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I. CLEAN WATER ACT (CWA)

A. Jurisdictional Scope of the CWA

1. Discharge through ground water

a. District court holds that although economic injuries are sufficient basis of injury to establish CWA standing, the fact that ground waters are hydrologically connected to surface waters does not contribute to establishing CWA jurisdiction:

Cooper Indus., Inc. v. Abbott Lab., Inc., 1995 U.S. Dist. LEXIS 7454 (W.D. Mich., May 5, 1995).

This action involved allegations under CERCLA and the CWA that Abbott Labs (and other defendants) operated facilities from which releases of hazardous substances caused the pollution of defendants' facilities, as well as the ground water at the site of a water well.

Defendant argued that the court lacked jurisdiction because the elements required to show standing for a citizen suit under these two statutes had been insufficiently pled. **The court, however, noted that the plaintiff had clearly pled economic and non-economic harms caused by the alleged pollution, and that economic injuries were a sufficient basis of injury under both the CWA and CERCLA to establish standing.**

With regard to the CWA action, however, the court found that the plaintiff's complaint failed to identify any point source or navigable water involved with the pollution of the site. "Even assuming that the migration of ground water led to the pollution of the … river, which further led to the pollution of the site, such allegations are insufficient to state a cause of action under the FWPCA." Citing to Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962 (7th Cir. 1994), **the court concluded that the fact that ground waters are hydrologically connected to some surface waters is insufficient to state a cause of action under the CWA.**

b. Ninth Circuit upholds previous decision that CWA jurisdiction extends to isolated waters used only by migratory birds:

Leslie Salt Co. v. United States. See page 3 for case summary.

B. NPDES Permits

1. District court finds that in the absence of proof of irreparable harm to receiving water quality, the City of New York's challenge to a storm water control plan must fail:

City of New York v. Anglebrook Ltd. Partnership, 891 F. Supp. 908 (S.D.N.Y., Apr. 14, 1995) aff'd 58 F.3d 35 (2nd Cir., June 21, 1995).

Plaintiff, City of New York (City), sought injunctive relief and civil penalties in a CWA citizen suit, claiming that the storm water pollution prevention plans (SWPPP) prepared as part of a General Permit for the construction of a proposed 240 acre golf course development in the watershed for its drinking water supply were inadequate and therefore violated the CWA.

All storm water runoff from 230 acres of the site must cross 50 acres of on-site wetlands and then flow 2-3 miles through ponds and brooks before entering a drinking water reservoir. Water from the remaining acreage drains into the storm drainage system for a neighboring road before entering another reservoir. The City contended that the phosphorus concentrations in these reservoirs already exceed the maximum set forth in state water quality standards, and have caused the reservoirs to be eutrophic. Objecting to a number of allegedly deficient technical components of the developer's SWPPP, the City claimed that the SWPPP violates effluent standards under CWA § 402(a), since any additional storm water runoff, no matter how little, would exacerbate the problem.

The City's principal objection to the project was that the SWPPP failed to conform to the requirements of the General Permit, which set out "Guidelines" to govern the preparation of the SWPPP. The court determined, however, that the Guidelines were intended to be flexible rules which require applicants to exercise good engineering practices, informed by professional judgment and common sense. The City also argued that the SWPPP contained insufficient information to permit an evaluation of whether it complied with the General Permit. The court noted that the SWPPP in fact contained voluminous texts, maps, diagrams, and extensive explanatory material, as well as underlying data, in sufficient detail to allow evaluation.

In its conclusion that the defendants had not violated the General Permit, the court noted that, considered as a whole, the SWPPP was a carefully conceived plan that fell well within the boundaries of good engineering design judgment,

containing adequate erosion and sediment controls and measures for maintaining storm water quality. The court observed that the "defendants have sufficiently guarded the watershed from deterioration with detailed structural and backup measures, buttressed by monitoring and inspection to ensure compliance." Moreover, the City failed to prove that as a result of deficiencies within the Plan, the storm water discharged during and after construction would cause, or contribute to, a contravention of water quality standards for phosphorus and turbidity. The court held that even if it were to find that the SWPPP contained some deficiencies, the City had failed to prove that any of those deficiencies would cause irreparable harm to the City's reservoirs or to its drinking water. Accordingly, the City's Motion for an Injunctive Relief was denied.

2. Board finds NPDES permit does not constitute an ICS if facility does not meet statutory requirements for imposing an ICS under CWA 304(l)(1):

In re Florida Pulp and Paper Ass'n. See page 18 for case summary.

C. State Water Quality Standards

1. Ninth Circuit holds that an EPA-established TMDL for dioxin was consistent with a reasonable interpretation and application of 33 U.S.C. § 1313(d) and that it was appropriate to impose the TMDL prior to first imposing a technology-based limitation:

Dioxin/Organochlorine Ctr. v. Clarke, 57 F.3d 1517 (9th Cir., June 22, 1995).

Several environmental groups and pulp and paper mills challenged the district court's summary judgment in favor of EPA, on their claims that the EPA violated the CWA, 33 U.S.C. §1251 et seq., by establishing total maximum daily loadings (TMDLs) based limits for the discharge of dioxin.

Pursuant to 33 U.S.C. §1314(1), the States of Oregon, Idaho, and Washington had listed the mills as point sources responsible for impairment of the water quality standards in the Columbia River basin. These states had also identified the Columbia River as water quality limited pursuant to 33 U.S.C. §1313(d)(1)(A). Having made this finding, the states, pursuant to §1313(d)(1)(C), or EPA, pursuant to §1313(d)(2), were required to establish a TMDL for dioxin.

The Environmental groups Dioxin/Organochlorine Center and Columbia River United (DOC) claimed that the TMDL developed by EPA failed to implement state water quality standards because it (1) inadequately protected aquatic life and wildlife, (2) inadequately protected certain human subpopulations, and (3) failed to consider the cumulative effect of dioxin related pollutants. DOC further asserted that the TMDL was based on arbitrary and capricious decisions by the EPA and that such action constituted an abuse of discretion. DOC contended that the EPA had not adequately considered the effect of the TMDL on aquatic life, wildlife, and human life.

Upon review of the scientific evidence and the documents relied upon by EPA to establish the TMDL, the Ninth Circuit rejected DOC's position and held that, **with regard to aquatic life and wildlife, the EPA decision was supported by substantial evidence**. With respect to the exposure limits set for human life, the court stated that EPA's decision could not be considered to be arbitrary and capricious nor an unreasonable interpretation of state water quality standards. The court held that **EPA's decision to establish the dioxin TMDL based on an ambient concentration of dioxin of 0.013 parts per quadrillion (ppq) was within reasonable limits of its discretionary authority and reflected an adequate consideration of the facts**.

The pulp and paper mills argued that EPA violated the CWA by issuing a TMDL prior to establishing less burdensome technology-based limitations, which they asserted are required by the Act prior to establishment of TMDLs. The mills asserted that because no effluent limits were developed for dioxin under 33 U.S.C. 1311(b)(1)(A) or (B), states improperly listed, and EPA improperly approved, such waters as water quality limited. Accordingly, neither the states nor EPA could implement

TMDLs pursuant to 1313(d)(1)(C) or (2). The mills asserted that the language of 40 CFR § 130.7 implies that technology-based limitations must have already been implemented and failed to achieve the necessary water quality. The mills also asserted that the legislative history of the CWA supports the argument that technology-based limits are mandated by the Act.

The court held that **EPA's interpretation of §1313(d) was consistent and reasonable and allowed EPA to establish TMDLs for waters contaminated with toxic pollutants without prior development of BAT limitations. The district court's grant of summary judgment in favor of EPA was affirmed.**

D. Wetlands

1. Wetlands Jurisdiction

a. Ninth Circuit upholds previous decision that CWA jurisdiction extends to isolated waters used only by migratory birds:

Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir., May 22, 1995).

In 1985, Leslie Salt began digging a feeder ditch and a siltation pond on its property and discharged fill that affected seasonally ponded areas used by migratory birds for habitat. After the Army Corps of Engineers (USACE) issued a cease and desist order under CWA § 404, Leslie Salt filed suit challenging USACE's jurisdiction. The United States also brought an enforcement action, which was consolidated with Leslie Salt's suit (Leslie Salt I). The district court held that USACE had no jurisdiction over the property, because the ponds had been artificially created and were dry much of the year.

On appeal (Leslie Salt II), the 9th Circuit reversed, stating that these conditions did not exclude them from being classified as "waters of the United States" as defined in the preamble of USACE's dredge and fill regulations (under "other waters"). The district court also held that "the commerce clause power, and thus the CWA, is broad enough to extend USACE's jurisdiction to local waters which may provide habitat to migratory birds and endangered species." The case was remanded for a determination of which parts of the property had sufficient connections to interstate commerce to subject them to Corps CWA jurisdiction. On remand (Leslie Salt III), roughly 12.5 acres were identified as such, and the district court found that Leslie Salt had violated the Act by discharging fill or altering structures within this area without a permit. The district court further ruled that penalties are mandatory under CWA § 309(d) and that the United States was entitled to injunctive relief to restore the property to its preexisting condition.

Leslie Salt appealed the district court's determination that CWA jurisdiction reaches isolated waters used only by migratory birds. Leslie Salt's first contention was that the corps preamble promulgated a rule without notice and comment, violating due process rights. The court explained that the merits of this claim turn on whether the migratory bird examples in the preamble are characterized as a substantive rule or an interpretive rule. As the 9th Circuit in Leslie II had previously decided this issue, and as it was plausible to find that the preamble was merely an interpretive rule and thus not subject to notice and comment requirements, the court declined to reconsider the 9th Circuit's earlier ruling.

Leslie Salt next claimed that USACE's interpretation of the Act to extend jurisdiction to habitat used by migratory birds is unreasonable. The court responded that, in light of the Act's language, policies, legislative history, and caselaw, "it is reasonable to interpret the Act as allowing migratory birds to be the connection between a wetland and interstate commerce," and the court was not clearly erroneous on this ground. Leslie Salt also claimed that if USACE's interpretation is held to be reasonable, it exceeds Congress' powers under the commerce clause. The court cited Supreme Court and other court holdings that Congress' commerce clause powers extend to regulation of migratory birds: Hughes v. Okla., 441 U.S. 322 (1979); and Palila v. Hawaii Dept. of Land and Natural Resources, 471 F. Supp. 985 (D. Haw. 1979). For these reasons, reconsideration of Leslie Salt II was determined to be inappropriate.

The court next addressed the issue of whether civil penalties are mandatory under § 309(d), which provides that "any person who violates [a provision of the CWA] shall be subject to" a civil penalty. Leslie Salt claims that "shall be subject to," as opposed to "shall pay," indicates discretionary judgment of the court to levy a penalty. The court held, however, that "as a matter of statutory interpretation, a longstanding canon holds that the word 'shall' standing by itself is a word of command rather than guidance when the statutory purpose is the protection of public or private rights." Moreover, Congress used less definitive language in the CWA when it wanted to indicate that penalties are discretionary (i.e., "may...assess a…civil penalty"). Finally, the Fourth Circuit and the Eleventh Circuit have held that civil penalties are mandatory under §309(d). Accordingly, the court affirmed Leslie Salt II's order regarding remedies.

b. District court holds that wetlands separated by man-made barriers from waters of the United States remain adjacent wetlands:

United States v. Banks, 873 F. Supp. 650 (S.D. Fla., Jan. 13, 1995).

The United States (U.S.) sought injunctive relief and civil penalties against defendant Parks B. Banks (Banks) for filling in five freshwater wetland lots located on Big Pine Key, Florida, without obtaining a § 404 permit, in violation of the CWA 33 U.S.C. § 1311(a).

The U.S. charged that without obtaining the required § 404 permit, Banks filled and altered the contours of five lots, including constructing a house on one of the lots. Banks subsequently applied for an after-the-fact permit for fill activities but was denied. Banks contended that one of the lots and a portion of another were "isolated" wetlands rather than "adjacent" wetlands. It was Banks' position that the filling of isolated wetlands was potentially permissible though subject to Corps permit application procedures under regulations in effect at the time the two lots were altered. In its findings of fact, the court, relying upon the 1987 Federal Wetlands Delineation Manual and testimony of a number of expert witnesses as to the nature of the lots and their characteristics as wetlands, found that all five lots are adjacent freshwater wetlands and that none of the lots are isolated wetlands.

