WATER ENFORCEMENT BULLETIN

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1994 Cases in Review*

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Disclaimer

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Revised Supplemental Environmental Projects Policy Issued

On May 3, 1995, the Office of Enforcement and Compliance Assurance (OECA) issued an interim revised supplemental environmental projects (SEP) policy. The revised policy is intended to more clearly define what a SEP is, and to provide additional flexibility to craft settlements which include SEPs to secure greater environmental and public health protection. The policy provides step-by-step procedures for calculating the cost of a SEP and the percentage of that cost which may be applied as a mitigating factor in establishing an appropriate penalty. For inquiries with regard to the new policy, or to obtain copies, contact David Hindin (202) 564-6004.

Revised Interim Clean Water Act Settlement Policy Issued

On February 28, 1995, a revised Clean Water Act penalty policy was issued by OECA. This interim settlement policy makes a number of changes to the 1986 CWA Penalty Policy. First, this revision establishes an alternative approach to use in appropriate cases to determine penalties against municipalities. This approach, called the national municipal litigation consideration, is based in part on past settlements and on evaluation of four factors: service population, duration of violations, environmental impact, and economic benefit. Second, the methodology for evaluating gravity of the violation has been revised to reduce redundancy, improve national consistency, and better cover non-effluent limit violations (such as bypasses). Third, two new gravity adjustments have been established to provide incentives for quick settlements and to mitigate penalty amounts for small facilities. For inquiries with regard to the new penalty policy, or to obtain copies, please contact Ken Keith, ORE-Water Enforcement Division, at (202) 564-4031.

I. Clean Water Act (CWA)

A. Jurisdictional Scope of Clean Water Act

1. Discharge through ground water

a. Seventh Circuit holds that CWA does not regulate discharges through ground water that connects to surface waters:

Village of Oconomowoc Lake v. Dayton Hudson Corp., 24 F.3d 962 (7th Cir., May 18, 1994), *cert. denied*, 130 L. Ed. 2d 282, 115 S. Ct. 322 (October 11, 1994).

The Village of Oconomowoc Wisconsin (Village) brought a citizen suit for alleged violations of the Clean Air Act (CAA) and CWA associated with construction of warehouses for a distribution center by Target Stores, a division of the Dayton Hudson Corporation. Defendants constructed a six-acre surface impoundment designed to collect and filter surface water runoff. The Village alleged violations of the CWA for unpermitted discharges of stormwater associated with construction activity, as well as for discharges from the surface impoundment to ground water that directly connects to surface waters. The district court dismissed the Village's CWA claims, holding that discharges from the impoundment into ground water, and subsequently into adjacent surface waters, are not actionable under the CWA.

The Seventh Circuit affirmed the district court, ruling ground waters are not "part of the (statutory) waters of the United States" and thus are not within the scope of CWA jurisdiction. The court stated further that neither the statute nor the regulations provide for regulation of discharges to ground water even where there exists a hydrological connection to nearby surface waters. (The court found that collateral reference to this problem in EPA rulemakings was not sufficient to allow for regulation.)

While the majority opinion held open the possibility that EPA could change its regulations to establish

CWA requirements for discharges to ground water with a hydrological connection to surface waters, Judge Manion, in a concurring opinion, stated that an amendment of EPA regulations could not render discharges through ground water subject to CWA, absent specific direction from Congress.

b. District court holds that CWA regulates discharges through ground water:

Sierra Club v. Colorado Refining Co., 838 F. Supp. 1428 (D. Colo., December 8, 1993) *reversed on other grounds*, 852 F. Supp. 1476 (May 17, 1994).

The Sierra Club alleged that the defendant had unlawfully discharged pollutants from its refinery to a nearby creek, some of which had reached the creek through ground water beneath the refinery. The defendant moved to dismiss for failure to state a claim under Rule 12(b)(6), arguing that the CWA does not regulate discharges of pollutants to ground water even if such pollutants migrate through ground water to surface waters.

Although the court found that caselaw conflicts as to whether CWA jurisdiction encompasses ground water, the court interpreted previous decisions by the Tenth Circuit in United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979) and Quivira Mining Co. v. EPA, 765 F.2d 126, 130 (10th Cir. 1985) as "leaving little doubt that the Tenth Circuit has chosen to interpret the terminology of the Clean Water Act broadly to give full effect to Congress' declared goal and policy `to restore and maintain the chemical, physical and biological integrity of the Nation's waters.'"

With this in mind, the court denied defendant's motion to dismiss, holding "that the Clean Water Act's preclusion of the discharge of any pollutants into `navigable waters' includes such discharge which reaches `navigable waters' through ground water." The court thus found that the plaintiff's allegations that the defendant had discharged pollutants into the soils and ground water beneath the refinery, which then made their way to the creek through ground water, stated a cause of action under the CWA.

This district court decision was appealed, and the Tenth Circuit Court of Appeals heard oral argument on this issue on May 16, 1994. The United States did not participate in the appeal. Subsequently, the district court dismissed the plaintiff's case on grounds that it was barred under § 309(g)(6) of the CWA. See 852 F. Supp. 1476 (1994) summarized on page 36. The United States is seeking to clarify the issue of CWA jurisdiction over discharges to ground water hydrologically connected to surface waters through the CWA authorization process in order to close a potentially significant loophole in the regulatory scheme of the CWA.

c. District court holds that the CWA regulates discharges that migrate through ground water to surface waters:

Washington Wilderness Coalition v. HECLA Mining Co. See page 7 for case summary.

2. Seventh Circuit upholds CWA jurisdiction over isolated waters:

Rueth v. EPA, 13 F.3d 227 (7th Cir., December 30, 1993).

In this decision, the Seventh Circuit upheld a district court's dismissal of a development company's challenge to EPA's findings underlying a compliance order under CWA § 309(a) after the company filled three acres of wetlands without a CWA § 404 permit.

The lower court had held that this case was governed by Hoffman Group, Inc. v. EPA, 902 F.2d 567 (7th Cir. 1990), which held that the CWA precludes pre-enforcement review of a compliance order until the agency brings a civil suit to enforce it. Reuth attempted to distinguish Hoffman Group on the grounds that in that case Hoffman Group was challenging a compliance order while Reuth was challenging the government's right to assert jurisdiction over the isolated wetlands at issue.

The Seventh Circuit ruled against Reuth, holding that Congress intended judicial review of challenges to agency administrative actions only after the agency either seeks judicial enforcement of a compliance order or seeks to enforce administrative penalties.

The court acknowledged that its holding placed Rueth "somewhat in limbo" until such time as EPA

sought to enforce its compliance order or assess administrative penalties. **But, the court found that "any reasonable and experienced developer such as Rueth should have known that the wetlands were potentially subject to regulation."** The Court suggested that "[p]erhaps Rueth was in its present predicament because it attempted to short cut and take an end-run around the permit requirement."

The court brushed aside Rueth's argument that it had no idea that the isolated wetlands in question were "waters of the United States." **The court stated: "As our recent decision in Hoffman Homes v. EPA, 999 F.2d 256, 261 (7th Cir. 1993), makes clear, however, nearly all wetlands fall within the jurisdiction of the CWA since one test for whether the wetland affects interstate commerce is whether migratory birds use the wetland. Id. Decisions such as Hoffman Homes give full effect to Congress's intent to make the Clean Water Act as far reaching as the Commerce Clause permits."** The court did caution that if EPA or the Corps overextended their authority, the court would not hesitate to intervene in pre-enforcement activity, but stated that in the case at hand "we are of the opinion that the wetland at issue at issue falls under the broad definition of 'waters of the United States' in Hoffman Homes."

Attorney: Cathy Winer, OGC

3. Eleventh Circuit finds Congress did not unconstitutionally delegate its authority to USACE to define "waters of the United States":

Mills v. United States, 36 F.3d 1052 (11th Cir., October 27, 1994).

Ocie and Carey Mills jointly owned two parcels of property in Santa Rosa County, Florida. Prior to their acquisition of the properties, the U.S. Army Corps of Engineers (USACE) determined that a portion of one of the lots was a wetland. In response to the previous owner placing red clay fill material on the site in preparation to build a driveway, USACE issued a cease and desist order to the owner. The Mills obtained the unrestored property, with full knowledge of the unresolved wetlands problems, and continued to deposit fill material on the wetlands without a permit, despite receiving two additional cease and desist letters from USACE.

The Mills were charged with and found criminally liable of violating the CWA and the Rivers and Harbors Act. The Mills subsequently filed a motion to vacate their sentences, which was denied by the district court. This court affirmed their convictions and sentences on direct appeal. United States v. Mills, 904 F.2d 713 (11th Cir. 1990). The Mills then filed a petition pursuant to 28 U.S.C. § 2255 asserting, among other grounds for which relief was denied, that their convictions under the CWA were void because Congress unconstitutionally delegated its legislative authority to USACE to define `waters of the United States' to include an expansive view of what constitutes `wetlands'.

The Eleventh Circuit agreed with the district court in finding that the Mills constitutional argument lacked merit. The court cited United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985), where the Supreme Court held that the USACE interpretation of `waters of the United States' as including wetlands adjacent to navigable waters is reasonable and consistent with the expressed intent of Congress. Riverside Bayview Homes, 474 U.S. 121, 131-39, 88 L. Ed. 2d 419, 429-34, 106 S. Ct. 455, 461-65. The court also agreed that, considering the purpose of the CWA, the context in which it was enacted, and its legislative history, Congress provided sufficiently precise standards by which to judge such delegation of authority to USACE.

B. Discharge of Pollutants

1. Fourth Circuit upholds conviction and sentence for discharge of bridge repair materials into waterway without a permit:

United States v. Schallom, 998 F.2d 196 (4th Cir., April 30, 1993) *cert. denied*, 126 L. Ed. 2d 228, 114 S. Ct. 277 (October 4, 1993).

Defendant Schallom was indicted for unlawful disposal, storage, and transportation of hazardous waste in violation of the Resource Conservation and Recovery Act (RCRA), and discharging pollutants without a permit in violation of the CWA, 33 U.S.C. § 1319(c)(2). Schallom challenged his conviction and sentence on the basis of the sufficiency of the evidence to support conviction, the court's instructions to the jury, and the determination of the sentence.

Evidence at trial proved that Schallom, in the course of repairing a bridge over Mill Creek in West Virginia, willfully and deliberately wasted shotcrete (a mixture of sand and cement) by spraying it into and on the banks of the creek. It was also proven that Schallom purposefully sprayed excessive amounts of shotcrete onto the bridge knowing the shotcrete would fall into the creek. The evidence showed that Schallom directed employees to remove excessive amounts of shotcrete from the bridge and to dump it into the creek. Mr. Schallom was convicted by a jury on one count of discharging pollutants without a permit and acquitted on the other charges. **The Fourth Circuit affirmed Schallom's conviction and sentence, finding sufficient evidence to support the conviction and rejecting Schallom's contention that the jury, not the court, should have determined whether cement and shotcrete were pollutants. The court held that because the components of concrete and shotcrete are defined as "pollutants" by the CWA, the introduction of these substances into Mill Creek made them "pollutants" as a matter of law.**

The court also rejected Schallom's assertion that bridge repair was exempt from the discharge permit requirements of the CWA, finding that pursuant to statutory and regulatory definitions, cement and shotcrete could not be considered exempted "fill material" for the purposes of bridge maintenance. The Fourth Circuit found no merit in Schallom's procedural and substantive challenges regarding the district court's calculation of his sentence.

2. **Fourth Circuit holds water sampling results and dye test sufficient evidence of discharge to support criminal conviction:**

United States v. Strandquist, 993 F.2d 395 (4th Cir., May 13, 1993).

Michael Strandquist, a manager for a campground and marina in Maryland, was found guilty of two counts of violating the CWA, 33 U.S.C. § 1311, for discharging raw sewage into a storm grate on July 19 and 26, 1991. The storm grate drained into a boat basin on a creek that is a tributary to Chesapeake Bay. The district court imposed imprisonment, supervised release, and home detention as a sentence.

On appeal, Strandquist challenged both his conviction and the district court's application of the sentencing guidelines. The Fourth Circuit affirmed the district court's findings on both counts.

The Fourth Circuit first rejected Strandquist's contention that the government failed to present sufficient evidence proving that the discharges for which he was charged reached "navigable waters." Citing the water sampling and dye tests conducted by the government, which identified the raw sewage and traced its path from the storm grate to the boat basin, **the court held that the evidence presented and the reasonable inferences arising from that evidence supported the jury's conclusion that the sewage discharged by Strandquist on the dates charged in fact reached waters of the United States.**

3. **Ninth Circuit holds that intermittent discharges of acid mine drainage from facility constructed to reduce discharge are subject to NPDES provisions:**

Committee to Save Mokelumne River v. East Bay Municipal Utility District, 13 F.3d 305 (9th Cir., December 29, 1993), *cert. denied*, 130 L. Ed. 2d 130, 115 S. Ct. 198 (October 3, 1994).

The Committee to Save Mokelumne River (Committee) brought a citizen suit under the CWA and won summary judgment against the East Bay Municipal Utility District (EBMUD), declaring that EBMUD had discharged pollutants from a dam facility constructed to collect and impound acid mine drainage without a permit in violation of the CWA.

EBMUD appealed, contending that: 1) the dam was not subject to the discharge permit requirements of the CWA because it does no more than impound navigable waters and impede flow into the Mokelumne River; 2) a material issue of fact existed as to whether EBMUD had "discharged a pollutant" within the meaning of the Act; 3) EBMUD activities in constructing and operating the facility were regulatory, and therefore would not constitute "additions of pollutants" under the Act; and 4) EBMUD was immune from CWA liability under the Eleventh Amendment.

The Ninth Circuit affirmed the lower court's grant of summary judgment. The court found that unlike dams operating on navigable waters, the facility in question did not pass pollution from one body of navigable water to another, but rather added surface runoff collected from the abandoned mine site. Moreover, the admissions of EBMUD that drainage sometimes passed over the spillway or through the valve into the River conclusively established the discharged of a pollutant.

The court disagreed with EBMUD's argument that it was liable under the CWA only if the facility produced a net increase in the acidity of the surface runoff compared to the acidity of the runoff before the facility was constructed. **The court stated that CWA categorically prohibits any discharge of pollutant from a point source without a permit, and does not require a showing of net increase in level of pollution before a permit is necessary. The court also rejected EBMUD's contention that the State cannot be held liable under the CWA for activities performed pursuant to its regulatory responsibilities,** noting that in the cases relied upon by EBMUD, "the absence of governmental liability under CERCLA rests squarely on express statutory exemptions," which do not exist in the CWA. Nor would the court grant Eleventh Amendment immunity, since plaintiffs "sought only prospective equitable relief, which is not barred by the Eleventh Amendment."

4. **Environmental Appeals Board (Board) rules discharge of a pollutant occurs when storm water containing cyanide from road salt is captured by facility and diverted for use in its industrial processes:**

In re J & L Specialty Products Corp., NPDES Appeal No. 92-22 (Envtl. Appeals Bd., June 20, 1994) Final Order Denying Review, Opinion by Judge Reich.

The Environmental Appeals Board (EAB) granted review of two issues raised in this petition: 1) whether EPA Region V's approval of Ohio's decision to list J & L Specialty Products Corp. (J & L) and its receiving waters under CWA § 304(*l*) is subject to administrative review; and 2) whether Region V correctly included a cyanide limit in J & L's permit, where the cyanide did not originate in the process wastewater, but from road salt captured in stormwater that entered the facility as process intake.

In an opinion by Judge Reich, the Board held that while only NPDES permit conditions, not listing decisions per se, are subject to review by the Board, **the Board can consider a petitioner's collateral attack on the Agency's actions in implementing CWA § 304(*l*) as part of the NPDES permit review, where the listing decision is material to the permit condition at issue**. The Board observed that CWA § 304(l) listing decisions affect permitting decisions in two ways: providing the Region authority to issue the permit in lieu of the State and altering the time allowed to come into compliance.

As a second issue, J & L had challenged the cyanide limit in its permit, arguing that it did not "discharge" pollutants as that term is defined in CWA § 502(12). J & L contended that the cyanide in its discharge came from a non-point source beyond its control because it originated in the road salt that washed into its stormwater sewers, and was not generated by J & L.

The Board upheld the permit limit, concluding that as a matter of law J & L "discharged" cyanide because J & L collected stormwater containing cyanide and diverted it for use in its industrial process before discharging to the receiving water via its wastewater outfall.

The Board noted that the definition of "discharge of a pollutant" requires an "addition of pollutants" from

a "point source." The Board found that J & L had added a pollutant to a navigable water by **introducing** cyanide to the receiving water. The Board distinguished this situation from one where pollutants in a facility's discharge originate in intake water taken from a receiving water, and are simply returned to the receiving water via the discharge (in such cases, facilities have been found not to be discharging pollutants). **In finding that J & L discharge was from a point source, the Board relied on caselaw holding that surface runoff is subject to NPDES permitting requirements where it is collected and channeled by man**.

5. Concentrated animal feeding operation held liable for discharges to irrigation canal:

In re Luis Bettencourt, Docket #1093-04-17-309(g) (Presiding Officer John A. Hamill, March 30, 1994) Order of Summary Determination of Liability.

This case involved claims under CWA § 309(g)(2)(A) for Class I civil penalties for an alleged unlawful discharge of pollutants from a concentrated animal feeding operation (CAFO) into an irrigation canal.

In his opinion, Presiding Officer John Hamill found that discharges of process wastewater effluent from the CAFO were subject to the terms of an applicable general permit even though the general permit's expiration date had passed prior to the date of the violation alleged. The discharge was subject to the permit because the respondent had submitted a Notice of Intent (NOI) in 1989, and Condition III.D. of the general permit provided that an expired general permit continues in full force and effect for facilities authorized to discharge under that permit until a new general permit is issued. The Presiding Officer noted that even if the respondent's CAFO were not covered by the general permit, it would still be subject to the prohibition in CWA § 301 against the discharge of pollutants without a permit.

Further, **it was found that the irrigation canal in question was a "water[*] of the U.S.," even though irrigation waters were not then flowing in the canal**. Such canals were part of a system that intermittently carries water from upstream portions of the Snake River to nearby farms and ultimately returned surplus and surface runoff to downstream portions of the Snake River or its tributaries.

After an analyzing a number of judicial and agency decisions, including United States v. Phelps Dodge Corporation, 391 F. Supp. 1181, 1187 (D. Ariz., 1975), the Presiding Officer concluded that a waterway may be determined to be "waters of the U.S." if "it is shown that either (1) there is a reasonable possibility that pollution of water which may intermittently flow in such waterway may have some impact upon interstate or foreign commerce, or (2) there is a reasonable possibility of downstream or `downflow' connection in water flow (whether intermittently or continuously) between the waterway at issue and some farther water body or wetlands in which there is a public interest or which is more clearly `waters of the U.S.' or a tributary thereof."

Attorney: Joseph W. Ryan, ORC, Region X

C. Point Source

1. Second Circuit holds that CAFO is per se a point source requiring permit:

Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114 (2d Cir., September 2, 1994), *rev'd*, 834 F. Supp. 1422 (W.D.N.Y., October 19, 1993).

Concerned Area Residents for the Environment (CARE) brought suit alleging that defendant Southview Farm's over-application of liquid manure to nearby fields resulted in unpermitted discharges of pollutants into U.S. waters. The district court overturned a jury verdict in favor of CARE on 5 of the 11 CWA violations, finding that the evidence presented at trial did not show the discharge was from a point source. The district court concluded that runoff from storing liquified manure and applying it to fields did not constitute a discharge from a "point source" either because such discharge was an "agricultural stormwater discharge," exempt from the definition of "point source," or because there was no discharge from "any discernable, confined, discrete conveyance."

On appeal, CARE challenged the lower court's conclusion. The United States participated, arguing that the district court erred as a matter of law in not holding that the defendant's facility was a concentrated animal feeding operation (CAFO), which is, per se, a point source under the CWA.

The Second Circuit reversed the district court, holding that the liquid manure spreading operations were a point source within the meaning of CWA § 1362(14) because: 1) the farm itself fell within the definition of a CAFO, 2) CAFO discharges are not subject to the agricultural stormwater exemption, 3) manure spreading coupled with a pipe that discharged manure into a stream constitutes a point source, and 4) there was sufficient evidence to conclude that manure spreading resulted in discharges to navigable waters on three occasions.

The district court had concluded that Southview Farm's facility was not a CAFO because crops were grown on a portion of the farm, and the definition of a CAFO expressly precludes a feeding operation where crops or vegetation are grown on any portion of the lot or facility. 40 C.F.R. 122.23(b)(1). The Second Circuit reasoned that this vegetation criterion of the CAFO definition applies to the lot or facility *in which* the animals are confined, and that Southview Farm raised crops apart from the cattle feed lots and did not have a permit for the liquid manure discharges. The court then concluded that the district court erred in setting aside the jury verdict and remanded the case for further proceedings.

Attorneys: Stephen Sweeney, OGC; Joseph Theis, OECA

2. District Court holds tailings ponds from a placer mine for gold and silver are a point source:

Washington Wilderness Coalition v. HECLA Mining Co., 870 F. Supp. 983 (E.D. Wash., October 21, 1994).

The Washington Wilderness Coalition (WWC) brought a CWA citizen suit action alleging that the HECLA Mining Company (HECLA) had violated § 301 of the CWA by discharging pollutants into navigable waters without a NPDES permit from its Republic, Washington, facility. HECLA's Republic, Washington, facility is a gold and silver placer mine that discharges wastewater (i.e., mill tailings, seepage return, and mine drainage) to a tailing impoundment under a State permit that is not a NPDES or State NPDES permit.

HECLA moved to dismiss on the basis that the court lacked subject matter jurisdiction, arguing that CWA § 505 does not provide for citizen suits for failure to obtain a permit. (WWC alleged HECLA failed to obtain a permit, but not violation of an "effluent limit.") Moreover, HECLA asserted that citizen suits are precluded in an authorized NPDES State. HECLA also maintained that WWC failed to state a claim because the mining runoff is not a point source entering navigable waters.

The court held that a citizen suit to enforce an effluent limit under CWA § 505 can be based on allegations that the defendant is discharging without a NPDES permit. See Hudson River Fishermen's Ass'n v. Westchester County, 686 F. Supp. 1044, 1050 (S.D.N.Y. 1988). The court noted that there is a split of authority on whether Federal citizen suits are available in States with authorized permit programs. Notwithstanding, **the court held that citizen suits may proceed in States authorized to run the NPDES program because nothing in the language or structure of the CWA suggests such suits are incompatible with State administration of the program**. Compare Lutz v. Chromatex, Inc., 725 F. Supp. 258, 261 (M.D. Pa. 1989) (RCRA citizen suit may proceed in States authorized to run RCRA program).

On the point source issue, the court held that WWC's allegations were sufficient to show that the tailings ponds are point sources under the generally accepted broad interpretation of that term. See United States v. Earth Sciences, Inc., 599 F.2d 368, 370 (10th Cir. 1979). In response to HECLA's argument that its ponds were not a point source, the court stated that even runoff caused by rainfall or snowmelt percolating through a pond or refuse pile is a discharge from a point source because the pond or pile acts to collect and channel contaminated water.

Finally, in response to HECLA's claim that WWC did not allege a discharge to navigable waters, **the court found that the CWA's prohibition against the discharge of any pollutant to navigable water encompasses discharges from point sources that migrate through ground water to surface waters**. As WWC alleged a hydrological connection between seepage from HECLA's impoundments to nearby surface waters, the court found that its complaint supported a claim under the CWA.

D. NPDES Permits

1. D.C. Circuit upholds EPA regulations for translating State narrative water quality criteria into permit limits:

American Paper Institute v. EPA, 996 F.2d 346 (D.C. Cir., June 22, 1993).

Petitioners challenged EPA regulations at CWA 40 C.F.R. 122.44(d)(1)(vi), which require NPDES writers to use one of three mechanisms to translate relevant state narrative water quality criteria (e.g. no toxics in toxic amounts) into chemical-specific effluent limitations. The D.C. Circuit denied plaintiffs' petition, holding that the regulations constituted "reasonable, authorized attempts" to fill gaps in the CWA's statutory approach for deriving effluent limitations in individual permits to meet water quality criteria for receiving waters.

The D.C. circuit rejected the petitioner's arguments that this rule requires states to impermissibly cede authority to the permit writer, finding that the regulation "does not supplant -- either formally or functionally -- the CWA's basic statutory framework for the creation of water quality standards; rather, it provides alternative mechanisms through which previously adopted water quality standards containing narrative criteria may be applied to create effective limitations on effluent emissions." The D.C. Circuit found that the regulation did not conflict with Congress' intent that states play the leading role in creating water quality standards. Rather, the court found that the three choices provided in the regulation allow permit writers flexibility to tailor appropriate, site-specific permit terms.

Finally, the court upheld EPA's interpretation of the term "applicable standard," found in § 304(1)(1)(B) of the CWA. Petitioners argued that Congress intended the term "applicable standards" to apply only to existing standards containing numeric criteria, as opposed to narrative criteria. The court, however, found that EPA's broader construction of the term "applicable standard" was reasonable and found no evidence in the text or history of the CWA that Congress was concerned only with violations of numeric criteria. The court concluded that the term "applicable standards" may plausibly be interpreted to include all standards that apply to state waters -- including those standards that contain narrative criteria.

2. Second Circuit holds discharge of pollutants not specified in permit is not unlawful under CWA:

Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353 (2d Cir., as amended February 3, 1994), *cert. denied*, 130 L. Ed. 2d 19, 115 S. Ct. 62 (October 3, 1994).

Atlantic States Legal Foundation (ASLF) filed a complaint under the citizen suit provision of the Clean Water Act (33 U.S.C. § 1365) alleging that Kodak had violated Sections 301 and 402 (33 U.S.C. §§ 1311 and 1342) of the CWA by discharging large quantities of pollutants not listed in its State Pollution Discharge Elimination Systems (SPDES) permit. ASLF argued that Section 1(b) of the SPDES permit itself and Section 301 of the CWA prohibit the discharge of any pollutant not specifically authorized under Kodak's SPDES permit. Kodak maintained that neither the CWA nor the regulations implementing the Act prohibit the discharge of pollutants not specifically assigned effluent limitations in a NPDES or SPDES permit. In addition, Kodak argued that to the extent the permit may have prohibited the discharge of these pollutants this prohibition is broader than that imposed by the Federal NPDES program and, therefore, not enforceable under the citizen suit provisions of the CWA. The district court granted Kodak's motion for summary judgment and Atlantic States appealed, relying on the same arguments presented to the district court.

