough to trigger the non-discretionary duties of EPA."** See Scott v. City of Hammond, 741 F.2d 992 (7th Cir. 1984). However, the court denied both Parties' motions for summary judgement regarding EPA's duty to promulgate pollution limits, on the grounds that triable issues of fact were created based on EPA's documentary evidence that New York created and submitted TMDLs to EPA that were approved by EPA.

On the issue of the timeliness of plaintiffs' action, defendants asserted the plaintiffs' claim under § 1365 was time-barred by the six-year statute of limitations in 28 U.S.C. § 2401(a). Rejecting this argument, the court reasoned that the application of a statute of limitations in this case was counter to the intent of Congress in enacting the CWA. In the alternative, the court concluded that the continued failure of a state to establish TMDLs creates a continuing duty of the Administrator to act. **The court held that "a citizen suit to enforce a failure by the administrator to perform a non-discretionary duty under 33 U.S.C. § 1365(a)(2) is not subject to any statute of limitations."** The court further rejected defendants' argument that the action was barred by the equitable defense of laches. **The court held that laches does not apply in a citizen suit to enforce a non-discretionary duty of the Administrator based on the fact that such a suit seeks to protect the public interest.** The court reasoned that even if laches applied in general, it did not bar plaintiffs' suit as there was no prejudice to defendants from any delay in bringing the suit and thus plaintiffs' action was timely.

Plaintiffs further challenged EPA's approval of New York's 1992 revisions, arguing the inadequacy of the revisions to include an adequate antidegradation policy under 40 C.F.R. § 130.6. **Finding EPA's interpretation of its regulations as reasonable and entitled to deference, the court accepted defendants' argument that under the CWA review of officially adopted revisions of water quality standards need only encompass a review of the revised parts of the state's system of water quality standards.** The court granted defendants' motion for summary judgement, finding that approval of the 1992 revisions was not arbitrary and capricious. Further, the court held that plaintiffs' suit under the APA was time-barred by the six-year statute of limitations. See Blassingame v. Secretary of the Navy, 811 F.2d 65 (2d Cir. 1987).

F. Wetlands

1. Wetlands Jurisdiction

a. Supreme Court denies certiorari in Leslie Salt Co. v. U.S.:

Cargill, Inc. v. U.S. See page ? for case summary.

b. District court holds fill activities on lands used for sheep grazing not exempt under prior converted cropland or farming exemption:

U.S. v. Appel, Case No. CV 94-7824 LGB (C.D. Cal. Feb. 2, 1996).

The United States sought a partial summary judgement against defendant John F. Appel (Appel) for unpermitted filling and discharge into the Ventura River and San Antonio Creek, California in violation of the CWA 33 U.S.C. §§ 1311(a) and 1344. The U.S. charged that Appel cleared and repositioned riverine vegetation into river channels and adjacent wetlands; leveled and graded river channels and adjacent wetlands; diverted flows; extracted and redeposited river-bottom material; constructed access roads across river channels; and otherwise disturbed adjacent wetlands. The U.S. also sought to permanently enjoin Appel from any further unpermitted filling or discharge and sought an order to allow the appropriate government agencies access to the property. In April 1994, the EPA issued Appel a Findings of Violation and Compliance Order pursuant to § 309(a) of the CWA ordering him to cease his fill activities and to provide EPA with a remediation plan. Appel failed to comply with the EPA order.

Defendant argued that EPA does not have jurisdiction over his property, that EPA's determination of jurisdictional waters on his property was invalid, and that he did not discharge pollutants into the waters; or if he did that the discharge was subject to the exemption for prior converted farmland 33 C.F.R. § 328.3(a)(8); or the farming exemption, 33 U.S.C. § 1344(f)(1)(A).

In its finding of facts, the court, relying upon U.S. v. Riverside Bayview Homes, 474 U.S. 121 (1985), and the testimony of expert witnesses, found that the Ventura River and its tributary San Antonio Creek constitute "waters of the United States" within the meaning of 33 C.F.R. § 328.3; 40 C.F.R. § 230.3, that the site also contains "wetlands" as defined in 33 C.F.R. § 328.3(b); 40 C.F.R. § 230.3(t), and as these areas border on and are contiguous with the two bodies of water, they are "adjacent wetlands" within the meaning of 33 C.F.R. § 328.3(a)(7); 40 C.F.R. § 230.3(s)(7); Riverside Bayview, 474 U.S. at 133-35.

With regard to the prior converted cropland exception, defendant argued that his property met the definition at 33 C.F.R. § 328.3(a)(8), which defines such wetlands as those areas "that before December 23, 1985, were drained, dredged, filled, leveled, or otherwise manipulated ... for the purpose, or to have the effect, of making production of an agricultural commodity possible and an agricultural commodity has been produced at least once before December 23, 1985." The court noted that by statute, prior converted croplands are considered "abandoned" after five years without tillable crop production, and such abandoned prior converted croplands revert to wetlands. **The court held that the prior converted cropland exemption applies by definition to wetlands and does not apply to rivers, streams or tributaries, which is where EPA claimed the defendant had discharged pollutants. The court held further that the defendant failed to establish that any of the parcel was prior converted cropland, that even if the parcel was once prior converted cropland it must be considered abandoned given defendant's agricultural activity was sheep grazing which is not considered tillable agriculture, and that the areas where the defendant discharged pollutants included rivers, streams and tributaries. The court also disposed of defendant's claim that sheep grazing was eligible for the "normal farming exemption," 33 U.S.C. § 1344(f)(1)(A). The court noted that the normal farming exemption prohibits the unpermitted discharge of dredge or fill materials into the navigable waters of the U.S. if such activity alters the flow or circulation of such waters. The court also held that the defendant's activities constituted discharge of pollutants citing to U.S. v. Sinclair Oil Co., 767 F. Supp. 200, 203 (D. Mont. 1990); and that defendant's operation of a bulldozer in the river channel was a point source discharge subject to regulation under § 404.** The court found for plaintiff on all counts and issued a permanent injunction against the defendants.

c. District court holds that mining overburden is not subject to § 404 regulations:

Friends of Santa Fe v. LAC Minerals, Inc. See page 5 for case summary.

