United States Environmental Protection Agency | Office of Enforcement and Compliance Assurance (2201A) | EPA 300-R-9-005 April 1999

EPA Water Enforcement Bulletin

Issue 15 | Water Enforcement Division | April 1999

Eric V. Schaeffer
Director, Office of Regulatory Enforcement

Brian J. Maas
Director, Water Enforcement Division

Editor: Joseph G. Theis
(202) 564-4053
Theis.Joseph@epa.gov

An Update of Cases Relating to Water Enforcement

October 1997 – September 1998 Cases in Review

In This Issue

This publication can be found on the Internet at http://www.epa.gov/oeca/ore/water/waterbull.html

♲ Recycle / Recyclable. Printed with Soy/Canola Ink on paper that contains at least 30% recycled fiber.

TABLE OF CONTENTS

Disclaimer

The Water Enforcement Bulletin is intended primarily for the use of EPA employees. The summaries contained in the Water Enforcement Bulletin do not represent an official Agency position with respect to matters in litigation, nor are they intended to create any rights, duties or obligations, either implied or otherwise, in any third parties. To make inquiries with regard to the Water Enforcement Bulletin please contact Joseph G. Theis (2243A), U.S. EPA, 401 M Street, SW, Washington, DC 20460, (202) 564-4053, e-mail: theis.joseph@epa.gov.

Note: The Water Enforcement Bulletin is available on the Internet at:

www.epa.gov/oeca/ore/water/waterbull.html.

I. Clean Water Act (CWA)

A. Jurisdictional Scope of the CWA

1. Fourth Circuit, in upholding criminal convictions, holds that discharges of pollutants to public sewers that flow to waters of the U.S. are subject to CWA:

U.S. v. Hartsell, 127 F.3d 343 (4th Cir. Mar. 11 1997).

Appellants, convicted for numerous violations of the Clean Water Act (CWA), 33 U.S.C. § 1311 et seq., appeal their convictions and sentences on approximately fifty separate assignments of error. The court specifically confronted the issue of whether the district court had subject matter jurisdiction to conduct the initial trial. The 4th Circuit Appellate Court denied appellant's contentions in affirming their convictions and sentences in their entirety.

Appellants argued that their polluting of public sewer systems is not included under the CWA's realm of "navigable waters." The court cited both the "plain language" of the CWA and its legislative history as the two guiding factors in determining this argument. The court viewed the definition of navigable waters as explained in the CWA, "waters of the United States," as being a purposely broad concept which treats "navigable" with "limited import." Furthermore, in determining Congresses intent, the court directly cites from the CWA's legislative history to allow "broad federal authority to control pollution, for 'water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at its source.'" S. Rep. No. 92-414, pg. 77 (1972). **The court concluded that both the plain language and Congress had intended for public sewer systems to be included in the CWA's jurisdiction.**

2. Ninth Circuit holds that where a proposed solid waste landfill requires the filling of wetlands, the EPA or an approved state solid waste program has jurisdiction under RCRA and that the USACE lacks jurisdiction to regulate such activity under the CWA:

Resource Investment v. Corps of Engineers, 151 F.3d 1162 (9th Cir. 1998).

Plaintiff Resource Investments Inc., appealed the U.S. Army Corps of Engineers' (USACE) denial of a § 404 permit for the filling of 21.6 acres of wetlands as part of construction of a municipal landfill. USACE had found that plaintiff failed to demonstrate a lack of practicable alternatives and that the project was not in the public interest because it would degrade wetlands and cause groundwater contamination. The district court had affirmed the USACE's denial of the permit.

On appeal, the Ninth Circuit reversed and remanded, holding that "when a proposed project affecting a wetlands area is a solid waste landfill, the EPA (or the approved state program), rather than Corps, will have permit authority under RCRA." The court reasoned that solid waste did not fall within the definition of dredged or fill material, and noted that EPA and the USACE have recognized that pollutants discharged directly into water primarily for the purpose of disposal were most appropriately regulated under the NPDES program (i.e., § 402). (See, 42 Fed. Reg. 37,122 (1977)). The court also found that the materials used to construct solid waste landfills—the gravel, soil, and synthetic liners—were not fill material because their primary purpose was not to replace any aquatic area with dry land, but rather to serve as a leak detection and collection system. In addition, the court stated that the siting, design, and construction of a solid waste landfill was specifically regulated under RCRA by EPA and states with authorized solid waste permit programs. (See, 40 C.F.R. § 258.12(a)(1)-(4)). The court observed that the USACE's interpretation of its jurisdiction was unreasonable because it would result in "regulatory overlap" that would be inefficient and could result in inconsistent decisions and policies. The court noted that USACE had expressed these very concerns in a March, 1984

letter from the Assistance Secretary of the Army for Civil Works to the Administrator of EPA, and had entered into a 1986 MOU with EPA that provided that once EPA promulgated its final municipal landfills rules (which occurred on October 9, 1991), responsibility for implementing wetlands protection with regard to solid waste disposal would be solely the responsibility of EPA. Finally, the court stated that its decision would give effect to the relevant provisions of both RCRA and the CWA, ' "while preserving their sense and purpose."'

3. District court holds that CWA does not protect against contamination of groundwater:

Allegany Environmental Action v. Westinghouse Electrical Corp., 1998 U.S. Dist. LEXIS 1846 (W.D. Pa. Jan 30, 1998).

Defendant NESCO, managed and operates a government laboratory in Pennsylvania. Plaintiffs, Allegany Environmental Action Coalition (AEAC), filed a claim that alleged the emissions and discharges from the laboratory violated various sections of the CWA, State Clean Streams Act, and RCRA. With regard to the CWA violations, the plaintiffs claimed that the defendants illegally dumped photographic wastes into a septic sewer system for more than twenty years, which later leaked into an adjacent hillside and into a lake. Plaintiff AEAC claimed that with each rainfall that toxic materials are released into the lake, therefore, qualifying as a continuing violation. The court dismissed the Clean Streams and RCRA counts, without prejudice, for not exhausting administrative remedies and not citing state law, respectively. **The Clean Water Act claims were dismissed with prejudice because the claim was based on groundwater contamination.**

In its decision, the court determined that the claim was not viable because the CWA does not protect against contamination of groundwater. Much of the opinion, though, focused on the difference between past violations involving hazardous materials and non-hazardous materials. Citing Fallowfield Development Corp. v. Strunk, 1990 U.S. Dist. LEXIS 4820 (E.D. Pa. April 23, 1990), the court noted that "if a person disposes of hazardous waste on a parcel of property, the hazardous waste remains on that property insidiously infecting the soil and groundwater aquifers. In other words, the violation continues until the proper disposal procedures are put into effect or the hazardous waste is cleaned up." The court then noted that *Fallowfield* included dicta which distinguished the potential harm from hazardous waste violations from CWA violations, stating that if "a person discharges a pollutant in violation of an effluent limitation under the Clean Water Act, but comes into compliance prior to the suit, little is gained by allowing a citizen suit since the damage has been done and is effectively irreversible." The court decided not to decide the issue based on wholly past violations, and instead dismissed the claim based on the groundwater contamination issue.

4. District court holds that an allegation that a discharge of pollutants entered ground water connected to surface water is sufficient to overcome a motion to dismiss for failure to state a claim:

Mutual Life Insurance Co. v. Mobil Corp., 1988 U.S. Dist. LEXIS 4513 (N.D.N.Y. Mar. 31, 1998).

Plaintiff Mutual Life of New York brought claims in November, 1996 against defendant Mobil under the CWA and RCRA based on defendant's accidental release of 750 gallons of gasoline into a monitoring well and the alleged migration of that gasoline onto plaintiff's property. Plaintiff also alleged that equipment failures at defendant's underground storage tank (UST) caused additional contamination during October 1988, January 1995, and September 1995. Defendant moved to dismiss the complaint based on its alleged failure to state a claim.

Defendant argued: 1) plaintiff's CWA claim failed as a matter of law because plaintiff did not allege defendant discharged pollutants into "navigable waters"; 2) plaintiff's RCRA claim failed as a matter of law because plaintiff alleged only past incidents

of pollution; 3) both the CWA and RCRA claims were barred by the five-year statute of limitations in 28 U.S.C. § 2462; and 4) the federal court should have abstained from hearing the case because a case based on the same facts had been filed in state court.

With regard to defendant's first argument, the court acknowledged that it was unclear whether discharges of pollutants to ground water connected to surface waters were subject to the CWA because no circuit court of appeals had directly decided the issue. The court observed that several district courts had held "that the CWA does encompass ground waters that are hydrologically connected to regulated surface waters." **Based on these decisions, the preliminary stage of this litigation, the broad interpretation of the term "navigable waters" under the CWA, and the purpose of the CWA to protect the quality of surface waters, the court held that the allegation that the discharge entered ground water connected to surface water was sufficient to state a CWA claim**.

As for whether the discharge constituted an imminent and substantial endangerment as required under RCRA § 6972(a)(1)(B), the court stated ' "[a]s long as the waste has not been cleaned up and the environmental damage has not been sufficiently remedied, there remains an ongoing RCRA violation.'" Prisco v. New York, 902 F. Supp. 374, 395 (S.D.N.Y. 1995). The court observed that where the CWA requires allegations of continuous or intermittent pollution, RCRA requires that "the effects of pollution—endangerment to human health or the environment—be imminent and substantial." The court found that at this stage it must accept the alleged allegations of continued pollution and imminent and substantial endangerment to human health as true.

The court also found that the plaintiff's allegation of an ongoing RCRA violation was sufficient to preserve its RCRA claim against any applicable statute of limitation. With regard to plaintiff's CWA claims, the court held that the five-year statute of limitations in 28 U.S.C. § 2462 applied to citizen enforcement actions under the CWA. The court held, however, that a CWA claim accrues not when the violations occur, but when citizen plaintiffs discover them. Atlantic States Legal Found. v. Al Tech Specialty Steel Corp. 635 F. Supp. 287 (N.D.N.Y. 1986). The court noted that in the pending state court proceeding the state court found that the earliest date on which plaintiff could have known of the spills was July 1991. The court found that the statute of limitations ran only on those claims filed more than five years and 60 days from this date. (The court held that the statute of limitations was also tolled during the 60 day notice period.)

Finally, the court rejected the defendant's abstention argument. The court found that the defendant had failed to demonstrate that the pendant state law action had the potential to materially impact the federal action. The court stated that "abstention from the proper exercise of federal jurisdiction is 'the exception, not the rule'," and that "'the mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction.'" The court granted defendant's motion only with regard to the subset of CWA claims filed more than 5 years and 60 days from the date of discovery.

5. District court holds that it lacks subject matter jurisdiction over discharges to surface water via groundwater:

U.S. v. ConAgra, Inc., 1997 U.S. Dist. LEXIS 21401 (D. Id. Dec. 31, 1997).

ConAgra, Inc., ("ConAgra") owns and operates a beef slaughter house and a Concentrated Animal Feeding Operation ("CAFO") in Idaho. Consistent with these activities ConAgra operates an NPDES permitted wastewater treatment facility which treats waste from the slaughtering process and holds a CAFO permit for the feed lot. Plaintiff United States ("U.S.") filed a complaint against ConAgra alleging, among other acts, that ConAgra: (i) discharged pollutants not authorized by its NPDES permit; (ii)

discharged pollutants in excess of its permit limits; and (iii) failed to comply with NPDES monitoring, reporting, and record keeping requirements.

The Court addressed a number of pre-trial motions including: defendant's motion to dismiss claims regarding discharges to surface water via groundwater for lack of subject matter jurisdiction; various motions by the U.S. and ConAgra to strike testimony and evidence; the U.S.' motion for partial summary judgment on defendant's affirmative defenses and on matters of liability; and ConAgra's motion for partial summary judgment on the issue of the amount of penalty to be assessed and the method of penalty calculation.

With respect to ConAgra's motion to dismiss the claims regarding discharges to surface waters via groundwater, the court undertook a review of the opinion in Umatilla Water Quality Protective Assoc., Inc., v. Smith Frozen Foods, Inc., 962 F.Supp. 1312 (D.Or. 1997), and found itself in agreement with that court's position that discharges of pollutants to groundwater are not subject to the CWA's NPDES permit requirements even if the groundwater is hydrologically connected to surface water. In support of its position the District Court cited to four major issues relied upon by the Umatilla court in reaching its decision and **held that it did not have jurisdiction over the discharges to the surface water of Indian Creek via groundwater**. Significantly, the court deferred for trial the important issue of whether discharges to surface waters via french drains are discharges from a point source or discharges via groundwater.

Through a motion for partial summary judgment the U.S. sought liability on issues that ConAgra discharged pollutants into waters of the U.S. in excess of effluent limits contained in its NPDES permit and that ConAgra failed to comply with the monitoring, record keeping, and reporting requirements of its NPDES permit. On the issues of discharges in excess of permit limits and failure to comply with the monitoring, record keeping, and reporting requirements the court granted in full the U.S.' motion for partial summary judgment. In total the court found ConAgra liable for 632 violations of the CWA. The court next examined the U.S.' motion for summary judgment regarding ConAgra's affirmative defenses. In reviewing defendant's assertion of an upset defense the court noted ConAgra's reliance upon the holding in Natural Resources Defense Council, Inc. v. EPA, 859 F.2d 156 (D.C. Cir. 1988). In that case the Circuit Court held that EPA acted arbitrarily and capriciously in not extending the upset defense to water quality-based limitations and ordered EPA to conduct proceedings to determine whether the defense should be extended. In the present case the District Court **held that inasmuch as EPA has not extended the defense, water quality-based limits are not defensible with the upset defense.**

The court next reviewed ConAgra's claim that the penalty of $25,000 per day sought for each violation was contrary to the specific terms of its permit. ConAgra alleged that its permit, which was issued in 1985 and had been administratively extended since 1990, specifically provided for civil penalties not to exceed $10,000 per day for each violation. Since the permit was issued prior to the 1987 amendments to the CWA which increased the civil penalties to $25,000 per day for each violation, ConAgra argued that the U.S. is bound by terms of the permit and should be prohibited from seeking the higher fine. The court agreed and **held that in the absence of any language in the permit subjecting the permittee to statutory changes, the permit's penalty language must control in assessing civil penalties**.

Plaintiff sought to introduce evidence at trial related to 33 U.S.C. § 1319(d) factors in order to increase the amount of penalty that could be assessed. In opposition ConAgra brought a motion in limine to exclude evidence regarding a history of violations and economic benefits (309(d) factors) which occurred outside the applicable statute of limitations. The court took note of the general application of the five year statute of limitations of 28 U.S.C. § 2462 to CWA civil penalties and the determination by the court in Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co., Inc., 786 F.Supp. 743 (D.N.D. Ind. 1992), that the maximum statutory penalty should not be

decreased because the defendant had a history of violations. However, the District Court noted that while the court in Universal Tool did not mitigate the maximum penalty because of a history of abuses outside the statute of limitations period, it also did not use the abuses to increase the penalty. On that basis and considering other cases addressing penalty issues, the court **held that evidence relating to the 309(d) factors will not include evidence of allegations of past violations or economic benefit which is alleged to have occurred prior to the statute of limitations period.**

B. Discharge of Pollutants/Point Sources

1. Third Circuit holds that the unpermitted discharge of sections of a dilapidated barge and sand and paint chips into navigable waters constitute discharges of pollutants in violation of the CWA:

U.S. v. West Indies Transport, Inc., 127 F.3d 299 (3rd Cir. 1997).

On appeal from the District Court of the Virgin Islands, the 3rd Circuit affirmed convictions and sentences of the appellant, West Indies Transport, for violations of the Clean Water Act, the Rivers and Harbors Act, and various other crimes involving visa fraud, conspiracy and racketeering. With regard to the environmental crimes, the primary issue decided by the court was whether certain barge management activities (e.g., severing and dropping portions of barges into the bay, conducting sandblasting operations on a floating barge) constituted point source discharges, as defined in the Clean Water Act. In brief, the court held that these activities were point source discharges, and affirmed the lower court convictions.

Appellant owned and operated a dry dock, ship repair facility and barge towing company in Krum Bay, St. Thomas. In 1987, appellant obtained permits to use five barges as fixed docks for its vessels. Two years later, after a hurricane shifted the barges from their permitted positions, appellant lashed the barges together and used them as docks, repair facilities and housing for their employees. Appellant was convicted of CWA violations for severing a damaged stern from one the barges, sandblasting the hull of another vessel discharging chips and sand into the bay, discharging untreated sewage and the illegal dumping of scrap metal at sea. In addition, appellants were convicted of several Rivers and Harbors violations for the unapproved construction of structures in waters of the U.S.

On appeal, the Third Circuit held that the appellant's barge salvage/maintenance activities did in fact result in the discharge of "pollutants" (rebar, concrete, sand and paint chips) into navigable waters of the U.S. The court determined that the barges were "floating craft" and not "vessels" because of the unsuitability of the barges for transportation. This distinction was used by the court to define the barges as point sources (33 U.S.C. § 1362(14)) and to include the discharges of sewage as violations of § 1311 and § 1316, and not § 1322.

With regard to the Rivers and Harbors Act charges, the court discarded the appellant's contention that they did not "knowingly" build an obstruction to navigation, by characterizing the intentional act of attaching the barges together, building walkways and providing electricity to the barges as a "knowing" construction activity. The court discharged the appellant's entrapment by estoppel claim, by holding that Coast Guard and other private placards on board the barges that explained the ocean dumping regulations did not relieve appellant of its legal responsibilities.

A dissenting opinion questioned the majority's broad interpretation of "point sources", instead suggesting that the Appellant's actions were analogous to the *Plaza Health* intermittent and manual dumping of blood, which was held not be a point source. The dissenting judge also characterized the Rivers and Harbors provision as requiring "knowing construction" and not "knowing use" of obstructions to navigation.

2. Third Circuit holds that uranium mill tailings are not "pollutants" for purposes of the CWA:

Waste Action Project v. Dawn Mining Corp., 137 F.3d 1426 (9th Cir. 1998).

Appellant Waste Action Project (WAP) alleged that appellee, Dawn Mining, had discharged pollutants, including uranium, silica, heavy metals, sulfates, phosphates, chlorides, and other chemicals, from several tailings disposal areas (TDAs) into waters of the U.S. without a NPDES permit in violation of the CWA. The district court had granted summary judgement for Dawn Mining having found that uranium mill tailings and associated wastes were "byproduct materials" as defined in § 11(e)(2) of the Atomic Energy Act (AEA) and, thus, were not "pollutants" as defined under the CWA.

The court observed that the appeal presented the legal question of whether uranium mill tailings are "pollutants" for purposes of the CWA's NPDES permit requirements. Appellants argued that the AEA, as amended by the Uranium Mill Tailings Radiation Control Act (UMTRCA) (1978), preserved EPA's authority to regulate uranium mill tailings under the CWA because such tailings were not expressly included in the AEA at the time the CWA was enacted. **The court disagreed and held that uranium mill tailings are not "pollutants" for purposes of the CWA.**

The court reasoned that even though uranium mill tailings were not defined as "byproducts" under the AEA when the CWA was enacted, the definition of "byproducts" in the AEA was amended in 1978 to expressly include such tailings. The court noted that EPA regulations exclude "byproduct materials" as defined in § 11(e)(2) of the AEA from the definition of pollutant under the CWA. (40 C.F.R. § 122.2). In addition, the court observed that the CWA legislative history makes it clear that although the CWA defines "pollutant" to include radioactive materials, such materials were only intended to include those radioactive materials not included within the AEA definition of the terms "source, byproduct, or special nuclear materials." The court stated that the AEA vested exclusive authority to regulate these materials with what was then the Atomic Energy Commission (now the NRC) and that the adoption of the UMTRCA "did not alter the AEA's comprehensive regulatory scheme." The court observed that UMTRCA amended the definition of "byproduct material" under the AEA to explicitly include uranium mill tailings, which had previously been controlled through the licensing process for uranium mills. The court recognized that UMTRCA did provide EPA with authority to promulgate standards for uranium tailings, but pointed out that the Act delegated authority to implement these standards to the NRC. The court stated that EPA has consistently interpreted its regulatory authority under the CWA to exclude materials regulated under the AEA. Finally, the court cited the unanimous Supreme Court decision in Train v. Colorado Public Interest Research Group, 426 U.S. 1 (1975), which held that "'the 'pollutants' subject to regulation under the [CWA] do not include source, byproduct, and special nuclear material,'" as supporting this decision through both its holding and reasoning.

3. Ninth Circuit holds that the term "point source" does not include any animal:

Oregon Natural Desert Association v. Dombeck, 151 F.3d 945 (9th Cir. 1998).

The U.S. Forest Service (USFS) appealed from a ruling that pollution from grazing cattle is subject to certification under § 401 of the CWA. The USFS had issued a grazing permit to the Burrils to graze 50 head of cattle in Oregon's Malheur National Forest, and the cattle allegedly polluted some of the waters within the National Forest. Appellee maintained that the USFS had violated the CWA by not obtaining State § 401 certification prior to having issued the grazing permit.

After finding that appellee had adequate standing to bring the original action and that appellee could properly pursue this suit under the citizen suit provisions of the CWA, the court addressed the question of whether the Forest Service grazing

permit required certification pursuant to § 401 from the State of Oregon. The court stated that resolution of this issue turned on whether the term "discharge" in the § 1341 of the CWA includes point and non-point source pollution, or only point source pollution. **The court concluded that the term "discharge" as used in the § 1341 only included point source pollution, and, therefore, no § 1341 certification was required for the issuance of USFS cattle grazing permits.** The court reasoned that "the CWA, when examined as a whole, cannot support the conclusion that § 1341 applies to nonpoint sources." The court observed that the 1972 CWA replaced the prior reliance on water quality standards with imposition of effluent limitations imposed only on point source discharges. The court noted that under the Act, nonpoint source discharges were not directly regulated but were subject to grant-based programs. It also stated that all of the sections cross-referenced in § 1341 relate to point sources discharges. In addition, the court found that the distinct use of the terms "discharge" and "runoff" in a manner associated with point source and nonpoint sources discharges, respectively, further supported its position. Finally, the court stated that it agreed "with the Second Circuit that the term 'point source' does not include a human being or any other animal."

4. District court holds the City of Atlanta discharged improperly treated CSO wastewater in violation of the CWA:

Upper Chattahoochee Riverkeeper Fund, Inc., et al., v. City of Atlanta, 1997 U.S. Dist. LEXIS 20334 (N.D. Ga. Nov. 17, 1997).

Plaintiffs the Upper Chattahoochee Riverkeeper Fund and others brought a citizen suit pursuant to 33 U.S.C. § 1365(a) against defendant the City of Atlanta alleging the City's combined sewer overflow (CSO) facilities were responsible for numerous permit and CWA violations. In its motion for summary judgment on liability, plaintiffs alleged that the City failed to monitor its CSOs pursuant to an approved sampling plan; failed to conduct proper monitoring, sampling, and recordkeeping as required by its permit; and failed to maintain adequate staffing. Plaintiffs also alleged that the City failed to adequately design the CSO treatment facilities, that the CSO discharges violated Georgia water quality standards both in the culverts that received the wastes and in the natural streams into which the culverts discharged, and that the City failed to maintain an alternate power source as required by the permit. Plaintiffs also brought common law actions for trespass and nuisance against the City.

Following review of the permit requirements, monitoring data, and evidence of violations, the court took up the nuisance and trespass claims. The court dismissed a number of plaintiffs on the grounds that they did not own land along the affected waterways. The court also found that the remaining plaintiffs had failed to demonstrate any injury to their property or failed to show that the City was the proximate cause of any nuisance and granted summary judgment to the City on the trespass and nuisance claims with respect to all plaintiffs.

The court next undertook a detailed review of the CWA claims and the liability issues. In reviewing the allegations that the City failed to maintain accurate records, the court noted that, despite plaintiff's allegations, the permits did not require the City to record the time of day samples were collected. Plaintiffs also alleged that the City failed to maintain accurate records with respect to composite sample collection. In finding for the plaintiffs on that issue, the court stated that the fact that the Georgia Environmental Protection Division (EPD) was aware the City was not obtaining composite samples was not a defense to intentional and flagrant falsification of monitoring reports. The court also found that the City failed to conduct composite sampling as required by its permits; never submitted an approved sampling plan to EPD; failed to treat wastes in accordance with the CSO plan (the court noted fecal coliform levels at many thousands of times above permitted levels); and violated its permits in that it failed to maintain adequate staffing. The court granted plaintiffs summary judgment with respect to these issues.

The court found as a matter of law that the City was not liable for failing to monitor rainfall and failing to collect representative samples because the City did not have an approved monitoring plan. The court also declined to consider plaintiff's claim that the City failed to maintain an alternate power source on the grounds that plaintiffs had not provided 60 days notice of the alleged violation prior to filing suit as required by 33 U.S.C. § 1365(b).

