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I. Clean Water Act (CWA)

A. Jurisdictional Scope of the CWA

1. Tenth Circuit holds that CWA § 301(f) prohibition does not apply to stack emissions from destruction of chemical weapons because such emissions do not constitute discharge into navigable waters:

Chemical Weapons Working Group v. U.S. Army, 111 F.3d 1485 (10th Cir. 1997).

Chemical Weapons Working Group, Inc., Sierra Club, and Vietnam Veterans of America Foundation (appellants) appealed as error the District Court of Utah's denial of a preliminary injunction to halt the Army's trial burns of nerve agents at the Army's incinerator in Tooele, Utah. Appellants argued that the Army's actions violated the Clean Water Act (CWA), the Resource Conservation and Recovery Act, the 1986 Department of Defense Authorization Act, and the Administrative Procedure Act. The district court dismissed these claims, including a claim that the stack emissions from the incinerator constituted a discharge of chemical weapon agents to navigable waters in violation of 33 U.S.C. § 1311(f) (Clean Water Act § 301(f)). Regarding the CWA claim, the court concluded that appellants had failed to state a claim for which relief could be granted.

On appeal, appellants argued that CWA § 301(f), which states in pertinent part, " . . . [i]t shall be unlawful to discharge any…chemical, or biological warfare agent…into the navigable waters" should be read broadly and was applicable to Tooele's stack emissions because the text of § 301(f) placed no limitation on the form of chemical agent discharged or the manner in which it enters navigable waters. **However, the court disagreed and held that § 301(f) of the CWA did not apply to Tooele's stack emissions because such emissions did not constitute discharge into navigable waters, despite the broad language and policy goals of that provision.**

The court reasoned that the plaintiffs' interpretation was inconsistent with congressional intent, would lead to irrational results, and would create a conflict between the CWA and the Clean Air Act (CAA). The court noted that Congress had specifically approved and funded incineration for destruction of chemical weapons and, thus, a ban on incineration would be contrary to congressional intent. The court also rejected plaintiff's position as irrational because it could lead to the absurd result of regulating car emissions under the CWA. The court observed that plaintiffs failed to cite a single instance in which stack emissions were regulated under the CWA. Finally, the court stated that plaintiffs' interpretation would create a conflict between the CWA and the CAA, and that the pollution effects of atmospheric deposition were considered and regulated under the CAA (see, 42 U.S.C. § 7403(e)(4) and §§ 7651(a)-(o)). In a footnote, the court also rejected plaintiffs' claim that stack emissions were analogous to discharges to groundwater that found their way to navigable waters and held that, unlike other indirect discharges, Toole's stack emissions lacked the requisite nexus to navigable waters to render them subject to regulation under the CWA.

2. Eleventh Circuit holds storm water drainage ditch is tributary and, thus, a water of the U.S. subject to the CWA:

U.S. v. Eidson, 108 F.3d 1336 (11th Cir. 1997).

Charles and Sandra Eidson operated Cherokee wastewater disposal and were convicted of knowingly discharging pollutants into navigable waters of the U.S. in violation of §§ 1311(a) and 1319(c) of the Clean Water Act. They were also convicted of mail fraud for making false representations in soliciting customers for their wastewater disposal business. Employees of Cherokee were observed pumping sludge and wastewater from a Cherokee truck into a storm drainage ditch that was connected to a drainage canal, which ultimately emptied into Tampa Bay. Charles Eidson was sentenced to 70 months, Sandra was sentenced to 37 months.

On appeal, the Eidsons argued that the drainage ditch into which the sludge was pumped was not a navigable water under the CWA, the CWA definition of pollutant was unconstitutionally vague, there was insufficient evidence to support their mail fraud convictions, and that the U.S. Sentencing Guidelines were improperly applied.

The court held that the drainage ditch into which the Cherokee discharged pollutants is a tributary of Tampa Bay and, thus, a "water of the United States" under CWA § 1362(7). The court observed that the sewer, the drainage ditch, and the canal were all part of a storm drainage system designed to discharge storm water into Tampa Bay. The court stated that it is "well established that Congress intended to regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce." The court disposed of the contention that the drainage ditch was not a navigable water because it was not navigable-in-fact, stating that the CWA definition of "navigable waters" as "waters of the United States, including the territorial seas" 33 U.S.C. § 1362(7) "'makes it clear that the term navigable as used in the Act is of limited import'and that with the CWA Congress chose to regulate waters that would not be deemed navigable under the classical understanding of the term." U.S. v. Riverside Bayview Homes, Inc., 474 U.S. at 133, 106 S. Ct. at 462. Moreover, the court stated there is no reason to suspect that Congress intended to regulate only natural tributaries, nor to exclude tributaries that flow only intermittently. (See U.S. v. Holland, 373 F. Supp. 665, 673 (M.D. Fla. 1974) (man-made water body used to convey pollutants is water of U.S.) and U.S. v. Texas Pipeline Co., 611 F.2d 345, 347 (10th Cir. 1979) (intermittent tributary to navigable water is water of U.S.).

Regarding the CWA definition of pollutants, the court concluded that although the definition is broad, it is not unduly vague, since based on the definition an ordinary person should have been able to understand that the petroleum-based, sludge-like substance was a pollutant within the meaning of the Act.

The court upheld the mail fraud convictions, finding sufficient evidence that Cherokee offered services (i.e., proper and lawful management of used oil and wastewater by a permitted entity) in exchange for a fee with the intent not to perform those services (Cherokee employees were instructed to intentionally dumped waste materials on the ground at and around their facility). As for application of the sentencing guidelines, the court concluded that the district court committed two errors and remanded the case for resentencing. The court held that there was insufficient evidence to conclude that the illegal discharge involved five or more participants or that such criminal activity was "otherwise extensive." The court stated that "a court should only consider 'conduct immediately concerning' the offense of conviction in determining an adjustment," and, thus, those employees involved in the mail fraud were improperly counted. The court also concluded that there was insufficient evidence to conclude that the loss caused by the fraudulent scheme exceeded $200,000. The court stated that their was no evidence that wastewater disposal practices from 1986 to 1990 were fraudulent.

3. District court finds that where discharge of pollutants to groundwater that is hydrologically connected to surface water results in pollutants reaching surface water such discharge constitutes a violation of the CWA:

Friends of the Coast Fork v. County of Lane, Oregon, No. 95-6105-TC, Findings of Fact and Conclusions of Law, (D. Or. 1997).