2. Regulatory Takings

a. Court of Claims not deprived of jurisdiction where pendent claim does not seek same relief; Court of Claims holds no temporary taking where government actions protects legitimate state interest and property retains economic viability:

Marks v. U.S., 34 Fed. Cl. 387 (1995).

Plaintiffs sought compensation from the United States Army Corps of Engineers (USACE) for an alleged temporary taking of wetlands located in Key West, Florida. Plaintiffs owned two adjacent parcels of land (Parcels 34 and 38) near the Key West airport and intended to build condominiums on the larger parcel (Parcel 38). The property is bounded on the north by a man-made waterway subject to tidal fluctuation and connected to the Atlantic Ocean and Cow Key Channel. Parcel 38 consists of 52 acres, the northern portion of which is a low lying, salt marsh area subject to tidal fluctuations. Parcel 34 consists of a 60 foot strip of property, which connects Roosevelt Boulevard on the east to Parcel 38 on the west, and is the only ingress and egress to Parcel 38.

In November of 1972, plaintiffs requested and received a dredge and fill permit from the City of Key West and commenced filling portions of Parcel 38. No state or federal permit was required at the time. On January 24, 1973, the USACE issued a cease and desist order regarding the placement of fill on parcel 38, citing violation of the Rivers and Harbor Act (33 U.S.C. 403), and subsequently ordered plaintiffs to remove fill placed below the mean high water mark. Plaintiffs ceased filling activity and subsequently paid a $500 fine for the unauthorized filling. Plaintiffs then applied for an after-the-fact permit and state water quality certification, both of which were denied. With the denials, plaintiffs were ordered to remove fill placed below mean high water. Plaintiffs failed to comply and the United States filed an enforcement action (10/21/80). The district court ultimately enjoined the U.S. and Florida from imposing any permit requirements, thus allowing development on Parcel 38 above the mean high water line, but conditioned development activity on partial restoration of the area below the high water line.

Plaintiff began fill activity on Parcel 34 in 1986. USACE issued a cease and desist order, and the plaintiffs challenged the Corp's action in district court by filing a motion to enforce the mandate of the parcel 38 litigation. The district court denied this motion based on a lack of subject matter jurisdiction (parcel 34 was not a part of the parcel 38 litigation).

In November, 1988, plaintiff sought relief in district court challenging the legality and constitutionality of the government actions. Plaintiff alleged a temporary taking of parcels 34 and 38 based on the permit requirements. In addition, in September of 1989 plaintiff filed a claim for temporary taking in the U.S. Court of Claims. This opinion addresses defendant's motions in this court to dismiss pursuant to 28 U.S.C. 1500 (lack of jurisdiction based on pendency of claim in another federal court), and for summary judgement; and plaintiff's cross-motion for partial summary judgement.

The Court of Claims held that 28 U.S.C. 1500 did not divest the Court of Claims of jurisdiction, since although the claims arise from the same operative facts they do not seek the same relief (i.e., the district court claims sought declaratory and injunctive relief, whereas, the Court of Claims action sought damages for an alleged taking).

Upon consideration of the merits of the parties' motions for summary judgement, the Court of Claims held as a preliminary matter that there can be no taking with regard to that portion of the plaintiff's claim arising from filling areas of Parcel 38 that lie below the mean high water line, since such property is within the navigational servitude of the U.S. and are subject to the exclusive control of the federal government. The Court of Claims then denied plaintiffs motion for summary judgement, and granted defendants's motion for summary judgement.

In addressing the merits of the temporary regulatory taking claim, the Court of Claims observed that three factors must be considered to assess the validity of a taking: 1) the nature of the government action; 2) the economic impact of the

regulation on the claimant; and 3) the extent to which the regulation interfered with reasonable, investment backed expectations. The court held that the plaintiffs failed to meet their burden of proof with regard to any of these three factors. First, the court found that there was a legitimate state interest in preserving the quality of water within the area of plaintiff's land, since the wetlands serve as habitat and the project would have definite long term effects on the water quality of the Class III waters of the immediate waterway area. Next, the court found that the government action did not leave the plaintiff's land devoid of all economic viability. Plaintiff had acknowledged that he made only a limited attempt to develop any part of Parcels 34 or 38, and that he did not fill the property above the high water line because he had not money to do so. In addition, during 1989 plaintiff sold the majority of Parcel 38 for millions of dollars. Finally, the court found that plaintiff's failed to demonstrate that regulatory and government action interfered with investment backed expectations. The court found that it is not sufficient to suggest that although a regulation existed, which the plaintiff should have or did know about, the government had not been in the practice of enforcing the regulation.

G. Citizen Suits

1. Fifth Circuit holds that citizen suit may be brought even if unlawful discharge under § 1311(a) results from EPA's failure or refusal to issue the necessary effluent limitation or permit:

Sierra Club v. Cedar Point Oil Co.. See page 2 for case summary.

2. Standing

a. Ninth Circuit judges issue dissenting opinion on allowing CWA citizen standing to sue for the enforcement of state water quality standards that have not been translated into effluent limitations in federal permits:

Northwest Envt'l Advocates v. City of Portland, 74 F.3d 945 (9th Cir. Jan. 24, 1996).

This is the published dissent from a decision to deny a petition for rehearing en banc, thereby allowing a CWA citizen suit for the enforcement of state water quality standards that have not been translated into effluent limitations in federal permits. See Northwest Environmental Advocates v. City of Portland, 56 F.3d 979 (9th Cir. 1995), summarized in earlier issue of the Water Enforcement Bulletin (WEB Issue 11, page 8).

Pointing out that the same panel had held the exact opposite in its original opinion [11 F.3d 900 (9th Cir. 1993)], the authors of the dissent asserted that the subsequent reversal of that holding was erroneously based upon PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 128 L. Ed. 716 (1994).