Plaintiffs alleged that the CSO discharges in the culverts violated Georgia water quality standards for fecal coliforms and metals, however, the City asserted there was no violation because the culverts were not "waters of the state." The court noted that Georgia law (O.C.G.A. § 12-5-22(33)) included "drainage systems" within the definition of "waters of the state" and that the culverts were certainly a drainage system. **The court concluded that there was overwhelming data demonstrating levels of fecal coliform and metals in the culverts in excess of Georgia Water Quality Standards and held plaintiffs were entitled to summary judgment on the issue that the discharges in the culverts violated the CWA.**

Plaintiffs also contended that the discharges from the CSOs were causing the natural receiving streams to violate water quality standards. The court noted that while the data indicated that the waters downstream of the culverts did not comply with state water quality standards for fecal coliform and metals, the data was inconclusive on the question of the source of the metals violations since in some cases the concentration of metals upstream of the culverts was either zero or within permissible levels. **The court did hold that the data supported plaintiff's position that the City was responsible for violations of fecal coliform standards in the streams and granted plaintiff's motion for summary judgment on that issue.**

C. State/Tribe Water Quality Standards

1. Third Circuit upholds EPA's "treatment as a state" regulation (40 C.F.R. § 131.8(b)(3)) and upholds application of tribal water standards to non-consenting, non-tribal members:

Montana v. U.S. Environmental Protection Agency, 137 F.3d 1135 (1988).

Plaintiff-appellants, representatives of the State of Montana and several municipalities, appealed a grant of summary judgment for defendant-appellees, Confederated Salish and Kootenai Tribes and EPA, regarding appellants challenge to regulations promulgated by EPA pursuant to § 518 of the CWA that provide for the treatment of Tribes as states (TAS) for purposes of the NPDES program. Appellants disagreed with EPA's decision to grant defendant tribes TAS status for the purpose of developing water quality standards. The Tribes' application for TAS was to obtain authority to establish water quality standards for all point sources within the boundaries of Flathead Indian Reservation in Montana, which includes lands owned by State and municipal interests.

Appellants argued that EPA's TAS regulation was inconsistent with Supreme Court decisions regarding when it was appropriate for tribes to engage in non-consensual regulation of non-tribal entities. The appellants argued that tribes should be able to regulate non-tribal entities only when all state or federal remedies have "been exhausted and have proved fruitless." **The court disagreed, and held EPA had not committed any material mistakes of law in delineating the scope of inherent tribal authority.** Rather, the court pointed out, EPA had carefully followed the lead cases on this issue (see, Montana v. United States, 450 U.S. 544 (1981) and Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997)) and required that to regulate non-tribal entities a tribe must demonstrate that the potential impact of the regulated activity must be "serious and substantial." The court did not view Montana as suggesting that "inherent

authority exists only when no other government can act."

With regard to EPA's decision applying its regulations in this case, the court found that the agency had concluded that the activities of non-tribal members were sufficiently serious as to pose serious and substantial threats to tribal health and welfare. The court observed that prior cases had held that threats to water rights could be a basis for invoking inherent tribal authority over non-indians. The court observed that given that "a water system is a unitary resource," it would be very difficult to "separate the effects of water quality impairment on non-Indian fee land from impairment on the tribal portions of the reservation." The court observed that its decision was fully consistent with the Tenth Circuit's decision in City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996), where that court upheld water quality standards that were more stringent than federal standards because it found that the authority to establish such standards was "in accord with powers inherent in Indian tribal sovereignty." **The court affirmed the district courts decision that EPA's TAS regulations were valid "as reflecting appropriate delineation and application of inherent Tribal regulatory authority over non-consenting non-members."**

2. D.C. Circuit holds that 40 C.F.R. § 131.20(c) does not impose a mandatory duty on EPA to approve water quality standards that a State left unchanged following its triennial review:

National Wildlife Federation v. Browner, 127 F.3d 1126 (D.C. Cir. 1997).

Plaintiffs National Wildlife Federation and others petitioned the State of Michigan to designate Lake Michigan an outstanding National resource water (ONRW). Michigan declined to grant the petition, and plaintiffs brought a CWA citizen suit against U.S. EPA for its failure to review Michigan's denial of plaintiff's petition. EPA moved to dismiss the suit for lack of subject matter jurisdiction, and the district court, having found no nondiscretionary duty on the part of EPA to review the State's decision to deny plaintiff's petition, granted EPA's motion. Plaintiffs appealed. On appeal, plaintiffs argued that EPA regulations imposed a mandatory duty on the Agency to review and evaluate Michigan's denial of the plaintiff's petition.

Plaintiffs contended that under 40 C.F.R. § 131.20(c), EPA was required to "review and approve" both new and revised state water quality standards, as well as any standards that remained unchanged following the State's triennial review of its water quality standards. Plaintiffs asserted that this requirement was clear from the language of the regulation, which, in plaintiff's view, required that EPA review and approve the complete results of the State's triennial review. In addition, plaintiff's argued that EPA's interpretation at trial was no more than a "convenient litigating position," and that to adopt EPA's position would allow States to frustrate the goals of the CWA by refusing to revise their water quality standards at all.

EPA argued that under 40 C.F.R. § 131.20(c) the Agency was only obligated to review modifications to the State's water quality standards, since unchanged standards were previously approved by the Agency. EPA argued that under the CWA, the Agency is under a nondiscretionary duty to review and approve only new or revised state water quality standards. EPA asserted that plaintiffs provided no evidence that the Agency had intended to expand its statutory duties when it promulgated 40 C.F.R. § 131.20(c), and provided no evidence supporting a different interpretation of these regulations. Finally, EPA noted that under the CWA EPA has discretionary authority to revise existing State water quality standards where such standards do not meet statutory requirements. Thus, EPA had a mechanism for addressing inadequate State standards, but one premised on EPA discretion.

The appellate court held that 40 C.F.R. § 131.20(c) did not impose a mandatory duty on EPA to approve water quality standards that the State of Michigan left unchanged following its triennial review. Therefore, the court affirmed the district court's judgment dismissing plaintiff's citizen suit and denying its motion for

summary judgment. The court agreed with EPA that plaintiffs presented no evidence that EPA had previously interpreted these regulations in an inconsistent manner, and, to the contrary, found that EPA's Water Quality Handbook supported the Agency's position. The court also observed that while the regulation in question could be interpreted so as to support either party's position, plaintiff's position was not compelled by the language of the regulation. The court noted that, generally and within certain limits, federal agencies are entitled to substantial deference in interpreting their own regulations. The court found that here EPA's position was eminently reasonable in light of the structure and purpose of the water quality standard regulations as a whole.

3. District court holds that State law that suspends enforcement of narrative nutrient water quality standards altered State water quality standards sufficiently to trigger EPA duty to review revised standards and approve or disapprove of such standards:

Miccosukee Tribe v. United States, 1998 U.S. Dist. LEXIS 15838 (Sept. 14, 1998).

Plaintiff Miccosukee Tribe brought a citizen suit under the CWA against defendant EPA and the United States asserting that the Everglades Forever Act (EFA) (1994) had changed Florida's water quality standards and that EPA had ignored its duty to review and approve or disapprove of those revised water quality standards. Previously, the State had determined that the EFA had not changed State water quality standards, and, in correspondence, EPA had agreed with that assessment. Based on that finding, in a prior action before this court , the court had dismissed plaintiff's claim for lack of subject matter jurisdiction, since the EPA was under no mandatory duty to review the State's water quality standards. The Eleventh Circuit reversed, finding that the district court should have conducted its own factual findings regarding whether the EFA had changed State water quality standards. EPA, rather than the court, did conduct such a review, and concluded in January of 1998, that the EFA did not change Florida's water quality standards. In the present action, both parties moved for summary judgement.

Plaintiffs maintain that the EFA changed Florida's water quality standards by allowing phosphorus discharges into the Everglades until 2006, in contravention of existing narrative water quality standards (i.e., at levels acknowledged to cause imbalances in the natural aquatic flora and fauna). Plaintiffs also argued that the EFA resulted in a defacto change to State water quality standards, since under the EFA if farmers implemented BMPs and paid an agriculture privilege tax they were not required to implement additional water quality improvement measures prior to December 31, 2006. Finally, plaintiffs asserted that the EFA changed State water quality standards because it failed to implement a 10 ppb phosphorus limit, the maximum that would ensure ecological balance in the Everglades. Defendants argued that the EFA was in effect a compliance schedule, that under the EFA the existing water quality standards remained in effect, and that the State was not precluded from adopting numeric standards at a date before 2003. Defendants also argued that violation of State water quality standards did not equate to revisions of such standards, and that because EPA was powerless to enforce water quality standards against non-point source discharges, the BMP and delayed development of numeric standards represented a reasonable approach.

The court first held that because EPA had explicitly considered whether the EFA changed Florida's water quality standards, plaintiff's citizen suit was moot. The court reasoned that the district court was only required to reconsider the EFA's impact on water quality standards absent action by the EPA Administrator. However, the court then reviewed whether EPA's assessment of the impact of the EFA on Florida's water quality standards was consistent with the APA. **The court held that EPA's conclusion that the EFA had not altered State water quality standards was arbitrary and capricious and not supported by the record.** Rather, the court found that because the EFA in effect had suspended enforcement of the existing

narrative water quality standards for nutrients until 2006, and thereby allowed discharges of phosphorus that violated the State's existing narrative water quality standards, the Act had changed the existing water quality standards. The court observed that neither the CWA not State law allowed compliance schedules for achieving compliance with existing State water quality standards. Moreover, the court stated that federal law did not allow "anything like a twelve-year compliance schedule," as would be provided under the EFA. The court agreed with EPA that mere violations of State water quality standards did not equate to revisions of such standards, but distinguished the instant case because the EFA specifically authorized such violations. Where this was the case, the court found that the only reasonable conclusion was that the State had changed its law. The court disagreed with EPA's claim that the EFA required compliance with existing narrative standards, and found that the Act only required farmers to develop programs that "considered" such standards. Finally, the court rejected EPA's argument regarding the non-point source nature of the discharges, finding that the CWA "by allowing non-point sources to violate state water quality standards until 2006, the EFA violates both the letter and spirit of the Clean Water Act."

D. NPDES Permits

1. Fifth Circuit holds that EPA lacks authority to require Louisiana to consult with FWS and NMFS as a precondition for becoming authorized to administer the NPDES program:

American Forest & Paper Ass'n v. U.S. EPA, 137 F.3d 291 (5th Cir. 1998).

Petitioners challenged the final rule in which EPA delegated to Louisiana responsibility for administering the NPDES program within that State. The challenge focused on provisions that required the State to consult with the FWS and the NMFS prior to issuing an NPDES permit and, where FWS or NMFS determined the proposed permit threatened endangered species, to modify the permit or face a veto of the permit by EPA pursuant to EPA's oversight authority.

The Fifth Circuit considered three issues: 1) whether petitioners waived their right to challenge the regulation because they did not participate in the agency proceedings below; 2) whether petitioners had standing to challenge the rule; and 3) whether EPA had authority to require Louisiana to consult as a precondition for becoming authorized to administer the NPDES program.

On the first issue, EPA argued that a party that does not comment on a final rule waives its right to challenge that rule in subsequent proceedings. The court disagreed. The court stated that EPA failed to identify any provision in the CWA that indicates that a party's failure to comment waives their right to judicial review. The court stated that the "statute allows 'any interested person' that promptly files an objection to seek review in this court." The court added that it had never held that failure to raise an objection during the comment period estopped a petitioner from raising it on appeal, in fact, the court noted it had rejected that very argument previously. Further, the court stated it would have been particularly unfair to estop petitioners from pursuing its claims in this instance since EPA modified its rule subsequent to proposal to include the consultation requirements. Finally, the court dismissed EPA's exhaustion of remedies argument finding that, given the significant public comments received by the Agency regarding the scope of endangered species protection, EPA clearly had the opportunity to consider the issue.

With regard to standing, the court found that petitioners alleged injury were not purely hypothetical. Rather, given petitioners need to renew their permits every five years combined with EPA's statement that the Agency "*will*" object to permits deemed likely to jeopardize a listed or proposed species or threaten habitat, petitioners alleged an actual or imminent injury. The court rejected EPA's argument that this action could not redress petitioners injury because Louisiana remained free to consult with FWS and NMFS on a voluntary basis, stating that the issue remained whether EPA had authority to require such

consultation in a rule. The court also found this action was ripe for review even though the regulation had not yet been applied. The court found that this was a purely legal question and, given that no further facts would have aided resolution of the case, and that delay would have imposed a significant burden on petitioners, the dispute was ripe for review.

As for whether EPA had authority to require Louisiana to consult with FWS and NMFS as a precondition for becoming authorized to administer the NPDES program, the court held that it did not. The court followed a *Chevron* analysis, but did not accord EPA deference to EPA's interpretation of the ESA. EPA argued that under CWA § 402(b) and § 304(i), the nine express requirements for approval of a state NPDES program constitute minimum requirements, but that nothing in § 402(b) prohibits EPA from imposing additional requirements. The court disagreed, stating that the language of § 402(b) was non-discretionary and that such language required EPA to approve a state program unless that program failed to meet one of the nine enumerated requirements. The court observed that EPA's claims were weakened by § 402(b)(6), (which grants EPA veto power over proposed permits that impair anchorage or navigation) because "Congress could have, but did not, grant EPA an analogous veto power to protect endangered species." The court found that § 304(i) only required EPA to promulgate regulations governing the approval process for state programs, but that it did not alter EPA's authority over such approvals in any relevant regard. Thus, the court concluded that Congress had spoken to the issue presented.

The court distinguished American Iron & Steel Institute v. EPA, 115 F.3d 979 (D.C. Cir. 1997) from the present case, finding that AISI addressed § 118(c)(2) of the CWA, which provided a broader grant of authority than § 402(b) to address aquatic life and wildlife. Finally, the court found that nothing in the § 7(a)(2) of the ESA provided EPA with authority to add additional criteria to § 402(b). Rather, the court stated that the ESA directs agencies to use their existing authority to promote the purposes of the ESA, but that "EPA cannot invoke the ESA as a means of creating and imposing requirements that are not authorized in the CWA."

The court granted the petition and vacated and remanded that portion of the rule that imposed consultation requirements and declared that EPA would veto any permit to which the FWS or NMFS objects.

2. Eighth Circuit holds that City of Glasgow's discharge of pollutants from a drinking water treatment facility without a NPDES permit violates CWA, and remands for determination of whether enhanced permit fees violate State Constitution:

State of Missouri v. City of Glasgow, 1998 U.S. App. LEXIS 18339 (8th Cir. Aug. 10, 1998).

The State of Missouri appealed the district court's ruling that a State statute requiring the City of Glasgow to pay increased permit fees to operate its water treatment facility violated the Missouri Constitution. The State also claimed the court improperly ordered the State to issue Glasgow a discharge permit for its water treatment facility despite the fact that Glasgow had failed to pay required fees. Glasgow operated a drinking water treatment facility that pumped water from the Missouri River into the facility, treated and distributed the water, and then pumped some water as well as some residual sludge back into the river.

On appeal, the State argued that the district court erred in failing to grant declaratory and injunctive relief on its claim that the City of Glasgow was discharging pollutants in violation of federal law. The State also claimed that it should be able to collect enhanced annual permit fees from the City. Glasgow asserted that it did not have to pay the permit fees because the State statute requiring the fees violated the Hancock Amendment to the

Missouri Constitution, which prohibited the State from reducing the State financed proportion of the costs of any existing activity or service required of counties or other political subdivisions. The Eight Circuit found that the Hancock Amendment worked only to prevent the State from charging an increased fee to obtain a permit in order to comply with the State's own water pollution law. **However, the court found that Glasgow was required to obtain a permit to comply with both State and federal law.** The court observed that the Supremacy Clause of the U.S. Constitution dictates that a State law cannot prevent the administration and execution of a federal statute and, thus, the State constitutional provision could not excuse Glasgow's operation of its water treatment facility without a permit in violation of federal law. The Eighth Circuit reversed the district court's judgment and remanded for issuance of an immediate order declaring Glasgow to be in violation of the CWA and enjoining Glasgow from discharging any sludge from its water treatment facility into the Missouri River until a permit was issued.

On the permit fee issue, the Eighth Circuit found that the State could lawfully increase fees charged to cities for operating permits without violating the Hancock Amendment so long as the State continued to fund the costs of administering the state water pollution laws in the same proportion as existed at the time of the Hancock Amendment's passage. However, there was insufficient evidence in the record to make such a determination. Therefore, the Eighth Circuit remanded the case for a determination of whether the increased permit fees represented an unlawful decrease in the state-funded proportion of the costs of administering the State water pollution laws, and reversed the district court's ruling ordering the state to issue Glasgow an operating permit.

3. Ninth Circuit remands alleged NPDES permit violation for discharges from storm drain not owned by defendant to determine whether defendant could be liable as operator of the drain:

San Francisco Baykeeper v. City of Saratoga, 1998 U.S. App. LEXIS 3942 (March 5, 1998).

[Note: Disposition not appropriate for publication and may not be cited to by the courts of this circuit except as provided by 9th Cir. R.36-3.]

Plaintiff-appellant San Francisco Baykeeper brought a citizen suit under the CWA that alleged that the defendant-appellee City of Saratoga had committed 14,000 violations of its NPDES permit by allowing the discharge of fecal coliform from a storm drain owned by CALTRANS but located within the City's jurisdiction. Upon cross motions for summary judgment, the district court found that, under the permit, the City would bear the burden of proving at trial that the flows discharging from the storm drain in question came from City-owned facilities or activities. Appellants acknowledged that the discharges did not come from City-owned storm drains and, thus, stipulated to the entry of judgment and appealed.

The Ninth Circuit found that the district court's order and stipulated facts incorrectly contemplated liability "only for discharges from drains owned by the City, not those found to be operated by the City." The court stated that under EPA regulations (40 C.F.R. § 122.26(a)(3)(vi)) the "City would be liable if it could be considered the operator" of the storm outfall at issue. The court acknowledged that district court may have used the terms "owned" and "owned or operated" interchangeably, however, the Ninth Circuit found that because the issue is so pivotal, it must remand for clarification.

4. EAB holds that municipal storm water permits do not need to include numeric effluent limitations where development of such limitations was infeasible and the permits included best management practices (BMPs) designed to reduce the discharge of pollutants to the "maximum extent possible" (MEP) as well as compliance with state water quality standards:

In re: Arizona Municipal Storm, 1998 NPDES LEXIS 1 (May 21, 1998).

Petitioners appealed from EPA Region IX's denial of their evidentiary hearing request on several legal issues pertaining to five NPDES storm water permits issued to five municipal separate storm sewer systems (MS4s) (City of Tucson, Pima County, City of Phoenix, City of Mesa, and the City of Tempe). Petitioners asserted 1) the Region and Arizona DEQ improperly met with the permittees during the comment period; 2) the permits did not ensure compliance with water quality standards because they did not contain numeric effluent limits or whole effluent toxicity (WET) limits; 3) the permits violate the CWA because they do not require WET testing of the discharge; 4) the storm water management programs incorporated into the permits fail to quantify pollution reduction; 5) the permits for Pima County and Tucson fail to address pollution from new areas of development; 6) the Region improperly allowed the permittees to defer submission of certain components of their storm water management programs; and 7) the Region illegally deferred the requirement that the City of Tucson demonstrate adequate legal authority to implement its storm water management program.

The EAB found that issues 4, 5 and 6 were not ripe for review because portions of the permits had been withdrawn and would be subject to administrative review when reissued. With regard to the claim of having held improper meetings with the permittees, petitioners asserted that 40 C.F.R. § 124.10-18 required that comments be submitted in writing or at a public hearing and thus the meetings with the permittees were improper. Petitioners also asserted that such meetings constituted improper exparte communications. The EAB disagreed with both arguments, finding that nothing in the regulations barred the Region from scheduling additional meetings with the permit applicants and the state prior to permit issuance. The EAB observed that here none of the issues discussed at the meetings were new and notes and documentation from the meetings were placed in the record so that petitioners were not in any way prejudiced. In addition, the Region found that the restriction on ex parte communications imposed under § 124.78(d) applies only after the granting of an evidentiary hearing. Here, the EAB observed, no such hearing was held and therefore this restriction was not applicable.

Petitioners second claim was that each permit must include numeric effluent limits that ensured compliance with state water quality standards. **The EAB disagreed, and found that where, as here, development of numeric effluent limitations was not feasible due to the lack of data about the impact of storm water discharges on receiving waters in Arizona it was appropriate to include best management practices (BMPs) in those elements of the storm water management plan adopted in the permits and that such BMPs constituted effluent limits intended to reduce the discharge of pollutants to the maximum extent possible (MEP) and compliance with state water quality standards.** The EAB observed that the term "effluent limitation" is defined to mean any restrictions on quantities, rates, and concentrations of constituents discharged from point sources. The Board also found the Region's approach to be consistent with relevant Agency regulations and policy. The EAB noted that the permits imposed reporting requirements that might have provided the basis for "appropriate permit modifications during the permit term."

With regard to petitioners assertion that annual WET testing of the discharges should have been required in the permits, the EAB found that petitioners failed to adequately explain or discuss why the Region's response to comments on this issue was insufficient. The Region had originally responded that the state's approved toxicity implementation guidelines called for no toxicity testing in the relevant cycle of MS4 storm water permits while a toxicity testing program appropriate for arid environments was being developed. The EAB, thus, denied review of this issue.

Finally, with regard to Tucson's authority to implement a storm water management program (SWMP), petitioners argued the requirement imposed under § 122.26(d)(2)(i) had been deferred

since the permit requires a review of such authority and the Region's plan was to address any inadequacy when the next permit term started. The EAB declined to interpret such action as improperly deferring the requirements of § 122.26(d)(2)(i). Rather, the EAB stated that in the absence of information suggesting that Tucson's general authority to protect health and the environment was inadequate, the Region's approach was consistent with existing regulations.

5. EAB holds that a NPDES permit provides "shield" against liability for discharge of pollutants not listed in the permit only when permit applicant has made adequate disclosures during the application process about the nature of its discharges:

In re: Ketchikan Pulp Company, CWA Appeal No. 96-7 (May 15, 1998).

Ketchikan Pulp Company (KPC), which operated a pulp mill in Ketchikan, Alaska, appealed an Initial Decision assessing a $23,000 civil penalty against it for alleged violations of CWA § 301(a). The alleged violations were based on three discharges from KPC's mill into Ward Cove, a navigable waterway adjacent to the mill.

The three discharges involved the following incidents. First, as part of equipment maintenance, KPC partially emptied one of its one million gallon settling tanks at its wastewater treatment plant by draining a two-year accumulation of flocculent into Ward Cove through the flocculent drain line. Second, in order to repair piping at the bottom of the aeration basin in the secondary wastewater treatment plant, KPC drained the contents of the 9.3 million gallon aeration basin and discharged an undetermined amount of sludge into Ward Cove. Third, employees operating the mill's digesters cleaned up an accidental spill of approximately 4,450 gallons of magnesium bisulfite (cooking acid) by washing the substance down through the floor drains in the digester area, where it went out untreated, into Ward Cove.

The NPDES permit in effect at the time of the discharges covered KPC's discharges of effluent from the mill for the period 1985 to 1990. The permit contained no effluent limitations for flocculent or cooking acid; in fact, neither substance was mentioned in the permit. The permit also contained no provisions relating to the control or prevention of industrial spills.

KPC's appeal raised the following issues: 1) whether the flocculent or cooking acid discharges were covered under the permit, such that the permit shielded KPC from liability for those two discharges; and 2) whether the sludge discharge violated the terms of the permit.

The EAB found that the permit did not shield KPC from liability for the flocculent or cooking acid discharges because KPC did not make adequate disclosure about either discharge during the application process. With respect to the sludge discharge, the EAB found that as part of the treatment process, the sludge ultimately discharged was removed from treated wastewater and returned to the aeration basin to continue the cycle of treatment. Thus, the sludge in the aeration basis at the time of discharge clearly was removed during the course of treatment in direct violation of the permit's unambiguous prohibition against such discharge.

Accordingly, the EAB affirmed the Initial Decision as to KPC's liability under CWA. In addition, the EAB affirmed the $23,000 penalty, which was not specifically challenged by either party, for the three CWA violations.

E. State Certification

1. Second Circuit holds that FERC must include in its licenses all conditions imposed by a State under its § 401 certification:

American Rivers v. Federal Energy Regulatory Commission, 129 F.3d 99 (2nd Cir. 1997).

Petitioners American Rivers, Inc., and the State of Vermont, sought review of several licensing orders issued by the Federal Energy Regulatory Commission (FERC), which licensed six hydropower projects located on rivers in Vermont. In issuing the licensing orders, FERC refused to include certain conditions developed by the State and included in the State's Clean Water Act (CWA) § 401 certification of the license's conformance with State water quality standards. FERC had found the conditions to be beyond the scope of Vermont's authority under the CWA. Petitioners requested rehearing of the licensing orders before FERC, which FERC denied. Petitioners then sought review by the Second Circuit Court of Appeals. The issue on review concerned the relative scope of authority of the States and the FERC under the CWA and the Federal Power Act (FPA).

Petitioners contended that according to the language of CWA § 401(d) "... FERC has no authority to review and reject the substance of a state certification or the conditions contained therein and must incorporate into its licenses the conditions as they appear in state certifications."

FERC argued that it is required to adopt only those conditions that are within the State's authority to impose under § 401, and that such conditions must be reasonably related to protecting water quality and must otherwise conform to the requirements of § 401. FERC also asserted that CWA §§ 401(a)(3) and 401(a)(5) support FERC's authority to distinguish improper conditions. In addition, FERC maintained that under Keating v. FERC, 288 U.S. App. D.C. 344, 927 F.2d 616 (D.C. Cir. 1991), it possessed authority to review and reject conditions that violated the terms of § 401. FERC argued that without such authority it would be impossible for the it fulfill its statutory mission. Finally, FERC asserted that certain conditions imposed under § 401 were inconsistent with FPA provisions.

