United States Environmental Protection Agency | Office of Enforcement and Compliance Assurance (2201A) | EPA 300-R-9-007 September 1999

Water Enforcement Bulletin

Issue 16 | Water Enforcement Division | September 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 1998 – June 1999 Cases in Review

In This Issue

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

Recent Fourth Circuit Decision in U.S. v. Smithfield Foods, Inc.

In a decision issued too late to include in this publication of the Water Enforcement Bulletin, the Fourth Circuit Court of Appeals upheld the finding of liability and wrongful profits (economic benefits) analysis used by the District Court for the Eastern District of Virginia in assessing the largest civil penalty in the history of the Clean Water Act. U.S. v. Smithfield Foods, Inc., No. 97-2709, 1999 U.S. App. LEXIS 22,092 (4th Cir. Sept. 14, 1999), decision below reported at 972 F. Supp. 338 (E.D. Va. 1998). The Court of Appeals remanded the decision to the District Court solely to correct an admitted error of approximately 4% in the government expert's calculation of the penalty. The Fourth Circuit specifically upheld the District Court's assessment of a separate penalty for each type of violation (i.e., monthly, daily maximum) finding that "this method of counting violations creates the proper incentive for polluters to comply."

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

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

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.

TABLE OF CONTENTS

I. Clean Water Act (CWA)

A. Jurisdictional Scope of the CWA

1. Second Circuit holds that discharge of waste slurry through drain into storm water discharge system that led into natural tributary of a navigable water constituted discharge of pollutants to waters of the U.S.:

United States v. TGR Corp., No. 171 F.3d 762 (2nd Cir. Mar. 26, 1999).

Defendant TGR Corp., appealed its conviction for knowingly discharging pollutants into waters of the U.S. in violation of the CWA. Defendant's company was in the business of removing and disposing of materials that contained asbestos, and employees of defendant's company had discharged a waste slurry containing asbestos and other pollutants into a drain that led to a storm water discharge system and subsequently to Grasmere Brook, which the district court had found to be a tributary of Ash Creek, a navigable water of the U.S. On appeal, defendant argued that Grasmere Brook was not part of "waters of the U.S.," but rather was a municipal separate storm sewer. Defendant also asserted that Grasmere Brook was part of a municipal waste treatment system and, thus, was expressly excluded from coverage under the CWA.

After observing that several Circuit Courts have found that Congress intended the definition of "waters of the United States" to be construed broadly and that use of the term "navigable" in the CWA was of limited import, the court considered defendant's arguments. The court found defendant's arguments that Grasmere Brook was part of a municipal separate storm sewer or a municipal waste treatment system to be without merit. The court observed that pursuant to 40 C.F.R. § 122.26(b)(8), a municipal separate storm sewer must be a conveyance "owned or operated by a State, city, town, borough, county, parish, district, association or other public body," and must be "[d]esigned or used for collecting or conveying storm water." The court found that testimony had clearly established that the Brook was not owned or operated by any public body. Further, the court found that the waste treatment system exclusion applied only to "manmade bodies of water which neither were originally created in waters of the United States ... nor resulted from the impoundment of waters of the U.S." The court concluded that, given the evidence presented that Grasmere Brook was a natural waterway that housed "aquatic life and water fowl" and flowed into Ash Creek, an undisputed navigable waterway, Grasmere Brook could not be considered a waste treatment system. **The court concluded that Grasmere Brook was a natural tributary of a navigable water, and that tributaries of navigable waters constitute waters of the U.S. for purposes of the CWA.** The court affirmed defendant's conviction.

2. District court holds isolated wetlands provide a sufficient basis for CWA regulation:

United States v. Krilich, 1999 U.S. Dist. LEXIS 4191 (N.D. Il. Mar. 24, 1999).

The parties had previously entered into a consent decree that addressed CWA violations involving wetlands in an area developed by defendants. Subsequently, defendants were held to have violated the terms of the consent decree (deadlines for a mitigation plan) and were subject to a substantial penalty under the terms of the decree. (See, United States v. Krilich, 948 F. Supp. 719 (N.D. Il. 1996)), which was upheld on appeal with the exception of a miscalculation of the penalty amount. (See, United States v. Krilich, 126 F.3d 1035 (7th Cir. 1997)). The final penalty of $1,257,500 was entered December 15, 1997. In the present action, defendants moved to bar enforcement of this penalty.

Defendants argued that the district court had lacked subject matter jurisdiction to enforce the mitigation plan deadlines because the land improperly filled did not constitute a wetland under the CWA or did

not have a sufficient connection with interstate commerce to invoke federal jurisdiction. **The court considered this second point and found that "both presently and in 1996, precedent in this circuit supports that isolated wetlands are a sufficient basis for CWA regulation."** The court acknowledged that the Ninth Circuit was in agreement and that the Fourth Circuit had reached a contrary position, but concluded that there continued to be a "colorable basis for exercising jurisdiction over the decree's subject matter."

Defendants also argued that the decree should have been modified to reflect more recent precedents that suggest that filled lands do not fall within the scope of the CWA. (See, United States v. Lopez, 514 U.S. 549 (1995) and United States v. Wilson, 133 F.3d 251 (4th Cir., 1991)). The court dismissed this argument, noting that even if defendants were correct, the decree would have been vacated as of the effective date of the court's decision. **The court explained that the rule that consent decrees may or must be modified to reflect changed circumstances, including significant changes in the law, is limited to relief from prospective application of the decree and, thus, here would not affect defendants' violation or penalty.** The court denied defendants' motion to bar enforcement of the penalty.

3. District court holds that groundwater is not included within the definition of "navigable waters":

Patterson Farm, Inc. v. City of Britton, 22 F. Supp. 2d 1085 (D. S.D. Sept. 29, 1998).

Plaintiff, Patterson Farm, Inc., a farming corporation located near Britton, South Dakota, instituted this action against the City of Britton (City) under the citizen's suit provision of the CWA. Plaintiff also included pendent State law claims and sought injunctive relief and damages.

In Counts I and V of the complaint, plaintiff asserted as a pendent State law claim that the City violated the one-time irrigation order issued by the South Dakota Department of Environment and Natural Resources (DENR) by irrigating water from its industrial lagoons that may have exceeded effluent standards when the ground was both frozen and saturated and posting no warning signs. Plaintiff also claimed that the municipal lagoons were negligently maintained which resulted in the unlawful drainage of sewage, pollutants, and contaminants onto plaintiff's property. These alleged circumstances constituted nuisance under State law.

In Counts II and VI, plaintiff asserted another pendant State law claim that the City was negligent in its operation and maintenance of the industrial and municipal lagoons based on the same claimed facts. Counts III and VII alleged violations of State environmental law. In Counts IV and VIII, plaintiff claimed the City violated the federal CWA when it violated 1) the order issued by DENR; 2) other effluent standards or limitations; and 3) best management practices as they relate to the municipal lagoons. Plaintiff also claimed the City violated federal law when it operated the industrial lagoons without a NPDES permit and allowed an unauthorized discharge of sewage and pollutants into navigable waters.

The City filed a motion for summary judgment claiming the court lacked subject matter jurisdiction to hear the federal and pendent State law claims; plaintiff lacked standing because all alleged violations were past violations; and the City was immune from liability for the State law claims of nuisance and negligence because it had no liability insurance. Plaintiff filed a cross motion for summary judgment restating the claims in the complaint.

The court, granting in part the City's motion for summary judgment as to Counts IV and VIII, found the following: 1) the industrial lagoon facility fell within the regulatory definition of a POTW, and as such was specifically excluded from the NPDES permit requirement provisions; 2) the court lacked subject matter jurisdiction over the alleged violation of the DENR order because, even if true, it was a

wholly past violation of the CWA for which citizen suits cannot be maintained; **3) the court lacked subject matter jurisdiction over the alleged discharges into the groundwater because groundwater is not included within the CWA's definition of "navigable waters;"** and 4) the alleged municipal lagoon violations were without merit because storm sewer systems were exempt from federal and State regulations for a municipality of less that 100,000 people, as well as falling within the exclusion of groundwater from the CWA. Because material facts were in dispute as to whether the industrial lagoon facility had been in compliance with the CWA, the court held neither party was entitled to summary judgment as to this aspect of Counts IV and VIII. Finally, with respect to Counts IV and VIII, the court granted plaintiff's motion for an order compelling the production of documents because the documents sought were not privileged material and were relevant to the claim of ongoing NPDES permit violations.

In addition, the court found that the City was immune from liability for the State law claims of nuisance and negligence because liability for pollution was expressly not covered by the City's insurance policy. Therefore, the court granted the City's motion for summary judgment as to Counts I, II, III, V, VI, and VII.

4. District court dismisses challenge to USACE CWA Section 404 jurisdiction over wetlands adjacent to navigable waters:

United States v. Hartz Construction Co., Inc., 1999 U.S. Dist. LEXIS 9126 (N.D. Il. June 14, 1999).

This matter arose out of a CWA civil enforcement action in which the government alleged that defendant Hartz Construction Co., Inc. (Hartz) had discharged dredged or fill material into waters of the U.S. without a Section 404 permit. Hartz also was sued for failing to report information requested by EPA pursuant to an information request made under CWA Section 308 to assist in the Agency investigation of Hartz's alleged discharges.

The matter revolved around the scope of the USACE's statutory authority to regulate discharges to waters of the U.S. under the Section 404 program. Section 404(a) of the CWA prohibits the discharge of dredged or fill materials into "navigable waters" without a permit. "Navigable waters" are defined in Section 502 as "waters of the United States, including the territorial seas." Although the CWA does not define "waters of the United States," EPA and the USACE have promulgated regulations at 33 C.F.R. 328.3(a)(3) and 33 C.F.R. 230.3(3)(s)(3) defining the term as follows: "all waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs … the use or destruction of which could affect interstate or foreign commerce …." In what has become known as the "migratory bird rule," in the preamble to the regulation, the USACE explained that the term "other waters" includes those which "are or would be used as habitat by other migratory birds which cross state lines." Under 33 C.F.R. 328.3(a)(7) and 40 C.F.R. 230.3(s)(7), 232.2, wetlands adjacent to navigable waters (other than wetlands) are also subject to CWA requirements.

Based on the above statutory and regulatory authority, the government asserted that wetlands that Hartz planned to use for development were wetlands under the "other waters" provision because at least one of the wetlands was used by migratory birds and because one of the wetlands was adjacent to navigable waters. Because Hartz failed to obtain a Section 404 permit for his discharges of dredged or fill material, the government pursued enforcement.

Hartz brought a motion to dismiss the government's complaint, alleging that the district court lacked jurisdiction. Hartz's motion relied on two theories: 1) that the regulation under which the government brought its action was unconstitutional under the Commerce Clause; and 2) that there was no factual basis for jurisdiction.

Hartz's Commerce Clause challenge relied on the Supreme Court's decision in United States v.

Lopez, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995). Based on Lopez, Hartz asserted that the "other waters" regulation under which the government asserted jurisdiction exceeded congressional authority because it lacked the jurisdictional nexus to interstate commerce, the basis for all CWA jurisdiction. In Lopez, a case dealing with a Federal law that made it a Federal offense to knowingly possess a fire arm in a school zone, the Supreme Court held that the statute was beyond the scope of the Commerce Clause's grant of authority to Congress.

The district court rejected Hartz's argument that Lopez should be read to override existing case law on the jurisdictional scope of the CWA. First, the court restated relevant law on this issue from other Circuits. The court stated that in Hoffman Homes Inc., v Administrator, U.S. Environmental Protection Agency, 999 F.2d 256 (7th Cir. 1993), Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir.) cert. denied, 516 U.S. 955 (1995) and Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984), the Seventh, Ninth and Tenth Circuits had reviewed the "other waters" provisions and determined that migratory birds created a jurisdictional nexis between a wetland and interstate commerce. The district court also stated that in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 88 L. Ed. 419, 106 S. Ct. 455 (1985), the Supreme Court clearly supported a broad reading of the term "navigable waters" to include adjacent wetlands.

In regard to the impact of Lopez on past Commerce Clause cases, the district court noted that the Supreme Court had made it clear that in the Lopez decision it did not intend to overrule any of its Commerce Clause precedent, but instead viewed its decision as a refusal to extend the application of the Commerce Clause further than it already had. The court also stated that the Seventh Circuit in United States v. Black, 125 F.3d 454 (7th Cir. 1997) had given Lopez a narrow reading, and in several cases, Seventh Circuit district courts addressing the "other waters" issue since Lopez had continued to follow the precedent in Hoffman Homes. **Following this lead, the district court stated that it, too, would follow Hoffman Homes and uphold the government's regulatory authority.** In making its decision, the court did note that the Fourth Circuit in United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) had chose to strike down the "other waters" provision in light of Lopez.

The district court then turned to two other jurisdictional challenges made by Hartz. First, the district court rejected Hartz's assertions that the court lacked jurisdiction because the government had not shown that the wetlands were "waters of the United States." The district court stated that if Hartz believed that the government's complaint failed to include allegations adequate to support its right to recovery, the correct vehicle for raising the question would be a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim.

Second, regarding Hartz's assertion that the court had no subject matter jurisdiction regarding the Section 308 action, the district court rejected Hartz argument that EPA could not demand information under Section 308 until the Agency established jurisdiction over the land in question. **The district court stated that on its face, Section 308 gives EPA jurisdiction to determine whether there is a CWA violation resulting from alleged improper activities.**

B. Discharge of Pollutants/Point Sources

1. District court holds trap shooting facility and each firing station is a point source:

Stone v. Naperville Park District, 38 F. Supp. 2d 651 (N.D. Il. Feb. 17, 1999).

Plaintiff Roger Stone brought a CWA citizen's suit against defendant Naperville Park District that alleged defendant violated the CWA by discharging lead shot into navigable waters of the U.S. without a NPDES permit. Defendant argued that the shooting range and firing stations did not constitute a "point source" and therefore plaintiff could not

establish a violation. **The court rejected this argument and found that "the trap shooting range, as well as each firing station," constituted a point source as defined in the CWA.** The court observed that the facility's purpose was to discharge lead shot (a pollutant); the facility was discernable, confined and discrete; and that the facility "channels" shooting by its design and purpose.

Plaintiff sought an injunction against future violations, remediation, civil penalties and attorneys fees and costs. Upon balancing the competing interests, the court granted an injunction against any future trap shooting without a NPDES permit. It denied plaintiffs request for an injunction ordering remediation, but requested the parties work together to develop such a plan.

2. District court holds that CAFOs include not only the ground where the animals are confined but also the lagoons and systems used to transfer the animal wastes to the lagoons as well as equipment which distributes and/or applies the animal wastes produced at the confinement area to fields outside the animal confinement area:

Community Ass'n for Restoration of the Env't v. Sid Koopman Dairy; 1999 U.S. Dist. LEXIS 8348 (E.D. Wash., May 17, 1999).

Plaintiff, Community Association for Restoration of the Environment (CARE), had moved for partial summary judgment on issues that were common to all four cases. Plaintiff asked the Court to grant summary judgment declaring that the defendant's facilities, including manure spreading operations outside confinement pens, are Confined Animal Feeding Operations ("CAFOs") and as such are point sources of pollution subject to the NPDES permitting program.

The court noted that defendants were incorrect in asserting that only the area where the animals are confined and the adjacent areas without vegetation can be considered a point source. The court stated that defendant's position would be contrary to the intent of Congress as expressed in the CWA and by EPA in its NPDES regulations. The definition of "point source" has been subject to broad interpretation including manure-spreading vehicles, bulldozers and backhoes. (See, Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114, 115 (2nd Cir. 1994); Avoyelles Sportmen's League, Inc. v. Marsh, 715 F.2d 897, 922 (5th Cir. 1983); United States v. Tull, 615 F. Supp. 610, 622 (E.D. Va. 1983); and United States v. Weisman, 489 F. Supp. 1331, 1337 (M.D. Fla. 1980)).

The court held that CAFOs include not only the ground where the animals are confined but also the lagoons and systems used to transfer the animal wastes to the lagoons as well as equipment which distributes and/or applies the animal wastes produced at the confinement area to fields outside the animal confinement area.

To that extent, the court granted plaintiff's motion for partial summary judgment. However, the court ruled that there remained genuine issues of material fact regarding the extent to which the defendant's lands, the operation of the facilities and the actions of manure-spreading equipment are point sources, which were questions of fact for trial.

3. District court holds that violations were not caused by "single operational upsets" and that EPA could enforce effluent limits for internal outfalls:

United States v. Gulf States Steel, Inc., 1999 U.S. Dist. LEXIS 8834 (N.D. Ala. June 8, 1999). See case summary on page 30.

C. State/Tribe Water Quality Standards

1. District court holds that EPA has discretion to determine at what point it is appropriate for the Agency to deem a State's failure to submit TMDLs a constructive submission meriting intervention, but that EPA's duty to establish TMDLs where a State fails to do so is not committed to Agency discretion by law, but must be fulfilled promptly:

Natural Resources Defense Council v. Fox, 30 F. Supp. 2d 369 (S.D.N.Y. Nov. 12, 1998).

Plaintiffs brought suit under the CWA and the APA against EPA claiming that, in light of New York State's failure for 19 years to establish TMDLs for impaired State waters as required under CWA § 303(d), EPA unlawfuly failed to intervene and establish these TMDLs itself. Plaintiffs also claimed that EPA acted in violation of the CWA and in an arbitrary and capricious manner with regard to New York State's recent TMDL submissions for reservoirs supplying drinking water to New York City. Plaintiffs further claimed that EPA's failure to intervene violated the APA because such failure was "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law."

EPA argued that its duty to intervene was discretionary and that plaintiffs were therefore barred from enforcing any such duty under the CWA or the APA. Alternatively, EPA argued that New York State's recent submission of TMDLs rendered EPA intervention unnecessary. Plaintiffs argued that EPA's duty to intervene was mandatory and that the law of the case precluded EPA from now raising the argument that its duty was discretionary. Despite previously ruling that New York State's failure to establish TMDLs could be considered a constructive submission of deficient TMDLs, the court here agreed to examine the proper characterization of EPA's duty to intervene when a State fails to submit TMDLs. The court reasoned that this question had not been precisely or directly addressed in its prior decision, that resolution of the question could affect jurisdiction, and that an incorrect finding (i.e., wrongly presuming the existence of a mandatory duty) would constitute clear error.