The court went on to make a legal finding that the lots were adjacent wetlands and not isolated wetlands and thus did not qualify for a general or nationwide permit. In so finding, the court relied upon 33 CFR § 328.3(c) and United States v. Tilton, 705 F.2d at 431, and held that **wetlands separated by man-made barriers from waters of the United States remain adjacent wetlands.** The court noted that man-made barriers that block the flow of surface waters between the lots and navigable waters do not defeat a finding that the wetlands are adjacent. United States v. Lambert, 589 F. Supp. 366, 371 (M.D. Fla. 1984). The court found that no hydrological connection to other waters is required for a wetland to be considered adjacent, that in this case there was a surface water connection during storm events, and that the lots are adjacent from an ecological standpoint.

The court went on to state that the lots at issue constituted waters of the United States at the time of the defendant's activities, and that the lots also constituted jurisdictional wetlands at the time of the defendant's activities. The court determined that the defendant violated the applicable laws of the United States in his refusal to cease filling these freshwater wetlands, and that the defendant had violated the CWA by discharging pollutants in the form of fill materials into the waters of the United States. Penalty issues were deferred for a subsequent adjudication.

2. Section 404 Permits

a. Ninth Circuit holds that USACE properly limited the scope of an EA to wetland acreage within its jurisdiction in approving permit for filling wetlands as part of large-scale water diversion project under another Federal agency's jurisdiction:

California Trout v. Schaefer, 58 F.3d 469 (9th Cir., June 26, 1995).

California Trout (CalTrout), a nonprofit environmental organization, filed suit to challenge an USACE's decision approving a permit application for the Stockton East Water District (SEWD) to discharge fill material into U.S. wetlands. The permit was sought in connection with building one of a number of water conveyance components of a 41-mile diversion project from the Stanislaus River. USACE determined that 4.18 acres of wetland within its jurisdiction would be affected by the construction and the associated discharge of fill material. The USACE prepared an environmental assessment (EA), limiting its review to only the environmental impacts of filling the 4.18 acres and granting the permit to SEWD. As a condition of the permit, USACE required SEWD to mitigate any adverse environmental effects caused by filling in the wetlands, including creating 9 acres of replacement wetlands.

CalTrout argued that USACE violated both NEPA and the CWA by limiting the scope of its review to the environmental impacts of filling the 4.18 acres of wetland, instead of analyzing the environmental effects caused by the project as a whole (specifically, the effects on the fisheries in the lower Stanislaus River). The district court granted USACE's and SEWD's motions for summary judgment, and this appeal followed.

Citing to North Carolina v. City of Virginia Beach, 951 F.2d 596 (4th Cir., 1991), the Fourth Circuit stated that USACE was justified in limiting its review in the present case because it was the Bureau of Reclamation, rather than USACE, that has the contractual right and statutory duty to control SEWD's water allocations as necessary to protect the needs of fisheries. "Most important," the court continued, "the Bureau has already fulfilled the NEPA mandate by preparing an EIS 'to the fullest extent required by NEPA'." Cases cited by CalTrout as precedent were determined by the court to be inapplicable, as they did not involve the "concurrent yet independent jurisdiction of two Federal agencies," such as in this case. Furthermore, the court held that contrary to CalTrout's claim, the USACE did use the same scope of analysis for analyzing both the impacts and alternatives as was used for analyzing the benefits of the project, by weighing the benefits of the specific facility to the water diversion project.

Finally, with regard to CalTrout's argument that USACE violated the CWA by failing to consider the views of the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), and state fish and game officials, the court found that in fact, USACE had considered and addressed them appropriately. While CalTrout may disagree with USACE's findings, "there is nothing in the record to suggest that findings resulted from any clear error of judgment." The lower court's holding was affirmed.

b. District court holds that ongoing impact from past wetlands violations does not constitute a continuing violation that extends the statute of limitations:

United States v. Telluride Co., 1995 U.S. Dist. LEXIS 6303 (D. Colo., May 2, 1995).

The United States brought a civil enforcement action pursuant to § 309 of the CWA, seeking injunctive relief and civil penalties against the Telluride Company, Mountain Village Company, Inc., and Telluride Ski area, Inc. (collectively, “Telco”). The U.S. alleged that Telco, in developing part of Telluride ski resort, filled or caused to be filled more than 60 acres of wetlands from 1981 through 1994 in violation of § 301 and § 404 of the CWA. Telco filed a motion for partial summary judgment on statute of limitations grounds, claiming that the applicable statute of limitations, 28 U.S.C. § 2462, gives the government 5 years from the date of the violation to file suit for civil penalties pursuant to the CWA, thus precluding claims on violations that occurred before October 15, 1988. The U.S. argued, on several grounds, that 28 U.S.C. § 2462 provided only a limited bar to its claims. District Court Judge John L. Kane, Jr. granted Telco's motion for partial summary judgment based on statute of limitations grounds.

Relying heavily on the D.C. Circuits decision in 3m Co. v. Browner, 17 F.3d 1453 (D.C. Cir. 1994) the court rejected the government's argument that since Telco had not removed the allegedly unlawful fill materials from the wetlands, the adverse effects of the fill continued, which constituted a continuing violation under the CWA. **The court found that**

because Telco was not presently discharging pollutants, no continuing violation existed for statute of limitations purposes. The fact that a continuing impact existed from Telco's past violations did not render the violation continuing. The court asserted that in the statutes of limitation context, courts have held that mere ongoing impact from past violations does not extend the period in which a plaintiff must file an action. In ruling that the 5-year statute begins to run at the time of the discharge, Judge Kane asserted that if the statute of limitations began to run only when the defendant removed the fill material and restored the wetlands, it might never begin to run at all.

The court also rejected the government's claim that the 5-year statute of limitations was equitably tolled during the proposed consent decree negotiations. Applying the law of the Tenth Circuit, Judge Kane found that there was no evidence that Telco misled the U.S. or lulled it into inaction so as to warrant a tolling of the statute.

Finally, the court rejected the government's argument that even if its civil penalties claim was barred by 28 U.S.C. § 2462, it would not affect the claim for injunctive relief. Following U.S. v. Windward, 821 F. Supp. 690, 693 (N.D. Ga 1993), the court concluded that because the U.S. was seeking legal relief in the form of civil penalties and equitable relief in the form of an injunction, based on the same facts, the statute of limitations bars both.

c. A prima facie CWA 301(a) case requires a showing that respondent had responsibility, control or authority over the discharges:

In re Urban Drainage & Flood Control District. See page 21 for case summary.

3. Regulatory Takings

a. U.S. Court of Federal Claims rules takings claim will fail without showing diminution in property value caused by Federal actions on the date of the alleged taking:

City Nat'l Bank of Miami v. United States, 1995 U.S. Claims LEXIS 66 (Ct. Cl., Apr. 7, 1995).

The plaintiff purchased property adjacent to the Florida Everglades in 1972 to mine limerock. After USACE denied the plaintiff a CWA §404 permit in 1980, the plaintiff suspended his appeal pending the outcome of Florida Rock Indust., Inc. v. United States, 115 S. Ct. 898 (1995). During this time, numerous state and local regulatory changes occurred, effectively precluding the plaintiff's ability to mine limerock on the property without special permits. Such changes included a Comprehensive Development Master Plan for Dade County and new county Class IV and surface water management permit requirements. The plaintiff did not attempt to apply for permits under any of these new state and local programs.

After the plaintiff's second §404 permit application was denied by USACE, the plaintiff sought just compensation for the alleged taking caused by the permit denial in the U.S. Court of Federal Claims. Plaintiff filed a motion in limine to determine whether evidence of existing state and county restrictions on limerock mining may be excluded when valuing the property prior to the date on which USACE denied the second permit. USACE requested summary judgment, arguing that the plaintiff lacked a compensable property interest in limerock mining, or in the alternative, that the permit denial had no effect on the value of the property because prior to the date of denial, state and local regulatory restrictions precluded limerock mining on the property.

USACE also disagreed with the court's prior ruling that the denial of the second permit application constituted a final agency action, rendering the claim ripe for review. USACE argued that its denial did not rule on the merits of the case, but was designated "without prejudice," signifying that the plaintiff could submit the required information at a later date. Citing to the record that showed a cycle of information requests and responses by the plaintiff during the permit application period, as well as the actual language in the permit denial, the court concluded that the term "without prejudice" by itself does not render a claim not ripe

for judicial review. Therefore, the denial was a merits-based determination constituting a final agency action ripe for review.

With regard to the taking issue, the court noted that under the Comprehensive Development Master Plan, which was in effect before USACE's denial, the plaintiff could in theory obtain an "amendment" to the Plan and an "unusual use permit" in order to mine limerock, though he had not attempted to do either to date. Therefore, if the plaintiff could show a reasonable probability that he would be successful in obtaining these variances, the court would rule on the remainder of issues posed in the motion in limine. Otherwise, the takings claim must fail, as there would be no diminution in the value of the property as of the date of the alleged taking attributable to actions of the Federal government. Accordingly, the plaintiff's motion in limine was provisionally denied subject to reinstatement.

b. Missouri Supreme Court holds that a state can condemn private property to replace federally protected wetlands disturbed in the construction of a highway:

Missouri *ex rel.* Missouri Highway and Transp. Comm'n v. Keeven, 895 S.W.2d 587 (Mo., Mar. 21, 1995).

In order to build a highway planned by the plaintiff (the Commission), it was necessary to disturb approximately 8.7 acres of federally protected wetlands. A dredge and fill permit was granted to the Commission by USACE under CWA § 404, with the condition that the Commission acquire 17.3 acres of replacement wetlands at a site 3.5 miles away from the highway. The particular site was chosen because no other suitable tracts of sufficient size were located. Also, the permit further provided that St. Stanislaus Park would annex these wetlands so that the St. Louis County Department of Parks and Recreation could manage the property as a wetland site. The Commission began the process of condemning the property for the replacement wetlands, which consisted entirely of property owned by respondents. The trial court held that the Commission lacked authority to condemn any lands to replace wetlands, and the Commission appealed.

On appeal, the respondents argued that the Commission's condemnation power was limited to land necessary for the actual construction of a highway. The Court pointed out that Missouri statute § 227.120 authorizes the Commission to condemn land for any purpose "necessary for the proper and economical construction of the state highway system for which the commission may have authority granted by law." In this case, the failure of the Commission to secure a Federal permit would preclude the construction of the highway at the chosen site. The acquisition of property required of the Commission as replacement wetlands was a necessary condition of such a permit. Thus, the Court held that **the Commission had the authority to meet the requirements of the Federal permit and condemn land to replace wetlands disturbed by the construction of state highways, where necessary for the proper and economical construction of state highways.**

The issue of whether the Commission properly selected and condemned the respondents' land, however, was remanded to trial court, with the admonition that respondents can only prevail against the Commission if they can show an abuse of discretion so great as to deprive the taking of its public purpose. Accordingly, the judgment of the trial court was reversed and remanded.

E. Citizen Suits

1. Standing

a. Ninth Circuit reverses it previous decision and holds that the CWA confers jurisdiction for citizen suits to enforce narrative water quality standards when such standards are part of an NPDES permit:

Northwest Envtl. Advocates v. City of Portland, 56 F.3d 979 (9th Cir., June 7, 1995).

In this decision, the 9th Circuit vacated its earlier decision in Northwest Environmental Advocates v.

City of Portland, 11 F.3d 900 (9th Cir., 1993). In its earlier opinion the panel had upheld the district court's decision that 54 combined sewer outfalls (CSOs) that discharged raw sewage during time of precipitation were covered by Portland's pollution permit and that Northwest Environmental Advocates (NWEA) lacked standing to bring a citizen suit under §505(a)(1) of the CWA, 33 U.S.C. § 1365(a)(1) to enforce water quality standards contained in Portland's permit. The district court had held that the CWA confers Federal jurisdiction to entertain citizen suits to enforce state water quality standards "only if they are incorporated into an NPDES permit through effluent limitations."