In affirming the order of the district court, the Second Circuit rejected ASLF's argument that Section 301 of the CWA prohibits the discharge of any pollutant not expressly permitted, noting that numerous exceptions allow for the discharge of pollutants once a discharger has complied with the regulatory program imposed under the CWA. The appeals court observed that Section 402 provides for the suspension of the requirements imposed under the national NPDES program where, as here, an approved State program is in place. The appeals court also specifically cited the shield provision under Section 402(k), under which compliance with a NPDES or SPDES permit is deemed compliance with Section 301 for purposes of the CWA's enforcement provisions. The appeals court observed that the Supreme Court has noted that "[t]he purpose of [Section 402(k)] seems to be . . . to relieve [permit holders] of having to litigate in an enforcement action the question whether their permits are sufficiently strict." E.I. du Pont Nemours & Co. v. Train, 430 U.S. 112, 138 n.28, 51 L. Ed. 2d 204, 223 n.28, 97 S. Ct. 965, 980 n.28 (1977).

The appeals court noted that ASLF's view of the regulatory scheme -- that the permit prohibits the discharge of pollutants not specified in the permit -- is unworkable and stands the existing regulatory framework on its head. Rather, the appeals court found that a NPDES or SPDES permit is intended to identify and limit the most harmful pollutants while leaving the control of the vast number of other pollutants to applicable disclosure requirements. Thus, the appeals court stated, "[o]nce within the NPDES or SPDES scheme . . . polluters may discharge pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants." Citing several EPA actions and policy statements, the appeals court observed that EPA has never acted to give validity to ASLF's "wholly impractical view" of the legal effect of a permit. Rather, EPA actions and statements have frequently contemplated discharges of pollutants not listed under a NPDES or SPDES permit.

With regard to ASLF's argument that Section 1(b) of the permit prohibits the discharge of unspecified pollutants (this provision made the discharge of pollutants not identified or authorized in the permit, or the discharge of pollutants in greater frequency than specified in the permit, a violation of the terms of the permit), the appeals court found that the Department of Environment Conservation's view of the scope of permit limits is the same as EPA's. More significantly, the appeals court found that it need not resolve this issue, since even if ASLF's position is correct (i.e., that the Act prohibits the discharge of pollutants not subject to specific permit limits), ASLF's action would fail because New York would be implementing a scheme that is broader than the CWA, and such broader schemes are not enforceable under Section 505 citizen suits.

3. Ninth Circuit upholds placer mining permit limits:

Ackels v. EPA, 7 F.3d 862 (9th Cir., October 14, 1993).

EPA issued NPDES permits to Del Ackels and other miners conducting gold placer mining in Alaska. The permits include effluent limits for turbidity based on Alaska water quality criteria and require the miners to conduct certain monitoring. The miners petitioned for review of the permits.

The petitioners challenged the turbidity standard, arguing that EPA should not have used the State water quality standard, but instead should have translated the turbidity standard into an effluent limit for settleable solids. **The court held that the effluent limit for turbidity was supported by substantial evidence because: 1) the limit was necessary to comply with State water quality standards; 2) technologies were capable of meeting the limit; and 3) no other approach (i.e., regulating settleable or suspended solids) would achieve compliance with the applicable standard.**

The petitioners also argued that EPA misinterpreted State law in establishing an arsenic effluent limit requiring that streams used in mining must be sufficiently clean to provide a source of drinking water. **The court held that the Agency had properly rejected these arguments and that EPA's interpretation of State law was reasonable and entitled to deference.**

The petitioners argued that requiring monitoring for settleable solids once per day of discharge instead of once per day of sluicing (the process used to remove gold from placer deposits) was unreasonable, asserting that this would require miners to remain onsite during inactivity and the off-season. **The court held that the requirement was supported by substantial evidence, since it only required monitoring when discharges are due to mining activities and it allowed miners to monitor only when sluicing operations were taking place, provided they prevented discharges from occurring at any other time.**

The petitioners also challenged the State certification process. **The court rejected the defendant's arguments, finding: 1) EPA had the authority to accept State certification beyond the 60-day period specified by regulation; 2) the State had properly indicated the authority for its more stringent settleable solid limit; and 3) when the State added new permit conditions, EPA, as required by statute, properly incorporated them into the final permit.**

Attorney: James W. Rubin, DOJ, Environmental Defense Section

4. Board upholds single whole effluent toxicity test failure as violation:

In re City of Hollywood, Florida, NPDES Appeal No. 92-21 (Envtl. Appeals Bd., March 21, 1994), Order Granting Review in Part, Denying Review in Part, and Remanding in Part, Opinion by Judge McCallum.

The City of Hollywood, Florida, appealed from the denial of an evidentiary hearing request submitted in connection with the reissuance of its NPDES permit. The City challenged a number of the terms and conditions included in the final permit issued to it by EPA Region IV.

Among the provisions challenged by the City were the pH and total residual chlorine limits, which the City argued should be measured at the end of a mixing zone. The Board agreed with Region IV that, until such time as a mixing zone was approved by the State, there was no basis for consideration of mixing in establishing effluent limitations (notwithstanding the fact that the City had submitted a request to the State). Given that the permit was remanded for other reasons, the Board did, however, instruct Region IV to ascertain on remand whether the State had granted the City's request for inclusion of a mixing zone and to re-examine and, if necessary, modify these provisions in light of the State's decision.

The City also raised numerous objections to the permit's proposed whole effluent toxicity limitation and the associated biological testing requirements. **The Board rejected the City's argument that failure of a single toxicity test could not be characterized as a permit violation because of the alleged variability among tests.** The Board found that the range of variability was acceptable to the State in establishing the standard, and the Region was required to incorporate limitations in the permit as necessary to implement the State standard. **Likewise, the Board rejected the City's argument that as a matter of EPA policy and practice, biomonitoring should be used for assessing the need for additional treatment, not as a limitation itself.**

The Board found that two additional arguments had merit. Region IV agreed that the designation of the test species used for effluent toxicity testing should be remanded for reconsideration. In addition, the Board granted the City's petition for review with regard to testing effluent at 100 percent strength, specifically to consider the issue of whether the CWA antibacksliding prohibition precludes allowing testing effluent diluted to 30 percent strength, notwithstanding Florida regulation (enacted subsequent to issuance of the City's previous permit) requiring such dilution.

E. State Water Quality Standards

1. Supreme Court holds that State can require minimum instream flow to preserve designated use of river:

PUD No. 1 of Jefferson County v. Washington Department of Ecology, 128 L. Ed. 2d 716, 114 S. Ct. 1900 (May 31, 1994).

This case involved a challenge to a CWA § 401 water quality certification for the construction of a hydroelectric project on a pristine river in Washington State. The petitioners, a city and local utility district, challenged the State's CWA § 401 water quality certification that required, among other things, a minimum instream flow to preserve the designated uses of the affected water body for fish migration, rearing, and spawning.

The certification was upheld by the Washington Supreme Court, which found that such flows are necessary to protect the existing and designated use of the river as a fish habitat, and thus are required conditions to protect the water quality standards of the State. The court also held that there was no Federal pre-emption and that setting the stream flow was within the Washington Department of Ecology's (WDOE's) authority. The local governments petitioned the U.S. Supreme Court for review.

The U.S. Supreme Court rejected the argument that the State could not impose a minimum stream flow requirement that was not directly related to any "discharge" of water or pollutants from the construction or operation of the hydroelectric plant. The Court found once there is a discharge for which a certification is required, CWA § 401(d) authorizes a State to include any appropriate additional conditions on the entire activity to protect water quality standards.

The U.S. Supreme Court found that State certifications may include conditions requiring compliance not only with a State's water quality criteria, but also with a State's designated uses or antidegradation policy. The court held that water quality standards consist of both criteria and designated uses.

The Court did not address the issue of whether there was a conflict between the State's authority under CWA § 401 and the authority of Federal Energy Regulatory Commission (FERC) to protect fish habitats under the Federal Power Act. The Court noted that FERC might decide to impose the same stream flow conditions under its authority if it issues the petitioner's license.

Attorney: Randy Hill, OGC

2. First Circuit remands EPA issued NPDES permit where result is inadequately explained:

Puerto Rico Sun Oil Co. v. EPA, 8 F.3d 73 (1st Cir., October 21, 1993).

EPA issued a final NPDES permit to Puerto Rico Sun Oil Company (Company) without allowing the use of "mixing zones." Although the Company's previous permit included a mixing zone provision, at the time the new permit was issued, the Puerto Rico Environmental Quality Board (EQB) was reformulating its mixing zone criteria. The EQB's final certification did not provide for mixing zone analysis. Both the Company and the EQB requested that EPA not issue a final permit pending reconsideration of Puerto Rico's final certification.

The Company petitioned the First Circuit to review EPA's issuance of the final permit. **The court held that EPA acted arbitrarily and capriciously in adopting the State certification requirements for the permit without the mixing zone provision but refusing to await EQB's decision on reconsideration of the mixing zone analysis.** While the First Circuit said it suspected that EPA simply became impatient with Puerto Rico's overdue final certification and expedited the final permit once the certification was received, it remanded the final permit for EPA to provide an explanation for refusing either to await reconsideration or to issue a permit using the mixing zone analysis. The court found that in issuing the final permit, EPA had complied with all substantive and procedural requirements of the CWA and EPA regulations. The court, however, stated that EPA's refusal to delay issuing a final permit, despite the knowledge that reconsideration by the EQB was underway, was arbitrary and capricious because "the outcome appears on its face to make no sense." EPA's order was vacated and remanded to EPA for further proceedings.

3. First Circuit holds EPA not arbitrary and capricious to incorporate into permit water quality standards still undergoing review by local agency:

Caribbean Petroleum Corp. v. EPA, 28 F.3d 232 (1st Cir., July 7, 1994).

The Caribbean Petroleum Corporation (Caribbean) challenged the discharge permit issued by EPA under the CWA, asserting that it was arbitrary and capricious for EPA to incorporate a water quality certification issued by the Environmental Quality Board (EQB) of the Commonwealth of Puerto Rico when that certification was still undergoing review by the EQB.

The court held that it is not arbitrary and capricious to incorporate a water quality certification into a final NPDES permit while the certification is undergoing review by the local agency where: 1) the local agency neither stayed the certification nor issued a new certification; 2) EPA allowed adequate time (11 and 1/2 months) for EQB to reconsider its Caribbean certification; and 3) the EQB certification comports with the effluent monitoring policy that Caribbean had been subject to since first permitted under the CWA. The court distinguished the facts of this case (11 months is adequate time for EQB to reconsider, there was no change in EQB's monitoring policy, and no formal stay of certification) from those in Puerto Rico Sun Oil Co. v. U.S. EPA, 8 F.3d 73 (1st Cir. 1993).

Attorneys: Randolph L. Hill, OGC; Meyer Scolnick, ORC, Region II

4. Fourth Circuit holds EPA did not act arbitrarily or capriciously in approving Virginia's and Maryland's revised water quality criteria for dioxin:

Natural Resources Defense Council, Inc. v. EPA, 16 F.3d 1395 (4th Cir., December 22, 1993).

The Maryland Department of the Environment (MDE) and the Virginia State Water Control Board (VSWCB) sought to revise the State's water quality standards to allow its waters to contain dioxin in an amount (1.2 ppq) indisputably less protective than EPA's guidance criterion (.0013 ppq), based on the Food and Drug Administration's (FDA's) less conservative cancer potency factor. The States adopted the new standard and submitted it to EPA for approval. EPA approved the standards, accompanying each approval with a Technical Support Document (TSD) that set out in detail EPA's scientific review of each State's analysis in deriving the new dioxin standard. EPA's conclusion was that their use of the new standard was scientifically defensible, protective of human health, and in full compliance with the CWA.

In a consolidated suit, the Natural Resources Defense Council (NRDC) and the Environmental Defense Fund (EDF) challenged EPA's 1984 dioxin criteria document and approval of the Maryland and Virginia water quality standards. The district court dismissed the original Count One of the Maryland complaint, holding that CWA § 304(a) does not mandate EPA to develop numeric criteria for dioxin or to update its 1984 dioxin criteria document. After giving NRDC an opportunity to amend Count One, the district court dismissed the amended count for failure to exhaust administrative remedies. The court granted summary judgment to EPA on the remaining claims, holding that EPA had not acted arbitrarily or capriciously in approving the State water quality standards.

On appeal, NRDC and EDF first argued that the district court applied an incorrect legal standard in deciding whether EPA properly approved the State water quality standards. Specifically, NRDC argued that the court accorded undue deference to EPA's decision, and that under CWA §§ 101(a) and 303(c), EPA has an independent duty to objectively ensure that State water quality standards meet the requirements of the CWA. In a de novo review, **the Fourth Circuit stated that the district court correctly found that States have the primary role in establishing water quality standards, and EPA's sole function is to review those standards for approval and determine whether the State's decisions are scientifically defensible and protective of designated uses.** Moreover, EPA abided by that standard as documented in the extensive agency review published in the TSDs.

The appellants also argued that EPA's action was contrary to law because it did not ensure that State standards were consistent with the CWA regarding the protection of all designated water uses (fish consumption in particular) and bioconcentration factors. Specifically, they claimed that the district

court failed to require EPA to protect subpopulations in Maryland and Virginia, two coastal States with large numbers of recreational and subsistence fishermen with higher than average fish consumption. The court agreed with the district court, however, that EPA "relied on scientifically defensible means to reach reasoned judgments regarding fish consumption levels." Moreover, the court found no clear evidence showing that EPA's bioconcentration factor was not supported by a sound scientific rationale. Accordingly, **the court held that EPA did not act arbitrarily in approving the States' standards.**

Finally, the appellants argued that the district court ratified EPA's approval of the dioxin standards without ensuring the protection of all stream uses. Acknowledging that the States' dioxin criteria are intended to protect human health only, and that EPA has not established national numeric criteria guidance for dioxin with respect to aquatic life and wildlife, **the court found that no convincing authority had been presented to show that the CWA requires States to adopt a single criterion for dioxin that protects against all identifiable effects on human health, aquatic life, and wildlife.**

With regard to the original and amended Count One of the Maryland complaint, NRDC challenged EPA's water quality criteria in its entirety, claiming that EPA failed to issue and revise complete water quality criteria for dioxin. On appeal, **the court agreed with the district court that EPA does not have a mandatory duty under the CWA to issue or revise criteria for dioxin, and that the 1984 EPA criteria document is not a reviewable "final" agency action for the purposes of the APA.**

5. Ninth Circuit holds failure of State to submit TMDLs for over 10 years deemed constructive submission of "no TMDLs" triggering a mandatory duty for EPA to promulgate TMDLs:

Alaska Center for the Environment v. Browner, 20 F.3d 981 (9th Cir., March 30, 1994).

EPA appealed an injunction resulting from a citizen suit by Alaska Center for the Environment (Alaska Center) under the CWA compelling the agency to take specified steps towards the establishment of total maximum daily loads (TMDLs) for Alaskan waters. The appeal challenged the plaintiff's standing and certain remedial aspects of the order.

The district court found in 1991 that the State of Alaska had never submitted TMDLs to EPA, and that EPA had done nothing over more than a decade to establish TMDLs under the procedures set forth in 33 U.S.C. § 1313(d). Relying on Scott v. City of Hammond, 741 F.2d 992 (7th Cir. 1984), the court held that the State's "failure to submit the TMDLs for over a decade amounted to a "constructive submission" of "no TMDLs," thereby triggering a mandatory duty for EPA to promulgate TMDLs. In June 1992, the court ordered EPA to develop a schedule for establishing TMDLs for the State, to submit a report on ambient water quality monitoring, and to propose a schedule for implementing of measures identified in its report within a specified amount of time.

On appeal, EPA argued that Alaska Center failed to prove "injury in fact" with respect to most of the specific water bodies in the State, and that their injuries were not likely to be redressed by a favorable decision in the case. Relying on Conservation Law Foundation v. Reilly, 950 F.2d 38 (1st Cir. 1991), EPA contended that the plaintiff must allege a member's diminished use and enjoyment of every water body that would be affected by the State-wide TMDL program.

The court disagreed, stating that unlike Conservation Law, the relief ordered involved the action of a single EPA office and the performance of a precise duty mandated by statute, and that the plaintiffs had demonstrated representation and injury throughout the entire area for which they seek relief. EPA also argued that actual water quality in State water bodies depends in part on discretionary acts of the State with respect to non-point source pollution. The agency cited Fernandez v. Brock, 840 F.2d 622 (9th Cir. 1988), stating that relief is contingent on the acts of a third party not before the court and therefore the redressability requirement of standing had not been met. The court stated, however, that this argument is untenable, as Congress had determined that the relief sought in this case "is the appropriate means of achieving

desired water quality where other methods, including nonpoint source controls, have failed."

With respect to the terms of the remedial order, EPA argued that the district court exceeded its remedial powers under CWA § 505 in ordering EPA to submit to the court its report on the adequacy of water quality monitoring in Alaska, and to propose a long-term schedule for the establishment of TMDLs. **The court held that the district court, which has broad latitude in fashioning equitable relief, acted with great restraint in light of EPA's 13-year delay in implementing a TMDL program in Alaska, imposing only those requirements necessary to develop TMDLs in Alaska, while deferring entirely to EPA for the substance and manner of achieving compliance with the CWA.** The district court's decision was affirmed.

6. District court upholds EPA approval of Tribal water quality standards more stringent than State water quality standards:

City of Albuquerque v. Browner, 865 F. Supp. 733 (D.N.M., October 21, 1993).

The City of Albuquerque (City) filed suit under the APA and the Declaratory Judgment Act, challenging EPA's approval of the Indian Tribe Isleta Pueblo (Tribe) water quality standards. The Tribe's standards are more stringent than the State of New Mexico's water quality standards.

Pursuant to CWA § 518, EPA has recognized the Tribe as a State for purposes of the Act. The City challenged EPA's approval of the Tribe's water quality standards on the following grounds: 1) EPA failed to follow required approval procedures, 2) EPA misinterpreted two provisions of the Act in approving the standards, 3) EPA approved standards that were unconstitutional, 4) EPA failed to provide a mechanism to resolve differences between the Tribe's and the State's standards, 5) EPA failed to ensure that the Tribe's standards were sufficiently stringent to protect designated uses, and 6) the Tribe's criteria are without scientific basis and should not have been approved.

The district court first rejected the City's claim that EPA had to give public notice and provide for comment prior to approving the Tribe's water quality standards. The Tribe provided public notice and held a public hearing. The court found that because all comments submitted to the Tribe during the comment period became part of the administrative record, which was received by EPA before approval was granted, the purpose of notice and comment was satisfied under the CWA without EPA providing for an additional notice and comment period.

The court next rejected the City's assertion that the Tribe may not develop water quality standards that are more stringent than Federal standards. The court also rejected the City's claims that the standards do not protect designated uses and are not rationally based. **The district court held that EPA followed the necessary procedural steps in accepting the Tribe's proposed water quality standards, and that the agency's decision was neither arbitrary, capricious, nor an abuse of discretion.** In denying the City's motion for summary judgment, the court found that EPA acted in accordance with the law and its decision was supported by substantial evidence in the administrative record.

7. District court holds that the CWA does not set deadlines for development of a certain number of TMDLs, but only requires development of TMDLs in accordance with the priority ranking of the WQLS list:

Sierra Club, North Star Chapter v. Browner, 843 F. Supp. 1304 (D. Minn., December 13, 1993).

Plaintiffs brought a citizen suit against EPA alleging that EPA failed to comply with its duty under Section 303(d) of the CWA to develop required water quality limited segments (WQLSs) and associated total maximum daily loads (TMDLs) for Minnesota. EPA challenged the plaintiffs' standing and maintained that EPA had satisfied its duty of overseeing State development of TMDLs since Minnesota had submitted several Section 303(d) lists that identified a number of WQLSs and 43 TMDLs.

Plaintiffs alleged that in 13 years Minnesota developed only a handful of TMDLs and these ignore non-point source pollution. Minnesota submitted an original and revised list of WQLSs, the latter of which included a list of WQLSs for eight river reaches, a schedule for completing TMDLs (ranging from 6/93 to 12/2002), and a reference to the State's CWA Section 305(b) report acknowledging that the Minnesota Pollution Control Agency (MPCA) had assessed 4,634 miles of the 91,944 total river miles in the State and 1,753 of Minnesota's 11,842 significant lakes. The Appendix to the 305(b) report indicated that approximately 1,116 waters did not meet applicable water quality standards. On August 9, 1993, EPA partially approved and partially disapproved the State's revised list because it did not include all water quality limited water bodies requiring a TMDL. The partial approval included 43 TMDLs. On December 1, 1993, EPA proposed a list identifying 447 WQLSs in the State.

The district court found that plaintiffs satisfied applicable standing requirements in that: 1) they demonstrated injury-in-fact through regular use of a large number of waters throughout Minnesota, 2) their injury is traceable to EPA's alleged failure to implement Section 303(d), and 3) the requested EPA action would redress their injury. On the merits, **the court observed that EPA's duty to act following prolonged State inaction is mandatory, not discretionary**. **The court held, however, that EPA had fulfilled its duties under Section 303(d) since the Agency had disapproved of Minnesota's most recent WQLS list and had developed its own such list. The court observed that the State had identified TMDLs that it believes should receive priority, had implemented some TMDLs, and was developing others.** The court reasoned that "...the Act does not set deadlines for the development of a certain number of TMDLs. The Act instead requires the development of TMDLs "in accordance with the priority ranking" of WQLS list. 33 U.S.C. § 1313(d)(1)(C)." Summary judgement was granted for the defendant.

8. Board rules that permit cannot include compliance schedule for water quality limits attributable to State water quality certification:

In re City of Haverhill, Wastewater Division, NPDES Appeal No. 92-29 (Envtl. Appeals Bd., April 14, 1994), Order Denying Review, Opinion by Judge Firestone.

EPA Region I issued a NPDES permit to the City of Haverhill, Massachusetts (City), for the City's publicly owned treatment works (POTW), which mandated that "combined sewer overflows must not cause violations of the State's Water Quality Standards." The City requested an evidentiary hearing on whether the permit should allow a schedule of compliance that would provide the City with reasonable time to come into compliance in the event that combined sewer overflows were found to be causing violations of State water quality standards. The Regional Administrator denied the City's request for an evidentiary hearing, stating that EPA may not authorize violations of State water quality standards, and that the CWA does not allow EPA to authorize unlawful discharges of pollutants by establishing compliance schedules in permits, citing EPA's decision in In re Star Kist Caribe, Inc. NPDES Appeal No. 88-5 (Administrator, April 16, 1990) Order on Petition for Reconsideration.

The Appeal Board held, for two reasons, that the Regional Administrator correctly denied an evidentiary hearing since, as a matter of law, the requested schedule of compliance may not be included in the permit. First, in its letter certifying the draft permit, the State wrote that "None of the conditions of the permit may be made less stringent without violating the requirements of the State Act and the Massachusetts Water Quality Standards." Thus, the condition requiring the City to comply with State water quality standards was attributable to State certification, within the meaning of 40 C.F.R. § 124.55(e). Under that section, the Agency may not entertain a challenge to a permit condition attributable to State certification, which may only be raised in the appropriate State forum. Second, even if such a challenge could be entertained, the result would be the same because EPA cannot authorize discharges pursuant to a compliance schedule where the discharge does not meet applicable State water quality standards. The only exception to this rule is when the water quality standard itself or the

State's implementing regulations can be construed as clearly authorizing a schedule of compliance. In this instance, the City failed to demonstrate that they meet the terms of this exception.

9. Board rules review of limitations attributable to State certification must be conducted pursuant to State procedures:

In re Town of Rockland Sewer Commission, NPDES Appeal No. 93-8 (Envtl. Appeals Bd., August 19, 1994), Order Denying Review, Opinion by Judge McCallum.

The Board denied the Town of Rockland Sewer Commission's (Rockland's) petition seeking review of EPA Region I's denial of a request for an evidentiary hearing, related to the effluent limitations for chlorine and copper in Rockland's NPDES permit. Rockland objected to the limitation, arguing that the permit should contain a schedule of compliance for chlorine and that the permit should not contain a limitation for copper because the Rockland facility was not capable of meeting the limitations.

In denying the petition, Region I concluded that the State water quality regulations did not authorize compliance schedules in NPDES permits. Likewise, the copper limit was required to be included in the permit regardless of Rockland's ability to comply with the limitation.

The Board found that it need not consider the merits of these arguments because the limitations were "attributable to State certification," and according to 40 C.F.R. § 125.55(e), Region I may not entertain a challenge to a permit, but rather the review and appeal of limitations and conditions "attributable to State certification" must be made through State procedures. Thus, the Board concluded it was not authorized to entertain Rockland's challenges to the permit.

Attorney: Ann Williams, ORC, Region I

10. Board holds challenges to permit limits attributable to State certification must be made through State procedures:

In re City of Fitchburg, NPDES Appeal Nos. 93-13, 93-14, 93-15, and 93-16 (Envtl. Appeals Bd., February 7, 1994) Order Denying Review, Opinion by Judge Reich.

EPA Region I issued four NPDES permits to the named wastewater treatment plants. These permits established toxic metals limits adopted to enforce Massachusetts' water quality standards pursuant to CWA § 301(b)(1)(C). The State standards did not include site-specific limits, and thus incorporated EPA's "Gold Book" criteria for certain toxic pollutants developed under CWA § 304(a). The permits issued by the Region were certified by the State. Requests for evidentiary hearings were filed by petitioners and denied by the Regional Administrator. His denial was based on a determination that the permit conditions being challenged (toxic metals limits) were attributable to State certification, and therefore, must be appealed to the State. These denials were appealed to the Board pursuant to 40 C.F.R. § 124.91.