Plaintiff environmental group Friends of the Coast Fork brought a civil action pursuant to the Clean Water Act (CWA) seeking injunctive relief and civil penalties against defendant Lane County for discharging leachate and condensate from its landfill into navigable waters of the U.S. without an NPDES permit. Specifically, plaintiff alleged that the Lane County landfill 1) allowed pollutant flows from surface breaches of the sidewalls of the mounded garbage or breaks in the pipes of the leachate collection system; 2) sprayed leachate onto wetlands; 3) discharged sidewall and basin drainage from an unlined leachate collection lagoon into groundwaters that were hydrologically connected to the surface waters of Camas Swale Creek; and 4) allowed the drainage of leachate from the landfill into groundwaters hydrologically connected to the surface waters of Camas Swale Creek.

Among facts the parties stipulated to are the following: 1) the leachate from the landfill is a pollutant; 2) the condensate from the hydrocarbon gas recovery system is a pollutant; 3) that on a number of occasions there were breakouts in the sidewalls of the pile of garbage or breaks in the

leachate collection system which resulted in surface flows of leachate to surface waters of the U.S.; 4) the landfill's permit, issued by the Oregon Department of Environmental Quality (DEQ), required the County to monitor groundwater at the landfill site and stated that the groundwater at the landfill site was more probably than not hydrologically connected to the base and surface flows of the Camas Swale Creek; 5) at various times samples collected from the monitoring wells have detected pollutants of the type found in the leachate produced by the landfill; 5) from the late 1970's to 1995, DEQ permitted the County to spray leachate onto an adjacent wetland area; and 6) the County does not have a permit to discharge leachate from the landfill into navigable waters of the U.S. nor does the County have a permit for spraying leachate onto wetlands.

After taking extensive expert testimony on the issue of the migration of leachate constituents in groundwater, the court found as a factual matter that groundwater, hydrologically connected to the base and surface flows of Camas Swale Creek and containing leachate discharged from the landfill and associated lagoons reached the surface waters of the Camas Swale Creek. The court observed that the County was unable to explain why contaminated groundwater, which had migrated to the wells, would not continue to migrate to the creek. Rather, it found plaintiff's experts more credible based on their calculations of the rate of contaminated groundwater flow.

As a matter of law, the court concluded that 1) the landfill and its associated lagoons were point sources for purposes of the CWA; and 2) the defendant violated the CWA by: a) its discharge of leachate and condensate into navigable waters via surface flows from sidewall and pipe breakouts; b) discharge of leachate from the landfill into groundwaters hydrologically connected to Camas Swale Creek; and c) spraying leachate onto wetlands. The parties were directed to file briefs on remedies and penalties.

4. District court rules the CWA does not govern discharges to groundwater, even in those cases where the groundwater is hydrologically connected to surface waters:

Umatilla Waterquality Protective Assoc., Inc. v. Smith Frozen Foods, Inc., 962 F. Supp. 1312 (D. Or. Apr. 9, 1997).

Umatilla Waterquality Protective Association, Inc. (UWQPA) brought a citizens suit pursuant to 33 U.S.C. § 1365(a) against defendant Smith Frozen Foods. The plaintiffs claimed that defendant's vegetable processing facility's wastewater pipelines periodically failed resulting in the discharge of pollutants into Pine Creek. Plaintiffs also alleged that defendant's old brine lagoon leaked sodium and chloride into groundwater and subsequently into Pine Creek, and that this discharge constituted a continuing unpermitted discharge of pollutants in violation of the Clean Water Act (CWA).

The parties filed a joint motion for immediate certification of three issues to the Ninth Circuit and the district court granted the motion and issued an interlocutory order with respect to the three issues. The three questions to which the parties had stipulated were: 1) Are discharges of pollutants into navigable waters via hydrologically connected groundwater subject to regulation under the federal Clean Water Act?; 2) If so, do subsoils containing residual pollutants from a former unlined brine pond constitute a point source under the federal Clean Water Act?; and 3) If so, does the ongoing migration of those pollutants to navigable waters via hydrologically connected groundwater constitute an ongoing discharge within the scope of federal Clean Water Act citizen suit jurisdiction?

In a partial judgment addressing the first question, the district court ruled that the CWA does not govern discharges to groundwater, even in those cases where the groundwater is hydrologically connected to surface waters. The court took note of the distinctions between federal and Oregon law regarding "navigable waters" and "waters of the state" and the fact that Oregon requires one type of permit for discharges to surface waters (NPDES permit) and a different type of permit for discharges to underground waters (WPCF

permit). The court stated that these distinctions are significant in that Oregon law classifies underground waters as "waters of the state" but these waters are not considered to be "navigable waters" as that term is used and applied under the Clean Water Act. Moreover, the court observed that EPA retains oversight jurisdiction of the state's NPDES program and EPA therefore has a statutory duty to inform the state when it is not administering a program in accordance with the requirements of the Clean Water Act. The court found it significant that for almost 25 years EPA had not objected to Oregon's dual permitting system nor had EPA required that a discharger to groundwater obtain an NPDES permit instead of the Oregon WPCF permit.

The court observed that past Ninth Circuit decisions had not addressed the issue of whether the CWA applies to discharges to groundwater. The court also observed that there was a split between jurisdictions as to whether the CWA applies to discharges to groundwater that affect surface waters. The court noted that some circuits had found that the CWA does apply to these situations, Friends of Santa Fe County v. LAC Minerals, 892 F. Supp. 1333, 1357-58 (D.N.M. 1995), Washington Wilderness Coalition v. Hecla Mining Co., 870 F. Supp. 983,989-90 (E.D. Wash. 1994) and other circuits have held otherwise. See, Town of Norfolk v. United States Army Corps of Engineers, 968 F.2d 1438, 1451 (1st Cir. 1992), Kelly v. United States, 618 F. Supp. 1103, 1106-7 (W.D. Mich. 1985). The court stated that EPA has never issued formal guidance interpreting the CWA to include regulation of groundwater. However, the court did recognize that EPA had stated in response to a rulemaking comment for the storm water regulations that "this rulemaking only addresses discharges to waters of the United States, consequently discharges to groundwater are not covered by this rulemaking (unless there is a hydrological connection between the groundwater and a nearby surface water body. See, e.g., Exxon Corp. v. Train, 554 F.2d 1310, 1312 n.1 (5th Cir. 1977))."

The court based its decision on the following grounds: 1) 33 U.S.C. § 1342, which establishes the NPDES permitting system, makes no reference to groundwater; 2) In the CWA, Congress addresses four categories of waters, navigable waters, the contiguous zone, the ocean, and groundwaters but only the first three of these are included within the definition of "discharge of a pollutant" under 33 U.S.C. § 1362(12); 3) The legislative history of the CWA indicates that Congress did not intend to regulate groundwater in any form; 4) EPA's Office of General Counsel has advised that under § 502(12) of the Act a discharge of a pollutant is defined to include discharges into navigable waters or the contiguous zone of the ocean but groundwaters are not included and no NPDES permit is required for such discharges. (Opinion, Office of General Counsel (December 13, 1973), as reprinted in Exxon Corp. v. Train, 554 F.2d 1310, 1312 n.21). Further, EPA twice promulgated regulations restricting its authority over groundwater (See, 38 Fed. Reg. 13,528 (May 22, 1973)), codified as 40 C.F.R. § 125.26(a)(1) and 44 Fed. Reg. 32,854, 32,870 (June 7, 1979); and 5) Oregon DEQ, which administers the CWA in Oregon, has interpreted the Act's NPDES program as not applicable to discharges to groundwater, and the U.S. Supreme Court has stated that state standards implementing the CWA "are part of the federal law of water pollution control" and "have federal character." Arkansas v. Oklahoma, 503 U.S. 91, 109-10 (1992).