EPA maintained that its decision as to when to deem a State's inaction regarding TMDLs as a constructive submission was and is discretionary. The court agreed. The court stated that the CWA does not establish any duty under which EPA must deem State inaction in developing and submitting TMDLs a constructive submission. It added that neither does the Act specify a date by which EPA must exercise any such "deeming" duty. The court observed that the CWA provides for the first submission of completed TMDLs by June 26, 1979, and for subsequent submissions to be completed according to priority ranking and submitted from time to time. **As a consequence of this statutory framework, the court concluded that EPA had at least some discretion to decide when it was appropriate to deem the State's inaction as a constructive submission. Based on this conclusion, the court found that it had no subject matter jurisdiction over plaintiff's CWA claims.**

With regard to the APA claims, EPA argued that plaintiffs failed to exhaust their administrative remedies, that the decision to deem submissions of TMDLs as insufficient is committed to Agency discretion and, that irrespective of these first two points, subsequent submission of TMDLs by New York State established that EPA need not have intervened. **The court rejected each of these arguments. The court found that there was no requirement that plaintiffs exhaust their administrative remedies (i.e., petition EPA) prior to bringing suit. Similarly, the court found that EPA's discretion in this instance was not unfettered. Rather, the court found that the States, or EPA in their absence, must establish TMDLs "promptly," meaning "within months, or perhaps, within a very few years."** Therefore, the court concluded that claims 6 and 7 stated a cause of action under the APA. Finally, the court concluded that the facts established by EPA,

although probative of whether New York State's actions in submitting TMDLs reduced or eliminated EPA's duty to intervene, did not eliminate any and all genuine issues of material fact and, therefore, did not justify summary judgment.

With regard to the reservoir TMDLs, EPA had approved eight TMDLs for phosphorus and deemed ten more to be "informational TMDLs" that were neither approved nor disapproved. **EPA argued that its decision to approve the eight TMDLs was discretionary and that, therefore, plaintiffs had no basis to challenge the decision under the CWA. The court agreed, holding that the CWA "leaves review of TMDL submission to the sound judgment of EPA."** As to whether EPA violated the APA in approving the eight TMDLs, the court examined whether the TMDLs achieved the applicable water quality standard, whether they contained an adequate margin of safety, whether they contained wasteload allocations and load allocations, whether the annual loads specified satisfied the statutory requirement of a "total maximum daily load," and whether the TMDLs satisfied the requirement for seasonal variations. The court found that several issues of material fact existed and, therefore, denied EPA summary judgment on this claim.

In addressing the "informational TMDLs," the court denied summary judgment to EPA, finding that given that the relevant waters were listed by New York State at the time as water-quality limited, it was not clear that under the CWA EPA had discretion to neither approve or disapprove of the TMDLs, even though the TMDLs ultimately showed that the waters were no longer impaired. The court also denied EPA judgment on the pleadings with regard to plaintiff's claim that EPA failed to fulfill its duty to oversee and effectuate the TMDL program.

2. District court holds that, with regard to when EPA must act given no State submission of TMDLs, the CWA provides a readily ascertainable deadline for EPA action and, as a result, at some point beyond July 26, 1979 the delay becomes unreasonable and EPA's duty to act is triggered:

American Canoe Ass'n v. U.S. EPA, 30 F. Supp. 2d 908 (Dec. 18, 1998).

Plaintiffs American Canoe Association and American Littoral Society brought suit against EPA alleging that the Agency had failed to comply with various duties imposed under the CWA, ESA, and APA. Plaintiffs alleged 1) EPA violated CWA § 106 by making grants to Virginia absent an adequate State program for monitoring water quality (count 1); 2) EPA failed to implement § 303(d)(2) and abused it discretion in violation of the APA when it approved Virginia's inadequate 1996 303(d) list of Water Quality Limited Streams (WQLSs) (counts 2 and 3); 3) EPA failed to establish TMDLs and TMDTLs for Virginia waters as required by the CWA and, alternatively, that failure to develop TMDLs was an abuse of discretion under the APA (counts 4 and 5); 5) EPA's failure to approve or disapprove of a CPP and review it from time to time constituted the failure to perform a mandatory duty under the CWA (count 6); 6) EPA failed to perform a mandatory, nondiscretionary duty because it failed to disapprove of Virginia's proposed 1987 CPP (count 7); 7) EPA failed to perform a mandatory, nondiscretionary duty because it failed to revoke Virginia's NPDES permitting authority based on the lack of an approved CPP (count 8); 8) Actions under counts 6, 7, and 8 violated the APA (count 9); 9) EPA failed to provide notice and opportunity for comment on its approval of Virginia's § 303(d) list, its approval of Virginia's TMDLs and TMDTLs, and it approval of Virginia's CPP in contravention of the APA's procedural requirements for agency rulemaking (count 10); 10) EPA failed to comply with the ESA in reviewing, approving and promulgating WQLSs, TMDLs, TMDTLs, and a CPP for Virginia, and such failures are reviewable under the APA (count 12).

With regard to count 1, EPA asserted plaintiffs lacked standing because they failed to plead facts that demonstrated any injury had been caused by

EPA's actions or that such injury would be redressed by the declaratory and injunctive relief sought. The court agreed and dismissed this cause of action.

The court treated counts 2 and 3 as alternative causes of action. EPA asserted that both were moot because Virginia's 1998 WQLS list had subsequently been submitted and partially approved and partially disapproved by EPA. The court observed that the mootness doctrine did not apply in situations where there was insufficient time to litigate the challenged action and there was a reasonable expectation the complaining party would be subject to the same action again. The court found that there had not been sufficient time for plaintiffs to challenge the 1996 list of WQLSs, and that further briefing was needed to address whether the alleged deficiencies in the 1996 list had been remedied in the 1998 list. The court also rejected EPA's argument that its approval of Virginia's 1996 list could not violate the CWA or APA because EPA had no duty to reach a particular result. Rather, the court found that EPA's regulations required the Agency to approve a list if it met the requirements of 40 C.F.R. § 130.7(d)(2).

With regard to count 4, EPA argued that the court lacked subject matter jurisdiction because EPA was under no mandatory duty to establish TMDLs in the face of inaction by a state. EPA argued that the CWA creates a mandatory, nondiscretionary duty only where it provides a date-certain deadline for Agency action. EPA alleged the CWA establishes no such deadline with regard to when EPA must act given no state submission of TMDLs. **The court disagreed, and found that the CWA did provide a readily ascertainable deadline for EPA action. Based on the language of § 303(d), the court viewed July 26, 1979 as the deadline for EPA approval of State submissions. The court recognized that a reasonable delay beyond this date would not necessarily be deemed a constructive submission that no TMDLs were necessary, but noted that at some point beyond July 26, 1979 the delay becomes unreasonable and EPA's duty to act was triggered**. The court also rejected EPA's argument that this cause of action was not ripe for review. Given that count 4 survived, count 5, which was an alternative cause of action brought under the APA, was dismissed.

With regard to count 6, EPA argued that plaintiffs failed to state a claim because EPA approved Virginia's CPP on September, 12, 1973. Noting an issue of fact that needed to be resolved, the court allowed this claim to the extent that it alleged EPA had never approved a CPP for Virginia, but dismissed it to the extent it sought to enforce a discretionary duty to review an approved CPP. On count 7, EPA argued that § 303(e) only requires EPA to approve an initial CPP. The court found that EPA was under no mandatory duty to disapprove of a CPP that failed to include mandatory elements and therefore dismissed this count.

On count 8, EPA argued that under CWA § 509(b)(1)(D) proper subject matter jurisdiction was in the court of appeals. The court agreed and dismissed this count. The court also dismissed count 9 based on multiple jurisdictional defects.

EPA moved to dismiss count 10 on various grounds. EPA asserted that this claim was moot because EPA had partially approved Virginia's 1998 TMDLs. The court found that it was not clear whether notice and opportunity for comment had been provided regarding the 1998 submission, and accordingly requested further briefing. EPA also argued that the challenge to EPA's approval of Virginia's CPP was time-barred, and the court agreed. Finally, the court allowed the portion of count 10 related to whether EPA had provided notice and comment on final agency action regarding approval or disapproval of TMDLs to survive, since plaintiffs lacked knowledge regarding the status of TMDLs due to EPA alleged failure to make proposed TMDLs and TMDTLs public.

Count 12 was dismissed because the ESA provides for review of compliance through citizen suits, and the APA applies only to agency action made

reviewable by statute and final agency action for which there is no other adequate remedy in a court.

3. ALJ holds that use of the trophic index to determine level of Section 303(b) impairment constitutes a "binding norm" and should have been subject to formal notice and comment:

Western Carolina Regional Sewer Authority v. South Carolina Department of Health and Environmental Control, No. 98-ALJ-07-0267-CC (June 21, 1999).

In an administrative matter in South Carolina, the Western Carolina Regional Sewer Authority (Authority) successfully challenged the method used by the South Carolina Department of Health and Environmental Control (DHEC) to add water bodies to the Clean Water Act Section 303(d) impaired list.

The Authority argued that DHEC relied too heavily on a "trophic state index" to determine the level of impairment from phosphorus. The Authority also contended that the trophic state index was not a satisfactory means to translate the State's narrative water quality criteria for nutrients to the numeric criteria used to declare the waters impaired.

The listing had important implications for the Authority. With the water body on the impaired list, the State would be required to develop Total Maximum Daily Loads (TMDLs) to allocate pollutant loadings among dischargers at levels sufficient to ensure that State water quality standards were attained. This would mean more stringent NPDES permit limits for the Authority and possibly a moratorium on construction of new sewage treatment facilities.

DEHC argued that it relied on a number of indicators to conclude that the waters were impaired for the aquatic life use for which they were designated, and that the trophic state index was only one of these indicators.

The State's Chief Administrative Law Judge (ALJ) agreed with the Authority, holding that use of the trophic index constituted a "binding norm" similar to a regulation that should have been subject to formal notice and comment. Accordingly, the ALJ granted summary judgment to the Authority based on the "unpromulgated regulation" argument, finding that although DHEC asserted that the trophic State index was a tool used, it was in fact a binding norm and a *de facto* numeric criterion:

The action was the first time a regulated entity has successfully challenged a Section 303(d) listing for nutrients based on narrative criteria.

D. NPDES Permits

1. Fifth Circuit holds that EPA did not violate the APA when it set zero discharge limits on produced water and produced sand in the coastal oil and gas effluent limitation guidelines, nor did EPA act in a manner contrary to the CWA when it set separate limits for Cook Inlet without designating it as a separate subcategory:

Texas Oil & Gas Ass'n v. U.S. EPA, 161 F.3d 923 (5th Cir. Dec. 17, 1998).

Eighteen petitioners challenged EPA's final effluent limitation guidelines (ELGs) for the coastal oil and gas producing industry, which were promulgated January 15, 1997. Three of the petitions also sought review of a NPDES general permit for oil and gas producing facilities issued by EPA Region 6 on January 9, 1995. Petitioners challenged EPA's promulgation of zero discharge limits on produced water and produced sand, EPA's decision to set more lenient limits for coastal facilities in Cook Inlet, Alaska, and Region 6's issuance of a general permit that banned the discharge of produced water from coastal facilities in Texas.

Texas petitioners asserted that in developing the zero discharge limit on produced water in the final ELG, EPA relied on a flawed analysis of the economic achievability of the limit and the Agency based its pollutant reduction estimates on a limited and unrepresentative study (the "10-facility study"). Petitioners argued that EPA excluded from its consideration wells drilled before 1980 and not recompleted since then. The court rejected this argument, finding that although the fact that EPA did not consider pre-1980 wells in this action may have had some effect on EPA's analysis, it did not rise to the level of an "arbitrary and capricious agency action." Rather, the court found that because marginally producing wells similar to the pre-1980 wells had been adequately represented in the Agency's Section 308 survey data, EPA had established a rational relationship between its decision and the basis for that decision. Similarly, the court rejected petitioners arguments regarding the 10-facility study, finding that the study only was used to estimate pollution reduction benefits. The court stated that the "benefit to be achieved from adopting a particular pollution control technology is not an element of that technology's cost," and found that such benefits were not a required part of the BAT determination. Given this fact, the court observed that even serious flaws in the study would not have provided "grounds for remanding the zero discharge limit."

Cook Inlet petitioners asserted that in setting the zero discharge limit on produced sand, EPA improperly refused to consider a "no free oil" alternative based on a sand washing treatment technology. The court dismissed this argument based on the fact that every coastal facility surveyed except one was practicing zero discharge at the time of the rulemaking, and the Agency had considered sand washing and concluded that it was not always effective in eliminating pollutants from produced sand.

Alaska petitioners argued that EPA violated the CWA when the Agency established different limits for Coastal facilities outside Alaska than for those in Cook Inlet without establishing Cook Inlet as a separate subcategory. The court, however, found that EPA had engaged in a permissible construction of the CWA because the Agency had appropriately balanced the need for nationally uniform standards with the need for some flexibility to address one group of point sources within a long-established category that were "dramatically different from all other point sources within that subcategory. (Chem. Mfrs. Ass'n v. Natural Resources Defense Council, 470 U.S. 116 (1984)). The court found it significant that EPA had concluded that due to geography and the circumstances of Cook Inlet, the cost of complying with zero discharge would have been "substantially higher for Cook Inlet facilities." Ultimately, the court found that, based on these facts, EPA had sufficient plenary rulemaking authority to set different effluent limits for these facilities.

Finally, the court found the challenge to the Region 6 general permit was moot, since even if the permit was remanded the final result would be governed by the final ELGs and, thus, the same zero discharge standard would be imposed.

2. Tenth Circuit holds that plaintiff cannot use CWA citizen suit provisions to challenge a NPDES permit that does not address the discharge of pollutants to groundwater where EPA determined during permit renewal that the permittee did not need a permit for groundwater seepage:

Notice: Rules of the Tenth Circuit Court of Appeals may limit citation to unpublished opinions. Please refer to the rule of the U.S. Court of Appeals for this Circuit (10th Cir. R. 36.3).

Amigos Bravos v. Molycorp, 1998 U.S. App. Lexis 28567 (10th Cir. 1998).

Plaintiffs, two non-profit corporations whose members are interested in protecting New Mexico's water resources, brought a citizen suit against defendant Molycorp, who operated a molybdenum

mine that discharged pollutants pursuant to a NPDES permit into the Red River, alleging that pollutants were being leached from waste rock piles at defendant's mine and discharged into the Red River through groundwater flow, seeps, and springs, and that these discharges were not authorized under defendant's NPDES permit. The district court had previously dismissed plaintiff's claims for lack of subject matter jurisdiction, finding that such claims should have been brought before the court of appeals in connection with defendant's permit renewal in 1993.

On appeal, plaintiffs argued that EPA did not follow the procedures necessary to include the discharges from the waste rock piles to groundwater in the final permit, EPA's response to comments regarding groundwater issues pertained to issues other than the alleged discharges from the waste rock piles, EPA did not take any "action" regarding waste rock pile discharges to groundwater because EPA's response neither issued, denied, nor required an NPDES permit for these discharges, and EPA's response to comments on discharges to groundwater did not reflect EPA's position on groundwater discharges that are hydrologically connected to surface waters. **The court of appeals rejected these arguments and affirmed the decision of the district court. The court agreed that plaintiffs should have pursued their present claims during the permit renewal process**. The court stated that plaintiff's claims were not viable because several opportunities existed for plaintiffs to challenge EPA's decision through administrative and judicial review. The court noted that plaintiffs could have requested that the Regional Administrator grant an evidentiary hearing to reconsider or contest the decision, and could have petitioned the U.S. Court of Appeals for review of that decision. With regard to the plaintiff's arguments that EPA focused on groundwater issues other than discharges from the waste rock piles and, therefore, did not consider the discharges at issue, the court found that the issue of waste rock drainage was raised in the public comments and that EPA addressed this concern by stating that it understood the concern for possible impact of seepage to the Red River, but that groundwater seepage was not considered a "point source" under the NPDES permitting program but is regulated by the State through the New Mexico Environmental Department.

3. District court holds that a NPDES storm water permit is not required for the construction of farming access roads, and that construction activities that disturb less than five acres and are not part of a larger common plan of development, are not subject to NPDES permit requirements:

Mamo v. Galiher, 28 F. Supp. 2d 1258 (Dist. Ct. Haw., Nov. 25, 1998).

Plaintiff Na Mamo O 'Aha' Ino brought an action under the CWA that alleged that various construction activities on defendants' property triggered the need for a NPDES stormwater permit and that defendants failed to obtain a dredge and fill permit prior to filling a portion of an adjacent wetland and stream. The construction activities alleged included building a helipad and utility barn, creating terraces, erecting water tanks for irrigation, storing road building materials, filling wetlands, clearing a turnaround area, and constructing, using and maintaining access roads. Defendants argued that their activities were not subject to permit requirements.

The court reviewed the definitions of construction under 40 CFR 122.26(b)(14)(x) and 33 U.S.C. 1362(14), and the permit exclusions under 40 CFR 122.3(e) for non-point source agricultural and silvicultural activities. The court then determined whether each of defendants' activities constituted "construction activities" or "non-point source discharges and/or development of land for agriculture."

With regard to defendants construction of access roads, the court held that no permit was required. The court found that the farming

roads at issue were analogous to logging roads, which have been held by the Ninth Circuit to be excluded from NPDES permit requirements. The court also found that both principles of statutory construction and the legislative history of the CWA supported this conclusion.

As for the defendants' other construction activities, the court considered whether these activities fell within the exception for activities that disturb less than 5 acres and which are not part of a larger common plan of development. (40 C.F.R. § 122.26(b)((14)(x)). The court calculated the area disturbed by the building of the helipad, utility barn, terrace construction, water tank installation, clearing for a turn around area, stockpiles of road building material, and filling of wetlands, and found the disturbance to be 1.61 acres, less than the five acres needed to trigger a NPDES permit. **With regard to the existence of a common plan of development, the court observed that such a plan is broadly defined by EPA as an announcement or piece of documentation or physical demarcation indicating construction activities may occur on a specific plot.** The court observed that a plan is also defined as a contiguous area where multiple separate and distinct construction activities may be taking place at different times on different schedules under one plan. The court did not consider the construction, use, and maintenance of the access roads a "construction activity" and thus did not consider them in this determination. **In addition, the court found that a plan submitted to the County of Maui and a cooperative agreement with the local soil and water conservation district, filed two and a half years apart, were insufficient to establish a common plan of development.** The court asserted that plaintiff confused development with construction as a large part of defendants' plan discussed planting trees and raising animals. The court concluded that defendant's activities were not undertaken pursuant to a "larger common plan of development."