Petitioners relied on a letter from the Massachusetts Bureau of Resource Protection (DEP) to show that the State never intended for permits incorporating "Gold Book" criteria to result in denial of appeals to the Region under cover of State certification. Petitioners further argued that this letter demonstrates that DEP did not mean by its certifications "that the metals limits could not be made less stringent without violating State water quality limits." See City of Fitchburg, et al.; 1994 TSCA LEXIS 18. At the very least, the City argued that ambiguity was created regarding the State's intentions, and thus permit limits could not be attributable to State certification citing In re Boise Cascade Corp., NPDES Appeal No. 91-20, at 10-11 n.7 (Envtl. Appeals Bd., January 15, 1993). Petitioners, relying on Puerto Rico Sun Oil Company v. EPA, 8 F.3d 73 (1st Cir. 1993), argued that the Administrator's denial was arbitrary and capricious.

The Board held that the Regional Administrator properly denied the request for an evidentiary hearing in each of these appeals. The Board

noted that 40 C.F.R. § 124.55(e) specifies that challenges to permit limitations and conditions attributable to State certification must be made through applicable State procedures. It also observed that in the certifications on appeal, the State's language is clear and unambiguous that the conditions of the permit could not be made less stringent (except through subsequent development of site-specific criteria).

Further, the Board found no ambiguity in the certification letters. The charge of ambiguity was further weakened by a recent I.C.P. Declaration from DEP dated December 21, 1993, stating in part: "The DEP certified each of these permits pursuant to section 401(a) of the federal Clean Water Act . . . . These certification letters remain in effect as to these specific permits and have not in any way been superseded or changed."

F. Pretreatment

1. Board upholds two-prong test for pretreatment programs for POTWs with flows less than 5 million gallons per day:

In re City of Yankton, NPDES No. 93-2a (Envtl. Appeals Bd., July 1, 1994) Order Denying Review, Opinion by Judge Firestone.

EPA Region VII appealed from an initial decision of Administrative Law Judge Nissen deleting a pretreatment program requirement from the City of Yankton's NPDES permit. Region VII had included a pretreatment requirement in the City's permit under 40 C.F.R. § 403.8(a), which allows a Region to require a pretreatment program at a POTW with less than 5 million gallons per day flow, if the region finds that such a requirement is warranted to prevent an occurrence of interference or pass through.

The Board found that the Presiding Officer used the correct two-prong test under CWA § 403.8. The first inquiry is whether any of the "circumstances" presented by the Region actually present a real possibility of interference or pass through. If the Region can establish no "circumstances" that present the possibility of interference or pass through, the analysis does not need to go further. **If the Region has established one or more circumstances suggesting the possibility of pass through or interference, the Region must inquire whether there is some nexus between the nature and character of the City's industrial effluent, and the role a City-run pretreatment program could play in preventing any interference or pass through from industrial users.**

Although Region VII was found to have met the first prong of this test (by showing the presence of ammonia in the effluent, indicating the possibility of pass through), the Board agreed with the Presiding Officer's conclusion that the Region had failed to establish an identifiable nexus between the presence of ammonia in the POTW's effluent and the potential benefits of requiring a pretreatment program. **The Board found that the Region had failed to present *any* evidence connecting any toxicant to any categorical users that would be the focus of a pretreatment program. Accordingly, the Board denied review of the Region's petition.**

Attorney: Marion Yoder, ORC, Region VIII

2. ALJ rules POTW's NPDES permit modification by letter to include an approved pretreatment program was a "minor modification" not requiring public participation:

In re Borough of Chambersburg Wastewater Treatment Plant, Docket No. CWA-III-063, (A.L.J. Jon G. Lotis, February 4, 1994) Order on Motions.

USEPA filed complaint against respondent POTW for failing to take appropriate actions against Industrial Users (IUs) as required by the POTW's pretreatment program and NPDES permit. The POTW asserted that its NPDES permit did not require a pretreatment program since it had never been modified to include one. Thus, central to the court's opinion was whether the POTW's permit had been modified by letter from the Pennsylvania Department of Environmental Resources (PADER), even though no follow-up had occurred. The POTW

argued that a permit modification would have required public participation procedures under State law. EPA contended that the letter constituted a "minor permit modification" under 40 CFR § 403.8(c), excepted from public participation requirements, and that the POTW had taken action implying consent to the modification (filing annual pretreatment reports, issuing IU permits, and sampling/analyzing IU wastewater).

Since nothing in the record indicated that the State objected to the federal requirements for permit modification at the time of NPDES program approval, the State's program must conform with federal requirements for minor modifications, even though there was no State provision for "minor modifications." **Accordingly, the court concluded that the POTW's permit had been validly "modified" to incorporate its pretreatment program, and as such, constituted an approved program enforceable by EPA.** The permit did not, however, require compliance with regulations or amendments to regulations that were promulgated after the modification. Therefore, regulatory amendments promulgated after the letter-modification were not enforceable in the instant proceeding. Moreover, the POTW was not required to change IU permits to satisfy new Part 403 requirements until its permit was appropriately modified.

The court also observed that the local sewer use ordinance controlling IUs requires IUs to obtain a "wastewater discharge" permit, while only Significant Industrial User (SIUs) need to obtain a "wastewater contribution" permit, contrary to the POTW's claim that its ordinance only requires permits for SIUs. (The named IU was not an SIU at that time.)

With regard to the allegation of failure to enforce pretreatment requirements against the second IU, the court found that the POTW had not followed its own procedures requiring monitoring of IU violators on a weekly basis, constituting a sufficient basis upon which to find the POTW liable for violating a condition of its NPDES permit. However, because the POTW published notice of violation with 15 days of receiving knowledge that the IU was a "significant violator," the POTW was not in violation of requirements for publishing notice of noncompliance.

G. Wetlands

1. Wetlands Jurisdiction

a. Third Circuit finds agriculture conversion activities not exempted under 404(f):

United States v. Brace, 41 F.3d 117 (3d Cir., December 2, 1994), *reh'g denied* 1995 U.S. App. LEXIS 378 (January 9, 1995).

The United States, after issuing three cease and desist orders, filed suit against Defendant Brace alleging violations of CWA § 404. Defendant is a farmer who had purchased approximately 600 acres in Erie County, Pennsylvania, from his father, who had used the property for pasturing cows and horses. Part of the site was a wetland at the time of purchase. Between 1976 and 1987, Brace altered the site, including cleaning the drainage system; clearing, mulching, and leveling the site; installing drainage tiles; and planting and growing crops. At no time did Brace have a CWA § 404 permit. The district court held that Brace was not liable for discharging without a CWA § 404 permit, finding that his activities were exempt under CWA § 404(f) (i.e., that they constituted normal farming, upland soil and water conservation practices, and maintenance of drainage ditches). The district court also held that these activities were not recaptured under CWA § 404(f)(2), finding that they did not convert the area to a new use, or impair the flow or reach of waters of the United States.

On review, the Third Circuit reversed the district court decision. The Third Circuit addressed whether the lower court erred in: 1) determining that Brace's discharges of dredge and fill were exempt under CWA § 404(f)(1), 2) determining that such discharges were not recaptured by CWA § 404(f)(2), and 3) determining that Brace was not subject to liability for violations of administrative orders.

The court held that the district court incorrectly found that Brace's activities were exempt under CWA § 404(f)(1). The court found that the relevant regulation defines "normal farming activity" as part of an established, ongoing farming operation, that must be conducted in accordance with the definitions in

33 C.F.R. § 323.4(a)(1)(iii). 33 C.F.R. § 323.4(a)(1)(ii). Under these provisions, **activities that bring an area into farming are not part of an established operation (33 C.F.R. § 323.4(a)(1)(ii)). Moreover, the court found that any established farming activity must be on the wetland site itself.** See United States v. Cumberland Farms of Connecticut, Inc., 647 F. Supp. 1166, 1175 (D. Mass. 1986). The court found that this was not the case, however. In addition, the court found that Brace's activities (i.e., excavating soil and burying four miles of drainage tubing, leveling wooded and vegetated areas, spreading dredged materials) are all excluded from the activities allowed under 33 C.F.R. § 323.4(a)(1)(iii). **The court did not reach the second issue, but noted that the district court erred in finding that Brace's activities were not recaptured, since the record clearly showed that such activity converted wetlands to uplands.**

The final issue addressed by the court was penalty assessment. The Court found that Brace clearly was subject to a civil penalty under §309(d) for his violation of 404 permitting requirements. With respect to Brace's noncompliance with EPA's administrative orders, the court held that "[s]ection 309(d) does not afford the district court discretion to grant an exemption from liability for violating the EPA administrative orders. See, e.g., Atlantic States Legal Foundation v. Tyson Foods, 897 F.2d 1128, 1142 (11th Cir. 1990) (the language of Section 309(d) 'makes clear that once a violation has been established, some form of penalty is required.')" The Court found, however, that the record was not sufficiently clear for it to determine whether a violation of the order had in fact taken place, and the court remanded the issue to the district court for further review.

Attorneys: Steve Neugeboren, OGC; Joe Theis, OECA.

b. Seventh Circuit upholds CWA jurisdiction over isolated wetlands:

Rueth v. EPA. See page 2 for case summary.

c. Eleventh Circuit finds USACE interpretation that waters of the U.S. include wetlands adjacent to navigable waters is reasonable:

Mills v. United States. See page 3 for case summary.

d. District court holds cleaning drainage ditch does not require CWA § 404 permit:

United States v. Sargent County Water Resource District, 876 F. Supp. 1090 (D.N.D., December 30, 1994).

The Federal government sued the Sargent County Water Resource District (County) seeking injunctive relief and civil penalties for violations of the CWA, claiming that the County required a permit under 33 U.S.C. § 1344 for work cleaning out a drainage ditch where dredged material was deposited in sloughs as well as on old spoil piles. The County argued that the work was exempt as maintenance. 33 C.F.R. § 323.4(a)(3). **The court, in deciding whether the work was "maintenance" or an "improvement," held that since the County's work was for the purpose of maintaining an existing ditch, and this is clear in the record (no deepening or widening, ditch returned to original configuration), the work was maintenance.**

The Federal government raised two additional arguments: 1) the cases cited need to be narrowly construed to avoid adverse impact on wetlands, and 2) the County lost its right by waiting so long to clear the drain. The court distinguished the cases, finding that they involved conversions of wetlands to agricultural uses, whereas here only maintenance had been conducted, and found that there was no unreasonable delay. The court found that delay was only relevant to the issue of recapture under CWA § 404(f)(2), and the County's actions did not trigger recapture.

2. § 404 Permits

a. Fourth Circuit holds EPA can base CWA § 404 veto solely on unacceptable environmental impacts:

James City County, Virginia v. EPA, 12 F.3d 1330 (4th Cir., December 30, 1993) *cert. denied*, 130 L. Ed. 2d 39, 115 S. Ct. 87 (October 3, 1994).

The Fourth Circuit upheld EPA's decision to veto the Ware Creek Reservoir Project under CWA § 404(c). This decision reversed the holding of the district court, which had overturned EPA's second veto of the proposed water supply project.

In 1988, the U.S. Army Corps of Engineers (USACE) granted a CWA § 404(b) permit to James City County for the construction of a dam and reservoir across Ware Creek. EPA vetoed the permit under its CWA § 404(c) authority. The County contested EPA's veto and the district court ordered USACE to issue the permit. James City County, Virginia v. EPA, 758 F. Supp. 348 (E.D. Va. 1990). The Fourth Circuit Court of Appeals affirmed the district court's holding that there was not sufficient evidence that the County had alternatives to building the Ware Creek reservoir, but remanded the issue to EPA to decide whether environmental considerations alone could justify a veto. James City County, Virginia v. EPA, 955 F.2d 254 (4th Cir. 1992). On remand, EPA again vetoed the CWA § 404 permit, basing its veto solely on environmental considerations. The County again challenged EPA's veto and the district court again ordered issuance of the permit. This order was appealed to the Fourth Circuit.

On the second appeal, the Fourth Circuit reversed the district court's decision. The Fourth Circuit found that EPA was not required to evaluate the County's need for water (beyond ensuring purity in whatever quantities of water the State and local agencies provide). **The court found that EPA has the authority to veto a project based solely on the project's environmental impacts that result in unacceptable adverse effects on the environment.** The court held that the district court and initial appellate reviews had applied the incorrect standard of review. The court had applied the substantial evidence standard; however, **Agency action under CWA § 404 is reviewable under the "arbitrary and capricious" standard**. The court further found that EPA's decision was valid under either standard.

The court also found that the district court failed to give adequate deference to EPA's technical expertise in evaluating the environmental impacts of the proposed project and mitigation offered to offset those impacts. Accordingly, the court rejected the notion that acreage offered in mitigation could be subtracted from the acreage impacted to determine net environmental impacts. The court upheld EPA's position that mitigation credit be given only in exceptional circumstances (which were not shown here).

Attorney: Steve Neugeboren, OGC

b. Sixth Circuit holds EPA withdrawal of objections to State-issued wetlands permit is not a discretionary act exempt from judicial review:

Friends of the Crystal River v. EPA, 35 F.3d 1073 (6th Cir., September 21, 1994).

Five groups challenged EPA's restoration of State control of the CWA § 404 wetlands permitting process after EPA had transferred such authority to the U.S. Army Corps of Engineers (USACE) and then to EPA. These groups alleged that: 1) EPA lacked authority to withdraw its original objections to State issuance of a permit to Homestead Resort and return control of the permit process to the State of Michigan, 2) EPA's actions were arbitrary and capricious, and 3) issuance of the permit by the State would violate the CWA.

Homestead Resort planned to fill 3.7 acres of wetlands during construction of a golf course. EPA objected to State issuance of a wetlands permit and the Michigan Department of Natural Resources (MDNR) denied the initial application. Following a State court challenge, the Michigan Natural Resource Council (MNRC) adopted a State ALJ's recommendation to issue the permit. EPA remained opposed and transferred wetland permit decision authority first to the USACE, then to EPA Region V, and then to the EPA Assistant Administrator of

Water, LaJuana Wilcher. The Assistant Administrator withdrew EPA's earlier objections and returned permitting authority to MDNR.

The district court imposed a temporary injunction pending resolution, and on June 9, 1992, found for the plaintiffs on counts one and three. Friends of the Crystal River v. EPA, 794 F. Supp. 674 (W.D. Mich. 1992). The court found that the statute did not prevent review of EPA's action. It also concluded that after the 90-day period for State reconsideration had lapsed (40 C.F.R. § 233.50(j)), EPA lacked authority to withdraw its objections, revoke USACE's management authority, or restore the State authority to issue the permit. The court then issued a permanent injunction precluding issuance of the wetlands permit, which was challenged in the present action.

The Court of Appeals affirmed the district court's grant of a permanent injunction barring State issuance of the CWA § 404 permit. On the issue of whether the CWA precludes judicial review of EPA's withdrawal of its objections, the appeals court observed that the APA imposes a presumption in favor of review that is only overcome where the statute precludes review or the act at issue is committed to agency discretion. 5 U.S.C. § 701(a). The court then found that transferring permitting authority back to the State was a non-discretionary act (citing Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. 402-410, 28 L. Ed. 2d 136, 150, 91 S. Ct. 814, 821 (1971) for the proposition that for an agency decision to be precluded from review due to its discretionary nature the statute must be "drawn in such broad terms that in a given case there is no law to apply."). The court also found that EPA's action was a final decision that would terminate the government's role in this case, and that the existence of an alternative forum (i.e., state court) did not preclude Federal judicial review in this case.

On the issue of whether EPA exceeded its authority by attempting to return permitting authority to Michigan after that authority had been transferred to USACE, the court found that EPA did exceed such authority, and reasoned that CWA § 1344(j), as applied through 40 C.F.R. § 233.50(j), specifies a time limit in which a State must conform with EPA objections and that, where a State does not comply within the specified time limit, authority transfers to the USACE. The court found that such provisions indicate congressional intent to divest the original agency of jurisdiction.

c. Eighth Circuit holds wetlands permit alternatives analysis may be limited to a severable portion of a development project when the portion of the development not requiring a permit would proceed regardless of permit and there is little or no net loss of wetlands:

National Wildlife Federation v. Whistler, 27 F.3d 1341 (8th Cir., June 29, 1994).

Turnbow sought the U.S. Army Corps of Engineers' (USACE's) permission to provide water access to a planned residential development by re-opening an old river channel, which would involve destroying 14.5 acres of wetlands existing in the channel. The USACE issued a permit containing 42 conditions, including enhancement of a mitigation area, under the Rivers and Harbors Act and the CWA. A member of the National Wildlife Federation (NWF) brought an action seeking to suspend the permit. The district court denied the claim and this appeal followed. The central issue on appeal was whether the USACE performed an adequate alternatives analysis, as required by 40 C.F.R. § 230.10. The plaintiffs also asserted that to the extent the USACE conducted an alternatives analysis, it reached an arbitrary and capricious result.

The Appeals Court upheld the district court's decision, finding that neither USACE's project definition nor its decision that no practicable alternative exists was arbitrary and capricious. The court observed that under Federal regulations where there is a practical alternative to a project that results in less adverse impacts, the USACE cannot issue a permit. 40 C.F.R. § 230.10(a). The court also noted that where a project is not water dependent, the applicant must demonstrate that alternatives do not exist. 40 C.F.R. § 230.10(a)(3).

The court then found that the fact that the USACE limited its analysis of the purpose of the project to the boat access area was supported by prior decisions (see Sylvester v. U.S. Army Corps of Engineers, 884 F.2d 394 (9th Cir. 1989) where, in

assessing the scope of National Environment Policy Act (NEPA) analysis, the court found that placing a golf course in a wetland area does not federalize the entire resort complex). It also observed that the housing development would proceed even without a wetlands permit, further suggesting that the water access was a separate issue from the remainder of the development. Finally, the court focused on the fact that this project, as modified pursuant to the conditions in the wetlands permit, including enhancement of a mitigation area, resulted in little or no net loss of wetlands.

d. District court holds that USACE properly conducted CWA wetlands permit review:

Conservation Law Foundation v. Federal Highway Administration, 827 F. Supp. 871 (D.R.I., July 30, 1993) *aff'd*, 24 F. 3d 1465 (1st Cir., May 23, 1994).

In 1992, the U.S. Army Corps of Engineers (USACE) completed an Environmental Assessment (EA) and issued a final CWA § 404 permit associated with the construction of the Jamestown Connector, a divided highway. Plaintiffs sought to enjoin construction of the Jamestown Connector, which they alleged would violate five federal statutes including the CWA.

The district court denied the plaintiffs' application for a preliminary injunction, finding that the plaintiffs had not shown that they were likely to succeed on the merits of any of their claims.

The plaintiffs first argued that the USACE violated CWA § 404(b)(1) guidelines by issuing a permit for the filling of wetlands where there exist "practicable alternatives" to the project. The court noted that the USACE was entitled to reasonably rely upon the evaluation of alternatives contained in the Final Supplemental Environmental Impact Statement (FSEIS) because the USACE properly supplemented the FSEIS and properly considered the incompatibility of the "practicable alternatives" in the permitting process. Sylvester v. U.S. Army Corps of Engineers, 882 F.2d 407, 409 (9th Cir. 1989). The USACE also required wetlands mitigation measures to reduce the impacts on wetlands from 13 acres to 4.6 acres. **The court held that having properly reviewed the record and considered relevant factors, including project purposes, nothing more was required of the USACE in evaluating practicable alternatives.** The USACE's decision was not arbitrary and capricious.

The plaintiffs also contended that the USACE failed to conduct a proper public interest review, which included considering cumulative impacts. 33 C.F.R. § 320.4(a)(1). The plaintiffs claimed that the USACE eliminated an overpass with the intention of constructing it later as part of a separate action. The court disagreed, stating that the USACE thoroughly examined the overpass, to the point where its elimination was required. The court noted that taking the plaintiffs' argument to its logical conclusion, "would allow future plaintiffs to challenge any portion of a project which has been eliminated but not completely purged from the minds of highway planners." **The court held that the USACE properly conducted the required public interest review**.

Finally the plaintiffs argued that the USACE's determination not to hold a public hearing violated CWA § 404(b)(1) guidelines. When the USACE issued its Public Notice for the Jamestown Connector permit, 6 requests were received for a public hearing, which listed 11 areas of concern. After the issuance of the Public Notice, the USACE addressed many of the concerns expressed by those requesting a hearing and met with local groups to hear concerns. The USACE concluded that additional information that was required appeared to be technical in nature and unlikely to be addressed in a public hearing. Accordingly, the USACE determined that a public hearing was not warranted. **Given the informal meetings held by the USACE and the preclusion of issues by developments occurring after the Public Notice, the court held that the USACE's decision not to hold a public hearing was not an abuse of discretion.**

[Note: This decision was affirmed by the First Circuit in Conservation Law Found. of New England v. FHA, 24 F. 3d 1465 (May 23, 1994)].

Attorneys: Beverly Nash, DOJ, Mary Elizabeth Ward, ENR, DOJ

3. Regulatory Takings

a. Federal Circuit Court addresses statute of limitations for temporary and permanent takings:

Creppel v. United States, 41 F.3d 627 (Fed. Cir., November 18, 1994).

Appellants brought temporary and permanent takings claims in the U.S. Court of Federal Claims, asserting that EPA and the U.S. Army Corps of Engineers (USACE) actions had deprived them of the value of their property. The Court of Federal Claims ruled that the property owners' claims were barred under the applicable six-year statute of limitations of 28 U.S.C. § 2401 (for claims subject to the jurisdiction of the Court of Federal Claims). The property owners appealed to the U.S. Court of Appeals for the Federal Circuit.

Appellants own property containing wetlands involved in a USACE flood control/reclamation project in Jefferson Parish, Louisiana. The project at the center of this controversy was begun in the 1960s and was originally intended as a flood control/land reclamation project. The project was to consist of a flood control dike, encircling a 3000-acre wetland, designed to allow the interior land to be drained and developed. In 1976, under a veto threat from EPA, the USACE dictated that the project could be approved under CWA § 404 only if pumping stations were changed to moveable flood gates (changing the nature of the project from one of both flood control and reclamation to one of solely flood control, with retention of the wetlands). This decision, known as the Wilson Order, was challenged and upheld by the Fifth Circuit Court of Appeals in 1982. The Fifth Circuit, however, remanded the case to the district court to determine whether local assurances were available for completion of the project and whether CWA § 404(c) prevented completion of the project. On remand, the district court ordered that the original project should proceed, but the court subsequently stayed its order to allow EPA to decide whether it would commence CWA § 404(c) proceedings. In October 1985, EPA exercised its CWA § 404(c) veto authority.

The Federal Circuit Court of Appeals upheld the Court of Federal Claims with regard to the temporary takings claims, finding that the property owners' claims were barred. The Federal Circuit Court of Appeals agreed with the lower court that the alleged temporary taking began in 1976 as a result of the Wilson order modifying the original project. The court found that any temporary taking ended in August 1984, when the district court ordered the original project to proceed, and that the six-year statute of limitation had thus expired by the time the property owners filed their takings claims in 1991.

The Federal Circuit Court of Appeals, however, reversed the lower court's ruling that the appellant's permanent takings claims were time barred. The Court found that "a claim under the Fifth Amendment accrues when the taking action occurs." The Court of Appeals disagreed with the lower court's reasoning that the government could have taken nothing permanently because EPA's 404(c) veto did not diminish the value of the property any more than it had already been diminished by the Wilson Order. The Court of Appeals found instead that the property owners retained some expectation of completion of the project (and an increase in their property values) until EPA's final determination under CWA § 404(c). The Court thus found that claimants had filed their permanent takings claim within the six-year statute of limitations. The permanent takings claims were remanded to the Court of Claims for further consideration.

Attorney: Pat Rankin, EPA Region VI

b. Federal Circuit rules that particular facts of each case determine whether regulatory takings are compensable under the Fifth Amendment:

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir., March 10, 1994), *reh'g denied and suggestion en banc declined*, 1994 U.S. App. LEXIS 16257 (June 21, 1994).

The plaintiff, Florida Rock purchased a 1560 acre wetlands parcel in Dade County for the purpose of extracting the underlying limestone -- a process that destroys the surface wetlands. The plaintiff's

CWA § 404 permit application was denied by the Army Corps of Engineers, and Florida Rock brought suit seeking monetary damages for the taking of private property for public use in violation of the Fifth Amendment. The Court of Federal Claims agreed. The Circuit Court vacated the judgment that a taking had occurred and remanded. The Court of Federal Claims found that the permit denial deprived Florida Rock of all value in its land and reinstated the damages award. The Circuit Court again vacated the takings judgment and remanded to the Federal Claims Court to determine whether the Federal government must compensate the plaintiff.

The Court of Federal Claims initially found that the permit denial was a regulatory taking, for which the landowner must be compensated. On appeal, the Federal Circuit held that the Court of Federal Claims, in determining the after-taking value of the affected property, had erred in focusing on immediate use -- the proper focus should instead have been on a determination of "fair market value." Florida Rock Industries, Inc. v. United States, 791 F.2d 893, 903 (Fed. Cir. 1986). Upon remand, the government presented evidence to establish the value of the property by establishing values on comparable properties. However, Florida Rock concluded that buyers of the comparable properties were lacking in sufficient knowledge in order for their purchases to qualify as truly comparable sales. Their expert concluded that the actual fair market value of the tract following the permit denial was negligible, and the Federal Claims Court agreed.

The Federal Circuit focused its decision in this second appeal on the economic impact of the regulation upon the value of the land. The court rejected the lower court's analysis that led to its conclusion that all economically beneficial use of the land was taken by the government, and remanded for a "determination of what economic use as measured by market value, if any, remained after the permit denial, and for consideration of whether, in light of their properly assessed value of the land, Florida Rock has a valid takings claim." The court determined that it was error for the Court of Federal Claims to interpret a reference in the first appeal to buyers being "correctly informed" to require a detailed inquiry into motivation and sophistication of the buyers whose purchases comprises the comparable sales used in the fair market value assessment. This reading led the trial court to reject all of the comparable sales values on the principle that none of the purchasers were sufficiently sophisticated and knowledgeable.