To provide a full district court opinion for review, the court also answered the other two questions to which the parties had stipulated. With respect to whether leaking ponds constitute a point source, the court stated that the Ninth Circuit has determined that point and nonpoint sources are distinguished not by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a defined, discrete conveyance. Trustees for Alaska v. Environmental Protection Agency, 749 F.2d 549 (9th Cir. 1984), and that based on the reasoning in U.S. v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir 1979) the Ninth Circuit has accepted the proposition that escape of liquid from a confined system through dirt is a point source. **The court ruled that if the Ninth Circuit should find that discharge of pollutants through hydrologically-connected groundwater are subject to NPDES permit requirements, the residues at issue would be a point source.**

On the question of the existence of a continuing violation, the court noted that the U.S. Supreme Court has held that § 1365 of the CWA "does not permit citizen suits for wholly past violations." Gwaltney of Smithfield, Ltd. v. Chesapeake Bay

Found., Inc., 484 U.S. 49, 64 (1987), however, the court noted that "[i]ntermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition." Sierra Club v. Union Oil Co. of California, 853 F.2d 667, 671 (9th Cir. 1988). The court stated that the final question is whether the ongoing migration of pollutants, when no more pollutants are being added to the old brine pond, is a violation of the CWA. The court determined that the definition of pollutant under 33 U.S.C. § 1362(6) includes "…industrial, municipal, and agricultural waste discharged into the water" and that the brine residues are pollutants both as chemical and industrial wastes. (See, Hudson River Fishermen's Ass'n v. City of New York, 751 F. Supp. 1088, 1011 (S.D.N.Y. 1990), aff'd 940 F.2d 649 (2nd Cir. 1991). **The court stated that a discharge of pollutants is ongoing if the pollutants continue to reach navigable waters, even if the discharger is no longer adding pollutants to the point source itself, and ruled that if a discharge through hydrologically-connected groundwater is subject to the NPDES permit requirement, ongoing migration of pollutants from an old brine pit's residues through groundwater to surface water without an NPDES permit would constitute an ongoing violation of the CWA.**

The court granted the parties' motion for a declaratory judgment to be certified for interlocutory appeal and stayed further proceedings until the Ninth Circuit either decides the interlocutory appeal, declines to exercise its jurisdiction to hear the interlocutory appeal, or one or both parties informs the court that no appeal was taken.

5. District court denies reconsideration of holding that NPDES permit requirements do not apply to discharges to groundwater:

Umatilla Waterquality Protective Assoc., Inc., v. Smith Frozen Foods, Inc., 1997 U.S. Dist. LEXIS 16458 (D. Or. Sept. 23, 1997).

Umatilla Waterquality Protective Association, Inc. (UWQPA), a citizen environmental group, previously brought a citizens suit pursuant to 33 U.S.C. § 1365(a) against defendant Smith Frozen Foods alleging that the defendant wastewater pipelines periodically failed, resulting in the discharge of pollutants into Pine Creek, and that defendant's old brine lagoon leaked sodium and chloride into groundwater and subsequently into Pine Creek, in violation of the Clean Water Act (CWA).

In an earlier order, the court ruled that the CWA does not govern discharges to groundwater, even in those cases where the groundwater is hydrologically connected to surface waters, and certified three issues to the Ninth Circuit: 1) Whether discharges of pollutants into navigable waters via hydrologically connected groundwater are subject to regulation under the federal Clean Water Act?; 2) If so, do subsoils containing residual pollutants from a former unlined brine pond constitute a point source under the federal Clean Water Act?; and 3) If so, does the ongoing migration of those pollutants to navigable waters via hydrologically connected groundwater constitute an ongoing discharge within the scope of federal Clean Water Act citizen suit jurisdiction? On issues two and three, the court previously held that if the Ninth Circuit should find that discharge of pollutants through hydrologically-connected groundwater are subject to NPDES permit requirements, the residues at issue would be a point source; and if a discharge through hydrologically-connected groundwater is subject to the NPDES permit requirement, ongoing migration of pollutants from an old brine pit's residues through groundwater to surface water without an NPDES permit would constitute an ongoing violation of the CWA. The Ninth Circuit denied permission to appeal, and EPA sought reconsideration, while the defendant moved to vacate the stay and set a ruling schedule.

The court denied EPA's request for reconsideration, and held that, contrary to EPA's assertions, the Agency had not established a comprehensive, definitive, formal, and consistent position asserting that NPDES program requirements apply to any discharges to groundwater. Lacking such an interpretation, the court found that EPA was not due deference under Chevron. The court also observed that both the CWA and its legislative history reflect Congressional intent that NPDES permit requirements would not apply to discharges to groundwater. The court cited Chemical Weapons Working Group v. U.S. Army, 111 F.3d 1485 (10th Cir., 1997), where discharges of pollutants to air were found not to constitute discharges to waters of the U.S., as analogous, and observed that discharges to groundwater are, "in common sense

terms," discharges to an intervening medium, not discharges to navigable waters. The court vacated the stay and committed to publishing an opinion within 60 days.

B. Discharge of Pollutants/Point Sources

1. District court finds that municipal landfill and associated lagoons are point sources for purposes of CWA:

Friends of the Coast Fork v. County of Lane, Oregon, No. 95-6105-TC, Findings of Fact and Conclusions of Law, (D. Or. 1997). See case summary on page 2.

C. State Water Quality Standards

1. Eleventh Circuit holds when jurisdiction is premised on EPA's duty to review water quality standards it was error for the district court to fail to independently determine whether State water quality standards had been changed by State law:

Miccosukee Tribe v. Browner, 105 F.3d 599 (11th Cir. 1997).

Appellant Miccosukee Tribe of Indians challenged the district court's (S.D. Fla.) dismissal of the Tribe's citizen suit under the Clean Water Act (CWA). The citizen suit alleged that Florida's Everglades Forever Act (EFA) modified Florida's water quality standards and violated the antidegradation requirements of the CWA. The district court had dismissed the suit on the basis that the EPA Administrator was not subject to a non-discretionary duty to treat the EFA as a change in Florida's water quality standards and propose its own regulations.