The original 9th Circuit decision was withdrawn and replaced by a new opinion from the same panel in light of the Supreme Court's recent decision in PUD No. 1 of Jefferson County v. Washington Department of Ecology, 114 St. Ct. 1900 (1994), which the court viewed as significant to the standing issue in the present case.

NWEA had argued that Portland's discharge permit expressly covers only two point sources, that the 54 CSOs in question are not listed in the permit section entitled "Sources Covered by this Permit,"and that the receiving waters of the CSOs are not mentioned along with the permit's description of receiving waters for covered discharges. The court found, however, that CSO events are contemplated in the permit section on "Permitted Activities" and concluded that the district court's findings were not clearly erroneous.

The court then addressed the issue of whether NWEA has a cause of action for water quality violations, noting that the plain language of the CWA authorizes citizens to enforce all permit conditions. Portland argued that the water quality standards of the CWA represent water quality goals, which are translated into effluent limitations, and that it is the latter that are enforceable. **The court, however, concluded that Congress intended effluent limitations to supplement and improve enforcement of water quality standards, rather than to replace them.** The court cited PUD No. 1 of Jefferson County, in which the Supreme Court held that the CWA allows states to enforce the broad narrative criteria contained in water quality standards, although it did not involve a citizen suit. The court also stated that "citizen suit enforcement of water quality standards is necessary to the effective enforcement of effluent limitations,...as water quality standards often cannot be translated into effluent limitations...." By interpreting the CWA "to exclude citizen suit enforcement of water quality standards that are not translated into quantitative limitations, Portland would have us immunize the entire body of qualitative regulations from an important enforcement tool. Such a result would be especially troubling in this case, because no effluent limitations cover the discharges from Portland's CSOs."

The court affirmed the holding of the district court that the permit covered the CSOs, and reversed the holding that the CWA does not confer jurisdiction for citizen suits to enforce water quality standards when they are part of an NPDES permit.

b. District court grants EPA motion for summary judgment denying citizen suit related to EPA failure to take final action regarding Arizona's water quality standards:

Defenders of Wildlife v. Browner, 888 F. Supp. 1005 (D. Ariz., May 1, 1995).

Plaintiff Defenders of Wildlife brought a citizen suit action pursuant to 33 U.S.C. § 1365(a)(2) against EPA for failure to perform a mandatory duty under the CWA. Plaintiff alleged that the Agency had not taken final action within the mandated statutory period regarding approval and/or denial of the State of Arizona's proposed water quality standards.

The court had previously issued an order dismissing plaintiff's citizen suit action for lack of jurisdiction. This opinion followed on plaintiff's motion to reconsider which asked the court to vacate the previous order and grant leave to file an amended complaint. The court granted plaintiff leave to file an amended complaint to add a claim under the Administrative Procedures Act (APA) on the grounds of unreasonable delay.

On February 19, 1992, Arizona submitted proposed standards to EPA, and EPA approved certain of the standards on March 2, 1992, within the 60 allocated days. Thereafter in April and July, EPA approved additional, proposed standards; however, the 90 days within which EPA had to disapprove standards passed. On September 9, 1993, the Agency disapproved certain of the state's standards and informed the state that it could take final action regarding remaining standards after it completed consultation with U.S. FWS regarding the Endangered Species Act. The Agency took final action approving and disapproving the remaining standards on April 29, 1994. The court ruled that under 33 U.S.C. § 1313(c)(3), the Administrator's duty to "promptly" prepare and publish proposed regulations for Arizona existed as of December 9, 1993, for standards disapproved on September 9, 1993, and existed as of July 29, 1994, for standards disapproved on April 29, 1994.

In addressing plaintiff's position as to whether the Agency failed to comply with a mandatory, nondiscretionary statutory deadline, the court held that **§ 303(c)(4) requires that the Agency act "promptly" and that this requirement is not a categorical mandate from Congress that deprives EPA of all discretion over the timing for preparing and publishing proposed water quality regulations for Arizona**. The court concluded that to allow plaintiffs to go forward under the citizen suit provision of the CWA would upset the delicate balance struck by Congress to permit citizen enforcement only of clear-cut Agency violations and defaults.

The court granted defendant's motion for summary judgment and granted plaintiffs leave to file an Amended Complaint to add a claim under the APA for unreasonable delay on the part of the Agency.

c. District court holds flawed storm water pollution prevention plan in violation of permit requirement is actionable violation of effluent standards for purpose of citizen suit:

City of New York v. Anglebrook Ltd. Partnership, 891 F. Supp. 900 (S.D.N.Y., Jan. 3, 1995).

Plaintiff New York City filed a CWA citizen suit alleging that defendant Anglebrook Limited Partnership's golf course construction plan failed to meet numerous requirements of the New York State Department of Environmental Conservation State Pollution Discharge Elimination System General Permit for Storm Water Discharges from Construction Activities (SPDES General Permit). On March 29, 1994, the City, pursuant to 33 U.S.C. § 1365(b)(1)(A), sent defendants a notice of intent to sue letter providing the requisite 60 days notice of alleged violations. The notice letter specifically identified five deficiencies in defendant's Storm Water Pollution Prevention Plan (SWPPP) and stated that such deficiencies were in violation of the SPDES General Permit.

On September 16, 1994, defendants filed an amended SWPPP. The City filed its complaint on October 5, 1994, alleging inadequacy of the September 16 SWPPP and that once construction commenced, construction-related storm water discharges would constitute additional violations of the Act. Defendant subsequently moved to dismiss pursuant to Federal Rules of Civil Procedure (F.R.C.P.) 12(b)(1) (lack of subject matter jurisdiction in that the City failed to comply with the Act's 60-day notice requirement) and F.R.C.P. 12(b)(6) (failure to state a claim in that no unlawful discharges were alleged).

The Court rejected the defendants' F.R.C.P. 12(b)(6) claim and held that **the City's allegations of defendants' permit violations were... sufficient to state a claim under §1365**. In so holding, the court made three findings: (i) Under 33 U.S.C. §1365(f)(6), citizens may sue for violation of a "permit or condition thereof," "violation of an effluent standard occurs when there is a violation of a permit or a condition of a permit and under § 1365(f)(5) state approval is required well in advance of construction projects as well as discharge of any pollutants." See Keating v. F.E.R.C., 927 F.2d 619 (D.C. Cir., 1991); (ii) though Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49 (1987) stands for the proposition that citizen suits may not be based on anticipated violations of the Act, here, the City's claim of a flawed plan filed in violation of permit requirements is an actionable violation of an effluent standard under §1365(f)(6); and (iii) Courts within the Circuit have held that inadequate plans

in the absence of any polluting event may be the basis for a citizen suit under the CAA. Because the citizen suit provision of the CWA is an analog of the CAA and follows concepts utilized in that act, and because of their contemporaneous enactment, interpretations of provisions of one Act have frequently been applied to the comparable provisions of the other. See NRDC v. Train, 510 F.2d 692 (D.C. Cir. 1975).

Finally, in rejecting the defendant's F.R.C.P. 12(b)(1) claim, the court made two holdings: (i) **because a violation of a permit requirement is, in itself, an independent basis for a citizen suit, notice of a flawed SWPPP is notice of an ongoing violation**, and (ii) **the March 29 notice letter provided defendants... sufficient notice of the SWPPP violations**. The court in large part relied on the fact that the defendant's amended SWPPP, filed in September 1994, was substantially similar to the one filed in December 1993, and the December plan was the basis for the City's March 1994 notice letter. The court denied the Defendant's motion to dismiss this case pursuant of F.R.C.P. 12(b)(1) and (6).

[Note: for summary of substantive case, see City of New York v. Anglebrook Ltd. Partnership, 1995 U.S. Dist. LEXIS 5213 (S.D.N.Y., Apr. 14, 1995) on page 1.]

d. District court holds that although economic injuries are sufficient basis of injury to establish CWA standing, the fact that ground waters are hydrologically connected to surface waters does not contribute to establishing CWA jurisdiction:

Cooper Indus., Inc. v. Abbott Lab., Inc. See page 1 for case summary.

2. Enforcement under comparable law as a bar to citizen suit

a. District court allows CWA citizen suit to proceed after state judicial action on the same violations, in light of the state's failure to determine economic benefit of noncompliance:

Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc., 890 F. Supp. 470 (D.S.C., April 7, 1995).

Plaintiffs brought this citizen action against Laidlaw Environmental Services, Inc. (Laidlaw), owner/operator of a hazardous waste incinerator and associated wastewater treatment plant, to enforce its NPDES permit and requesting relief and the imposition of civil penalties. Defendant moved to dismiss, arguing that the citizen suit is barred under CWA § 505(b)(1)(B), since the state had previously brought and settled a lawsuit against Laidlaw for the same alleged violations. Plaintiffs responded that the state did not "diligently prosecute" its action against Laidlaw so as to preclude this action.

The district court first determined that congressional intent in the CWA's "diligent prosecution" condition was to prohibit citizen suits where the government enforcement agency is diligently prosecuting or has diligently prosecuted a judicial action to enforce the same alleged violations. As to whether the state's prior judicial action and ultimate settlement in this case constituted "diligent prosecution," the court noted various procedural defects: the state filed its complaint and consent order on the very last day of the statutory 60-day notice period during which it was possible for a state court action to preclude a citizen suit; the complaint was filed at the defendant's request, to bar a citizen suit; defendant drafted the complaint and settlement agreement, filed the suit, and paid the filing fee; the settlement agreement was entered into "with unusual haste, without giving the plaintiffs the opportunity to intervene."

While these procedural aspects did not in and of themselves establish lack of diligent prosecution, the lack of opportunity for citizen intervention weighed heavily against the defendant's claim of "diligent prosecution." Moreover, certain substantive provisions of the resulting consent order also weighed in favor of allowing the plaintiff's action to proceed, such as the great difference between the maximum statutory penalty ($2,270,000, in this case) and the actual penalty recovered ($100,000). Even more compelling was

the state's failure to recover, or even calculate the economic benefit that Laidlaw received by not complying. While the calculation of economic benefit is not required under the CWA for civil penalties, "recoupment of a violator's economic benefit of noncompliance is central to the enforcement of the CWA." For this reason, "the failure of the state enforcement agency to recover, or even to determine, a violator's economic benefit is strong evidence that the agency's prosecution of that violator was not diligent for purposes of § 505(b)(1)(B)." Therefore, the plaintiff's citizen suit was not barred by the state agency's prior judicial enforcement action.

3. Attorneys' Fees

a. Third Circuit rejects use of a flat 50 percent negative multiplier based on 50 percent success in awarding fees and costs to prevailing plaintiff in citizen suit, and allows fee award resulting from fee contest itself:

Public Interest Research Group, Inc. v. Windall, 51 F.3d 1179 (3d Cir., Apr. 10, 1995).

Public Interest Research Group of New Jersey (PIRG) filed a citizen suit against the U.S. Air Force for violations of the CWA at McGuire Air Force Base. While the suit was pending, the Air Force and EPA agreed to a consent order in a separate EPA action, in which it agreed to attain compliance with its NPDES permit and to submit progress reports on compliance with imposed interim effluent discharge limitations. The Air Force offered to settle the suit with PIRG at this point, but PIRG refused, because the offer "failed to provide all the relief PIRG wanted." PIRG counter-offered, however, asking the Air Force to pay civil penalties for every future permit violation. Meanwhile, the district court granted PIRG's motion for summary judgment and issued a permanent injunction against the Air Force. PIRG withdrew its claim for civil penalties, in light of the sovereign immunity holding in Dept. of Energy v. Ohio, 503 U.S. 607 (1992).

During proceedings to determine counsel fees and costs, the magistrate judge used a 50 percent negative multiplier since PIRG had obtained no monetary damages in the suit, which was one of the two claims. The judge noted that the injunctive relief granted to PIRG was substantially identical to the relief in the consent order between EPA and the Air Force, but conceded that PIRG had achieved "limited" success on this issue. The district court also denied the application for attorney fees incurred in the dispute over the fee award, since the total recommended for fees in the underlying case was a mere $11.20 over the settlement offer made by the Air Force.