The dissenters argued that the decision from which rehearing was sought contradicts the plain language of the CWA, conflicts with prior decisions of the circuit, and "creates a needless intercircuit conflict with all courts of appeals that have addressed the issue." Moreover, the dissenters argued that "the decision establishes a citizens' cause of action [for citizen enforcement of narrative state water quality standards] that Congress never intended and that no other circuit has felt compelled to recognize."

b. District court denies motion to intervene for failure to show that proposed consent decree pertaining to EPA's issuance of cooling water intake structure regulations will impair movant's interest:

Cronin v. Browner, 898 F. Supp. 1052 (S.D.N.Y. July 24, 1995).

This citizen suit was filed to compel EPA to issue regulations under CWA § 316(b) 33 U.S.C. § 1326(b), with respect to cooling water intake structures. EPA and plaintiffs submitted to the court a proposed consent decree that set forth a timetable by which EPA will either issue such

regulations or determine that none are necessary. This opinion addressed a motion by 56 electric utility companies and others to intervene in the citizen suit.

The court noted that to qualify for intervention as of right, an applicant must demonstrate that it has an interest relating to the subject of the action that may be impaired in the disposition of the action and that its interest is not adequately represented by existing parties. The court may also permit intervention when a statute confers a conditional right to intervene or when an applicant's claim and the main action have a question of law or fact in common, but only after considering whether the intervention will unduly delay or prejudice the rights of the original parties.

The proposed intervenors claimed that insofar as the court would fail to reach the merits of plaintiffs' claims in determining whether to enter the proposed consent decree, the court lacked subject matter jurisdiction to enter the decree at all. The court responded that the standard to vest subject matter jurisdiction does not involve addressing the merits of the plaintiffs' claims; the claims advanced in the complaint must simply be more than "wholly insubstantial and frivolous." The complaint alleged that EPA had failed to fulfill its "mandatory" duty to issue regulations under § 316. The proposed intervenors argued that this section does not establish a mandatory duty because it sets forth no deadlines for the issuance of regulations under it. The court concluded that it is not necessary that a deadline be found in the same paragraph or section setting forth the duty to establish the existence of a mandatory duty, and that the plaintiffs' claims were sufficiently substantial to support subject matter jurisdiction.

Regarding the right to intervene, the court found that the petitioners had failed to identify a single substantive aspect of the proposed consent decree that might, except in the event of the most speculative of circumstances, impair their interests. Moreover, the court was of the opinion that intervention would prejudice and delay the interests of the original parties. For these reasons, the motion to intervene was denied.

c. District court holds that the determination of whether violations were continuous for citizen suit standing purposes must be made on a parameter-by-parameter basis:

Friends of the Earth v. Chevron Chem. Co., 900 F.Supp. 67 (E.D. Tex. Sept. 1, 1995).

Plaintiffs Friends of the Earth (Friends) brought a civil enforcement action against Chevron Chemical Company pursuant to § 505 of the CWA (33 U.S.C. § 1365) alleging that Chevron had violated seven permits parameters and committed a monitoring violation. Friends sought a declaratory judgement, injunctive relief, civil penalties, and costs. Friends and Chevron filed cross-motions for summary judgement along with Chevron's motion for dismissal on grounds of mootness. Chevron sought summary judgement on grounds of lack of evidence of violations of its NPDES permit, lack of standing of plaintiff or its members, and asserting that plaintiff's injunctive relief claim should be dismissed as moot.

In its ruling on the mootness issue, the court noted that in seeking dismissal of a claim as moot, a claim may be dismissed when "there is no reasonable expectation that the wrong will be repeated." U.S. v. W.T. Grant Co., 345 U.S. 629 73 S. Ct. 894, 897, 97 L. Ed. 1303 (1953). Due to conflicting evidence, the court held that Chevron had failed to demonstrate with absolute clarity that TSS violations could not reasonably be expected to recur, and therefore the plaintiff's claim for injunctive relief was not moot.

In its motion for summary judgement Chevron claimed that (1) the action should be dismissed on constitutional grounds because it is not justiciable; (2) that plaintiff's claim for civil penalties for temperature exceedances should be dismissed for insufficiency of notice under 33 U.S.C. § 1365(b)(1)(A); (3) that plaintiff's claims regarding copper and zinc violations should be disposed of because the permit restrictions never went into effect; and (4) that plaintiff lacked statutory standing to seek civil penalties under the CWA

because the violations complained of occurred wholly in the past.

Chevron first argued that plaintiff's members did not have constitutional standing to sue on their own behalf. Applying the standard articulated in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S. Ct. 752, 758, 70 L. Ed. 2d 700 (1982), the court determined that the plaintiffs claims of "harm to aesthetic, environmental or recreational interests were sufficient to meet the injury threshold. The court also determined that the injuries complained of were "fairly traceable" to defendants conduct because "plaintiffs need only show that there is a 'substantial likelihood' that defendant caused plaintiffs harm." Public Interest Research Group, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1109, 111 S. Ct. 1018, 112 L. Ed. 2d 1100 (1991) and the discharges into tributaries of Sabine Lake and the Gulf of Mexico (the injuries complained of) were not so tenuous given that defendant's discharge is only two to four miles from Sabine Lake. The court also determined with respect to redressability that, "[T]he general public interest in clean waterways will be served in this case by the deterrent effect of an award of civil penalties." Powell Duffryn Terminals, Inc., 913 F.2d at 73. Thus, the court held the plaintiffs satisfied all three components of the Valley Forge Christian College test and therefore had constitutional standing to pursue this citizens suit.

Addressing the sufficiency of notice under 33 U.S.C. § 1365(b)(1)(A), the court observed that plaintiff had provided adequate notice of violations for six of the seven parameters in question. **However, the court held that plaintiff failed to give notice to defendant about temperature exceedances nor included any specific allegations of temperature exceedances and did not include any specific allegations of temperature exceedances in any past notice letter. The court found that plaintiff's notice was insufficient under § 1365 for the temperature exceedances and granted defendants motion for summary judgement on these claims.**

The court also granted Chevron summary judgement on the issue of zinc and copper violations. **The court held that (pursuant to 40 C.F.R. § 124.15(b)) because the zinc and copper parameters were contested by defendant through a request for an evidentiary hearing, those parameters were not enforceable.** See Puerto Rico Sun Oil Co. v. U.S. EPA, 8 F.3d 73, 76 (1st. Cir. 1993).