On appeal the court considered whether the district court erred in dismissing the complaint for lack of subject matter jurisdiction. Appellants argued that the district court should have allowed discovery because determining whether the EFA changed Florida's water quality standards required a detailed factual analysis. EPA maintained that the Agency's authority in this instance was discretionary, that the district court's ruling did not require the court to make any factual findings, and that the EFA did not impose a nondiscretionary duty on EPA to enforce the CWA against Florida.

The appeals court held it was error for the district court to dismiss the complaint based on a lack of subject matter jurisdiction without independently assessing whether the EFA had altered State water quality standards. The court observed that subject matter jurisdiction in this case was dependent on a factual question -- whether the EFA changed Florida's water quality standards. If it had, the court stated that such actions would have been sufficient to trigger a nondiscretionary duty on the part of EPA to review and approve or disapprove of the revised standards. The appeals court found that the district court inappropriately relied on the State's representations that the EFA did not change State water quality standards, rather than conducting its own factual findings. The court found the district court should have taken actions sufficient to decide independently whether the EFA altered State water quality standards. The court reversed the dismissal and remanded the case for further proceedings.

2. D.C. Circuit Court strikes down in part and upholds in part EPA's Final Water Quality Guidance for the Great Lakes:

American Iron & Steel Inst. v. EPA, 115 F.3d 979 (D.C. Cir. 1997).

American Iron and Steel Institute (AISI or petitioner) brought a comprehensive challenge to EPA's Final Water Quality Guidance for the Great Lakes (Guidance). Petitioners challenged: 1) EPA's statutory authority; 2) EPA's methodology for establishing the Guidance; 3) the procedures specified for implementing the Guidance; 4) the consistency of the Guidance with the Great Lakes Water Quality Agreement; 5) the provisions requiring compliance with the Endangered Species Act; and 6) specific numeric criteria included in the Guidance. Intervenors National Wildlife Federation (NWF) also challenged selected provisions of the Guidance.

Petitioners asserted the following regarding EPA's statutory authority under § 118 of the CWA: 1) EPA lacked statutory authority to issue the Guidance as a binding regulation; 2) EPA misinterpreted the language of § 118(c)(2)(C) regarding

development of programs "consistent with" the Guidance; 3) section 118 does not justify imposition of uniform, basin-wide criteria; and 4) EPA promulgated improper procedures for establishing site-specific modifications to the wildlife criteria.

The court rejected all four of the petitioners arguments. First, the court observed that § 118 of the CWA clearly provided the Agency with authority to publish the Guidance as a rule. The court observed that use of the term guidance "is not inconsistent with the notion of mandatory regulations." Public Citizen v. NRC, 498 U.S. 992 (1990), *cert. denied*, and that Congress would not have directed the Agency to set limits and standards unless it intended the Agency to enforce them against the States. **Thus, the court held that § 118 gave the Agency the authority to issue the Guidance in the form of a regulation**. Second, the court found that EPA's interpretation of § 118, which required that State or Tribal programs be as protective as the standards delineated in the Guidance to be eligible for approval, was permissible since the CWA did not specify what level of conformity was required for a State's plan to be "consistent with" the Agency guidance. Third, the court held that it was not unreasonable for EPA to interpret § 118(c)(2)(A) as contemplating uniform standards for the Great Lakes basin as a whole. Finally, regarding petitioner's argument that the Guidance unlawfully restricts the authority of the States because it allows modification of the wildlife criteria only where the State established a lower bioaccumulation factor for a particular site, the court noted that EPA stated it has no intention of precluding development of site-specific wildlife criteria on other scientifically-justified grounds, and held EPA's approach was permissible and that as long as EPA held to that position the petitioner's challenge was not ripe.

Petitioners also challenged the Guidance's Tier II methodology for derivation of aquatic life and human health criteria, and claimed that EPA exceeded its regulatory authority and had no scientific support for what it promulgated. The court rejected both these contentions, finding that the Tier II methodology (which is used to derive numerical limits when incomplete data exists) specified numerical limits on pollutants in ambient Great Lakes waters was adequately explained in the preamble and response to comments, and that a two-tiered approach was consistent with § 118(c)(2). The court observed that CWA § 118(c)(2) required EPA to specify numerical limits on pollutants in the Great Lakes without regard to whether complete toxicity data exists for the pollutant.

Petitioners also raised five issues regarding implementation of the Guidance, two of which were deemed unripe (and are omitted here). First, petitioners challenged EPA's requirement for a pollution minimization program as being beyond the Agency's statutory authority, since it would impose restrictions upon internal plant waste stream discharges. The court found that although under § 401(a)(2) EPA is allowed to require monitoring of internal waste streams, EPA is not authorized to regulate pollutant levels in a facility's internal waste streams. The court struck down those provisions (Procedure 8.D) insofar as they would impose point-source water quality-based effluent limits on facility's internal waste streams. Second, petitioners argued that the elimination of mixing zones for bioaccumulative chemicals of concern (BCC) failed to consider the issue of cost, and EPA's limitation on the dimensions of mixing zones was not adequately justified nor consistent with past EPA practices. The court held that the Agency failed to address whether the measure was cost-justified, and remanded the matter to EPA, but found that EPA had adequately justified its decisions regarding mixing zone dimensions and BCC dilution ratios. Finally, petitioners challenged EPA's "reasonable potential" procedures under the Guidance, asserting that EPA departed from past practices and had made overbroad conclusions. The court found that EPA had not acted in an arbitrary and capricious manner in presuming that, for a body of water in which the standard for a pollutant has been exceeded, a source which contributes pollutants to that body of water has the reasonable potential to contribute to exceedances. The court also determined that EPA had been using the 95th percentile upper bound estimates of effluent data for making worst case estimates of effluent quality and there was no merit in AISI's contention that EPA had departed from its past practices.

Intervenors NWF asserted that the Guidance failed conform to the Great Lakes Water Quality Agreement in that: 1) EPA failed to explain how the Guidance achieves virtual elimination and zero discharge of persistently toxic substances; 2) the

Guidance contains improper exceptions to the mixing zone phase out for BCCs; and 3) the Guidance fails to provide implementation procedures for controlling non-point sources of pollution. The court disagreed with NWF's positions, finding that zero discharge was a goal, not a mandate; that mixing zone provisions did conform with the agreement; and that the Guidance contained specific regulations and measures for managing and reducing non-point source pollution.

AISI challenged the Guidance's endangered species provisions on the ground that EPA has no authority to require State program elements to protect endangered species. The court upheld the Guidance's requirement to protect endangered species on the basis that CWA § 118(c)(2), which provides that the Guidance "shall specify numerical limits on pollutants in ambient Great Lakes waters to protect human health, aquatic life, and wildlife…," was all the authority EPA needed to promulgate regulations designed to protect endangered and threatened species in the Great Lakes System. The court noted that if impaired water quality caused the extinction of a species, such water quality would not meet the Act's requirements.