PIRG appealed the 50 percent negative multiplier (applied by the district court). Relying on principles set out in Hensley v. Eckerhart, 461 U.S. 424 (1983), **the court concluded that only after the "lodestar" (reasonable hours expended x hourly rate for services in applicable market) is determined does the district court have discretion to consider results obtained and exclude some or all of the time spent on unsuccessful claims**. "A simple, mechanistic reduction based solely on the ratio of successful to unsuccessful issues is precluded." The court vacated the lower court's fee award accordingly. PIRG also questions the denial of its application for counsel fees and expenses incurred in litigating the initial fee request. Citing previous caselaw, the court held that legal services rendered in a dispute over the attorneys' fees due a prevailing plaintiff are recoverable under a fee shifting statute, remanding this issue for calculation of fees.

The court also affirmed the district court's choice of the entire District of New Jersey as the relevant market for legal rates and remanded for consideration the Air Force's objections to the propriety of PIRG's charges. The court observed that the district court must "consider a party's objections to particular time charges and make [its] findings on the hours that should be included in calculating the lodestar.

b. Ninth Circuit upholds denial of attorneys' fees where citizen suit did not prompt remedial action and the resulting consent decree specified that monetary settlement would not be

considered in a petition for attorneys' fees:

Citizens for a Suitable Highway v. Forbes, 1995 U.S. App. LEXIS 1178 (9th Cir., Jan. 20, 1995) [Note: Unpublished opinion - check applicable court rules before citing].

Citizens for a Suitable Highway (Citizens) appealed the district court's order denying their petition for attorneys' fees in their suit against defendant for discharging fill material into a wetland on school district property without a CWA permit. The fill had been placed on the property at the request of local groups interested in building a baseball field, by a construction company working on a nearby portion of highway.

After this discharge had come to the attention of a Federal Fish and Wildlife Service official, the defendants negotiated with the school district and the State Department of Transportation to remove the fill under threat of referring the case to the U.S. Justice Department.

Plaintiffs filed a citizen suit, seeking declaratory and monetary relief to create or enhance another wetland; they did not seek to have the fill removed. A settlement was negotiated, in which defendants agreed to pay citizens $38,000 to create or enhance watersheds located in the Ecological vicinity of the subject wetland.

The district court denied the plaintiff's petition for attorneys' fees, reasoning that the citizens' suit did not prompt the removal of the fill on the school property. Moreover, pursuant to the terms of the consent decree, the court excluded consideration of the $38,000 payment to Citizens in its decision. Affirming the district court's holding, the 9th Circuit stated that Citizens was not a prevailing party, since at the time that Citizens filed its formal complaint, negotiations for removing the fill had already been completed. Moreover, the court held that the consent decree was unambiguous in precluding consideration of the $38,000 payment, and that therefore Citizens was bound by agreement to this term of the consent decree. Accordingly, the district court's denial of attorneys' fees was affirmed.

4. Remedies

a. District court denies injunction against construction of CSO retention basin where its impact has been properly assessed and the project is found to be in the public interest:

Pure Waters, Inc. v. Director of Michigan Dep't of Natural Resources, 883 F. Supp. 199 (E.D. Mich., Apr. 21, 1995).

Plaintiff citizens group brought suit against the Michigan Department of Natural Resources (MDNR), requesting an injunction to halt construction of the Linden Park retention basin (RTB), an impoundment designed to limit the amount of discharge of untreated CSO into the Rouge River. Plaintiff's complaint stated that the process leading to approval of the Linden Park RTB and defendant's EA and finding of no significant impacts (FONSI) failed to meet the requirements of the National Environmental Policy Act (NEPA), the Michigan Environmental Protection Act (MEPA), Michigan Compiled Laws, applicable state and Federal water quality standards under the CWA, and defendants' NPDES permit. Plaintiff argued that it would be irreparably harmed by construction of the Linden Park RTB because NEPA and MEPA were not followed during the approval stages.

The District Court denied plaintiff's request for an injunction, holding that the approval process for the Linden Park RTB did not violate NEPA or MEPA and that plaintiff's claim of irreparable harm was without merit.

The court found that MDNR's preparation of an EA, provision of a public comment period, and issuance of a FONSI satisfied the requirements of NEPA in form and substance. It was clear to the court that MDNR considered potential problems associated with the Linden Park RTB plan and possible alternatives, and concluded that any possible negatives associated with the proposal were greatly outweighed by the positive attributes of the project. Because NEPA does not mandate particular results but simply prescribes the necessary process, if the adverse environmental effects of the proposed action are adequately identified and evaluated, an agency is not

constrained by NEPA from deciding, as here, that other values outweigh the environmental costs.

The court also found plaintiff's MEPA claim to be without merit. MEPA requires, in part, that a plaintiff show that the impact of an activity on the environment rises to the level of impairment. Because construction of the Linden Park RTB would dramatically improve water quality of the Rouge River, Judge Feikens could find no evidence that the project would impair the environment.

The court concluded that while issuance of an injunction would be warranted where the likelihood of a plaintiff sustaining irreparable harm was so great that it outweighed the public interest, the public interest in allowing construction of the Linden Park RTB easily outweighed the alleged harm plaintiff would suffer if an injunction was not issued.

5. Notice Requirements

a. Third Circuit holds that notice of discharge violations that provides sufficient information to identify additional violations of the same type occurring during and after the period covered by notice is sufficient to cover the additional violations:

Public Interest Research Group, Inc. v. Hercules, Inc., 50 F.3d 1239 (3d Cir., Mar. 31, 1995).

Plaintiffs, Public Interest Research Group of New Jersey, Inc. (PIRG) and Friends of the Earth (FOE), filed a citizen suit complaint under the CWA 33 U.S.C. § 1365, alleging that Hercules had committed more than 68 discharge violations of its Federal and state permit at the defendant's Gibbstown facility. Pursuant to 33 U.S.C. § 1365(b), NJPIRG/FOE gave 60 days' notice to the EPA, the New Jersey Department of Environmental Protection and Energy (NJDEPE), and Hercules of its intention to sue Hercules for the 68 discharge violations.

NJPIRG/FOE subsequently supplemented their list of the defendants' alleged discharge violations to include 114 discharge violations, 328 monitoring violations, 58 reporting violations, and 228 recordkeeping violations. These violations were alleged to have occurred before, during, and after the period of the original 68 violations. Hercules filed a cross motion seeking summary judgment and alleging that NJPIRG/FOE failed to comply with the CWA and the accompanying regulation's (40 CFR § 135.3(a)) 60-day notice requirement in that plaintiffs did not provide a new letter giving 60 days notice of the additional violations.

The district court granted summary judgment for Hercules for all pre-complaint discharge violations not listed in the original notice letter and all monitoring, reporting and recordkeeping violations. The court granted summary judgment to NJPIRG/FOE as to 43 of the 68 discharge violations listed in the notice letter and complaint, and 17 post-complaint discharge violations of the same type as those identified in the notice letter.

Both parties appealed, with Hercules asserting that plaintiffs' 60-day notice letter lacked the required statutory and regulatory specificity to put recipients on notice of the violations upon which plaintiffs intended to sue. The Circuit Court held that **notice of one facet of an effluent infraction is sufficient to permit the recipient to identify other violations arising from the same episode.**

The court separately addressed the pre-complaint discharge violations, the post-complaint discharge violations, and the monitoring, reporting, and recordkeeping violations. With respect to the pre-complaint discharge violations, the court held that **a notice letter that includes a list of discharge violations, by parameter, provides sufficient information for the recipients to identify violations of the same type (same parameter, same outfall) occurring during and after the period covered by the notice letter.** With respect to the post-complaint discharge violations, the court did not distinguish between post- and pre-complaint violations and stated that **as long as a post-complaint violation is of the same type as a violation included in the notice letter (same parameter, same outfall), no new 60-day notice letter is necessary to include these violations in**

the suit. Finally, the court held that **when a parameter violation has been noticed, subsequently discovered, directly related violations of discharge limitations or of monitoring, reporting, and recordkeeping requirements for that same parameter at the same outfall and for the same period may be included in the citizen suit.**

The judgment of the district court was reversed and the case remanded for further consideration consistent with the court's opinion.

b. Ninth Circuit finds notice of citizen suit insufficient where it fails to identify all plaintiffs:

Washington Trout v. McCain Foods, Inc., 45 F.3d 1351 (9th Cir., Jan. 24, 1995).

Plaintiffs United Food and Commercial Workers, Local 1439 (Union), Washington Trout, and the Central Basin Audubon Society brought a citizen suit under the CWA against McCain Foods, Inc. (defendant). Plaintiffs alleged that the defendant, without obtaining an NPDES permit and in violation of the CWA and Washington State environmental statutes, discharged pollutants from its potato processing plant into Owl Creek.

Plaintiff Union sent notice of intent to bring suit on February 25, 1992. The notice letter did not provide the address and phone number of the named plaintiff nor the identity, address, or phone number of Washington Trout and the Central Audubon Society. The letter also failed to identify the dates of the alleged violations. On June 15, 1992, the Union, Washington Trout, and Audubon filed suit under the Act. The Union was subsequently dismissed from the suit when it went into trusteeship. Defendant moved for summary judgment on grounds that the notice was defective in that it did not (i) identify Washington Trout or Audubon as plaintiffs; (ii) contain the address or phone number of the Union; or (iii) specify the dates of alleged violations.

The district court agreed with the defendant's position and dismissed the suit for lack of subject matter jurisdiction upon determining that the plaintiffs had not complied with the notice provisions of 33 U.S.C. § 1365 and 40 CFR § 135.3(a). In affirming the district court, the Circuit Court, citing Hallstrom v. Tillamook County, 493 U.S. 20 (1989), held that **the notice provided McCain was insufficient as required by the regulations promulgated under the CWA. In particular, the notice failed to identify the two additional plaintiffs, making it impossible for either EPA or McCain to negotiate or seek an administrative remedy. Therefore, the Ninth Circuit ruled that the district court was correct in dismissing the action for lack of subject matter jurisdiction**.

c. Ninth Circuit upholds dismissal of citizen suit and award of attorneys' fees for noncompliance with notice requirements:

Hispanos Unidos v. Scab Rock Feeders, Inc., 1995 U.S. App. LEXIS 9091 (9th Cir., Apr. 18, 1995) [Note: Unpublished opinion - check applicable court rules before citing.]

Plaintiffs Hispanos Unidos, Washington Trout, Irene Salas, and Central Basin Audubon Society (Citizens) appealed the district court's dismissal of their suit under the CWA against Scab Rock Feeders, Inc. for lack of subject matter jurisdiction. Citizens alleged that Scab Rock discharged pollutants from its feedlot in violation of the CWA. The district court found that Citizens' 60-day notice letter to defendants was jurisdictionally defective under the CWA. Scab Rock cross-appealed, contending that the district court erred by awarding it a lesser amount of attorney's fees than requested.

The Ninth Circuit held that the district court properly dismissed Citizens' action for lack of subject matter jurisdiction, and that because Citizens filed an amended complaint based upon the original defective notice, the district court did not abuse its discretion by awarding attorney's fees against Citizens.

Regarding Citizen's 60-day notice letter, the Ninth Circuit followed Washington Trout v. McCain Foods, Inc., 45 F. 3d 1351 (9th Cir., 1995), which held that the failure to provide the dates of the

alleged violations or the addresses and phone numbers of the plaintiffs in the notice, as required by regulations promulgated under the CWA, deprived the district court of subject matter jurisdiction.

The Ninth Circuit upheld the district court's finding that, pursuant to Title 28 U.S.C. § 1927, Citizens' action in filing the suit "unreasonably and vexatiously multiplied the proceedings," warranting imposition of attorneys' fees against Citizens.