Defendant argued that in order to establish statutory standing under § 1365(a), at the time of the filing of the complaint, a "plaintiff must 'make a good-faith allegation of continuous or intermittent violation ...'" Carr v. Alta Verde Indus., Inc., 931 F.2d 1055, 1061 (5th Cir. 1991). Defendant further argued that a court must consider a plaintiff's allegations and proof on a parameter by parameter basis. The court noted that there was no issue of genuine material fact regarding continuous or intermittent violations and observed that, "[W]hen determining whether a permit-holder has violated an effluent limitation, one must look at each parameter within each point source independently." Sierra Club v. Shell Oil Co., 817 F.2d 1169, 1173 (5th Cir. 1987), and although the plain language of the statute authorizes a citizen to commence a civil action against a person who is in violation of a 'permit,' it does not follow that such a suit, once commenced, can extend to cover all past as well as present permit violations, including those that are not reasonably likely to recur." Natural Resource Defense Council, Inc. v. Texaco Refining & Marketing, Inc., 2 F.3d 493, 499 (3rd Cir. 1993). On this basis the court held that plaintiff had statutory authority to seek civil penalties only for defendant's TSS exceedances and did not have standing to seek civil penalties for other permit violations.

The court found plaintiff's claim for injunctive relief was not moot, upheld plaintiff's claim for defendant's alleged TSS violations and ruled that defendant was entitled to summary judgement on plaintiff's other claims for civil penalties.

d. District court holds that operating without a permit is a continuing violation of the CWA allowing for citizen suit:

Molokai Chamber of Commerce v. Kukui, Inc. See page 6 for case summary.

3. Enforcement Under Comparable Law as a Bar to Citizen Suit

a. District court holds that state-issued Notice of Apparent Noncompliance is not bar to citizen suit where state had not initiated penalty actions for CWA violations:

Molokai Chamber of Commerce v. Kukui, Inc. See page 6 for case summary.

b. District court denies defendant's motion for reconsideration in a citizen suit, where the state's failure to calculate economic benefit was not the sole evidence of non-diligent prosecution in the earlier action:

Friends of the Earth v. Laidlaw Envtl. Servs., 890 F. Supp. 770 (D.S.C. July 7, 1995).

In this citizen action, the defendant moved for reconsideration of an earlier order rejecting defendant's argument that plaintiff's citizen suit was barred under § 505(b)(1)(B) of the CWA, 33 U.S.C. § 1365(b)(1)(b), because the state had previously brought, and settled, a law suit against Laidlaw for the same alleged violations of its discharge permit. Laidlaw argued that this finding had been erroneously based solely upon the fact that the state did not recoup a penalty at least equal to the defendant's economic benefit of non-compliance.

The court observed that in the earlier case, the failure of the state to calculate, or even consider, the economic benefit of non-compliance was evidence of non-diligent prosecution, but was not the only factor upon which the decision rested. (See earlier case reported in the Water Enforcement Bulletin, Issue 11, page 11.) The court also noted that the earlier holding had not stated that such failure to consider economic benefit, standing alone, would always support a finding of non-diligent prosecution. **Finding no basis in the arguments of defendant or amicus curiae to disturb its earlier order, the motion for reconsideration was denied**.

c. District court holds that citizen suit is not barred by issuance of state permit where the state is not seeking penalties:

Friends of Sante Fe v. LAC Minerals, Inc. See page 5 for case summary.

4. Statute of Limitations

a. District court holds no statute of limitations applies to citizen enforcement of administrator's non-discretionary duties:

Natural Resources Defense Council, Inc. v. Fox. See page 8 for case summary.

b. District court holds that unpermitted discharges of dredged or fill materials remaining in wetlands constitute a continuing violation for purposes of the five-year statute of limitations of 28 U.S.C. § 2462:

U.S. v. Reaves, Case No. 94-925 Civ-J-20 (M.D. Fla. Feb. 29, 1996).

Defendant moved for summary judgement in a civil enforcement action brought by the United States for violations of the Clean Water Act (CWA) and the River and Harbors Act (RHA) resulting from defendant's unauthorized dredge and fill activities on property located in a remote rural area in Nassau County, Florida. The United States alleged in its complaint that the defendant discharged dredged or fill materials into wetlands in 1981 when he excavated material from Alligator Creek to create a canal and discharged the material as fill over approximately 17 acres of the Creek to create uplands. The Corps discovered the violations during a site visit in December 1989. The United States filed its action in September 1994.

Defendant did not deny that the site constituted wetlands and waters of the United States and acknowledged that he had discharged dredged or fill material into those waters without a permit from the Army Corps of Engineers. Defendant instead argued that the government's action was barred by the five-year general federal statute of limitations in 28 U.S.C. § 2462 asserting that the governments claims "accrued" on the date of the underlying violations in June of 1981. Defendant argued that the government's claims for both injunctive relief and civil damages were barred as the suit was not filed until more than thirteen years later. The United States argued first that the defendants unauthorized discharges constituted a continuing violation of the CWA as long as the illegal fill remained in place. The United States argued in the alternative, that if the claims were deemed to have accrued under § 2462, the correct date of claim accrual was the date when the government knew, or had reason to know, that unauthorized discharges had occurred. The government asserted that this would have been in December 1989 when a Corps biologist first observed the discharges. Finally, the United States argued that its claims for injunctive relief were not subject to the statute of limitations § 2462, and thus, even if its civil penalty claims were barred, the government was entitled to full restoration of the site.