In determining whether a compensable taking of property occurred, the Circuit Court focused on two preliminary issues. First, whether a regulation must destroy a certain proportion of a property's economic use or value in order for a compensable taking of property to occur. Second, how to determine, in any given case, what that proportion is. After a discussion of the differences between a physical taking of the land and a regulatory taking, the court concluded that "the amount of just compensation should be proportional to the value of the interest taken as compared to the total value of the property, up to and including total deprivation, whether the taking is by physical occupation for the public to use as a park, or by regulatory imposition to preserve the property as a wetland so that it may be used by the public for ground water recharge and other ecological purposes."

The court recognized the difficulty in determining the extent of a regulatory taking, and discussed the historical application of the Fifth Amendment to this issue. The court acknowledged the "difficult task of resolving when a partial loss of economic use of the property has crossed the line from a noncompensable `mere diminution' to a compensable `partial taking.' The court upheld the body of law in this area, ruling that the question of when a regulatory taking occurs cannot be answered as a matter of absolute doctrine, but instead required a case-by-case adjudication: "the question depends upon the particular facts." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 67 L. Ed. 322, 43 S. Ct. 158 (1922). The court recommended questions to be asked in the determination of economic loss: "[A]re there direct compensating benefits accruing to the property, and others similarly situated, flowing from the regulatory environment? Or are benefits, if any, general and widely shared through the community and the society, while the costs are focused on a few? Are alternative permitted activities economically realistic in light of the setting and circumstances, and are they realistically available? In short has the government acted in a responsible way, limiting the

constraints on property ownership to those necessary to achieve the public purpose, and not allocating to some number of individuals, less than all, a burden that should be borne by all?" The court remanded for a determination in the record of the `after imposition' value of the land, in order to determine if a partial taking had occurred.

Attorney: Klarquist, DOJ

c. Federal Circuit holds value of other land developed or sold before current regulatory environment existed should not be considered in determining regulatory taking of land at issue:

Loveladies Harbor, Inc. v. United States, 27 F.3d 1545 (Fed. Cir., May 24, 1994), *aff'd* 28 F.3d 1171 (Fed. Cir., June 15, 1994) *reh'g denied and suggestion for reh'g in banc declined* 1994 U.S. App. LEXIS 28462 (September 29, 1994).

The government appealed an award, based on a judgment of regulatory taking by the Court of Federal Claims, of $2,658,000 to Loveladies Harbor development. The Army Corps of Engineers denied Loveladies' application for a CWA § 404 permit for the filling of 12.5 acres of wetlands. This denial was challenged and, based on a finding of "greater than 99 percent diminution of value, coupled with . . . a lack of a countervailing substantial legitimate state interest," the Court of Federal Claims determined that a taking had occurred.

The Court of Appeals held that no error was committed by the trial judge in finding that a taking had occurred when the Federal government denied the CWA § 404 permit. The Court of Appeals observed that, following the decision in Lucas v. South Carolina Coastal Council, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992), the law of regulatory taking consists of the following tenets: 1) a property owner who can establish that a regulatory taking of property has occurred is entitled to a monetary recovery for the value of the interest taken, measured by just compensation; and 2) there has been a regulatory taking if: A) there was a denial of economically viable use of the property as a result of the regulatory imposition; B) the property owner had distinct, investment backed expectations; and C) the interest taken was vested in the owner, as a matter of State property law, and not within the power of the State to regulate under common law nuisance doctrine.

The court found that, since Loveladies clearly purchased the original 250-acre tract of property expecting to develop it (only 51 acres remained undeveloped), the regulation at issue interfered with Loveladies investment-backed expectation. In assessing whether there had been a denial of economically viable use, and the key issue of defining what constitutes the property whose value is compared pre- and post-regulation, the court found that the value of the 12.5 acres at issue was most appropriate. The trial court found that other land developed or sold before the regulatory environment existed should not be considered, and the Court of Appeals found that the government had not demonstrated that such a finding was clear error.

With regard to the nuisance question, the court again agreed with the trial court, which found that the government failed to prove that State nuisance law could be used to prevent the fill. The court observed that given the long history of development activity (Loveladies originally purchased the 250 acres in 1958), nothing in the State's conduct reflected a determination that certain development activities would violate the State's nuisance law.

d. Federal Circuit holds issuance of cease and desist order requiring that plaintiff obtain a wetlands permit does not constitute temporary taking:

Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir., November 24, 1993).

During Tabb Lakes' development of five contiguous parcels of land, the U.S. Army Corps of Engineers (USACE) was notified of potential wetlands on three sections of the property. Following an investigation, the USACE ordered Tabb Lakes to cease and desist from further filling of any wetlands until a CWA § 404 permit was obtained. Over the next 10 months, the parties were unsuccessful in negotiating an agreement to mitigate damages to the wetlands and thus lead to issuance of a permit. Tabb Lakes

withdrew and sought a declaratory judgment that USACE did not have regulatory jurisdiction over all wetlands, but only over those "waters of the United States that have a sufficient nexus with interstate commerce." In 1988, the district court held that the action by USACE in asserting its jurisdiction over Tabb Lakes' property was procedurally defective under the APA. This was affirmed by the Fourth Circuit Court of Appeals.

Tabb Lakes filled its wetlands and developed its property. On November 2, 1990, Tabb Lakes filed a complaint in the Court of Federal Claims seeking compensation for a "temporary" taking of its property. The period of the taking was alleged to have run from October 8, 1986, the date on which the USACE issued its cease and desist order, to December 19, 1989, the date on which the Fourth Circuit judgment became final.

The Court of Federal Claims ruled, and was affirmed by the Federal Circuit, that the plaintiff had not been deprived of all, or substantially all, economically viable use of its property during the alleged period of the taking on the grounds that there was some continued development and sales activity over the 3 years, and that the government-caused delay in pursuing the permit process was not extraordinary or in bad faith. Furthermore, the Federal Circuit held that the cease and desist order issued by USACE did not rise to the level of a "taking," and thus, compensation was not required. While the order stopped the filling of wetlands, it specifically left the door open to development by obtaining a permit. In United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126-127, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985), the Supreme Court stated that "the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking . . . . Only when a permit is denied and the effect of the denial is to prevent `economically viable' use of the land in question can it be said that a taking has occurred." **The Court of Appeals added that the standard for determining economically viable use of the property considers both the character of the action and the nature and extent of the interference with rights in the parcel as a whole, and that the plaintiff concedes that when all five sections of the subdivision are considered, there is no taking.**

The court also noted that the permit cases are inapplicable, since the USACE, as it turned out, lacked jurisdiction to issue a wetlands permit. Rather, such a mistake may give rise to a due process claim (which are not remedied by compensation), not a taking claim. Finally, the Court of Appeals found that the delay caused by the USACE's order was not so unreasonable as to constitute a taking, and that the government was not responsible for diminution in value caused by preliminary activity.

Attorney: David Shilton, DOJ

H. Citizen Suits

1. Standing

a. Third Circuit adopts modified parameter-based basis for establishing CWA citizen suit jurisdiction:

Natural Resources Defense Council, Inc. v. Texaco Refining and Marketing, Inc., 2 F.3d 493 (3d Cir., August 12, 1993).

Plaintiffs Natural Resources Defense Council and Delaware Audubon Society (collectively "NRDC") alleged that Texaco Refining and Marketing (Texaco) repeatedly violated its NPDES permit, which limits Texaco's effluent discharges from its Delaware City oil refinery. The district court held Texaco liable for 365 permit violations, imposed civil penalties totalling $1,680,000, and issued a permanent injunction prohibiting further permit violations and ordering Texaco to comply with various permit provisions.

Texaco appealed, raising five issues, and NRDC cross-appealed. The Third Circuit affirmed in part and reversed in part, and remanded for further proceedings consistent with its opinion.

The Third Circuit upheld the district court's use of the modified parameter-based approach for determining whether it had jurisdiction over

allegations of both past and ongoing permit violations. Under this approach, a plaintiff can establish continuous or intermittent violations by either proving a likelihood of recurring violations of the same parameter or proving a likelihood that the same source of trouble will cause recurring violations of one or more different parameters. The court found that a strict by-parameter standard was too narrow because jurisdiction over each pre-complaint parameter violation requires post-complaint violations of the same parameter. The court rejected NRDC's claim that ongoing violations of any one parameter in a discharge permit was sufficient to subject the discharger to civil penalties for past violations of all other parameters in the same permit.

The court upheld the trial court's decision to hold Texaco liable for 323 pre-complaint parameter violations based on 42 post-complaint violations of the same parameters. The court found that because proof of one or more post-complaint violations is itself conclusive, the district court was correct in relying on such violations to determine that corresponding pre-complaint violations were continuous or intermittent.

The Third Circuit rejected Texaco's claim that, since NRDC's claims for injunctive relief were moot because the refinery came into compliance through permit changes and the closure of one of the discharge outfalls, that NRDCs civil penalty claims also must be dismissed as moot. The court cited precedent and the structure and language of the CWA in holding that once a citizen plaintiff establishes an ongoing parameter violation at the time of complaint, the court must assess penalties for all proven violations of that parameter.

The appeals court also held that the plaintiff citizen groups had standing to bring the suit, finding that they had adequately shown that their injuries were reasonably traceable to Texaco's permit violations.

The court upheld the imposition of a permanent injunction banning future discharge permit violations from the refinery, although it remanded the case to narrow the scope of the injunction to order compliance only for the parameters that had been continuously or intermittently violated. The scope of the district court's injunction was too broad because it enjoined future violations of discharge parameters for which no violations had been proved at trial.

In response to Texaco's claim that the district court overcounted the days of violation used to support calculation of the fine imposed, the **Third Circuit ruled that violations of the daily average pollutant discharge limit could be calculated only for the number of days within the month that the facility operated.**

b. Ninth Circuit holds injury-in-fact standing element satisfied where plaintiffs establish they were adversely affected by inadequate water quality of representative number of waters throughout State:

Alaska Center for the Environment v. Browner. See page 14 for case summary.

c. Ninth Circuit holds citizens do have standing to enforce State water quality standards:

Northwest Environmental Advocates v. City of Portland, 1995 LEXIS (9th Cir., June 7, 1995), withdrawing opinion published at 11 F.3d 900 (9th Cir., December 10, 1993).

[Note: The following is a summary of the original 9th Circuit opinion which was withdrawn and replaced by a new opinion from the same panel on June 7, 1995. A summary of the new opinion will be included in the next issue of the Water Enforcement Bulletin.]

The Northwest Environmental Advocates sued the City of Portland, alleging that the City's practice of discharging raw sewage during times of precipitation from combined sewer overflow (CSO) outfall points was not covered by the City's NPDES permit and thus violated the CWA. The citizen suit also alleged that these CSO events violated Oregon State water quality standards and therefore violated a condition of the City's permit.

The Court of Appeals affirmed the district court's holding that the CWA does not confer jurisdiction for citizen suits to enforce State water quality standards that are a condition of an NPDES permit.

d. Ninth Circuit finds citizen group lacks standing to compel promulgation of regulations that provide for treatment of Indian tribe as a State under CWA regulations:

Citizens Interested in Bull Run, Inc. v. Reilly, 1993 U.S. App. LEXIS 10386 (9th Cir., April 29, 1993).

Citizens Interested in Bull Run, Inc. (CIIBRI) and some of its individual members brought suit against EPA to compel the agency to promulgate regulations under CWA § 518(e), specifying how Indian tribes should be treated as States for purposes of administering the CWA on Indian reservations. The Ninth Circuit affirmed the district court's dismissal of the citizen suit for lack of standing.

The Ninth Circuit found that CIIBRI had not established that there was a "substantial likelihood that the relief requested will redress the injury claimed." While CIIBRI alleged that treatment as a state (TAS) regulations would allow tribes to enforce the CWA more strictly, CIIBRI did not allege that any tribes would in fact regulate water quality more strictly than EPA, and CWA § 518(e) would not require tribes to exceed Federal enforcement standards. The court cited various cases establishing that a plaintiff does not have standing if the remedy for the alleged injury depends on the actions of a third party not before the court. The court noted that promulgation of CWA § 518(e) regulations would not ensure that the third parties involved--Indian tribes--would modify water quality standards.

The Ninth Circuit also rejected CIIBRI's assertion that it had "procedural standing" under the CWA citizen suit provision and the APA. The court cited the Supreme Court's holding in Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992), finding that a plaintiff asserting standing from a "procedural injury" must still demonstrate standing. CIIBRI's final claim, that its Native American members have a procedural interest in tribal sovereignty, was also rejected by the Ninth Circuit. The court noted that no tribes were parties to the lawsuit, and found that any procedural rights in protecting tribal sovereignty would not extend to individual tribal member plaintiffs.

[Note: Unpublished opinion—check applicable court rules before citing.]

e. District court holds citizen suits may proceed in NPDES authorized States to enforce effluent limits:

Washington Wilderness Coalition v. HECLA Mining Co. See page 7 for case summary.

f. District court holds reconsideration of previous opinion related to alleged violations of effluent limitation is warranted where party demonstrates that earlier ruling was premised upon misunderstanding of relevant regulatory scheme:

Atlantic States Legal Foundation, Inc. v. Colonial Tanning Corp., 827 F. Supp. 903 (N.D.N.Y., July 19, 1993).

This action and Atlantic States Legal Foundation, Inc. v. Twin City Leather Corp. (90-CV-801), both citizen suits under the CWA, are addressed simultaneously in this opinion. The defendants are operators of tanneries that discharge wastewater to a POTW, and have allegedly violated specific effluent limitations.

Relevant to the present motion, the court held that the Atlantic State Legal Foundation (ASLF) lacked standing to bring certain claims, i.e., alleged pre-1989 violations that had not been included in the complaint, but were included in the complaints' ad damnum clauses. Accordingly, the court limited the scope of the case to the violations specifically alleged in the complaint and attached intent to sue letters. In the present case, the court addressed the plaintiffs' motion for reconsideration of these decisions.

With regard to the plaintiffs' standing, the court initially held that the plaintiffs' injury-in-fact was not "fairly traceable" to the defendants' allegedly illegal conduct, and thus that the summary judgment in the defendants' favor was proper. The court now realizes that implicit in the establishment of categorical pretreatment standards for indirect discharges was a recognition of the fact that both the indirect source and the POTW are independent polluters. Reconsideration is warranted where, as here, a party demonstrates that the earlier ruling was premised upon a misunderstanding of a relevant regulatory scheme.

The court finds that the relevant question is not, as previously stated, whether the defendants' pollutants reached the Cayudetta Creek in "unlawful amounts." Instead, if the defendants' discharge exceeded the effluent standards, the pollutants reached the waterway, and those pollutants are of the type that cause the injury sustained by the plaintiffs, the injury in fact is fairly traceable to the defendants' violation. **Consequently the court held that it was in error to rule that plaintiffs' injuries were not fairly traceable to the defendants' allegedly unlawful conduct, and thus, the plaintiffs have standing to bring the instant action.**

The court also found that it was in error to dismiss the plaintiffs' claims limiting the scope of the complaint. However, because the issue of scope was not properly presented at the time of the original motions for summary judgment, the court denied without prejudice the plaintiffs' motions for summary judgment.

g. District court holds potential problem with sampling data known prior to motion for reconsideration does not constitute new evidence in district court's reconsideration decision:

Atlantic States Legal Foundation, Inc. v. Karg Bros, Inc., 841 F. Supp. 51 (N.D.N.Y., December 20, 1993).

Karg Brothers operates a tannery that discharges wastewater to a POTW as regulated by its NPDES permit. ASLF filed a citizen suit, alleging violations of the tannery's NPDES permit limitations. Both parties moved for summary judgment. The court denied the plaintiffs' motion for summary judgment in its entirety. Likewise, the court ruled that the defendant's motion for summary judgment be granted in part, based on the plaintiffs' lack of standing to sue for the alleged exceedances of specific chemical limitations, and denied in part, based on material questions of fact remaining.

The court addressed the plaintiffs' motion for reconsideration, and in light of its favorable ruling on reconsideration motions made in the similar case of Atlantic States Legal Foundation, Inc. v. Colonial Tanning Corp., 827 F. Supp. 903 (N.D.N.Y., July 19, 1993) [see page 31 for case summary] determined that the plaintiffs have standing to sue in this case. The court then addressed the defendant's claim that documentation recently became available showing that all sampling data that form the basis of the complaint are invalid. **The court noted that although the defendant was aware of a potential problem with sampling data used as evidence in the complaint before the motion for reconsideration was filed, it chose not to address the issue at that time, and therefore the information did not truly present new evidence meriting weight in the court's reconsideration decision. The plaintiffs' motion for summary judgment was thus granted regarding this issue as well as reconsideration.**

h. District court holds that CWA authorizes citizen suits against Indian Tribes:

Atlantic States Legal Foundation, Inc. v. Salt River Pima-Maricopa Indian Community, 827 F. Supp. 608 (D. Ariz., July 12, 1993).

Plaintiff filed an action against the defendant, Salt River Pima-Maricopa Indian Community (SRPMIC), under the citizen suit provisions of § 505 of the CWA, 33 U.S.C. § 1365, and the RCRA, 42 U.S.C. § 6972(a)(1)(A). The complaint alleges that the SRPMIC landfill (Tri-City landfill) is being operated in violation of the CWA, 33 U.S.C. §§ 1311(a) and 1344, and the RCRA, 42 U.S.C. §§ 6944-6945.

Defendant moved for dismissal of the complaint for failure to state a claim. The defendant argued that

the action filed is not permitted under the citizen suit provisions of CWA and RCRA. Defendants asserted that an action for a violation § 404 of the CWA § 1344 is not maintainable under the citizen suit provision.

The court rejected the defendant's first argument, finding that CWA § 505 authorizes citizens suits against "any person," including Indian Tribes or other authorized tribal organizations. The court also found the relevant provisions of RCRA to be similar and distinguished caselaw suggesting that Indian tribal sovereign immunity precluded suit for violations of the CWA or the RCRA.

The court also rejected the defendant's argument that even if citizen suits are available in this instance, violations of CWA § 404 are not redressable by citizen suits. The plaintiffs' complaint alleged that the defendant SRPMIC owned and operated the Tri-City landfill, which discharged pollutants, without a permit, into the Salt River. The court noted that CWA § 505(f), allows citizen suits for a violation of § 301, 33 U.S.C. § 1311, which provides that except as in compliance with seven listed sections, the discharge of any pollutant by any person shall be unlawful. CWA § 301 requires compliance with § 404 of the Act.

The court held that because SRPMIC failed to obtain the requisite permit under § 404, SRPMIC also violated § 301, and the plaintiffs had standing to enforce the violation arising under § 404 through § 301 and the citizen suit provision, § 505. The court denied the defendants' motion to dismiss.

i. District court holds that insertion of new condition into State discharge permit gives rise to citizen suit under CWA:

Hudson Riverkeeper Fund, Inc. v. Orange and Rockland Utilities, Inc., 835 F. Supp. 160 (S.D.N.Y., October 21, 1993).

Defendant sought summary judgment and dismissal of the complaint for lack of subject matter jurisdiction, failure to state a claim, and failure to join the New York State Department of Environmental Conservation (DEC). Plaintiff is a not-for-profit corporation dedicated to preserving the beauty and quality of the Hudson River and its tributaries. Defendant is a public power utility and operates Lovett Generating Station on the Hudson River. Plaintiff sought declaratory judgment, injunctive relief and monetary damages pursuant to CWA § 309(d), 33 U.S.C. § 1319(d), based on allegations that the defendant engaged in continuing violations of Condition 9 of its State Pollutant Discharge Elimination System (SPDES) permit.

On May 30, 1989, defendant applied to DEC to renew its SPDES permit. After the usual procedural steps including public notice, DEC reissued the permit. This reissued permit contained a new provision not found in the previous permit, Condition 9, upon which this litigation is founded. Condition 9 states: "The location, design, construction, and capacity of the cooling water intake structure shall reflect the best technology available for minimizing adverse environmental impact." Defendant asserts that during the drafting stage, the permit writer "knew at that time there was no generally applicable definition of `best technology available' established by DEC . . . ." Riverkeeper submitted responses to the published draft permit, objecting to lenient and unenforceable provisions.

The District Court denied defendant's motion for summary judgement, holding that whether the Lovett plant was presently in compliance with Condition 9 of its SPDES permit was a genuinely disputed issue of material fact, and that the condition was valid and enforceable by citizen suit.

The court determined that it had subject matter jurisdiction over the complaint pursuant to § 505(a)(1) of the CWA. The court concluded that Riverkeeper is not estopped from this action because it criticized the form and content of Condition 9 during the public comment period for the draft permit. Furthermore, as a matter of law, Condition 9 is not so vague or ambiguous as to be useless, lacking in meaning, or unenforceable. 'Best technology available' is something that can be ascertained as fact, the court noting that evidence submitted by affidavit suggests better technology exists.

The court took note that Condition 9 was a paraphrase of § 704.5 of the DEC's own regulations. Once inserted into a permit, the permit writer "in effect issued an open invitation to a lawsuit, which invitation Riverkeeper accepted." The presence of Condition 9 in the Lovett SPDES permit allowed plaintiff to allege that the permit was being violated because the facility was not employing the 'best technology available.' The court further concluded that DEC was a necessary party under Fed. R. Civ. P. 19(a)(ii) because failure to join them would leave the defendant subject to incurring multiple obligations.

Attorney: Robert F. Kennedy, Jr. (NRDC)

j. District court finds plaintiff bringing CWA citizen suit must satisfy traditional standing requirements:

Tannenbaum v. United States, 1993 U.S. Dist. LEXIS 9010 (N.D. Ill., June 30, 1993) (motion for appointment of counsel); 1993 U.S. Dist. LEXIS 18672 (N.D. Ill., January 6, 1994) (motion for summary judgement); *sub. nom.* Tannenbaum v. Jamison, 1994 U.S. Dist. LEXIS 3751 (N.D. Ill., March 29, 1994) (motion to dismiss); 1994 U.S. Dist. LEXIS 7504 (N.D. Ill., June 6, 1994) (motion to amend complaint).

Plaintiff seeks to enjoin his neighbors from dumping concrete rubble on wetlands and compel them to clean up previously dumped concrete on the wetland adjoining the creek. He alleges that this illegal dumping will cause diminution of waterfowl, disruption of drainage patterns, and incursion on the natural water filtering process.

Defendants seek to dismiss on grounds that plaintiff has failed to allege an injury sufficient to confer standing and fails to aver that any Federal environmental statutes have been violated. The Supreme Court made clear in Lujan v. Defenders of Wildlife, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992), that the plaintiffs must allege facts demonstrating that they will be directly affected by the disputed action. **Since the plaintiff failed to plead any proximity to the affected land or that he would be directly affected by the alleged affects of the dumping, the court dismissed the complaint for failure to satisfy the injury-in-fact requirement necessary to confer standing.**

The court denied plaintiff's motion for leave to file a third amended supplemental complaint because of his failure to provide the defendant with 60 days notice that he intended to bring a citizen suit under the CWA. The court noted that the CWA expressly provides that "no action may be commenced . . . under subsection (a)(1) of this section . . . prior to 60 days after the plaintiff has given notice of the alleged violation . . . to any alleged violator of the standard, limitation, or order." 33 U.S.C. § 1365(b). Noting that courts have routinely applied a strict notice standard to the notice standards in the CWA, the court dismissed this action.

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

a. Second Circuit holds local enforcement does not preclude citizen suits:

Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp. See page 49 for case summary.

b. Eighth Circuit holds State enforcement action constitutes bar to citizen suit for both civil penalties and equitable relief:

Arkansas Wildlife Federation v. ICI Americas, Inc., 29 F.3d 376 (8th Cir., July 7, 1994) *reh'g and reh'g en banc denied*, 1994 U.S. App. LEXIS 21408 (8th Cir., August 12, 1994).

ICI Americas, Inc. (ICI), operates a herbicide manufacturing plant in North Little Rock, Arkansas, and in 1988 received a NPDES permit from the State. ICI failed to comply with applicable discharge limits and entered into a Consent Administrative Order (CAO) with the State requiring payment of a civil penalty of $1000. Subsequent modifications to the CAO were made due to continuing compliance problems and three additional civil penalties were imposed.

On October 15, 1991, Arkansas Wildlife Federation (AWF) filed a complaint in district court alleging ICI's ongoing violation of the CWA and seeking civil penalties, declaratory relief, injunctive relief, and the costs of litigation. The district court granted ICI's motion for summary judgment, finding that AWF's action was jurisdictionally barred because 33 U.S.C. § 1319(g)(6)(A)(ii) precludes citizen suits for violations "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to 33 U.S.C. § 1319(g)." The judgement applied to all of ICI's past violations and covered claims for declaratory relief and injunctive relief, as well as civil penalties.

The 8th Circuit affirmed the district court's decision, finding that in issuing the original CAO the State "commenced" an action within the meaning of 33 U.S.C. § 1319(g)(6)(ii). The court also found that the State was diligently prosecuting the enforcement action against ICI. The court reasoned that ICI and the State were working together toward compliance and that citizen suits should not be intrusive of the State's enforcement discretion. The Court thus found that a citizen suit should go forward when the State fails to exercise its enforcement responsibility, citing Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 60-61, 98 L. Ed. 2d 306, 108 S. Ct. 376 (1987); and North and South Rivers Watershed Ass'n v. Town of Scituate, 949 F. 2d 552, 557 (1st Cir. 1991). **The court also found that the State enforcement provisions used were comparable to 33 U.S.C. § 1319(g), since the overall regulatory scheme affords significant citizen participation, even if the State law does not contain precisely the same public notice and comment provisions as those found in the CWA. The court also found that AWF could not seek civil penalties for violations not addressed in the first CAO because the original, corrected, and amended CAOs were all a single, ongoing enforcement action. Finally, the court found that it would be "unreasonable" to allow claims for declaratory or injunctive relief to go forward where claims for civil penalties are barred under 33 U.S.C. § 1319(g)(6), since such claims would interfere with or duplicate ongoing actions.**

c. Ninth Circuit disagrees with First Circuit over preemptive effect of administrative compliance action on citizen suits:

Washington Public Interest Research Group v. Pendleton Woolen Mills, 11 F.3d 883 (9th Cir., December 1, 1993).