The court held that FERC was required by CWA § 401 to include in its licenses all conditions imposed by a State under its § 401 certification notwithstanding FERC's view that some of those conditions were beyond the State's authority under the CWA. Thus, the court granted the petition for review, vacated the orders of the FERC, and remanded the matter for further proceedings consistent with the opinion. The court first noted that FERC was not due deference in interpreting the CWA, since FERC was not responsible for implementing the CWA. The court then reviewed the language of CWA § 401(a) and § 401(d), and noted that the language of § 401(d), which requires that State certification "shall become a condition of any federal license or permit..," was unequivocal. **The court agreed with the FERC that conditions imposed under §401 must relate to protecting water quality, but emphasized that FERC did not have authority to determine which certification conditions were proper and which were improper under 401(d).** This, the court observed, was the "crux of the dispute in this case." The court observed that prior to issuing the licensing order to Turnbridge Mill Corporation (the first order challenged here) FERC's position had been that it was required under § 401 to include in its license all conditions imposed through State certification. The court noted that EPA shared this view. The court then found that FERC read *Keating*, the decision upon which FERC premised its change of position, too broadly. The court found that Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 80 L. Ed. 2d 753, 104 S. Ct. 2105 (1984) (Commission required by mandatory language in FPA to include conditions deemed necessary by the Secretary of the Interior for the protection and utilization of Native American reservation) was more on point. The court also observed that where a State § 401 certification included conditions that, in FERC's view, were improper, the appropriate remedy was for the licensee to challenge such conditions, or for FERC to not issue the license.

2. Ninth Circuit holds that certification is required only where a discharge is present:

Citizens Interested In Bull Run v. R.L.K. & Co., 1998 U.S. App. LEXIS 3926 (9th Cir. Mar. 4, 1998).

[Note: Disposition not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.]

Appellants brought suit on September 17, 1996, against R.L.K. & Co., operator of a ski area, for violations of the Clean Water Act. Appellants sought a declaratory judgment that R.L.K. violated the CWA by operating under an invalid Forest Service permit and by discharging salt; an injunction ordering R.L.K. to halt its salting pending Oregon DEQ certification; and civil penalties of $5,000 per day of salting since April 1992. The Oregon DEQ certified operation of the ski area on December 12, 1996. In addition, R.L.K. submitted an uncontested affidavit that it did not salt between August 26 and December 12, 1996.

Appellants raised three arguments. First, appellants cited PUD No. 1 v. Washington Department of Ecology, 511 U.S. 700, 114 S. Ct. 1900 (1994) in arguing that the permittee's overall operation was subject to certification, even where the discharge had ceased (i.e., that "an uncertified permittee was a violator regardless of any threat of discharge"). **The court disagreed, and found that in *PUD 1* the Court stated "that certification was authorized once 'once the threshold condition, the existence of a discharge, is satisfied'."** Second, appellants argued that R.L.K. continued to discharge salt after it had ceased salting activities through runoff from snowmelt. **The court observed that such runoff did not appear to constitute "an 'activity' that may result in a discharge," as required under 33 U.S.C. § 1341(a), and held that the issue was not properly before the court because appellants failed to raise it in their original brief.** Finally, appellants argued that the district court erred in concluding that there was no genuine issue concerning the cessation of salting. Appellants relied on an affidavit that asserted broken bags of salt were seen in the Salmon River, and photos taken by a journalist that showed bags of salt in the Little Zig Zag Stream. **The Circuit Court concluded that such evidence was not inconsistent with R.L.K.'s showing that it ceased salting on August 29, 1996, and held that no genuine issue of material fact existed.** The court affirmed the lower court's decision.

3. Ninth Circuit holds that the term "discharge" as used in CWA § 1341 is limited to discharges from point sources and does not encompass nonpoint source pollution and that, therefore, no State certification is required for the issuance of cattle grazing permits:

Oregon Natural Desert Association v. Dombeck, 151 F.3d 945 (9th Cir. 1998). See case summary on page 6.

F. Section 404/Wetlands

1. Federal Circuit holds that takings claim accrued upon denial of permit and is thus barred by six-year statute of limitations:

Bayou Des Familles Development Co. v. United States, 130 F.3d 1034 (Fed. Cir. 1997).

Plaintiff Bayou Des Familles (BDF) Development Corporation alleged that the denial, in September 1979, by the U.S. Army Corps of Engineers (USACE) of a CWA § 404 after-the-fact permit to build a levee constituted a taking of its property without just compensation, in violation of the Fifth Amendment. Plaintiff brought suit in the Court of Federal Claims in July, 1991. That court dismissed the suit as barred by the six-year statute of limitations. Plaintiff appealed. On appeal the central issue before the court was when did BDF's claim become ripe for adjudication.

Key points in the 25 year history of the case include the following. BDF sought an after-the-fact dredge and fill permit in 1975, which was denied by USACE in September, 1979. Uncertainty regarding the placement of a flood and hurricane levee, and plans to build Jean Lafitte National Park, contributed to

the USACE's delay in acting on the permit application. Ultimately, the park was established in 1978 (the park contained 1000 of the 2000 acres that constituted plaintiff's development). BDF responded to the USACE's denial of the permit by filing suit in district court, which denied BDF's challenge to the permit denial. Finally, at the request of Jefferson Parish, USACE granted a permit to construct a hurricane levee to the West Jefferson Levee District. To obtain a right-of-way for the levee, the Levee District filed an expropriation suit against BDF. As a result, the state trial court awarded BDF approximately $15 million.

Plaintiff BDF argued that its taking claim did not ripen until 1986, when the USACE granted Jefferson Parish a permit for a hurricane levee on an alignment other than that of BDF's ordinal plan. BDF maintained that since prior to that point it was possible that the hurricane levee would be built on BDF's original alignment, BDF's land was not rendered worthless until the USACE finally resolved the matter by issuing the permit. **The court disagreed, and found that the taking accrued on September 21, 1979, the date the USACE denied BDF's levee permit.** The court observed that although determining the point in the permit application process when a final decision is made by the responsible agency is difficult, plaintiff's actions in litigating the USACE's decision suggests the finality of the decision. The court also observed that in the expropriation suit brought by the West Jefferson Levee District, the Supreme Court of Louisiana recognized that the USACE's denial of the permit in 1979 destroyed the value of BDF's land. The court noted that even if the permit denial in 1979 had not constituted final action on the permit application, the decision of the federal district court in 1982 "left no doubt about the legally binding nature of the government's action." Ultimately, the court concluded that BDF's wetlands had no economic value for development purposes following the permit denial. **Because the taking accrued beyond the six-year statute of limitations period, the court upheld the Court of Federal Claims dismissal.**

2. Federal Circuit holds that withdraw of § 404 permit application from active status based on the appellant's failure to complete a valid WQC application did not constitute a final decision by the USACE:

Heck and Assoc., Inc. v. United States, 1998 U.S. App. LEXIS 1003 (Fed. Cir. Jan. 23, 1998).

Appellant Howard Heck and Associates, Inc., appealed the judgment of the Court of Federal Claims, 37 Fed. Cl. 245 (1997), which dismissed appellant's complaint and held that the court lacked jurisdiction over appellant's Fifth Amendment taking claim because the claim was not ripe for review. In seeking a CWA § 404 permit, Heck was required to obtain a water quality certification (WQC) from the State of New Jersey. Heck submitted a WQC application to the NJDEP, but never submitted an adequate alternatives analysis, and NJDEP did not issue the WQC and ultimately canceled Heck's WQC application. Heck continued to seek the § 404 permit from the U.S. Army Corps of Engineers (USACE), arguing that under CWA § 401 the requirement for WQC had been waived. Despite publishing the § 404 permit application for public notice, however, the USACE notified Heck that the WQC requirement could not be waived, and that USACE had withdrawn the § 404 application from active status until the WQC was provided. Heck subsequently filed a Fifth Amendment takings claim, which the court found to be not ripe because the USACE had never issued a final decision on the merits.

The central issue on appeal was whether the USACE's withdraw of Heck's § 404 permit application from active status based on the failure to complete the application by not including the WQC constituted a final decision by the USACE. The court held that it did not. The court held that the dismissal of the § 404 application by the USACE as incomplete was not a final decision or a decision on the merits. The court observed that submission of a WQC is a prerequisite to issuance of a § 404 permit, and that

under 33 C.F.R. § 320.4(j) the USACE had discretion to deny the permit without prejudice if the State refused to certify compliance with water quality standards. The court noted that neither the State of New Jersey nor the USACE refused to give its approval; rather, both canceled the application as incomplete. The court stated that Heck had failed to demonstrate that NJDEP had made any decision on the merits that denied Heck economically viable use of its land and, thus, could not argue that NJDEP's cancellation of Heck's WQC application constituted a final decision. The court observed that Heck remained free to seek the necessary WQC.

The court found that Heck's other arguments lacked merit as well. The court stated that Heck had not demonstrated that the WQC application process was futile because Heck had never completed the process and had its application rejected. Nor had Heck demonstrated that the State of New jersey had unduly delayed the application process; rather, the court observed that Heck was responsible for the delay. The court rejected Heck's hardship argument as well, finding that any hardship that was experienced by Heck was due to its own refusal to complete a valid WQC application. Finally, the court found that the theory that NJDEP violated state law in demanding the alternatives analysis must be challenged in State court. The court affirmed the judgment of the court of Federal Claims.

3. Fourth Circuit upholds denial of CWA § 404 permit where detrimental environmental impacts of the fill project outweigh its benefits:

B & B Partnership v. United States, 1997 U.S. App. LEXIS 36086 (4th Cir. Dec. 24, 1997).

Appellants B & B Partnership challenged the U.S. Army Corps of Engineers' (USACE) denial of a § 404 permit that would have authorized appellants to fill 1.5 acres of wetlands as part of developing a construction and debris landfill. The denial was based on the USACE district engineer's findings that the detrimental environmental impacts of the project outweighed its benefits, and that appellants had not demonstrated the absence of practicable alternatives. The district court had upheld the USACE's decision, and appellants appealed.

Appellants raised two issues on appeal: 1) whether the district court erred in excluding from review several documents that pertained to two USACE permit decisions addressing other construction and debris landfills situated in the same county; and 2) whether the decision in this case by USACE was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.

Appellants argued that the district court abused its discretion by denying appellants' motion to supplement the record with documents pertaining to USACE permit decisions (i.e., approvals) addressing two other construction and debris landfill situated in the same county. Appellants asserted the USACE relied on these documents when it evaluated appellants' application, however, the district court had concluded otherwise. **The Fourth Circuit found that appellants had failed to demonstrate that the USACE relied on either of the relevant documents when it evaluated appellants' application and, therefore, those documents did not pertain to the merits of the USACE's decision. The Fourth Circuit held that the district court had not abused its discretion in denying the motion to admit the documents.**

With regard to whether the USACE's decision to deny the permit was arbitrary and capricious, appellants argued that the USACE's conclusions regarding the environmental impacts of the project were not supported by facts in the record. **The Fourth Circuit disagreed, and found that the record provided adequate evidentiary support for the USACE's findings and conclusions. The court held that the evidence in the record provided a rationale basis for the USACE's denial of appellant's permit application.**

The court also noted that, contrary to appellants' assertion, USACE was not required to submit the materials that appellant had provided to USACE in response to public comments on the permit

application to the Fish and Wildlife Service, the National Marine Fisheries Service, and the EPA for their review. Rather, the court found that under USACE regulations (33 C.F.R. § 325.2(a)(2)) USACE was only required to do so if the district engineer believed that the supplemental materials would have affected the public's view of the proposal. The court observed that here the supplemental materials were not relevant to the principal bases for the USACE's decision.

4. Fourth Circuit holds that the portion of USACE regulations which define waters of the U.S. to include those waters whose degradation "could affect" interstate commerce exceeds its authority under the Clean Water Act and the regulation is invalid:

U.S. v. Wilson, 1997 U.S. App. LEXIS 35971 (4th Cir. Dec. 23, 1997).

Defendants J. Wilson, Interstate General, L.P., and St. Charles Associates, L.P., appealed felony convictions for knowingly discharging fill and excavated material into wetlands without a Clean Water Act § 404 permit. As part of the development of a planned community, defendants had attempted to drain three (of four relevant) parcels of land that were wetlands by digging ditches and depositing the excavated dirt next to the ditches (i.e., sidecasting). In addition, defendants deposited fill and gravel on three of the four parcels. On appeal, defendants argued that 1) the U.S. Army Corps of Engineers' (USACE) regulations (33 C.F.R. § 328.3(a)(3)), which in part define waters of the U.S. to include those waters whose degradation "could affect" interstate commerce, exceed the authority of the CWA and the Commerce Clause of the Constitution (defendants also asserted that the district court's instructions to the jury, which were based on § 328.3(a)(3), were improper); 2) the district court improperly applied CWA requirements to wetlands that did not have a "direct or indirect surface connection to other waters of the U.S."; 3) the CWA does not apply to "sidecasting"; and 4) for a felony conviction under the CWA the mens rea requirement must be proven for each element of the violation. Defendants also challenged evidentiary rulings of the district court, and aspects of their sentences. The court issued a ruling resolving only the interstate commerce and criminal intent issues (i.e. issues 1 and 4). While two of the three judges on the panel issued opposing opinions on the sidecasting and adjacency issues, neither opinion had the support of two judges so as to constitute an opinion of the court.

Defendants argued that "in allowing the jury to find a nexus with interstate commerce based on whether activities 'could affect' interstate commerce, the [district] court authorized a 'limitless view of federal jurisdiction,' far more expansive than the standard recently summarized in U.S. v. Lopez, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995). **The Fourth Circuit agreed, and held that in promulgating 33 C.F.R. § 328.3(a)(3), the USACE "exceeded its congressional authorization under the Clean Water Act, and that, for this reason, 33 C.F.R. § 328.3(a)(3) (1993) is invalid."** The Fourth Circuit observed that under *Lopez* Congress could clearly regulate discharges of pollutants that substantially affect interstate commerce (514 U.S. 549, 558-59). It also recognized that Congress presumably could regulate the discharge of pollutants into nonnavigable waters to the extent necessary to protect the use or potential use of navigable waters as instrumentalities of interstate commerce. Finally, the court observed that Congress arguably has power to regulate discharges of pollutants into waters that themselves flow across state lines, or that connect to waters that do so. However, the court found that § 328.3(a)(3) "requires neither that the regulated activity have a substantial affect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters." Based on its conclusion regarding § 328.3(a)(3), the court found that the district court's jury instruction based on this regulation was also erroneous.

Defendants further contended that the district court erred in instructing the jury with regard to the mens rea required to establish the criminal violations (§

1319(c)(2)(A)). Specifically, defendants argued that the CWA required that the government show the defendants were aware their conduct was illegal, and also required that the appropriate mens rea be shown to accompany each element of the offense. The defendants argued that this case should be governed by Liparota v. United States, 471 U.S. 419, 85 L. Ed. 2d 434, 105 S. Ct. 2084 (1985) (government had to prove defendant knew his action was unauthorized in proving violation of food stamp act). The court distinguished *Liparota*, and noted that *Liparota* did not create a mistake-of-law defense. Rather, the court found that the structure of the CWA, it legislative history, and applicable precedent (see, U.S. v. International Minerals & Chemical Corp., 402 U.S. 558, 29. L. Ed. 2d 178, 91 S. Ct. 1697 (1971) (Court declined to find proof of defendant's knowledge of the illegal nature of his act was a required element in criminal violation)) supported the conclusion that the government need not show defendants were aware their acts were unlawful. **Thus, the court declined to hold that the CWA requires that defendants must have known their acts were illegal, but did hold that the CWA "requires the government to prove the defendant's knowledge of facts meeting each essential element of the substantive offense."** Because the jury instructions did not adequately require the government to prove defendant's knowledge with regard to each element of the violation, the court found that a new trial was required.

5. D.C. Circuit affirms rejection of Tulloch Rule:

National Mining Association v. U.S. Army Corps of Engineers, 145 F. 3d 1399 (D.C. Cir., 1998).

The parties appealed a district court opinion that held that the "Tulloch Rule" (which removed the de minimis exception to the U.S. Army Corps of Engineers' definition of the term "discharge of dredged material" and expanded the definition to include any redeposit, including incidental fallback, of dredged material) exceeded the U.S. Army Corps of Engineers' authority under § 404 of the Clean Water Act (CWA). The district court had granted summary judgment to plaintiffs AMC and enjoined USACE and EPA from enforcing the "Tulloch Rule." (See, American Mining Congress v. U.S. Army Corps of Engineers, 951 F. Supp. 267 (D.D.C. 1997).

Appellees argued that the "Tulloch Rule" exceeded the USACE's statutory authority because it would regulate incidental fallback which, because it returns dredged material to virtually the same spot from which it came, cannot be said to constitute the addition of a pollutant to jurisdictional waters. USACE argued that under the CWA incidental fallback could be classified as a discharge since the term "discharge" is defined to include the addition of a pollutant to navigable waters and the definition of the term "pollutant" includes "dredged soils" as well as "rock," "sand," and "cellar dirt." (33 U.S.C. 1362 (12), (6)).

The D.C. Court of Appeals held that incidental fallback did not constitute the addition of a pollutant to waters of the U.S. and, thus, that the "Tulloch Rule" exceeded USACE's authority. The court found incidental fallback constituted a "net withdrawal, not an addition, of material" and, therefore, it could not constitute a discharge. The court observed that "Tulloch Rule" would subjected "virtually all excavation and dredging performed in wetlands" to federal regulation and the court found this to exceed authority granted in the CWA. The court noted that Congress has established two distinct statutory programs to address the removal of dredged materials from waters (i.e., CWA) and the discharge of dredge and fill material (i.e., the Rivers and Harbors Act). The court rejected the appellants arguments that the specific exemptions in § 404(f) of the CWA support their interpretation of the term "discharge." In response to arguments that the court's interpretation of the term "discharge" would effectively read the regulation of dredged material out of the CWA, the court stated that it was not holding that the USACE could not legally regulate some forms of redeposit under § 404. The court reiterated, however, that USACE's assertion of jurisdiction over "any redeposit," including incidental fallback, went beyond the agency's permissible authority. The court noted

that since the CWA establishes no bright line distinguishing incidental fallback from "regulable redeposits," "reasoned attempts by the agencies to draw such a line would merit considerable deference." The court also distinguished opinions from several other circuits that supported the proposition that any redeposit may be regulated under § 404 finding that such opinions predated the "Tulloch Rule." The court also rejected appellants arguments that a more lenient test than Chevron should be applied here due to the facial challenge to the regulation.

Finally, with regard to remedies, the court found that once the district court found that the "Tulloch Rule" was illegal, it was under no further duty to make explicit findings regarding the elements necessary for a permanent injunction. Further, the D.C. Circuit Court found, based on prior decisions as well, the APA, and concerns regarding a flood of duplicative litigation, that when, as here, an agency rule is found to be unlawful, "the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." The D.C. Circuit Court affirmed the judgment of the district court.

6. District court enjoins USACE from accepting preconstruction notices pursuant to NWP 29 after June 30, 1998, pending compliance with NEPA:

Alaska Center for the Environment v. West, 1998 U.S. Dist. LEXIS 6644 (D.AL, April 30, 1998).

Plaintiffs challenged the U.S. Army Corps of Engineers (USACE) issuance of its Nationwide Permit for Single-Family Housing (NWP 29), asserting that it violated the CWA, NEPA, and the ESA. Plaintiffs argued that NWP 29 harmed them by depriving them of opportunities to participate in the permitting process and by threatening harm to the environment. Specifically plaintiffs asserted that 1) USACE could not ensure minimal adverse environmental effects as required by CWA § 1344(e) through the process used under NWP 29 known as preconstruction notice (PCN); 2) USACE's decision document acknowledged that NWP 29 would impact threatened and endangered species in contravention of the ESA; and 3) under NEPA, USACE had not adequately considered the no-action alternative, and had not considered reducing the one-half acre ceiling and excluding high-value waters.

Upon motions for summary judgment the court's review focused on USACE's compliance with NEPA. **The court held that because the USACE's Decision Document supporting NWP 29 did not contain meaningful discussion of why the acreage limitation should not be smaller and why high-value waters should be excluded, the decision document did not constitute an adequate Environmental Assessment.** The court remanded it to USACE for further proceedings. The court observed that under NEPA USACE was obliged to consider an appropriate range of alternatives, but had failed to do so. The court noted that commenters on the proposed NWP had raised the issues of alternative acreage ceilings and protecting high-value waters, but that the Decision Document did not indicate that USACE had not fully considered these alternatives. The court found that USACE's decision to reject the no-action alternative was neither arbitrary and capricious or unreasonable.

The court then considered whether injunctive relief was appropriate. The court found that the potential harm to the environment from the placement of fill into high-value waters would be serious and irreversible. In contrast, the court found that the harm to the USACE and persons seeking to place fill for the construction of single family houses was mitigated by the availability of individual § 404 permits (which would require extra time) and other NWPs. **The court enjoined USACE from accepting PCN's pursuant to NWP 29 after June 30, 1998, pending compliance with NEPA through the issuance of an environmental assessment that adequately addresses the exclusion of high-value waters and the use of an acreage ceiling other than 0.5 acres.**

7. District court holds that slip plowing and disking of delineated wetlands required § 404 permit:

Borden Ranch Partnership v. U.S. Army Corps of Engineers, 1998 U.S. Dist. 1955 (E.D. Cal. Jun. 9, 1998).

The District Court for the Eastern District of California denied summary judgment motions for the plaintiff and granted, in part, summary judgment for the United States. The central issue was whether plaintiffs violated § 301 of the Clean Water Act by their failure to obtain a § 404 permit from the U.S. Army Corps of Engineers (USACE) prior to engaging in certain agricultural activities. In making its decision regarding the cross-motions for summary judgment, the court ruled that USACE had subject matter jurisdiction over plaintiff's activities, ruled out normal farming exemptions, and determined that the recapture provision applied.

Plaintiffs owned and operated a farm, Borden Ranch, in California, and failed to obtain a § 404 permit for deep slip plowing and disking of delineated wetlands. Plaintiffs claimed that their plowing activities did not constitute the placement of fill, and alternatively, argued that these activities were exempted from § 404 permit requirements as "normal farming activities." They also made facial challenges against the applicable regulations, in additional to commerce clause and due process claims.

With regard to the subject matter jurisdiction under § 301, the court held that the plaintiff's activities were within the jurisdiction of the USACE. The court held that the redeposit of earth can constitute the "addition of a pollutant" (Ryback v. EPA, 904 F.2d 1276, 1285-86 (9th Cir. 1990) and that the purpose of the activity was irrelevant (Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617, 627 (8th Cir. 1978). Therefore, the court granted the United States' request for declaratory judgment that the plaintiff's actions violated section 301.

The court denied plaintiff's contention that the activities were exempt from the permit requirements, under the exemption for "normal farming activities." To be covered by the exemption, the activity must be part of an established farming activity, and not part of an effort to bring an area into farming. The court rejected plaintiff's arguments about the historical agricultural uses of the property, and utilized the plaintiff's admissions of the need to deep rip and disk the area before it would be suitable for its intended use. In its holding, the court deferred to the agency's construction of the Clean Water Act, finding it reasonable and not in conflict with the expressed intent of Congress. U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985).

The court held that plaintiff's activities would be subject to the recapture provision of the CWA, 33 U.S.C. 1344(f)(2). This provisions requires a permit for "any discharge of dredged or fill material into the navigable water incidental to any activity having as its purpose bringing an area into a use which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced."

The court dismissed the facial challenges to the validity of the regulations, stating that the challenge was time-barred by a six year statute of limitations under the Administrative Procedures Act. 28 U.S.C. 2401(a). The court also held in favor of the defendants on the plaintiff's due process claim. The court stated that the due process claims were based on notice issues, and could be overcome where reasonable persons would have known that their conduct was at risk.

Lastly, the court upheld the validity of the migratory bird rule, an EPA guideline adopted by the USACE, used to determine regulatory jurisdiction over isolated intrastate waters. The court restated the holdings under Leslie Salt II, and III, to establish the validity of the rule in the 9th Circuit.

8. District court holds that USACE has authority to delegate § 404 permit issuance authority to district engineers:

Johnson v. U.S. Army Corps of Engineers, 1998 U.S. Dist. LEXIS 8422 (D. MN June 1, 1998).

Plaintiffs, who were farmers, landowners, and residents of Pennington County, Minnesota, sought a temporary restraining order and preliminary injunction suspending the § 404 permits issued by the U.S. Army Corps of Engineers (USACE) to the Red Lake Band of Chippewa Indians and Pennington County for the River Road Phase III Project. The project involved realignment and reconstruction of BIA Route 19. Pursuant to NEPA, the Red Lake Band of Chippewa Indians had prepared an environmental assessment that identified six alternatives, including the preferred alternative (No. 5), which involved filling 30 acres of wetlands. Plaintiffs argued that the CWA did not allow the Chief Engineer to delegate issuance of § 404 permits to the District Engineer, and that the District Engineer's rejection of the alternatives 1-4 and 6 was "arbitrary, capricious and an abuse of discretion."