The court denied plaintiff's motion for partial summary judgment and granted in part defendant's motion for summary judgment, holding that defendants were not required to secure NPDES permits for their activities. Because a genuine issue of material fact existed as to whether defendants placed fill material into the adjacent stream, defendant's motion for summary judgment on this issue was denied.

E. Section 404/Wetlands

1. Court of Appeals for the Federal District holds that denial of Section 404 permit for the dredge and fill of underwater lake-bottom property did not constitute a compensable government taking:

Forest Properties, Inc. v. United States, 177 F.3d 1360 (May 18, 1999).

This case stemmed from the planned development of two properties, one upland tract and a 9.4 acre piece of contiguous lake-bottom property that constituted wetlands. Plans called for the fill of the lake-bottom land property to create peninsulas on which homes would be built. In 1988, Forest Properties, Inc., acquired title to the upland property and entered into a contract for the purchase of the lake-bottom property. Forest also took over a previously filed Section 404 permit application that requested authorization to dredge and fill the lake-bottom property. In 1989, the U.S. Army Corps of Engineers (USACE) informed Forest that if it were to make a final decision on the permit application at that time, the recommendation would to deny the permit because the project did not meet the criteria established at 40 CFR § 230.10(a)(3). Despite the fact that Forest modified his plans and had secured necessary State permits, in 1992 the USACOE denied the Section 404 permit application. In response, Forest revised its development plan to eliminate the lake-bottom property and proceeded with the development of the upland area, creating 106 lots with a market price of about $12 million, at a cost of $7.1 million.

Forest did not seek administrative or judicial review of the USACE action, but did file a takings action in the Court of Federal Claims, which held that no taking had occurred. On appeal, the Court of Appeals affirmed the decision. The court framed its analysis by outlining relevant Federal takings law, citing Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994), stating that a determination on whether the government's denial of the permit constituted a taking of Forest's real property for which the Fifth Amendment mandated payment of just compensation involved three inquires: 1) whether the taking alleged was physical or regulatory; 2) if the alleged taking was regulatory, what was the relevant parcel for determining the economic impact of the regulation; and 3) did the regulatory action actually constitute a taking. The Court of Appeals held that the permit denial should be considered an alleged regulatory taking, as there was neither a physical taking or invasion of the lake-bottom land, with the impact of the USACOE action simply being that Forest was not able to make a particular use of the property.

Regarding the issue of the "relevant parcel" for the takings analysis, the Court of Appeals concurred with the decision of lower court that the relevant parcel was the entire 62 acre project, not, as Forest claimed, the 9.4 acres of submerged lands. Key to the court was the fact that from the outset of the project, the two parcels were treated as components of a single integrated project and that Forest's economic intentions were to utilize the upland parcel in conjunction with the lake-bottom land as one income producing unit.

On the issue of whether the USACE's denial of the permit was a regulatory taking of the 62 acre parcel, the court, citing Penn Central Transp. Co. v. New York City, 438 U.S. 104, 57 L.Ed. 2d 631, 98 S.Ct. 2646 (1978), stated the following relevant factors to determine whether a government regulation constitutes a regulatory taking: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation has interfered with distinct investment-backed expectations; and 3) the character of the governmental action. Applying this criteria, the Court of Appeals upheld the lower court's decision, finding that any diminution in the value of Forest's property related to the permit denial was not substantial enough to protect as a taking. First, the court found that the character of the action did not have an impact in this case, as the dredging and filling of the submerged area would not constitute a nuisance under State law. Second, the court stated that the denial had not significantly interfered with Forest's reasonable investment backed expectations, largely basing its finding on the fact that at the time Forest purchased the property, it had knowledge of the existing regulatory requirements and knew three years before permit denial that the USACOE planned to deny the permit application. Finally, the court stated that Forest failed to introduce convincing evidence to show the amount, if any, by which the value of the relevant parcel, the 62 acres, was reduced by the permit.

2. Court of Federal Claims holds that USACE denial of permit to fill lake bottom for residential development does not constitute a taking requiring compensation under the Fifth Amendment:

Palm Beach Isles Ass'n v. United States, 42 Fed. Cl. 340 (Oct. 19, 1998).

Plaintiffs owned 50.7 acres of real property in Palm Beach County, Florida that primarily existed as submerged land below the mean high water mark. Plaintiff's filed a complaint against the U.S. seeking compensation in excess of $10,000,000 for an alleged taking of property without just compensation. Plaintiffs claimed that when the U.S. Army Corps of Engineers (USACE) denied a dredge and fill permit for the property, defendant took plaintiff's property in violation of the Fifth Amendment.

In 1958, the plaintiffs purchased a 311.7 acre parcel of property that included the 50.7 acres at issue for $380,190. In 1968, plaintiffs sold a 261 acre upland oceanfront portion of the parcel for

approximately $1 million but retained ownership of 50.7 acres, consisting of 49.3 acres of lake bottom that is below the mean high water mark, and 1.4 acres of adjoining shoreline of red mangrove/ saltmarsh cordgrass wetlands that is above the mean high water mark.

On May 31, 1989, plaintiffs filed a permit application with the USACE pursuant to the Rivers and Harbors Act § 10 and the CWA § 404. The application sought permission to fill the 49.3 acres of lake bottom and 1.4 acres of adjoining shoreline for the purpose of constructing a residential development. The USACE denied the permit application as being contrary to the 404(b)(1) guidelines and contrary to the public interest. USACE concluded the project would have resulted in the elimination of 50.7 acres of important Lake Worth shallow water habitat. The parties filed cross-motions for summary judgment on plaintiff's claim that the USACE actions constituted a taking in violation of the Fifth Amendment.

The court found that plaintiffs' taking claim was not viable in that the U.S. government's navigational servitude rights removed from the takings inquiry some 49.3 acres of plaintiffs' property within the navigational servitude waters below the mean high water mark. In addition, the claim for the remaining 1.4 acres was not found to constitute a per se taking of land when the entire parcel of either the 311.7 acres or 50.7 acres was considered. Moreover, the court found plaintiffs lacked a reasonable investment-backed exception in the value of this 1.4 acres when assessed in the context of the entire parcel, of which 49.3 acres was subject to the navigational servitude and 261 acres were sold for a substantial gain. Finally, the court observed that plaintiffs could still apply for a permit from the USACE and a zoning variance from state and local authorities that would allow for water dependent used of the 50.7 acre parcel, thereby providing other viable development options. Accordingly, the court denied plaintiffs' motion for summary judgment, and granted defendant's cross-motion for summary judgment.

3. District court dismisses suit to enforce violation of Section 404 permit terms for lack of subject matter jurisdiction where violation resulted in discharge of pollutants but not a discharge of dredge and fill material:

United States v. United Homes, 1999 U.S. Dist. LEXIS 2354 (N.D. Il. Feb. 24, 1999).

Plaintiff United States brought suit on behalf of the U.S. Army Corps of Engineers (USACE) against defendant United Homes for failing to comply with terms of defendant's Section 404 permit, which had been issued to fill a portion of a wetland located on land that was being developed by defendant. Plaintiff alleged defendant failed to develop adequate or properly maintain the required soil and siltation controls, and that such actions resulted in the discharge of pollutants to waters of the U.S.

Defendant moved to dismiss the case, arguing that the USACE lacked jurisdiction because the pollutants discharged were not "dredge and fill materials," as those materials are defined in the CWA and corresponding regulations. **The court agreed. The court observed that the USACE only has jurisdiction over issuing permits for dredge and fill activities, whereas EPA has authority to issue permit for the discharge of all other pollutants. The court then examined whether the pollutants discharged here constituted dredge and fill material, and concluded that they did not.** The court found that the "pollution complained of by the Government" did not constitute dredge and fill material, and reiterated that the USACE lacked jurisdiction over non-dredge and fill discharges. The court observed that although the defendants may have been violating the CWA, the violations were not within the jurisdiction of the USACE, the party on whose behalf the government brought the suit. Thus, the court granted defendant's motion to dismiss.

4. District court holds that the purposeful relocation of materials

within wetland does not constitute incidental fallback, but is more similar to sidecasting, which is subject to Section 404 of the CWA:

United States v. Bay-Houston Towing Co., 33 F. Supp. 2d 596 (E.D. Mich. Jan. 14, 1999).

The United States sought injunctive relief and civil penalties against defendant Bay-Houston Towing Co., for discharging pollutants without a NPDES permit (count I), discharging dredge and full materials into wetlands without a Section 404 permit (count II), and violating an administrative compliance order (count III). All violations were associated with defendant's peat harvesting activities in Sanilac County, Michigan. Defendant sought summary judgment with regard to counts I and II.

Defendant argued that count I was moot because on July 24, 1998, the Michigan Department of Environmental Quality (MDEQ) issued it a NPDES permit that authorized the discharge of peat bog drainage water into the Black River. The United States argued that the injunction sought would require defendant to reduce the number of outfalls discharging pollutants, and to comply with other requirements in the MDEQ-issued permit. The court allowed review of defendant's compliance with specified violations of the permit, which the government was required to identify within 60 days.

With regard to count II, defendant argued that its peat harvesting operation did not constitute a discharge or addition of pollutants to wetlands and, therefore, it did not fall within the government's jurisdiction under Section 404 of the CWA. The court disagreed. The court found that this case did not involve incidental fallback, since defendant's activities involved the "purposeful relocation" of different materials in the peat bog. Rather, the court observed that defendant's activities were more consistent with sidecasting, which, the court observed, has always been subject to Section 404. The court discussed the decision in United States v. Wilson, 133 F.3d 251 (4th Cir. 1997), and found the reasoning of Judge Payne to be the more persuasive (arguing that sidecasting did constitute the addition of a pollutant to the water, and stating that in National Mining Assoc., v. U.S. Army Corps of Engineers, 330 U.S. App. D.C. 329, 145 F.3d 1399 (D.C. Cir. 1998), the court did not hold that the USACE may not legally regulate some forms of redeposit under its Section 404 permitting authority). The court similarly concluded that defendant's spreading of the sidecasted bog material from the side of the ditch into the bog for future harvest, and discing of the wetlands, could constitute an addition of pollutants.

Defendant also argued that it had not discharged pollutants because the materials were ultimately removed from the wetland. The court found that whether defendant's activities could have been categorized as "discharges" when the bog material was only temporarily displaced into other areas of the bog before being removed raised a genuine issue of material fact. Similarly, the court found the question of whether the haul roads were temporary to be a question of fact. Finally, the court found that defendant's use of indigenous bog vegetation and clays to create haul roads and foundations for windrows could constitute the discharge of fill material under the CWA. The court denied defendant's motion for summary judgment.

5. District court denies defendant's motion to bar $1,257,500 penalty for wetlands violations:

United States v. Krilich, 1999 U.S. Dist. LEXIS 4191 (N.D. Il. Mar. 24, 1999). See case summary on page 1.

6. District court rejects Home Builders Association's claims that agreement between USACE and other federal, state and local agencies designed to coordinate various programs to regulate soil erosion and sediment

control exceeds USACE statutory and regulatory authority:

Home Builders Ass'n of Greater Chicago v. USACE, et al., 1999 U.S. Dist. LEXIS 9453 (N.D. Il, June 15, 1999).

This case involves an action brought by the Home Builders Association of Greater Chicago, a group of construction companies and residential developers doing business in the Chicago area, seeking declaratory and injunctive relief against the USACE. In its action, the Association claimed that the USACE exceeded its authority when it entered into an "Interagency Coordination Agreement" (ICA) with other federal, state and local agencies, under which the parties would coordinate their respective regulatory actions to regulate soil erosion and sediment control in Lake County, Illinois. Parties to the ICA were the USACE, the Lake County Stormwater Management Commission (SMC), the Lake County Soil and Water Conservation District (SWCD) and the U.S. Department of Agriculture Natural Resources Conservation Service (NRCS).

ICA conditions that applied to the USACE all involved actions to be taken in the Section 404 permitting process. The USACE agreed to the following: 1) wherever appropriate, when issuing a Section 404 permit, include as a special condition that the permittee consult with the SMC on soil erosion and sediment control plans; 2) at the USACE's discretion, require the permittee to submit a soil erosion and sediment control plan to the SMC for review and approval; 3) at the USACE's discretion, require the permittee to schedule a preconstruction meeting with the SMC to review implementation of the soil erosion and sediment control plan; 4) if the USACE (or the SWCD or NRCS) received a report of a soil erosion and sediment issue on the site, it would contact SMC, who would then take action to correct the problem with possible USACE assistance; and 5) request that SMC conduct on-site inspections during the construction phases of land development to determine whether the site was in compliance with approved plans and Section 404 permit requirements.

The Association's primary complaint was that the procedural obligations imposed on the USACE under the ICA unlawfully expanded the USACE's narrow authority over dredge and fill erosion and siltation controls to encompass regulation of general site construction and siltation controls and stormwater management plans for developed sites, none of which fell under the USACE's regulatory jurisdiction. The Association also claimed that the ICA impermissibly expanded the other agencies limited authority to cover Section 404 activities. Accordingly, the Association asked that the court declare the ICA invalid and require the USACE to rescind it on the ground that it exceeded the USACE statutory and regulatory authority and violated the APA.

The USACE presented three defenses: 1) that the Association's claims were not "ripe;" 2) that the Association did not have "standing;" and 3) that the ICA was not a "final agency action," therefore it was not subject to judicial review because only final agency actions come within the limited waiver of sovereign immunity of the APA. The district court stated that if it decided the USACE's motion on the first two grounds, it need not address the third.

Presenting a brief summary of the ripeness doctrine, citing Abbott Laboratories v. Gardner, 397 U.S. 136, 18 L. Ed. 681, 87 S. Ct. 1507 (1967), the district court stated that the basic rationale of the doctrine was "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies" and "to protect the agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties." Citing Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 118 S. Ct. 1665, 140 L. Ed. 2d 921 (1998), in which the Supreme Court rejected on ripeness grounds a challenge to a Forest Service resource management plan that set logging goals, but did not authorize the cutting of any trees, the

district court stated that ripeness depends on "'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.'"

The Association argued that the matter was ripe because the ICA "crystalized" the USACE's position, that the USACE intended to "federalize" construction and that the ICA would force Association members to modify their behavior to avoid the procedural burdens and substantive consequences that would result from implementation of the ICA. **The court, drawing parallels to the Ohio Forestry case, disagreed with the Association's assertions that the suit was ripe, focusing on the discretionary nature of the USACE's obligations and, due to the non-mandatory language of the ICA, whether the procedural burdens cited by the Association as the basis for its action would ever occur.**

Turning to the hardship issue, again relying on Ohio Forestry, the district court rejected the Association's claims of hardship, stating that the Association had failed to prove that its members would have to change its behavior from the outset or modify existing activities. **Accordingly, the court stated that it was not convinced that withholding review of the ICA would cause substantial hardship to the Association's members, and, therefore, it would withhold review until the suit ripened with the USACE's implementation of the ICA and exercise of its authorities.**

On the standing issue, the court, citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992), stated that that the Association needed to establish three elements to satisfy the constitutional elements for standing: 1) injury in fact, i.e., invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or speculative; 2) causation; and 3) redressability. **Based on these criteria, the district court held that the Association did not have standing, since the nature and imminence of the alleged injury was too speculative.** In so holding, the district court focused on the fact that concerns regarding more burdensome permitting procedure and additional regulatory requirements depended on how the USACE actually implemented the ICA, and although it was possible that the USACE could take inappropriate action, imagining such circumstances only amounted to speculation and conjecture. **The court granted the USACE's motion to dismiss, and dismissed the Association's case without prejudice.**

7. District court approves settlement agreement regarding future regulation and study of mountaintop mining operations:

Bragg v. Robertson, 1999 U.S. Dist. LEXIS 9254, 48 ERC (BNA) 1913.

This action involved a proposed Settlement Agreement to resolve claims against EPA, USACE, the Office of Surface Mining (OSM) and the Fish and Wildlife Service (FWS) arising from their alleged failure to carry out respective CWA Section 404, SMCRA and NEPA duties to regulate mountaintop mining operations in West Virginia. The Settlement Agreement had two main components. First, the Federal defendants and the West Virginia Department of Environmental Protection (WVDEP) agreed to enter into an agreement to prepare an Environmental Impact Statement (EIS) on a proposal to consider developing agency policies, guidance and coordinated agency decision-making processes, the "long term approach," to minimize the adverse effects of mountaintop mining operations and excess spoil disposal sites. Second, the Agreement provided an "interim approach" to regulation of mountaintop mining activities, the focus of which was the creation of an interagency coordination process, primarily aimed at meshing the USACOE Section 404 permitting process with the WVDEP's NPDES program and the State permitting process for surface mining and reclamation.

The Settlement Agreement also provided that prior to the completion of the EIS, any application for mountaintop mining operations in West Virginia that would result in "more than minimal adverse effects" in waters of the U.S. would require a Section 404 permit for all overburden and fill material in waters of the U.S. Any application for West Virginia mountaintop mining operations that proposed to discharge fill in waters of the U.S. draining a watershed of 250 acres or more would be considered to have more than a "minimal adverse impact" and would, therefore, require an individual Section 404 permit. Similarly, if the USACE determined that a discharge into waters draining a watershed of less than 250 acres would have more than a "minimal adverse impact," the USACE would require an individual Section 404 permit.