Petitioners challenged as arbitrary and capricious EPA's human health and wildlife criteria for mercury and PCBs. AISI claimed that the method for generating the mercury BAF was arbitrary and capricious in that the Agency's model did not account for the natural variations in mercury concentrations in nature and that the model was flawed in that it does not account for the ingestion of mercury from sediments, and thereby assumed that all mercury would come from the water column. The court rejected the contention that use of the model was arbitrary. AISI also alleged that the Agency failed to respond to comments that suggested the use of alternatives such as bioavailability index or a dynamic model in establishing the mercury BAFs and that the methylmercury BCF the Agency used was partially based on a flawed study. The court found the record demonstrated the Agency considered the relevant factors raised by suggested alternatives and explained the basis for its decision, and that this was all the response to comment required. **With respect to the alleged flawed BCF methodology, the court noted that EPA had addressed concerns about the study, and that regarding questions of scientific judgment the court must be "at its most deferential."** Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. 87, 103 (1983). Petitioners next challenged the acceptable daily exposure (ADE) value, which was used by EPA in calculating the human health criteria for mercury, asserting the mercury criteria was arbitrary because it was based on an ADE that the Agency knew to be inaccurate and the Agency used an outdated ADE for mercury. EPA claimed that it was under a court order to publish the Guidance by a certain date and there was insufficient time to make revisions. EPA also pointed out that it had issued separate guidance alerting States and Regional offices that where an ADE has been revised, the Agency will approve criteria using the revised ADE. The court agreed with EPA that the Agency was not obliged to stop the entire process because a new piece of evidence emerged. The court observed that EPA had an obligation to deal with newly acquired evidence in some reasonable fashion and that the Agency met this requirement.

Finally, AISI asserted the following regarding the Guidance's human health and wildlife criteria for PCBs: 1) the Agency made mathematical errors in calculating the PCB BAF; 2) the Agency used an unnecessarily high cancer potency factor (CPF) in determining the human health criterion; and 3) the Agency relied on faulty data in its computation of the BAF. In vacating the challenged PCB criteria, the court observed that EPA abandoned its defense of the PCB criteria. The court therefore vacated the challenged PCB criteria and stated that it would not enter a binding ruling on an administrative decision when the responsible agency had already determined that the decision under review is fundamentally flawed and the agency was committed to revisions.

The court granted the petitioners challenge to the Guidance procedures governing mixing zones, the pollutant minimization program procedures, and the criteria for PCBs. The court denied the petitions for review on the other issues.

3. **District court holds that where EPA disapproves of State water quality standards under CWA § 1313(c) EPA has mandatory duty to promulgate such standards and holds that a**

2-year delay by EPA before disapproving state water quality standards was arbitrary, capricious, and an abuse of discretion in violation of the Administrative Procedure Act:

Idaho Conservation League v. Browner, 1997 U.S. Dist. LEXIS 9548 (W.D. Wash. Feb. 20, 1997).

Plaintiff citizen group brought a motion for summary judgment under § 1365(a)(2) of the Clean Water Act (CWA) alleging that EPA failed to carry out mandatory duties under CWA §§ 1313 (c)(3) and 1313 (c)(4)(A) to timely approve or disapprove Idaho's water quality standards (WQS) and, following formal disapproval, failed to promulgate substitute standards. EPA brought a motion for summary judgment contending that the agency's duties were either satisfied or discretionary and that plaintiff's claims should be dismissed.

On July 11, 1994 the Idaho Division of Environmental Quality (IDEQ) submitted WQS for Idaho waters to EPA for review. On June 25, 1996, almost two years later, EPA Region X wrote a letter to IDEQ approving certain WQS and disapproving others. The letter stated in pertinent part that Idaho's WQS are subject to EPA review pursuant to 33 U.S.C. § 1313 (c)(3), and that the letter constituted "official notification." Subsequently, the parties stipulated in writing that the June 1996 letter constituted official notification of disapproval.

The court identified two questions for review: whether EPA formally disapproved the Idaho's submitted WQS under § 1313 (c)(3) and, if so; whether EPA under § 1313 (c)(4)(A) had a mandatory duty to prepare and publish new Idaho WQS. With respect to the first question, the court reviewed the language of § 1313 (c)(3), related federal regulations (see, 40 C.F.R. § 131.21), and applicable case law, and found that EPA's June 1996 letter did constitute official action. The court noted that the action was subsequently stipulated to and that EPA's later contention that the stipulation was a mistake was unpersuasive. The court found that the question of whether the court should order EPA to approve or disapprove Idaho's WQS was moot as agency action had already been taken.

The court next reviewed whether EPA had a mandatory duty under § 1313 (c)(4)(A) to prepare and publish proposed regulations. The court took notice of the statute which states in part that "…Administrator shall promptly prepare and publish proposed regulations…" EPA argued that the phrase "shall promptly…" provides discretion to the Administrator and therefore no mandatory duty exists. **The Court, relying upon Idaho Conservation League, Inc. v. Russell, 946 F.2d 717, 720 (9th Cir. 1991), in which that court stated "There is no case law suggesting Section 303(c) leaves the Administrator any discretion to deviate from this apparently mandatory course" held that under the plain language of the statute and the cited authorities EPA's duty under § 1313 (c)(4)(A) is mandatory.**

Lastly, the court took up the issue as to whether EPA had acted promptly under § 1313 (c)(4)(A). Following a brief review of the relevant case law, which the court concluded did not provide a bright line rule, the court observed that EPA had delayed two years and compounded the delay with an additional seven month delay. **The court held that, given such a delay, EPA had failed to perform its mandatory duty to promptly prepare and publish water quality standards for Idaho and that EPA's failure to carry out duties clearly mandated by the CWA was arbitrary, capricious, and not in accordance with the law, and thus a violation of the Administrative Procedure Act.** The court granted plaintiff's motion for summary judgment, denied EPA's motion, and directed EPA to promulgate WQS for Idaho in accordance with its June 1996 disapproval letter within sixty days.

4. District court holds that, as affecting plaintiff's interests, new or revised State water quality standards become effective only after EPA has completed its review process and approved the standards under the CWA:

Alaska Clean Water Alliance v. Clark, 1997 U.S. District LEXIS 11144 (W.D. Wash. July 8, 1997).

Alaska Clean Water Action and Trustees for Alaska brought two claims against the U.S. EPA under the

Clean Water Act (CWA) for failure to carry out its duties in a timely manner and challenging the legality of regulations. The State of Alaska proposed revised water quality standards in December of 1993, and submitted them to EPA for review January 26, 1995. By November 1996, EPA neither approved or disapproved of the revised water quality standards. On April 7, 1997, EPA approved the revised water quality standards.