Plaintiffs argued that the decision in U.S. v. Mango, 1998 U.S. Dist. LEXIS 2771 (N.D.N.Y. March 5, 1998) held that the Secretary of the Army did not have authority to delegate § 404 permit issuance to District Engineers. **However, this court found the Mango decision erroneous. Rather, the court found that the CWA did not specifically address subdelegation of § 404 permit issuance authority and that the USACE's construction of the statute in delegating permit issuance authority by regulation was permissible.**

Regarding the substantive basis for the permit decision, plaintiffs argued that the purpose of the project was to improve safety and traffic flow, and that all of the alternatives achieved this objective, including the off-reservation alternatives. Thus, plaintiffs argued that USACE's characterization of the purpose of the project as "bypassing existing roads" including local traffic, was an "eleventh hour change" improperly intended to reject the off-reservation alternatives. The court disagreed. The court found that USACE's concern about easing conflicts with local traffic was expressed in the final draft EA and, thus, was not a last minute change. Moreover, the court found that USACE rejected the off-reservation alternatives based on safety and traffic concerns, and that the USACE's decision making process evinced a thorough review of the matter. Given that plaintiffs were not likely to succeed on the merits, the court declined to issue injunctive relief.

9. District court denies plaintiff's summary judgment motion alleging USACE improperly granted City of Bessemer a permit for dredge and fill activities in violation of the CWA, USACE regulations, and other statutory requirements:

Water Works and Sewer Board City of Birmingham v. U.S. Army Corps of Engineers, 1997 U.S. Dist. LEXIS 17215 (N.D. Al. Oct. 22, 1997).

Plaintiff Water Works & Sewer Board of the City of Birmingham challenged the validity of a permit issued by defendant U.S. Army Corps of Engineers (USACE) to the City of Bessemer. The City, which had been serviced by the plaintiff, desired to build its own water supply (including intake structure), treatment and distribution system. The City had sought a permit under the RHA and CWA § 404 to build an intake structure and associated pipeline. The USACE provided public notice of the permit application, received and considered public comments on the application, but denied a request from plaintiff to hold a public hearing on the basis that a public hearing would not provide additional information regarding the final decision. On November 13, 1995, the USACE issued the permit to build an intake structure and associated pipeline. The permit was stayed temporarily around March 1, 1996, but went back into effect on March 17, 1997.

Following the USACE's denial of the public hearing plaintiff filed suit contending, among other things that the permit was improperly issued because: 1)

the USACE failed to hold a public hearing in violation of USACE regulations, the statutes governing the USACE's permitting process, and the Due Process clause of the Fifth Amendment; 2) the USACE failed to adequately consider the substantial adverse effects of the permitted activity on the public interest; 3) the USACE erroneously failed to require preparation of an environmental impact statement in violation of the National Environmental Policy Act, 42 U.S.C. § 4321, et seq.; and 4) the USACE permit would not comply with the Environmental Protection Agency's Guidelines for Specification of Disposal Sites for Dredged or Fill Material, 40 C.F.R § 230 et seq. The City of Bessemer and the USACE filed motions for summary judgment and Water Works filed a cross motion for summary judgment and a motion for limited discovery and a hearing.

With respect to plaintiff's claim that the USACE failed to comply with its permitting procedures, following a detailed review of the regulations and case law the court reasoned that the USACE had correctly concluded that plaintiffs written submittals adequately presented the issues of concern and a public hearing was not needed for clarification. **The court held that in denying the request for a public hearing the USACE acted within its appropriate range of its discretion and such denial was neither arbitrary nor capricious**.

Regarding whether the USACE's refusal to hold a public hearing violated the Administrative Procedures Act (APA), the court concluded that the denial of the hearing violated neither § 5 of the APA, § 10 of the Rivers and Harbor Act of 1899 (RHA), or § 404 of the Clean Water Act (CWA). The court observed that, "[a] federal agency is not required to conduct public hearings before making a threshold determination as to the need for an EIS so long as members of the public are given the opportunity to submit facts which might bear upon the agency decision." Sierra Club v. Alexander, 484 F.Supp. 455, 471 (N.D.N.Y. 1980). Further, the court noted that the USACE's procedures adequately complied with CWA § 1344(a), which mandates an "opportunity for public hearings." The court observed that if the USACE determined that it had the information necessary to reach a decision and there was "no valid interest to be served by a hearing, the USACE had the discretion not to hold one.

With respect to plaintiff's request for hearings and discovery, the court stated that "[T]he focal point for judicial review of an administrative agency's action should be the administrative record." Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers, 87 F.3d 1242, 1246 (11th Cir. 1996). The court noted that where an administrative agency fails to adequately explain its decision the proper course of action is to remand the matter to the agency for additional investigation or explanation.

Plaintiff asserted that the Corps' public interest review was intended to be a "broad review" which must include not only the structures affecting navigable waters but also those structures that help fulfill the purpose of the project such as the treatment plant and pipeline. **In a detailed analysis relying in part on two Circuit Court cases (see, Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269 (8th Cir. 1980), and Save the Bay, Inc. v. U.S. Army Corps of Engineers, 610 F.2d 322 (5th Cir. 1980)), the court held that the water treatment plant and the aspects of the project not related to the intake structure and pipeline crossings were not within the scope of the USACE's jurisdiction in undertaking the public interest review.**

Plaintiff contended that in failing to consider impacts of the water withdrawals on human uses of the river the USACE conducted an inadequate CWA § 404(b)(1) analysis, and that the USACE failed to make an appropriate evaluation of the alternatives to a "dredge and fill" action as required under CWA § 404(b)(2). The court pointed out that the governing regulation, 40 C.F.R. § 230.50, did not require the USACE to consider the impacts of water withdrawal on water supply in its § 404(b)(1) review, only impacts on water supply from the addition of fill into the water. The court also rejected plaintiff's assertion that the no-action alternative of purchasing water from plaintiff was a

practicable alternative in line with § 404(b)(2). As the court noted, the purpose of the project was to sever the City's reliance on plaintiff water treatment and distribution system.

Finally, plaintiff contended that USACE failed to conduct a proper alternative analysis in its environmental assessment. As the court pointed out, the arbitrary and capricious standard was the proper one for review of NEPA determinations. Since the USACE had reasonably considered alternatives in its decision making, the court found no bases upon which to set aside the USACE's decision.

10. District court holds that soil redeposited through "incidental fallback" constitutes a discharge of a pollutant for purposes of the Clean Water Act:

U.S. v. Feinstein, Case No. 96-232-CIV-FTM-24 (D), Decided June 12, 1998.

The Feinstein's contracted in the 1980's to develop 248 acres of land in Fort Meyers, Florida. The site was cleared, grubbed, and graded. In June of 1992 the U.S. Corps of Engineers (USACE) issued a cease and desist order prohibiting the discharge of pollutants into the waters of the United States located on the property. The Government initiated an action in June of 1996 seeking injunctive relief, restoration of the polluted waters and civil penalties. The Feinstein's, citing American Mining Cong. v. U.S. Army Corps of Eng'rs, argued that soil redeposited through "incidental fallback" did not constitute the addition of a pollutant under the CWA.

The court observed that the Supreme Court explained in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) that if the statute is silent or ambiguous with respect to the specific issue, the court must decide whether the agency's interpretation is based on a permissible reading of the statute. Here, the court determined that Congress did not directly address the question of whether incidental fallback is discharge of a pollutant under the CWA. Thus, the court deferred to the USACE's interpretation of the statute. The court concluded that the USACE's construction of the CWA was permissible. The court reasoned that case law has established that the "addition" of a pollutant to U.S. waters encompasses "redeposit," and that incidental fallback is "essentially minimal redeposit." The court further reasoned that because the CWA does not draw lines based on the amount of pollutant added (redeposited) it did not make sense to prohibit "redeposit", but allow incidental fallback. The court found fault with the *American Mining Cong.* decision because that court, faced with the incidental fallback issue, interpreted the CWA rather than deferring to the interpretation of the USACE and the EPA.

The court concluded that the property contained wetlands because it had both the characteristic vegetation and characteristic hydrology of a wetland. The wetlands satisfied the jurisdictional requirement by being "hydrologically connected to and in a continuum with other waters of the United States," and thus "adjacent" to them.

11. Court of Claims holds that wetlands determination and delineation themselves are insufficient to constitute a compensable taking under the Fifth Amendment:

Robbins v. The United States, 1998 U.S. Claims LEXIS 32 (Feb. 20 1998).

Plaintiffs contracted to sell 38 acres of land in Tennessee to a buyer who intended to develop it. After the U.S. Army Corps of Engineers (USACE) determined that the property contained jurisdictional wetlands, the contract was canceled. Plaintiffs never submitted a § 404 permit application to develop the wetlands. Plaintiffs filed a complaint to recover damages from the USACE's alleged taking of the land sale contract or alternatively, the taking of the property without compensation in violation of the Fifth Amendment.

The court analyzed the takings issue via the "two-tiered" inquiry outlined in M & J Coal Co. v. United States, 47 F.3d 1148, 1153-54 (Fed. Cir. 1995). First, the court assesses the nature of the land owner's property interest to determine whether a compensable interests exists. Second, after the property interest is established, the court determines whether the government's action constitutes a compensable taking of private property for a public purpose. The court added a third factor to its analysis, the extent to which the government action interferes with plaintiffs' reasonable investment-backed expectations, Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). The court explained that "government action that merely frustrates expectations under a contract does not constitute a taking." Thus, the court found that the wetland determination and delineation themselves were insufficient to constitute a compensable taking as they did not supply the requisite government action. Furthermore, the court noted that the possibility that the USACE still could have granted plaintiffs a permit precluded the wetland determination from constituting a taking.

12. District court holds the U.S. Army Corps of Engineers has jurisdiction over isolated intrastate waters that provide a habitat for migratory birds even if the particular birds on the site do not substantially affect interstate commerce:

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 1998 U.S. Dist. LEXIS 3994 (D.N. IL E, March 25, 1998).

The Corps initially determined that the property did not contain any wetlands. The Corps later asserted jurisdiction over the SWANCC property because migratory birds had been observed there and the waters were used or could be used as a habitat by migratory birds. Two subsequent applications for a section 404 permit were denied.

The court does not agree with the 4th Circuit, in U.S. v. Wilson, 133 F.3d 251 (4th Cir. 1997), that the Lopez decision puts regulation of intrastate migratory bird habitats beyond the reach of the commerce clause. Migratory birds are considered proper subjects for regulation under the commerce clause. Isolated wetlands provide habitat to migratory birds whose existence supports interstate commerce. The migratory bird rule is a valid application of the CWA because the scope of jurisdiction under the CWA tracks that of the commerce clause and the commerce clause allows regulation of intrastate migratory bird habitats.

13. District court reconsiders ruling on sidecasting in light of *Wilson* and holds sidecasting constitutes does not discharge for purposes of CWA:

U.S. v. Deaton, Action No. MJG-95-2140 (Jun. 23, 1998).

The United States brought an action against defendants James and Rebecca Deaton under §§ 301(a) and 404 of the CWA that asserted defendants had failed to obtain a permit for excavating a drainage ditch within a wetland area and "sidecasting" the excavated material such that is was deposited next to the ditch within the wetland. In a Corrected Memorandum and Order issued September 22, 1997, the court had held that defendants' sidecasting constituted the discharge of pollutants into water of the U.S. (deemed adjacent wetlands) in violation of the CWA. In this action, the court reconsidered that outcome in light of the Fourth Circuit's decision in U.S. v. Wilson, 133 F.3d 251 (4th Cir. 1997).

Defendants argued that the court lacked jurisdiction over the Deaton's property and that the sidecasting did not constitute the discharge of a pollutant into waters of the U.S. The court focused on the sidecasting issue and did not address the jurisdictional question. The court observed that in *Wilson* the Fourth Circuit held that sidecasting (i.e., the redepositing of soils excavated from a wetland next to the ditch being created but within the

wetland) did not involve the addition of pollutants to the wetland, and therefore did not constitute a "discharge," as that term is defined under the CWA. Given this precedent, this court stated it was obliged to predict that the Fourth Circuit would hold that sidecasting did not constitute a discharge of pollutants and, thus, ruled that the sidecasting in this case did not constitute a prohibited discharge. Despite this outcome, the court observed because two of the three judges that heard *Wilson* did not join that portion of the *Wilson* opinion that discussed sidecasting, the issue may not be well settled in the Fourth Circuit. Moreover, the court restated its belief that the reasoning and decisions of the Fifth, Ninth, and Eleventh Circuits on this issue, which have held that sidecasting does constitute discharge, remained more compelling in the court's view. Nevertheless, the court vacated it prior decision to extent it held that sidecasting constituted discharge and granted defendant's motion for summary judgment.

14. District court holds that only EPA, not the USACE, has statutory authority under the CWA to bring a civil enforcement action to enforce violations of § 404 where no § 404 permit has been issued:

U.S. v. Hallmark Construction Company, 1998 U.S. Dist. LEXIS 11892 (D. Illinois, July 23, 1998).

Plaintiff the United States sued defendant Hallmark Construction Company for filling what the U.S. Army Corps of Engineers (USACE) deemed a five acre isolated wetland (Area B) without first obtaining authorization under § 404 of the CWA. Plaintiff sought restoration or mitigation, whereas defendant argued that the U.S. lacked jurisdiction over Area B, the USACE was not a proper plaintiff, and the claim was barred by the statute of limitations.

The court's decision focused on propriety of the USACE, and the U.S. as its representative, as a plaintiff. Defendant argued that under the CWA the USACE had authority to issue and enforce § 404 permits, including the authority to bring a civil action for violations of § 404 permits, but did not have authority to seek civil penalties for a "permitless" discharge. Under § 319(b), defendant argued that such authority resides solely with EPA. Defendant added that the 1989 MOU between EPA and the USACE improperly allowed USACE to assume enforcement authority for violations of § 404 restrictions. **Upon examination of CWA §§ 1319 and 1344, the court agreed, and held that under these sections of the CWA Congress has not delegated authority to the USACE to commence a civil action to enforce dredge and fill violations where such violations occur without a permit.** The court observed that only Congress could delegate such enforcement authority to the USACE, and Congress had not done so. The court acknowledged that the sole judicial decision to examine this issue reached the opposite conclusion, however, the court found that decision did so without citing any authority. Relying on the language of the CWA, this court declined to "reallocate the statute's express delegation of enforcement authority." Based on this holding, the court dismissed the complaint and declined to address the remaining arguments.

[*Note*: The U.S. moved for reconsideration and on September 9, 1998, this court vacated the above decision and held that § 404 does grant USACE authority to bring an enforcement action in instances of a permitless discharge, and that the U.S. was a proper party plaintiff. U.S. v. Hallmark, 14 F. Supp. 2d 1065 (N.D. Il. Sept. 9, 1998)].

15. District court holds that USACE has authority under CWA to bring an enforcement action in instances of a permitless discharge of dredge and fill materials into waters of U.S., and sustains application of migratory bird rule to isolated intrastate wetlands:

U.S. v. Hallmark Construction Company, 14 F. Supp. 2d 1065 (N.D. Il. Sept. 9, 1998).

Plaintiff the United States sued defendant Hallmark Construction Company for filling what the U.S. Army Corps of Engineers (USACE) deemed a five acre isolated intrastate wetland (Area B) without first obtaining authorization under § 404 of the CWA. Plaintiff sought restoration or mitigation, whereas defendant argued that the U.S. lacked jurisdiction over Area B, the USACE was not a proper plaintiff, and the claim was barred by the statute of limitations. In a prior decision, this court held that only EPA, not the USACE, had statutory authority under the CWA to bring a civil enforcement action to enforce violations of § 404 where no § 404 permit had been issued. In its initial decision, the court found that the U.S. (as representative for USACE) was not a proper plaintiff and dismissed plaintiff's suit. 1998 U.S. Dist. Lexis 11892 (N.D. Il. Jul. 23, 1998). The U.S. moved for reconsideration of the July 23rd decision, and the court considered plaintiffs jurisdictional and statute of limitations arguments.

On reconsideration the court vacated its earlier decision and held that § 404 does grant USACE authority to bring an enforcement action in instances of a permitless discharge, and that the U.S. was a proper party plaintiff. The court stated that under § 404(s)(3), USACE clearly could bring a civil enforcement action in instances where it could issue a compliance order under § 404(s)(1). The court then observed that, under the CWA, the USACE retained the authority it is was granted under the Rivers Act to issue permits for dredge and fill activities. In addition, the court observed that CWA § 404 provided the USACE with authority to issue permits for discharges of dredge and fill material into navigable waters. The court reasoned that such power to permit these activities and materials implied authority to exert control over them. The court noted that the USACE currently has authority over dredge and fill discharge activities that may be used in non-permitting ways (e.g., authority to issue cease and desist orders for unauthorized activity in areas under its control, see, 33 C.F.R. § 209.120(g)(12)(I)). Given all this, the court stated that "[i]f the Corps has permit control over wetlands areas to ensure their protection, it most certainly has the power to stop unlawful permitless activity that endangers navigable waters. The authority to issue cease and desist order is inherent in its control of discharge into navigable waters."

As for plaintiffs argument that USACE lacked jurisdiction over Area B because the USACE's "migratory bird rule" (33 C.F.R. § 328.3(a)(3)) exceeded the limits of Commerce Clause authority, the court, in an additional memorandum and order, dismissed defendant's motion for summary judgement. Defendant asserted that the migratory bird rule exceeded the authority provided to Congress under the Commerce Clause, and that the leading Seventh Circuit case on this issue, Hoffman Homes, Inc., v. EPA, 999 F.2d 256 (7th Cir. 1993) (Hoffman II) (migratory bird rule and EPA's regulation of isolated wetlands did not violate the Commerce Clause) should be reexamined subsequent to U.S. v. Lopez, 514 U.S. 549 (1995) (federal law imposing criminal sanctions for possession of handguns in local school zones exceeded Commerce Clause authority). This court disagreed and stated that in *Hoffman II* the Seventh Circuit explicitly recognized that the cumulative loss of wetland habitats had reduced the population of many bird species and had impaired the ability of people to hunt, trap, and observe those migratory birds, thereby affecting commerce. In addition, the court stated it was not clear that *Lopez* would dictate a different result in *Hoffman II*. Finally, the court found that *Hoffman II* implied that the USACE had not exceeded its CWA authority by regulating intrastate isolated wetlands, since that court ultimately applied the USACE regulatory definition. Thus, based on the law of the circuit, the court held that the USACE did not exceed its authority under the Commerce Clause or the CWA by regulating intrastate isolated wetlands as "waters of the U.S." However, the court found that genuine evidentiary issues remained as to whether Area B was a jurisdictional "farmed wetland" or a non-jurisdictional "prior converted cropland."

16. District court holds that USACE cancellation of application for coverage under nationwide § 404 permit based on applicant's

inaction and issuance of cease and desist order for potential CWA/RHA violations were not final agency actions under the APA:

Inn of Daphne, Inc., v. The United States of America, 1998 U.S. Dist. LEXIS 13991 (S.D. Al. Aug. 26, 1998).

Plaintiffs brought an action seeking declaratory judgement that plaintiff was entitled to build a boat ramp that extended off plaintiffs' property under nationwide permit 36 and that the U.S. Army Corps of Engineers' (USACE) denial of permission to repair a failed retaining wall under nationwide permit 3 was arbitrary and capricious. The United States moved for judgement on the pleadings, arguing that the USACE had not taken final agency action.

Due to concern about prehistoric artifacts possibly being on plaintiffs' property, USACE had denied plaintiffs permission to rebuild the failed retaining wall under nationwide permit 3 unless plaintiffs obtained an archeological survey of the property acceptable to defendant and the State Historical Preservation Officer. Plaintiff failed to obtain such a survey and the USACE ultimately canceled the application for coverage under the nationwide permit based on plaintiffs' failure to respond to the request for the survey.

The central issue was whether the USACE's cancellation of the plaintiffs' application for coverage under nationwide permit 3 constituted final agency action. The court held that it did not. The court cited the provisions of 5 U.S.C. § 704 and several case decisions, including Bennett v. Spear, 520 U.S. 154 (1997), in finding that in no way could cancellation of plaintiffs' application for coverage under the nationwide permit "be considered 'consummation of the [Corps'] decisionmaking process'," since the decision to cancel the application was not based on the merits, but on plaintiffs' inaction, and plaintiffs still could have applied for an individual permit. In addition, the court found that no action by USACE carried any legal consequence, since plaintiffs had other legal options for permit coverage and the cease and desist order merely informed plaintiffs that USACE believed that jurisdiction existed. The court concluded that as of the date the complaint was filed, the USACE had neither "granted nor denied plaintiffs permission to repair the failed retaining wall, nor had they taken legal action to require the plaintiffs to abate the potential violations of the RHA and/or CWA via construction of a boat ramp into D'Olive Creek." Having found no final agency action, the court dismissed the action for lack of subject matter jurisdiction.

17. District court finds inadequate subject matter jurisdiction where plaintiff challenged USACE's authority to require a dredge and fill permit based on the fact that USACE had delegated authority to issue such permits to the State of Michigan:

Charfoos and Co. v. West, 1998 U.S. Dist. LEXIS 7112 (E.D. Mich. 1998).

Plaintiff Charfoos and Co., obtained a state permit to fill 43 acres of wetlands and sought a federal permit to do the same, while simultaneously challenging the U.S. Corps of Engineers (USACE) jurisdiction to require the federal permit. Plaintiffs asserted that the subject wetlands were not navigable waters and were not adjacent to navigable waters, and therefore were subject only to the State of Michigan's permit authority. The USACE had delegated authority to issue wetland permits to Michigan, with the exception of waters used or susceptible to use in interstate commerce and adjacent wetlands. The State program operated pursuant to an MOA, which listed those waters for which permitting authority was not delegated, and provided for joint permitting of activities in such waters. The defendant USACE challenged the courts subject matter jurisdiction to hear the case, arguing that the court could not entertain a challenge to the USACE's jurisdiction over a specific wetland.

In deciding this case, the court followed Southern Ohio Coal v. Office of Surface Mining Reclamation and Enforcement, 20 F.3d 1418 (6th Cir. 1994) (district court lacked jurisdiction to review pre-enforcement action by EPA where delegated state issued discharge permit for untreated mine water and EPA threatened to issue compliance order if discharge was not stopped). **The court observed that the holding of *Southern Ohio* applied not only to orders issued once a violation had been identified, but also to the investigatory work necessary to discover a violation, and to challenges to the jurisdiction of the oversight agency to issue pre-enforcement orders. The court observed that such a challenge, which the court viewed as analogous to plaintiff's challenge here, was improper at this time.** The court also rejected plaintiffs claims that final agency action had occurred, and found that judicial review was not available under the APA because under *Southern Ohio* the Sixth Circuit had held that the CWA precluded review of pre-enforcement actions. The court also rejected plaintiff's arguments that they were only seeking to enforce their contractual rights under the MOA. Finally, the court rejected plaintiffs claim that under Leedom v Kyne, 358 U.S. 184 (1958), the court could review agency actions that were "'in excess of its delegated powers and contrary to a specific [statutory] prohibition."' The court found that *Leedom* was inapplicable here because the USACE had not acted in a manner clearly "'outside of it delineated authority."'

18. District court upholds USACE's decision to allow coverage under nationwide permits where USACE engaged in reasoned decision making and plaintiff failed to offer contradictory evidence other than expert testimony:

Mylith Park Lot Owners Assoc. v. U.S. Environmental Protection Agency, 1998 U.S. Dist. LEXIS 3227 (Mar. 17, 1998).

Plaintiff Mylith Park Lot Owners Association sought judicial review under the APA of the U.S. Army Corps of Engineers' (USACE) decision to authorize construction of a berm and sewer line for a housing development pursuant to nationwide permits 12 and 26, rather than subject to individual permits as authorized under 33 U.S.C. § 1344. In a prior decision issued on November 14, 1997, Magistrate Judge Bobrick of this court issued a report and recommendations that defendant's motion for summary judgment be granted and plaintiff's motion for summary judgment be denied. Plaintiffs sought an extension to file objections to these recommendations, but never filed those objections. In this action, the district court reviewed the November 14, 1997 recommendations to determine whether they were arbitrary and capricious or the result of an abuse of discretion, in violation of the APA.

Plaintiffs argued that the USACE's issuance of general permit coverage for the berm and sewer line was arbitrary and capricious because USACE had not engaged in a meaningful evaluation of the data and scientific evidence, had relied on inaccurate or unscientific environmental evaluations, had disregarded the opinions of plaintiff's expert, did not consider local impacts on wildlife, and had ignored the amount of wetlands that would be impacted by the project. **The court first held, based on plaintiff's failure to file objections to the November 14, 1997 recommendations, that plaintiffs had waived their right to appeal those recommendations. The court then held that the November 14, 1997 recommendations contained no error of law and that the findings of fact upon which the recommendations were based had adequate support in the record. The court, therefore, granted defendant's motion for summary judgement.**

The court stated that plaintiffs had provided little, if any, evidence that challenged the validity of the scientific data used by the USACE to formulate its decision. The court noted that USACE required the permittee to notify USACE prior to filling any wetlands so that it could conduct a review of whether an individual permit was warranted, and that the USACE concluded that the project would

"not cause more than a minimal adverse impact on the wetlands." The court also pointed out that based on the highly deferential standard of review applied to the USACE's decision, plaintiff's expert's opinion, for which little or no foundation and basis had been provided, was irrelevant as a matter of law. The court further observed that the record demonstrated that USACE had considered potential impacts on local plant life as well as threatened and endangered species, and had considered the berms potential effect on the wetland, as well as on flooding and groundwater. Given how USACE had proceeded and the fact that the project would only adversely affect 0.9 acres of wetland, the court found that USACE's decision was "not arbitrary and capricious nor the result of an abuse of discretion."