The district court found that the defendant's unpermitted discharge of dredged or fill material into wetlands on the site constituted a continuing violation for as long as the fill remained in place, and therefore the court concluded that the five-year statute of limitations in 28 U.S.C. § 2462 had not begun to run on the United States claims for civil penalties or injunctive relief. In reaching its decision, the district court relied on the Fourth Circuit's decision in Sasser v. Administrator, 990 F.2d 127, 129 (4th Cir. 1993). In Sasser, the Fourth Circuit found that each day that a pollutant remained in wetlands without a permit was an additional day of violation for purposes of subject matter jurisdiction. (The defendant had argued that the EPA administrative law judge was without jurisdiction because the unauthorized discharges had occurred prior to the 1987 amendment of CWA giving EPA authority to assess civil penalties). The court also relied on North Carolina Wildlife Federation v. Woodbury, 29 Env't Rep. Cas. (BNA) 1941 (E.D.N.C. 1989) holding that unauthorized fill left in waters of the United States constitutes a continuing violation for purposes of the citizen suit provision of the CWA). In a footnote, the court considered and rejected the argument that the decision in 3M Co. v. Browner, 17 F.3d 1453, 1462 (D.C. Cir. 1994) necessitated a different result.

c. ALJ indicates that, in light of other authorities, the decision in U.S. v. Telluride is of questionable precedential value:

In the Matter of Gallagher & Henry, Docket No. CWA-A-012-93 (Pearlstein Nov. 29, 1995) *Rulings on Motion to Compel and for Reconsideration*.

In a CWA class II administrative penalty action, brought by EPA for Respondent's unauthorized discharge of fill material at three wetlands sites in Cook County, Illinois, Respondent sought reconsideration of the denial of its motion for accelerated decision, and to compel the Agency to supplement its prehearing exchange.

In its motion for accelerated decision the Respondent argued that the violations alleged at two of the three sites were time barred under the five-year Federal statute of limitations at 28 U.S.C. § 2462. Respondent argued that the filling at two of the wetlands sites occurred more than five years prior to the filing of the complaint, and were thus time barred citing to the decision in U.S. v. Telluride Co., 1995 U.S. Dist. LEXIS 6303 (D. Colo. May 2, 1995) (holding that the five-year statute of limitations begins to accrue on the date that dredged or fill material is deposited and fill remaining in place is not a continuing violation for statute of limitations purposes). Noting that the Agency asserted that the violation continued each day fill material remaining in place, the court denied the Respondent's motion for accelerated decision finding that genuine material issue of material fact remained as to when the statute of limitation had accrued (if ever). In reaching this decision, ALJ Pealstein stated: **"At this juncture, I will only point out that, in light of other**

authorities, the Telluride case is of questionable precedential value."

With respect to its motion to compel, the Respondent argued that EPA had failed to comply in its prehearing exchange with the court's order that the Agency set out how it determined the proposed penalty. Specifically, Respondent sought to compel production of an internal Agency document containing the Agency's administrative penalty settlement calculation. The ALJ ordered the Agency to supplement its prehearing exchange, because it failed to reveal any direct application of the statutory factors found in § 309 (g)(3), however, **the ALJ specifically found that the Agency was not required to disclose the document setting forth its internal penalty settlement calculation**. The ALJ requested the Agency provide: 1) a statement clarifying the number of violations alleged and apportioning the penalty among the $125,000 proposed penalty among the sites; 2) an indication of the amount of any adjustments related to the statutory factors in § 309(g) for each site or violations; and 3) a statement as to whether any EPA penalty or enforcement policies and/or guidelines were used by the Region in calculating the penalty.

5. Notice Requirements

a. Tenth Circuit holds that each plaintiff must comply with CWA notice requirements to be a proper party to a citizen suit:

New Mexico Citizens for Clean Air and Water v. Espanola Mercantile Co., 72 F.3d 830 (10th Cir. Jan. 2, 1996).

In an action to enforce the CWA's prohibition on unpermitted discharges (and other violations) against defendant, plaintiff New Mexico Citizens for Clean Air and Water (Citizens) provided the sixty-day notice required by 33 U.S.C. § 1365(b) before filing the complaint, however, plaintiff Pueblo of San Juan (Pueblo) did not. In binding arbitration of the suit, plaintiffs prevailed on two issues and defendants prevailed on the other two. The parties then entered into a consent decree and the district court awarded $46,003 in attorney fees to plaintiffs. Defendant appealed the award, arguing that Pueblo was not entitled to attorney fees because it failed to give notice under the Act before commencing suit. Defendant also asserted that the fee award was excessive.

The circuit court reversed the district court's decision and remanded it for further proceedings. In reviewing Hallstrom v. Tillamook County, 493 U.S. 20 (1989), the court agreed that compliance with CWA notice requirements is a mandatory precondition to suit. **The court adopted the strict construction of the notice requirement in Washington Trout v. McCain Foods, Inc., 45 F.3d 1351 (9th Cir. 1995), consistent with Hallstrom, in holding that each plaintiff must comply with the notice requirements to be a proper party to a citizen suit.** Although the court ruled that Pueblo was not entitled to attorneys fees since it was not a proper party to the suit, the court instructed the district court to take into account the fees involving Pueblo that plaintiff Citizens would have incurred in any event. In a footnote in the opinion, the court noted this case leaves open the issue left open by Hallstrom of whether a mandatory precondition to suit is a component of non-waivable "subject matter jurisdiction."

On the issue of the amount of the award, the court rejected plaintiff Citizens' contention that a party's agreement to pay all reasonable attorneys' fees eliminates the need for the district court to make any qualitative assessment in awarding fees. The court noted that plaintiff Citizens' argument ran contrary to Hensley v. Eckerhart, 461 U.S. 424 (1983). **Referring to its opinion in Jane L. v. Bangerter, 61 F.3d 1505 (10th Cir. 1995), the Tenth Circuit held that an award of counsel fees must take into account the degree of success attained by the prevailing plaintiff.**

b. District court finds detailed information in letter constitutes sufficient notice for citizen suit:

California Sportfishing Protection Alliance v. Lassen Gold Mining, Inc., Case No. CIV S-95-1655 LKK/JFM (E.D. Cal. Jan. 16, 1996).

On July 16, 1995, plaintiff notified defendant, a mining operation, by letter of its intentions to file a citizen suit against defendant for CWA violations.

The letter alleged that defendant violated specific standards of its permit each month, for six specific months, at a particular mine in a particular facility. After such suit was filed, defendant moved, pursuant to Federal Rules 12(b)(6) and 12(b)(1), to dismiss, alleging that plaintiff's letter did not provide legally sufficient notice of the violations as required by 33 U.S.C. § 1365(b) and 40 C.F.R. Part 135.2(a).