The court denied Scab Rock's claim for a greater award of attorneys' fees, finding that because Citizens raised an arguable issue that had not been previously addressed by the court, their case was not unreasonable or frivolous.

d. District court holds that notice of a flawed storm water pollution prevention plan constitutes notice of an ongoing violation for purposes of 33 U.S.C. § 1365:

City of New York v. Anglebrook Ltd. Partnership. See page 10 for case summary.

e. District court dismisses citizen suit for failing to meet the notice requirement:

Atlantic States Legal Found. v. G. Heileman Brewing Co., 1995 U.S. Dist. LEXIS 7383 (D. Or., May 18, 1995).

The Atlantic States Legal Foundation (Atlantic) brought a citizens suit under 33 U.S.C. § 1365(b)(1) seeking to enforce a wastewater discharge permit issued to the G. Heileman Brewing Company (Heileman) of Portland, Oregon. Atlantic mailed its notice of intent to sue on December 2, 1994, and Heileman received the notice on December 5, 1994. On January 31, 1995, Atlantic filed its action against Heileman. On the same day, Heileman entered into a Consent Decree with the City of Portland and the State of Oregon. The City and the state also filed the Consent Decree that day, along with a complaint against Heileman, in the Circuit Court of the County of Multnomah Oregon.

Defendant's filed a motion contending that the court should dismiss the suit on the pleadings, or in the alternative, grant summary judgment to Heileman for the following three independent reasons: (i) the Federal court should abstain from jurisdiction because the Oregon Circuit Court has exercised jurisdiction; (ii) Atlantic did not comply with the notice provisions of 33 U.S.C. § 1365(b)(1); and (iii) Atlantic's claims have been rendered moot by the entry of the Consent Decree.

The court rejected Heileman's contention that the notice was legally served on the date the notice was received by Heileman rather than on the date mailed by Atlantic. In doing so, the court cited 40 CFR § 135.2(c), which provides that "notice given in accordance with the provisions of this subpart shall be deemed to have been served on the postmark date if mailed, or on the date of receipt if served personally." The court noted that the statute requires a period of 60 days between the date on which the notice of an alleged violation is mailed and the date on which the action is filed. In finding that it did not have subject matter jurisdiction, the court held **this action was filed 60 days after the notice of the alleged violation was mailed and therefore did not meet the statutory requirement for notice**. It was the court's position that Atlantic should have waited one more day before filing in order to comply with the 60-day notice requirement.

The court did not address the remaining issues raised by Heileman, granted Heileman's motion to dismiss or, in the alternative, for summary judgment, and entered judgment accordingly.

F. Judicial Review

1. Pre-enforcement Review of CWA § 309(a) Administrative Orders

a. Tenth Circuit joins Fourth, Sixth, and Seventh Circuits in holding that Congress did not intend to allow judicial review of EPA compliance orders under the CWA:

Laguna Gatuna, Inc. v. Browner, 58 F.3d 564 (10th Cir., June 20, 1995).

Laguna Gatuna, an industrial wastewater disposal operation, had received written notice from EPA that the sinkhole it used for waste disposal was not "waters of the United States" subject to EPA jurisdiction, based on the representation that the sinkhole was "not hydrologically connected" to other waters and there were "no recreational, industrial, or other uses that could affect interstate commerce." Nevertheless, EPA issued a compliance order to Laguna to cease disposal of industrial wastewater into the sinkhole upon finding dead migratory birds nearby. Laguna complied and filed an action for declaratory relief, claiming that EPA had no jurisdiction. The district court dismissed the action for lack of subject matter jurisdiction, resulting in this appeal.

Citing to Southern Ohio Coal Co. v. Office of Surface Mining, 20 F.3d 1418 (6th Cir.), *cert. denied*, 115 S. Ct. 316 (1994); Rueth v. United States EPA, 13 F.3d 227 (7th Cir., 1993); and Southern Pines Assocs. v. United States, 912 F.2d 713 (4th Cir., 1990), **the court stated that Congress did not intend to allow judicial review of compliance orders under the CWA**. The plaintiffs in all three cases cited by the court as "indistinguishable from this case" made similar challenges that their land was not within the CWA definition of 'waters of the United States' and that the compliance order and lack of Federal review violated guarantees of substantive and procedural due process. The court agreed with those circuits that there is no jurisdiction to make such challenges, and the district court's order dismissing the case was affirmed.

G. Administrative Hearings

1. Board confirms that issues identified during comment period are preserved for evidentiary hearing purposes:

In re Florida Pulp and Paper Ass'n, NPDES Appeal Nos. 94-4 & 94-5 (Envtl. Appeals Bd., May 17, 1995) *Order Denying Review in Part and Remanding in Part*.

Respondents sought review of the partial denial of their evidentiary hearing requests on certain issues relating to the renewal of their pulp mill's NPDES permit. Buckeye appealed on three issues: (1) whether the Region had the legal authority to require sampling and analysis of sludge; (2) whether there is an accepted, validated protocol for analyzing ambient crab tissue, and if not, whether the Region improperly required Buckeye to prepare a plan of study for such analysis; and (3) whether the Region improperly imposed an ICS under CWA 304(l) and, assuming the Region did impose an ICS, whether the Region misapplied § 304(l) in establishing the schedule of compliance. Florida Pulp and Paper Associates (FPPA) sought review on two issues: (1) whether the Region improperly imposed an ICS; and (2) Whether the species of organisms proposed for use in chronic toxicity tests are representative of species inhabiting waters affected by the discharge.

The EAB held that the latter FPPA issue be remanded so that an evidentiary hearing could be conducted. In its comments on the draft permit, FPPA had stated that the proposed species may not be representative of species affected by Buckeye's discharge. The Region denied FPPA's hearing request on this issue, stating that the issue had not been raised with sufficient specificity. However, the EAB held that because the issue was sufficiently well-defined to elicit a substantive response from the Region, and because another commenter raised the same issue (and also elicited a substantive response), the EAB rejected the Region's assertion. **The issue of whether a permit's designated test species are suitable surrogates for indigenous species is a genuine issue of material fact which, if adequately raised, requires an evidentiary hearing.**

Review was denied for the remaining issues. The first two raised by Buckeye were not raised in its comments on the draft permit and thus were not preserved for hearing. With regard to the third issue relating to the permit's 3-year compliance schedule, the EAB concluded that the Region did not (and could not) impose an ICS, because the statutory prerequisites for doing so had not been met as to that facility.

H. Sludge Use and Disposal

1. District court finds that county ordinance prohibiting land

application of sewage sludge is not preempted by CWA and does not violate Commerce Clause:

Welch v. Board of Supervisors, 1995 U.S. Dist. LEXIS 8263 (W.D. Va., May 24, 1995).

Plaintiff farmers, who wanted to apply sewage sludge to their land located in Rappahannock County (County), appealed a magistrate's final judgment finding that a county zoning ordinance that prohibits the land application of sewage sludge within the County was not preempted by the CWA and did not violate the Commerce Clause of the U.S. Constitution.

The district court for the Western District of Virginia affirmed the decision of the magistrate judge, holding that the County ordinance was not preempted by the CWA because the CWA allows states and localities to enact requirements for the use and disposal of sewage sludge more stringent than the Federal requirements. The court further held that the County ordinance did not violate the Commerce Clause because the County had demonstrated health and safety benefits of the ordinance that were not illusory and because plaintiffs failed to provide sufficient evidence that the burden on the free flow of sewage sludge in interstate commerce was clearly excessive in relation to the putative local benefits asserted by the County.

The district court rejected plaintiff's contention that Federal regulations promulgated pursuant to the CWA established a national policy favoring land application of sewage sludge and that the County ordinance was preempted because it conflicted with this policy. Of the three approved methods for disposal of sewage sludge, incineration, disposal in a landfill, and land application, EPA's regulations appear to reflect a preference for land application. The regulations state, in part, that land application is a means of making "beneficial use" of sewage sludge and that communities should consider alternatives to burying or burning their sludge (58 Fed. Reg. 9249 (Feb. 19, 1993)). **The court found, however, that the CWA explicitly leaves the manner of disposal or use of sewer sludge up to local determination, and that notwithstanding any regulatory preference for land application, EPA's final rules leave the ultimate decision to states and localities. The court concluded that the County ordinance did not conflict with the Federal standards for use or disposal of sewage sludge.**

The Commerce Clause claim was reviewed pursuant to the test set forth in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970): "Where the statute regulates evenhandedly to affect a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." The only burden on interstate commerce asserted by the plaintiffs was that they could not use sewage sludge as a fertilizer on their land. **Balancing the County's legitimate local interest in promoting health and safety against plaintiff's insufficient evidence demonstrating an excessive burden on interstate commerce, the court concluded that the County ordinance did not violate the Commerce Clause.**

I. Enforcement Actions/Liability/Penalties

1. Ninth Circuit joins Fourth Circuit and Eleventh Circuit in holding that CWA § 309(d) civil penalties are mandatory:

Leslie Salt Co. v. United States. See page 3 for case summary.

2. Second Circuit holds that government need not prove defendant knew his conduct was unlawful to establish criminal violation due to CWA permit violations:

United States v. Hopkins, 53 F.3d 533 (2d Cir., Apr. 28, 1995).

Defendant Robert H. Hopkins appealed from a judgment entered in the U.S. District Court for the District of Connecticut following a jury trial convicting him on one count of falsifying, tampering with, or rendering inaccurate a

monitoring device or method required to be maintained pursuant to CWA § 309(c)(4), 33 U.S.C. § 1319(c)(4)); one count of violating the restrictions of a discharge permit issued pursuant to CWA § 309(c)(2)(4), 33 U.S.C. § 1319(c)(2)(A); and one count of conspiracy to violate §§ 309(c)(2)(A) and (c)(4). The U.S. charged that Hopkins, as Vice President for Manufacturing of Spirol International Corporation (Spirol), deliberately tampered with Spirol's wastewater testing and falsified its reports to the State of Connecticut's Department of Environmental Protection (DEP), which administered the CWA provisions applicable to Spirol's discharges into nearby Five Mile River. Hopkins was sentenced to 21 months' imprisonment, to be followed by a two-year period of supervised release, and ordered to pay a $7,500 fine. On appeal, he contended that the district court improperly instructed the jury on the knowledge element of each count of the indictment and erred in giving a "conscious avoidance" instruction with respect to the two substantive counts.

The Second Circuit affirmed Hopkins' conviction, holding that the trial court correctly instructed the jury that the government was required to prove only that Hopkins knew the nature of his acts and performed them intentionally, not that he knew that those acts violated the CWA or the regulatory permit issued to Spirol. The court also held that the district court did not err in instructing the jury that it could find Hopkins guilty based upon his conscious attempt to avoid actual knowledge that wastewater samples had been falsified.

The circuit court noted that in constructing knowledge elements that appear in "public welfare" statutes, i.e., statutes that regulate the use of dangerous or injurious goods or materials, the Supreme Court has inferred that Congress did not intend to require proof that the defendant knew his actions were unlawful. The Supreme Court has stated that "where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." United States v. Int'l Minerals & Chemical Corp., 402 U.S. 558, 565 (1971). The Second Circuit also found that the legislative history of § 1319(c)(2)(A) and (c)(4) supported the conclusion that the government need not prove that the defendant knew his conduct was unlawful.

The court also rejected Hopkins' contention that the trial court should not have given a conscious avoidance instruction to the jury. A conscious avoidance charge is appropriate when (a) the element of knowledge is in dispute and (b) the evidence would permit a rational juror to conclude beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact. The court found that both prerequisites for a conscious avoidance instruction were present in this case and that in addition to ample evidence that Hopkins himself had ordered the tampering with the wastewater samples, there was also evidence that he had studiously avoided confirming the tampering.

3. District court imposes statutory maximum civil penalty against a chemical manufacturing facility for multiple NPDES discharge violations:

Public Interest Research Group, Inc. v. Magnesium Elektron, Inc., 40 ERC 1917 (D.N.J., Mar. 9, 1995).