In the first claim, plaintiffs alleged that EPA failed to meet the requirements of § 303(c)(3) of the CWA, which requires that after a State has submitted officially adopted revisions of water quality standards for EPA review, EPA must either notify the State within 60 days of its approval, or within 90 days of its disapproval. Plaintiffs also argued that EPA's April 7, 1977 approval of the water quality standards did not make the argument moot, because of the obligation to ensure compliance with the ESA, which requires that EPA consult with the U.S. Fish and Wildlife Service (FWS). The court disagreed and held in favor of EPA, stating that the CWA requirements had been met and the ESA requirements were a separate matter.

The second claim brought by the plaintiffs focused on a conflict between EPA regulations regarding State revisions to water quality standards (40 C.F.R. 131.21(c)) and the CWA process for EPA review of revised State water quality standards (33 U.S.C. 1313(3)). Resolution of the conflict impacts when the revised State water quality standards became effective. The relevant regulations state that "[a] State water quality standard stay[s] in effect, even though disapproved by EPA, until the State revises it or EPA promulgate[s] a rule that supersedes the State water quality standard." In contrast, the CWA explicitly states that "[i]f the Administrator, within 60 days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State."

Plaintiffs argued that the CWA clearly and unambiguously indicates congressional intent that an affirmative act (EPA's review and approval) is required to change existing State water quality standards. The court dismissed EPA's suggestion that this claim was also moot, and agreed with plaintiff's argument that this situation fell within an exemption to the mootness doctrine for claims capable of repetition yet evading review. EPA further argued that this provision should not have been read in isolation, but suggested that § 301(b) and § 510 offered support for EPA's interpretation. The court disagreed, emphasizing the primacy of the plain meaning rule for interpreting statutes. **The court held that, as applied in this instance, the language of the statute was controlling and, thus, new or revised State water quality standards become effective only after EPA has completed its review process and approved the standards under the CWA.**

D. NPDES Permits

1. Tenth Circuit holds that EPA was not arbitrary and capricious in revising secondary treatment regulations applicable to POTWs:

Maier v. EPA, 114 F.3d 1032 (10th Cir. 1997).

Plaintiff appellants, Peter Maier, Intermountain Water Alliance, Atlantic States Legal Foundation, and others (plaintiffs), brought suit against EPA pursuant to the Clean Water Act (CWA) 33 U.S.C. § 1369(b)(1). Plaintiffs alleged EPA, in revising federal regulations requiring secondary treatment for publicly owned treatment works (POTWs), failed to consider advancements in municipal wastewater treatment technology that rendered the revised regulations for secondary treatment inadequate. Specifically, plaintiffs alleged that the revised secondary treatment standards should include standards for nitrogenous biochemical oxygen demand (NOD) in addition to the promulgated standards for carbonaceous biochemical oxygen demand (CBOD) and five-day biochemical oxygen demand (BOD_5). Plaintiffs subsequently petitioned EPA to institute a new rulemaking to reflect this information, EPA denied the petition, the denial was upheld by the Agency, and this appeal followed.

Plaintiffs contended that EPA's refusal to initiate a new rulemaking was arbitrary and capricious because the development of new technology had removed both the legal and factual predicate of the EPA's decision not to set parameters for NOD (i.e., new secondary treatment technology made it feasible and cost-effective to control both CBOD and

NOD). Plaintiffs argued in the alternative that even if EPA had discretion to address NOD by permit, the Agency's decision to do so was not supported by the evidence or was based on the consideration of impermissible factors.

The court stated that the issue on appeal was whether control of NOD must be accomplished through EPA's generally-applicable standards for secondary treatment, or whether it was proper for the agency to address the issue on a case-by-case basis through the permit process. The court observed that an agency's refusal to initiate rulemaking was subject to broad deference under the arbitrary and capricious standard, and that rulemaking proceedings may be required "if a significant factual predicate of prior decision on the subject (either to promulgate or not to promulgate specific rules) has been removed." WWHT, Inc. v. FCC, 211 U.S. App. D.C. 218, 656 F.2d 807, 819 (D.C. Cir. 1981). The court also noted that an agency determination may likewise be vulnerable to challenge if it rests on an insufficient legal predicate.

Based on the language of the statute, the court rejected plaintiffs' claim that § 1314(d)(1) requires the Administrator to publish secondary treatment regulations for any pollutant, including NOD, that can be controlled by secondary treatment. Rather, the court found that the agency has a duty to publish information about the degree of effluent reduction attainable. The court noted that EPA has consistently classified NOD reduction as a form of advanced treatment that will be required by permit if necessary to protect water quality and that technological feasibility is not the only criterion the EPA may use to determine which of the secondary treatment technologies ought to be considered standard. The court determined that the Agency had made a reasoned consideration of the factors within its expertise.

The court examined § 1311(b)(1)(B), which gives the agency authority to determine the stringency and scope of generally-applicable effluent limitations based on secondary treatment, and found that even if reductions in NOD and nutrients potentially fall within the definition of secondary treatment, it was up to EPA to determine whether it should promulgate generally-applicable effluent limitations for these pollutants. The court reasoned that the statute requires that generally-applicable effluent limitations for POTWs be based on secondary treatment, but does not on its face require that the generally-applicable effluent limitations address all pollutants that might be reduced by secondary treatment. **The court held that EPA's exercise of its discretion under §§ 1311 and 1314 was not in these circumstances arbitrary, capricious, or manifestly contrary to the statute.**

Regarding plaintiffs' argument that EPA's refusal to include parameters for NOD in its secondary treatment regulations was arbitrary and capricious because the refusal was not supported by the evidence before the agency and was based on the consideration of impermissible factors, the court restated its interpretation of the statute that technological feasibility is not the only criterion that EPA may rely upon when determining secondary treatment controls. The court noted that the Agency's decision is supported by other factual predicates within the expertise of the Agency including the Agency's position that the impacts of NOD and nutrients on receiving water quality are highly variable and that control of NOD by permit adequately protects water quality. Further the court found that it is not impermissible for EPA to consider effects on water quality in determining whether reductions attainable by new secondary technologies ought to be uniformly imposed on POTWs. The court observed that EPA relies on § 1311(b)(1)(C) which authorizes the use of the permitting process to impose "more stringent limitations" on POTWs where necessary to protect water quality, and the fact that Congress has provided for water quality permitting as a gap filling measure, gives strong support to the Agency's delegated authority to fill gaps where it has concluded that NOD should not be part of standard secondary treatment. As the court stated, the fact that secondary treatment controls are technology-based does not preclude the EPA from deciding that certain technology-attainable standards are necessary and appropriate only for some POTWs.