The district court denied defendant's motion to dismiss. **Relying on Washington Trout v. McCain Foods, Inc., 45 F.3d 1351 (9th Cir. 1995) (strict compliance with CWA notice provisions is a jurisdictional prerequisite for a citizen suit) and California Sportfishing Protection Alliance v. City of West Sacramento, 1995 WL 628316 (E.D. Cal. 1995), the court held plaintiff's notice was sufficient as it furnished recipients with notice of the distinct violations, provided a reasonably limited range of dates in which these violations allegedly occurred and alleged that the violations were continuing.** The court pointed out that, contrary to defendant's contentions, Washington Trout does not require the notice to set forth the specific date of each alleged violation nor does it require that the notice list each specific discharge point, effluent or receiving water within the facility in which the alleged violations occurred.

Remarking that since the letter satisfied the statute and regulations without reference to defendant's self-monitoring reports, the court noted that it would not address the "subtle question" of whether a notice letter relying upon information possessed by defendant and the Regional Board must include that information when submitted to the EPA.

c. District court dismisses citizen suit, where notice of intent to sue failed to provide a reasonably specific indication of the time period when the alleged CWA violations occurred:

Hudson Riverkeeper Fund, Inc. v. Putnam Hosp. Ctr., Inc., 891 F. Supp. 152 (S.D.N.Y. June 26, 1995).

Defendant hospital, owner/operator of a sewage treatment plant discharging directly into the Croton Falls reservoir, filed this motion to dismiss an action brought for violations of the Clean Water Act. The defendant argued that Hudson Riverkeeper's notice of intent to sue failed to meet the notice requirements for a citizen suit, in that it listed the parameters that the Hospital had allegedly violated, and stated that the violations were continuing, but did not identify the dates on which the alleged violations occurred.

The court noted that EPA regulations [at 40 CFR 135.3(a)(1994)] require citizen suit notices to contain "sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice."

The plaintiff responded that all the hospital needs to do to ascertain the specific dates of the alleged violations is review their "easy to scan" DMRs, and that their notice letter listing violated parameters constituted "sufficient information" as required by EPA.

The court concluded that although EPA regulations do not require the specific dates of alleged violations to be included in a notice letter, at least "some reasonably specific indication of the time-frame" when they occurred is necessary. "Hudson Riverkeeper's failure to indicate any time-frame during which the alleged violations occurred may have prevented the Hospital from accurately identifying its alleged violations and may have hindered a timely, out-of-court resolution of this conflict." **Accordingly, the defendant's motion to dismiss the complaint was granted.**

d. District court holds that citizen plaintiff must give notice for violations of a new parameter, finding inadequate notice for subsequent temperature exceedances not included in original notice letters:

Friends of the Earth v. Chevron Chem. Co. See page 13 for case summary.

H. Judicial Review

1. Regulations

a. Sixth Circuit upholds effluent limitations for offshore oil and gas industry:

BP Exploration & Oil v. U.S. EPA, F.3d 784 (6th Cir. Sept. 28, 1995), *reh'g denied*, 1996 U.S. App. LEXIS 547 (Jan. 4, 1996).

In these consolidated cases, plaintiffs challenged EPA's effluent limitations promulgated for the offshore oil and gas industry under §§ 301, 304 and 306 of the CWA. The Final Rule, which became effective April 5, 1993, was formulated in response to a Consent Decree. See NRDC v. Reilly, C.A. No. 79-3442 (D.D.C. April 5, 1990; *modified* May 28, 1992). Plaintiffs representing industry contended that the standards were too stringent, while plaintiff NRDC challenged the standards as being too lenient. Plaintiffs challenged substantive aspects of the Final Rule relating to (1) produced water, (2) drilling fluids and drill cuttings, and (3) produced sand. The Sixth Circuit court affirmed the Final Rule for the offshore oil and gas subcategory.

Industry plaintiffs challenged the method for measuring oil and grease in produced water in the setting of BAT and NSPS limits. Deferring to the agency's discretion and distinguishing this case from Association of Pacific Fisheries v. U.S. EPA, 615 F.2d 794 (9th Cir. 1980), **the court held that EPA made a reasonable decision based on empirical data in determining the appropriate method.**

Further on the issue of produced water, plaintiff NRDC challenged EPA's refusal to regulate radioactive pollutants. In distinguishing this case from NRDC v. U.S. EPA, 863 F.2d 1420 (9th Cir. 1988) (holding that EPA should not delay new BAT standards to wait for precise cost figures), **the court held that EPA legitimately declined to regulate radionuclides in produced water due to insufficient data on health effects at this time.** The court also upheld EPA's judgement in rejecting zero discharge of produced waters through reinjection, noting that "NRDC is wrong to contend that EPA is not permitted to balance factors such as cost against effluent reduction benefits."

As to Industry plaintiffs' assertions that EPA violated the CWA on the issue of drilling fluids and drill cuttings, the court concluded that: (1) EPA's revised BPT calculation passed the BCT cost test; and, (2) since the CWA does not require a precise calculation of BAT and NSPS costs, EPA acted within its discretion in setting BAT and NSPS limits for drilling muds and drill cutting. **Although the court found some merit in Industry plaintiffs' allegation that EPA erred in classifying drill cuttings as Total Suspended Solids, the court declined to remand this portion of the Final Rule concluding that "altering BCT in this case would not change the result."**

With regard to regulation of the discharge of drilling fluids and cuttings, plaintiff NRDC challenged EPA's decision to establish a three-mile zero discharge limit for the Gulf and California and to reject the zero discharge option for Alaska. The court rejected all of the arguments presented by NRDC, holding in favor of EPA's determinations as to the unacceptably high nonwater quality environmental impacts in setting the limits. **The court stated that the "overriding principle in our review of the final rule is that the agency has broad discretion to weigh all relevant factors during rulemaking. The CWA does not state what weight should be accorded to the relevant factors; rather, the Act gives EPA the discretion to make those determinations."**

Concluding that an agency's discretion is especially broad when it involves highly scientific or technical considerations (See Reynolds Metals Co. v. U.S. EPA, 760 F.2d 549 (4th Cir.)), the court also upheld EPA's decision to require zero discharge of produced sand.