19. Court of Claims holds that under ripeness doctrine plaintiff's takings claim accrued for purposes of applying the statute of limitations when permit application was denied on the merits and in such manner as to suggest further efforts would be futile:

Cristina Investment Corp. v. United States, 40 Fed Cl. 571 (1998).

Plaintiffs Cristina Investment Corp., and Cris Realms Inc., brought a claim on February 21, 1995, against the U.S. Army Corps of Engineers (USACE) asserting that USACE's selection of an alignment for a government levee proscribed the development of plaintiff's wetland property and constituted a taking of such property, which should have been compensated in the amount of $ 2,156,000. On September 21, 1979, USACE had denied a separate § 404 permit application (that of Bayou des Familles Development Corp., or BDF) for a private levee in a different alignment that would have allowed plaintiffs development.

Defendant argued that all events fixing liability had occurred by September 21, 1979, and, therefore, plaintiff's claim was barred by the six-year statute of limitation (28 U.S.C. § 2501). Plaintiffs argued that, notwithstanding the USACE's denial of BDF's permit application on September 21, 1979, legal challenges to the denial of the BDF permit and local political debate suggested the possibility that either BDF or USACE would locate a levee such that plaintiffs development could proceed. Plaintiffs argued by analogy to the *Dickinson* stabilization principle, which provides that a takings claim that arises from a continuing physical process does not accrue until the physical process has stabilized, (See, U.S. v. Dickinson, 331 U.S. 745, 749 (1947)). Under this principle plaintiff maintained that their claim did not accrue until the political process affecting location of the levee had stabilized, which was in either 1989 or 1990. The court observed that the *Dickinson* principle only applied to takings that involved a continuous physical process and, therefore, it was not the correct analytical framework within which to consider plaintiffs' claims. Rather, the court stated that the ripeness doctrine was appropriate framework within which to consider plaintiffs' claims.

Under the ripeness doctrine, the court observed that a government denial of a permit would be considered final, and any related takings would accrue, if the property owner had made a proper permit application and such application was denied on the merits and in such a way as to suggest that reapplication for a modified plan would be futile. Applying these criteria to the claims presented by plaintiff Cristina Investment Corp., the court found that the USACE's September 21, 1979 denial of BDF's permit application was final because USACE's decision had addressed the merits of BDF's proposal and had rejected it on ecological grounds, including the "unchanging fact that the wetlands at issue here were within a protected [national park] zone." Based on this, the court found that plaintiff's claim accrued as of September 21, 1979 and held that plaintiff's claim was barred by the six-year statute of limitation. The court denied plaintiff Cris Realms claim based on the fact that it did not own the property in question as of the date of the government's final action.

G. Citizen Suits

1. Jurisdiction

a. District court holds that EPA has no mandatory duty to oppose a State's CAFO environmental strategy that may not be fully consistent with CWA requirements where application of the strategy has not been shown to result in a violation of CWA standards or orders, nor has the strategy been shown to effectuate a change in water quality standards:

Cross Timbers Concerned Citizens v. Jane Saginaw, Regional Administrator, U.S. EPA, Region IV; and Paul Johnson, Chief, U.S. Department of Agriculture, 1997 U.S. Dist. Lexis 20346 (N.D. Texas, December 16, 1997).

Plaintiffs sought relief against the U.S. EPA and U.S. Department of Agriculture, Natural Resource Conservation Service (NRCS), for allegedly failing to take action regarding a Texas strategy developed by the Tarleton Institute for Applied Environmental Research (TIAER) that addressed concentrated animal feeding operations (CAFOs) as non-point source discharges. Plaintiffs alleged that the strategy violated the CWA, and that EPA both failed to act regarding the strategy and condoned it by providing grants to support the strategy. Defendants argued that the court had no jurisdiction to hear the claims brought against EPA or NRCS under the Clean Water Act.

Plaintiff asserted jurisdiction under the citizen suit provisions of the CWA (33 U.S.C. § 1365(a)), as well as under the APA (review of final agency action to determine whether it was arbitrary and capricious). Under the citizen suit provisions of the CWA, plaintiffs argued that EPA had a mandatory duty to oppose the State's environmental strategy which did not comply with the standard or permit that EPA had already required under the CWA. The court disagreed. **The court found that plaintiffs lacked jurisdiction under § 1365(a)(1) because the plaintiffs: 1) had not asserted any violation of an effluent standard or limitation or of an order of EPA or a state, as required by § 1365(a)(1), and 2) because § 1365(a)(1) could not be read as providing a basis for a citizen suit against the EPA as adminstrator of the CWA because to do so would render § 1365(a)(2) meaningless. (See, Bennet v. Spear, 520 U.S. 154 (1997)). The court also found that plaintiffs lacked jurisdiction under § 1365(a)(2) because EPA was under no mandatory duty to act regarding the strategy document.** The court stated that EPA had fulfilled its duty under 33 U.S.C. § 1311(e) by having promulgated effluent limitations for feedlots (see, 40 C.F.R. § 412) and having applied those guidelines to CAFOs in Texas through a general CAFO permit issued in 1993. The court also examined whether any duty was imposed under 33 U.S.C. § 1313, and found that plaintiff had neither argued that the strategy document constituted a change in state water quality standards, nor had plaintiffs taken the requisite actions to trigger EPA's duty to act on such changes, if indeed any changes had occurred. Thus, the court held that plaintiff's claim was not ripe for review. The court observed that adjudication of these claims should be deferred until EPA had the opportunity to accomplish its duties and the plaintiff had the opportunity to clarify and finalize its case if EPA failed. The court also noted that this suit appeared to be an action for enforcement, and that under well established Fifth Circuit law, "enforcement decisions are strictly discretionary with the EPA."

With regard to plaintiff's APA argument, the court held that it may not review the agency action in question for arbitrariness or capriciousness because it did not constitute a "final agency action" as required under the APA.

b. District court holds USACE is not a proper defendant for an action under CWA §505(a)(1):

Stewart v. Potts, U.S. Army Corps of Engineers, 1997 U.S. Dist. LEXIS 17388 (S.D. Tex. Oct. 30 1997).

Plaintiffs S. Stewart, the Houston Audubon Society, and the Sierra Club, brought suit against the District Engineer for the U.S. Army Corps of Engineers (USACE), the Secretary of the Army (collectively federal defendants), and the City and Mayor of Lake Jackson. The suit sought relief under the Administrative Procedure Act (APA), the Clean Water Act (CWA) and the Declaratory Judgment Act (DJA) for violations of National Environmental Policy Act (NEPA) and the CWA. The claims were based on the USACE's issuance of a CWA § 404 permit to the City of Lake Jackson. Plaintiff's alleged that in considering the permit application and issuing the § 404 permit, the USACE improperly eliminated a substantial area within the proposed golf course site from classification and consideration as wetlands.

The federal defendants filed a partial motion to dismiss the claims that arose under the CWA. Defendants argued that under CWA § 505(a)(1), the CWA citizen suit provisions authorized suit against regulated parties, but not against the USACE or EPA. **The court agreed, and held that plaintiffs could not maintain a suit against the USACE under § 505(a)(1) of the CWA for an alleged violation of USACE's duty to administer the § 404 permit program.** The court observed that the USACE was not a proper defendant to an action under 505(a)(1). (See, Bennett v. Spear, 520, U.S., 154, 117S. Ct. 1154, 137 L. Ed. 2d 281 (1997) (where a provision of the ESA analogous to the citizen suit provision of the CWA was held to only allow civil actions against regulated parties)). The court granted the federal defendant's motion to dismiss the CWA claims.

The federal defendants also argued that plaintiffs could not bring their claims under the federal mandamus provision, 28 U.S.C. § 1361, and, again, the court agreed. The court found that the mandamus provisions applied "only where government officials clearly have failed to perform non-discretionary duties." The court observed that although the USACE's decision regarding permit issuance must follow proper procedures, that decision was entitled to deference. Thus, the court held that defendants owed no duty to the plaintiffs that would have provided for review of the plaintiff's claims under the Mandamus Act. These claims were also dismissed.

Although the court dismissed plaintiff's claims under the Clean Water and Mandamus Acts, the court found that plaintiff's claims under the APA could properly be brought. The court instructed the parties to file summary judgment motions addressing plaintiff's APA claims.

The City of Lake Jackson filed a motion to dismiss the complaint in its entirety. The City argued that plaintiff's APA and NEPA claims against the City should have been dismissed because the City was a non-federal entity. The court agreed and dismissed these claims. With regard to the CWA claims, the City argued that plaintiff's had not alleged the City was in violation of an effluent standard or order and, again, the court agreed and found that the plaintiffs had failed to state a claim against the City for violation of the CWA (i.e., plaintiffs had failed to plead a prima facie case for violation of the CWA). Finally, with respect to plaintiff's request for a declaratory judgment stating that the City would have been in violation of the CWA if the City had attempted to build the golf course, the court found that the Declaratory Judgment Act did not expand the jurisdiction of federal courts, and since plaintiffs lacked jurisdiction under the CWA, they had no basis to seek declaratory judgment. The court dismissed these claims as well.

c. District court holds that exercise of EPA Adminstrator's authority to investigate citizen complaints and to make findings relative to these complaints is discretionary, not mandatory:

Weatherby Lake Improvement Company v. Browner, No. 96-115-CV-W-8 (W.D. Mo. Aug. 17, 1997).

Plaintiff, Weatherby Lake Improvement Company, brought a citizen suit alleging that developers either discharged pollutants into the Weatherby Lake watershed or failed to install and maintain proper erosion and sedimentation controls. In addition, plaintiff sued the EPA Adminstrator for allegedly failing to perform the nondiscretionary act of withdrawing approval of the state NPDES permitting program where it was not being administered according to the CWA requirements pursuant to 33 U.S.C. § 1251 et seq. **The court found that EPA's authority to investigate citizen complaints and to make findings of violations, which would then force EPA to withdraw state authority to administer a state NPDES program, is discretionary, not mandatory.** The court explained that plaintiff could petition EPA to commence proceedings to withdraw an approved NPDES program, or it may maintain suit against those defendants allegedly violating CWA requirements. However, plaintiff failed to state a claim against EPA upon which relief could be granted and failed to demonstrate that the court had subject matter jurisdiction over its claim against the EPA. Accordingly, the court granted defendant Browner's motion to dismiss the claims against EPA.

d. District court holds that plaintiffs' citizen suit seeking civil penalties was moot where injunctive relief had been granted and no continuing violations were alleged, since civil penalty would not redress plaintiff's injury:

Roland Dubois v. U.S. Department of Agriculture, 1998 U.S. Dist. LEXIS 15198 (D. N.H. Sept. 30, 1998).

Plaintiffs brought a citizen suit that sought injunctive relief as well as to compel defendant, Loon Mountain Recreation Corporation, to pay civil penalties resulting from violations of the Clean Water Act. The initial disposition of this case had been appealed to the First Circuit and remanded from that court with instructions for the district court to grant injunctive relief, which was in fact granted. The remaining issue before the district court was whether civil penalties should be assessed against Loon for past violations. Loon moved to dismiss in light of the fact that an injunction was already in place and that plaintiff's civil claim did not present a justiciable case.

The district court examined the issues of standing and mootness in the context of Steel Co. v. Citizens for a Better Env't, 140 L.Ed. 2d 210, 118 S. Ct. 1003 (1998), which held that a plaintiff seeking declarative and injunctive relief for past violations of EPCRA lacked standing since such remedies would not redress any legitimate Article III injury. Here, the court found that the holding of *Steel Co.*, was equally applicable to citizen suits seeking civil penalties under the CWA since both require such penalties to be paid to the U.S. Treasury. Plaintiffs argued that this case could be distinguished because they had alleged continuing violations. The court stated that even if *Steel Co.*, could be distinguished, plaintiffs claims became moot when the court issued its injunction against further violations. The court observed that since plaintiffs had not alleged any violations of the terms of the injunction, nor offered evidence of any continuing violations, an award of civil penalties would not deter further violations. **The court observed that since the CWA requires that civil penalties be paid to the federal government, plaintiffs "deriving comfort and joy from the fact that the U.S. Treasury is not cheated, [did] not redress a cognizable injury under Article III.**" Thus, the district court held that plaintiff's claim for civil penalties was moot, regardless of whether they had standing to seek such penalties when the suit was brought. The court granted Loon's partial motion to dismiss for lack of subject matter jurisdiction.

2. Standing

a. Fifth Circuit holds that, in determining whether non-profit corporation has members that could assert standing for purposes of establishing organization's associational standing, formal membership is

not controlling where there is sufficient "indicia of membership":

Friends of the Earth v. Chevron Chemical, 129 F.3d 826 (5th Cir. 1997).

Plaintiffs appellants Friends of the Earth (FOE) brought a citizen suit under the Clean Water Act (CWA) against Chevron for violations of the terms of Chevron's NPDES permit. The district court dismissed the action for lack of subject matter jurisdiction, having found that FOE lacked associational standing because it had no members under corporate law. FOE's bylaws provided that its membership requirements were to be set by its board of directors, but that board had never acted to determine such requirements. FOE appealed.

The appellate court first observed that the Supreme Court in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977) established that an organization can assert associational standing to represent the interests of its members where it could show 1) one or more the organization's members would have standing on his or her own right; 2) the interests the organization seeks to protect in the lawsuit are germane to the purposes of the organization; and 3) the nature of the case does not require the participation of the individual member as plaintiffs. The appellate court then noted that the central issue in this appeal pertained to the first criterion under *Hunt*, whether FOE had members who would have been entitled to standing on their own right.

The court observed that an organization's form under state law does not affect its federal standing (see, Sierra Association for the Environment v. Federal Energy Regulatory Commission, 744 F.2d 661 (9th Cir. 1984)). **Rather, the court followed *Hunt* and decisions from other circuits in applying a functional approach that focused on using an "indicia of membership" test to determine whether FOE had members whose interests FOE could represent in court.** In applying this test, the court observed that the purported members of FOE elected its governing body, financed its operations, had voluntarily associated themselves with FOE, and had consistently asserted they were members of FOE. In addition, the court observed that the suit was within FOE's central purpose, and, thus, within the "scope of reasons that individuals joined the organization." Based on these facts, the court concluded that FOE had associational standing to represent its members. The court reversed the district court decision and remanded the case for reconsideration.

The dissent argued that the majority unnecessarily extended the standards for associational standing to non-profit corporations by improperly expanding *Hunt*, a case that involved a State agency, to cover non-profit corporations, and by selectively citing other authority. The dissent also asserted that FOE had clear procedures to establish its membership under the laws of the District of Columbia, and failed to do so. In reaching its decision, the dissent argued that the majority had effectively relieved FOE of some of its Article III standing burden.

b. Tenth Circuit holds that plaintiff lacks standing to challenge endangered species consultation requirements within EPA's authorization of Oklahoma's NPDES program because such requirements only apply to sensitive waters and plaintiff failed to allege members discharge to or intend to discharge to such waters:

American Forest & Paper Ass'n v. U.S. EPA, 154 F.3d 1155 (10th Cir. 1998).

Plaintiff American Forest & Paper Association challenged EPA's approval of the Oklahoma National Pollutant discharge Elimination System permit program, particularly those portions of the program that address endangered species consultation procedures between Oklahoma and the U.S. Fish and Wildlife Service (FWS). In applying for authorization to administer the NPDES program, Oklahoma agreed to a procedure that

specified how ODEQ and FWS would work together to ensure NPDES permits for discharges to sensitive waters complied with ESA requirements. This procedure was formally adopted in an MOU, which was incorporated by reference in the final rule approving Oklahoma's NPDES program.

Plaintiffs argued that EPA acted beyond it authority by requiring Oklahoma to comply with the ESA through the consultation process that was made a condition of the State's NPDES authorization. EPA countered that plaintiffs lacked standing to bring the challenge, that the challenge was not ripe, and that the Agency had acted within the scope of its authority.

The court held that plaintiffs lacked standing to challenge approval of Oklahoma's NPDES program, including the consultation procedures, because plaintiffs had not established that any of their members held NPDES permits to discharge into sensitive waters or planned to apply for such permits. The court observed that, as an association, plaintiff would have standing to bring suit on behalf of its members if it could show that any of its members would have standing to bring suit on there own behalf. But the court found that because plaintiff failed to assert that any of its members held permits to discharge to sensitive waters in the State, or planned to seek such permits, plaintiff had failed to demonstrate sufficient "injury in fact" for purposes of establishing Article III standing. The court stated that plaintiff had failed to show that its members were "among the injured." The court acknowledged that after oral argument the Fifth Circuit held in American Forest & Paper Ass'n v. U.S. EPA, 137 F.3d 291 (5th Cir. 1998) that plaintiff had standing to challenge EPA's authorization of Louisiana's NPDES program on similar grounds as alleged here, but stated it was unclear from that opinion whether the consultation process imposed in Louisiana was limited to sensitive waters or applied to all permit applications. Thus, the court found that the Fifth Circuit decision was not necessarily inconsistent with this court's decision.

3. Enforcement Under Comparable Law as Bar to Citizen Suit

a. Eighth Circuit holds that administrative enforcement agreement between State environmental agency and polluter precludes pending citizen suit seeking civil penalties where such agreement is the result of a diligently prosecuted enforcement process:

Comfort Lake Assoc. v. Dresel Contracting, Inc., 1998 U.S. App. LEXIS 3733 (8th Cir. Mar. 5 1998).

Plaintiffs Comfort Lake Association, Inc., brought a citizen suit under the CWA seeking injunctive relief, civil penalties, and costs and attorney's fees against defendants Dresel Contracting Inc., and Fain Companies for alleged violations of the storm water regulations imposed under the CWA. Defendants were granted an NPDES permit in the Fall of 1994 to address storm water discharges related to construction of a Wal-Mart, and did not fully comply with the sedimentation and erosion control requirements. After a warning letter the Minnesota Pollution Control Agency (MPCA) followed by several inspections and issuance of two notices of violation, defendants brought the site into full compliance on May 19, 1995. The NPDES permit was terminated in April, 1996. However, in May, 1996, MPCA issued a negotiated stipulation agreement that imposed $12,203 in civil penalties for all alleged permit violations known as of the effective date of the agreement.

Following the first warning letter from MPCA, plaintiffs had submitted a notice of intent to file a citizen suit under CWA § 1365. The district court had granted defendant's motion for summary judgment and in a separate order denied plaintiffs an award of costs and attorneys fees. Thus, the issues presented in this case were whether MPCA's enforcement action precluded plaintiff's claims for injunctive relief and civil penalties, and whether the district court abused its discretion in denying an award to plaintiffs of costs and fees.

With regard to the preclusion issue, the court first examined injunctive relief and then civil penalties. The court observed that MPCA's determination that there was no further likelihood that violations would recur because construction was complete and the permit terminated was entitled to deference. The court agreed with the Second Circuit that the claim for injunctive relief was moot unless plaintiffs could prove there was a realistic prospect that the violation alleged would continue notwithstanding the permit termination and stipulation agreement." (See, Atlantic States Legal Found, Inc. v. Eastman Kodak Co., 933 F.2d 124,127 (2d Cir. 1991). The court concluded that plaintiffs had not provided evidence to contradict the stipulation agreement.

As for civil penalties, the court held that MPCA's enforcement action did preclude plaintiff's effort to obtain more severe penalties. The court stated that although the stipulation agreement was not a res judicata or collateral estoppel bar like a judicially approved consent agreement, it did constitute a final agency enforcement action that resulted from diligent prosecution. The court found such a result consistent with the supplementary role of citizen suits as enforcement actions, and indicated that a contrary result would discourage such informal agreements as reached here. Finally, the court concluded that since plaintiffs citizen suit had not been a catalyst to the State's enforcement action, no costs and attorneys fees were due plaintiffs.

4. Injunctive Relief

a. District court finds inadequate basis to issue permanent injunction where there is no proof of irreparable harm occurring due to violations of flow volume permit limits:

Coalition for a Livable West Side v. NYC DEP, 1998 U.S. Dist. LEXIS 1955 (S.D. NY., Feb. 20, 1998).

Plaintiffs brought a citizens suit under the CWA that alleged the New York Department of Environmental Protection (DEP) had violated the CWA permits for the North River Wastewater Treatment Plant and the Wards Island Wastewater Treatment Plant by exceeding the limits on the volume of flow directed to these plants. Plaintiffs requested that the court enjoin DEP from making additional hook-ups to sewage service for Wards Island and North River until the plants have adequate capacity to manage the increased flow, and requested the appointment of an expert to monitor operations at these plants. DEP moved for summary judgment, asserting that the flow limits were not subject to enforcement under § 505 of the CWA. Previously, the New York State Department of Environmental Conservation (DEC) had brought administrative enforcement actions against DEP regarding both plants that resulted in consent agreements. In prior decisions, the district court held that the these consent orders did not bar or render moot the citizens suit and had granted plaintiff summary judgment as to liability.

The two central issues presented here were whether the flow limits exceeded the requirements of the CWA and therefore were not enforceable pursuant to the Act's citizen suit provisions; and whether an injunction was justified. **On the first issue, the court found that the flow limitations in the State permits were consistent with federal requirements and, thus, were amenable to enforcement through citizen suit.** The court found that DEP's reliance on Atlantic States Legal Foundation, Inc., v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1994), was misplaced, as the permits issued in this instance did not encompass "a greater scope of coverage than that required by federal law."

With regard to plaintiffs request for permanent injunctive relief, the court found that plaintiffs had not demonstrated irreparable injury and inadequate legal remedies. The court observed that plaintiffs had not demonstrated that the permit violations threatened the integrity of the receiving waters for these plants. In addition, the court noted that the defendant had submitted affidavits demonstrating that both plants had been in compliance with their flow permit limits since 1994. The court further found no basis to appoint a special master and, thus, denied defendant's motion and dismissed plaintiffs' claims.

H. Administrative Practice

1. ALJ holds that prehearing settlement of administrative action must be reduced to writing and that only the Regional Administrator, not an EPA attorney, can bind Agency in settlement:

In the Matter of: Indoor Air Quality, 1997, No. Docket CAA - III-074.

Respondent Solomon Schechter Day School of Philadelphia, Inc., moved for an order to enforce what it claimed was an oral settlement agreement between itself and U.S. EPA. EPA opposed the motion to enforce settlement and requested that the motion and accompanying exhibits be stricken. EPA denied that its counsel had orally agreed to settle and maintained that, irregardless, such an agreement would have been unenforceable as matter of law.

The court stated that prehearing settlements of administrative actions are government by Rule 18 of the Consolidated Rules of Practice. (40 C.F.R. 22.18). **The court found that under Rule 18 any settlement must be reduced to writing and that only the Regional Administrator can formally settle a case on half of EPA.** Under Rule 18, an EPA attorney does not have the authority to bind the Agency by way of settlement. The court granted EPA's motion to strike with respect to documents that related to settlement negotiations, citing 40 C.F.R. 22.22, which provides for the exclusion of evidence "relating to settlement which would be excluded in federal courts under Rule 408 of the Federal Rule of Evidence." The court allowed in two documents that did not specifically identify the settlement positions of the parties.

I. Enforcement Actions/Liabilities/ Penalties

1. Third Circuit affirms district court's use of wrongful profits approach to calculating economic benefit factor of CWA penalty, and finds no error in considering parent companies finances to determine impact of penalty on violator:

U.S. v. Municipal Authority of Union Township, 1998 U.S. App. LEXIS 16440 (3rd Cir. July 20, 1998).

Appellant Dean Dairy, a subsidiary of Dean Food Inc., appealed the amount of civil penalties imposed for 1,754 violations of its IU permit and 79 instances of interference with Union Township's POTW, which occurred between July 1989 and April 1994. The district court had imposed a civil penalty of $ $4,031,000 for these violations. The district court used a bottom-up approach to calculating the penalty (i.e., calculating the economic benefit and adjusting that figure based on the remaining five factors in 33 U.S.C. § 1319). The district court found that had appellant's Fairmont plant reduced production sufficient to comply with its permit conditions, it was likely appellant would have lost a major customer (PennMaid), and such loss would have reduced appellant's revenues by $ 417,000 per year. This amount was then multiplied by the time period of the violation, and then doubled to provide a proper deterrent and punishment.

In this action, appellant Dean Dairy challenged the district court's analysis of two of the six factors considered in determining the civil penalty: the economic benefit of the violations to Dean Dairy, and the economic impact of the penalty upon the Dean Dairy.