The main focus of the decision was the challenge to the Settlement Agreement by several industry associations representing entities involved in surface mining and reclamation activities in West Virginia. First, the court addressed the standing of the Associations to bring their challenge, stating that under Alumax Mill Prods., Inc. v. Congress Fin. Corp., 912 F.2d 996 (8th Cir. 1990) and Quad/Graphics, Inc. v. Fass, 724 F.2d 1230 (7th Cir. 1983), the Associations would have standing if they could demonstrate that they would "suffer formal legal prejudice" from the Settlement Agreement, with "formal legal prejudice" occurring when a nonsettling defendant "is stripped of a legal claim or cause of action." The Associations claimed "formal legal prejudice" had occurred because companies could not challenge the agreed upon individual, rather than Nationwide, permitting approach because the USACE's decision was not a "formal agency action." **The court held that the Associations had failed to establish formal legal prejudice, because: 1) they had not demonstrated that once the USACE made a final determination on an individual permit, an applicant could not challenge the decision; and 2) that the companies' expectations regarding the Section 404 permitting process based on the USACE previous behavior "are not rights established by contract, statute or regulation," but instead, "simply expectations and assumptions that cannot bind the Corps from exercising its administrative discretion and duties." Thus, the court held that, without legally cognizable injuries, the Associations lacked standing to challenge the terms of the Agreement.**

Addressing the Associations' claim that the Settlement Agreement constituted an invalid rulemaking under the Administrative Procedure Act (APA) because the Federal Defendants did not follow proper notice and comment procedures in its adoption, the court held that formal APA requirements did not apply because the Settlement Agreement contained only "interpretive," not "substantive," rules. Regarding the "long term resolution" of the permitting issue through the NEPA process, the court held that the Settlement Agreement did not constitute a substantive rule, but rather a general statement of policy. In regard to the "interim approach" to permitting, the court held that the provisions were clearly within the ambit of interpretive rules, focusing on the fact that the Settlement Agreement simply better defined an existing process, the discretionary nature of many of the USACE's determinations, the fact that the procedures were recognized as "interim," and that the provisions regarding inter-agency coordination were simply agreements as to the process the agencies would use, without binding the agencies' discretion.

Turning to the Associations' final arguments, regarding the contention that the Settlement Agreement violated NEPA because it provided for the retention of consultants mutually acceptable to the agencies and the plaintiffs, the court found no violation, stating that nothing in the Settlement Agreement stated or implied that anyone other than the agencies would be preparing the EIS or suggested that should the agencies determine to hire a contractor, anyone other than the agencies would perform the selection process or that anyone other than an unbiased contractor would be chosen.

The court also rejected the Associations argument that the Settlement Agreement was invalid because it violated the equal protection component of the Fifth Amendment's Due Process clause and the Equal Protection clause of the Fourteenth Amendment by applying to surface mining operations in West Virginia, but not other States, and that the Federal Defendants had "no rational basis" for treating surface mining operations in West Virginia differently, thus not satisfying the constitutional criteria for taking such action. The district court held that the Associations failed to meet the burden of proving that the Federal Defendants had "no rational basis related to a legitimate government interest to support their decision," the standard of review in this type of case. The court noted that the prevalence of the regulated activity in West Virginia fully justified the action. Finally, the court rejected the Associations' argument that the Settlement Agreement constituted an impermissible delegation of executive authority because the Federal Defendants had agreed to allow the plaintiffs to participate in the EIS development process, the right to comment on individual permits and the right to participate in a dispute resolution process, stating that it was permissible to allow the Plaintiffs to be involved in the EIS contractor selection process, that the Settlement Agreement simply recognized the rights of the general public to be involved in the permitting process under existing regulations, and that the Associations had offered no justification on why the dispute resolution process was impermissible.

8. District court dismisses challenge to USACE CWA Section 404 jurisdiction over wetlands adjacent to navigable waters:

United States v. Hartz Construction Co., Inc., 1999 U.S. Dist. LEXIS 9126 (N.D. Il. June 14, 1999). See case summary on page 3.

9. District court holds that the continuing presence of a reconstructed fishpond wall without any current governing permit does not violate the CWA since the original placement was conducted pursuant to proper authorization under a nationwide permit:

Harold Wright v. Lance Dunbar et al., Civ. No. 97-00137 HG (Hawaii, April 27, 1999).

Plaintiff brought numerous claims against defendants concerning erosion and pollution damage to plaintiff's seaside property allegedly caused by defendant's restoration of an ancient Hawaiian fishpond wall, and defendant's participation in a stream cleaning and dredging project. Count II constituted a CWA citizen suit claim that sought an injunction for removal of the pond, civil penalties, costs, and attorney's fees. Defendant Dunbar argued that the court lacked jurisdiction because plaintiff failed to provide the proper notification of the violation to the defendant, and plaintiff failed to allege any ongoing violation.

The court found that plaintiff had properly served notice on defendant Dunbar, and that such notice contained sufficient information to satisfy the requirements of 40 C.F.R. § 135.3(a). Defendant Dunbar also asserted that there were no continuing violations of the CWA at the time plaintiff filed the complaint (2/6/97) because construction of the fishpond wall had been completed several years prior. Plaintiff made three arguments in response.

First, plaintiff argued that Dunbar had failed to obtain a § 401 water quality certification prior to applying for authorization for the fishpond project under a USACE DA nationwide permit 3, and this resulted in a continuing violation. The court disagreed. The court found that because the USACE had applied for State § 401 certification of the relevant nationwide permit in 1989 and the State of Hawaii had waived the certification requirement by failing to respond to the USACE's request, the nationwide permit was valid in Hawaii and individuals covered under that permit were covered under the USACE's certification and did not need to obtain an individual certification.

Second, plaintiff asserted that construction of the fish pond had not complied with the terms of the USACE nationwide permit. Again, the court disagreed. The court found that, although the USACE eventually revoked Dunbar's authorization to restore the fishpond under the nationwide permit, all worked conducted on the fishpond during the period covered by the complaint had been conducted in conformance with the permit.

Finally, plaintiff argued that the ponds presence without a valid authorized permit constituted a continuing violation because the fishpond wall was a conduit from which silt was intermittently discharged. The court considered whether the failure to obtain an individual water quality certificate for the fishpond wall after the USACE revoked coverage under the nationwide permit constituted a continuing violation, as well as whether the intermittent discharge from the wall of silt into the ocean constituted an unpermitted discharge. On the first issue, the court found that because reconstruction of the wall was covered by the nationwide permit when it occurred, the continued presence of the reconstructed wall without any "current governing permit" did not violate the CWA, "as the original placement was done pursuant to proper ... authorization under the nationwide permit." On the second issue, the court found that plaintiff had not substantiated his claim that the fishpond wall continued to discharge sediment and cause turbidity. The court thus concluded the no material issue of fact existed on this issue. The court held that defendant was entitled to summary judgment with respect to plaintiff's CWA claims.

F. Citizen Suits

1. Standing

a. Fourth Circuit holds that two non-profit environmental organizations lacked standing because they failed to establish injury in fact and failed to establish that the alleged injuries in fact were fairly traceable to defendant's conduct:

Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 179 F.3d 107;(4th Cir. 1999).

Plaintiffs brought a citizen suit under the CWA against defendant Gaston Copper Recycling Corporation alleging various violations of its NPDES permit. The district court dismissed the citizen's suit for lack of subject matter jurisdiction concluding that plaintiffs lacked standing. On appeal, plaintiffs contended that they established that their members suffered injuries in fact that were fairly traceable to defendant's conduct. The Fourth Circuit Court of Appeals reviewed the case de novo.

In regard to plaintiffs' claim of injury in fact, the court concluded that the concerns of plaintiffs' members were based on mere speculation as to the presence of pollution without any evidence to support their fears or establish the presence of pollutants in the allegedly affected waters. There were no toxicity tests, or tests or studies of any kind, performed on the allegedly affected waters. None of plaintiffs' members testified that there was an observable negative impact on the waters that they used or the surrounding ecosystems of such water. **While recognizing that recreational and economic interests of plaintiff members are legally protected interests, the court concluded that the member's concerns, standing alone, simply failed to establish that their legally protected interest were actually, or imminently threatened of being adversely affected.**

The court proceeded assuming arguendo that plaintiffs established that their members suffered injuries in fact and reviewed plaintiff's claim that the alleged injuries in fact were fairly traceable to defendant's conduct. **The court concluded that plaintiffs did not present evidence that the allegedly affected waterways contained effluents of the type that defendant discharged and that the distances between the source of the alleged pollution and the waterways used by plaintiffs' members was simply too great to**

infer causation. As such, the court concluded that plaintiffs had failed to establish that the injuries were fairly traceable to defendant's conduct.

The court therefore concluded that plaintiffs lacked standing and affirmed the district court's judgment dismissing plaintiffs' action for lack of jurisdiction.

In a dissent, Chief Judge Wilkinson opined that the majority had encroached on congressional authority by establishing standing hurdles so high as to effectively remove the citizen suit provision from the Clean Water Act. The dissent would reverse the judgment and remand for a determination of whether defendant has discharged pollutants in excess of its permit limits.

b. District court holds that civil penalties sought for ongoing violations of the CWA specifically deter such violations sufficient to satisfy the redressibility requirement for purposes of establishing standing:

Natural Resources Defense Council v. Southwest Marine, 39 F. Supp. 24 1235 (S.D. Cal. Jan. 27, 1999).

Defendant Southwest Marine sought reconsideration of an order that denied defendant's prior motion to preclude imposition of civil penalties for violations of the CWA. Defendant argued that Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) dictated that citizen suit plaintiffs never have standing to seek penalties for violations of an environmental statute if those penalties are paid to the U.S Treasury. The court disagreed. The court distinguished *Steel Co*., from the instant case based on the fact that *Steel Co.*, dealt with wholly past violations, whereas, the instant case involved ongoing violations. The court observed that the possible imposition of monetary penalties in this case could specifically deter current and ongoing violations. **Based on this finding, the court concluded that "civil penalties awarded to the U.S Treasury may remedy the Plaintiff's injuries" and thus were sufficient to satisfy the redressibility requirement of current standing law.**

The court also rejected defendant's argument that plaintiffs must not only have standing to bring their case but must have standing to seek each particular remedy. (Citing the City of Los Angeles v. Lyons, 461 U.S. 95 (1983)). The court observed that in effect defendant was arguing that irrespective of ongoing violations a citizen suit plaintiff could never seek civil penalties. The court rejected this argument as well, holding that "Lyons and its progeny are not applicable" because those cases typically involved requests for injunctive relief to remedy allegations of harm from officials or quasi-official conduct, and in such cases the interests in standing had to be weighed against the government's interest in being able to conduct its affairs. The court found no analogous concern here.

2. Enforcement Under Comparable Law as Bar to Citizen Suit

a. Sixth Circuit holds that series of four administrative enforcement orders constituted diligent prosecution under a comparable State law sufficient to bar citizen suit:

Jones v. City of Lakeland, 175 F.4d 410 (6th Cir. April 20, 1999).

Plaintiffs brought a citizen suit under the CWA against defendant City of Lakeland alleging the City discharged pollution from its stabilization lagoon into State waters in violation of its NPDES permits. The district court, having found that the Tennessee Department of Environmental Conservation (TDEC) was diligently prosecuting a civil action against the City, had dismissed the action for lack of subject matter jurisdiction. The TDEC had issued four administrative orders in an attempt to require the City to come into compliance. On appeal, the Sixth

Circuit Court of Appeals reviewed whether either bar to citizen suits contained in CWA § 1365(b) or 1319(g)(6)(A) applied.

The court first examined whether the TDEC's action constituted diligent prosecution, and concluded that it did because the TDEC had made repeated efforts to require compliance, and such efforts resulted in progress towards such compliance, even though practical difficulties encountered by the City resulted in continued noncompliance. The court observed that the TDEC had imposed a fine in its fourth order and that this order provided for further fines if the City failed to comply with the requirements of the order. The court then examined whether the administrative orders issued by TDEC constituted an "action in a federal or state court." The court concluded that administrative proceedings of the State's water quality control board or TDEC that sought to enforce the Tennessee Water Quality Control Act (TWQCA) did not constitute actions taken in court for purposes of CWA § 1365(b). Thus, the court concluded the district court had improperly concluded that § 1365(b) barred plaintiff's suit.

The court then examined whether § 1319(g)(6)(A) barred plaintiff's action. Since the court had already found that the TDEC's actions constituted diligent prosecution, the court focused on whether the requirements of TWQCA were comparable to those in § 1319(g). The court concluded that the State law provisions were comparable to the CWA requirements. The court found that the State law contained similar enforcement goals to the CWA, comparable penalty provisions, and provided a meaningful opportunity for public participation.

In a dissent, Judge Krupansky found that the CWA and the TWQCA were not comparable, and that the record did not establish that the TDEC had diligently prosecuted an enforcement action under the TWQCA.

b. Ninth Circuit holds that a CWA citizens' suit, for violations that continued beyond the timeframe specified in a State enforcement action, is not barred by such enforcement action where no penalty was imposed under the State action and environmental enhancement projects imposed under the State action did not address the continuing violations:

Northern California River Watch v. Sonoma County Water Agency, 1998 U.S. Dist. Lexis 19921 (9th Cir., Dec.17, 1998).

Plaintiff Northern California River Watch brought a citizen's suit that claimed defendants violated the CWA (33 U.S.C. § 1251) by failing to comply with their NPDES permit as a result of allowing certain discharges of pollutants into their wastewater collection, treatment, and disposal system. Plaintiff sought civil penalties as well as declaratory and injunctive relief. Defendants claimed that plaintiff's claims should be barred under CWA § 1319 because the State of California (through its Regional Water Quality Control Board), on November 14, 1997, had brought an administrative enforcement action against defendants for the same violations addressed under the citizen's suit. The State enforcement action had resulted in an $8,000 fine and an agreement for the defendants to perform two environmental enhancement projects. By its terms, the consent agreement covered violations that had occurred from January 1994 through July 1997.

Plaintiff argued that its claims were not barred by the State enforcement action because the State action only addressed violations that occurred through July 1977, whereas, plaintiff's claim addressed violations that occurred since that date. Defendants responded that, despite the fact that the State enforcement action was limited by its terms to violations that occurred up to July 1977, and the fact that the State action had resulted in a penalty and agreement to perform two environmental enhancement projects, the State enforcement action was an ongoing proceeding at

the time plaintiffs filed their complaint and it therefore barred plaintiff's citizen suit. In effect, defendant argued that because the State had continued to monitor defendant's compliance and was considering further action, the State's action constituted "diligent prosecution" under the CWA.

The court disagreed with defendant's arguments and held that plaintiff's claims for those violations that occurred after July 1997 were not barred by the State's continued monitoring of the defendant's compliance status. The court observed that for a citizen suit to be barred the comparable state law must "contain penalty provisions and a penalty must actually have been assessed under state law." (See, Knee Deep Cattle Co. v. Bindana Investment Co. 94 F.3d 514 (9th Cir. 1996).) The court recognized that, with respect to the post-July 1997 violations, no penalty had been assessed by the State.

The court also rejected defendant's argument that citizen suit enforcement should have been barred because part of the State settlement required defendants to perform environmental enhancement projects (i.e., creating a fish passage and funding agricultural stormwater runoff monitoring). The court added that because none of the terms of the State administrative enforcement agreement, including those requirements that imposed the environmental enhancement projects, addressed the ongoing violations asserted in plaintiffs suit, the State enforcement action could not be considered diligent prosecution of the violations that continued beyond July 1997.

c. District court holds that the prosecution of a State enforcement action that addresses the same claims as a citizen suit does not bar the citizen suit where the State action is filed after the citizen suit has been filed:

Long Island Soundkeeper Fund, Inc. v. New York City Dep't of Envtl. Protection, 27 F. Supp. 2d 380 (E.D.N.Y., Nov. 23, 1998).

Plaintiff brought an action under the citizen suit provisions of the CWA that alleged the New York City Department of Environmental Protection (DEP) violated conditions (i.e., fecal coliform, nitrogen, settleable solids, biological oxygen) of discharge permits issued by the New York State Department of Environmental Conservation (DEC) at eight sewage treatment plants that discharged into the East River and Jamaica Bay. Defendants moved to dismiss or stay the proceeding based on a State enforcement action that addressed the same violations but was filed approximately 30 minutes after the citizen suit. After providing 60 days notice of their intent to file the citizen suit, plaintiff had twice agreed with DEC to delay filing the suit pending discussions between plaintiffs, defendants, and DEC. Plaintiffs declined a third request by DEC to delay filing the citizen suit.

Defendants argued that the DEC was diligently prosecuting an enforcement action in State court that addressed the same violations brought by the plaintiff, and that pursuant to § 1365(b)(1)(B) of the CWA, plaintiff's citizen suit must therefore be dismissed. **The court disagreed and found that given that the DEC action was filed in state court after the citizen suit had been filed, it was not barred under § 1365(b)(1)(B). The court observed that the language of the CWA bars citizen suits only where diligent State prosecution is initiated prior to a citizen suit.** Here, the court observed, the DEC had the opportunity to file its action prior to plaintiff's claim but did not do so. The court held that "state prosecution of the same claims no matter how diligent, will not preclude a properly filed private action, or require its dismissal." Defendants cited two cases in which citizen suits were dismissed even though they were filed before State enforcement actions. Atlantic States Legal Foundation v. Eastman Kodak Co., 933 F.2d 124 (2nd Cir. 1991) and United States Environmental Protection Agency v. City of Green Forest, 921 F.2d

1394 (8th Cir. 1991). The court, however, distinguished these cases since they involved dismissal based on settlement of the issues (with no likelihood of continuing violations), not on diligent prosecution.

Defendant's also argued the court should refrain from exercising jurisdiction over plaintiff's citizen suit under the doctrine of abstention. (See, Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). The court declined, finding that the citizen suit was authorized under federal law and enforced federal requirements designed to protect water quality. Moreover, the court stated that defendant's position was "undermined by its own inaction."

Finally, defendants contended that plaintiff's claim that the Jamaica sewage plant violated its permit limits for settleable solids could not be enforced because the settleable solids limit was imposed under state law and was stricter than federal requirements. (See, Atlantic States Legal Foundation v. Kodak Co., 12 F.3d 353 (2nd Cir. 1993). The court agreed, and found that under *Atlantic States* plaintiff's lacked standing to bring this claim.

d. District court holds that CWA citizen suit not precluded by State Notice of Violation and Cease and Desist Order issued prior to filing of action, despite the fact that State took further administrative action with a penalty assessed and collected after the suit was filed:

Old Timer, Inc. v. Black-Hawk Central Sanitation District, et al., 1999 U.S. Dist. Lexis 9366.

Plaintiff The Old Timer, Inc. was a riverside facility in Colorado at which tourists panned for gold. Plaintiff Grisenti was the owner of The Old Timer. Defendant Black-Hawk Central Sanitation District operated a sewage treatment plant that discharged its wastewater to the river seven miles upstream to The Old Timer. Other defendants included past operators of the plant and the operator at the time of the suit.