Defendant Magnesium Elektron, Inc. (MEI), a chemical manufacturing plant, stipulated in an earlier court order to liability under the CWA for 41 discharge violations related to its NPDES permit, 76 monitoring violations, 4 reporting violations, and 2 bypass violations. Subsequently, MEI was also found liable for 27 additional violations for unpermitted total organic carbon discharges. Plaintiffs filed this citizen suit under the CWA seeking the imposition of the statutory maximum civil penalty of $2,625,000 for this total of 150 CWA violations.

To determine the penalty amount for these violations, the court reviewed the statutory factors set forth in the CWA. First, in an effort to quantify economic benefit to MEI resulting from noncompliance, the court heard testimony by Dr. Michael Kavanaugh. He convinced the court that

the economic benefit of noncompliance in this case was the cost of hauling all wastewater to Trenton during the period of violations, or $5,330,000. The court noted, however, that "if the penalty arrived at by calculation of the economic benefit exceeds the statutory maximum penalty, the penalty will be reduced to the statutory maximum," in this case $2,625,000.

With regard to the seriousness of the violations, the court concluded, in general, that none of the discharge violations were serious, because there was no evidence of any harm to the environment or of any aesthetic problem as a result of the discharges. In contrast, because specific records related to MEI's permit reporting requirements were the only source of information available to enforcement agencies, plaintiffs, and the public, the non-discharge violations were deemed serious. However, because the economic benefit factor already caused the penalty to exceed the statutory maximum, no further calculations related to seriousness were determined to be necessary.

Similarly, MEI's extensive history of violations and mixed efforts to comply did not receive further consideration because of the results of the economic benefit factor. It was also determined that MEI's parent company (Alcan Aluminum) would be able to pay a penalty of up to $10,000,000 without any measurable effect on its solvency. For these reasons, **the court imposed the maximum civil penalty statutorily allowed, in the amount of $2,625,000.**

4. A prima facie CWA 301(a) case requires a showing that respondent had responsibility, control or authority over the discharges:

In re Urban Drainage & Flood Control District, Docket No. CWA-VIII-94-20-PII (Vanderheyden, Feb. 14, 1995) Order Granting Respondent's Accelerated Decision Motion and Denying Complainant's Motion for Partial Accelerated Decision.

Because of flood control and erosion problems in a creek on property owned by the City of Lafayette, the City requested the Urban Drainage and Flood Control District to undertake a repair project. EPA filed a complaint against the City, the District, and the contractor that performed the project for the alleged unauthorized discharge of dredged and fill material in violation of CWA 301(a). Upon a motion by the City for an accelerated decision to be dismissed as a respondent for failure of the complaint to establish a prima facie case, the ALJ Vanderheyden noted that liability will attach if the respondent is the legal cause of the discharge. **"The causation requirement can be fulfilled if the respondent has responsibility, control or authority over the discharges." [citing to Love v. New York State Dep't of Envtl. Conservation, 529 F. Supp. 832 (S.D.N.Y. 1981)].**

EPA argued that, although the City did not actually discharge dredge and fill material, the City had substantial control and responsibility over the project by providing fill and transport of fill for the project; installing access gates to the area; and surveying the completed project with the District. The ALJ found, however, that the District has the statutory responsibility to implement maintenance projects for the protection of waterways in the state, and that the complaint had failed to produce sufficient allegations that the City had control over the alleged discharges Consequently, the court held that the City should be dismissed as a respondent.

J. Consent Decrees

1. District court disallows action to amend complaint to add causes of action previously subject to final consent order, but finds that addition of defendant 18 months after initial complaint filed does not constitute undue delay:

United States v. Florida Cities Water Co., 1995 U.S. Dist. LEXIS 7510 (M.D. Fla., April 26, 1995).

The United States (U.S.) sought leave to amend its complaint against Florida Cities Water Co. (Florida Cities) to 1) to add new allegations of CWA violations against Florida Cities, and 2) add Avatar Holdings Inc. (Avatar) as a defendant in its action against Florida Cities. In the amended complaint, the U.S. alleged that Florida Cities had violated CWA § 1319(b) at its Barefoot Bay and

Carrollwood facilities. In addition, the U.S. alleged that Avatar, through a series of holding companies, was directly responsible for Florida Cities' environmental practices and, therefore, a proper party to the litigation. Prior to this motion to amend, Florida Cities had entered into final Consent Agreement and Orders with EPA regarding the violations at the Barefoot Bay and Carrollwood facilities.

Florida Cities argued that pursuant to 33 U.S.C. § 1319(g)(6)(A), final Consent and Agreement Orders are not subject to judicial review, and that the U.S. was barred from seeking penalties for discharges from these facilities without an NPDES permit. Florida Cities maintained that the unauthorized discharges violations at the Barefoot Bay facility were settled via a consent decree and, among other evidence, produced copies of cancelled checks indicating the payment of penalties assessed for the alleged violations. Florida Cities also asserted that the penalties with respect to the similar violations at the Carrollwood facility were settled via a consent order, and that EPA closed the matter with respect to Carrollwood when it issued a March 3, 1992 compliance letter. The court agreed with Florida Cities, and held that because the proposed amendments would be futile and the proposed Amended Complaint would be subject to dismissal upon a motion to dismiss, denial of leave to amend the complaint was proper.

Avatar argued that allowing the motion for leave to amend would be untimely and prejudicial, and it would make Avatar the first-named and principle defendant, thereby radically altering the scope of the case. **The court, in upholding the plaintiff's Motion for Leave to Add Party, held that although the Complaint was filed approximately 18 months before the Plaintiff's motion for leave to amend the Complaint, under the circumstances of this case, such period does not constitute undue delay.** The court noted that brief extensions of discovery deadlines might be necessary in order to prevent prejudice to Avatar.

II. SAFE DRINKING WATER ACT

A. Fourth Circuit holds that evidence that TCE concentrations in water wells originating from a nearby facility that exceeded EPA MCLs is sufficient to show substantial injury or actual damage for purposes of proving nuisance and trespass:

Carroll v. Litton Systems, Inc., 1995 U.S. App. LEXIS 10833 (4th Cir., Feb. 1, 1995).

A Litton Systems, Inc. (Litton) facility in North Carolina used trichloroethane (TCE) as a degreasing solvent from 1967 until about 1974. In 1986, Litton detected TCE in the groundwater at the plant site, and subsequent tests indicated that TCE was also present in plaintiffs' private drinking water wells located on nearby property. In 1988, a number of people who had obtained their drinking water from these wells brought suit against Litton, asserting claims of negligence, gross negligence, strict liability, nuisance, and trespass, as well as claims under CERCLA and RCRA.

Plaintiffs claim that during the 15 years prior to the discovery of the TCE in the wells in 1986, plaintiffs consumed TCE in their drinking water and, as a result, developed a variety of health problems known to be caused by TCE exposure. For the purposes of its motion for summary judgment, Litton conceded that the TCE found in the residential wells in 1986 originated at its plant. Expert testimony was presented by the plaintiffs that Litton's TCE entered the residential wells in 1970, that certain estimated quantities of TCE would have existed in the wells since 1970, and that plaintiffs' health problems would have been caused by Litton's TCE if the previous calculations were correct. The district court found that such unsupported evidence was inadmissible. Moreover, the entry of Litton's TCE into the wells constituted only a de minimis encroachment and, therefore, did not cause a substantial injury (required for nuisance claims) or actual damage (required for trespass). Accordingly, the lower court granted summary judgment for Litton on all claims.

Addressing the personal injury claims, the Fourth Circuit explained that the plaintiffs must have submitted "admissible evidence from which a reasonable jury could find, viewing this evidence in the light most favorable to the plaintiffs, that Litton's TCE caused their medical problems." The

court concluded that even though plaintiffs' expert witnesses failed to provide evidence that is adequately supported by scientific testing, documentation, or acceptance in the scientific community, sufficient additional evidence existed that could persuade a reasonable jury to find that the plaintiffs' health problems were caused by Litton's TCE. (Plaintiffs had presented evidence that Litton used TCE at its plant for a period of time; that the TCE found in the wells originated from the plant; and that the types of health problems experienced by the plaintiffs were known to be caused by TCE.) As a result, the court reversed the summary judgment as to the personal injury claims. With regard to nuisance and trespass claims of plaintiffs owning the wells, **the court found that the concentration of TCE measured in the well water in 1986, compared to EPA's published MCL**, was sufficient evidence to allow a reasonable jury to conclude that Litton's TCE had caused them substantial injury or actual damage. The lower court's grant of summary judgment on these claims was reversed as well, remanding the issue for a determination of which plaintiffs owned the wells.

Considering the CERCLA claim, the court noted that plaintiffs did not even attempt to show that the costs they sought to recover under § 107 were incurred consistent with the national contingency plan in effect when they brought their action. Similarly, the plaintiffs made no showing that any of Litton's alleged violations of RCRA requirements were continuing at the time they filed their action. Accordingly, the court affirmed the district court's grant of summary judgment for Litton on the CERCLA and RCRA claims.

B. D.C. Circuit dismisses (and remands) for review of final atrazine standards for lack of ripeness, as petitioner had not yet appealed EPA's denial of request for review:

Ciba-Geigy Corp. v. EPA, 46 F.3d 1208 (D.C. Cir., Feb. 21, 1995).

Ciba-Geigy petitioned for review of an EPA final rule under the Safe Drinking Water Act (SWDA) setting the Maximum Contaminant Level (MCL) and Maximum Contaminant Level Goal (MCLG) for atrazine, an herbicide developed and in large part produced by Ciba-Geigy. Almost 3 years after issuing the final rule, EPA published a revised atrazine reference dose which, under the method the Agency had used in the final rule, would yield a higher MCLG. In response to this change, petitioner filed for review of the final rule's atrazine MCLG and corresponding MCL. The SDWA provides that such a request must generally be filed "within the 45-day period beginning on the date of the promulgation of the regulation...." However, the statute permits late filing "if the petition is based solely on grounds arising after the expiration of such period." It is under this provision that Ciba-Geigy filed this petition after the 45-day period, claiming the recently revised reference dose as the "new ground."

After filing this petition, Ciba-Geigy also filed a request with EPA seeking revision of the atrazine MCL and MCLG and a stay of their effectiveness based on the new reference dose. EPA denied the petition, yet Ciba-Geigy had not yet petitioned review of the denial.

Citing Oljato Chapter v. Train, 515 F.2d 654 (D.C. Cir., 1975), the court "found it within [its] inherent powers to enforce our interest in informed decision-making by requiring presentation to the Administrator of any new information thought to justify revision of a standard of performance, or any other standard reviewable" under the Act before exercising its own jurisdiction. This rule, explained the court, is derived from ripeness concerns rather than from administrative exhaustion requirements. Accordingly, the petition was dismissed without prejudice and remanded to develop a reviewable record and, in the interest of economy, to consider again whether to revise the atrazine MCLG and MCL in light of the new reference dose.

III. OIL POLLUTION ACT

A. Eleventh Circuit holds that OPA §2713 creates a mandatory condition precedent barring all OPA claims until presentment through claims procedures in OPA 2713(a):

Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., 51 F.3d 235 (11th Cir., decided Apr. 17, 1995; Second Amendment, April 26, 1995).

The Appellants brought this action under the Oil Pollution Act (OPA) to recover business, property, and tourist damages sustained as a result of an oil spill in Tampa Bay that resulted from the collision of the appellees' vessels. Appellees moved to dismiss for lack of subject matter jurisdiction because the Appellants had failed to comply with OPA's claims presentation procedure. Appellees argued that resort to the claim procedure is a mandatory condition precedent to any OPA lawsuit, and that Appellants' failure to present their claims rendered them unripe for judicial resolution. Appellants maintained that the OPA's claims presentation requirement applies only to actions seeking to recover from the OPA-created fund, and not to action brought directly against the responsible parties.

Looking first to the plain meaning and the legislative history of the statute, the court found that "no reading of §2713(a)'s language suggests that Congress intended to limit its applicability to claims against the Fund," meaning that all claims are required to be presented through the procedures set out in OPA. Furthermore, a comparison with comparable CERCLA provisions supports this conclusion; unlike OPA's claims provision, which states that "all claims... shall be presented...," CERCLA's claims provision states that "all claims which may be asserted against the Fund... shall be presented." The court interpreted this difference to mean that Congress "purposely rejected the CERCLA approach limiting the presentation requirement to those claims asserted against the Fund."