The court noted that EPA has articulated its uncontroverted view that NOD is highly variable with receiving water body conditions, that NOD is particularly unsuited for a generally-applicable regulation, and that it is being dealt with by permit. The court found that the EPA had struck a balance between the broad statutory purposes and the

unique problems posed by specific pollutants and technologies and that the EPA had offered a reasoned basis for its belief that the balance between these was to apply a technology-based standard to some, rather than all POTWs. **Based on the above, the court held that neither EPA's interpretation of the CWA nor its rejection of rulemaking in this instance was arbitrary and capricious and that where NOD is a problem it may be addressed through individual permits.**

2. EAB holds that a municipally owned industrial wastewater treatment facility that received mostly influent from industrial process wastes rather than municipal sewage is still a Publicly Owned Treatment Works under the National Pollutant Discharge Elimination System:

In re: City of Port St. Joe and Florida Coast Paper Company, 1997 NPDES LEXIS 1 (July 30, 1997).

The City of Port St. Joe and the Florida Coast Paper Company (petitioners) petitioned for review of their National Pollutant Discharge Elimination System (NPDES) permit, which categorized them as a Publicly Owned Treatment Works (POTW). The City of Port St. Joe, a municipality, owned and operated the Industrial Wastewater Treatment Plant (IWTP). The IWTP maintained it was an atypical municipally owned treatment works because of the industrial type of waste received, mainly from the Florida paper and pulp mill rather than from municipal sewage. Therefore, IWTP argued that it should be classified as a non-POTW facility. The Environmental Appeals Board (EAB) dismissed all of petitioners' legal issues and all but three of their factual issues. The three factual issues were remanded back to Region IV for further action and consideration.

Petitioners appealed the Regional Administrator's (RA) denial of their evidentiary hearing request. The board found that Petitioners had not raised any legal, factual, policy or other issues in their appeals that merited review. See, 40 C.F.R. §124.91(a)(1).

Regarding whether the Region erred when it classified the IWTP as a POTW, petitioners argued that ownership was irrelevant as to whether a facility was a POTW, rather, they contended that the design of the facility and the characteristics of its effluent demonstrated that this plant was an industrial plant. The EAB stated the petitioners fell within the regulatory definition of a POTW and had not cited any authority to the contrary. 40 C.F.R. §122.2.

Petitioners asserted that, as an alternative to finding that the IWTP was not a POTW, the Region could have imposed less stringent secondary treatment standards than those presently required by the permit. The Region responded that the regulation did not give them discretion to lower the standards unless the facility fell within one of the regulatory exceptions provided at 40 C.F.R. §133.103 or 133.105, which petitioners failed to demonstrate. The EAB concluded that the petitioners had not demonstrated that the Region made a clear error by imposing an 85% removal requirement for biochemical oxygen demand (BOD) and total suspended solids (TSS) in this permit.

Petitioners also argued that the denial of their request for an evidentiary hearing on nineteen factual issues deprived them of their right to due process of law. The EAB rejected petitioners' argument and found that the various alleged factual issues did not warrant a hearing for various reasons, including petitioner's failure to raise a genuine issue of material fact and failure to raise the issues during the comment period. Thus, the EAB concluded that petitioners were not denied due process when their request for evidentiary hearings was denied.

Petitioners also asserted that the IWTP was not subject sewage sludge management requirements imposed under §405(f) of the Clean Water Act because the sludge generated by the facility did not meet the applicable regulatory definition. See, 40 C.F.R. §503.9(w). Petitioners' argued that their waste was mostly paper and pulp, an industrial sludge, not sewage sludge and, therefore, it was not subject to sewage sludge regulatory requirements. The EAB rejected petitioners' argument and found that because these standards were required by the regulation, it was proper for the Region to include sewage sludge management requirements in the permit.

The EAB remanded the permit on three issues. First, the methods used by the Region to determine the permit limits for BOD and TSS were too vague to

allow proper review. Second, the four pages of specific pretreatment requirements in the permit went beyond, were contradictory with, or were duplicative of the provisions in the City's approved pretreatment program and the Region had not responded to all significant comments on these issue. And finally, the "permanent metals" monitoring requirement was found to be inconsistent with the State certification, which was modified after the permit was issued.

E. State Certification

1. D.C. Circuit holds that a reduction in discharge flow does not constitute a discharge for purposes of triggering State certification under CWA § 401(a)(1):

North Carolina v. Federal Energy Regulatory Comm'n, 112 F.3d 1175 (D.C. Cir. 1997).

The State of North Carolina and the Roanoke River Basin Association (petitioners) sought U.S. Court of Appeals review of the Federal Energy Regulatory Commission's (FERC's) decision to amend a license under which a power project was operated within Lake Gaston, Virginia. The amended license allowed the City of Virginia Beach (City) to build an intake structure within the power project's boundaries and withdraw approximately 60 million gallons per day (mgd) of water from the project's reservoir for transport to Virginia Beach. Petitioners maintained that FERC failed to comply with § 401(a)(1) of the CWA, which requires that any applicant for a federal license or permit to conduct any activity that may result in any discharge into navigable waters, must provide the permitting agency with a certification from the State in which the discharge originates that the discharge will comply with applicable water quality standards.

Initially, the U.S. Army Corps of Engineers (USACE) granted the City a dredge and fill permit for the construction of the water withdrawal intake structure. Because the dredge and fill permit was a federal license, the City obtained a § 401 certification from the State of Virginia. Subsequently, Virginia Electric Power Company (VEPCO), the power project licensee, applied for an amendment to its power project license to permit withdrawal of the water from the reservoir. Petitioners requested that FERC stay the licensing proceedings until VEPCO received a § 401 certification from the State of North Carolina, however, relying upon 18 C.F.R. § 4.38(f)(7)(iii), FERC initially ruled that § 401 certification from North Carolina was not required because the license amendment would not have a "material adverse impact on the water quality in the discharge from the project." FERC also ruled that North Carolina had waived its certification rights under § 401 when it failed to assert them during the USACE's review of the dredge and fill permit. Petitioners appealed and, following a remand order by the court, FERC issued an order on November 7, 1996 concluding that the construction, operation, and withdrawal of water in and from Virginia is not one that results in a discharge originating from the State of North Carolina within the meaning of CWA § 401(a)(1). North Carolina appealed both the FERC's decision and the finding that it had earlier waived its certification rights.

The court first reviewed the waiver issue and held that North Carolina had not waived its certification rights. The court stated that under § 401(a)(1), a state waives its certification rights when it "fails or refuses to act on a request for certification … after receipt of such request." The court noted that the license applicant in this case, VEPCO, had never made a request that North Carolina provide water quality certification, therefore, North Carolina could not have waived its certification rights. The court also disagreed with FERC's use of the doctrine of claim preclusion to deny North Carolina's certification claim, finding that the claim preclusion doctrine was inapplicable because North Carolina was not provided the opportunity to act on a request for certification.