After several months of NPDES noncompliance by the County, on September 8, 1992, the Colorado Water Quality Control Division (WQCD) of the Colorado Department of Health (CDH) issued a Notice of Violation and Cease and Desist Order for July and August 1992 violations. On September 22, 1992, The Old Timer gave the District notice that it intended to file a CWA citizen suit. The Old Timer filed the CWA citizen suit on January 29, 1993. To bring itself into compliance, the District devised a plan that included immediate actions, interim improvements and a large-scale expansion. Despite these attempts, discharge violations continued. The following federal and state enforcement actions ensued: 1) EPA issued a Notice of Violation on August 26, 1993; 2) the WQCD issued a second Notice of Violation and Cease and Desist Order on October 20, 1993, for violations that occurred between August 1, 1992, and September 30, 1993; 3) the WQCD issued a "Public Notice of Intended Penalty" on October 20, 1993, giving notice of its proposed negotiated civil penalty of $85,000 against the District; 4) the CDH approved the agreement and issued an order imposing the $85,000 penalty on September 19, 1995.

Based on the above facts, the District argued that The Old Timer's CWA suit was barred either under Section 309(g)(6)(A)(ii), which precludes citizens suits for violations for which "the State has commenced and is diligently prosecuting an action under a State law comparable to [the CWA administrative penalty subsection], or under Section 309(g)(6)(A)(iii), which precludes suits for violations "for which the … State has issued a final order not subject to judicial review and the violator has paid a penalty assessed under … such comparable State law." Based on its analysis of the statutory language, CWA legislative history and relevant case law, the district court concluded that neither of the Section 309 provisions precluded The Old Timer's action.

The court noted that before The Old Timer commenced its suit, the only action initiated by the WQCD was the issuance of the Notice of Violation and Cease and Desist Order, which did not include any assessment of penalties. Noting a split in case law regarding whether this type of action was sufficient to preclude a citizen suit under Section 309(g)(6)(A)(ii), relying heavily on legislative history, **the court concluded that it was Congress's intention to preclude citizen suits only when EPA or a State had already commenced an "administrative penalty action" against an alleged violator. Accordingly, it held that The Old Timer's action was not barred by the pre-suit Notice of Violation and Cease and Desist Order issued by the WQCD.**

The district court then addressed the issue of whether the 1995 CDH order assessing the $85,000 penalty against the District "retroactively" barred the suit under Section 309(g)(6). **Again looking to CWA legislative history, the court held that the State's later assessment of an administrative penalty and the District's payment thereof did not defeat the court's jurisdiction.** Relying on Long Island Soundkeeper Fund, Inc. v. New York City Dep't of Envtl. Protection, 27 F. Supp. 2d 380 (E.D.N.Y. 1998) and Natural Resources Defense Council, Inc. v. Lowengart & Co., 776 F. Supp. 996 (M.D. Pa. 1991), the court stated that the provisions of Sections 309(g)(6)(A) and 505 only prevent a citizen from "commencing" an action, and once an action has been properly filed, the court has jurisdiction, notwithstanding a State's subsequent assessment of an administrative penalty

Turning to the District's claims that its subsequent improvements to the treatment plant rendered The Old Timer's citizen suit "moot" by bringing the District into compliance, the district court split its analysis for the claim for injunctive relief and the claim for civil penalties. Regarding The Old Timer's claim for injunctive relief, the court stated that under Gwaltney of Smithfield, Ltd v. Chesapeake Bay Found., Inc., 484 U.S. 60 L. Ed. 2d 306, 108 S. Ct. 376 (1987), a claim for injunctive relief becomes moot when there is no reasonable expectation that the polluter will continue to pollute in the future. The court concluded that the District's plant upgrades had corrected the problem causing the violations that were the subject of the action and that permanent improvements made it unlikely that the discharge violations at issue would continue. Thus, the court found the request for injunctive relief to be moot. **The court, however, held that the fixed District's post complaint compliance did not moot The Old Timer's claim for civil penalties, stating that the overwhelming number of circuits considering this issue have held that a defendant's actions after citizen suit filing that result in compliance, with no threat of repeat violations, while mooting the claim for injunctive relief, do not do the same for civil penalty claims.**

Addressing which of The Old Timer's penalty claims could proceed, the court stated that although it had concluded that the civil penalty action was not precluded either under Section 309(g)(6)(A) or the mootness doctrine, The Old Timer's claims relating to violations that were specifically covered by the CDH's final penalty order (i.e., those occurring between July 1992 and May 16, 1994) were barred under the principle of *res judicata*. Although it determined that The Old Timer could pursue its penalty claims, the district court stated although it was seeking penalties for violations that occurred before and after July 1992 and May 16, 1994, many of these violations were not included in the notice of intent to sue, which had incorporated by reference the WQCD's initial Notice of Violation and Cease and Desist Order to identify violations. Because the notice did not identify any pre-July 1992 violations, and there was no evidence that such episodic violations were related to the discharges identified in the notice, the district court held that The Old Timer could not seek civil penalties for any of the pre-July 1992 violations. Regarding violations after May 16, 1994, the district court held that these violations were still actionable if they were related to the violations covered in the Notice of Violation and Cease and Desist Order.

Turning to the final issues, regarding the liability of past and current plant operators, the court stated that because The Old Timer did not serve any of the current operators of the plant with the required Section 505 notice, the operators were not proper defendants, and because under Gwaltney citizen suits cannot be brought for wholly past violations, the operators of the plant prior to the date The Old Timer filed its suit were also not proper defendants, as their alleged violations had occurred wholly in the past (i.e., before the suit). Regarding The Old Timer's request for attorney fees, citing Beard v. Teska, 31 F.3d 942 (10th Cir. 1994), the court stated that for The Old Timer to be entitled to such fees, it must show that its citizen action was a substantial factor leading to the relief obtained, and that defendant's actions were required by law. The court determined that the question of whether The Old Timer's action was a substantial factor bringing about the District's compliance action was a factual question that could not be decided by summary judgment.

The court referred the case back for a determination on attorney fees, along with a determination on both liability issues for violations after May 16, 1994 and imposition of appropriate penalties, and a determination on the liability of the District on The Old Timer's state law claims.

e. District court grants summary judgment motion of citizen suit plaintiff regarding CWA liability of defendant wastewater treatment plant based on finding that defendant had discharged heat exceeding upstream temperature of receiving waters, despite the fact that defendant's NPDES permit did not include any limitation for heat:

Piney Run Preservation Ass'n v. County Comm'rs of Carroll County, 50 F. Supp. 2d 443 (D. Maryland, May 20, 1999).

The Piney Run Preservation Association, a non-profit association whose activities included efforts to protect the Piney Run Stream, filed suit against the County Commissioners of Carroll County, Maryland, the operator of a sewage treatment plant that discharged to the Piney Run Stream. The Association then brought a motion for summary judgment to establish the County's liability under CWA Section 505, with the County filing a similar motion requesting that the court find that no liability existed.

The case involved a long battle involving the Association, the County and the Maryland Department of the Environmental (MDE) over the volume of the discharge from the County's treatment plant and appropriate limits on discharges of heat that MDE should impose in the County's State-issued NPDES permit. The County held an NPDES permit originally issued by the MDE in 1991 that was set to expire in February 1995. Because at the time of the lawsuit the MDE had not reissued the permit, the 1991 permit was in place. The County's permit had no specific limit on effluent temperature.

The citizen suit was preceded by years of administrative and judicial wrangling between the Association, the County and the MDE. In 1991, the County had requested an increase in permitted effluent from 500,000 to 900,000 gpd. In administrative actions, the Association challenged the MDE's decision to reissue the County's NPDES permit allowing the increase on the grounds that this action would continue and exacerbate the "thermal pollution" of the stream. Despite the Association's objections, the MDE determined that it would issue the permit with the increased discharge allowance. After exhausting all administrative appeals, the Association challenged the permitting decision in Maryland State court. This resulted in action remanding the case to the MDE for further determinations regarding the nature of the discharge and associated impact to the Piney River Stream.

After a hearing but before the MDE made any final determination regarding the proposed changes to the NPDES permit, the Association initiated its CWA citizen suit by giving the required notice under Section 505 of alleged CWA violations to the County, the MDE and to EPA. The Association subsequently filed suit, alleging that the County had violated the terms of its NPDES permit by discharging heat into the Piney Run Stream.

Recounting the factual issues pertinent to the case, the district court noted that the County's permit had no specific limit on effluent temperature. The permit did include a requirement that the County submit monthly reports to the MDE. Such reports included the temperatures of the plant influent, plant effluent, stream above the outfall and stream sixty feet below the outfall. The Association presented summaries of the reports that showed that the temperature of the plant effluent had exceeded the upstream temperature on 371 of 397 days.

Citing Atlantic States Legal Foundation v. Eastman Kodak Co., 12 F3d 353 (2d Cir. 1994), the County argued that the district court lacked jurisdiction to hear the case because the County's NPDES permit did not include any effluent limitation for heat. In the Atlantic States case, the Second Circuit held that "once within the NPDES or SPDES scheme, polluters may discharge pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants." **The district court, however, noted that the Ninth Circuit in Northwest Advocates v. City of Portland, 56 F.3d 979 (9th Cir. 1995) had held that the CWA "allowed a citizen suit to enforce water quality standards that had not been translated into numerical effluent limits on the permit."**

The district court found that based on the language of the CWA Section 505, the Association had the authority to bring the action against the County. **The court focused on the language in Section 505 that states that an action may be brought against "any person … who is alleged to be in violation of (A) an effluent standard or limitation under this chapter," with the term "effluent standard or limitation under this chapter" defined in Section 505(f) as, among other things, " an unlawful act under subsection (a) of [CWA Section 301]."** Section 301 provides that except in compliance with sections 301, 306, 307, 318, 402 and 404 of the CWA, the discharge of any pollutant by any person shall be unlawful. Based on its reading of this statutory language, the court determined that the County's discharge created a cause of action under Section 505.

G. Enforcement Actions/Liabilities/ Penalties

1. D.C. Circuit finds that EPA reasonably interpreted the CWA as precluding challenge to a state-issued permit in a federal enforcement action and upholds administrative penalty for violations of NPDES storm water permit related to discharges from roofs of buildings and gutters:

GMC v. U.S. EPA, 168 F.3d 1377 (D.C. Cir. March 23, 1999).

Petitioners General Motors Corp. (GM), sought review of an administrative penalty of $62,500 imposed for 92 violations of its stormwater NPDES permit (Outfall 002). In the administrative enforcement proceeding GM had argued primarily that EPA had erred in refusing to consider GM's collateral attack on the validity of the State-issued permit.

In the Court of Appeals, GM first argued that the ALJ erred by following federal rather than Michigan law, the latter of which arguably would have permitted a collateral attack upon a state-issued permit. The court rejected this argument because in this instance there was a federal statute, the CWA, to apply. GM then argued that there was not

substantial evidence supporting the ALJ's decision because the permit "was invalid from the outset" but EPA refused to hear an attack on the validity of the permit. The court found that in the CWA Congress has not explicitly addressed the question of whether a State permittee may collaterally attack the validity of its State-issued permit in a federal enforcement proceeding. **The court then found that EPA had reasonably interpreted the CWA by holding that GM could not challenge the validity of the State-issued permit in the federal enforcement proceeding because the proper forum for such a challenge was before the State administrative agency and in State court, and GM had failed to seek review in either forum.**

GM also argued that the ALJ erred in concluding GM's permit for Outfall 002 did not expire on October 1, 1990, the termination date for the permit, since GM had not applied for a new permit (the plant had ceased operation August 1988). The court dismissed this argument because the ALJ had explicitly stated that GM's penalty would remain the same even if the EAB or this court were to ultimately conclude that GM's permit expired on October 1, 1990 and GM failed to challenge the penalty calculation before the EAB or in this court.

Finally, GM claimed it was denied its due process rights because it lacked notice that the metals present in rainfall or leached from the roofs of its buildings would be considered pollutants for purposes of the CWA and its NPDES permit. The court rejected this argument as well, finding that GM's permit contained specific limits for copper, lead and zinc discharged from Outfall 002, and that GM, in informing the MDNR of the violations, included the ambient and leached metals as contributing to those violations. Hence, the court found GM's lack of notice argument unpersuasive. The court concluded that substantial evidence supported EPA's finding of violations and denied the petition for review.

2. District court holds ALJ finding of liability was based on substantial evidence:

Smith v. Hankinson, 1999 U.S. Dist. LEXIS 5151 (S.D. Ala. Mar. 31, 1999).

Plaintiff P. Smith sought judicial review of a $12,000 administrative penalty assessed by EPA for two violations that involved discharging pollutants into a wetland without a permit in an effort to fill the wetland and construct an access road. The court reviewed the violations to determine if there was substantial evidence in the record to support the violations, as well as to determine whether the penalty constituted an abuse of discretion. Both parties sought summary judgment. Plaintiff argued that the total area involved was less than 1,000 square feet and that such a small area qualified for coverage under a Nationwide permit, and was therefore exempt from any violation of the CWA. The court rejected this argument since the plaintiff had not raised this claim during the administrative hearing. The court also rejected the introduction of an affidavit of B. Vittor, which supported plaintiffs new claim and opposed the EPA's motion for summary judgment. The court acknowledged there were four exceptions to the prohibition on consideration of extra-record material, but found that plaintiff had not demonstrated that any of those exceptions applied in this instance.

Plaintiff also disputed whether the wetlands into which the discharge occurred were waters of the U.S., and asserted that he had not controlled or directed the activity that resulted in the discharge. The court found that both elements had been established by substantial evidence. The wetlands determination had been based on the location of the site, the regulatory definition of the term "wetlands," and the three key characteristics of wetlands (i.e., hydric soil, wetlands vegetation, and wetlands hydrology). In addition, the court noted that the wetlands was only yards away from Terry Cove Harbor, a navigable cove connected to the Gulf of Mexico. **With regard to control over the discharge, plaintiff asserted he did not own the property, but the court found this contrary to the evidence, and observed that ownership was of no consequence, since plaintiff had**

responsibility for, or control over, performance of the work that resulted in the discharge.

Lastly, the court reviewed the penalty amount. The court found that the ALJ had "meticulously addressed" each of the statutory penalty factors and imposed a penalty of $12,000, which the court found to be appropriate. The court entered judgment for EPA.

3. District court places 176 sewage treatment facilities in receivership based on overwhelming evidence of repeated, unabated violations of the CWA and the LEQA over an extended period of time, as well as defendant's blatant and continued violation of a consent decree intended to remediate such violations:

United States v. Acadia Woods, Civ. Action No. 6:98-0687 (W.D. La., Mar. 22, 1999).

On July 31, 1998, a consent decree was entered by the parties that required defendants to undertake remedial measures at 176 sewage treatment plants to bring the sewage treatment facilities into compliance with the CWA and NPDES program requirements. In December 1998, inspections at 73 of these plants revealed 661 violations of the consent decree. The U.S., and the Louisiana DEQ as intervenor, originally sought an injunction and then requested that the court issue an order appointing a receiver with full powers to oversee operations of defendant's sewage treatment plants. **Following a hearing on the merits, Judge Tucker L. Melancon issued a memorandum ruling and judgment that appointed a receiver for defendant's sewage sludge treatment plants.**

Key findings of fact included the following. The consent decree required compliance with effluent limitations specified in each NPDES permit issued to defendants by the Louisiana DEQ. Inspections conducted at 73 of the 176 plants identified 661 violations of the consent decree; none of the plants were found to be in compliance with the consent decree. Plants were found to be in critical disrepair, with one-third of the facilities requiring replacement. Defendants had continued to discharge large quantities of potentially harmful pollutants, in excess of permit limits, into local waters, streams and bayous. Such pollutants included raw sewage, solids, and sludge that had not been adequately treated or disinfected. Defendants committed numerous operational violations, and lacked a basic understanding or had a blatant disregard for the public health components of operating of sewage treatment plants. The violations showed that injunctive relief was inadequate to remedy the violations and protect the public health. Defendants lacked the financial ability to conduct their business in an environmentally sound manner. The extraordinary relief sought was needed to protect the citizens and environment of Louisiana.

Key conclusions of law included the following. Section 362(b)(4) of the Bankruptcy Code did not operate as a stay to the enforcement of a "... governmental unit's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power." Jurisdictional tension between the bankruptcy court and the district court was resolved by the appointment of the same individual as receiver and bankruptcy trustee. Defendants discharge of pollutants into waters of the U.S. were violations of the CWA and the Louisiana EQA.

The court concluded that the appointment of a receiver was necessary because of the overwhelming evidence of repeated, unabated violations of the CWA and the LEQA over an extended period of time as well as due to the considerable violations of the consent decree. The court noted given the magnitude of the problems, the prolonged noncompliance, and the fact that the defendants had failed to make progress toward abating what were clearly flagrant violations of the law since the consent degree was entered, it was

appropriate to appoint a receiver and grant him or her broad powers. The court stated that it believed that the regulatory process for sewage treatment facilities in the State of Louisiana may have systemic problems that are state wide. Based on this concern, the court's order went so far as to require that the Secretary of Louisiana, with counsel, meet with the State Governor, the Speaker of the House, the President of the Senate, and other officials to inform them about this case and to examine the State's ability to better ensure that similar situations do not arise in the future.

4. District court holds that violations were not caused by "single operational upsets" and that EPA could enforce effluent limits for internal outfalls:

United States v. Gulf States Steel, Inc., 1999 U.S. Dist. LEXIS 8834 (N.D. Ala. June 8, 1999).

This action was brought against Gulf States Steel, Inc. (GSSI) alleging CWA violations at GSSI's manufacturing facility. The Alabama Department of Environmental Management (ADEM) had issued an NPDES permit to GSSI's predecessor in December 1987 that authorized discharges from a single outfall, 001. On September 28, 1994, ADEM issued a new NPDES permit to GSSI's predecessor that imposed additional conditions, including effluent limits, on six outfalls located at various points along the facility's internal wastewater treatment system. Upon GSSI's formation in April 1995 and acquisition of the facility, the 1994 permit was administratively transferred to GSSI. In 1997, the government filed this action against GSSI seeking civil penalties and injunctive relief, alleging that GSSI had violated its NPDES permit effluent limitations. In its motion for partial summary judgment, the government sought an Order holding GSSI liable for 1,000 violations, from May 1, 1995 to September 30, 1998, comprising 4,290 days of violation.