Appellant first challenged the district court's the use of a "wrongful profits" approach to calculating the economic benefit that resulted from the violations. Under the wrongful profits approach, the district court examined documented revenues that appellant was able to retain through conduct that violated the CWA, but which would have been lost to appellant had appellant reduced its production volume to achieve compliance with the conditions in its IU permit. Appellants argued that the parties had stipulated that appellants had received no economic benefit from delaying the capital investment necessary to achieve compliance, that no published case had used the "wrongful profits" approach, that such an approach was inconsistent

with EPA policy, and that the government unfairly surprised appellant by the use of this approach. The court rejected each of these arguments.

After describing the reasons for considering economic benefit in determining civil penalties and noting that the maximum statutory penalty that could have been imposed was $ 45,825,000 (based on a top-down approach), the Third Circuit emphasized that the CWA does not prescribe the precise methodology that must be used in calculating civil penalties and, thus, the district court had considerable discretion in determining its approach. The court observed that the facts of this case were unique because the appellant lost money due to its noncompliance (the fees it paid to the POTW exceeded the cost of building and operating its own pretreatment system). **In such circumstances, the court found that use of the "wrongful profits" approach was neither in conflict with the CWA nor with economic principles, and that such an approach represented a method other than calculating delayed or avoided capital expenditures to remove the economic incentive for violating the CWA where a violator was neither willing to install the requisite treatment nor reduce production and forego some portion of its revenue.** With regard to the remaining arguments, the court found that EPA guidelines were not applicable to calculating civil penalties at hearing or trial, and that such guidelines did indeed recognize use of the wrongful profits approach in specific situations. The court also found that the government had provided sufficient notice with regard to the wrongful profits approach throughout the trial and had reserved its right to demonstrate appellants economic benefit from actions other than having delayed the capital expenditures needed to come into compliance.

Regarding consideration of the finances of appellant's parent company, Dean Foods, Dean Dairy argued that Dean Foods was not a party to this action and had exercised insufficient control to justify piercing the corporate veil. The court rejected this argument and stated that only Dean Dairy was penalized in this action. The court explained that Dean Foods was only considered with respect to ensuring that appellant Dean Dairy had the ability pay the penalty imposed. The court found that such consideration was appropriate, particularly where, as here, Dean Dairy did not retain its revenues but transferred them to Dean Foods. The court affirmed the order of the district court.

2. Seventh Circuit holds stipulated daily penalty in consent decree was properly enforced:

U.S. v. Krillich, 126 F.3d 1035 (7th Cir. 1997).

Defendant Krillich appealed a $1.3 million judgment imposed against him for failing to fulfill the conditions of a consent decree, which required the defendant to create a 3.1 acre wetland mitigation site at a development site. The consent decree contained a schedule with interim dates and a date for completing the planting of the mitigation area of May 15, 1993. The decree also included a force majeure provision and specified that any changes were to be in writing.

Krillich claimed that too much rain in June, 1993 prevented him from being able to complete the required grading and excavation, and that too little runoff from the development resulted in the failure of the mitigation site to take on the characteristics of a wetland. Krillich attempted on several occasions to obtain extensions of the deadlines in the consent decree, but when EPA rejected such requests, never petitioned the court as the terms of the consent decree allowed. The issue on appeal was whether the district court properly ordered Krillich to pay the $2,500 daily stipulated penalty.

Krillich argued that the government, through its conduct, modified the consent decree; for enforcement purposes, consent decrees are interpreted as contracts and that under Illinois law he was protected by the doctrine of impossibility and frustration; and the government should be equitably estopped from enforcing the penalty provisions. The court rejected all of these arguments. The court observed that correspondence between Krillich, EPA, and DOJ

clearly established that the government expected Krillich to comply with the terms of the agreement. The court observed that with regard to a new plan offered by Krillich, such correspondence even discussed potential alternatives to the daily penalty provisions. The court specifically noted that despite the clear and consistent nature of the government's position, Krillich had not petitioned the court for resolution of the conflict. With regard to the theory of impossibility and frustration, the court observed that these contract law provisions were akin to the force majeure provisions in the consent decree. The court declined to allow Krillich to rely on impossibility and frustration when Krillich had not been able to establish that he deserved relief under the force majeure conditions of the decree. Finally, the court found that, given the difficulty of proving estoppel against the government, the fact that EPA worked extensively with Krillich in an attempt to complete the job, and the fact that the government was very clear that the deadlines in the consent agreement were unchanged, "estoppel is out of the question."

The court held that the stipulated daily penalty was properly enforced but, upon the governments request, recalculated the penalty to cover one month less noncompliance (for a final penalty of $1,257,500).

3. Tenth Circuit holds that injunctive relief is not a penalty for purposes of 28 U.S.C. § 2462 and that the concurrent remedy rule does not bar the government's claim for equitable relief:

U.S. v. Telluride Co., No. 97-1236 (10th Cir. June 25, 1998).

The United States appealed the district court's grant of partial summary judgement to appellees Telluride Co., Mountain Village Inc., and Telluride Ski Area, Inc., (Telco) that dismissed the government's claims for violations of the CWA that occurred prior to October 15, 1988 based on the five-year statute of limitations (28 U.S.C. § 2462). The government had claimed that Telco had illegally filled 45 acres of wetlands between 1981 and 1989. Based on these alleged violations, the government had sought both civil penalties and injunctive relief. The injunctive relief sought to enjoin the further discharge of material, restore damaged wetlands, and require the replacement of wetlands where damaged wetlands could not be restored. The district court applied the concurrent remedy rule (i.e., when legal and equitable relief are available concurrently, and the applicable statute of limitations bars application of the legal remedy, a court must withhold the equitable remedy as well) to hold that § 2462 barred the government's claim for injunctive relief. The issues on appeal were: 1) whether § 2462 should have been held to bar equitable relief where, by its terms, it applies to "any civil fine, penalty or forfeiture," and 2) whether the district court erred in having applied the concurrent remedy rule to bar the government's equitable claims.

With regard to whether the relevant statute of limitations applied to equitable relief, the court first stated that it was appropriate to interpret § 2462 narrowly against the government because in the absence of a clear congressional expression to limit the time within which the government may act in its governmental capacity, no time limitation applies. (See, E.I. DuPont de Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924)). Moreover, the court noted that ' "statutes of limitation sought to be applied to bar the rights of the government, must receive a strict construction in favor of the government."' Id. The court then considered arguments regarding whether the language of § 2462 (... "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claims first accrued...") made that provision applicable to non-monetary penalties, such as injunctions. The court concluded that it did, reasoning that the term "otherwise" modified the term "penalty." **However, the court then found that an injunction as sought here did not constitute a penalty because the injunction sought only to restore the wetlands that had**

been damaged to the status quo or to create new wetlands where restoration was not possible. The court characterized such a remedy as restorative in nature.

On the second issue, the court found that the district court had erred in applying the concurrent remedy rule to bar the government's equitable claims. The court observed that in making its decision the district court had relied on U.S. v. Windward Properties, Inc., 821 F.Supp. 690 (N.D. Ga. 1993), which had applied the concurrent remedy rule to bar the government's claims for legal and equitable relief, but that the Eleventh Circuit had abrogated the *Windward* decision in U.S. v. Banks, 115 F.3d 916, 919 (11th Cir. 1997). The court observed that the *Banks* decision rejected application of the concurrent remedy rule to the government "when it seeks equitable relief in its enforcement capacity under the traditional principles of construction discussed above." The court stated, "for the same reasons applied in Banks, we conclude the concurrent remedy rule does not bar the government's claim for equitable relief."

4. District court holds that, in the absence of permit language subjecting the permittee to statutory changes, the permit's penalty language must control in assessing civil penalties:

U.S. v. ConAgra, Inc., 1997 U.S. Dist. LEXIS 21401 (D. Id. Dec. 31, 1997). See case summary on page 3.

5. District court uses "bottom-up" method to calculate civil penalty of $12,600,000 for violations of CWA:

U.S. v. Smithfield Foods, Inc., 972 F. Supp. 338 (E.D. Va. 1997).

On May 30, 1997, the court granted partial summary judgment on counts I through V to the United States for defendant Smithfield's violations of the CWA. On July 18, 1997, the court granted partial summary judgment on counts VI and VII to the United States. The court previously found that defendant was liable for 164 days of violation for count V, late reporting. In this matter, the court sought to determine 1) the days of violation for counts I-IV and VII; 2) defendant's maximum liability for the violations; and 3) the appropriate civil penalty.

In calculating the days of violation, the court first observed that it would count each violation of a monthly average or loading limit as a violation of every day of the month in which the violation occurred. In addition, the court observed that where multiple violations of the permit occurred on the same day, the court would deem each violation to constitute separate day of violation. The court noted that § 309(d) of the CWA provides for a "civil penalty not to exceed 25,000 per day *for each violation*" (emphasis added), which the court observed was not the same as a maximum penalty of $25,000 per day. Based on the testimony of an EPA Environmental Scientist and the defendant's DMRs, the court found the following days of violation of defendant's permit limits: 5112 days for phosphorus; 459 for ammonia; 200 for kjeldahl nitrogen (TKN); 72 for fecal coliform; 63 for total suspended solids; 4 for pH; 4 for cyanide; 4 for chlorine; and 1 for oil and grease. The court found a total of 5919 days of violation of effluent limits in the permit.

With respect to count VII, recordkeeping violations, the court observed that defendants' records up to December 1993 were destroyed by an employee, and thus, defendant did not have adequate records until December 31, 1996. The court found that the defendant was in violation of the CWA recordkeeping requirements for 884 days. The defendant argued that the destruction of the records should only have constituted a single day of violation, but, given the strict liability nature of the CWA, and the need to create an incentive to comply with the recordkeeping requirements rather than to destroy relevant records, the court declined to treat 884 days of missing records as a single day of violation. Overall, the court found that there were a total of 6,982 days of violation (this total included

violations discussed above and 15 days stipulated to by the defendant for violation of submission of false discharge monitoring reports), and a total maximum statutory penalty of $174,550,000.

The court then considered the §309(d) factors to establish the appropriate civil penalty. Key factors in the courts reasoning were the fact that defendants' effluent limit violations (5919 days of violation) were frequent and severe and had a significant impact on the environment and the public; its late reporting violations (15 days of violation) were moderately serious and could have been prevented but were not made in bad faith; defendants' submission of inaccurate DMRs (15 days of violation) was extremely serious and could have been prevented through the use of safeguards; and defendant's destruction of and failure to maintain records (884 days of violation) were extremely serious and also could have been prevented through the use of safeguards. The court did note that defendants made some efforts to eliminate their discharges by connecting to the local treatment works, believed their discharges were permissible pursuant to a State order, provided altered records to Virginia DEQ, and directed its employees to comply with CWA requirements.

The court used a "bottom-up" method of calculating the economic penalty, starting with the defendants' economic benefit of non-compliance ($4.2 million), and adjusting upward from there based on the § 309(d) factors. Accordingly, the court found the appropriate civil penalty to was $12,600,000.

6. District court holds that civil penalties recovered as a result of enforcement actions brought by the government under the CWA must be paid into the U.S. Treasury:

U.S. v. Smithfield Foods, Inc., 1997 U.S. Dist. LEXIS 18934 (E.D. Va. Nov. 26, 1997).

On August 8, 1997, the District Court for the Eastern District of Virginia entered a judgment against the defendants for $12,600,000 in civil penalties. The court order the plaintiff to submit a proposal for the allocation of all or part of the penalty to the restoration of the Chesapeake Bay and its tributaries, specifically the James and Pagan Rivers. The government's response indicated that according the CWA, caselaw, congressional intent, and public policy, Smithfield had to pay the full $12,600,000 into the U.S. Treasury.

The court observed that the CWA does not specify where civil penalties are to be paid, but noted that the Miscellaneous Receipt Act (31 U.S.C. § 3302(c)(1)) required ''that 'a person having custody of possession of public money' must deposit the money with the Treasury within a certain time limit." The court then stated that is was its belief that a penalty, imposed pursuant to a federal statute, in an action brought by the federal government, constituted public money, and, as such, it had to be deposited in the U.S. Treasury.

The court observed that with respect to citizen suits, it was clear that Congress intended penalties to be paid into the Treasury. See S Rep. 92-414, at 133 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3745. The court found only one case that examined the issue in the context of suits brought by the government. This case held that "once an assessment was labeled as a civil penalty, the money must be paid to the treasury." U.S. v. Roll Coater, Inc., 1991 U.S. Dist. LEXIS 8790 (S.D. Ind. 1991). The court also observed that recent bills to amend the CWA would have provided authority to direct penalties towards "beneficial uses," but no such bills had yet become law.

Although the court observed that depositing the penalties into the treasury did not, from a policy perspective, seem to be the most effective means of redressing environmental problems, the court ordered that the full penalty be paid into the U.S. Treasury.

7. District court imposes a civil penalty of $1,500,000 for discharging pollutants without a NPDES permit over a 12-year period where the violation was both serious and

prolonged but the defendants' ability to pay justified some mitigation of the penalty:

U.S. v. Gulf Park Water Co., 1998 U.S. Dist. LEXIS 12802 (S.D. Miss., Mar. 11, 1998).

In a prior decision, defendants Gulf Park Water Co., Johnson Properties, Inc., Glenn K. Johnson and Michael Johnson, were found liable for discharging pollutants from their wastewater treatment facility into waters of the U.S. without a NPDES permit. In this action, the court determined the amount of civil penalties.

The court observed that defendants were in violation of the CWA permitting requirements for 12 years (since 1985), having failed to connect their wastewater treatment facility in Ocean Springs, Mississippi, to the central POTW. The court observed that in 1985 the Chancery Court of Jackson County, Mississippi ordered defendants to cease these discharges and find a lawful alternative method of managing their wastewater. The district court found that, based on the five-year statute of limitations, defendants had committed at least 1,825 violations of the CWA. The court noted the maximum penalty per violation was $ 25,000 per day for violations that occurred through January 30, 1997, and $ 27,500 per violations for violations that occurred after January 30, 1997.

Noting the split of authority regarding the methodology for calculating civil penalties, the court followed U.S. v. Marine Shale Processors, 81 F.3d 11329 (5th Cir. 1996) and chose to employ a top-down method for calculating the penalty. The court then reviewed the six statutory factors pertinent to calculating civil penalties under the CWA. **With regard to the seriousness of the violation, the court found that the violations were serious solely by virtue of their 12 year duration.** The court stated that defendants knew that a permit was required and simply ignored that requirement. **The court rejected the argument that the violations were any less serious because their were other sources of pollution on the Gulf Coast, and stated that the U.S. "is not required to establish that environmental harm resulted from the defendants' discharges, in order for this Court to find the discharges 'serious'."** The court found that the defendants' discharges constituted both an actual and potential threat to public health and the environment. The court declined to mitigate the civil penalty based on a lack of actual harm.

With regard to economic benefit, the court considered the testimony of plaintiff's expert, that the defendants enjoyed approximately $1.2 million benefit based on delayed and avoided costs, and the court adjusted this estimate for incorrect assumptions. The court concluded that $600,000 was a reasonable estimate of economic benefit. The court then considered defendants' history of violations and observed that defendants remained in violation for a prolonged period, and continued to act in violation even after the complaint in this action had been filed. In fact, the court observed that only an action seeking an order of contempt prompted defendants to start the process of coming into compliance. With regard to good faith efforts to comply with the CWA, the court found that although defendants were recalcitrant, there were some mitigating circumstances that warranted consideration and justified slight mitigation. In assessing the economic impact of any penalty on the defendants, the court considered plaintiff's expert's estimate that defendants could pay a penalty of $ 5,300,000 based on assets that could be sold, versus defendants' expert's testimony that defendants could not pay any penalty based on defendant's tenuous financial condition. A special master was appointed and ultimately concluded that defendants could pay a penalty in excess of $1,000,000, which the court recognized was a significant reduction in the potential penalty. The court concluded that defendants must pay a civil penalty of $ 1,500,000 for their CWA violations.

8. EAB upholds ALJ penalty assessment on grounds that failure to challenge a State-issued permit in a timely manner precludes raising objections years later in an enforcement proceeding:

In re: General Motors Corporation, 1997 CWA LEXIS 13 (Dec. 24, 1997).

On June 16, 1988, the Michigan Department of Natural Resources (MDNR) issued General Motors (GM) a storm water discharge permit containing numerical discharge limits for copper, lead, and zinc. The permit provided for an appeal to the Michigan Water Resources Commission (MWRC) within 60 days of permit issuance. GM never filed an administrative challenge to the permit. The permit also stated that a permit renewal request must be submitted by April 1, 1990. GM did not submit its renewal application until May 18, 1990.

It was undisputed that discharges from the GM facility outfall exceeded the permit's limitations for copper, lead, and zinc. In May and December of 1991, prior to filing a complaint, EPA Region V issued two notices of violation and orders for compliance requiring certain actions be taken. After the Region filed its complaint in March 1993, GM made three requests to MDNR to terminate the permit. The first two requests were denied, and the third request was granted on December 20, 1994, after GM had completed appropriate actions to come into compliance.

GM raised three issues in this appeal: 1) whether the permit was void ab initio because the State of Michigan lacked the authority to issue the permit; 2) whether, in this case, copper, lead, and zinc, could be considered "pollutants" under CWA; and 3) whether the permit expired by operation of law in 1990 because GM did not file a timely request for renewal.

The EAB held that because GM failed to exhaust its administrative remedies under state law, GM could not raise objections to the permit five years later in an enforcement proceeding. The EAB found that whatever the merits of GM's argument as to Michigan's alleged lack of authority to issue the permit in light of the 1987 CWA amendments, those arguments could and should have been raised before the state entity that issued the permit, or to the MWRC in an administrative appeal following permit issuance in 1988. Similarly, having failed to timely challenge the inclusion of the permit limitations for copper, lead and zinc, GM could not collaterally attack their inclusion in the enforcement proceeding. In addition, the permit did not expire by operation of law in 1990 because the permit renewal was requested prior to its expiration; both GM and MDNR behaved as if the permit remained in effect; and GM failed to file a timely objection to continuation of the permit. Finally, GM did not point to any error, and the EAB found nothing erroneous, in the penalty calculation.

Accordingly, the EAB agreed with the ALJ's decision to reject the merits of GM's arguments and affirmed the civil penalty of $62,500 assessed against GM.

9. EAB holds that discharge of sludge removed from treated wastewater and returned to aeration basin to continue cycle of treatment, violated permit prohibition on discharge of sludge removed from wastewater during the course of wastewater treatment:

In re: Ketchikan Pulp Company, CWA Appeal No. 96-7 (May 15, 1998). See case summary on page 15.

10. ALJ imposes statutory maximum penalty of $125,000 where estimate of economic benefit was adjusted to exclude period barred by statute of limitations:

In the Matter of: B.J. Carney Industries, Inc., 1998 CWA LEXIS 1 (Jan. 5, 1998).

On June 9, 1997, the EAB issued a remand order to determine: 1) how much of the $167,000 economic benefit associated with the improper discharge of process wastewater accrued within the statute of limitations period; and 2) an appropriate penalty based on the factors in CWA § 309. (See, In re: B.J. Carney Industries, 1997 CWA LEXIS 1 (June 9, 1997)). The remand instructed the ALJ to subtract from the $167,000 that portion of the

benefit the accrued outside of the statute of limitations.

Complainant's expert testified that the respondent's economic benefit from the initial date of noncompliance, January 26, 1984, through the date the penalty was deemed paid, July 1, 1997, was $266,917. (Note: the same expert had calculated respondent's economic benefit of $167,000 at the initial hearing). She calculated that the economic benefit that accrued from the initial date of noncompliance through the date when the statute of limitations did not bar enforcement, October 12, 1985, was $14,689. Subtracting this amount from either the $266,917 or the $167,000 amount yielded in excess of the $125,000 statutory maximum penalty. Respondent argued that the $14,689 amount was incomplete because there was a "compounding" of that amount in the years after October 12, 1985 in complainant's analysis. The ALJ rejected this assertion, and found that respondent had failed to demonstrate any flaw in complainant's estimate. Respondent also argued that complainant's analysis did not exclude operating and maintenance costs after respondent closed the facility in 1990. The ALJ found, however, the such costs were in fact excluded. Finally, respondent argued that a different weighted cost of capital should have been used after October 1993. The ALJ found this argument immaterial, since the statutory maximum penalty had been received by October 1993.

Respondent submitted arguments regarding the gravity of the violations and other factors that mitigated the penalty assessment, however, the ALJ found that the EAB had sustained the findings of the initial hearing with regard to gravity and mitigating factors. Based on the EAB's instructions not to retry matters already decided and reviewed, the ALJ did not consider respondent's arguments on these points. The gravity portion of the penalty remained $9,000. Given respondent's reluctance to come into compliance, the ALJ also rejected arguments that justice or equitable considerations warranted a reduction in the penalty. Based on the economic benefit and gravity of the violation, the ALJ imposed the statutory maximum penalty of $125,000.

11. ALJ holds that respondent's activities following purchase of oil facility constituted a substantial continuation of activity that supported imposing successor liability:

In the Matter of: Heating Oil Partners, 1998 CWA LEXIS 8 (Sept. 21, 1998).

U.S. EPA filed a complaint and sought a partial accelerated decision that alleged that respondent committed a series of violations of the oil pollution prevention regulations. Violation of these regulations, found in 40 C.F.R. Part 112, subject the owner or operator of the facility to the assessment of civil penalties, pursuant to the CWA § 311(b)(6)(ii). Respondent acquired an oil terminal (facility) that had been in violation of the CWA prior to respondent's purchase and which continued in violation (i.e., remained essentially unchanged) for at least several months after the acquisition. EPA sought a penalty of $125,000 and a determination that respondent would be responsible for successor liability on the basis of substantial continuation of the oil business. The respondent denied liability for the violations.

The ALJ observed that although, generally, the purchaser of an asset does not acquire the liabilities of the company that sold the assets, the purchaser may acquire seller's liability if: 1) the parties agree to that effect; 2)the transaction amounts to a de facto merger; 3) the transaction is fraudulently entered into to escape liability; or 4) the purchasing company is merely a continuation of the business enterprise of the seller. The ALJ observed that federal courts have broadened the "mere continuation" exception, most notably, under CERCLA, and often consider the following factors in determining whether a corporate successor should be held potentially liable under the "substantial continuity" theory: 1) retention of the same employees; 2) retention of the same supervisory personnel; 3) retention of the same production facilities in the same location; 4) retention of the same name; 5) production of the same product; 6) continuity of assets; 7) continuity

of general business operations; and 8) whether the successor holds itself out as the continuation of the pervious enterprise. Federal courts have also found that EPA may extend liability to successor corporations for the purpose of enforcing statutes to assess civil penalties.

The ALJ found that EPA had established several elements of the "substantial continuity" theory. **Based on this, the ALJ found respondent's activity constituted a continuation of the prior company, which could be held liable for the violations alleged in the complaint that occurred during the period the facility was owned by the prior company.** Respondent's liability for alleged violations and the amount of civil penalty remained in dispute. The ALJ noted that the finding of substantial continuity was irrelevant from the standpoint of deciding the amount of the civil penalty because both the penalty estimated for all violations occurring prior to and after respondent's ownership (i.e., $234,572) and the penalty estimated for only the period of respondent's ownership (i.e., $205,772) exceeded the statutory maximum. EPA asserted that the resolution of the issue of successor liability "is important because it may affect the knowledge and culpability attributable to respondent." The ALJ observed that this assertion alone would not have been proper grounds for EPA's motion, but the fact that respondent's knowledge and culpability remained as disputed material facts made the case justiciable.

J. Criminal Cases

1. Fourth Circuit holds that to establish a criminal violation of the CWA the government must prove defendant's knowledge of facts meeting each essential element of the substantive offense:

U.S. v. Wilson, 1997 U.S. App. LEXIS 35971 (4th Cir. Dec. 23, 1997). See case summary on page 20.

K. Section 311 (Oil and Hazardous Substance Liability)

1. ALJ holds prior spill obligates facility to develop SPCC plan:

In the Matter of: Philadelphia Macaroni Co., 1998 CWA LEXIS 5 (May 28, 1998).

EPA filed a complaint that charged respondent Philadelphia Macaroni Company violated § 311(j) and 40 C.F.R. Part 112 by failing to prepare an SPCC plan within six months of installing a 10,000 gallon oil tank at its Warminster, Pennsylvania facility. The complaint, which was based on an EPA inspection conducted on January 29, 1997, sought a penalty of $33,420. Respondent asserted that it was not required to develop an SPCC plan because a discharge of oil from its facility could not reasonably have been expected to reach navigable waters. In addition, respondent argued that EPA's proposed penalty was arbitrary and excessive. A prior state inspection had indicated that respondent had discharged oil into a tributary of Pennypack Creek on January 11, 1996.

The ALJ found that pursuant to 40 C.F.R. § 122.3(b), the prior discharge of oil into a navigable water of the U.S. triggered respondent's obligation to develop an SPCC plan by April 3, 1996. The ALJ observed that EPA's inspection found that respondent had not developed an SPCC plan in a timely manner and, therefore, respondent had violated § 311(j). In addition, the ALJ found that respondent's assertion that a discharge of oil from its facility could not reasonably have been expected to reach navigable waters was contrary to a preponderance of evidence in the record. Specifically, the ALJ observed that although the enclosed tank was one-quarter mile from the nearest tributary, a sump pump was 10 feet from the tank and that pump emptied directly into the tributary. The ALJ added that the January 11 spill was discharged into the tributary through the automatic sump pump after the tank overflowed.