Plaintiff, Washington Public Interest Research Group (Washington PIRG), brought a citizen suit alleging that defendant, Pendleton Woolen Mills (Pendleton), discharged pollutants in violation of its NPDES permit. The district court granted summary judgment on behalf of the defendant on the grounds that, under CWA § 309(g)(6)(A)(i), the issuance of a compliance order by EPA against the defendant barred citizen suit enforcement.

On appeal brought by the plaintiff, in which the United States joined as an amicus curiae, **the Ninth Circuit reversed the district court and expressly rejected the First Circuit's reasoning in North and South Watershed Association v. Town of Scituate, 949 F.2d 552 (1st Cir. 1991).** In Scituate, the First Circuit held that a citizen suit is barred under § 309(g)(6)(A)(ii), even when the state is not prosecuting a penalty action, but only a compliance action.

In its opinion, the Ninth Circuit examined the plain language of § 309(g)(6)(A) to find that this section only bars citizen enforcement when EPA is prosecuting an administrative penalty action under this section.

The Ninth Circuit's holding can be read to allow for a citizen suit enforcement in the face of State compliance action as well. The court stated: "We are unaware of any legislative history demonstrating a congressional intent to extend the bar on citizen suits in section 1319 (g) (6) to a context other than an administrative penalty action."

d. District court holds consent order imposed under comparable State law sufficient enforcement to bar citizen suit:

Pape v. Menominee Paper Co., 1994 U.S. Dist. LEXIS 10277 (W.D. Mich., May 6, 1994).

Plaintiff brought a citizen suit under CERCLA against Menominee Paper Company (MPC) alleging the company's solid waste landfill violates provisions of RCRA, CERCLA, and CWA. This action was brought while MPC was subject to a consent order issued by the Michigan Department of Natural Resources (MDNR) and under which MPC was closing its landfill and providing remedial actions. The district court dismissed plaintiff's claims under RCRA and CWA for failure to state a claim and lack of jurisdiction, but found that genuine issues of material fact existed with regard to the CERCLA claim.

The court found that the RCRA claim was barred because Michigan is authorized to implement a hazardous waste program and, thus, such claim must be filed pursuant to Michigan law. In addition, the court found that the solid waste regulations at 40 C.F.R. § 257 are not intended to be the sole basis of a legal claim (plaintiff did not originally plead a violation of the corresponding statutory provision -- 42 U.S.C. 6945(a)).

In examining the CWA claim, the court observed that Congress amended § 1365 by disallowing any civil penalty action under § 1365 for an alleged violation "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection . . . ." 33 U.S.C. § 1319(g)(6)(A)(ii). The court reviewed recent decisions interpreting what constitutes a comparable law and found that such laws share essential features with the CWA. It also observed that the reasoning set out in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49, 98 L. Ed. 2d 306, 108 S. Ct. 376 (1987), where the court observed that "citizen suits are proper only if the Federal, State and local agencies fail to exercise their enforcement responsibility," applies here. **The court concluded that Michigan's Water Resources Commission Act, under which the MDNR was implementing the consent agreement, was comparable to the CWA within the meaning of the amendment, thus barring the plaintiff's claim.**

With regard to the CERCLA claim, the court found that since the plaintiff had alleged a continuing violation, and that there is an issue of fact as to whether hazardous substances in reasonable quantities are being released from MPC's landfill.

e. District court holds citizen suit barred because of existing

consent order and NPDES permit, and because the State had taken steps to initiate enforcement procedures under State law:

Sierra Club v. Colorado Refining Co., 852 F. Supp. 1476 (D. Colo., May 17, 1994).

The Sierra Club brought a citizen suit against the Colorado Refining Company (CRC) for violations of its NPDES permit and the CWA. In the past, the Colorado Water Quality Control Division (WQCD) had on occasion taken action when CRC's self-reporting indicated possible permit limit exceedances, such as issuing Notices of Violations (NOVs), a notice of significant noncompliance, and a cease and desist order. CRC had responded to various actions and had participated in a running dialogue with WQCD related to its violations and plans for compliance. Recognizing since 1978 that there existed seepage of petroleum product from the refinery into the ground water and from there into Sand Creek, CRC entered into a consent order with Conoco and EPA on March 8, 1989, to halt the flow of contaminants from the ground water to Sand Creek. This consent order was acknowledged in CRC's NPDES permit.

In its suit, Sierra Club alleged three causes of action, the first for unpermitted discharges into Sand Creek from CRC's refinery immediately to the south of the creek in violation of CWA § 301, the second for discharges to Sand Creek in violation of CRC's NPDES permit and the CWA, and the third for failure to determine the impact to Sand Creek of CRC's noncomplying discharges. (CRC's motion to dismiss in part plaintiff's second cause of action was granted by the court on December 8, 1993. See Sierra Club v. Colorado Refining Co., 838 F. Supp. 1428 (D. Colo., December 8, 1993), summarized on page 2.)

CRC sought dismissal of the first cause of action based on the CWA bar against citizen suits for violations "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection." 33 U.S.C. § 1319(g)(6)(A)(ii). CRC argued that the State, through its reference to the conditions of the consent order in the NPDES permit, was diligently prosecuting an action under state law, thus barring the citizen suit. Sierra Club contended that the State's issuance of NOVs and cease and desist orders was evidence that the State did not consider the consent order as the commencement of an action under State law or diligent prosecution of CRC's violations. Pointing out that the primary function of a citizen suit is to "enable private parties to assist in enforcement efforts where Federal and State authorities appear unwilling to act," **the court concluded that both the State and EPA had addressed the concerns of the Sierra Club's first cause of action and had devised a plan to address CRC's unpermitted discharges, through the consent order and NPDES permit.** Since "duplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well under way do not further" the goals of the CWA, the court granted CRC's motion for summary judgment.

CRC argued that Sierra Club's second cause of action was barred because the State commenced and was diligently prosecuting an action under State law for CRC's violations of its NPDES effluent limitations. Sierra Club argued that the State must begin its "diligent prosecution" before the date that the notice of intent to sue is mailed by the citizen group (60 days before filing suit), and that the State's issuance of a notice of significant noncompliance on March 19, 1993 did not constitute "diligent prosecution" to bar this action. **Because the State served its notice of significant noncompliance with the State's statutory procedures for the institution of enforcement proceedings, the court determined that it "commenced an action" within the meaning of the CWA.** CRC's motion for summary judgment on this cause of action was granted accordingly.

Finally, CRC argued that the third cause of action (that CRC had failed to determine the impact to Sand Creek of its noncomplying discharges, as required by its permit and the CWA) has no basis in fact. CRC had sampled the creek on a monthly basis under the terms of its consent order, and the resulting reports indicated the quality of the water and included the nature and impact of all discharges, complying and noncomplying, into Sand Creek. **Because Sierra Club's response failed to show any issues of triable fact, and since it did not file an affidavit explaining why it was unable**

to present facts to oppose CRC's motion for summary judgment, the court also granted this motion for summary judgment.

f. District court holds State enforcement action does not preclude a CWA citizen suit where State statute is not comparable:

Citizens for a Better Environment—California v. Union Oil Co. of California, 861 F. Supp. 889 (N.D. Cal., July 8, 1994).

The Citizens For a Better Environment (Citizens) brought a citizen suit challenging Union Oil Company of California (Unocal) and five other refineries' discharge of wastewater containing selenium into San Francisco Bay. In November 1993, Unocal entered into a settlement to a suit that challenged the more stringent final and interim selenium limits resulting from a CWA § 304 listing and subsequent State listing. The settlement provided that the State court challenges would be dismissed and the California Water Resources Control Board (CWRCB) would issue a Cease and Desist Order (CDO) extending Unocal's deadline for complying with the final selenium limits for five years. Unocal also was required to pay the State two million dollars.

Citizens charged that under the settlement: 1) Unocal failed to comply with applicable effluent standards, 2) Unocal failed to comply with applicable water quality standards, and 3) Unocal engaged in unfair business practices. In seeking to dismiss the suit for failure to state a claim, Unocal argued that: 1) the CDO extended the compliance deadline such that Unocal was in compliance with applicable limits, 2) citizens could not bring a citizen suit to enforce permit standards because the CWRCB had already issued a final order under State law comparable to 33 U.S.C. § 1319(g) for which the violator had paid a penalty, and 3) citizens had failed to satisfy applicable notice requirements.

The court held that the State's settlement and CDO did not modify the underlying permit because permit modifications are subject to specific procedural and substantive requirements. Moreover, even if the State had met the procedural requirements for modifying the permit, the CDO would have violated the three-year deadline for polluters coming into compliance with water quality standards under 33 U.S.C. § 1314(l)(1)(D) as well as the anti-backsliding provisions under the CWA. Rather, the court viewed the CDO simply as a statement by the State agency as to how it intended to exercise its prosecutorial discretion.

With regard to whether a citizen suit is precluded under **33 U.S.C. § 1319(g)(6)(A)(iii), the court held that the State's enforcement action was not taken under a comparable State law, because the CDO was issued under California Water Code § 13301, which authorizes cease and desist orders, but not penalties**. The court found that California Water Code § 13301 is not comparable to CWA § 309 because it does not authorize penalties nor impose requirements and safeguards, such as public notice and participation and consideration of penalty assessment factors. The court found that payment made in the context of settlement of the State court action did not constitute a "penalty." See similar suit, California Public Interest Research Group v. Shell Oil Co., on page 40.

g. District court holds that citizen suit not precluded by nonjudicial State enforcement action:

Illinois Public Interest Research Group v. PMC, Inc., 835 F. Supp. 1070 (N.D. Ill., October 14, 1993).

Plaintiff, Illinois Public Interest Research Group (Illinois PIRG), commenced a citizen suit seeking penalties from the defendant, PMC, Inc., an organic chemical manufacturer, for alleged failure to comply with Federal and Metropolitan Water Reclamation District of Greater Chicago (MWRD), pretreatment standards. The defendant moved to dismiss the plaintiff's citizen suit. Alternatively, the defendant requested the court to stay the action until the completion of certain administrative proceedings.

Neither the EPA nor the Illinois EPA (IEPA) instituted proceedings against the defendant to redress the violations. However, before the filing of the complaint, the MWRD issued a notice of show cause hearing. Following negotiations, the MWRD and PMC, Inc. entered into an Interim Consent Order (ICO) in which the defendant agreed to implement a work plan that would gather information

needed to recalculate alternative discharge limits. The defendant completed the study in February 1993; however, as of October 1993, there had been no final determination in the MWRD proceedings.

The district court denied the defendant's motion to dismiss or stay the action. The defendant advanced three arguments in moving to dismiss. First, the defendant argued CWA § 505(b)(1)(B) provides a jurisdictional bar where EPA or the State has commenced and is prosecuting an action seeking compliance. The court held that the action by the MWRD was not the type of State action contemplated under the CWA, nor an action "in a court." **The court found that a citizen suit is not precluded by nonjudicial enforcement action where the administrative action does not provide an effective mechanism for vigorous enforcement of the Act.**

Second, the defendant argued that the court should stay the judicial proceeding while MWRD proceeded administratively to determine alternative discharge limits. The court held that the concept of primary jurisdiction, which concerns the timing of judicial review over matters delegated to administrative agencies, was inapplicable to the defendant because the question before the court was the enforcement of existing discharge standards, not the setting of discharge standards.

Third, the defendant asked the court to abstain under the Colorado River doctrine. Colorado River Water Conservation District v. United States, 424 U.S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976). Under the Colorado River doctrine, a Federal court determines whether to refrain from exercising its jurisdiction where substantially the same issues in a federal action are contemporaneously under consideration in a State court action. The court declined to abstain under the Colorado River doctrine, noting that relief in the MWRD administrative proceeding would not be as broad as that which was requested in this action. The court also reiterated that the existing discharge standards remain in effect until modified by the MWRD.

3. Remedies

a. District court holds that citizen suit may seek injunctive and declaratory relief under CWA, but not civil penalties where State administrative enforcement action ongoing:

Orange Environment, Inc. v. County of Orange, 860 F. Supp. 1003 (S.D.N.Y., August 2, 1994).

Plaintiffs brought a citizen suit under the CWA and RCRA alleging that the defendants violated the CWA by discharging pollutants, including landfill leachate, into the Wallkill River without a required permit. The district court granted the defendant's motion to dismiss the plaintiff's claim for civil penalties under the CWA, but denied the defendant's motion to dismiss the plaintiff's claim for injunctive and declaratory relief.

The defendants argued that at the time suit was filed the New York Department of Environmental Conservation (DEC) was prosecuting an administrative action concerning the alleged violation and that the DEC action divested this court of subject-matter jurisdiction. In 1987, Congress amended the CWA to add an "administrative penalties" subsection. This provision has the effect of precluding a citizen suit where a State is diligently prosecuting an administrative penalty enforcement action. 33 U.S.C. § 1319(g)(6)(A). This limitation on citizen suits requires State prosecution of the violation under a comparable State law, in this case New York's Water Pollution Control law. The court determined that, while DEC may not have originally conceptualized its activities at the landfill as an enforcement action under Article 17 of the New York Environmental Conservation Law, "it appears that the water pollution issue was a major component of the action at its inception and that enforcement of Article 17 had become a major purpose for DEC action by 1989."

Regarding the issue of diligence on the part of the State agency, the court deferred to DEC. The problem was not that the DEC was turning a blind eye to the County's violation, but that the County consistently failed to comply with the terms of the consent orders. The court found that U.S.C. § 1319(g)(6)(A) precluded a civil penalty action under the citizen suit provisions of the CWA.

The defendants also argued that if the requirements of U.S.C. § 1319(g) preclusion are satisfied, a citizen suit is barred entirely. In Coalition for a Liveable Westside, Inc. v. New York Dep't of Environmental Protection, 830 F. Supp. 194 (S.D.N.Y., August 2, 1993), **this court rejected the conclusion in Scituate that U.S.C. § 1319(g)(6) barred all citizen actions**. This section was intended to ensure that an entity that has violated the CWA will not be subject to duplicative civil penalties for the same violation. The court held that a limitation of the preclusion provisions of U.S.C. § 1319 (g)(6) is supported by the plain language of the statute and by the equities of this case.

b. District court upholds citizen suit for injunctive relief where civil penalty action dismissed:

NRDC v. Van Loben Sels, 1994 U.S. Dist. LEXIS 19206 (C.D. Cal., November 8, 1994).

In a CWA citizen suit, the court granted defendant California Department of Transportation's (CALTRANS) motion to dismiss. The court based the dismissal on the Eleventh Amendment's bar to suits against States and State agencies in Federal courts. Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 121 L. Ed. 2d 605, 113 S. Ct. 684, 688 (1993). The court found that neither the State nor Congress had waived the State's immunity.

However, the court allowed a claim for injunctive relief against State officials to go forward under the doctrine of Ex parte Young, 290 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908) (allowing suits for prospective relief against state officials to ensure that they do not employ the Eleventh Amendment as a means of avoiding compliance with Federal law). The court found that the plaintiff had alleged continuing violations and that the issue of whether to enjoin future violations was a remedy clearly permitted under the statute.

The court rejected the defendant's argument that the action was barred under 33 U.S.C. § 1319(g)(6) because it was filed after a public agency commenced an enforcement action. The court noted that 33 U.S.C. § 1319(g)(6) only bars civil penalty actions under certain provisions of the CWA. The court found that, based on the ruling above, this action was no longer a civil penalty action, and hence, 33 U.S.C. § 1319(g)(6) did not apply.

4. Notice Requirements

a. District court finds notice indicating basis for suit adequate in citizen suit challenge:

California Public Interest Research Group v. Shell Oil Co., 840 F. Supp. 712 (N.D. Cal., December 22, 1993); 1994 U.S. Dist. LEXIS 18999 (N.D. Cal., January 5, 1994).

The California Public Interest Research Group (CALPIRG) brought suit against Shell Oil Company (Shell), alleging that Shell had discharged selenium into San Francisco Bay in amounts exceeding those allowed by its NPDES permit. On plaintiff's motion for summary judgment, **the court held that pendency of a collateral challenge to an NPDES permit creates no defense to liability in an enforcement action for violations of that permit**. Plaintiff's motion for partial summary judgment with respect to liability was granted.

The second opinion cited above decided Shell's motion for summary judgment. Shell asserted that the plaintiffs lacked standing and failed to comply with the CWA's notice requirements for intent to sue since the content of the notice was not sufficiently specific to constitute "adequate" notice (33 U.S.C § 1365 (b)(1)(A)). CALPIRG's notice stated that Shell was in violation of CWA §§ 301 and 307 by discharging selenium and cyanide into San Francisco Bay in violation of its NPDES permit. **The court held that notice of intent to sue under the CWA is not rendered inadequate for not identifying the permit number, reciting the specific numerical limits for selenium and cyanide contained in the NPDES permit, or providing specific dates of the alleged violations.** The court distinguished McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182 (E.D. Cal. 1988) in which the notice letter alleged negligence and nuisance claims and failed to make any reference to seven different pollutants later named in the suit. The court stated that here, Shell was clearly put on notice that it would be sued

for all discharges specified in the letter, and "to allow dischargers to defeat a 60-day notice, by interposing hypertechnical objections, would undermine the purpose of the Act and provide a shelter for polluters where none was intended."

Shell also argued that the two individual plaintiffs must be dismissed as plaintiffs for failure to comply with the 60-day pre-suit notice requirement, since they were not identified in the CALPIRG notice. **The court held that so long as defendants receive proper notice of the action from one plaintiff, additional plaintiffs can join without filing separate 60-day notices.**

Finally, Shell argued that the plaintiffs lacked standing because there was no injury-in-fact. The court noted that it is well-established that neither economic injury nor any adverse health effects are necessary for standing. Harm to recreational and aesthetic interests alone is sufficient to confer standing in environmental cases. Lujan v. Defenders of Wildlife, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). The fact that plaintiffs still use a resource does not deprive them of standing, so long as the challenged conduct is adversely affecting their enjoyment. **The court held that it is this very use that has given plaintiffs a basis for asserting diminished enjoyment of the Bay, which forms a part of their injury.** Plaintiffs need not become so offended or disgusted by pollution of a resource that they stop using it altogether in order to obtain standing. Accordingly, Shell's motion for summary judgment regarding notice and standing was denied. See similar suit, Citizens for a Better Environment v. Union Oil Co., on page 37.

b. District court holds that failure to comply with CWA notice provisions deprives court of jurisdiction:

Avitts v. Amoco Production Co. See page 60 for case summary.

c. District court holds that sufficiency of notice and merits of claims under CWA are so linked as to require determination of both concurrently:

Mancuso v. Consolidated Edison Co., 1993 U.S. Dist. LEXIS 17731 (S.D.N.Y., December 13, 1993).

Plaintiffs owned a marina in the City of New Rochelle. They brought a citizen suit and pendent state law claim claiming that their property had been contaminated by the release of polychlorinated byphenyls (PCBs) from ConEd's Echo Avenue Site and that as a result they have been damaged by loss of property value and exposure to health hazards. ConEd moved for summary judgment.

The CWA authorizes private suits for injunctive relief after notice of an alleged ongoing violation is given, if the violation continues. See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49, 98 L. Ed. 2d 306, 108 S.Ct. 376 (1987). This statutory notice is intended to allow the defendant time to cure the violation, rendering the citizen suit unnecessary. 40 C.F.R. 135.3 sets forth the specific requirements regarding the notice given.

Plaintiffs purported to give ConEd notice pursuant to 33 U.S.C. § 1365(b) in two letters sent to ConEd. ConEd argued that this notice did not spell out an ongoing violation in sufficient detail and that there was not any ongoing violation of which notice could possible be given. The court found the issue of notice so intertwined with the merits of the case that it would be impossible to decide one issue without deciding the other. Under Fed.R.Civ.P.1, the court directed the parties to consider appointment of a neutral expert to determine whether contamination exists, whether it is ongoing, and who, if anyone, caused it.

d. District Court denies motion to amend complaint for failure to provide 60 days notice of citizen suit:

Tannenbaum v. United States. See page 33 for case summary.

I. Judicial Review

1. Final Agency Action

a. Fourth Circuit finds no jurisdiction over EPA internal memorandum:

Appalachian Energy Group v. EPA, 33 F.3d 319 (4th Cir., August 23, 1994).

The Appalachian Energy Group (Appalachian) challenged an internal EPA memorandum, invoking jurisdiction under CWA § 509 (b)(1)(F). Appalachian requested that the memorandum be declared unlawful and that it be set aside as inconsistent with the CWA and amounting to a new rule, adopted without proper notice under the Administrative Procedures Act (APA). EPA argued that the court does not have subject matter jurisdiction.

In the internal EPA memorandum between a branch chief and a regional storm water coordinator, the branch chief advised the coordinator that an NPDES permit is required for "storm water discharges from construction activities involving oil and gas facilities." The oil and gas companies feared that EPA was attempting, under the guise of an internal legal interpretation, to impose an unauthorized regulation on oil and gas operations by requiring a permit for every exploratory activity because almost every such activity inherently involves some construction.

The initial EPA memorandum was a brief, one-paragraph statement. The court found that, on its face, the memorandum did not approve the issuance or denial of a permit, it did not facially involve or relate to a pending decision to issue or deny a permit, and it was not used to issue or deny a permit. Similarly, on its face, the memorandum did not purport to issue a new rule. The memorandum only provided the author's interpretation of two regulations apparently in tension. Moreover, the memorandum did not represent final agency action.

The court noted that CWA § 509(b) confers jurisdiction on the courts to review only specific actions of issuing or denying permits under CWA § 1342 by the EPA Administrator. The court distinguishes Natural Resources Defense Council, Inc. v. EPA, 966 F.2d 1292 (9th Cir. 1992), since activities relating to the issuance or denial of permits were involved. **The court held that it lacked subject matter jurisdiction to review the internal EPA memorandum and dismissed the application for review.**

Attorneys: Karen Lee Egbert, DOJ

Stephen J. Sweeney, OGC

b. Ninth Circuit holds EPA listing decisions under CWA § 304 (l) do not constitute final Agency action:

HECLA Mining Co. v. EPA, 12 F.3d 164 (9th Cir., December 21, 1993).

The HECLA Mining Company challenged EPA's decision to include a river and a mine on the B and C lists under CWA § 304(*l*), arguing that such decisions are final agency actions and that EPA exceeded its authority when, after it approved Idaho's B and C lists, it unilaterally amended them. The district court dismissed the mining company's challenge for failure to state a cause of action under the Administrative Procedures Act (APA), 5 U.S.C. § 704.

The mining company argued that EPA's decision to include the river and the mine on Idaho's lists was final agency action because the decisions could not be revisited or changed.

The Ninth Circuit held that the decision to include the river and mine on the lists was not a final agency action necessary to state a cause of action under APA § 704. Finality of an agency action turns on whether the action is a definitive statement of the agency's position, had a direct and immediate effect on the day-to-day business of the complaining party, had the status of law, and whether immediate compliance with the decision is expected. Federal Trade Commission v. Standard Oil Co. of California, 449 U.S. 232, 66 L. Ed. 2d 416, 101 S. Ct. 488 (1980).

The Ninth Circuit concurred with the Third and Fourth Circuits in concluding that the listing decisions are merely preliminary steps in the § 304(*l*) process. Municipal Authority of the Borough of St. Marys v. EPA, 945 F.2d 67 (3d Cir. 1991); P.H. Glatfelter Co. v. EPA, 921 F.2d 516 (4th Cir. 1990). The final agency decision that will require action would be the issuance of a final NPDES permit. Upon issuance of a final NPDES permit, there is a definitive statement of EPA's position: it carries the status of law, requires immediate compliance, and has a direct and

immediate effect on the day-to-day business of the permittee.

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

a. Fourth Circuit holds advisory action by Corps did not constitute final enforcement action eligible for judicial review:

Commissioners of Public Works of Charleston v. United States, 1994 U.S. App. LEXIS 20162 (4th Cir., August 3, 1994).

The Commissioners of Public Works of Charleston (CPW) appealed the dismissal of their suit against the U.S. Army Corps of Engineers (USACE). CPW purchased 12 acres of land believing no wetlands were present, based on a plat created and signed by a USACE official. Prior to construction on the site, CPW sought assurances that no wetlands were located on their property. USACE indicated that the plat did not include the portion of land now owned by CPW and believed that there were wetlands present thereon.

CPW sued USACE seeking a ruling that the plat covered their properties. They also argued that USACE's failure to honor the plat violated the Due Process clause of the Fifth Amendment. The district court dismissed the suit for lack of subject matter jurisdiction, citing Southern Pines Associates v. United States, 912 F.2d 713 (4th Cir. 1990), in which the court held that the CWA prohibited "pre-enforcement review" of USACE activity.

On appeal, CPW argued that Southern Pines was applied in error, and that the real issue is whether USACE must comply with the plat. The Fourth Circuit disagreed, stating that Southern Pines interpreted the CWA as limiting opportunities for judicial review to situations where agency enforcement proceedings had become final enforceable agency orders. This expressed the intent of Congress that agencies be empowered to act on environmental problems quickly and without becoming immediately entangled in litigation. **The court observed that USACE's activities thus far had only been advisory in nature, and that even if wetlands were determined to be present, CPW could seek a permit from USACE allowing construction. Therefore, the court concluded that a suit against USACE was premature and the judgment of the lower court dismissing the suit was affirmed.**

[Note: Unpublished opinion—check applicable court rules before citing.]

b. Sixth Circuit follows Fourth and Seventh Circuits holding that there is no pre-enforcement review of CWA § 309(a) order:

Southern Ohio Coal Company v. Office of Surface Mining, Reclamation, and Enforcement, Dep't of the Interior, 20 F.3d 1418 (6th Cir., April 8, 1994), *reh'g denied*, 1994 U.S. App. LEXIS 14324 (May 31, 1994), *cert. denied*, 130 L. Ed. 2d 278, 115 S. Ct. 316 (October 7, 1994).