GSSI offered two arguments to defeat the government's claims of CWA violations. First, GSSI argued in its motion for partial summary judgment that the government could not bring its action for any of the alleged violations of the effluent limitations for outfalls in GSSI's internal wastewater treatment system because the internal outfalls were not discharges into waters of the U.S. The government argued that GSSI was improperly attempting to challenge its obligations under its NPDES permit, stating that the proper procedure to challenge the conditions would have been to apply for federal review in the United States Court of Appeals under CWA Section 509. In the alternative, the government argued that even if the court found that GSSI's challenge was not improper under Section 509, still GSSI was prevented from contesting the effluent limitations on the internal waste streams because neither GSSI nor its predecessor, availed itself of administrative and judicial review available under Alabama state law. The court rejected the government's first argument, stating that because GSSI's permit was issued by ADEM, not the EPA, the terms and conditions of the permits were not subject to federal review, and that under the plain language of Section 509(b)(2), an alleged violator is prohibited from litigating the terms of its NPDES permit in an enforcement action only if the alleged violator chose to forego review available under Section 509(b)(1). **The court, however, agreed with the government that GSSI was precluded under State law from contending that the permit terms were not enforceable, stating that Alabama state law, like Section 509(b)(2), expressly prohibited an alleged CWA violator from collaterally attacking the terms of its permit in an enforcement proceeding.**

GSSI also argued that its challenge to the internal outfall effluent limitations did not constitute an impermissible collateral attack, but instead challenged the "enforcement" of the limitations by contesting whether the discharges were to waters of the U.S., an element of CWA liability, relying on language in 40 CFR Section 122.2 that states "Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the [Clean Water Act] ... are not waters of the United States." **The Court again concluded that GSSI's failure to timely petition**

for review of the permit precluded GSSI's attack on the conditions therein, stating that regardless of whether the internal waste streams were themselves waters of the U.S., GSSI was required to comply with all conditions of its NPDES permit, including the limitations for the internal outfalls which eventually made their way to the receiving stream.

Addressing other GSSI challenges to the enforcement of the limits on the internal outfalls, the court rejected GSSI's argument because the company had no legal existence until after the 1994 permit was issued to its predecessor, it was impossible for it to administratively challenge the internal waste stream limits, stating that GSSI assumed the liabilities and obligations of its predecessor as part of the business transaction and that it now stood in the shoes of its predecessor regarding the NPDES permit. The court also rejected GSSI claims that it should be excused from having to comply with the permit effluent limitations on the internal waste streams because, allegedly, ADEM representatives made verbal representations that the limitations would not be enforced, stating by its terms the permit required compliance with all its terms and conditions, and that verbal representations by ADEM officials without formal modifications in the permit do not excuse the holder from permit terms. The Court thus concluded that permit effluent limitations on the internal outfalls were enforceable and that the government had established that there were no genuine issues of material fact with respect to GSSI's liability for permit violations from the internal outfalls. Accordingly, the Court denied GSSI's motion for partial summary judgment on the issue of its alleged non-liability for violations concerning internal waste stream effluent limitations.

Turning to this issue of the number of alleged violations, GSSI argued that the government "over-counted" the number of violations for which GSSI was liable, contending that a substantial number of its alleged violations were caused by "single operational upsets" and should have been counted as single violations. GSSI basically argued that under Section 309(d), if an upset, a term defined at 40 CFR Section 122(n)(1), is found to have occurred, then the upset should be counted as one violation, not all effluent limitation violations that result from the upset. The court noted that under CWA Section 309(d), which sets out the factors a court must consider when determining the amount of a civil penalty, the concluding sentence provides: "For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation." The court stated that the "single operational upset" defense, citing U.S. v. Smithfield Foods, Inc., 972 F.Supp. 338, 342 n. 7 (E.D.Va.1997), was not a complete defense to liability, but relates, rather, only to the amount of penalties the district court may impose.

The court concluded that GSSI had not presented sufficient evidence to establish the defense. GSSI had contended that a number of single parameter violations that occurred for a number of consecutive days should be counted as single violations under that defense. **The Court noted that, contrary to GSSI's interpretation, Section 309(d) did not mandate that multiple-day violations of a single pollutant parameter be counted as a single violation when such multiple-day violations are attributable to single operational upsets; rather, that the language provided that simultaneous multiple pollutant parameter violations are to be counted as if they were a single pollutant parameter violation where the multiple pollutant parameter violations were caused by a single operational upset. The court stated that in its estimation, the Section 309(d) single operational upset defense was not intended to mitigate violations caused by upsets where the polluter experiences noncompliance with one pollutant parameter due to some extraordinary event and then fails to take immediate remedial steps and thereby allows that noncompliance to continue over an extended period, and that to hold otherwise would actually give a polluter incentive to delay action to correct noncompliance resulting from an upset.** The

court also rejected GSSI's assertion of the defense on the basis that some of the events claimed as "upset" were neither exceptional or beyond its reasonable control; and rejected GSSI's arguments that Section 309(d) required that every one of its daily maximum violations that were attributable to a single cause be counted as only one violation for each cause and that Section 309 precluded the counting of monthly violations of per day average effluent limitations as violations occurring each day of the month, where the monthly violation has a single cause.

5. EAB holds no reversible error or abuse of discretion occurred where ALJ imposed $2,000 penalty for wetlands violation:

In re: Britton Construction Co., BIC Investments, Inc., and William and Mary Hammond, 1999 EPA App. LEXIS 9 (Mar. 30, 1999).

EPA Region III appealed the assessment of a $2,000 penalty against respondents for filling, as part of a construction joint venture, wetlands located on Chincoteague Island, Virginia. The Region had sought a $125,000 administrative penalty. Respondents also appealed the penalty.

EPA made several arguments on appeal. First, EPA argued that the ALJ failed to articulate the nature and extent of specific reductions made in decreasing the proposed penalty. The EAB found that the ALJ made a good faith effort to consider all the requisite statutory factors, and ultimately provided a sufficient sense of the reasons for reducing the penalty.

Second, EPA maintained that the ALJ had improperly reduced the penalty assessed based on EPA's enforcement and respondent's mitigation. The EAB did not agree, and found that it was entirely appropriate for the ALJ to consider the government's action regarding this matter and that, EPA's own general penalty framework policy provides for penalty reduction based on corrective action.

Third, EPA argued that admitting respondent's tax records after the hearing and reducing respondent's penalty based on those records was reversible error. The EAB observed that the ALJ had not reduced the penalty based on the respondent's tax records, but that those records were used to bolster previously submitted affidavits that characterized respondent's ability to pay. In addition, it observed that final penalty was predominantly based on the small area of wetland affected, and the successful mitigation of the site. The EAB found that, although the ALJ could be criticized for how this material was admitted, "no material prejudice and, hence, no reversible error resulted from denying the Region an opportunity to have experts analyze these particular tax returns."

Fourth, EPA argued that the ALJ had failed to consider the increased property value as measure of economic benefit. The EAB declined to consider this argument because EPA had not adequately raised it before the ALJ. Finally, EPA asserted that the ALJ calculated respondent's wrongful profits improperly. The EAB found that because the USACE had authorized respondents to build on the sites, it would have been unjust for the ALJ to allow the government to recoup any "wrongful" profits that resulted from the construction.

Respondents argued that no regulated fill activities had occurred on the site after November 28, 1989, and, therefore, the five-year general federal statute of limitations barred the government's claims. The EAB disagreed, and found that the record indicated that respondents had placed fill material on the site just prior to February 6, 1990, within five years of when the complaint was filed (November 28, 1994). Respondent also argued that EPA had not provided fair notice of the requirements that were enforced, since respondent viewed EPA's standards for remediating wetlands violations as different from those of the USACE. The EAB rejected this argument because respondent had failed to raise it in the administrative hearing. Respondent also argued that the penalty initially sought by EPA ($125,000) was arbitrary and violated respondent's due process rights. The EAB found no error on the

part of the ALJ. Finally, respondents argued that they lacked the ability to pay the penalty. The EAB concluded the Region had established respondents' ability to pay, and respondents had not rebutted that fact.

H. Criminal Cases

1. Second Circuit affirms criminal convictions for knowing discharge of pollutants and for the negligent discharge of oil:

Notice: Rules of the Second Circuit Court of Appeals may limit citation to unpublished opinions. Please refer to the rules of the United States Court of Appeals for this circuit.

United States v. Superior Block & Supply Co., 1999 U.S. App. LEXIS 14013 (2nd Cir. June 22, 1999).

In this matter before the Second Circuit Court of Appeals, Superior Block & Supply Co. and its president, Ralph Crispino, Jr. appealed their convictions in the district court for the knowing discharge of industrial pollutants into navigable waters without a permit under CWA Sections 309(c)(2), 311 and 402 and the negligent discharge of a "harmful" quantity of oil into a navigable river under CWA Sections 309(c)(1) and 311(b)(3). Superior was also convicted of killing migratory birds through the discharge of oil in violation of the Migratory Bird Act, 16 U.S.C. Section 703.

The case involved two types of discharges into the Quinnipiac River from the Superior facility. The first type was discharges for concrete-block grinding operations that occurred from 1993 through 1995. The district court record indicated that beginning in 1993, officials at Superior, including Crispino, became aware that the company had not obtained necessary permits for its wastewater discharges. In early 1995, officials from the Connecticut Department of Environmental Protection (DEP) inspected Superior's operations and issued a Notice of Violation noting the lack of a permit for the discharges from the grinding operations. Between March and June 1995, Superior's environmental engineer met several times with DEP officials to discuss the facility's permit application, at which Superior alleged that DEP acknowledged that the discharges were occurring and did not indicate that such discharges should be stopped. Superior submitted its permit application in June 1995 and waited for further DEP action.

The second type of discharge was the spilling of oil from Superior's boilers into the Quinnipiac. In October 1995, a small quantity of oil spilled into a trench on the floor reached the river through the storm drain system. It was alleged that employees were aware that some oil reached the river. On the day following this first incident, a more serious incident occurred, as a boiler seal broke resulting in the discharge of between 5,500 and 6,000 gallons of industrial fuel oil into the Quinnipiac. Most of the oil flowed through the interior drains, but some flowed out of a window and into external floor drains that also fed into the storm drain system.

On appeal, the defendants challenged their CWA convictions for the knowing discharge of pollutants and for the negligent discharge of oil. Superior did not challenge its conviction under the Migratory Bird Act, and neither defendant challenged the sentences imposed by the district court. The Second Circuit affirmed the convictions, addressing each of the defendant's arguments as follows.

First, the defendants argued that the evidence presented at trial was insufficient to support the necessary finding that they were aware of the nature of the pollutants discharged through the concrete grinding process. **The court rejected this argument, stating that the government argued to the jury that it could infer defendants' awareness of the nature of the wastewater discharge from the defendants' knowledge that they needed a permit from DEP for the discharges**. The court found that under the circumstances presented, such an inference was permissible.

Second, Superior and Crispino challenged their conviction relating to the negligent discharge of oil on the grounds that they were only negligent as to the discharge into the internal drains, not the discharge of the oil to the Quinnipiac. They also argued that even if the internal drains had been plugged, some lesser amount of oil would still have flowed out of the window and "nonnegligently" into external drains. Accordingly, the defendants argued that the proscribed injury, the "riparian release of a 'harmful' quantity of oil" under CWA Section 311(b)(3) would have occurred regardless of their negligent failure to plug the internal drains.

The court rejected this argument, stating that even if some harmful amounts of oil would have reached the river with or without the defendants' negligence, there was enough evidence that less oil would have reached the river if they had plugged the drains. Accordingly, the court found that the defendants should be punished for the harmful quantity that was negligently released.

Finally, the defendants challenged two aspects of the jury instructions. In addressing these contentions, the court first stated that because the defendants failed to object to the charges at trial and the alleged error was not "structural," its review of the trial court's instruction would be for "plain error" under United States v. Zvi, 168 F.3d 49, 58 (2d Cir. 1999), with the standard being to determine "whether the instruction caused a miscarriage of justice when viewed as a whole and in the context of the entire trial." Based on these guidelines, the court found that no error met this standard. Accordingly, the Second Circuit affirmed the judgment of the district court.

2. Sixth Circuit reverses grant of motion for judgment of acquittal and reinstates conviction for discharge of pollutants from a ship without a NPDES permit:

United States v. M/G Transport Services, Inc., 173 F.3d 584 (6th Cir. April 22, 1999).

The United States appealed a district court's decision that granted defendant's motion for judgment of acquittal on various charges (counts 4–9) related to the dumping of ash and other pollutants into federal waterways without a permit. A jury had previously convicted M/G Transport Services Inc., and J.H. Thomassee, a company Vice-President with operational control, of conspiracy to violate the CWA (count 1) and of failure to report an oil spill from the M/V Richard A Hain on July 2, 1990 (count 2) ; and convicted M/G Transport Services Inc., Thomassee, and two captains of discharging or aiding and abetting in the discharge of pollutants without a permit (counts 4–9). In granting the motion for judgment of acquittal, the district court had found that the government had failed to produce evidence that the crimes had been committed on or about the dates alleged, and that principles of due process precluded holding the defendants criminally liable for discharging pollutants "when no permit would have ever been issued" for the discharges undertaken by the defendants.

The Sixth Circuit Court reviewed defendants alleged due process violation first. Defendants had argued that under United States v. Dalton, 960 F.2d 121 (10th Cir. 1992) (conviction for failure to register a firearm reversed because by law that firearm could not be registered under any circumstances) counts 4-9 must be dismissed. The court distinguished *Dalton* from the present case, finding that here the CWA does not provide that a permit for the discharge of pollutants could never be issued, only that the quantity and quality of the pollutants may have needed to be regulated to conform with the requirements imposed under the CWA.

In addressing the sufficiency of the evidence, the court found that the government had indeed shown that the alleged violations had occurred reasonably near the dates established in the indictment, and the court concluded that this was sufficient. The court found that it was reasonable for the jury to infer from testimony describing how burn barrels were dumped within

days of becoming filled with ash and residue that such dumping occurred within a short period of when the captain's log indicted a barrel of trash was burned. In addition, the court found that the testimony presented to the effect that various pollutants were among the items burned in the burn barrels was sufficient to support the inference that the residue remaining in the barrels, which were ultimately dumped into various rivers, contained pollutants regulated under the CWA.

3. Ninth Circuit affirms criminal conviction for improper indirect discharge:

United States v. Iverson, 162 F.3d 1015 (9th Cir. Dec. 11, 1998).

Defendant appealed his conviction of four counts of having violated the CWA, the Washington [State] Administrative Code (WAC), and the City of Olympia's Municipal Code (Olympia Code), and one count of conspiring to violate the WAC or the CWA. Defendant was founder, company President, and Chairman of the Board, of CH20, a company that blended chemicals. The violations stemmed from defendant's having discharged drum-cleaning wastes to the sanitary sewer without a permit or other approval during 1992 - 1995. On appeal, defendant argued: 1) the district court misinterpreted the relevant laws; 2) the relevant provisions are unconstitutionally vague; 3) the district court erred in formulating its "responsible corporate officer" jury instruction; and 4) the district court erred in its admission of evidence of defendant's prior discharges of industrial wastes.

Defendant first argued that the court erred because it did not allow defendant to address the issue of the effect of his discharge on water. Defendant argued that the WAC and Olympia Code allow discharges of industrial waste that do not affect water quality. The court disagreed, and found that the WAC and Olympia Code incorporated the federal standard by reference and that this standard prohibited the discharge of hauled or trucked industrial waste except at a discharge point designated by the POTW.

With regard to defendant's vagueness challenge, defendant argued that the three definitions of the term "pollutant" in the CWA, the WAC and the Olympia Code created vagueness. **The court again disagreed, and found that the WAC and the Olympia Code properly incorporated by reference the federal prohibition on the discharge of trucked or hauled industrial waste, and that a reasonable person or ordinary intelligence would understand from reading the relevant provisions this prohibition.**

Defendant also argued that the court had erred in formulating its "responsible corporate officer" jury instruction because it did not adopt defendant's instruction, which provided that a corporate officer is responsible only when the officer "in fact exercise control over the activity causing the discharge or has an express corporate duty to oversee the activity." **The court, in interpreting this term for the first time, rejected defendant's instruction and held based on the wording of the CWA, the Supreme Court's interpretation (see, United States v. Dotterweich, 320 U.S. 277 (1943) and United States v. Park, 421 U.S. 658 (1975)) and this court's interpretation of similar requirements, that, under the CWA, "a person is 'responsible corporate officer' if the person has the authority to exercise control over the corporation's activity that is causing the discharges. There is no requirement that the officer in fact exercise such authority or that the corporation expressly vest a duty in the officer to oversee the activity."** The court further rejected defendant's arguments regarding the rule of lenity, the wording of the instruction, and the need to specifically find a violation of the CWA. The court concluded that the jury instructions were not erroneous.

With respect to the admissibility of the defendant's prior acts, the court rejected defendant's arguments that prior discharges did not tend to prove a material fact or were too remote. Rather, the court

found that such discharges tended to prove familiarity and knowledge because they were the result of the same drum cleaning activities, and because such prior acts were so similar to the present violations and defendant's knowledge of the CH20's industrial waste had not changed, the fact that the prior acts had occurred seven years before did not make them too remote. The court affirmed the convictions.

4. Ninth Circuit upholds sewage sludge hauler's sentence and conviction for aiding and abetting the unlawful disposal of sewage sludge, for conspiracy and mail fraud:

United States v. Cooper, No. 97-50296 (9th Cir. Apr. 9, 1999).

Defendant Gordon Paul Cooper was a part owner of Chino Corona Farms (CCF) a company that handled sewage sludge generated by San Diego wastewater treatment plants. Under its contract with the City, CCF removed sewage sludge for a fixed amount per ton. CCF was required to submit weighmaster certificates for each truckload hauled, to obtain City approval to haul to a proposed use or disposal site and to submit bills of lading to show each truckload's ultimate destination. The contract did not refer to the City's NPDES permit issued by the California Water Quality Board, which required the City to give prior written notice of any planned changes in its sewage sludge use or disposal practice and to regularly report on its sewage sludge disposal, describing the location, the rate of application in pounds per acre per year and subsequent uses of the land. Soon after beginning work, with City and Water Quality Board approval, CCF began shipping city sewage sludge to Mexico. When logistical problems arose, Cooper switched disposal sites, without notifying the City or the Water Quality Board, to a California farm. At the same time Cooper was land applying the sewage sludge at the new site, CCF continued to receive weighmaster certificates indicating that the sludge was being shipped to Mexico and sent the false certificates to the City to support its invoices.

The City subsequently discovered that Cooper had been hauling sewage sludge to the new site and that the weighmaster certificates were false and canceled the CCF contract. Cooper resigned, was investigated by the FBI, indicted, and after a jury trial, convicted of conspiracy, aiding and abetting the unlawful disposal of sewage sludge and mail fraud related to his involvement in the disposal of sewage sludge. After a sentencing hearing, the district court adopted the presentence report's recommendations and sentenced Cooper to fifty-one months' imprisonment.