In calculating the penalty, the ALJ applied the statutory factors specified in § 311(b)(6)(B)(iii). The ALJ agreed with EPA that failure to submit a SPCC plan was a most serious violation, but reduced the penalty amount by 10 percent because respondent was a pasta maker not in the oil storage business, secondary containment for the tank itself had been provided, and respondent took measures to prevent a recurrence of the January 11 spill. No adjustment was made for any other factors.

II. Other Statutes

A. SDWA

1. Fourth Circuit holds that EPA order, mandating systematic groundwater sampling and providing bottled water to those with contaminated well water, constitutes a permissible exercise of EPA's emergency statutory powers:

Trinity American Corp. v. U.S. EPA, 1989 U.S. App. LEXIS 17751 (4th Cir. Aug. 4, 1998).

Petitioner Trinity American Corp., sought review of an emergency order issued pursuant to the SDWA that mandated systematic groundwater sampling and the distribution of bottled water within a three-quarter mile radius west-southwest of its property. Trinity owned and operated a polyurethane foam plant in the Glenola Community of Randolph County, North Carolina. Prior to and during Trinity's ownership, the land had been contaminated with various toxic chemicals due to the mismanagement and improper disposal of such chemicals on the property (and in part due to prior use of some of the property as a landfill).

In 1989, the State health department fined the company and forced it to remove 28,000 pounds of diesel fuel-contaminated soil. And in 1994, the State health department found that Trinity's groundwater was contaminated with dichloroethene and trichloroethene in excess of the maximum allowed by EPA. A site assessment revealed that toxic chemicals contaminated the wells that supplied drinking water to Trinity and the 3-D Upholstery Shop. In 1996, the Randolph County Health Department, issued Trinity a final notice to "cease and desist" from chronic pumping and disposal of sewage and industrial wastewater directly onto the ground. Shortly thereafter, the State health department also found several violations of North Carolina health codes due to Trinity's improper storage and disposal of sewage and industrial waste. In December 1996, Trinity entered into a consent decree with the state health department, attempting to remedy the problems found in the site assessment.

Subsequently, EPA investigated the groundwater contamination in and around the Trinity site and confirmed the contamination found in the site assessment and also found contaminated water in two other wells. On the basis of its investigation, EPA issued an emergency order in which it concluded that chlorinated solvents and petroleum hydrocarbons from the Trinity site had been detected above maximum allowable levels in private supply wells located to the west-southwest of the Trinity property. Due to the high concentrations of these contaminants, EPA found that current use of the groundwater might present an imminent and substantial endangerment to human health. EPA also determined that the State's efforts were insufficient to protect the public health.

Trinity argued that 1) it was protected under an "innocent landowner" defense; 2) it did not contribute to the contamination; 3) the EPA emergency order displaced the State's authority to protect groundwater; and 4) no evidence demonstrated that any person had actually consumed contaminated water. **The Eighth Circuit rejected each of these arguments, finding that no innocent landowner defense existed under the SDWA, the record supported EPA's conclusion that Trinity contributed to the groundwater contamination, State action was reasonably viewed as inadequate to protect public health and thereby foreclose the need for EPA action, and that EPA need not prove that anyone had consumed contaminated water, only that contaminants in or likely to enter an**

underground source of drinking water may pose an imminent substantial endangerment to the health of persons. Having found a rational basis for EPA's decision, the court held that the order constituted a permissible exercise of EPA's emergency powers under the SDWA and denied Trinity's petition for review.

2. EAB rejects challenges to UIC permits:

In re: NE Hub Partners, 1998 UIC LEXIS 1 (May 1, 1998).

Petitioners filed for review of two underground injection control (UIC) permits issued by Region III to NE Hub Partners that would allow the construction and operation of up to ten Class III UIC wells for solution mining and up to ten Class I wells for brine disposal. Petitioners used the area proposed for the wells—a sandstone formation—for storage of natural gas. Petitioners presented both substantive and procedural challenges. The substantive challenges concerned technical criticisms of permit conditions regarding the construction and operation of the UIC wells. The procedural claims addressed the adequacy of the Region's response to comments, as well as other claims, including, reopening the comment period.

Regarding the solution mining permits, petitioners argued 1) the permit conditions that addressed drilling mud loss during well construction would lead to the migration of contaminants and natural gas to underground drinking water sources; and 2) the permit conditions that addressed the cementing of well casings were inadequate to prevent the migration of contaminants to underground drinking water sources. **The EAB rejected both of these arguments, finding first that the UIC permits contained adequate conditions to ensure compliance with the requirements of 40 C.F.R. § 146.32 (prevent migration of fluids into or between underground sources of drinking water), the Region had adequately considered petitioner's concerns, and that a difference of expert opinion, without more, did not demonstrate the Region's action was clearly erroneous or an important matter of policy or exercise of discretion.** As to the cementing issue, the EAB also rejected petitioner's claims, finding that the permit conditions specified adequate means of verifying the integrity of the well casings and ultimately preventing the migration of contaminants.

With regard to the brine permits, petitioners argued: 1) the maximum injection pressure was calculated incorrectly and was too high; 2) the area of review (for corrective action and monitoring) was too small; 3) the corrective action requirements were developed improperly; and 4) the monitoring requirements were based on incomplete information and were inadequate; and 5) additional analysis of the liquid to be injected was required. The EAB rejected each of these arguments, finding: 1) the Region included an MIP permit condition that satisfied the regulatory standard despite using in part guidance developed for Class II wells; 2) the site-specific area of review was calculated in conformance with the requirements of § 146.6(a); 3) the Region included sufficient corrective action conditions (e.g., plug and abandon 6 wells) and explained the basis for determining such conditions, which adequately fulfilled the corrective action requirements; 4) the Region developed a monitoring system for the brine wells that considered and was protective of petitioners gas storage operation and conformed with relevant regulatory requirements; and 5) NE Hub adequately characterized both the water to be injected into the salt deposits and the salt that would be dissolved to injected as brine.

The petitioners also raised three procedural claims: 1) that the Region did not adequately respond to comments submitted by petitioners on the draft permits; 2) the Region should have reopened the comment period due to changes in the permitted activity and the receipt of new information; and 3) EPA lacked jurisdiction because NE Hub decided not to inject the brine produced from the first two solution mining wells. The EAB rejected these arguments, finding: 1) the Region considered and responded to all significant comment in conformance with 40 C.F.R. § 124.17; 2) the changes in the permitting activity were not germane

to issuance of the UIC permit and the two pieces of "new" information received during remand of the permits did not raise a substantial new question or issue; and 3) NE Hub reserved the right to use the wells for disposal of brine from the remaining solution mining wells. Moreover, the EAB stated that EPA's role was not to assess what might constitute excess capacity but, rather to determine whether the wells as proposed would comply with the requirements of the SDWA. The petition was denied.

B. RCRA

1. Ninth Circuit holds RCRA does not authorize citizen suits based on State Subtitle D standards that are more stringent than the minimum federal criteria:

Ashoff v. City of Ukiah, 130 F.3d 409 (9th Cir. 1997).

Plaintiff Ashoff brought a RCRA citizen suit that asserted the City of Ukiah's solid waste disposal site had violated RCRA, the CWA, and State law. The district court dismissed the RCRA claim for lack of subject matter jurisdiction and also dismissed the CWA claim. The court concluded that RCRA did not authorize citizen suits in federal court to enforce state regulations authorized under Subtitle D of RCRA, but indicated that Ashoff could file a complaint alleging violations of the federal minimum criteria. Instead of doing so, Ashoff appealed. The question on appeal was whether RCRA authorized citizen suits in federal court for violations of State standards that are more stringent than the federal criteria.

Ashoff argued 1) RCRA allows States to enact more stringent standards and nothing in RCRA bars suits on such standards, 2) limiting citizen suits in such cases would be contrary to congressional intent, 3) other environmental statutes such as the CWA and CAA authorize citizen suits based on more stringent state standards, and 4) limiting claims to those based on minimum federal criteria would allow landfill owners to defeat RCRA citizen suits by arguing in every case that the state standard is more stringent. **The court rejected these arguments and held that RCRA does not authorize RCRA citizen suits based on State Subtitle D standards that are more stringent than the minimum federal criteria.**

The court first observed that RCRA does authorize citizen suits on the basis of the minimum federal Subtitle D criteria (40 C.F.R. Part 258) in states with approved Subtitle D (municipal solid waste landfill) permit programs. The court found that this was so because the state standards became effective pursuant to the RCRA provisions (i.e., the federal criteria gave the state standards legal effect under federal law). Following from this, however, the court concluded that "RCRA does not authorize suits based on State standards that are more stringent than the federal criteria because they do not become effective pursuant to RCRA. When a State elects to create more stringent standards, nothing in RCRA gives them legal effect. Their legal effect flows from State law."

The court noted that the district court had suggested that citizens suits could not be brought to enforce State Subtitle D regulations once the State program was authorized by EPA. The court stated this was incorrect. The court observed that, for the reasons discussed above, citizen suits under RCRA could be brought by any person, whether in an authorized or unauthorized state, to enforce compliance with the statutory and regulatory standards. The court stated that EPA had endorsed numerous times the use of RCRA citizen suits to enforce the Subtitle D criteria regardless of whether the Agency had approved a State/tribal permit program.

The court observed that although other environmental statutes establish a similar relationship between EPA and the States, and allow citizen suits to be based on more stringent state standards, these statutes differ from RCRA and, therefore, cannot be read to support plaintiff's claims. The court noted that the CWA explicitly requires States to create more stringent standards (26 U.S.C. § 1311(b)(1)(C)). The court also observed that the citizen suit provision of the CWA specifically incorporates orders issued by a State.

(26 U.S.C. § 1365(a)(1)). The court stated that RCRA has no analogous provisions. Finally, the court observed that to adopt plaintiff's reading might improperly interfere with State sovereignty, and may chill States from adopting more stringent standards.

2. District court denies motion to dismiss, finding that where hazardous waste remains on-site, the failure to properly close a hazardous waste facility may constitute a continuing violation:

Cornerstone Realty, Inc. v. Dresser-Rand Company and Ingersoll-Rand Company, 1997 U.S. Dist. Lexis 21740 (D. Conn. September 30, 1997).

Plaintiffs brought a civil suit seeking injunctive relief and damages against defendants, the current and former owners of commercial property, based on a failed real estate transaction that resulted when contamination was found on the property. Plaintiffs brought a variety of state law claims, as well as two RCRA claims, specifically failure to properly close a hazardous waste generating facility and failure to properly close a hazardous waste management facility. Defendants moved to dismiss six of plaintiff's claims, including the RCRA claims. Defendants argued that both the RCRA claims were time-barred by the five-year statute of limitations in 28 U.S.C. § 2462 because the failure to properly close the facility occurred more than five years before these claims were filed. Plaintiffs contended that the RCRA claims were continuing violations that tolled the limitations period.

The court held that the obligation of an owner or operator of hazardous waste facility to properly close that facility continued for as long as the facility remained unclosed and hazardous waste remained at the site. The court stated that the closure regulations and relevant caselaw supported the assertion that the obligation to undergo closure continued where, as here, hazardous waste remained on the property. The court found that because the obligation to properly close the facility continued beyond the date when defendants shut down the facility, plaintiff's failure to meet its closure obligations prevented the violation from being complete, which prevented the statute of limitations from tolling. Based on this continuing obligation and plaintiff's allegation that hazardous waste materials remained on the property, the court found that the RCRA claims should not be dismissed because the plaintiff may have been able to prove a continuing violation.

3. District court grants in part and denies in part motion for preliminary injunction with respect to RCRA claims, and denies motion with respect to CWA claim due to split of authority regarding whether the continuing migration of contaminated groundwater constitutes an ongoing violation:

Wilson v. Amoco Corporation, 1998 U.S. Dist. LEXIS 57 (D. Wyo. Jan. 2, 1998).

Plaintiffs, citizens of Casper, Wyoming, brought a citizen suit under RCRA and CWA alleging that defendants, Amoco Corporation, Burlington Northern Railroad Company, and Steiner Corporation, discharged and released hazardous and toxic contaminants from their respective Casper facilities thereby injuring the public health and the environment as well as plaintiffs' properties. Plaintiffs sought a preliminary injunction requiring defendants to contain the discharges and remediate the contaminated property.

At Amoco's petroleum refinery and tank farm located along the North Platte River, the court found that environmental concerns included groundwater contamination, lead contamination, sulfuric acid contamination, asbestos contamination, benzene contamination, and various forms of contamination that potentially remained in the large volume of underground piping beneath the refinery. The court also found that Amoco, in working with EPA and Wyoming Department of Environmental Quality (WDEQ) to address the environmental concerns, exhibited a pervasive corporate attitude to delay, deter, and deceive.

At the Burlington Northern (BN) rail yard facility, testing confirmed diesel and oil contamination and a substantial plume of PCE extending across the property. At Steiner's former dry cleaning facility, a significant PCE plume existed that originated in the vicinity of the facility and extended underneath the BN yard and eventually to the North Platte River. Both parties denied any responsibility for the PCE contamination.

At the time of filing, there were no ongoing operations at the Amoco and Steiner facilities, and plaintiffs did not charge that BN's current operations resulted in new discharges of contaminants into the groundwater. As such, with a few exceptions as to Amoco, the alleged ongoing violation with respect to all three defendants was the continuing migration of the contaminated groundwater to the North Platte River. **"Given the split of authority as to whether such ongoing migration constituted a CWA violation," and the failure of the parties to brief the court on this issue, the court declined to consider the CWA claim and proceeded solely under RCRA.**

Because plaintiffs sought a mandatory injunction, which was more burdensome than a prohibitory injunction, plaintiffs were required to demonstrate entitlement to the injunction by heavy and compelling evidence. With respect to Amoco, the court applied the traditional equitable factors in determining if an injunction was appropriate, and found that the balance of equitable factors tipped heavily in favor of the issuance of an injunction. However, given that a trial on the merits was six months away, the court determined that it was unreasonable to issue a plenary order requiring the requested remediation, since it could not be accomplished within that time. The court did consider it practicable to order Amoco to undertake a number of other investigative, monitoring, and interim measures.

As for the contamination the court found attributable to BN, i.e., the diesel fuel, the evidence did not clearly indicate an existing threat to human health or the environment. The court found that any threat posed by the mere presence of a nonhazardous substance such as diesel was not sufficiently severe to warrant comprehensive injunctive relief only six months before trial.

With regard to Steiner, the court found that plaintiffs' evidence did not clearly show that Steiner was a significant contributor to the PCE plume or that the plume constituted an imminent and substantial endangerment to health or the environment. The court was reluctant to impose the considerable burden of investigating and remediating a plume for which Steiner almost certainly did not bear sole responsibility.

Accordingly, the court granted in part and denied in part plaintiffs' motion for preliminary injunction with respect to their RCRA claim against Amoco, and ordered specific injunctive relief. Plaintiffs' motion was denied with respect to their CWA claim against all defendants, and denied in all respect as to BN and Steiner.

4. District court holds that the leaching of hazardous waste into groundwater from hazardous waste contaminated soil constitutes the continuing disposal of hazardous waste:

U.S. v. Power Engineering Co., 1998 U.S. Dist. LEXIS 8650 (June 10, 1998).

The United States, on behalf of U.S. EPA, brought an overfile enforcement action against defendant Power Engineering and Jack Lilienthal, a third party defendant, for violations of RCRA stemming from the operation of a metal refinishing facility and the failure to properly manage and dispose of hazardous waste generated by the facility. The action sought a preliminary injunction that required defendants to document that they had secured the resources to properly close the facility and to pay third-party claims that may have arisen from its operation. Defendants, in relevant part, argued that the facility operated in compliance with Colorado hazardous waste regulations and therefore was exempt from financial assurance requirements.

The court concluded that the facility continued to dispose of hazardous waste in three distinct ways

and thus was not in compliance with Colorado hazardous waste regulations. First, the court found that the hexavalent chromium condensate mist (i.e., suspended liquid) generated by air scrubbers and that settled onto soil within the facility constituted a hazardous waste.

Second, the court found that the facility's failure to remediate soil contaminated by a yellow/orange liquid that leaked from air scrubbers down the west side of the facility's main building constituted continuing disposal of hazardous waste because such waste continued to leach chromium into groundwater. Defendant's argued that the leaks were repaired in 1994 and, thus, disposal had ceased. **The court disagreed, and based on numerous prior decisions, held that the leaching of hazardous waste into groundwater from hazardous waste contaminated soil constituted the continuing disposal of hazardous waste.** The court observed "the overwhelming majority [of decisions] have found continuing violations for substantive violations of RCRA when the environmental harms caused by the violations are curable, even when the affirmative act that initiates the violation occurred on a single day." The court noted that because the definition of the term "disposal" in RCRA includes the term "leaking" disposal occurs both when a solid or hazardous waste is first deposited onto the ground as well as when such wastes migrate from their initial disposal location.

Finally, the court found that the facility failed to remediate three open waste piles of contaminated soil excavated from beneath chrome-plating tanks. The court ordered defendants to provide financial assurance valued at $3,500,000.

C. Paperwork Reduction Act

1. District court holds that Paperwork Reduction Act does not require an agency to obtain OMB approval for the agency to use information that is properly collected in new ways:

Tozzi v. U.S. Environmental Protection Agency, 1998 U.S. Dist. LEXIS 6234 (D.C. Cir. Apr. 21, 1998).

Plaintiffs sought a preliminary injunction that would have restricted EPA from using TRI data for the Sector Facility Indexing (SFI) Project, a project that seeks to integrate existing environmental records from several publicly available data bases. The information compiled in these data bases was collected pursuant to OMB approvals obtained in conformance with the requirements of the Paperwork Reduction Act. Plaintiffs argued that EPA could not use the TRI data for the SFI project without first obtaining a separate OMB approval for this new use of the data. Plaintiffs asserted that EPA's use of the data for the SFI project constituted a "substantive or material modification." Plaintiffs also argued that EPA and OMB should have reviewed the proposed new uses of the data based on a public comment period, and that OMB should have made a determination of the new uses' practical utility pursuant to 44 U.S.C. § 3508.

The court found that republishing the TRI data in another form did not constitute making a substantive or material modification to the data. The court observed that the information itself was not modified in any way, nor was the manner in which is was collected. In addition, the court found that OMB does not have to separately approve each and every new use of information properly collected. Rather, the court observed that the proper focus for OMB approval under the PRA is on the collection of information, not the agency's subsequent use of the collected information.

2. ALJ holds that PRA defense may be raised after answer has been filed and, regarding certain RCRA BIF provisions, EPA failed to display an approved OMB control number in both the Federal Register and the C.F.R.:

In the Matter of: Parke-Davis Division Warner-Lambert Co., 1998 RCRA LEXIS 2 (Jan. 2, 1998).

EPA filed a complaint against respondent Parke-Davis that alleged violations of EPA's Boiler and Industrial Furnace (BIF) regulations promulgated under RCRA. Respondent moved for an accelerated decision dismissing count I of the complaint on the grounds that EPA failed to comply with requirements imposed under the Paperwork Reduction Act (PRA). EPA argued that respondent had waived its PRA defense because it had failed to raise this defense in its answer. EPA also argued that there was only a partial lapse in obtaining OMB approval.

Count I involved five separate information request regulations [40 C.F.R. §§ 265.13 (general waste analysis), 265.15 (general inspection requirements), 265.16 (personnel training), 265.54 (amendment of contingency plan), and 265.112 (closure plan; amendment of plan)]. **The ALJ rejected EPA's waiver argument, citing Lazarus, Inc., TSCA Appeal No. 95-2 (September 30, 1997) for the proposition that respondent could raise a PRA defense after an answer had been filed.** The ALJ observed that, as stated in *Lazarus*, use of a PRA defense could only be barred where it was "so untimely as to prejudice the complainant, or 'interfere with the [judge's] duty to conduct an efficient adjudication'." The ALJ stated that EPA did not argue it was prejudiced and that given the prehearing status of the case, EPA could not substantiate such an argument. Accordingly, the ALJ barred EPA from prosecuting the respondent for the first three alleged violations.

With regard to § 265.54, EPA asserted an incorrect but current OMB control number was displayed in the C.F.R., and notice of OMB approval was published in the Federal Register. Similarly, with regard to § 265.112, EPA asserted that a "blanket display" indicating OMB approval appeared at the end of 40 C.F.R. § 265.120. In addition, EPA argued that notice of the OMB approval number was published in the Federal Register. **The ALJ found that these efforts failed to comply with the plain wording of the PRA, which requires that EPA display the control number from the approved ICR in both the Federal Register and the C.F.R.**

D. Freedom of Information Act (FOIA)

1. District court holds that materials subject to FOIA request must be released where notes were not deliberative and did not concern enforcement matters and release of criminal files would not interfere with enforcement proceedings:

Grine v. Coombs, 1997 U.S. Dist. LEXIS 19578 (W.D. Pa. Oct. 10, 1997).

Plaintiffs Grine et al., brought nine claims against defendants Coombs et al., related to contamination of plaintiff's property allegedly caused by defendants. One claim was a Freedom Of Information Act (FOIA) claim against the U.S. EPA, which asserted that EPA failed to release results of soil tests of plaintiff's property and that EPA improperly withheld non-exempt documents that related to an alleged chemical spill on the defendant's property and that could have been the source of the contamination. Plaintiffs sought six distinct items of information and the court had previously granted EPA summary judgment with regard to two of those items. This court examined EPA's summary judgment motion for the remaining four items.

The first of the remaining four items was the log book of the EPA On-Scene Coordinator (OSC). EPA had provided to plaintiffs a copy of the log book with portions not relevant to the plaintiff's case redacted. The court reviewed the entire log in camera and, with the exception of two limited entries, found that EPA had provided all portions of the log that were responsive to plaintiffs FOIA request. **The court denied EPA's motion with regard to the two limited excerpts.**

The second item consisted of several EPA inter-office memoranda in the form of e-mail. EPA asserted that this information was protected under EPA's deliberative process privilege, since it played a part in Region III's decision as to what, if any, Superfund removal action would be taken at the plaintiff's property. Plaintiffs argued that there was

never any truly deliberative process regarding Superfund removal because the level of contamination was not sufficient. **The court, following in camera review, held that the withheld material was covered by the deliberative process privilege, since the redacted material was pre-decisional in nature and contained deliberative information.**

The third item concerned certain notes of Daniel Isales, Assistant Regional Counsel, made from a September, 1995, phone conversation with Dan Holler of the Pennsylvania DEP. EPA argued that these notes where protected under either attorney work product doctrine, or the deliberative process privilege. The court held that the notes were not protected under either privilege. The courted concluded that the notes essentially contained factual information and that they were predecisional in nature, since they post-dated the decision to forgo federal removal action. **The court also held that the notes were not protected under the attorney work-product privilege, since they did not reflect mental impression, opinions, or strategies concerning anticipated litigation.** The court observed that the notes did not suggest consideration of any Superfund enforcement action, and consideration of such action was inconsistent with the OSC's representation that EPA had decided in March 1995, not to take further action at the plaintiff's property. The court denied EPA's motion with regard to this item.

The last items considered were several documents from EPA's Criminal Investigation Division. **With regard to fourteen entries in the OSC's logbook, the court observed that even if these were compiled for law enforcement purposes, EPA did not demonstrate how disclosure of these entries would interfere with potential law enforcement proceedings.** Thus, the court ordered production of this information. **With regard to six Reports of Investigation (ROIs), the court found that although they were compiled for law enforcement purposes under the "rational nexus" test, following review, the information was not deemed so sensitive that "its production would reasonably be expected to cause interference with any pending enforcement proceedings."** The court ordered production of this information as well. **Finally, with regard to two Memoranda of Interviews (MOIs), the court found that these documents also were not of such a sensitive nature that their disclosure would likely interfere with any pending enforcement proceedings. EPA had also asserted that these MOIs were exempt under § 552(b)(7)(C) of the APA, but the court found no compelling privacy interest was served by restricting access to these MOIs.**

E. Oil Pollution Act (OPA)

1. Ninth Circuit holds State BAP oil spill regulations are not preempted by Federal laws, except for provisions addressing design and construction requirements, which are preempted:

International Assoc. of Independent Tanker Owners v. Gary Locke, 1998 U.S. App. LEXIS 12894 (9th Cir. Feb. 4, 1998).

Appellants sought review of the district courts grant of summary judgment finding that each of 16 of Washington State's Best Available Protection (BAP) regulations were not preempted by the Oil Pollution Act of 1990 (OPA) and other federal laws. The State's BAP regulations impose requirements on oil tankers to prevent oil spills.

The state defendants argued that OPA § 1018 provides that nothing in the OPA preempted states from imposing "additional liability or requirements with respect to the discharge of oil or other pollution by oil." Appellants countered that § 1018 applied only to Title I of the Act, and did not affect preemption imposed by other provisions of the Act. The court found such a reading at odds with the plain language of § 1018, which states that '"nothing in this Act" preempts states from "imposing any .... requirements with respect to the discharge of oil or other pollution by oil".' **The court found that the savings provisions of § 1018 applied to all the titles of the OPA. The court**

declined, however, to apply the savings provision of § 1018 to other federal tanker regulation statutes.