On April 8, 1994, the U.S. Court of Appeals for the Sixth Circuit issued an order in favor of the United States in its appeal of a lower court order enjoining EPA and the Office of Surface Mining of the Department of Interior (DOI) from acting to halt the pumping of contaminated wastewater from Southern Ohio Coal Company's (SOCCO's) Meigs Mine 31 following its flooding in July 1993.

Following the issuance of a preliminary injunction against EPA and DOI, SOCCO subsequently pumped more than 1 billion gallons of untreated, highly acidic wastewater into tributaries of the Ohio River.

In a decision consistent with prior rulings of the Fourth and Seventh Circuits, the Sixth Circuit ruled that the district court lacked jurisdiction to review an EPA compliance order prior to the commencement of enforcement proceedings. The Court of Appeals also found that, contrary to the district court's interpretation of the CWA's regulatory scheme, EPA retains independent enforcement authority in primacy States under CWA § 402(i).

c. Seventh Circuit disallows pre-enforcement review:

Rueth v. EPA, 13 F.3d 227 (7th Cir., December 30, 1993). See page 2 for case summary.

d. District court holds wetlands jurisdictional determinations not subject to pre-enforcement review:

Child v. United States, 851 F. Supp. 1527 (D. Utah, May 9, 1994).

On May 9, 1994, the U.S. District Court for the District of Utah held, consistent with a growing body of caselaw, that a wetlands jurisdictional determination is not subject to pre-enforcement review under the CWA.

The owner of 400 acres of real property in Kane County, Utah, was informed by the U.S. Army Corps of Engineers (USACE) that the property contained wetlands subject to CWA jurisdiction. USACE informed the owner that small amounts of fill deposited in the wetlands would have to be removed in order to avoid being subject to enforcement under the CWA. After the property owner cured the violation, the owner filed a lawsuit against USACE and EPA alleging that USACE had improperly found that the property contained wetlands, and requesting that USACE and EPA be enjoined from asserting jurisdiction over the property, or taking any enforcement action.

The court agreed with the government and dismissed the lawsuit based on the large body of caselaw holding that Congress intended to preclude pre-enforcement review of administrative enforcement actions. Since the jurisdictional finding in this case would have been antecedent to the bringing of an administrative enforcement action, the court reasoned that jurisdictional determination also cannot be subject to judicial review.

3. District court finds administrative remedies need not be exhausted before filing judicial appeal of civil penalty:

Forman Petroleum Corp. v. United States, 1994 U.S. Dist. LEXIS 8928 (E.D. La., June 27, 1994).

The U.S. Coast Guard (USCG) assessed a $4000 Class I civil penalty under the CWA against Forman Petroleum Corporation (Forman) as a result of a spill of crude oil into a navigable waterway. After the penalty order was issued, Forman filed appeals with both the USCG and the district court. The USCG moved to dismiss, contending that filing the court action was premature as Forman has not exhausted its administrative remedies.

Noting that the civil penalty assessed against Forman was indisputably not final, the court observed that the CWA explicitly provides for judicial review of civil penalties during the 30-day period between issuance and finality of the penalty (33 U.S.C. § 1321(b)(6)(G)). **The court thus found that Forman need not exhaust its administrative remedies before appealing the penalty order, and denied the USCG motion to dismiss accordingly. For the preservation of "judicial economy," however, the court stayed further action on the case pending the resolution of Forman's administrative appeal.**

J. Administrative Hearings

1. First Circuit holds that party must present genuine issue of material fact to warrant evidentiary hearing:

Puerto Rico Aqueduct & Sewer Authority v. EPA, 35 F.3d 600 (1st Cir., August 31, 1994), *cert. denied*, 130 L. Ed. 2d 1065, 115 S. Ct. 1096 (February 21, 1995).

In September 1979, the Puerto Rico Aqueduct & Sewer Authority (PRASA) sought a modification for its Mayaguez facility permit to obtain relief from secondary treatment requirements under 33 U.S.C. § 1311(h). EPA's final denial of the request for modification on December 13, 1991, followed notice, comment and a two-day public hearing. In 1992, PRASA commenced an administrative appeal of EPA's final denial by submitting a request for an evidentiary hearing based on a new study by the U.S. Geological Survey that contained some conclusions helpful to PRASA's cause. On July 23, 1992, EPA rejected the request for an evidentiary hearing, and the Environmental Appeals Board affirmed, stating that the regulatory

provision governing requests for evidentiary hearings (found at 40 C.F.R. § 124.75) and requiring "material issues of fact relative to the issuance of the permit" is comparable to Rule 56 of the Federal Rules of Civil Procedure, which authorizes summary judgment if there is "no genuine issue as to any material fact."

Arguing that the standard of Rule 56 was applied in error, PRASA sought judicial review of EPA's determination. PRASA asserted that 40 C.F.R. § 124.75 contains no "genuineness" requirement, that summary judgment as it exists in the courts has no "legitimate place in agency practice," and that even if the Board has the authority to interpret such a requirement, it cannot do so without giving advance notice. Moreover, while PRASA did not deny that its studies failed to draw direct conclusions regarding future impacts of the facility's emissions as required by 40 C.F.R. 125.61(f)(3), it argued that EPA's interpretation of the regulation was "absolutist" and inappropriate.

The 1st Circuit Court concluded that in developing the regulatory process for requiring an evidentiary hearing, EPA necessarily and reasonably contemplated that to qualify, a party would have to present a genuine and material dispute, as those two requirements are inherent in the very concept of administrative summary judgment. Citing a vast array of case history and legal interpretation, the court stated that Rule 56 is the "prototype for administrative summary judgement procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgement." Furthermore, even though the Board had never before equated Rule 56 and EPA's summary judgment procedure so explicitly, there is administrative case history showing the use of "the Rule 56 yardstick" in the denial of evidentiary hearings.

The court then considered whether EPA's denial of an evidentiary hearing was correctly supported by the record. Specifically, the USGS studies provided only weak evidence on the current impacts of the facility's emissions relative to the current impacts of all other emissions, and did not make comment on future impacts. Thus, the request for modification did not satisfy the 40 C.F.R. § 125.61(f)(3) requirement that PRASA show that emissions from the Mayaguez POTW would not increase or contribute to the adverse impacts already suffered by polluted marine environment receiving the discharge. The court concluded that even though "in some cases an imprecise regulation may require an agency to give an applicant the benefit of the doubt regarding a summary decision, other cases [such as the present case] will be so clear-cut as to warrant summary adverse action, notwithstanding the imprecision in the agency's standards." Accordingly, the Court found the Board's decision to be faithful to the record and well-supported by authority.

2. Board rules CWA § 304(l) listings not subject to direct review:

In re J & L Specialty Products Corp. See page 5 for case summary.

3. Board notes "bad faith" is an issue of fact subject to evidentiary hearing review:

In re Marine Shale Processors, Inc., NPDES Appeal No. 91-22 (Envtl. Appeals Bd., September 12, 1994) Final Decision and Order, Opinion by Judge McCallum.

Marine Shale Processors, Inc. (MSP) appealed from a denial of its request for an evidentiary hearing. MSP had requested an evidentiary hearing after EPA Region VI terminated its NPDES permit and denied MSP's application for renewal and modification of that permit. Region VI denied the permit on the grounds that after MSP filed its NPDES permit application, MSP began receiving and processing hazardous wastes. Region VI asserted in the final termination decision that MSP had intentionally acted in bad faith and had deceived the Agency regarding the true nature of its activities. Region VI denied the evidentiary hearing and MSP filed a petition for review of this denial.

The Environmental Appeals Board indicated that in order to meet its burden of showing that an evidentiary hearing should be granted with regard to an NPDES permit decision, the

petitioner must demonstrate the existence of a material issue of fact, and demonstrate that a genuine dispute exists where there is sufficient evidence in the administrative record to support a finding for either party. The Board held that the issue of whether or not MSP had acted in bad faith was a material issue of fact under the circumstances. In addition, the Board concluded that the record on appeal indicated that MSP had presented evidence bearing on whether MSP acted in bad faith, which if true would allow a reasonable finder of fact to find that the Region erred in concluding that MSP acted in bad faith. The Board thus remanded the case and ordered EPA Region VI to conduct an evidentiary hearing on whether MSP had intentionally misrepresented the nature of its hazardous waste-related activities.

Attorney: Patrick Rankin, ORC, Region VI

4. Board rules appeal mooted by withdrawal of permit:

In re Bay County Waste Treatment Facility (Panama City, Florida), NPDES Appeal Nos. 92-16 and 92-17 (Envtl. Appeals Bd., October 3, 1994) Order Dismissing Appeals, Opinion by Judge Firestone.

In this opinion, the Environmental Appeals Board dismissed appeals from denials of request for an evidentiary hearing on a NPDES permit which Region IV had withdrawn and proposed to reissue. In April 1990, Region IV issued a renewal draft NPDES permit governing wastewater discharges for Bay County Waste Treatment Plant No. 1, located on Tyndall Air Force Base. Bay County and Stone Container Corporation (Stone) opposed the monitoring requirements and discharge limitations for whole effluent toxicity as completely unnecessary or unnecessarily restrictive. A local advocacy group, Legal Environmental Assistance Foundation (LEAF), objected to the effluent limitations criteria for "industrial" wastewater facility designation and argued for the stricter "domestic" facility criteria.

Region IV issued a final permit decision that retained the contested provisions. In July 1992, Bay County, Stone, and LEAF requested an evidentiary hearing, but the Regional Administrator denied each request. Petitions for review challenging the denial of those evidentiary hearing requests were filed. However, before the Board addressed the petitions, Region IV requested the Board remand the permit so Region IV could develop permit modifications; the Board did so. Region IV withdrew the contested provisions and issued a new draft permit, which addressed many of the challenged permit conditions, including eliminating WET sludge management requirements and secondary treatment conditions.

Bay County and Stone opposed the proposed modifications and moved to reinstate the original July 1992 appeal proceedings. **The Board concluded: 1) the appeals were mooted by the Region's lawful withdrawal of the challenged permit provisions, 2) there was no longer any final permit decision for the Board to review, and 3) the NPDES Appeal Nos. 92-16 (Stone) and 92-17 (Bay County) must be dismissed for lack of jurisdiction. The Board found that the Region's withdrawal of the permit provisions challenged in the July 1992 appeals is consistent with 40 C.F.R. § 124.60(b), which allows the withdrawal of a permit in whole or in part "at any time prior to the rendering of an initial decision in a formal hearing on the permit."**

Subsequently, the petitioners requested reconsideration of the Board's October 3, 1994, orders dismissing their NPDES permit appeals and clarification of the LEAF July 1992 appeal (which had been remanded to the Region and is now moot due to the Region's withdrawal of the POTW's classification). When the Region issues a final decision, petitioners will be free to seek Board review. Accordingly, the requests for reconsideration and clarification were denied.

Attorneys: Andrea Madigan, ORC, Region IV; Steve Sweeney, OGC

5. Board rules that withdrawal of NPDES permit moots request for evidentiary hearing on permit:

In re City of Port St. Joe, NPDES Appeal No. 93-9 (Envtl. Appeals Bd., January 11, 1994) Order Dismissing Appeal, Opinion by Judge Reich.

The City of Port St. Joe, Florida (City), petitioned the Board for review of what it considered to be a "de facto denial" by EPA of its evidentiary hearing request in an NPDES permit proceeding. The Region, after receiving an evidentiary hearing request on a final permit decision issued to the City, withdrew the permit and reopened proceedings to issue a new permit. It was the Region's issuance of a new draft permit which the City asserted was a "de facto denial" of its evidentiary hearing request on the previous permit.

The City argued that it was prejudiced by the Region's action of withdrawing a permit and reissuing a new draft permit. Though the regulations contemplate a decision by the Regional Administrator within 30 days of an evidentiary hearing request, 40 C.F.R. § 124.60(b) allows withdrawal of a permit "any time prior to rendering of an initial decision in a formal hearing on a permit." The City claimed that the withdrawal was a "de facto denial," which is subject to an appeal to the Board pursuant to 40 C.F.R. § 124.91(a).

The Board found that withdrawal of a permit was not equivalent to a denial. The withdrawal of the permit clearly mooted any request for an evidentiary hearing on the permit. The Board's jurisdiction to review permit decisions under the CWA depends on the existence of an EPA-issued permit. Since there was no final permit decision in effect, the Board had no jurisdiction and dismissed the appeal.

6. Board rules that new information must be submitted to the proper official in a timely manner:

In re Liquid Air Puerto Rico Corp., NPDES Appeals No. 92-1 (Envtl. Appeals Bd., May 5, 1994) Order Remanding in Part and Denying Review in Part, (Envtl. Appeals Bd., July 12, 1994) Order Denying Reconsideration, Opinion by Judge McCallum.

Liquid Air Puerto Rico Corporation (Liquid Air) sought review of the denial of its evidentiary hearing request to EPA Region II in connection with renewal of an NPDES permit for its gas manufacturing facility.

Liquid Air argued that its discharge was exempt from the NPDES permit requirements under CWA § 402(p), which generally provides a moratorium on NPDES permits for discharge "composed entirely of storm water" until October 1, 1994. EPA Region II responded that the moratorium was inapplicable because Liquid Air's discharge was not composed entirely of storm water, but included ground water infiltrating the storm water system.

On appeal to the Board, Liquid Air asserted, for the first time, that it had eliminated the ground water discharge. However, the Board denied the motion for reconsideration, noting that the discharge was not composed entirely of storm water and thus not entitled to the moratorium. The Board found that submittal of new information regarding the elimination of ground water from the storm water discharge should have been submitted with the comments on the draft permit or with the request for an evidentiary hearing because the administrative record serves the important function of identifying the basis for a permit decision and facilitating public participation in the permit issuing process. Although Region II had discretion to consider new information brought to the attention of proper officials, Liquid Aid did not submit the information to the hearing clerk in a timely manner and did not request consideration of this letter in connection with its pending evidentiary hearing. **The Board held that EPA did not abuse its discretion in not considering Liquid Air's new information**.

Attorney: Nina Dale, ORC, Region II

K. Sludge Use and Disposal

1. D.C. Circuit Court upholds in part and remands in part EPA's technical standards for sewage sludge use or disposal (40 C.F.R. Part 503):

Leather Industries of America, Inc. v. EPA, 40 F.3d 392 (D.C. Cir., November 15, 1994).

Petitioners sought review of several provisions of the standards for the use or disposal of sewage sludge (58 Fed. Reg. 9387 (1993)). The plaintiffs challenged aspects of EPA's rules for ensuring that beneficial use of sewage sludge does not

contaminate agricultural land and other disposal areas with heavy metals and toxic substances. The court agreed with four of the claims raised in the consolidated petitions.

First, the court held that EPA had failed to justify its use of the 99th percentile concentration limits for chromium and selenium (40 C.F.R. § 503.13(b), Table 3) and remanded those limits. Under CWA § 1345(d)(2)(D), the sludge limits must be risk-based; however, EPA failed to demonstrate a correlation between risk data and data derived from the National Sewage Sludge Survey, the data set upon which the concentration limits were based. The court rejected EPA's argument that the 99th percentile cap provided a margin of safety, and also rejected the contention that the cap reflected a legitimate antibacksliding approach based on current sludge output.

Second, the court rejected the risk-based caps for the remaining pollutants in 40 C.F.R. § 503.13(b), Table 3, as applied to heat-dried sludge. The court said that EPA had not adequately justified its use of the assumed rate and duration of application to apply the risk-based caps to heat-dried sludge. The court ordered EPA "either to justify its general assumptions on rate and duration or to provide more tailored caps that fit the data on heat-dried sludge."

The D.C. Circuit also agreed with a Colorado city's claim that the risk-based cap for selenium may have been based on improper exposure assumptions. The court indicated that Pueblo, Colorado, uses sludge at sites with low potential for public and child contact and suggested that a significant proportion of sewage-sludge application involved similar sites. The court remanded the Table 1 selenium limit for further justification or modification.

The court also remanded the risk-based concentration limit for chromium (40 C.F.R. § 503.13(b), Table 2). The court concluded that while EPA had authority to protect against phytotoxicity--the reduction of plant yields caused by the uptake of certain metals--it lacked adequate support for its final cumulative pollutant limit.

2. District court holds that CWA does not preempt local discretion to choose manner of sludge disposal or use:

Welch v. Board of Supervisors of Rappahannock County, Virginia, 860 F. Supp. 328 (W.D. Va., July 18, 1994).

Landowners in Rappahanock County, Virginia, filed an action challenging the validity of an amendment to the Zoning Ordinance, which prohibits the application of sewage sludge on agricultural lands. Referring to statutory provisions at 33 U.S.C. § 1345(d), and associated EPA regulations for use and disposal of sludge, the plaintiffs argued that the CWA preempts the local ordinance as amended. The plaintiffs contended that under the CWA, EPA established a comprehensive regulatory program with a clear preference for use of sludge (i.e., through land application) rather than simple disposal, and that the amended ordinance conflicts with national policy as manifested through this program. Both parties filed motions for summary judgment.

The court granted the defendants' motion and denied the plaintiffs' motion for summary judgment, holding that the CWA did not pre-empt the amended local ordinance. The court found that in spite of the preference for utilizing sludge instead of disposing of it, the statute and regulations expressly provide that the actual determination of the manner of disposal or use of sludge is a local determination. EPA's role, as stated in its regulations, is to set standards for each specified practice, leaving the choice of practice to local communities.

In conclusion, the court stated that Congressional intent is clear that States and localities are responsible for regulating the manner of sludge disposal or use, and that the defendants in this case made a choice allowed by Federal law to prohibit one form of sludge disposal or use, but not all forms or manners of practice foreseen in the CWA. The County's choice was a proper exercise of authority under Federal law that does not conflict with the policy of the CWA as effectuated by the regulations.

L. Enforcement Actions/Liability/Penalties

1. **Second Circuit holds civil penalty mandatory once liability is established:**

Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp., 993 F.2d 1017 (2d Cir., May 14, 1993).

In this decision, the Second Circuit reversed a district court decision that had dismissed a CWA citizen suit against an industrial user (IU) in which the citizens sought both civil penalties and injunctive relief for pretreatment violations. The lower court had ruled that the citizen's CWA § 505 enforcement action was mooted by the local pretreatment control authority's administrative enforcement actions against, and subsequent settlement with, the IU, and the IU's subsequent compliance.

The Second Circuit ruled that local control authority enforcement, unlike State or Federal enforcement, cannot preclude Federal CWA citizen suits, stating: "In general, the Act accords the enforcement actions of local agencies less deference than it does those of State and Federal agencies." In reaching its decision, the Appellate Court had solicited and received amicus participation from EPA.

The court held that the mooting of injunctive relief does not moot a civil penalty claim, citing the Eleventh Circuit decision in Atlantic States Legal Foundation v. Tyson Foods, Inc., 897 F.2d 1128 (1990) and the Fourth Circuit in Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd., 890 F.2d 690 (1989). The Appeals Court emphasized the role of deterrence in citizen enforcement in reaching this conclusion, and distinguished an earlier Second Circuit ruling in Atlantic States Legal Foundation v. Kodak, 933 F.2d 124 (1991), which could have been read to support the defendant's position. **The appellate panel also indicated that the civil penalty provision of the CWA requires the imposition of a civil penalty upon a finding of liability.**

2. **Third Circuit holds that once a violation has been established some form of penalty is required:**

United States v. Brace. See page 20 for case summary.

3. **Ninth Circuit upholds criminal convictions and sentences of two managers of sewage treatment plant for knowingly discharging sewage sludge into ocean in violation of NPDES permit:**

United States v. Weitzenhoff, 35 F.3d 1275, (9th Cir., August 3, 1993), *cert. denied*, 130 L. Ed. 2d 884, 115 S. Ct. 939 (January 23, 1995).

Michael H. Weitzenhoff and Thomas W. Mariani, who managed a sewage treatment plant in Honolulu, Hawaii, were charged with conspiracy and substantive violations of the CWA for discharging partially processed sewage sludge directly into the ocean from the plant in violation of the plant's NPDES permit. Most of the discharges occurred during the night; none were reported to Hawaii's Department of Health or EPA.

The trial court found the defendants guilty of criminal violations of the CWA, specifically, knowingly discharging waste-activated sludge (WAS) into the ocean in violation of the plant's NPDES permit and rendering inaccurate the plant's method for monitoring discharges. The defendants were sentenced to imprisonment. At trial, the defendants admitted authorizing the discharges, but claimed that their actions were consistent with the sewage plant's NPDES permit.

On appeal, the Ninth Circuit upheld the criminal convictions and sentences of Weitzenhoff and Mariani. The Ninth Circuit held that the use of the term "knowingly" in § 309(c)(2) defining felony offenses under the CWA does not require the government to prove that the defendants knew that their acts violated the CWA or their NPDES permit. The court acknowledged that the use of "knowingly" in § 309(c)(2) was ambiguous, but found that the legislative history of the CWA penalty provisions strongly suggested that criminal sanctions are to be imposed on an individual who knowingly engages in conduct that results in a permit violation regardless of whether the polluter is aware of the requirements or even the existence of the permit. **The court**

concluded that the government did not need to prove that the defendants knew that their acts violated the permit or the CWA.

The Ninth Circuit rejected defendants' assertion that the discharges were permissible bypasses of the treatment system necessary to restore the sewage plant's biological balance and thus avoid a complete plant shutdown. The court held that the discharges were not essential maintenance necessary to assure efficient operation. The court also rejected defendants' contention that the NPDES permit was unconstitutionally vague, finding that the defendants were knowledgeable in the wastewater field and that the permit was not vague as to the illegality of discharging sewage sludge in excess of the permit effluent limits.

In the dissenting opinion from the order rejecting the suggestions for rehearing en banc, several Ninth Circuit judges took issue with the court's holding and construction of the term "knowingly" in defining CWA felony offenses. The dissent states, in part: "Congress has distinguished those who knowingly violate permit conditions, and are thereby felons, from those who unknowingly violate permit conditions, so are not . . . . If we read the statute on the assumption that Congress used the English language in an ordinary way, the state of mind required is knowledge that one is violating a permit condition. The dissent concludes by stating: The harsh penalty for this serious crime must be reserved for those who know they are, in fact, violating permit limitations."

4. District court holds ongoing permit litigation does not relieve liability in an enforcement action:

California Public Interest Research Group v. Shell Oil Co. See page 40 for case summary.

5. District court addresses due process concerns related to Class I administrative penalties:

Gulfstream Development Corp. v. EPA, Civ. Action No. 92-544-RRM (D. Del., December 16, 1993).

The U.S. District Court for the District of Delaware remanded a CWA Class I administrative penalty action for wetlands violations. The administrative complaint, which proposed a penalty of $7,500, was served April 23, 1992. The response was filed May 28, 1992, four days after the statutory 30-day deadline. The default provisions of 40 C.F.R. § 28.21 were applied and a default judgment entered. Penalty arguments were submitted; supplemental arguments addressing economic benefit and ability to pay were requested and submitted. The Presiding Officer recommended a penalty of $13,500, which was adopted in the Final Order.

The court remanded the matter to EPA Region III based on three concerns. First, the court indicated that the failure to respond in a timely manner was a procedural failure and that Gulfstream Development Corporation should be given the opportunity to explain its failure, so that excusable neglect could be acknowledged. The court stated that it would affirm an administrative decision based on the merits, but not one based on procedural default. Second, the court was concerned with the lack of explicit notice that a proposed penalty of greater than the $7500 could be assessed in the event of a default, even through the CWA contemplates that the penalty decision maker is the Agency, not the complainant. Finally, the court was troubled by the lack of a factual record of the administrative proceeding. The judge urged the parties to develop through the administrative process a "real clear, real precise" record, "that drives a judge to a result."

Attorney: Joan Hartmann, ORC, Region III

6. District court holds claims of laboratory error not a defense; interim effluent limits set by consent order not binding on the United States; single operational upset defense rejected:

United States v. Borough of Plum, Civil Action No. 93-370 (W.D. Pa., July 21, 1994).

The United States brought suit against the defendants for violations of effluent limits, discharge of raw sewage in navigable waters, and failure to monitor pursuant to an applicable administrative

order. The United States moved for partial summary judgment on liability and the court granted the motion, rejecting several defenses raised by the defendants.

The defendants first asserted that laboratory error caused inaccurate Discharge Monitoring Reports (DMRs). They supported this assertion with: 1) an affidavit from their consulting engineer stating that the final biological oxygen demand (BOD) should have been lower than the total suspended solids (TSS) concentration, and 2) the plant operator's notes on the DMR stating that he disagreed with the tests. This evidence of reporting inaccuracies was rejected as too speculative. See Public Interest Research Group of New Jersey v. Yates Industries, Inc., 757 F. Supp. 438, 447 (D.N.J. 1991).

The defendants raised several additional defenses. First, the defendants argued that the plant was operating under interim limits imposed under a State-issued consent order. **The court rejected this defense, finding that a State consent order does not bind the United States, which was not a party to the order. In addition, the court held that such interim limits cannot be considered a valid modification of the permit.**

Next, the defendants argued that the number of violations should be reduced under a defense of single operational upset resulting from mechanical failures, extreme rainfall, and the unanticipated closing of the landfill. **The court rejected the single operational upset defense**, **since the plant was not an otherwise generally compliant facility**. Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 76-77 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109, 112 L. Ed. 2d 1100, 111 S. Ct. 1018 (1991). Finally, a defense that the United States was estopped based on the plant's reliance on discussions with the Pennsylvania Department of Environmental Regulation regarding the time the plant had to eliminate the overflows was rejected because no affirmative misconduct on the part of the United States had been alleged or proven.

Attorney: Sara Himmelhoch, DOJ

7. District court holds that DMRs are conclusive evidence of violations of the CWA:

United States v. Aluminum Co. of America, 824 F. Supp. 640 (E.D. Tex., June 28, 1993).

ALCOA discharged wastewater in violation of its NPDES permit and the United States brought suit. The parties stipulated that the applicable statute of limitations for an action for civil penalties under the CWA is five years from the date the claim accrues. At issue was whether the claim accrued when the violator reported the violation or the date the violation actually occurred. **The court held that the five-year time period begins when the defendant files its DMRs, "since the responsibility for monitoring effluent rests with the defendant, 33 U.S.C. § 1318(a)(4)(A), and the public cannot reasonably be deemed to have known about any violation until the permit holder files its DMRs."** See Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 75 (3rd Cir. 1990), *cert. denied*, 498 U.S. 1109, 112 L. Ed. 2d 1100, 111 S. Ct. 1018 (1991). Accordingly, ALCOA's cross-motion for partial summary judgment was denied.