Cooper appealed, arguing the following: that he complied with Federal regulations governing sewage sludge; that he could not be criminally liable for violating an NPDES permit to which he was not a party; that the CWA was void for vagueness; that the prosecution failed to disclose an exculpatory FBI report; that a government witness falsely testified that he had no agreement with the government; that the prosecutor committed misconduct during final argument; and that the district court improperly enhanced his sentence.

The Ninth Circuit rejected each of Cooper's arguments and affirmed the conviction and sentence based on the following analysis. First, stating that by their own terms the Part 503 regulations and the CWA do not usurp local control over sewage sludge disposal decisions, the Ninth Circuit rejected Cooper argument that he did not need City or Water Board approval to apply the sewage sludge at the farm site because the Part 503 standards preempted or superceded the notice requirements in the City's NPDES permit and that compliance with Part 503 relieved him of the duty to comply with the terms of the City's NPDES permit. **Second, addressing Cooper's argument that he could not be held liable for violating the City's NPDES permit because he was not a party thereto, the court disagreed, stating that § 309(c)(2)(A) imposes criminal liability on "any person who knowingly violates … any permit condition or limitation implementing any of such sections [of the Clean Water Act] in a permit issued under" § 402. Citing United**

States v. Brittain, 931 F.2d 1413 (10th Cir. 1991) and United States v. Iverson, 162 F.3d 1015 (9th Cir 1994), the court held that the phrase "any person" was broad enough to include both permittees and nonpermittees. Third, regarding the "knowledge" requirement necessary for a criminal conviction, the Ninth Circuit held that there was ample evidence that Cooper knew of the NPDES permit and its application to his conduct, making him liable under § 309(c)(2). **Fourth, the court rejected Cooper's contention that §§ 309 and 402 should be considered "void for vagueness" because the provisions do not distinguish between different grades of sewage sludge.** Finally, the court rejected Cooper's argument that CCF's contract with the City required CCF to comply with the later enacted Part 503, stating that Cooper's actions did not comply with the new regulations because the new regulations did not supercede the City's NPDES permit.

After rejecting several evidentiary and procedural challenges by Cooper regarding the admissibility of evidence, witness testimony and allegations of prosecutorial misconduct during closing arguments, the court upheld the district court's interpretations of the Federal Sentencing guidelines, finding that the court's application of the facts to the guidelines and corresponding enhancement decisions to be appropriate.

5. District court denies motion by CWA defendant to suppress evidence as unconstitutionally obtained:

United States v. Johnson, et al., 1999 U.S. Dist LEXIS 9432 (June 18, 1999).

This motion was one of several brought in a criminal action involving eleven defendants charged with 31 counts of criminal violations, including conspiracy to violate the CWA; violations of NPDES permit conditions for failing to provide proper operation and maintenance and failing to take samples and perform other required analyses; making false statements; witness tampering; and obstruction of the criminal investigation. Prior to trial, one of the defendants, Glenn Kelly Johnson, made a motion to the court to suppress oral evidence that Johnson claimed was unconstitutionally obtained. The government opposed the motion.

Johnson was not formally arrested. In his motion, however, he claimed that during the exercise of the valid search warrant at his place of employment, the government "effected an unconstitutional arrest of his person" through the use of a large number of armed agents to execute the search warrant. Through this "thinly veiled threat of violence," Johnson alleged that the government obtained oral statements from him that he contended "may lead to other evidence that the prosecution might use at trial." The government contended that at the beginning of the execution of the warrant, all employees were informed that they were free to stay on or leave the premises at their discretion and that several employees did actually leave.

The district court's analysis focused on whether the facts alleged by Johnson constituted a "custodial interrogation." If the court determined that Johnson was in the government's custody at the time he made his statements, then such statements would be considered unconstitutionally obtained.

The court first stated that the Supreme Court in a line of cases has defined a "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody" and that a person is "in custody" when he is formally arrested or when a reasonable person in the suspect's position would understand the situation to constitute a restraint on his freedom of movement that is consistent with the constraint typically associated with formal arrest." **The court stated that the relevant inquiry to determine whether there has been such a restraint is how "a reasonable person in the suspect's position would have understood the situation," with a "reasonable person" being "a person who is neutral to the purposes of the investigation – that is, neither guilty of criminal conduct or**

overly apprehensive nor insensitive to the seriousness of the circumstances." The court added that the key issue "was not what did the defendant think was happening to him when he gave the damaging information, but what would the reasonable person have thought under the same circumstances."

Turning to relevant case law, the district court stated that the Fifth Circuit, under United States v. Paul, 142 F.3d 836 (5th Cir 1998), United States v. Fike, 82 F.3d 1315 (5th Cir. 1996), and United States v. Bengivenga, 845 F2d 593 (5th Cir 1988), had formulated a four-factor test to determine when questioning amounts to custodial interrogation: 1) the length of the detention and questioning; 2) whether the interrogation took place in a private or public setting; 3) the number of government agents conducting the interview; and 4) the surrounding circumstances of the detention.

Applying these factors, the district court found that the defendant was not in the custody of the government at the time of his questioning. Thus, his statements were not unconstitutionally obtained. The court focused on the fact that Johnson's detention was brief, that the questions were asked at his place of employment, that the number of agents used in executing the warrant was reasonable, and that the circumstances surrounding the alleged arrest, for example, the fact that Johnson was informed that he was free to leave the premises and the fact that the warrant was executed during the workday, militated against a finding that he was in custody. The court concluded by stating that even if Johnson was in custody at the time of his statement, his questioning by government officials did not amount to an interrogation. Based on this analysis, the district court denied Johnson's motion.

I. Section 311 (Oil and Hazardous Substance Liability)

1. District court holds that § 311 is not the exclusive CWA enforcement authority available to address an accidental spill of petroleum, but that § 309 also provides such authority:

United States v. Texaco Exploration & Production Co., Case No. 2:98-CV-0213S; United States v. Mobil Exploration and Production. Co., Case No. 2:98-CV-0220S (May 27, 1999, D. Utah).

The U.S. brought claims against defendants Texaco and Mobil that alleged defendants' "pipelines and onshore facilities ruptured, leaked, and/or overflowed causing oil and/or produced water to spill into the environment" in violation of §§ 309 and 311 of the CWA. Defendants moved to dismiss the claims brought under § 309 of the CWA. Defendants argued that the remedial schemes set forth in §§ 309 and 311 of the CWA are mutually exclusive, and that § 309 applied only to "chronic, continuous, and anticipated discharges..." that can be controlled through treatment and can be regulated through the "CWA's discharge permitting program."

Defendants argued that because the discharges here were not anticipated, were not from typical point sources, and were not amenable to NPDES permitting, § 309 should not apply. Defendants made three primary arguments.

First, defendants argued that because § 309 does not enumerate § 311 as within its basic enforcement framework, and because § 311 proscribes the discharge of oil and hazardous substances (including providing its own definitions), § 311 "governs enforcement of the Spill Program." **The court did not agree. The court observed that nothing in the CWA specified that §§ 309 and 311 were mutually exclusive, but that the Act did specify that a person could not be subject to civil penalties under both §§ 309 and 311, which would not be possible if they were mutually exclusive. The court further observed**

that § 309(a)(3) authorizes actions for injunctive relief for violations of § 301(a) generally, and that § 301(a) applies to any person who discharges a pollutant, not just permittees.

Second, defendants argued that the 1978 amendments to § 311 of the CWA that excluded discharges that were in compliance with a permit indicated Congresses' intent to address unanticipated discharges under § 311 exclusively. The court allowed that this argument supported defendants' position to some degree, but found that the amendments did not go so far as to suggest that § 311 was intended to be "the exclusive remedy for accidental spills."

Finally, defendants argued that case law supported their position, however, the court observed that defendants cited no case in which a § 301 or § 309 claim had been dismissed on the grounds that § 311 was the exclusive remedy for a "classic spill." The court noted that in Marathon Oil v. U.S. EPA, No. 97CV-267D (D. Wyo. Aug. 20, 1998) the district court rejected defendants' argument. It also observed that in United States v. Hamel, 551 F.2d 107 (5th Cir. 1977), the court concluded that discharged gasoline was a pollutant and §§ 301 and 309 were alternative provisions. **The court added that if § 309 did not apply to an accidental discharge, then a whole category of spills (i.e., accidental spills from point sources) could pollute the Nation's waters with "impunity."**

2. District court upholds $5,000 CWA penalty assessment imposed by U.S. Coast Guard against an oil terminal facility that discharged a harmful quantity of oil into an adjacent bay based on finding that Coast Guard's determination was supported by substantial evidence in the administrative record and was not an abuse of discretion:

BP Exploration & Oil, Inc. v. U.S. DOT and USCG, 44 F. Supp. 2d 34 (D.D.C. 1999).

In this matter, BP Exploration & Oil, Inc. challenged the Coast Guard's assessment of a $5,000 penalty under the CWA for discharging a harmful quantity of oil from its oil terminal facility into adjacent Curtis Bay. CWA Section 311(b)(3) prohibits the discharge of oil in harmful quantities into navigable waters, with "discharge" defined to include "spilling, leaking, pumping, pouring, emitting, emptying, or dumping…." Section 311 does, however, exempt certain discharges from coverage if such discharges fall within one of three exemptions set out in Section 311(a)(2). The exemption relevant to this case was "Exemption C," which provides that "continuous or anticipated intermittent discharges from a point source, identified in a [NPDES permit or application], which are caused by events occurring within the scope of relevant operating systems" are not discharges prohibited under Section 311. EPA regulations at 40 CFR 117.12(d)(2)(iii) provide that a discharge is permitted under Exemption C if it is caused by "a control problem, an operator error, a system failure or malfunction, an equipment or system startup or shutdown, an equipment wash, or a production schedule change, provided that such upset or failure is not caused by an on-site spill of a hazardous substance."

BP's terminal included an Oil Water Separator (OWS), a storm sewer line, storage tanks and a truck-loading ramp. The storm sewer line carried storm water and entrained oil from nearby storage tanks and the truck loading rack to the OWS. The incident giving rise to the violation occurred when heavy rains caused BP's storage tank areas to flood, prompting BP to drain the storage tank areas into the OWS. Simultaneously, a BP customer spilled oil on the truck loading rack. While the storage tanks were draining, stormwater flowed through the OWS at a rate of approximately 1,865 gallons per minute (gpm), with oil entering the bay.

The Coast Guard initiated civil proceedings against BP for illegally discharging oil. At hearing, BP

argued that the discharge resulted from "operator error" when BP employees disturbed already-separated oil in the OWS during their attempt to cleanup the oil with absorbent pads. Accordingly, BP argued that Exemption C under CWA Section 311 should apply. Both parties agreed in the administrative proceeding that the OWS functioned most efficiently at a flow rate of 300 gpm, and at that rate, oil would not collect in the third compartment and subsequently be discharged to receiving waters. Although the hearing officer found that the cleanup efforts did contribute to the problem, he concluded that the increased flow rate caused the oil spill and assessed a $5,000 penalty. BP appealed the penalty assessment to the Coast Guard Commandant, who found that Exemption C did not apply because the record did not indicate that BP's OWS was designed to, nor was it capable of, processing the spilled oil and rainwater. BP paid the penalty and filed an action seeking a refund. Both parties submitted for summary judgment, with the district court ruling as follows.

First addressing Coast Guard jurisdictional arguments, **the court rejected the contention that it lacked jurisdiction to hear the case because the CWA has no refund provision and that BP failed to identify any waiver of sovereign immunity that would permit its refund action, stating that the Commandant's decision to impose a penalty constituted a "final agency action," that BP properly filed a notice of appeal under Section 311(b)(6)(G)(i), and that BP was, therefore, entitled to a review of the decision under the Administrative Procedure Act, 5 U.S.C. Section 704.** The court also stated that Section 311(b)(6)(G) expressly permits any person against whom a penalty has been assessed to obtain review of the assessment in the U.S. District Court for the District of Columbia, and that BP had followed all procedural requirements necessary to obtain this review. Next, regarding the Coast Guard's argument that BP's action was moot because it had already paid the penalty, the court held that BP was under a statutory and regulatory obligation to make the payment immediately and that such action did not preclude it from taking the action under Section 311(b)(6)(G).

The court then turned to BP's challenges to the Coast Guard's enforcement and penalty decisions. **First, regarding BP's allegations that the Coast Guard improperly relied upon its "Marine Safety Manual" in its regulatory and enforcement decision making because the Manual was not promulgated in accordance with the notice and comment requirements the APA, the court, noting that while APA Section 553 expressly requires agencies to afford notice and comment of a proposed rulemaking and an opportunity for public comment prior to promulgating a "substantive rule," the issuance of "interpretive rules and policy statements and guidance" was not subject to these same requirements. The court concluded that the Manual was not intended to be a "binding" document, and, therefore, the Coast Guard was not required to follow APA procedures before relying on the Manual.**

Next, the court turned to BP's contention that the Coast Guard's penalty decision was not based on substantial evidence in the record and was an abuse of discretion because the hearing officer failed to consider evidence related to the flow rate of the OWS. **The court stated that under Section 311(b)(6)(G), a court can not overturn a decision imposing a civil penalty "unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or the Secretary's assessment of the penalty constitutes an abuse of discretion." The court also stated that the "substantial evidence" and "abuse of discretion" standards mirror those in the APA and should be interpreted in the same way. The court noted that for it to find that there was not "substantial evidence" in the record for the Coast Guard to make its decision, it must find that there was "no reasonable interpretation of the evidence could justify it."** In addressing the "abuse of discretion" argument, the court stated that

its review must be "highly deferential" to the Coast Guard, and, although its inquiry into the facts must be "searching and careful," it was "not empowered to substitute its judgement" for that of the Coast Guard. Based on these standards of review, the court determined that the Coast Guard considered the relevant evidence submitted by BP on the applicability of Exemption C to the facts of the discharge and simply rejected BP's position, based largely on testimony that indicated that increased flow rate caused the discharge into Curtis Bay, not operator error. The court also found that the Commandant's imposition of the $5,000 penalty was not an abuse of discretion.

3. ALJ assesses a civil penalty of $24,876 for violations of SPCC requirements and oil discharge prohibitions:

In the Matter of Pepperell Associates, 1999 EPA ALJ LEXIS (Feb. 26, 1999).

EPA Region I filed a complaint that charged Pepperell Associates with violations of the CWA § 311(j)(1) or, in the alternative, § 307(d). Count I of the complaint charged that respondent operated a facility regulated under the Oil Pollution Prevention regulations, 40 C.F.R. Part 112, without a Spill Prevention Control and Countermeasure Plan (SPCC Plan) from December 1985 to July 14, 1997. Count II charged that respondent failed to prepare an SPCC Plan from October 16, 1997 to April 16, 1998, and failed to implement the SPCC Plan within six months of installing a new above-ground oil storage tank on October 16, 1997. Count III charged that respondent on October 17, 1996, discharged oil into or upon a navigable water of the U.S. in a quantity that was determined may be harmful or, in the alternative, that respondent discharged oil into a POTW in violation of a Pretreatment Standard. An Order on the parties' cross-motions for accelerated decision entered on October 9, 1998 was incorporated by reference, and any inconsistent findings were superseded by the findings in this decision.

An oil spill on October 17, 1996 at respondent's facility, Pepperell Mill, resulted in 350 to 400 gallons of number six heating oil reaching Gully Brook and Androscoggin River. Approximately 300 gallons were recovered from Gully Brook and Androscoggin River, while 50 to 100 gallons remained unrecovered. As a result of the spill, 100 to 200 gallons reached the Lewiston Wastewater Treatment Plant. The POTW, designed to treat domestic waste, did not have the capacity to treat industrial waste such as water contaminated with number six heating oil. In order to maintain the integrity of the treatment process, the POTW was forced to decelerate severely its treatment process while oil was removed from the incoming wastewater, wet wells, and primary sedimentation basins. No noticeable oil passed through the POTW into the Androscoggin River.

The ALJ concluded that respondent violated the CWA § 311(j)(1) and the implementing SPCC regulations for the period from December 1985 to October 31, 1996 for its failure to prepare and implement an SPCC Plan. From November 1, 1996 to July 14, 1997, respondent's facility was not subject to EPA jurisdiction because the underground buried oil storage capacity of the facility which could reasonably be expected to discharge to navigable waters was 30,000 gallons, which was below the jurisdictional threshold of 42,000 gallons. Thus, respondent was not liable for such violations during that period. Since the facility was not subject to EPA jurisdiction for SPCC regulation purposes from November 1, 1996 to October 16, 1997, when a new 20,000 gallon above-ground oil tank was installed, respondent was not required to prepare and implement an amended SPCC Plan as opposed to a new SPCC Plan during this period. Thus, respondent was not liable for an SPCC Plan violation as alleged in Count II of the complaint. The ALJ also concluded that respondent violated the CWA § 311(b)(3) on October 17, 1996 by discharging oil into a navigable water of the U.S. in a quantity that was determined to be harmful.

A civil administrative penalty of $15,385 was assessed for respondent's violation of the CWA § 311(j)(1) and the implementing SPCC regulations for failure to prepare and implement an SPCC Plan; a penalty of $9,491 was assessed for respondent's violation of § 311(b)(3) for its discharge of oil into navigable water as alleged in Count III for a total civil administrative penalty of $24,876.

II. Other Statutes

A. Oil Pollution Act (OPA)

1. Fourth Circuit holds that, under the OPA, compensable removal costs and damages are those that result from the discharge of oil or substantial threat of discharge into navigable waters or adjacent shorelines:

Gatlin Oil Company, Inc. v. U.S. DOT, 169 F.3d 207 (4th Cir. Mar. 2, 1999).

Gatlin Oil Company sought compensation from the Oil Spill Liability Trust Fund for oil spill related damages caused by vandals. Gatlin sought $850,000 but the U.S. Coast Guard allowed only $6,959. The District Court for the Eastern District of North Carolina set aside the Coast Guard's decision and remanded the case for further consideration. The United States appealed the district court's remand of the Coast Guard's decision.