Accordingly, the court held that the clear text of OPA §2713 creates a mandatory condition precedent barring all OPA claims unless and until a claimant has presented her claims in compliance with §2713(a).

B. District court holds that OPA does not apply to diesel spill from locomotive fuel tanks:

United States v. Southern Pacific Transp. Co., 1995 U.S. Dist. LEXIS 5247 (D. Or., Jan. 20, 1995).

Plaintiff filed this action seeking civil penalties, injunctive relief, and cost recovery for claims arising out of a discharge of diesel fuel into navigable waters of the United States and adjoining shorelines following a freight train derailment. The United States first sought injunctive relief under § 309(b) of the CWA. Plaintiff's second claim sought to recover penalties under § 311 of the CWA as amended by the Oil Pollution Act of 1990 (OPA). Plaintiff's third claim sought recovery under both the CWA and the OPA of removal costs incurred by the U.S. and reimbursement to the Oil Spill Liability Trust Fund for any disbursements made in connection with or as a result of the discharge. Defendant moved to dismiss plaintiff's first claim and the OPA claims in plaintiffs' third claim.

The district court denied defendant's motion to dismiss plaintiff's first claim for relief, finding plaintiff's claim for injunctive relief sufficient for pleading purposes. The court granted defendant's motion to dismiss plaintiff's claim under the OPA, finding that locomotive fuel tanks do not constitute a “facility” under the OPA, and that the OPA did not apply to the fuel spill at issue.

Where a requested injunction seeks to prevent future violations, the plaintiff must establish that there is a reasonable likelihood that such violations will occur. Southern Pacific argued that the derailment was an accidental nonintentional occurrence, which they have no incentive to repeat. Defendant further argued that the U.S. was not entitled to injunctive relief because such relief is available for ongoing violations of the CWA or a demonstrable likelihood of future violations. **Based on the governments representation that the claim for injunctive relief concerned a limited number of specific practices that might increase the likelihood of future derailments, the Court found that the United States claim for relief was sufficient for pleading purposes.**

Regarding the government's claims for recovery of removal costs pursuant to the OPA, the district court found that the purposes identified in the definition of “facility” evidenced congressional

intent that the OPA apply to oil spills occurring during the commercial production and transportation of oil, not during subsequent consumer use. **The court concluded that since the diesel spill from the locomotive fuel tanks did not occur during commercial production or transportation of oil, such fuel tanks were outside the OPA definition of "facility" in 33 U.S.C. § 2701(a).** The court noted that this interpretation was consistent with the legislative history of the OPA.

IV. MARINE PROTECTION RESEARCH & SANCTUARIES ACT

A. Third Circuit upholds denial of preliminary injunction against ocean dumping despite noncompliance with EPA regulations:

Clean Ocean Action v. York, 57 F.3d 328 (3rd Cir., June 12, 1995).

Plaintiffs, a group of conservation, fishing, boating, civic, realty, and educational groups, brought this action against USACE, EPA, the Port Authority of New York and New Jersey, and various Federal officials for declaratory and injunctive relief to stop the ocean dumping of materials dredged from the Port Authority's Newark/Port Elizabeth facility. USACE had issued a permit, pursuant to the Marine Protection, Research, and Sanctuaries Act (MPRSA), allowing the Port Authority to dredge material from its Newark/Port Elizabeth facility and dispose of the material at a dump site 6 miles off the New Jersey shore. The dredged material to be dumped contained dioxin. The district court denied plaintiff's application for a preliminary injunction against the ocean dumping.

The Third Circuit affirmed the district court's decision, holding that the district court committed a serious error in applying the law with respect to the defendant's compliance with EPA regulations, but that both the balance of harms and the public interest support the denial of the preliminary injunction.

In reviewing the regulations relating to ocean dumping, the court found that dumping of materials containing dioxin was prohibited unless the dioxin is present only as a trace contaminant. Determination of whether dioxin is present as a trace contaminant can only be made after specified tests required by the regulations have been conducted. The required tests were not conducted by defendants as specified.

The Third Circuit rejected the district court's finding that EPA and USACE had reserved discretion to themselves to determine which tests to conduct. In reviewing the regulations upon which the district court relied, the Third Circuit determined that the reservation of discretion to determine how to conduct tests cannot be read as a reservation of discretion to determine whether to conduct tests required by the unequivocal language of the regulations. The court found that the regulations made a clear distinction between requiring a test and determining how to conduct it and concluded that the district court's holding that defendants complied with EPA regulations constituted serious error in applying the law.

The Third Circuit next reviewed the factors that must be considered when ruling on a motion for a preliminary injunction: the likelihood of success on the merits; the extent of irreparable injury from the conduct complained of; the extent of irreparable harm to the defendants if a preliminary injunction issues; and the public interest. The court found that the plaintiffs had failed to show the requisite irreparable injury and that the district court had not abused its discretion in weighing the balance of harms and denying the preliminary injunction. Citing the "extraordinary economic importance" of keeping the port functioning, the court found that the potential "catastrophic injuries" to various economic interests and the public at large outweighed the minimal or nonexistent injuries to plaintiffs since no significant adverse environmental effects had been shown.

V. CASES UNDER OTHER STATUTES

A. Commerce Clause

1. The Supreme Court affirms decision that Federal prohibition of firearms possession in school zones exceeds Commerce Clause authority:

United States v. Lopez, Jr., 115 S.Ct. 1624 (Apr. 26, 1995).

Defendant, a 12th-grade student, had been charged with violating the Gun-Free School Zones Act of 1990 [18 U.S.C. 922(q)(1)(A)] by carrying a concealed handgun into his high school. The District Court denied his motion to dismiss the indictment, concluding that §922(q) is a constitutional exercise of Congress' power to regulate activities in and affecting commerce. In reversing, the Court of Appeals held that the Act exceeds Congress' Commerce Clause authority, as the possession of a gun in a local school zone is in no sense an economic activity that might, even through repetition elsewhere, have a substantial effect on interstate commerce. The Supreme Court affirmed this decision.

In its analysis, the Supreme Court cited to NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), United States v. Darby, 312 U.S. 100 (1941), and Wickard v. Filburn, 317 U.S. 111 (1942) as caselaw defining three broad categories of activity that Congress may regulate under its commerce power: (1) the use of the channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and (3) activities that have a substantial relation to interstate commerce. The Court stated that where economic activity "substantially affects" interstate commerce, legislation regulating that activity will be sustained.

The Court concluded that § 922(q) clearly does not represent either of the first two categories, and that the central issue is whether the statute is a regulation of an activity that substantially affects interstate commerce. **The Court determined that § 922(q) is a criminal statute that by its terms has nothing to do with commerce, and that it contains no jurisdictional element that would ensure, through case-by-case inquiry, that the activity in question affects interstate commerce. Accordingly, in a 5 to 4 decision, the judgment of the Court of Appeals was affirmed.**

A dissenting opinion written by Justice Breyer and joined by Justices Stevens, Souter, and Ginsberg disagreed, applying three basic principles of Commerce Clause interpretation. First, in his reading of caselaw, the commerce power does encompass the regulation of local activities insofar as they significantly affect interstate commerce. Second, "in determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act,.... but rather the cumulative effect of all similar instances (i.e., the effect of all guns possessed in or near schools)." "And third, the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove." In other words, the Court must scrutinize not whether the regulated activity sufficiently affected interstate commerce, but, rather, whether Congress could have had a rational basis for so concluding.

B. Penalties

1. Continuing Violations

a. Ninth Circuit holds that failure to give notice of intent to remove asbestos is one-time violation of Clean Air Act for purpose of determining penalty:

United States v. Trident Seafoods Corp., 60 F.3d 556 (9th Cir., July 12, 1995).

Trident Seafoods removed asbestos in violation of the Clean Air Act (CAA) during renovation of an abandoned fish cannery that it purchased, and also failed to give notice of intent to remove asbestos to EPA as required by the Act. EPA gave notice of its intent to charge Trident with one notice violation and four substantive violations of the CAA unless Trident paid a civil fine of $346,000. Trident refused and the United States commenced this action. A jury found in favor of Trident on the substantive charges, but the district court found that Trident had violated the CAA by failing to provide written notice before removing asbestos, and imposed a civil fine of $64,750 after considering mitigating factors. Despite Trident's argument that failure to give notice is a single violation occurring on a single day, thus subject to a maximum fine of $25,000, the court held that failure to comply with the notice requirement is a

continuing violation, subject to a $25,000 per day maximum. Trident appealed this ruling.

The court noted on appeal that neither the statute nor its implementing regulations expressly address whether the failure to comply with the notice requirement is a one-time violation or a continuing violation, nor is there case law on the issue. The court referred to language in Clean Water Act cases to distinguish the two statutes, noting that "the Fourth Circuit has held that violations of discharge limits under the CWA are daily violations even though reports of such discharges were required on a monthly or quarterly basis" Sierra Club v. Simkins Indus., Inc., 847 F.2d 1109 (4th Cir. 1988). In contrast, the CAA and its regulations do not define specific time periods, and "Trident's only obligation under the clear language of the regulation then in effect was to notify EPA before renovation began. This could reasonably be interpreted to mean that the only 'day of violation' occurred on the day before Trident commenced renovation."

In view of policy arguments expressed by the lower court that "the self-evident purpose of notification [is] to enable the enforcement agency to monitor asbestos removal and assure effective compliance with work rules," the court stated that "the agency had both the opportunity and the obligation to state clearly in its regulations either that there is a continuous duty to notify or that a failure to notify gives rise to a penalty based on the length of time that the breach exists." **Thus, the court held that Trident should be penalized only for a single violation for failing to give notice of intent to remove asbestos.**

Judge Ferguson points out that an act of omission is no different from an act of commission when determining a penalty for violations of the Act. "If notice is not given one day, nor on succeeding days, the violation is not cured. It continues for each day that notice is required and not given." The facts of this case, which indicated questionable asbestos removal practices were compelling to this Judge, "given the purpose of the notice requirement to allow supervision of the renovation process by the responsible agency." "To conclude otherwise would remove any incentive to comply, since a renovator could conduct asbestos removal without providing any notice and, if discovered, would only have to pay a maximum penalty of $25,000 for a one-day violation. The renovator could thus enhance his chances of escaping liability for conducting an improper removal, because once the renovation was complete, evidence of improper work practices may be impossible to reconstruct."

b. ALJ rules that failure to comply with RCRA notification or registration requirements is a continuing violation, although the assessment of penalties can only extend as far back as 5 years prior to the filing of the complaint:

In re Harmon Electronics, Inc., Docket No. RCRA-VII-91-H-0037 (Vanderheyden, Dec. 12, 1994) Initial Decision.

This action arose from a complaint issued by EPA against respondent for violations under RCRA including operation of a hazardous waste landfill without a permit or interim status; failure to have a groundwater monitoring program for a hazardous waste landfill; failure to establish and maintain financial assurance for closure and post-closure of its landfill; and failure to timely notify EPA and/or register as a hazardous waste generator. Respondent was found to be liable on all counts. Following an evidentiary hearing on the appropriateness of EPA's proposed $2,343,706 penalty, 3M Company v. Browner, 17 F.3d 1453 (D.C. Cir. 1994) was decided, in which the D.C. Circuit held that the general 5-year statute of limitations period in 28 U.S.C. 2462 applies to all federal agencies' actions, including penalty assessment proceedings, and that the statute of limitations begins to run from the time the violation first accrued.

In this context, respondent argued that the regulations implementing the subject RCRA requirements all became effective between 1980-1982, and that all the violations were completed and instantaneous at the moment the requirements went into effect. As a result, respondent asserted that EPA's failure to initiate a proceeding within 5 years from the date the violations first accrued

barred the instant penalty action under the statute of limitations. EPA argued that all of these offenses were continuing violations, which continued at least until the date that respondent first registered as a hazardous waste generator.