ALCOA asserted two defenses to the imposition of strict liability for point source violations under its NPDES permit. See CWA §§ 309(b) and (d). First, ALCOA argued that DMRs are not conclusive evidence of violation of the permit, alleging that certain exceedances were statistically insignificant and should not be considered violations. **The court reviewed and stated its agreement with case law holding that DMRs filed by a permittee are "virtually unassailable" as admissions of the violations reflected therein. The court went on to hold that "[a] violation is a violation no matter how statistically insignificant."** In addition, ALCOA claimed that exceedance of the permit's daily average limitation was not a separate violation for every day of that month. **Consistent with the Fourth, Eighth, and Eleventh Circuits, the court held that the violation of a daily average constituted a violation for every day of that month.** Accordingly, the court granted the government's motion for summary judgment with respect to liability for these violations.

Finally, ALCOA claimed that the terms of the permit with regard to monitoring requirements and limitations were ambiguous. Specifically, ALCOA argued that the monitoring requirements for Outfall 004 never became effective because ALCOA did not "restart" its 42-inch reactor as required by its NPDES permit. **The court applied contract interpretation principles to the permit and held that there remained questions of fact to resolve on the term "restart."** Accordingly, the court denied the government's motion for summary judgment with respect to these particular violations.

8. **District court holds a city may not use as a defense a state's sanctioning of NPDES violations nor may a State suspend the requirements of the NPDES permit without following appropriate procedures:**

United States v. City of Toledo, 867 F. Supp. 595, 598, 603 (N.D. Ohio, March 31, 1994).

Under the citizen suit provision of the CWA, the State of Ohio sought injunctive relief and recovery of civil penalties for the City of Toledo's alleged violations of its NPDES permit. The State's complaint was based on a comparison of the City's Monthly Operating Reports (MORs) with the terms of the NPDES permit which revealed nearly 200 violations during the period covered by the complaint. The City claimed in defense that the timeframes relied upon by the City in its MORs and those used by EPA and the State EPA were inconsistent, thus creating a genuine dispute of facts sufficient to deny summary judgment to the plaintiffs. The district court noted that the defendant at no point denied that violations had occurred. Observing that the plain language of the permit expressly provides that compliance is to be evaluated in the context of a 7- and 30-day periods, the district court concluded that the City failed to show that the number of violations would change if the plaintiff used the wrong method in making its computations of the 7- and 30-day periods. The district court also found that the City's claims of inaccurate readings were insufficiently supported and that it failed to meet the requirements of its "upset" defense, in that the City did not show which violations were attributable to upsets, nor that the plant was operating properly at the time of the alleged, but unspecified upsets. Motion for partial summary judgment was granted to the plaintiff.

The City also argued that the State was not a "citizen" capable of maintaining a CWA citizen suit. The district court noted that the state viewed itself as an intervening party in a civil action "to require compliance" with the requirement of the Act and the City's NPDES permit. In accordance with Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49, 98 L. Ed. 2d 306, 108 S. Ct. 376 (1987), the district court agreed with the City that a citizen-intervenor under 32 U.S.C. 1365(b)(1)(B) can only seek penalties for ongoing violations of Federal law and not civil penalties for past violations. Thus, the district court granted the City's motion for summary judgment for all counts except for the State's demand for injunctive relief.

In its second motion for partial summary judgment, the State of Ohio alleged exceedances of the NPDES permit, improper bypasses, sampling and reporting requirement failures, and noncompliance with the mandate to employ a properly certified plant manager. The defendant did not dispute the claims of exceedances by the State, but argued that compliance was excused by the Director of the State EPA in a document entitled Director's Final Findings and Orders (DFFO). However, the district court rejected the City's claim that the DFFO suspended requirements under the NPDES permit. The court reasoned EPA must have authority to enforce the CWA, even if violations have been sanctioned by a State agency. The court stated: **"In light of the supremacy of federal law in this area, a state cannot suspend the operation of the terms and conditions of a NPDES Permit without following appropriate procedures."** Toledo, 867 F. Supp. at 606. See United States v. Ohio Edison Co., 725 F. Supp 928 (N.D. Ohio 1989).

The City also claimed the defense of equitable estoppel. The district court found that "[a]lthough the City ha[d] developed a record of systemic indifference to the situation caused to permit holders by the EPA's failure to clarify the lawfulness of reliance on DFFOs," Toledo, 867 F. Supp. at 607, this does not meet the standard of affirmative misconduct required to give rise to equitable

estoppel, as established in United States v. Guy, 978 F.2d 934, 937 (6th Cir. 1992).

In addition, the district court agreed with the State that the City failed, under the requirements of its NPDES permit, to provide notice of unanticipated bypasses envisioned by the applicable regulations. However, as to unavoidable bypasses, the district court found that the City's response had created an issue of fact regarding the need to bypass, and denied the plaintiff's motion for summary judgment on this issue.

Finally, the defendant failed to comply with monitoring and reporting requirements, and summary judgment was granted on this motion.

9. District court holds discharge variance petition granted by State bars Federal enforcement action:

United States v. Citizens Utilities Company Illinois, 1993 U.S. Dist. LEXIS 16393 (N.D. Ill., November 18, 1993).

The United States sought injunctive relief and civil penalties under the CWA against Citizens Utilities (Citizens) for the dumping of pollutants into a stream in violation of its NPDES permit. That permit established effluent limitations for biological oxygen demand, total suspended solids, fecal coliform, ammonia nitrogen, and residual chlorine. Citizens brought a motion for reconsideration of the court's denial of its motion to dismiss. Citizens' motion to dismiss was based primarily on res judicata and Federal abstention doctrines. The court rejected these defenses, finding that it was unclear from the pleadings whether Citizens had obtained a variance from the Illinois Pollution Control Board (PCB) temporarily excusing compliance with three of the five permit effluent limitations. Based on this uncertainty, the court held that the pendency of a variance petition does not suspend the limitations of the permit, and that a court must enforce all permit provisions and provide remedies for past violations even though the permit might later be modified by a State agency.

In this motion, Citizens clarified that its variance petition was not simply pending before the PCB; rather, the PCB, at the instruction of the Illinois Appellate Court, had granted a variance excusing Citizens from complying with certain discharge restrictions. The court noted that the CWA provides for the granting of variances imposed by the NPDES regulations when compliance would "impose an arbitrary and unreasonable hardship on the applicant or permittee."

The court granted Citizens' motion for reconsideration and stay, according to general principles of comity and federal abstention of those claims pertaining to three discharge effluents. The court further noted that Citizens had obtained permission for the variance from both the PCB and the Illinois Appellate Court, and that "allowing the United States . . . to prosecute those claims covered by the variance could unduly interfere with Illinois' administrative process and lead to the imposition of inconsistent obligations on Citizens."

M. Consent Decrees

1. District court holds consent decree related to NPDES violations cannot be entered until it includes a compliance schedule that has been reviewed by the public:

United States v. Fina Oil and Chemical Co., 1993 U.S. Dist. LEXIS 16118 (E.D. Tex., July 29, 1993).

Fina Oil and Chemical Company (Fina) owns and operates an industrial plant, which discharged wastewater in violation of its CWA NPDES permit. The parties agreed to, and petitioned the district court to enter, a consent decree containing the terms of their agreed settlement.

The proposed consent decree received comment from the National Resource Defense Council (NRDC) objecting to the proposed settlement. After reviewing the comment, the United States decided the proposed consent decree was fair, reasonable, and consistent with the purposes of the CWA. The government argued that NRDC did not need to examine the proposed compliance plan before entry of the consent decree because EPA would verify that the plan would be sufficient to ensure Fina's compliance.

NRDC argued, however, that the consent decree should not be entered because it did not contain a compliance plan to explain how Fina intended to comply and what restitution it intended to make. Further, if submission of Fina's compliance plan was postponed until after the entry of the decree, NRDC argued that the public would have been denied the opportunity to review a key provision necessary for a meaningful assessment of the consent decree.

The district court recognized that a presumption of validity envelops a consent decree, citing United States v. Cannons Engineering Corp., 720 F. Supp. 1027 (D. Mass. 1989). **However, the district court found that the consent decree was incomplete without a compliance schedule.** The district court agreed with NRDC that the compliance schedule was an integral part of the consent decree. **The district court held that the public must be given a meaningful opportunity to comment upon the compliance plan before the district court enters the consent decree because of its potentially dramatic effect on the public interest and welfare.** In order to meet the mandates of 28 C.F.R. § 50.7, the district court ordered that within 30 days from this order, the consent decree must be re-published complete with a compliance plan.

2. District court holds that NPDES permit conditions must conform to consent decree:

United States *ex rel.* Michigan Natural Resources Commission v. Wayne County, 1994 U.S. Dist. LEXIS 18775 (E.D. Mich., December 22, 1994).

The district court granted the defendant's motion to clarify and effectuate the purposes of a consent decree filed and approved by the court. The dispute arose from the re-issuance of an NPDES permit that contained substantial discrepancies between it and a consent decree previously filed with the court.

The plaintiffs did not dispute that there were substantial differences between the NPDES permit and the consent decree. Some plaintiffs even agreed that the consent decree was the controlling authority. However, plaintiffs argued that the district court did not have jurisdiction to hear the dispute and that the applicable law allowed discrepancies between the permit and the consent decree.

The Sixth Circuit has found that the court retains jurisdiction over a consent decree after it is approved. Lorain NAACP v. Lorain Board of Education, 979 F.2d 1141 (6th Cir. 1992). Further, a consent decree operates as a final judicial order which places the power and prestige of the court behind the parties' compromise. Williams v. Vukovich, 720 F.2d 909 (6th Cir. 1983). The plaintiffs claimed that even if the court retained jurisdiction, it may not address the discrepancies between the permit and the consent decree. Such a ruling would constitute an advisory opinion because the defendants do not presently face enforcement of the permit. Finally, the plaintiffs claimed that the consent decree mandates alternative dispute resolution (ADR) procedures, and thus the court cannot hear the dispute until the ADR process is complete.

The district court held that disposition of the issue by the court did not constitute an advisory opinion because its disposition affected the parties' relationship with its creditors, contractors, and others in reliance of the consent decree. Even the language of the consent decree, which specified that the parties must engage in arbitration, stated that the court retained jurisdiction for the purpose of ruling on any motion by any party to enforce the terms and conditions of the consent decree.

The district court also held that according to all relevant law, the consent decree controlled. United States v. Armour & Co., 402 U.S. 673, 29 L. Ed. 2d 256, 91 S. Ct. 1752 (1971). Therefore, the court held that during the life of the consent decree any NPDES permit issued must comply with the conditions of the decree.

3. District court rejects consent decree as not adequate to accomplish the goals of the CWA:

United States v. Telluride Co., 849 F. Supp. 1400 (D. Colo., April 20, 1994).

The United States brought suit against Telluride Company, developer of a ski area and golf course

located in Telluride, Colorado, after determining that approximately 40 acres of wetlands had been filled by Telluride without a CWA § 404 dredge and fill permit. The U.S. District Court for the District of Colorado denied the United States motion to enter the consent decree, finding that the decree failed to "fulfill the objectives of the Clean Water Act." The court objected to the filing of the complaint and the lodging of the proposed consent decree on the same day. The court objected to the size of the penalty as too low, the amount of the remediation as too little, and the location of the restoration project (60 miles away) as too far away from the filled site.

The court found the consent decree to have been developed in a manner that was procedurally unfair. The court believed that the settlement was not the result of an adversary process, and therefore the court declined to pay deference to the government's judgment. The court was offended that EPA had relied upon the defendant's experts to develop the remediation plan. **The court also found the consent decree not technically adequate to accomplish the goals of the CWA. The court believed that the settlement did not comply with EPA's policy on remediation of wetlands, and found that the size of the civil penalty was not sufficient.**

4. District court rejects proposed partial consent decree and U.S. agrees to stay secondary treatment claims pending waiver decision:

United States v. City of San Diego, 1994 U.S. Dist. LEXIS 19501 (S.D. Cal., March 31, 1994).

In 1988, the United States and the State of California sued San Diego to require the City to comply with secondary treatment requirements and to address other violations of the CWA, including numerous sewage spills, and pretreatment and sludge disposal violations. San Diego, the State of California, and the United States entered into a partial consent decree, lodged with the court in January 1990, which was intended to resolve the injunctive relief claims of the enforcement action. (Following a earlier trial in the penalty phase of the case, San Diego was required to pay a $500,000 penalty and perform a $2.5 million water conservation project.) Under this proposed partial consent decree for injunctive relief, San Diego agreed to meet secondary treatment standards by the year 2003 through construction of a number of facilities, including water reclamation plants, and the upgrade of its existing plant.

Following several years' delay, during which time several hearings on whether the proposed consent decree should be entered were held and San Diego and the State of California sought to repudiate the decree, the district court issued an order rejecting the proposed partial consent decree. The court rejected the consent decree for four reasons: implementation of the consent decree would not provide additional environmental benefit; rejecting the consent decree would save the City resources and avoid unnecessary sludge production; and not mandating construction of the reclamation facilities required under the consent decree would substantially decrease design, construction,and operational costs.

[Editor's Note: Although disagreeing with a number of aspects of the district court's opinion (particularly the finding of no environmental harm from the City's existing, less than secondarily treated discharge, and the court's implicit conclusion that there would be no added benefit from the secondary treatment facilities required under the consent decree), the United States decided not to appeal the court's rejection of the proposed consent decree, but instead to proceed to trial and seek an order from the court requiring San Diego to comply with the CWA, including the secondary treatment requirements. Subsequently, Congress passed special legislation allowing San Diego a renewed opportunity to apply for a § 301(h) waiver from secondary treatment requirements, and the United States agreed to a stay of the secondary treatment claims pending a decision on San Diego's revised waiver application.]

Attorney: Hugh Borrall, Region IX-ORC

II. Safe Drinking Water Act

A. Seventh Circuit holds that mixed sludge wastes are not regulated hazardous wastes:

United States v. Bethlehem Steel Corp., 829 F. Supp. 1047 (N.D. Ind., August 31, 1993) *aff'd in part, rev'd in part*, 38 F.3d 862 (7th Cir., September 26, 1994).

EPA brought an action against Bethlehem Steel (Bethlehem) to enforce hazardous waste requirements under RCRA and the underground injection control (UIC) provisions of the SDWA. Bethlehem disposed of waste ammonia liquor by forcing it under pressure into underground injection wells pursuant to an UIC permit. Bethlehem's original UIC permits were conditioned on Bethlehem's performance of a corrective action program for all of the solid waste management units on its property. Bethlehem also created waste sludge from the treatment of electroplating and disposed of it in two finishing lagoons and a landfill at the plant site pursuant to RCRA interim status standards. The U.S. alleged that Bethlehem failed to perform any phase of the corrective action program prescribed in the UIC permits, and that Bethlehem failed to comply with RCRA interim status performance standards. The district court granted summary judgment to the United States on all six counts and ordered Bethlehem to comply with its hazardous waste obligations. The court also assessed penalties in the amount of $6 million. Bethlehem appealed the injunction and penalty, arguing that 1) it was unreasonable for EPA to expect it to complete the program on schedule because the corrective action deadlines were impossible to meet and were imposed "in a boilerplate fashion", and 2) that its sludge was not hazardous waste.

The circuit court affirmed the district court's grant of partial summary judgment regarding the failure of Bethlehem to comply with the corrective action conditions required by the UIC permits. However, the circuit court found that Bethlehem's wastewater treatment sludges did not fall under the F006 hazardous waste listing and thus were not subject to RCRA Subtitle C requirements. The court found that the F006 listing, by its terms, applied only to sludge from pure electroplating wastewaters, and not to mixed sludges. The court found it significant that the F006 listing did not include the term mixture or blend, as did the F001-F005 listings immediately preceding F006. The court also agreed that Bethlehem was correct in asserting that its sludges were not listed F006 pursuant to EPA's mixture rule because that rule has been vacated and remanded. See Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991). Hence, the court vacated this portion of the district court's opinion.

Attorney: Dorothy Attermeyer, Region V-ORC

B. Ninth Circuit upholds waiver of attorney fees in consent decree:

Bull Run Coalition v. Reilly, 1993 U.S. App. LEXIS 20170 (9th Cir., July 29, 1993).

Bull Run Coalition (Coalition) filed this citizen suit action when the EPA Administrator failed to meet a deadline under the Safe Drinking Water Act (SDWA). The SDWA required the Administrator to publish maximum contaminant level goals by June 19, 1888, regarding 40 listed contaminants. On February 14, 1989, a consent decree, offered by EPA to the Coalition, was approved without change by the district court.

As defined by SDWA § 1449(d), the consent decree awarded reasonable costs of litigation to the Coalition. Paragraph 5 of the consent decree expressly limited attorney fees to those that had accrued as of the date of EPA's offer of judgment. This implicitly waived post-settlement fees.

In early December 1990, EPA requested the Coalition's consent to a 6-month extension of the December 30, 1990, final rulemaking deadline as to 5 of the 40 listed contaminants. The Coalition refused. Each party then filed a motion with the district court to modify the consent decree. EPA prevailed on its requested extension; however, the district court modified the consent decree to allow the Coalition litigation costs that it incurred opposing EPA's requested extension.

EPA filed a motion for reconsideration of the modified consent decree, which awarded attorney's fees to the Coalition. The Coalition demonstrated no change in the facts or law, which made removal of the waiver in the original consent decree equitable. Moreover, the Supreme Court has determined that "absent some degree of success on the merits by

the claimant, it is not `appropriate' for a federal court to award attorney's fees." Ruckelshaus v. Sierra Club, 463 U.S. 680, 682, 77 L. Ed. 2d 938, 103 S. Ct. 3274 (1983). **Accordingly, the court held that the modification of the district court's earlier order was an abuse of discretion.**

The Coalition also argued that it was entitled to attorney's fees under the Equal Access to Justice Act (EAJA). To support this contention, the Coalition relied on Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842 (9th Cir. 1987), which held that the plaintiffs were entitled to proceed under the APA to enforce violations under the CWA. By doing so, fees became available under the EAJA. The court stated that that decision should not be interpreted to suggest that plaintiffs seeking relief under the CWA may circumvent the notice requirement of the citizen suit provision by resorting to the APA. **The court held that the EAJA did not provide an alternative basis for recovery of attorney's fees.** The district court's judgement was reversed.

[Note: Unpublished opinion—check applicable court rules before citing.]

C. Tenth Circuit upholds EPA's construction of the SDWA term "natural gas" as including only energy-related hydrocarbon gases:

ARCO Oil & Gas Co. v. EPA, 14 F.3d 1431 (10th Cir., December 23, 1993).

ARCO Oil and Gas (ARCO) petitioned for review of a finding by EPA that the Agency properly required ARCO to obtain a Class I EPA permit under SDWA for operation of its Garcia Number One injection well in Colorado. The wastes disposed of in this well are produced from a gas extraction project that generates primarily carbon dioxide for use in oil recovery. Previously, the Garcia Number One well had been regulated as a Class II well.

EPA's decision was based on its characterization of the waste fluids disposed of in the Garcia Number One well as "hazardous," "industrial," or "municipal" waste within the meaning of 40 C.F.R. § 144.6(a)(1)-(2), defining Class I wells. ARCO argued that the fluids should instead be characterized as fluids "brought to the surface in connection with . . . conventional oil or natural gas production" within the meaning of 40 C.F.R. § 144.6(b)(1), resulting in continued Class II designation. EPA maintained that the definition of natural gas "for the purpose of underground injection control regulations was intended to include only `energy-related' hydrocarbon series gases such as methane and butane, not carbon dioxide." In appealing the denial of administrative review, ARCO petitioned that EPA's construction of SDWA be set aside, or that the reclassification be overturned as arbitrary and capricious.

The appeals court found that neither the statute nor the legislative history of the statute shed light on the intended meaning or scope of the term "natural gas," or the treatment of carbon monoxide as "natural gas." The court continued that "because Congress' concern about undue interference with oil and gas production is secondary and expressly subject to the primary goal of ensuring clean water, the legislative history cited by ARCO in no way mandates that we override EPA and adopt the broad construction" of the term. The court then considered whether EPA's narrow interpretation of the term "natural gas" is a "permissible construction of the [statute]," per Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). Applying Chevron, the court found that EPA's narrow construction of "natural gas" was consistent with the SDWA's overriding goal of treating water pollution as a national concern. With regard to the "arbitrary and capricious" claim, the court, citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971), found that ARCO's complaint did not warrant a holding that EPA's decision was arrived at without a "consideration of the relevant facts," nor did the Agency's decision reveal a "clear error of judgment." Consequently, the Agency's action was determined not to be arbitrary or capricious. ARCO's petition for review was denied.

D. District court holds that SDWA lead ban applies to private water systems that affect public water systems:

Klinger v. CBH Development Corp., 1993 U.S. Dist. LEXIS 13144 (E.D. Pa., July 6, 1993).

Plaintiffs filed a citizen suit action against defendant developers, claiming that defendants violated the SDWA lead ban. Defendants used lead solder in the construction and installation of plumbing fixtures in the plaintiffs' homes, which were connected to a public water system. The lead levels in the plaintiffs' plumbing systems exceeded the SDWA's maximum allowable levels of lead. Defendants moved for summary judgment, arguing that the SDWA lead ban only applied to public water systems, and that the citizen suit provision encompassed only ongoing violations.

The district court denied defendants' motions for summary judgment, holding that the SDWA lead ban applied to private water systems that affect public water systems. The court found the decision to be consistent with the statutory construction and legislative intent of the SDWA, and that it served the purpose of the lead ban, which was "to eliminate the future use of lead in water supply distribution systems and to notify persons who may be at risk from lead in existing systems."

The district court also rejected the defendants' claim that their actions did not constitute an ongoing violation of the SDWA. The court found that the presence of high levels of lead in the plaintiffs' plumbing systems, which were connected to a public water system, established an ongoing violation of the SDWA, and that the defendants were in "continuous breach of the public welfare."

E. District court holds citizen group has standing and has met notice requirements for SDWA citizen suit:

Acorn v. Edwards, 842 F. Supp. 227 (E.D. La., November 16, 1993), *motion for reconsideration denied*, 842 F. Supp. 227 (E.D. La., January 12, 1994); *award of attorney fees*, 1994 U.S. Dist. LEXIS 16547 (E.D. La., November 14, 1994).

This case was initiated by the Association of Community Organizations for Reform Now (ACORN) on February 17, 1993, by sending defendants a "Notice of Intent to Sue" alleging violations of 42 U.S.C. § 300j-24(c) for failure to send EPA's published list of water coolers that are not lead free to Louisiana schools, and 42 U.S.C. §§ 300j-24(d)(1) & (3) for failure to have a remedial program to test water coolers that are not lead free and that are located in participating schools to ensure that they are repaired, replaced, permanently removed, or rendered inoperable so as to minimize risk to school children.

The district court granted the plaintiffs' motion for an award of attorney's fees and other expenses resulting from litigation entered into in February 1993. The defendants' previous motion to dismiss for lack of standing and failure to comply with the notice provisions was denied as was their subsequent motion for reconsideration of that ruling. Because the defendants' subsequent actions, undertaken because the plaintiffs initiated the instant proceedings, had indicated substantial improvement in adhering to the statutory guidelines of the Lead Contamination Control Act (LCCA) of 1988, 42 U.S.C. §§ 300j-24(c) and 300j-24(d), the case was dismissed for mootness and the plaintiffs, as the prevailing party, were awarded attorney's fees and expenses.

The defendants' principal argument in this case was that the plaintiffs lacked standing to pursue the matter and that their lack of standing was sufficiently jurisdictional to require dismissal under Fed. R. Civ. P. 12 (b)(1). The court found that the plaintiffs had representational standing as set forth by the Fifth Circuit in Save Our Community v. EPA, 971 F.2d 1155 (5th Cir. 1992). Pursuant to Save Our Community, representational standing is appropriate where: 1) its members would otherwise have standing to sue in their own right, 2) the interests it seeks to protect are germane to the organization's purpose, and 3) neither the claim asserted nor the relief requested requires participation of the individual members in the lawsuit. ACORN meets these tests because ACORN members are parents whose children attend schools in the State of Louisiana that have water coolers in operation that are listed as not lead free, and would have standing to sue in their own right. Further, because their children are immediately threatened with injury or harm, standing was proper. Finally, because ACORN's case was brought pursuant to the citizen suit provision of the SDWA, 42 U.S.C. § 300j-8, which authorizes suits by any person, not just those

interested parties within a "zone of interest" as set out under APA § 10, 5 U.S.C. § 702, ACORN had standing to sue.

The court also held that, contrary to the defendants' claim that the plaintiffs failed to comply with the notice requirements of 42 U.S.C. § 300J-8, the plaintiffs' notice letter complied with all statutory requirements. The defendants had more than sufficient information to identify the specific requirements allegedly violated within the meaning of 40 C.F.R. § 135.12(a). The plaintiffs' notice letter was addressed to all defendants alleged to have violated the statute and identified the location of the alleged violations and the dates of the alleged violations.

In the LCCA, Congress expressly provided for an award of attorney's fees. The general immunity provisions of the Eleventh Amendment do not bar the court from granting an award of attorney's fees. Further, the court may in its discretion allow the prevailing party reasonable attorney's fees as part of the costs. Generally, plaintiffs must show the goals of the lawsuit were achieved, and the suit caused the defendants to remedy the complained-of behavior. Furthermore, the lawsuit must be a substantial fact or significant catalyst in changing behavior. Watkins v. Fordice, 7 F.3d 453 (5th Cir., November 24, 1993). Because the plaintiffs clearly satisfied their burden of demonstrating that their lawsuit was a significant factor in the defendants modifying their behavior, the plaintiffs prevailed. Finally, the defendants' argument that the plaintiffs were precluded from recovering attorney's fees because they had not been charged by counsel and counsel had not earned any fees was of no consequence. The court found that the fact that the prevailing party was represented by a public service organization or firm was irrelevant.