On appeal, the central issue was which damages were compensable under § 2702 of the OPA. Gatlin argued that it was entitled to costs that resulted from the "incident," as that term is defined in the OPA. The Coast Guard argued that only costs and damages that result from any such "incident" (i.e., the discharge or substantial threat of discharge into navigable waters or adjacent shorelines) were compensable. **The court agreed, and held that the compensable removal costs and damages were those that resulted from the discharge or substantial threat of discharge into navigable waters or adjacent shorelines.** However, the court observed that Gatlin was entitled to reasonable compensation, including full compensation for removal costs the federal on-site coordinator determined were consistent with the N.P., and for cost resulting from actions he or she directed. The court also noted that Gatlin was entitled to compensation for loss of earnings and earnings capacity caused by the need to comply with directions. The court found that Gatlin was not entitled to compensation for fire damage, because there was no evidence that the fire caused or threatened to cause the discharge of oil. Nor did the court allow compensation for Gatlin complying with directives from State officials, since such actions were not ordered by the federal on-site coordinator or determined to be consistent with the N.P. The court found that Gatlin's costs of assessing damages should have been compensated provided these were reasonable, but that Gatlin was not due interest because there was no clear waiver of sovereign immunity for interest under the OPA. The Fourth Circuit Court vacated the district court's judgment, and remanded the case for further proceedings.

2. District court holds that, in the case of abandonment, the OPA provides for liability of both previous and current lessees/operators:

United States v. Bois D' Arc Operating Corp., 1999 U.S. Dist. LEXIS 3199 (E.D. La. Mar. 9, 1999).

Plaintiff United States sought the recovery of costs on behalf of the oil spill liability trust fund from defendant Bois D' Arc (BDA) for two discharges of crude oil and petroleum from a capped but leaking well and abandoned platforms located on land leased by defendant. The United States sought $95,331, and in this action, sought summary judgment. The court observed that the well and tank battery platform were off-shore facilities and were located within defendant's lease area. Therefore, the court found that defendant BDA was a responsible party under the OPA. BDA argued that the capped well and platform constituted an

abandoned off-shore facilities, and that the OPA, under 33 U.S.C. § 2701(32)(F), provides that in the case of abandonment, the responsible parties immediately prior to abandonment remain the responsible parties. The court viewed this argument as asserting that Section (C) (which defines responsible party for off-shore facilities) and Section (F) (which defines responsible party in the case of abandonment) are mutually exclusive. The court disagreed. **Based on the language of the OPA, the legislative history of the Act, and Congresses desire in passing the Act to expand government oversight of cleanups, the court found that Section (F) "expands, rather than contracts, the definition of responsible party."** Based on this finding, the court held that BDA was a responsible party under the OPA. BDA also argued that the U.S. Coast Guard did not comply with the N.P. in responding to the spill by plugging the well, but the court again disagreed. The court granted the United States' motion for summary judgment.

B. Emergency Planning and Community Right-To-Know Act (EPCRA)

1. EAB finds that use of EPA self-disclosure settlement policy in litigation was inappropriate, but affirms civil penalty amount calculated based on policy due to concerns regarding fairness:

In re: Bollman Hat Company, 1999 EPA App. LEXIS 4 (Feb. 11, 1999).

EPA appealed an initial decision that addressed the proper civil penalty for seven violations of EPCRA (i.e., failing to file toxic chemical release forms for several chemicals over several years). The central issue on appeal arose out of the EPA Region III's use of the self-disclosure policy—a settlement policy—to calculate the penalty reductions for respondent's self-disclosure of the violations. In the original complaint, EPA proposed a civil penalty of $39,716. The ALJ applied the self-disclosure policy and 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. Based on this finding, the ALJ imposed a penalty of $8,166.

On appeal, Region III argued that the ALJ erred in applying the self-disclosure policy to reduce the civil penalty for counts I-V to $0. Alternatively, the Region argued that even if the self-disclosure policy was property applied, the facts did not support reduction in the penalty beyond that given in the complaint. Lastly, the Region maintained that ALJ erred in sanctioning the Region through a penalty reduction of 25 percent for counts VI and VII because the Region had denied respondent a due process right to litigate the use of the self-disclosure policy. Respondent opposed each of the grounds for appeal.

The EAB observed that the Region was correct that the self-disclosure policy should not have been applied to a litigated penalty assessment and that such use was inconsistent with the express terms of the policy. The EAB observed that such application did not promote consistency and was a disincentive for settlement. The EAB stated that "to sustain the Region's appeal, we would be required to find that it was clear error for the Presiding Officer to have relied upon the Region's own misreading, misapplication, and misinterpretation of the Self-Disclosure Policy. We do not believe that this finding would be justified, particularly where the Region was unwilling to admit in its post-hearing brief that its use of the self-disclosure policy in this litigation was clear error." The EAB thus found, that although the ALJ's reliance on the policy was not unreasonable, because it did not want to promote further improper application, the EAB declined to adopt the ALJ's penalty rationale. The EAB deemed the penalty amount calculated by the ALJ appropriate and fair, and stated that although respondent had not been denied due process, Region III's failure to disclose use of the settlement policy was unfair and inappropriate.

2. EAB holds that "justice" penalty adjustment factor may only be applied to recognize environmentally beneficial projects when other penalty adjustment factors are insufficient or inappropriate to achieve fair and just result:

In re: Catalina Yachts, Inc., 1999 EPA App. LEXIS 7 (March 24, 1999).

The U.S. EPA Region IX and Catalina Yachts appealed the assessment of a $39,792 civil penalty for seven violations of EPCRA § 313 reporting requirements. The Region had sought $175,000. The ALJ had reduced the gravity-based penalty amount (calculated by the ALJ to be $173,274) based on Catalina's "attitude" (reduction of $51,982) the delisting of one chemical of concern (acetone) (reduction of $12,500), and in consideration of "other matters as justice may require" (reduction of $69,000). The adjustment for the "justice" factor was based on environmentally beneficial activities undertaken by Catalina.

On appeal, Catalina argued that the ALJ erred because he rigidly applied EPA's penalty policy, did not fully account for the statutory penalty factors, and improperly limited credit for the environmentally beneficial projects. EPA argued that the ALJ erred because there was inadequate support for downward adjustments for the "cooperation" and "compliance" components of the "attitude" factor; and the adjustments for environmentally beneficial projects were not factually supported in the record and were inconsistent with the EAB decision in *In re* Spang & Co., 6 E.A.D. 226 (EAB 1995).

The EAB found no error with regard to the ALJ's use of the penalty policy or consideration of the statutory penalty factors. The EAB found that the ALJ had not applied the ERP as a rule, but rather had used both the ERP and the statutory factors listed in TSCA § 16 to calculate the penalty, and had in fact made adjustments based on the statutory factors not contemplated in the ERP.

In examining application of the statutory penalty factors, the EAB found that the ALJ's application of the penalty policy provided an adequate basis for the gravity-based penalty. In addition, the Board found no error in the ALJs refusal to consider the fact that Catalina submitted chemical use data to local agencies and that Catalina had conducted public outreach. The EAB also upheld the delisting adjustment, having found no basis for Catalina's desired 80 percent reduction of the gravity-based penalty for the acetone violations. With regard to adjustment factors, the EAB focused its discussion on "attitude" and "other matters as justice may require." With regard to attitude, the EAB upheld the 30 percent downward adjustment imposed by the ALJ. The EAB found that the record supported the ALJ's finding that Catalina had been cooperative in most respects. The EAB observed that cooperation during settlement was just one aspect that should be considered in determining whether an adjustment for cooperation should be granted. As for compliance, the EAB similarly found the record supported the ALJ's adjustment.

Finally, with respect to the ALJ's reduction for Catalina's environmentally beneficial projects, the EAB found it was error for the ALJ to have reduced the penalty based on these projects. The EAB cited *Spang* for the proposition that "use of the justice factor should be far from routine, since application of the other adjustment factors normally produces a penalty that is fair and just." The Board continued, " [i]f, and only if, despite application of the other adjustment factors, an assessed penalty is so disproportionate to the violations at issue as to be manifestly unjust, should a presiding officer apply the justice factors to recognize environmentally beneficial projects." **The Board found that here, because Catalina had received the full benefit of the "attitude" adjustment factor, as well as a significant adjustment for the delisting of acetone, it believed the resulting penalty of $108,792 was fair and just**. The EAB reversed the ALJ $69,000 downward penalty adjustment for "other matters as justice may require" and ordered Catalina to pay a civil penalty of $108,792.

The EAB observed in a footnote that it questioned whether two of three projects qualified as environmentally beneficial projects. In one case, it was not clear that the project affected either acetone or styrene, the chemicals that triggered the underlying violations. In the other, the costs and benefits of the project were largely speculative. The EAB observed that the ALJ had improperly considered the prospective costs and benefits of a program that had been in place only four months and covered only 30 percent of Catalina's gel coating activities.

C. Clean Air Act (CAA)

1. D.C. Circuit remands revised NAAQSs for particulate matter and ozone based on unconstitutional delegation of legislative authority:

American Trucking Ass'n v. U.S. EPA, No. 97-1441 (D.C. Cir. 1999).

Petitioners challenged numerous aspects of the final revised primary and secondary National Ambient Air Quality Standards (NAAQS) for particulate matter (PM) and ozone, which had been promulgated during July 1997. 62 Fed. Reg. 38,652 (1997) and 62 Fed. Reg. 38,856 (1997), respectively. *This summary focuses only on three of the issues raised by petitioners*: that EPA's construction of §§ 108 and 109 of the CAA constituted an unconstitutional delegation of legislative power; that the NAAQS revisions violated the Unfunded Mandates Reform Act (UMRA); and that the NAAQS revisions violated the Regulatory Flexibility Act (RFA).

Petitioners asserted that with regard to both the PM and the ozone rules, EPA had construed §§ 108 and 109 of the CAA "so loosely as to render them unconstitutional delegations of legislative power." The court agreed and remanded the regulations to EPA for further consideration. (The court did not vacate the new ozone standards because the court found they could not be enforced under CAA § 181(a). Ultimately, based on issues *not* discussed here, the court vacated the coarse PM standards, and it invited briefing on the remedy for the fine PM standard). The court observed that § 109(b)(1) of the CAA provides that EPA must establish the PM and ozone NAAQSs at a level "requisite to protect the public health" with an "adequate margin of safety." **The court then found, that although the criteria used by EPA in assessing health effects for purposes of setting the NAAQSs for these non-threshold pollutants were sufficient (i.e., they focused the inquiry on the pollutants' effects on public health), no intelligible principle for distinguishing acceptable levels from unacceptable levels had been derived by EPA from the CAA**. The court observed that, in effect, EPA had merely established that less stringent NAAQS levels would allow greater harm and more stringent levels would allow less harm, without articulating or establishing a rationale for why the selected level satisfied the statutory standard. The court stated that EPA "[l]acked determinate criteria for drawing lines" and that the Agency had "[f]ailed to state intelligibly how much is too much."

The court discounted the fact that the NAAQSs were recommended by the Clean Air FACA because the court concluded the FACA's recommendations lacked a sufficiently specific basis. The court observed that "the question whether EPA acted pursuant to lawfully delegated authority is not a scientific one." The court also rejected EPA's argument that the NAAQSs were set slightly higher than background for the two pollutants, since EPA had "not explicitly adopted" this rationale. Additionally, the court rejected EPA's argument that the Agency had not adopted a lower standard because of the greater uncertainty that health effects exist at such lower levels. The court stated that "the increasing uncertainty argument is helpful only if some principle reveals how much is too much." Here, the court stated, "[n]one does."

The court indicated that here EPA had claimed broader latitude than OSHA asserted in International Union, UAW, v. OSHA, ("Lockout/Tagout I") 938 F.2d 1310, 1317 (D.C. Cir.

1991) (Regulations remanded to OSHA for a more precise definition of § 3(8) of the Occupation Safety and Health Act). The court found that EPA's approach could justify the selection of any standard, and was, thus, too unconstrained. The court added that here, because the standards in question affect "the whole economy," a more precise delegation that at issue in *Lockout/Tagout I* is required. The court also distinguished cases cited by EPA that supported the proposition that when there is uncertainty about the health effects of a pollutant within a particular range, EPA may make policy judgments to establish appropriate standards within that range. The court found such cases were not controlling because they did not involve a claim of undue delegation. The court also distinguished South Terminal Corp., v. EPA, 504 F.2d 646 (1st Cir. 1974) (rejecting nondelegation challenge regarding EPA's adoption of a plan for preventing violations of Boston's NAAQSs), since the NAAQSs were already established and served as the goals against which the means of compliance (i.e., the plan) could be assessed.

The dissent by Justice Tatel argued that the court had ignored the last 50 years of Supreme Court non-delegation jurisprudence, § 109's delegation was "narrower and more principled" than other delegations upheld by the Supreme Court and this court, and the record demonstrated that EPA discretion was properly limited by § 109 in developing the NAAQSs. Judge Tatel identified at least six Supreme Court decisions that upheld delegations of authority similar to § 109 (e.g., "to regulate broadcast licensing in 'the public interest'," "to fix 'fair and equitable' commodity prices," and "to regulate new drugs that pose an 'imminent hazard to public safety'.") He also observed that, consistent with these Supreme Court decisions, the First Circuit had rejected a similar nondelegation challenge to the CAA's "requisite to protect the public health" language. South Terminal Corp., v. EPA, 504 F.2d 646 (1st Cir. 1974). Judge Tatel added that he disagreed that the decision in *Lockout/Tagout I* required a different result. He viewed the standard in § 109 of the CAA as more precise than the standard in *Lockout/Tagout I*. Finally, he stated and articulated why EPA had adhered to a "disciplined decisionmaking process constrained by the statute's directive to set standard 'requisite to protect public health' based on criteria reflecting the 'latest scientific knowledge'." Judge Tatel distinguished the issue of nondelegation from that of EPA having promulgated an arbitrary and capricious standard, and allowed that the concerns raised by the court may be better viewed under the latter theory. With regard to nondelegation, however, Judge Tatel stated that " the Constitution requires that Congress articulate intelligible principles." He concluded that "Congress has done so here."

With regard to UMRA claim, petitioners asserted that EPA was required to prepare a Regulatory Impact Statement (RIS) when it set the NAAQSs. They also argued that EPA's failure to develop a RIS rendered the NAAQSs arbitrary and capricious. The court rejected both of these arguments. **The court found that even if EPA failed to prepare a RIS, UMRA did not provide a basis for staying, enjoining, or invalidating an agency rule based on such failure.** In addition, the court observed that a RIS would only contain information on the costs of implementation, and given that EPA was precluded from considering costs in setting the NAAQSs, no information in a RIS could have rendered the NAAQSs arbitrary and capricious.

Petitioners also asserted that EPA improperly certified that the revised NAAQSs would not have a significant impact on a substantial number of small entities, in violation of the RFA. The court rejected this argument as well, finding that the revised NAAQSs did not regulate small entities directly. Rather, the court observed that it is the States that regulate small entities through SIPs. (See, Mid-Tex Elec. Coop., Inc. v. FERC, 773 F.2d 327, 342 (D.C. Cir. 1985). The court concluded that EPA's certification was not improper.

D. Surface Mining Control and Reclamation Act (SMCRA)

1. Court of Federal Claims holds that Secretary of Interior's denial of a surface mining permit does not result in a compensable taking where mining activity would be enjoinable as public nuisance under State law:

Rith Energy, Inc. v. United States, 1999 U.S. Claims LEXIS 146 (BNA) 1951 (June 25, 1999).

This takings case arose from the denial of a surface mining permit by the Department of Interior's Office of Surface Mining Reclamation and Enforcement (OSM). The plaintiff, Rith Energy, was the prospective permittee. Pursuant to SMCRA requirements, before proceeding with mining operations, Rith applied to OSM for a surface-mining permit. As part of its application, Rith obtained soil samples to determine the level of toxicity of the soil to be mined and prepared a Toxic Materials Handling Plan explaining how it would treat overburden that exhibited a potential to cause acid mine drainage to an underlying aquifer. Based on the results of the soil samples and the sufficiency of the plan, OSM found that Rith's operations were expected to produce little or no adverse change in the prevailing hydrologic balance and issued Rith a permit. In response to complaints, OSM resampled the overburden in Rith's permit area and found substantially more environmental risk from the operation than demonstrated by the sampling submitted Rith's permit application. Accordingly, OSM suspended Rith's permit pending submission of a new handling plan. While the re-permitting process was proceeding, Rith received approval to mine another portion of it lease areas until ultimately OSM ordered Rith to cease all mining operations. Rith then submitted a series of handling plans to OSM, each of which was rejected, and OSM ultimately denied Rith's final attempt to obtain a permit revision.

After a series of administrative appeals and judicial challenges and appeals, the Court of Federal Claims addressed Rith's claims that OSM's permit denials constituted a compensable taking. The court stated that in general, regulatory takings cases involve a three part "fairness inquiry." Citing Penn Central Transp. Co. v. New York City, 438 U.S. 104, 57 L.Ed. 2d 631, 98 S. Ct. 2646 (1978), the court noted that under this inquiry, a court must examine the character of the government action that gave rise to the claimed loss, the extent to which that action interfered with the owner's reasonable investment backed expectations, and the extent of the economic harm occasioned by the government's actions. **The court, citing Lucas v South Carolina Coastal Council, 505 U.S. 1003, 120 L.Ed. 2d 798, 112 S. Ct. 2886 (1992), then noted that an alleged regulatory taking that restrains an owner from the beneficial uses of his property, even a restraint that bars all such use, cannot be the basis of a compensable taking where the restraint that is imposed is grounded "in the restrictions that background principles of the State's law of property and nuisance already in place upon land ownership."**

Based on this rule, the court examined whether OSM's denial of Rith's mining permit by federal officials acting under the authority of SMRCA paralleled a result that could have been achieved under Tennessee nuisance law. The court noted that if it found that Tennessee nuisance law would allow the issuance of an injunction restraining Rith from proceeding with a surface mining operation given a finding that, because of the inadequate handling plans, there would be a high probability of acid drainage to the drinking water aquifer, which was the basis for the permit denial, there could be no compensable taking.

The court found that under the Tennessee Water Quality Control Act, Rith would not be issued a permit and was subject to injunctive action for the adverse impact of its operations on the State waters. The court stated that OSM's denial of a mining permit because of the high probability of acid mine drainage into the aquifer "represented a exercise of regulatory authority indistinguishable in purpose and result from that which plaintiff was always subject under Tennessee nuisance law." **Because Rith's conduct would constitute an enjoinable nuisance under State law, the court concluded that no compensable taking had occurred.**

INDEX OF CASES