I. Enforcement Actions/Liability/ Penalties

1. **Fifth Circuit adopts statutory maximum as starting point for penalty assessment:**

Sierra Club v. Cedar Point Oil Co. See page 2 for case summary.

2. **District court rejects sampling error defense:**

U.S. v. Union Township, Civil Action No. 1:CV-94-0621 (M.D. Pa. 1995).

The United States brought this two-count action under the Clean Water Act against defendant Fairmont for violations of Fairmont's Industrial User Permit, which included limits for BOD_5 and TSS. Fairmont discharges industrial wastewater containing pollutants into Union Township's POTW. Count I asserted that Fairmont violated § 307 of the CWA by exceeding its effluent limits, and supported such allegations with DMRs indicating such exceedances. Count II alleged that Fairmont violated the same section by "interfering with" Union Township's POTW. Plaintiff sought summary judgement as to liability on both counts.

The defendant admitted that its DMRs indicated violations of its effluent limits, but argued that the DMRs are not accurate due to sampling error. Sampling and analysis of Fairmont's effluent is conducted by the Municipal Authority of Union Township, under contract. As a result of the alleged sampling error, the defendant argued that a factual issue exists that precludes summary judgement. **The court did not agree, and held that, in light of the reasoning in Sierra Club v. Union Oil Co. of California, 813 F.2d 1480 (9th Cir. 1987) (permittee may not impeach its own report by showing sampling error), the court deemed defendant's DMRs to be accurate and granted summary judgement for plaintiffs on count I.**

With regard to count II, the defendant made three arguments. First, defendant argued that it would be impossible for conventional pollutants to cause interference, as defined under federal regulations. The court rejected this, finding that the C.F.R. specifically cites BOD pollutants as capable of causing interference with a POTW (40 C.F.R. 403.5(b)(4)). Second, defendant argued there is no evidence that establishes that defendant's discharge interfered with the Union POTW. This argument was premised on the defendant's claim that the laboratory data was inaccurate and unreliable. The court rejected this argument as well, for the same reasons discussed under Count I (i.e., DMRs are deemed accurate). Finally, defendant argued that the POTW's own poor practices and inadequate process controls resulted in the aeration basin solid clarifier rates and ammonia violations, rather than defendant's exceedances. The court found this assertion contrary to defendant's expert report, which stated that inadequate process controls were only one of several factors, including BOD, that caused interference. The court found the defendant liable for 1,754 violations under count I and 79 instances of interference under count II.

3. **District court grants summary judgement under the CWA where contractor performed unauthorized fill activity finding that party with responsibility or control over the work is also strictly liable:**

U.S. v. Lambert, 1996 U.S. Dist. LEXIS 1343 (S.D.W.Va. Jan. 31, 1996).

The U.S. Corps of Engineers notified defendant that excess fill and unauthorized dock structures on his residential property, along the western bank of the Kanawha River, had not been authorized under a general permit for bank stabilization. Defendant applied for an after-the-fact permit to cover the excess fill and dock structures, to which the Fish and Wildlife Service, EPA, and state Department of Natural Resources objected, in addition to adjacent upstream and downstream neighbors. The Corps denied the permit application and directed the defendant to remove the excess fill, and to relocate the dock structure 30 feet closer to shore to conform to the new alignment of the river bank.

The United States, on behalf of EPA, initiated an enforcement action seeking injunctive relief and civil penalties for violations of the CWA and injunctive relief under the Rivers and Harbors Act (RHA). The court found that the defendant had

discharged fill material, even though an independent contractor actually performed the work, since the defendant was responsible for the performance of that work. **The court stated that "[t]he CWA imposes liability on the party who actually performed the work and on the party with responsibility for or control over performance of the work", citing to U.S. v. Board of Trustees of Fla. Keys Community College, 531 F. Supp. 267, 274 (S.D.Fla. 1981).** The court found that fill material had been discharged from a point source (earthmoving equipment), into a navigable water of the United States, without a permit, and hence, the United States was granted summary judgement with respect to CWA liability.

With respect to the Rivers and Harbors Act (RHA) claim, the court concluded that the dock and its extensions were "structures" that obstructed the navigable capacity of the river, and that the river's normal flow and circulation patterns had been disrupted by them. Thus, defendant's actions in constructing the dock and extensions without a permit violated § 10 of the RHA. Moreover, his actions in placing foreign material on the riverbank and in the river violated § 13 of the RHA. Summary judgement was granted to the plaintiff on this count accordingly.

J. Administrative Practice

1. ALJ denies motion to compel Agency to disclose internal penalty settlement calculation:

In the Matter of Gallagher & Henry. See page 16 for case summary.

K. Consent Decrees

1. Standard that must be met to vest court with subject matter jurisdiction for purposes of entering a consent order is that claims advanced in the complaint must simply be more than "wholly insubstantial and frivolous":

Cronin v. Browner. See page 12 for case summary.

L. Pretreatment

1. District court finds that conventional pollutants alone can cause interference as defined in federal pretreatment regulations and rejects defendant's additional defenses to interference claims:

U.S. v. Union Township. See page 20 for case summary.

II. CASES UNDER OTHER STATUTES

A. Endangered Species Act

1. District court holds that compliance with an NPDES permit is not sufficient to demonstrate compliance with the Endangered Species Act (ESA):

Idaho Rivers United v. National Marine Fisheries, Case No. C94-1576R (W.D. Wash. 1995).

Plaintiff's challenged the Biological Opinion issued by National Marine Fisheries Service (NMFS) in March, 1994, and the decision of the United States Forest Service to approve unchanged its Record of Decision for operation of the Beartrack Mine Project, a cyanide, heap leach gold mine that operates within the Salmon National Forest. The mine, which was issued CWA § 402 (new source) and 404 (dredge and fill) permits in 1991, is located in the Napias Creek drainage area, which was historically accessible chinook salmon habitat. Plaintiff's asserted that both the NMFS and USFS violated § 7(a)(2) of the ESA which requires consultation with NMFS or the Fish and Wildlife Service prior to taking agency action to ensure that it is not likely to jeopardize an endangered or threatened species or adversely affect its critical habitat.