Citing Toussie v. U.S., 397 U.S. 112 (1970) and U.S. v. McGoff, 831 F.2d 1071 (D.C. Cir. 1987), the respondent argued that there was no continuing violation and even if there was, it did not operate to extend the statute of limitations. The ALJ found that this case was readily distinguishable in that these two cases involved criminal prosecutions, in which case "if any ambiguity exists in the scope of a criminal statute, then it should be resolved in favor of lenity." Moreover, the violations in those cases stemmed from the single act of failing to register or provide notification as required by the statute, whereas the "offense here was not simply an act of failing to file for a permit but a state of continued noncompliance with RCRA by treating, storing and disposing of hazardous waste without a permit."

Referring to the rules of statutory construction, the ALJ further stated that both the language and the legislative history of RCRA support a finding of a continuing violation, and also cited to U.S. v. Ekco Housewares, Inc., 853 F. Supp. 975 (N.D. Ohio 1994) (noncompliance with RCRA and its implementing regulations are continuing violations). Moreover, the ALJ noted that the same result has been found under TSCA, and the CWA [with respect to allowing improperly discharged dredged or fill material in wetland areas to remain unabated, citing U.S. v. Tull, reviewed on other grounds, 107 S. Ct. 1831 (1987) and U.S. v. Cumberland Farms of Connecticut, cert. denied, 108 S. Ct. 1016 (1988)]. The ALJ also noted that each day the violation continues, a separate claim accrues, thereby extending the statute of limitations.

For these reasons, the ALJ concluded that EPA's complaint had been timely filed, since all the violations continued at least until 1988, when respondent filed its hazardous waste generator notification. However, though EPA argued that the entire period of noncompliance may be considered when assessing penalties for continuing violations under RCRA, the ALJ held that any assessment of penalties can only extend as far back as 5 years prior to the filing of the complaint. Finally, after reviewing the appropriateness of the penalty as applied to all four claims, the ALJ assessed a civil penalty in the amount of $586,716 against respondent.

2. Ability to Pay

a. Board rules that Agency bears the burden of proof on the appropriateness of a proposed penalty considering all listed statutory factors, including a respondent's ability to pay:

In re New Waterbury, Ltd., TSCA Appeal No. 93-2 (Envtl. Appeals Bd., Oct. 20, 1994).

U.S. EPA, Region I, appealed the decision of a presiding officer to reopen a hearing and rescind a $35,750 penalty assessed against New Waterbury, Ltd. ("New Waterbury") for undisputed violations under §6(e) of TSCA, 15 U.S.C. §2605(e). The presiding officer had rescinded the penalty he previously assessed, after reopening the hearing, on the grounds that the Region had not rebutted New Waterbury's "showing" that it did not have the resources or ability to pay any penalty.

On appeal, the Board held that the presiding officer properly concluded that the Region bears the burden of proof regarding the "appropriateness" of a penalty considering all listed statutory factors, including a respondent's ability to pay. The Board concluded that the complainant bears both the burden of going forward and the burden of persuasion as to the appropriateness of the proposed penalty. The Board stated that this does not mean that the Region bears a separate burden on each statutory factor; "rather the burden of proof goes to the Region's consideration of all the factors." Thus, the Board expressly rejected New Waterbury's contention that the Region must prove that a respondent has the funds necessary to pay a proposed penalty before a penalty can be assessed. The Board, at the same time, rejected the Region's contention that ability to pay is an affirmative defense for which respondent bears the burden of proof.

The Board noted that in the initial stages of a penalty proceeding, a respondents ability to pay may be presumed. **The Board stated, however, that "where ability to pay is at issue going into a hearing, the Region will need to present some evidence to show that it considered the respondent's ability to pay a penalty. The Region need not present any specific evidence to show that the respondent can pay or obtain funds to pay the assessed penalty, but can simply rely on some general financial information regarding the respondent's financial status which can support the inference that the penalty assessment need not be reduced."** Once the Region comes forward with evidence showing that it considered ability to pay, as well as the other enumerated statutory factors, the burden of going forward shifts to the respondent. To rebut the Region's case, the respondent must demonstrate through introduction of evidence that either the Region failed to consider each statutory factor or, despite consideration of each factor, the penalty calculation is not appropriate. Thereafter, in order to prevail on its burden of persuasion, the Region must address respondent's evidence through new evidence or through cross examination that will discredit the respondent's contentions.

Although finding that the presiding officer did not err in reopening the hearing to allow additional evidence on New Waterbury's ability to pay, the Board ruled that the presiding did err by rescinding the entire penalty based on New Waterbury's ability to pay. The Board sua sponte assessed a penalty of $24,000 against New Waterbury and remanded to the presiding officer for adoption of a reasonable payment schedule.

b. Board restates its position that Agency bears the burden of proof on the appropriateness of a proposed penalty considering all listed statutory factors, including a respondent's ability to pay:

In re James C. Lin and Lin Cubing, Inc., FIFRA Appeal No. 94-2 (Envtl. Appeals Bd., Dec. 6, 1994).

Respondents James C. Lin and Lin Cubing Inc. appealed from an initial decision assessing a civil penalty of $38,000 for violations of FIFRA arising out of the application of a restricted use pesticide. On appeal, respondents argued, among other things, that the penalty assessed by the Presiding Officer was excessive because it jeopardized respondents' ability to remain in business.

The Board found that respondents had not shown that the assessed penalty would jeopardize their ability to continue in business. In reaching this conclusion, the Board restated its position with respect to the burdens of proof for establishing ability to pay as set out in In Re Waterbury Ltd., A California Limited Partnership, TSCA Appeal No. 93-2 (EAB, Oct. 20, 1994). Applying the standards of that case, the Board concluded that the penalty assessed was appropriate in respect to respondent's ability to continue in business.

C. Environmental Justice

1. Board denies review of environmental justice challenges to Region V RCRA permit decision:

In re Chemical Waste Management, Inc., RCRA Appeal No. 95-2 & 95-3 (Envtl. Appeals Bd., June 29, 1995).

U.S. EPA Region V issued the Federal portion of a permit, pursuant to RCRA, to Chemical Waste Management of Indiana, Inc. (CWMII) for a landfill facility. The EAB received and consolidated three petitions for review of the Region's permit decision. Petitioners raised environmental justice concerns as to whether the operation of CWMII's facility would have a disproportionately adverse impact on the health, environment, or economic well-being of minority or low-income populations in the area surrounding the facility. The Region held an informal informational meeting subsequent to the public hearing and the close of the comment period in an effort to address such concerns. The Region also performed a demographic analysis of the surrounding populations to determine whether the facility would create disproportionate impacts.

Specifically, petitioners argued that (1) EPA clearly erred in attempting to implement Executive Order

12898 relating to environmental justice without national guidance or criteria; (2) The Region's demographic study, which was restricted to a one-mile radius around the facility, was clearly erroneous and ignored evidence concerning the racial and socioeconomic composition of, and the facility's impact on, the community both within and outside of the one-mile radius; and (3) EPA based its permit decision on information obtained at the informal meeting, but such information did not become part of the administrative record and the Region did not follow the procedures governing public hearings.

The EAB denied review of the petitions, finding that petitioners failed to demonstrate that either the Region's permit decision or the procedures it followed to reach that decision involved factual or legal errors, exercises of discretion, or important policy issues warranting review.

The EAB first held that while the Executive Order relating to environmental justice does not change the substantive requirements for reviewing a permit under RCRA, the RCRA permitting process provides opportunities for EPA to exercise discretion to implement the Executive Order, and as a matter of policy, EPA should exercise those opportunities to the greatest extent practicable. When EPA has a basis to believe that operation of a facility may have disproportionate impacts on a minority or low-income segment of the affected community, EPA should, as a matter of policy, exercise its discretion to ensure early and ongoing opportunities for public involvement in the permitting process.

The EAB also held that it had no basis for reviewing petitioner's claims because petitioners had not demonstrated how the absence of a national environmental justice strategy, criteria, or guidance had led to an erroneous permit decision.

The EAB further held that petitioners failed to demonstrate that EPA clearly erred in restricting the scope of its demographic study to a one-mile radius or in concluding that there would be no disproportionate adverse impact on low-income or minority populations within a one-mile radius. The EAB reasoned that determining the proper scope of a demographic study to consider such impacts was an issue calling for highly technical judgment as to the probable dispersion of pollutants through various media into the surrounding community, which was exactly the kind of issue that the Region, with its technical expertise and experience, was best suited to decide.

The EAB finally held that the informal informational meeting was not a public hearing and thus was not subject to procedures governing such hearings. The EAB also found that comments made at that meeting were properly incorporated into the administrative record. Finally, the EAB held that petitioners had failed to demonstrate that EPA based its permitting decision on information gathered at the informational meeting.

D. Administrative Practice

1. Board denies motion to dismiss, where respondent has not yet filed answer to complaint:

In re Cetylite Indus., Inc., Docket No. FIFRA 95-H-13 (Envtl. Appeals Bd., May 12, 1995) *Order Denying Motion to Dismiss*.

EPA filed a complaint against Cetylite Industries under FIFRA § 14(a). Before submitting an answer to the complaint, Cetylite filed a Motion to Dismiss before the Environmental Appeals Board (EAB), pursuant to 40 CFR 22.16 and 22.03, which provides that all motions filed or made before an answer to the complaint is filed shall be ruled upon.

The EAB noted that 40 CFR 22.15(a) confirms that a respondent believing itself entitled to judgment as a matter of law is nevertheless required to file an answer to the complaint. Section 22.20(a) authorizes the "Presiding Officer" to make a decision to dismiss in enumerated circumstances. But § 22.21(a) provides for the appointment of a "Presiding Officer" only after an answer to the complaint has been filed.

Therefore, the Motion to Dismiss was denied, without prejudice.

E. Due Process

1. **Board finds that while an agency may interpret regulatory requirements for the first time in an adjudication, due process notice must be given to the regulated entity:**

In re CWM Chem. Serv., Inc., TSCA Appeal No. 9301 (Envtl. Appeals Bd., May 15, 1995) *Order on Interlocutory Appeal*.

EPA Region II issued a complaint seeking penalties against CWM, operator of a landfill for the disposal of PCB-contaminated sludges, alleging in part that CWM violated specified limitations in its landfill approval document by disposing of 260 shipments of sludge containing concentrations of PCBs in excess of 500 parts per million (ppm).

CWM moved to dismiss, claiming that each of the shipments in question contained PCBs in concentrations below 500 ppm measured on a dry weight basis. The Region opposed dismissal, based on circumstantial evidence to the contrary. At that point, CWM moved for an accelerated decision contending that during the time of the alleged violations, it was not legally obligated to measure PCB concentrations on a dry weight basis. The presiding officer agreed and dismissed the complaint, noting that the Region neither alleged nor set forth in the complaint a violation based upon the wet weight method of measuring PCB concentrations.

The Region contended on appeal that at the time of the alleged violations, CWM was legally obligated to measure PCB concentrations on a dry weight basis and that CWM had notice, either constructive or actual, of this requirement. Specifically, the Region argues that actual notice was evidenced by CWM's regular submission of dry weight concentrations in the reports required under its landfill approval. CWM also had constructive notice, argued EPA, in light of the scientific community's approval of the dry weight method. "CWM had constructive notice that dry weight basis measurements were fundamental to the PCB regulatory scheme and therefore they were required by that scheme."

The EAB disagreed, concluding that no legally enforceable obligation to measure PCB concentrations on a dry weight basis has existed since its deletion as a requirement from the regulations in 1984, and no such obligation is set forth in CWM's landfill approval documents. Citing to the APA, the EAB noted that a regulated entity generally must have prior notice of the rule for it to be binding on that entity.

Although an agency is permitted to develop an interpretation of validly promulgated rules for the first time in an adjudication, the application of the interpretation must comport with the notice requirements of due process, particularly where the agency is seeking penalties for a violation of the interpretation. Notice of required conduct must come from the language of the regulation itself or, if applicable, the approval document, and not, as the Region argues, from the state of scientific knowledge. Accordingly, because the Region's complaint alleged violations only on a dry weight basis, the complaint does not state a claim upon which relief can be granted, and dismissal is therefore warranted.

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