The court then examined whether other federal statutes addressing tanker regulation preempted the state BAP regulations. The court first addressed conflict preemption. Appellants maintained that the BAP regulations frustrated the purposes and objectives of Congress in adopting the current legislative scheme applicable to oil spills. The court disagreed. The court looked at the overall purposes and objectives of Congress in passing the Tank Vessel Act (TVA), the Ports and Waterways Safety Act (PWSA), the Port and Tanker Safety Act (PTSA), and the OPA, and found that the most recent statute—the OPA—reflected Congressional "willingness to permit state efforts in the areas of oil spill prevention, removal, liability and compensation. **The court declined to strike down the BAP regulations on the basis of conflict preemption.** The court also found that the regulations did not frustrate relevant international agreements, stating that strict uniformity was not required by these agreements and that the international agreements in this field only established minimum standards. The court also declined to consider new treaty-based arguments raised for the first time by EPA on appeal.

With respect to field preemption, the court observed that in Ray v. Atlantic Richfield Co., 435 U.S. 151, 55 L. Ed. 2d 179, 98 S. CT. 988 (1978), the Supreme Court decided that in enacting the PWSA Congress had effectively preempted the field of tanker design and construction, but not all other potential avenues of state regulation. **The Ninth Circuit found that "virtually all of the challenged BAP regulations impose operational requirements rather than design and construction requirements." Thus, the court found that these requirements were not automatically subject to preemption under *Ray*. However, the court did find that the State's BAP regulatory provisions that addressed navigation and emergency towing equipment (§ 317-21-265(1) & (2)) did constitute design and construction requirements, which were preempted by the PWSA.**

Finally, the court addressed whether any of the BAP regulations were expressly preempted by federal law. Appellants argued that some of the BAP regulations were expressly preempted by existing Coast Guard regulations promulgated pursuant to the OPA. **However, the court found that because § 1018 of the OPA prohibits the preemption of state law, the regulations at issue were not valid (i.e., the Coast Guard had acted beyond the scope of its delegated powers).** Appellants then argued that the BAP regulations violated the Commerce Clause (i.e., impermissibly burdened interstate commerce). However, appellants failed to argue that the incidental burden imposed by the BAP regulations on interstate commerce was clearly excessive in relation to the "putative local benefits," or that BAP regulation "discriminate in favor of in-state interests." Thus, the court found this argument to be without merit.

The court reversed the district court's grant of summary judgment regarding WAC § 317-21-265, but affirmed the decision with regard to all other challenged BAP regulations.

2. D.C. Circuit upholds majority of NOAA rule implementing the OPA, adopts NOAA construction of portions of rule, and vacates two parts of the rule:

General Electric Co. v. National Oceanic and Atmospheric Administration, 128 F.3d 767 (D.C. Cir. 1997).

Industry and insurance company petitioners challenged the National Oceanic and Atmospheric Administration's (NOAA's) final regulation for implementing the Oil Pollution Act. The final rule addressed trustee assessment of natural resource damage (61 Fed. Reg 440-510 [1996]). The final rule established a three stage procedure for assessing injuries resulting from oil spills and for implementing plans to restore damaged natural resources. The three stages included a pre-

assessment phase, restoration planing phase, and restoration-implementation phase.

Industry petitioners argued that in promulgating the rule NOAA acted in an arbitrary and capricious manner by allowing the use of contingent valuation in assessing natural resource damage. Specifically, industry petitioners argued that NOAA had ignored its expert panel's recommendations that this technique must be used pursuant to stringent standards. Petitioners also asserted that it was arbitrary for NOAA not to bar contingent valuation. Finally, petitioners maintained that it was wrong to extend passive use valuations to temporary losses of natural resources (i.e., industry petitioners argued that passive loss occurred only where loss was permanent). The court disagreed with all of these arguments. The court found that it was sufficient that the rule allowed for the use of several valuation techniques, provided they produce valid and reliable results. Moreover, the court found that it had ruled not to bar contingent valuation in a prior case (see, Ohio v. U.S. Dept. of the Interior, 880 F.2d 432, 478 (D.C. Cir. 1989)). Finally, regarding temporary passive losses, the court found that the issue was not ripe for review.

Industry petitioners also argued that since OPA delegated oil removal authority to the President, NOAA exceeded its authority in promulgating a rule that provided trustees with authority to remove residual oil. On this issue the court found that NOAA had failed to adequately explain the differences between the proposed rule and the final rule, as well as other issues regarding roles, authority, and responsibility, and, thus, had failed in undertake reasoned decision making.

Finally, industry petitioners argued that NOAA acted arbitrarily in including monitoring and oversight costs, as well as administrative, legal, and enforcement costs within the definition of "reasonable assessment costs." The court found that, with regard to monitoring costs, the OPA was silent. The court then found that NOAA's acted reasonably in finding that monitoring was an essential step in restoration. With regard to the inclusion of legal fees within reasonable assessment costs, NOAA did not oppose vacatur of the definition of assessment costs to the extent it referred to attorney fees.

The court identified several issue on which the parties had reached agreement and discussed these only to document NOAA's representations.

Finally, insurance petitioners raised several arguments, none of which the court found had merit. First, the court observed that insurance petitioners had no standing to argue that 15 C.F.R. § 990.20(b), which would allow trustees that had begun damage assessments under CERCLA to switch to the final rule, was impermissibly retroactive. The court found that petitioners had shown neither concrete nor imminent injury. Second, the court found that nothing in the plain language of § 1002 or § 1006 of the OPA excluded the use of passive use values. Third, the court found that the rule did not need to address the OPA's liability limits, since the rule did not affect a responsible party's right to invoke those limits. Fourth, the court found that the rule did not impinge on responsible parties' rights to seek contribution from other parties. Finally, the court found that the rule's requirements that remediation plans be "reliable and valid" adequately constrained the trustee's discretion in assessing resource damage.

The court vacated the definition in 15 C.F.R. 990.30 of "reasonable assessment costs" to the extent it included legal fees, and vacated § 990.53(b)(3)(i)'s authorization of residual removal authority. The court adopted NOAA's construction of § 990.51 (trustee must prove causation); § 990.52(d)(3)(ii) (the term estimate is synonymous with calculate); and § 990.27(b) (trustee must develop site-specific restoration plan). The court upheld the remainder of the rule.

F. EPCRA

1. Supreme Court holds that where declarative and injunctive relief sought in citizen suit would not remedy respondent's alleged injuries associated with wholly past

EPCRA violations, respondent lacked standing to maintain the suit and the courts lacked jurisdiction to hear the suit:

Steel Co. v. Citizens for a Better Environment, 1998 U.S. LEXIS 1601 (March 4, 1998).

Plaintiff-respondent Citizens for a Better Environment brought a citizen suit against defendant-petitioner Chicago Steel and Pickling Company for past violations of EPCRA seeking declarative and injunctive relief (petitioner filed all of the overdue forms required under §§ 11022 and 11023 prior to the commencement of the citizen suit). The district court held that because petitioner had brought its filings up to date by the time the complaint was filed, the court lacked jurisdiction to entertain a suit for present violations. In addition, the district court held that because EPCRA does not provide relief for purely past violations, respondent's complaint was not a claim upon which relief could be granted. The Seventh Circuit reversed, concluding that EPCRA authorizes citizen suits for purely past violations. Petitioners then sought review by the Supreme Court, which accepted the case to resolve a conflict between the Sixth and Seventh Circuits.

The Supreme Court stated that the case presented two issues: whether EPCRA authorizes suits for purely past violations; and, whether respondent had standing to have brought the action. A key focus of the opinion was on which issue should be decided first. **The Court declined to endorse the "doctrine of hypothetical jurisdiction" for purposes of addressing the merits question first. Rather, the Court considered the standing question first, and held that because none of the relief sought would have remedied respondent's alleged injuries, respondent lacked standing to maintain the suit and, therefore, the Supreme Court and the lower courts lacked jurisdiction to entertain the suit.**

Three Justices wrote separate concurring opinions and the majority spent much of the opinion responding to Justice Steven's concurrence. Justice Stevens argued that the Court has the authority to answer the statutory (i.e., merits) question first and because EPCRA does not appear to provide for jurisdiction over citizen suits for past violations, the Court should not decide the constitutional issue. The majority disagreed, and found that the merits question of whether § 11046(a) permitted the cause of action was not a "jurisdictional" question. The majority distinguished Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation, Inc., 848 U.S. 49 (1987), stating that the relevant statutory provision in Gwaltney suggested the existence of subject matter jurisdiction, whereas here, § 11046(c) of EPCRA should not be read to make the elements of § 11046(a) jurisdictional. The Court also asserted that in no case has it called "the existence of a cause of action 'jurisdictional,' and decide that question before resolving a dispute concerning the existence of an Article III case or controversy."

The Court also declined to endorse the concept of hypothetical jurisdiction (finding it proper to proceed immediately to the merits despite jurisdictional questions where the merits question is more readily resolved and the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied), which the Court observed has been "embraced" by several Courts of Appeals. The Court stated that such a practice "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers."

In addressing the standing question, the Court focused on the redressability element required under Article III standing (the "likelihood that the requested relief will redress the alleged injury."). The Court explained that none of the items of relief sought would have served to eliminate the effects of the late reporting on respondent or reimburse respondent for losses caused by the late reporting. The majority reasoned that the declaratory judgment was of no value to the respondent. In addition, the Court observed that the penalties authorized by EPCRA are payable to the U.S. Treasury, not respondent and, thus, the penalties did not redress any injury to respondent. Furthermore, the Court found that any 'interest in

attorney's fees is insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.' Lewis v. Continental Bank Corp., 494 U.S., at 480 (citing Diamond v. Charles, 476 U.S. 54, 70-71(1986)).

In other concurring opinions, Justice O'Connor joined by Justice Kennedy noted that the Court's opinion shouldn't be read as setting out a list of circumstances under which courts may exercise judgment in holding off on difficult jurisdiction issues when the case can be resolved on the merits in favor of the same party. Justice Breyer would not make it a requirement to first address jurisdiction, then the merits.

2. ALJ holds that gravity-based portion of EPCRA penalty should be reduced 100 percent where all criteria of self-policing policy are satisfied, and that where the self-policing policy is inapplicable the ERP allows partial reduction:

In the Matter of: Bollman Hat Company, 1998 EPA App. LEXIS 3 (Mar. 17, 1998).

EPA filed a complaint alleging respondent had committed seven violations of EPCRA for failing to file toxic chemical release forms several chemicals over several years. The complaint proposed a civil penalty of $39,716, which EPA asserted had been calculated in accordance with EPA's August, 1992 Enforcement Response Policy (ERP) for EPCRA section 313. Respondent acknowledged the violations but challenged the penalty amount and requested a hearing. Respondent asserted that EPA had failed to grant respondent certain penalty reductions allowed under the ERP for the delisting of a chemical and for other factors as justice may allow.

At hearing EPA disclosed that it had relied upon EPA's self-policing policy to determine what adjustments should be made to the gravity-based penalty set pursuant to the ERP. With regard to count one, EPA initially calculated a gravity-based penalty of $25,000 based on the delay, size of the business, and amount of chemical of concern used. Then EPA had allowed a 75 percent reduction under the self-policing policy because the respondent had self-disclosed and met eight of the nine criteria specified in the self-policing policy needed to obtain a complete waiver of the gravity-based penalty (as for the ninth criterion, EPA asserted that respondent failed to prevent future violations). Upon reviewing the facts, the ALJ found that respondent had discovered all of the violations simultaneously and had acted to both achieve compliance and prevent future violations. **The ALJ concluded that respondent had satisfied all nine of the criteria needed to obtain a complete waiver of the gravity-based penalty and granted a waiver of 100 percent of the gravity-based penalty.**

For counts two through five, the ALJ similarly found that because respondent had self-disclosed the violations prior to EPA action and, as explained above, had met all nine criteria specified in the self-policing policy needed to obtain a complete waiver of the gravity-based penalty, complete waivers of the gravity-based penalty amount were warranted.

For count six, EPA asserted it had not reduced the $8,893 proposed penalty because respondent had not self-reported the violation prior to EPA action. Respondent argued that prior to being contacted by EPA it had started to gather the data needed to complete the reporting form. The ALJ found the record supported this assertion, but observed that respondent had not notified EPA regarding the violation and efforts to come into compliance. Based on this, and the fact that respondent had intentionally decided to wait to file the forms until a data collection system was in place, the ALJ concluded the self- policing policy did not apply. Nevertheless, pursuant to the ERP the ALJ allowed a 55 percent reduction for respondent's attitude (30 percent) and other factors as justice may require (25 percent).

Finally, regarding count seven, the EPA proposed a penalty of $8,893. The ALJ first corrected this to $9,074 to account for six additional days of violation, and then reduced this amount 55 percent

to $4,083 for the same reasons discussed immediately above.

3. ALJ holds that in calculating proposed penalty for EPCRA violation based on EPCRA ERP the Agency may not restrict application of adjustment factors contained in ERP to settlement only:

In the Matter of: Catalina Yachts, 1998 EPCRA LEXIS 4 (Feb. 2, 1998).

Complainant EPA charged respondent Catalina Yachts, Inc., with seven counts of violating EPCRA § 313 related to its use of specified chemicals in excess of the applicable threshold quantities and its failure to submit toxic chemical release forms to the Administrator and the State. EPA proposed that a penalty totaling $175,000 be assessed for these violations. Respondent asserted that it was a small business that was initially unaware of its obligations under EPCRA and that once it became aware of its obligation to comply with EPCRA it did so in a timely manner. Respondent asserted that EPA indicated that it had used the EPCRA Enforcement Response Policy (ERP) in calculating the proposed penalty and that EPA had informed respondent that the agency had no authority to reduce the penalty by more than the 30 percent specified in the ERP. Respondent argued that because the ERP had not been promulgated pursuant to notice and comment rulemaking under the APA rigid adherence to the ERP was neither necessary nor lawful.

The ALJ found that the appropriate penalty for the EPCRA violations was $39,792. The ALJ first found that count VII should have been calculated on a per day basis since the violation since the relevant Form R was submitted within one year (324 days). Therefore, the gravity-based penalty should have been $173,274. Subject to this change, the ALJ found prima facie that the ERP provided a reasonable basis for determining the gravity-based penalty.

The ALJ then examined EPA's application of the adjustment factors specified in TSCA § 16. At the outset, the ALJ noted that respondent had waived any defense regarding inability to pay and the effect of the penalty on respondent's ability to continue to do business. The ALJ observed that since acetone was delisted under EPCRA during the period of the alleged violations, EPA was willing to reduce penalty 25 percent ($12,500). In examining the factors of cooperation and compliance specified in the ERP, **the ALJ first held that EPA's practice of only considering such factors in settlement negotiations was arbitrary and capricious, since once the agency has elected to determine the penalty according to the ERP it may not " 'pick and choose' the provisions of the ERP with which it will comply."** The ALJ found that a 15 percent reduction was warranted for cooperation (i.e., respondents commitment to environmental compliance), and that an additional 15 percent reduction was warranted because respondent had no prior violations and had made good faith efforts to comply (combined reduction of $51,982). The ALJ then further adjusted the penalty based on other matters as justice may require. Here, citing Spang & Company, EPCRA Appeal Nos. 94-3 & 94-4 (EAB, Oct. 20, 1995), the ALJ found that previously incurred environmentally beneficial expenditures totaling an estimated $230,000 justified a $69,000 credit against the proposed penalty.

4. ALJ holds that failure to comply with EPCRA § 311 is a continuing violation not barred by the federal five-year statute of limitation, but that failure to comply with EPCRA § 312 is not a continuing violation and is not barred under the statute of limitation:

In the Matter of: Mafix, Inc., 1998 EPA App. LEXIS 6 (Feb. 12, 1998).

EPA filed a complaint that alleged Mafix had committed six violations of EPCRA, three each of §§ 311 and 312, by failing to submit in a timely manner material safety data sheets and emergency and hazardous chemical inventory forms. The Agency sought a civil penalty of $84,000 for these violations. Mafix asserted that the violations were

barred by the applicable federal five-year statute of limitations. All the alleged violations occurred at least five and one-half years prior to when EPA filed its complaint.

The ALJ focused on whether any of the six violations constituted continuing violations, which had the potential to affect the application of the five-year statute of limitation. **The ALJ observed that continuing violations have been recognized by the EAB under RCRA and TSCA. (See, Harmon Electronics, Inc., RCRA (3008) Appeal No. 94-4 (March 24, 1997); and Lazarus, Inc., TSCA Appeals No. 95-2 (September 30, 1997). The ALJ observed that in determining whether a requirement was continuing in nature key considerations included the statutory language, including relevant legislative history, and implementing regulatory language. The ALJ noted that the EAB in *Lazarus* stated that "words and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature. In contrast, a continuing nature may be negated by requirements that must be fulfilled within a particular time frame."**

The ALJ observed that § 311 imposed a one-time filing obligation that served an important public safety and health purpose, and found that both of the factors supporting finding that the violation of counts I-III were continuing violations. The ALJ stated that the need for the LEPC, the SERC, and the fire department to have the MSDS information did not decrease with the passage of time. **Thus, the ALJ concluded that only the actual filing of the MSDS would satisfy the requirements of EPCRA § 311 and begin the running of the five-year statute of limitations. The ALJ found that counts I-III of EPA's complaint were not barred by the statute of limitations.**

With regard to counts IV-VI, which involved violations of EPCRA §312, the ALJ observed that the inventory submission requirement was not a one-time event, but was imposed annually. The ALJ found this to be critical (again, citing *Lazarus*). The ALJ reasoned that Matrix's failure to submit the inventory forms by the filing date of March 1 resulted in the accrual of a violation of § 312. He added that although Matrix remained obligated to comply with the inventory submission requirement after the March 1 submission date, that date marked the end of the "period for which the offending party may be held liable under EPCRA Section 312 liability." With regard to § 312, the ALJ found the federal five-year statute of limitations begins to run "from the time that the owner or operator should have filed the emergency and hazardous chemical inventory form, but didn't."

G. Rivers and Harbors Act (RHA)

1. District court holds USACE did not act in an arbitrary or capricious manner when it found that numerous houseboats constituted permanently moored floating vessels that required a permit under the RHA:

U.S. v. Hernandez, 979 F. Supp. 70 (D. P.R. 1997).

The government brought a class action suit under §§ 403 and 409 of the Rivers and Harbors Act (RHA) that sought injunctive relief to compel defendants to remove their houseboats from La Parguera (a natural reserve in Puerto Rico that contains mangrove forests on the shoreline and a series of off-shore cays and bays that are navigable waters of the U.S.). The RHA prohibits any obstruction of waters of the U.S., and makes it unlawful to build, among other things, any permanently moored floating vessel, without a permit. Based on a finding that the primary use of these houseboats was as weekend or vacation homes, rather than means of transportation, the USACE determined that the houseboats were permanently moored floating vessels. None of the houseboat owners had RHA permits to moor their houseboats in La Parguera.

Following the issuance of cease and desist orders from the U.S. Army Corps of Engineers (USACE), 48 owners sought RHA after-the-fact permits to moor. The USACE denied 41 of these applications,

based on the objections of EPA, the Fish and Wildlife Service, (FWS) and the National Marine Fisheries Service (NMFS). Permit denials were based in part on the fact that the FWS had issued a biological opinion that stated the issuance of the relevant RHA permits would have likely jeopardized the yellowed shoulder blackbird. In addition, the court observed that mooring houseboats in La Parguera had been found to cause a detrimental environmental impact and was inconsistent with Puerto Rico's coastal zone management program.

The court reviewed the USACE's denial of the RHA permits to determine whether the agency had acted in an arbitrary and capricious manner. The court observed that USACE had thoroughly investigated the nature of the houseboats and concluded that, despite the ability of the houseboats to navigate (albeit inefficiently), and their possession of locally issued boating licenses, the primary use of the houseboats was as weekend or vacation homes. The court also observed that the RHA provided the USACE with broad discretion in regulating United States waterways (see, U.S. v. Alameda Gateway, Ltd., 953 F. Supp. 1106 (N.D. Cal. 1996), and that, after considering the intended use, navigability, construction, and environmental impact of the houseboats, the USACE made a rational determination that these houseboats were permanently moored floating vessels. **The court concluded that the USACE had not acted in an arbitrary or capricious manner when it found that the houseboats were permanently moored floating vessels and had denied the RHA after-the-fact permits.** Accordingly, the court granted the government's request for injunctive relief.

The court also rejected arguments by several owners that had acquired their houseboats after the application proceedings in 1988-90, and owners who received a "no-permit-required" letter in 1990, that they had been denied their due process rights. Rather, the court reiterated that non of these houseboats had RHA permits as required by § 10, and stated that those persons who had received the no-permit-required letter were clearly informed by letter in 1993 that if they did not move their boats they would be subject to suit. The court also noted that § 10 does not require that the USACE hold a hearing prior to making a determination. It added that the "no-permit- required" owners had received notice of their alleged violations in 1990.

H. Clean Air Act (CAA)

1. Fourth Circuit holds that EPA's interpretation of its benzene fugitive emission NESHAP should be afforded deference, but that the small plant exemption provisions of the rule are insufficient to provide fair notice absent actual notice:

U.S. v. Hoechst Celenese Co., 128 F. 3d 216, 1997 U.S. App. LEXIS 29362 (4th Cir. Oct. 27, 1997).

The United States brought suit on behalf of EPA against Hoechst Celenese Corp., (HCC) for alleged violations of the benzene fugitive emission source National Emission Standard for Hazardous Air Pollutants (NESHAP) (40 C.F.R. Part 61, Subparts a, J, and V) at HCC's Celriver plant in Rock Hill, South Carolina. These regulations exempt ' "any equipment in benzene service that is located at a plant site designed to produce or *use* less than 1,000 megagrams of benzene per year." ' (40 C.F.R. § 61.110(c)(2)). HCC interpreted this exemption as exempting their Celriver plant because it did not consume more than 1,000 megagrams of benzene per year. EPA asserted that HCC's Celriver plant did not qualify for the exemption and, even if it did qualify for the exemption, HCC could not claim exempt status because it had never applied to EPA for the exemption. The district court had upheld EPA's interpretation of the regulations, but found that HCC lacked fair notice of EPA's interpretation of the exemption and, therefore, refused to hold HCC liable for any violations of the regulations.

On appeal, the 4th Circuit considered two issues: 1) whether EPA's interpretation of its own regulation should be afforded deference; and 2) whether and when HCC was afforded fair notice of EPA's interpretation of the benzene rule exemption.

The court found that the plain language of the regulation did not indicate any intent to limit the meaning of the term "use" to consumption. Moreover, the court found that EPA's interpretation of the term "use" was logical and consistent with both the purpose of the Clean Air Act and the purpose of the exemption itself (a "small plant exemption"). **The 4th Circuit thus agreed with the district court that EPA's interpretation of its own regulations deserved deference.**

With regard to the fair notice issue, the court considered two distinct time frames: 1) the period from 1984, when the benzene rule was promulgated, to 1989, when EPA first became aware of the violation and contacted HCC; and 2) the period that followed contacts between EPA and HCC until 1992, when HCC came into compliance with the regulations. With regard to the first time frame, EPA argued that the term "use" is a broad term and that the exemption at issue should have been interpreted narrowly by HCC. EPA also asserted that the purpose of the exemption—to exempt small plants—clearly did not support application to the large Celriver plant. However, the court focused on whether in this specific instance defendant HCC lacked reasonable notice regarding the scope of the regulations. The court declined to hold that the regulations, their preamble, or their purpose, "clearly put HCC on notice that the Celriver plant did not qualify" for the exemption. Moreover, the court declined to find that HCC had reason to know its "exemption claim rested on extremely shaky grounds" and, therefore, triggered a duty to request clarification from the EPA. Rather, the court concluded that HCC's contacts with the Texas Air Control Board (TACB) and EPA Region 6, regarding two other HCC facilities located in Texas, gave HCC reason to believe that "its interpretation of the exemption—equating 'use' to 'consumption,' was accurate." **Based on this, and references in the rulemaking record that equate use of the term 'use' with 'consume,' the court concluded that HCC had not received fair notice of EPA's interpretation between 1984 and 1989.**

The court further found that the benzene NESHAP did not provide fair notice that a plant owner must apply for the small plant exemption, nor did it provide fair notice that the owner of an exempt plant must file an initial report.

With regard to the 1989–1992 time period, the court observed that EPA had contacted HCC in June, 1989, to clarify the scope of the exemption and suggest that the Celriver plant may very well be subject to the benzene NESHAP. The court noted that internal HCC minutes (July 1989) indicated the company understood the implications of the EPA letter addressing interpretation of the exemption (a second, more definitive letter was sent from EPA to HCC in August, 1989). **Thus, the court concluded that EPA's 1989 communications were sufficient to put HCC on notice of EPA's interpretation of the benzene NESHAP exemption and HCC was liable for violation of that NESHAP from August, 1989, until it came into compliance.** The court affirmed the district court's order except "as to whether after August 1989, HCC Celriver had notice of EPA's interpretation of the NESHAP exemption" and the court remanded the case for the reconsideration of applicable penalties.

Judge Niemeyer dissented from the finding that HCC had received fair notice following August, 1989. The dissent found that is was unreasonable and unfair to impose penalties in a situation where the language of the relevant rule was not clear and HCC relied on the interpretation of one EPA Region over another, highlighting the fact that EPA itself "could not agree on the proper reading of its own regulation."

INDEX OF CASES