The Snake River spring/summer chinook salmon and the Snake River fall chinook salmon (hereinafter Snake River salmon) were listed by the NMFS as threatened species under the ESA in May, 1992. Pursuant to the ESA listing of the Snake River salmon, USFS and NMFS undertook their responsibilities to conduct "consultation" as require under § 7 of the ESA prior to approval of the Beartrack Mine Project. On March 31, 1994, NMFS issued a Biological Opinion on the Beartrack Mine that concluded that the Mine was not likely to jeopardize the continued existence of the Snake River chinook or result in adverse modification of critical habitat. Following issuance of the Biological Opinion, USFS and EPA let stand their original approvals of the Mine's Plan of Operations and NPDES permit, respectively.

Plaintiff's argued that the Biological Opinion was arbitrary and capricious in that it had no rational connection to the evidence before the agency, it ignored critical factors, and it weighed too heavily ineffective mitigation measures. Defendants argued that the Opinion was not flawed, and that even if it were, USFS undertook its own reasoned analysis supporting continued operation.

The district court found that the Biological Opinion and the determination to permit the Beartrack Mine Project to proceed without modification of the 1991 ROD was arbitrary and capricious and ordered the defendants to reinitiate consultation and address the deficiencies discussed in the Order. The court found that the Biological Opinion failed to consider the impact of potential hazardous material spills it predicted were likely to occur, failed to support its conclusion that the sediment level increase will not harm critical habitat, failed to provide a reasoned basis for the conclusion that the wetlands impacts of the project are not expected to adversely affect the chinook, and failed to consider other factors, including groundwater impacts, mass failures, and leaks from the heap leach pad. **The court also found, contrary to defendant's contention, that compliance with an NPDES permit is not necessarily sufficient to satisfy the requirements of the ESA**. On this issue the court stated "there is no authority cited for the proposition that, as a matter of law, compliance with a NPDES permit automatically meets the requirements of the ESA." The court noted that such scientific determination remained to be made or at least properly documented. Finally, the court observed that in several instances the Opinion contained analysis that was simply too conclusory, acknowledging effects on critical habitat yet asserting that such habitat would not be appreciably diminished.

B. Civil Rights Act

1. District court denies a TRO to halt operation of a wastewater treatment facility in an action under the Civil Rights Act of 1964 and NEPA, given the balance of hardship favoring the defendants and the plaintiffs' questionable prima facie case:

Goshen Rd. Envtl. Action Team v. USDA, 891 F. Supp. 1126 (E.D.N.C. May 10, 1995).

Plaintiffs alleged that the defendants violated their civil rights under Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et. seq., by approving placement of a wastewater treatment facility in an African-American community, and that defendants violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4732(d)(c) by failing to provide an environmental impact statement for the facility. To grant this motion for a Temporary Restraining Order and Preliminary Injunction, the court noted that a decided imbalance of hardship must exist in the movant's favor, and the movant must raise "questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation."

The court concluded that while irreparable injury might result to the plaintiffs if the TRO was not granted, public interest in continuing the operation of the treatment facility (to which there are currently at least 64 members online), shifted the balance of hardship to favor the defendants. Moreover, the court believed that the statute of limitations would likely bar the Title VI civil rights claim, and the doctrine of laches might effectively bar the NEPA claim, even if the balance of hardship was found to favor the plaintiffs. Finally, the court found that the plaintiffs had not alleged

"that the location and funding of the facility were accomplished with discriminatory intent; rather, plaintiffs have alleged the existence of a 'racially disproportionate adverse impact' on plaintiffs." Accordingly, the motion for a TRO was denied. The court reserved ruling on the motion for preliminary injunction until the issues could be more fully briefed by the parties.

C. Eleventh Amendment

1. Supreme Court holds that the 11th Amendment prohibits the abrogation of a state's sovereign immunity for suit by individuals to enforce a federal right, unless that right exists under the 14th Amendment:

Seminole Tribe v. Florida, 1995 LEXIS 2165 (Sup. Ct. Mar. 27, 1996).

The Supreme Court held in a 5-4 opinion that the 11th Amendment prohibits the federal abrogation of a state's sovereign immunity in cases where an individual sues the state to enforce a federal right, unless that federal right exists under the 14th amendment. The court overturned its 1989 holding in Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), which held that when the states gave Congress plenary powers to regulate interstate commerce under the Interstate Commerce Clause, they also gave to Congress the power to abrogate the states' sovereign immunity for laws enacted under those Commerce Clause powers. This suit arose as a challenge by the State of Florida to the Indian Gaming Regulatory Act, a 1988 law that allows Indian Tribes to sue states in federal court for failing to negotiate in good faith over gambling operations on tribal lands. In its decision, the court stated that Congress may abrogate the states' sovereign immunity if it has "unequivocally expressed its intent to abrogate the immunity" and has acted "pursuant to a valid exercise of power." The only valid exercise of that power, according to the court, is found under the 14th Amendment which explicitly gives Congress the power to enforce the terms of that amendment. As a result of this holding, the Clean Water Act's citizen suits provisions and those of other federal environmental laws are in question with respect to their application to suits by individuals against states.

The ruling does not affect the Federal government's ability to sue states to enforce environmental laws, see, e.g., U.S. v. Texas, 143 U.S. 621, 644-645 (1892) (finding such power necessary to "the permanence of the Union."). In addition, the court held that the doctrine established in Ex parte Young, 209 U.S. 123 (1908) remains valid law. This doctrine allows an individual to bring suit against a state officer to bring the officer's conduct into compliance with federal law. However, the court held that it operates only if Congress has not created a remedial scheme for enforcement of the Federal law. How the court's interpretation of the Ex parte Young doctrine will be applied to the Clean Water Act and other environmental statutes remains to be seen.

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