III. Oil Pollution Act

A. District Court Holds OPA Applicable to Non-Navigable Waters Where Discharge Threatens Navigable Water or Adjoining Shorelines:

Avitts v. Amoco Production Co., 840 F. Supp. 1116 (S.D. Tex., January 4, 1994) *vacated on other grounds*, 53 F. 3d 690 (May 22, 1995).

[Note: This decision was vacated and remanded by the Fifth Circuit on other grounds in Avitts v. Amoco Prod. Co., 53 F. 3d 690 (May 22, 1995).

Avitts sought relief for the surface and subsurface contamination of their property caused by the oil exploration operations of Amoco Production Company (Amoco). During the trial, it became apparent that the extent of the contamination would have to be researched to determine the amount of relief. All proceedings were suspended save Avitts' interim application for attorneys' fees. Avitts argued that their attorneys' fees and expenses were recoverable under the CWA and Oil Pollution Act (OPA). The district court found that it did not have jurisdiction to hear this case under the CWA because Avitts failed to provide statutory notice of suit to Amoco.

The CWA's citizen enforcement provisions specifically require potential litigants to notify the potential defendant, EPA, and the State of their intentions to sue, at least 60 days prior to the commencement of any action. **Following Hallstrom v. Tillamock County, 493 U.S. 20 (1989), the court found that such notice was "a strictly construed, mandatory condition precedent to the commencement of suit," and that Avitts' failure to "at least substantially comply" with the notice provision deprived the court of any discretion to hear claims under the CWA.**

However, the court found the OPA applicable in this case, rejecting Amoco's argument that Chigger and Cowart Creeks are not navigable waters. The court found that a construction of the statute that would limit its application strictly to pollutants discharged directly to navigable waters would thwart the remedial purpose of the Act. The court found that for purposes of a removal cost reimbursement lawsuit the minimum nexus an incident must have to the coastline is that the facility "poses the substantial threat of a discharge of oil . . . into or upon the navigable waters or adjoining shorelines." 33 U.S.C. § 2702(a). In this case, the

court found that the exploration operations in West Hastings, being located in the drainage basin for Clear Lake, pose a substantial threat to Clear Lake's water quality. **In its most significant ruling, the district court found that, although OPA did not specifically enumerate attorneys' costs and fees as recoverable, such fees and costs should, as a matter of statutory interpretation, be includable in a claim for the reimbursement of removal costs under Section § 1002 of OPA. This holding appears to apply equally to government cost recovery cases as well as private causes of action.**

B. District court holds that link to coastal or inland waterways required for OPA cause of action:

Sun Pipe Line Co. v. Conewago Contractors, Inc., 1994 U.S. Dist. LEXIS 14070 (D.Pa., August 22, 1994).

Sun Pipe Line Company (Sun Pipe) filed this action under the Oil Pollution Act (OPA) against defendants for damage caused when ditch-digging equipment operated by the defendants struck a six-inch petroleum pipeline owned by Sun Pipe. The ruptured pipeline caused approximately 12,000 gallons of petroleum to spill onto the surrounding land. Sun Pipe immediately notified the Pennsylvania Department of Environmental Resources (DER) and carried out the required removal and remedial activities to mitigate the effects of the spill. Sun Pipe then sought to recover the expenses incurred in conducting the cleanup under the Oil Pollution Act (OPA). Defendant Conewago moved to dismiss the complaint for failure to state a claim, arguing that no basis existed for liability under the OPA. Conwego argued that OPA pertains only to the discharge, or threatened discharge, of oil upon navigable waters of the United States or adjoining shorelines. **The district court granted the defendant's motion to dismiss, holding that to establish liability under the OPA, plaintiffs must demonstrate some link, direct or indirect, to U.S. coastal or inland waterways.**

Sun Pipe had failed to allege in the complaint any threat to a specific body of water, although there were several vague references to the existence of nearby wetlands, ponds, streams, and underwater aquifers. To the extent that the complaint addressed the threat at all, it merely suggested that only areas of soil were contaminated.

Nevertheless, the court examined the possible constructions of the term "navigable waters," defined in OPA as "the waters of the United States, including the territorial sea." The court referenced language from Avitts v. Amoco Production Co., 840 F. Supp. 1116, 1121-1125, (S.D. Tex., January 4, 1994) *vacated on other grounds*, 53 F. 3d 690 (May 22, 1995), interpreting the OPA definition. In that case, the court found that a construction of the statute that would "limit its application strictly to pollutants discharged directly into navigable waters would unjustifiably thwart the Act's aim of remediating all causes of this contamination . . .," although the Avitts court conceded that at some point the connection between a discharge and possible impact on navigable waters becomes too remote to pose a real threat.

Looking to other statutory definitions of "navigable waters," the court noted that caselaw involving the CWA (such as United States v. Riverside Bayview Homes, 474 U.S. 121, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985)) has given the term an expansive definition. In response to Sun Pipe's urging that the OPA's definition of "navigable waters" should be coextensive with that of the CWA, the court observed that the two statutes have a key distinction that bears on this argument. While the CWA was passed to eradicate pollution from all of the nation's waterways, the OPA was enacted to address a problem of a more limited geographic scope. The court found the primary focus of OPA, indicated by legislative history, is on coastal waterways, and the protection of inland waterways was a lesser consideration. *[Ed. note: This issue was not briefed by the parties, and the court's distinction in this dicta mistakenly assumed that the "adjoining shoreline" language of CWA § 311(b)(3), which preexisted OPA's 1990 passage, should be interpreted as if it were written in 1990 in response to coastal disasters, such as the Exxon Valdez spill. In fact, the phrase first appeared in predecessor law in*

1966.] Nevertheless, the court noted that OPA was written "to dovetail with preexisting federal legislation"--specifically, CERCLA and CWA. Together, the three statutes were "intended to operate as a comprehensive network of federal legislation aimed at controlling and eliminating pollution, indicating a broader application than solely coastal shorelines or waterways."

The court concluded that "some link, direct or indirect," to U.S. coastal or inland waterways must be demonstrated to invoke the protection of the OPA. While the court held that the discharge or threat of discharge need not take place in or on a covered body of water, the court stated that there must be some threat that the oil will make its way into protected areas, i.e., coastal or inland waterways. As plaintiff's complaint made no specific allegation that the oil spill threatened any body of water, the action was dismissed and Sun Pipe was granted leave to amend its complaint within 20 days to allege specific facts demonstrating that a cause of action exists.

IV. Cases Under Other Statutes.

A. Penalties

1. Third Circuit finds appellant bears responsibility for establishing ability to pay and it is only one of five factors:

Municipal & Industrial Disposal Co. v. Browner, No. 92-1636 (3d Cir., December 20, 1993).

This favorable Memorandum of Opinion affirms a lower court ruling assessing a $480,000 civil penalty for violations of a Resource and Conservation and Recovery Act (RCRA) § 3013 Order (monitoring, analysis, and testing) against Municipal and Industrial Disposal Company (MIDC). The fine consists of a $2000 per day penalty assessed for 240 days of violation. MIDC argued that the district court erred by failing to consider MIDC's ability to pay and that the penalty recommended was overly punitive.

The court acknowledged that, as delineated in United States v. Readers Digest Association, Inc., 622 F.2d 955 (3d Cir. 1981), MIDC's ability to pay is one of five factors to be considered in assessing civil penalties. However, **the court held that MIDC bears the burden of establishing its ability to pay a civil penalty, and that MIDC presented no evidence of its ability to pay**.

Attorney: Martin Harrell, ORC, Region III

2. District court holds notice violations are continuing violations allowing penalties for each day of violation:

United States v. Trident Seafoods Corp., No. C92-1025D (W.D. Wash., December 13, 1993).

The United States brought suit against Trident Seafoods Corporation (Trident) under the CAA for failure to give proper notice of asbestos removal.

In the penalty phase of the case, Trident argued that the failure to notify was a one-time violation subjecting it to a statutory maximum penalty of $25,000. EPA argued that the violation was continuing because each day notice was not given was another day the regulating agency could not inspect the facility to ensure compliance.

The court held that as a matter of law, failure to comply with the notice requirement in question was a continuing violation, ending only when renovation was completed or EPA had actual notice.

3. District court holds that five-year statute of limitations under 28 U.S.C. § 2462 is applicable to administrative penalty cases:

3M Co. (Minnesota Mining and Manufacturing) v. EPA, 17 F.3d 1453 (D.C. Cir., March 4, 1994).

3M Company (Minnesota Mining and Manufacturing) challenged EPA's assessment on administrative appeal of a $130,650 penalty for violation of the

Toxic Substances Control Act (TSCA) § 16(a)(2)(A) (failure to file premanufacturing notifications), arguing that the statute of limitations found in 28 U.S.C. § 2462 barred such an assessment (§ 2462 imposes a five-year statute of limitations applicable to civil fines and penalties). Some of the alleged violations occurred more than five years prior to EPA's complaint.

The D.C. Circuit held that an administrative penalty proceeding under TSCA § 16(a)(2) is an "action, suit or proceeding" under U.S.C. § 2462, that it constitutes an action, suit, or proceeding "for the enforcement of" a civil penalty, and that EPA's penalty claim accrued at the time that the company committed the violation, not the time that the agency discovered the violation. 3M Company discovered these violations on their own and notified EPA.

The court reasoned that an agency's adjudication of a civil penalty case readily fits the description "action, suit or proceeding" (the regulations describe the Agency's process for assessing civil penalties as a "proceeding." 40 C.F.R. §§ 22.01(a), 22.04(b)(2), 22.11(a) and (b)). The court looked at the provision historically preceding 28 U.S.C. § 2462, which barred a "suit or prosecution for any penalty or forfeiture" where brought beyond five years from when the penalty accrued, in finding that the term "enforcement" in 28 U.S.C. § 2462 does not limit it to the collection of penalties. Finally, the court found the meaning of the term "first accrued" to be well settled as meaning the moment a violation occurs.

In footnote 16, the court referenced EPA's discussion of CWA enforcement cases supporting a variation of the "discovery rule." In these cases, each court held that the statute of limitations under 28 U.S.C. § 2462 began when the discharge violator filed its company report with EPA, not when the company illegally discharged waste. However, the court distinguished these cases, as none of the cases cited purported to adopt any general interpretation of the term "accrued."

The court found that EPA may not assess civil penalties for any violation committed by the company more than five years before EPA commenced its proceeding. The petition for review was granted and the case remanded for further proceedings consistent with the opinion.

Attorneys: Mark Garvey, OECA, Patricia Roberts, OGC

4. District court holds the liability provisions of the National Marine Sanctuaries Act establish strict liability for damages resulting from the destruction, loss or injury of any sanctuary resource:

United States v. M/V Miss Beholden, 856 F. Supp. 668 (S.D. Fla., June 27, 1994).

The United States sought damages under the National Marine Sanctuaries Act (NMSA), 16 U.S.C. § 1431 *et seq*., for the destruction of approximately 1025 square meters of coral reef resulting from the grounding of the M/V Miss Beholden on the Western Sambo Reef off Key West, Florida. This reef is within the Florida Keys National Marine Sanctuary. On a motion for partial summary judgment on the issue of liability, the court held that the United States had met its burden of proof establishing that no genuine issue of fact existed. Evidence submitted by the government conclusively established the events leading up to the grounding, and defendants offered no evidence to refute the facts presented.

The government argued that the NMSA imposes strict liability, and that its showing that the grounding of the vessel caused damage to the reef was sufficient to establish the liability of the vessel. **The court found that, given the similarities between the NMSA, CWA, and CERCLA (the latter two being models for the liability provisions of the NMSA), the strict liability interpretation of CWA and CERCLA should be extended to the NMSA.** Thus, the defendants were held liable for the damage caused unless they can provide an appropriate defense.

Since the defendants did not respond to the motion for the summary judgment, the court examined potential defenses and held that summary judgment

was appropriate on the issue of liability, and that the M/V Miss Beholden was strictly liable for damages, to be proved at trial.

5. Board rules credit should be eliminated for cost of illegal activity in penalty calculation:

In re Burlington Northern Railroad, CAA Appeal No. 93-3 (Envtl. Appeals Bd., February 15, 1994) Final Decision and Order, Opinion by Judge Reich.

During a single day, Burlington Northern Railroad Company (Burlington) openly burned 200 creosote-treated railroad ties in violation of Montana's State Implementation Plan. EPA Region VIII brought an action based on CAA § 113(d). The initial decision in the enforcement action assessed a penalty of $25,000, the statutory maximum. However, in the initial opinion, the Presiding Officer credited the costs of the open burning ($520) against the costs that would have been incurred to lawfully dispose of the ties ($2212) in calculating the economic benefit gained by the violation ($1692).

EPA appealed to alter what the Agency viewed as incorrect and potentially harmful precedential language in the initial decision. EPA argued that the costs of the illegal disposal should not have been subtracted from the economic benefit calculation because no credit should be given for illegal expenditures.

The Board declined to resolve the issue as to whether credit should be given for illegal expenditures in calculating economic benefit, but indicated that the Board was sensitive to the Office of Enforcement's concerns about the potential precedential nature of the decision, and therefore, the Board modified the initial decision to eliminate language providing credit for the costs of open burning. In declining to resolve the issue on appeal, the Board reasoned that this appeal was not the best vehicle for addressing the issue, noting that to decide the issue here would not affect the penalty imposed in this case, since the penalty amount could not increase under the statutory maximum for one violation occurring during one day.

Attorneys: Margaret Livingston, ORC, Region VIII; Jerome MacLaughlin, OECA

B. Administrative Procedures

1. Second Circuit holds RCRA permits need not include automatic termination provisions triggered by State authorization, nor must MOA provide for periodic termination of Federal permits:

Ciba-Geigy Corp. v. Sidamon-Eristoff, 3 F.3d 40 (2d Cir., August 12, 1993).

Ciba-Geigy and Hercules Incorporated (collectively Ciba) petitioned for review of EPA permit decisions and a Memorandum of Agreement (MOA) between EPA and the State of New York. The petition was dismissed in part and denied in part.

In 1989, Ciba, current and past owners of a hazardous waste site, decided to close its paint pigment production facility and applied to the New York Department of Environmental Conservation (DEC) for an appropriate permit. Because the site contained hazardous waste and the State had not obtained authorization to run its Hazardous and Solid Waste Amendments (HSWA) program, permits were issued by both DEC and EPA. EPA issued its permit in October 1991. Ciba petitioned for review of the Federal permit, arguing that the Federal permit was improper because it substantially duplicated the State permit, and that even if the Federal permit could be issued, the Federal permit was required to contain an automatic termination provision triggered by State authorization. During the pendency of the review process, the Federal permit was automatically stayed. In April 1992, the Environmental Appeals Board (EAB) denied Ciba's petition, finding that EPA was required to administer the HSWA program prior to State authorization, even if the State had adopted substantially similar requirements and had included those requirements in its permits, and that there was no requirement that the Federal permit have an automatic

termination provision. The Federal permit became effective in May 1992, two weeks before New York received authorization to administer its HSWA. Ciba then requested that the Regional Administrator terminate the Federal permit in light of the intervening authorization of the New York program. This request was denied by the lack of the Regional Administrator's response (July 1992).

Ciba sought the court's review of: the EAB's decision rejecting the review of the October 1992 Federal permit, the May 1992 decision of the Regional Administrator to terminate the stay of the permit upon its effective date, the July 1992 refusal of the Regional Administrator to terminate the permit upon request, and the portions of the MOA failing to provide for automatic termination of the Federal permit. The requested relief was that the permit be set aside or that the MOA be modified to provide for termination.

The challenge to the July 1992 refusal to terminate the Federal permit and the May 1992 decision to terminate a stay of the Federal permit were dismissed for failure to exhaust administrative remedies. The petition for review of the October 1991 issuance of the permit approved by the EAB in April 1992 and of the May 1992 MOA between EPA and New York was denied.

The court determined that of the three permit decisions before it, only one was properly before the court. Ciba failed to exhaust administrative remedies for the July 1992 decision to terminate the permit, and the May 1992 decision to terminate the stay was essentially the same as the July 1992 decision.

By limiting review only to the October 1991 permit and the May 1992 MOA, **the narrow legal issues before the court were: (i) must EPA include an automatic termination provision, triggered by State authorization in preauthorization Federal permits, and (ii) must an MOA provide for the immediate termination of pre-existing Federal permits**.

The court found that EPA's position not to immediately terminate the permit was not inconsistent with the regulation, 40 C.F.R. § 271.8(b)(6). Ciba argued that by adopting this regulation, EPA committed itself to including a termination provision in Federal permits and to immediately terminating Federal permits upon State authorization. The court disagreed, stating that the regulation says nothing about the content of permits. As for the MOA, the regulation requires only that it contain a provision for transfer of existing permits. There was no question that the MOA had provisions governing the transfer of existing permits.

Ciba also argued that EPA's construction of RCRA was impermissible under Chevron, USA, Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 81 L.Ed.2d 694, 104 S.Ct. 2778 (1984). The court determined that under the first prong of Chevron, the statutory language governing interim HSWA authorization, 42 U.S.C. § 6926(g)(2), cannot be read to specify any particular procedure for termination of Federal permits. Under the second prong, EPA's actions cannot be said to have been unreasonable. Continued authorization avoids the gap in regulation that might occur if the State failed to immediately issue a new permit containing all applicable requirements, and allows the State and Federal regulators the opportunity to coordinate in an effective manner a gradual transfer of jurisdiction. **The court found that Ciba could prevail only by showing that EPA's resolution of the issue was directly contrary to congressional intent, or that the statute was silent on the issue and the agency's resolution was unreasonable**. The court held that Ciba failed to meet the Chevron test.

Attorney: John A. Sheehan, DOJ, Stuart Keith, ORC-Region II.

2. District court upholds EPA and USACE decisions resulting from their interpretation of bioassay requirements for ocean dumping of dioxin-containing material:

Clean Ocean Action v. York, 861 F. Supp. 1203 (D.N.J., June 28, 1994) *aff'd* 1995 U.S. App. LEXIS 14460 (3d Cir., June 12, 1995).

[Note: This decision was affirmed by Third Circuit in Clean Ocean Action v. York, 1995 U.S. App. LEXIS 14460 (June 12, 1995). A summary of the appeal will be published in the next Water Enforcement Bulletin.]

Plaintiffs challenge decisions of the U.S. Army Corps of Engineers (USACE) in the issuance of a permit to the Port Authority of New York and New Jersey, authorizing maintenance dredging in Newark Bay. The permit authorized removal of up to 500,000 cubic yards of sediment material and disposal of the material at the Atlantic Ocean "Mud Dump" site. Because the sediments had been found to contain dioxin, extensive testing and considerable inter-agency information exchange occurred over a period of more than three years, including public hearings and completion of the National Environmental Policy Act (NEPA) documents and resulting in an 18-volume administrative record. In the final permit, 25 special conditions were included to mitigate the adverse effects of the dioxin during the dredging and disposal process, and after having been disposed of at the Mud Dump site. The plaintiffs filed this suit to obtain an injunction against further dumping and revocation of the permit.

After initial hearings, the court set out a number of preliminary conclusions in a letter opinion, and ordered the Port Authority to submit evidence that the permit had been lawfully issued under the Marine Protection, Research, and Sanctuaries Act (MPRSA), 33 U.S.C. §§ 1401 to 1445. USACE also was restrained from issuing further permits for dumping sediment at the Mud Dump site unless compliance with 40 C.F.R. § 227.6 had been established (i.e., that dioxin was present in the sediment in only trace amounts) or a waiver was granted.

The court reconsidered its preliminary conclusions as part of this opinion. Specifically at issue is whether the government is required to conduct bioaccumulation tests in the suspended particle phase of sediment dumping under 40 C.F.R. § 227.6(c). (In this instance, acute toxicity tests had been conducted in the suspended particulate phase for benthic organisms, but not on pelagic species.) The regulations require that in testing to evaluate whether dumping dioxin-contaminated material would cause "significant undesirable effects, including the possibility of danger associated with their bioaccumulation in marine organisms," bioassays shall be applied on liquid, suspended particulate, and solid phases of wastes "according to procedures acceptable to EPA, and for dredged material, acceptable to EPA and USACE." The government contended that the regulations give them discretion to develop appropriate testing procedures to evaluate whether dumping the dioxin-contaminated material would cause significant undesirable effects. Interagency guidance on these regulations found in the 1977 Green Book explains that since "concern about bioaccumulation focuses on the possibility of impact associated with gradual uptake over long exposure times, primary attention is given to dredged material deposited on the bottom. Bioaccumulation from the material remaining in the water column is generally of minor concern owing to the short exposure time and low exposure concentrations resulting from rapid dispersion and dilution."

The court also reconsidered its original finding that bioaccumulation tests performed for dioxin in the solid phase for only one benthic species were inadequate when it appeared that 40 C.F.R. § 227.6(c)(3) requires such testing on three species. Here, the government argued that this regulation required three bioassays, but not necessarily three to determine mortality and three more to determine sublethal effects.

In both instances, the court gave heightened deference to the agencies' interpretation of their own jointly developed, highly technical regulations, and noted that the agencies had interpreted and applied the regulations consistently for approximately 16 years without previous challenge. As a result, the court changed its original opinion and concluded that the agencies' interpretation was not arbitrary and capricious, and that the bioassays conducted met the regulatory requirements and supported the conclusion that the dioxin was a trace contaminant falling outside the dumping prohibition of 40 C.F.R. § 227.6(a).

Finally, plaintiffs argued that because the USACE imposed a capping requirement for the dumped dredged material, it followed that the sediment must

have "potentially unacceptable levels of toxicity or bioaccumulation of contaminants in benthic organisms," and therefore, must be more than a trace contaminant. The court responded that impositions of cautious requirements does not convert what has been established as a trace contaminant into a prohibited contaminant. The plaintiffs further contend that the escape of 2 to 5 percent of the sediment as it descends to the ocean floor is a per se violation of the MPRSA. In reply, the court observed that the incidental escape of sediment was considered in the government's evaluation of significant undesirable effects, and that the plaintiff's position is illogical.

In view of these conclusions, the earlier order was vacated and the plaintiff's application for an injunction was denied on the ground that they are unlikely to prevail on the merits of the case.

3. Board disfavors dismissals with prejudice in first instance of pleading deficiency:

In re Commercial Cartage Company, Inc., CAA Appeal No. 93-2 (Envtl. Appeals Bd., February 22, 1994) Remand Order, Opinion by Judge Firestone.

The Office of Air and Radiation, Field Operation and Support Division, filed the Agency's first administrative complaint under CAA § 211, which restricts the sale and distribution of gasoline exceeding specified Reid Vapor Pressure (RVP) levels, against Commercial Cartage Company, Inc. (Cartage). The complaint alleged 11 violations of CAA § 211. Specifically, the complaint alleged that Cartage violated 40 C.F.R. § 80.28(e), which governs violations "detected" at branded retail outlets.

Cartage moved to dismiss for failure to state a claim, arguing that the complaint failed to allege that the carrier altered the quality of the gasoline or intentionally or negligently delivered non-complying gasoline to an area covered by CAA § 211. The Presiding Officer granted the motion to dismiss with prejudice, finding that since the violation was detected at a branded retail outlet (Unocal), liability is determined under 40 C.F.R. § 80.28(e), and this provision requires that the complaint allege causation (i.e., that the gasoline was found at the carrier's facility or that the carrier caused the gasoline to violate the RVP standard).

On appeal, the Board held that, although the complaint was deficient for not alleging causation as required under 40 C.F.R. § 80.28(e) or violations detected at the carrier's facility, dismissal with prejudice was in error. The Board found that there was no basis to assume that amending the complaint would be futile, nor that such amendment would result in any prejudice to Cartage. The court noted that dismissal of a complaint should ordinarily be without prejudice, absent repeated failures or circumstances where it is clear that a more carefully crafted complaint would still be unable to show a right to relief on the part of the complainant. In re Asbestos Specialists, Inc., TSCA Appeal No. 92-3, at 13 (Envtl Appeals Bd., October 6, 1993).

4. Board dismisses petition for untimely filing:

In re Heritage Environmental Services, Inc., RCRA Appeal No. 93-8 (Envtl. Appeals Bd., August 3, 1994) Order Dismissing Appeal, Opinion by Judge McCallum.

Heritage Environmental Services, Inc. (HES) sought review of a permit issued by EPA Region V under the Hazardous and Solid Waste Amendments (HSWA) to RCRA. On March 31, 1993, the Region issued a final HSWA permit to HES. A cover letter accompanied the permit on March 31, 1993, stating that any appeal must comply with the provisions of 40 C.F.R. § 124.19 and must be received by the Board within 33 days of service of notice by mail of the permit decision.

The Region received notice of the petition for review on May 3, 1993, the filing deadline. However, HES sent its appeal to the Board by certified mail on April 29, 1993, and it was received on May 6, 1993. The Region moved to dismiss the petition as untimely, since the Board received the petition three days beyond the specified deadline. **Since no**

compelling circumstances were presented that would warrant a relaxation of the filing requirement, the Board dismissed the petition for review as untimely. In re Georgetown Steel Corporation, RCRA Appeal No. 91-1, (Administrator, June 10, 1991).

Attorney: Richard Murawski, ORC, Region V

5. Board rules permit dispute resolution procedures comply with due process:

In re Allied-Signal Inc., RCRA Appeal No. 92-30 (Envtl. Appeals Bd., May 16, 1994) Order Denying Review, Opinion by Judge McCallum.

Allied-Signal Inc. (Allied) sought review of its HSWA permit issued by EPA Region II that requires Allied to conduct corrective action and characterization steps at several solid waste management units.

Allied argued, among other things, that the permit dispute resolution mechanisms were deficient as a matter of constitutional procedural due process, because the Division Director's decision regarding a disputed permit revision is not immediately reviewable by a court. The Board rejected this argument and noted that the permit contains the necessary procedural safe-guards required in this context. The Board held that immediate recourse to the courts is not required as a matter of due process in these circumstances. In re General Electric Company, RCRA Appeal No. 91-7, at 25, 27, (Envtl. Appeals Bd., April 13, 1993).

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