Petitioners argued that the language of § 401 regarding "any activity" . . . which may result in any discharge into the navigable waters applied to VEPCO's "substantially altered operation" of the power project whereby less water would flow through the dam turbines. Petitioners also argued the discharge originated at the point the water exited the dam turbines in North Carolina (see, PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994)), thereby requiring North Carolina certification.

The court found that the relevant activity for purposes of § 401(a)(1) was the construction and operation of the pipeline project. **Moreover, the court held that such activity did not result in a discharge as defined by the CWA, since the act of withdrawing water could not properly be construed as the addition of one or more pollutants to the water. The court observed that the decrease in the volume of water passing through the dam turbines could not be considered a discharge as that term is defined in the CWA.** The court noted that in Save Our Community v. EPA, 971 F.2d 1155, 1165 (5th Cir. 1992) that court held that removal of water from wetlands is not a discharge for purposes of § 404 of the CWA. **Further, the court stated that the existence of certification rights under § 401 did not depend on whether a discharge was altered, rather, certification rights vested only if an activity may have resulted in a discharge.** The court also distinguished PUD No. 1 from this case. The court observed that § 401(d) authorizes a State to place additional conditions on the target activity (such as the minimum flow requirements at issue in PUD No.1) once the threshold condition -- the existence of a discharge -- has been satisfied. However, the court observed that in this case there was no discharge. The court noted that in PUD No. 1 the Court never attempted to define a discharge and in no way indicated that an alteration of a discharge was sufficient to invoke the certification requirement of § 401(a)(1).

The court held that the withdrawal of water from Lake Gaston resulting in a decrease in the volume of a preexisting discharge was not an activity that resulted in a discharge for the purposes of § 401(a)(1) of the CWA and did not require that a water quality certification first be obtained from the State of North Carolina.

2. **EAB holds that absent State certification EPA Region properly concluded that it lacked authority to include a mixing zone in a NPDES permit where State regulations reserve discretion over mixing zones to the State:**

In re: Ketchikan Pulp Co., NPDES Appeal No. 95-6 (Dec. 12, 1996).

Ketchikan Pulp Company (KPC) sought review of EPA Region X's partial denial of an evidentiary hearing to address certain provisions of KPC's renewed NPDES permit for its pulp mill in Ketchikan, Alaska. The draft renewed permit included a proposed mixing zone, however, when the Alaska Department of Environmental Conservation (ADEC) waived certification of compliance of the draft permit with State water quality standards, the Region removed the mixing zone provision from the permit and required compliance at the point of discharge into Ward Cove. The Region observed that although State regulations authorize imposition of a mixing zone under certain circumstances, these rules specifically reserved the exercise of such authority to the ADEC.

KPC raised three issues in its petition for review: the State's failure to certify a mixing zone resulted from misleading communications by the Region or an inadequate period of time within which to certify the permit; seasonal limits on BOD and DO were improperly based on unrepresentative data used as inputs to the TMDL; and the permit should include a mixing zone for manganese. The Environmental Appeals Board (EAB or Board) also requested additional briefing on the issue of whether the Region had authority to prescribe a mixing zone for KPC's facility even absent explicit authorization from ADEC, and the applicability of *In re* Star Kist Caribe, Inc., 3 E.A.D. 172 (Adm'r 1990) in this context.

The EAB denied the petition for review, concluding that KPC failed to present sufficient evidence of the existence of a material issue of fact regarding the failure to provide for a mixing zone; failed to preserve the issue of the representativeness of the data used to develop the TMDL from which the BOD and DO limits were derived; and did not raise a material issue when it challenged the Region's conclusion that manganese was bioaccumulative and therefore did not justify a mixing zone under State regulations.

On the issue of the basis for the State's failure to certify a mixing zone, the EAB found no evidence that the State was mislead by the Region regarding

the State's authority to certify a mixing zone larger than those in the draft permit. Rather, the EAB noted that correspondence from EPA to the State expressly recognized that the State could have imposed different mixing zones than provided in the draft permit. In addition, the EAB found that ADEC was provided with 90 days to provide or waive certification, which, combined with the clear notice provided as to the period for certification, the Board found was ample. Finally, the EAB found that the Region had provided no assurances to the State and KPC that the Region would defer issuing the permit if the parties proceeded diligently with the process of permitting an extended outfall into Tongass Narrows. The EAB distinguished this case from Puerto Rico Sun Oil Co. v. EPA, 8 F.3d 73 (1st Cir. 1993), observing that here the State did not seek additional time to provide certification or to delay issuance of the permit. On the issue of EPA authority to prescribe a mixing zone for KPC's facility even absent explicit authorization from ADEC, the Region argued that such an act would violate State water quality standards and be inconsistent with the CWA, which reserves to the states the authority to determine the appropriate water quality standards. The EAB found these arguments to be reasonable and consistent with the requirements of the CWA. Regarding KPC's claim that the data used to develop the TMDL from which the BOD and DO limits were calculated were not representative of the current conditions at the facility, the EAB found that review must be denied because the issue was not raised during the public comment period. Finally, regarding the failure to include a mixing zone for manganese, the EAB found that since the State waived certification of the draft permit, and this waiver was the basis for not authorizing any mixing zone in the final permit, whether or not the State regulations allow for a mixing zone was not material to the present permit determination.

F. Section 404/Wetlands

1. Eighth Circuit holds SCS's regulations are a reasonable interpretation of the Swampbuster Act and SCS's determination of wetlands was supported by substantial evidence:

Gunn v. U.S.D.A., 1997 U.S. App. LEXIS 16480 (July 7, 1997).

Charles Gunn challenged the Soil Conservation Service's (SCS) determination that certain parts of his farmlands were converted wetlands and therefore could not be farmed without his losing eligibility for certain benefit programs. Gunn owned 160 acres, which was drained (tiled) in 1906 and subsequently farmed. In 1991, Gunn sought SCS certification that his land did not contain converted wetlands, and was told his farm contained 32.9 acres of farmed wetlands, which could continue to be farmed provided he did not improve the land's drainage. Tiling on neighboring farmland rendered Gunn's land wet and unsuitable for farming in some years, and in 1992 new drainage tiles and an open ditch where installed by the soil drainage district to remedy the problem. The new system drained the land completely. Subsequently, the SCS determined that 28.2 acres of Gunn's land were converted wetlands that could not be farmed without losing eligibility for farm benefit programs. Gunn sought declaratory relief, damages, and, in the alternative, compensation for inverse condemnation. The district court held that the classification of the land as converted wetlands was reasonable, and denied relief. It also held jurisdiction for the inverse condemnation claim was proper in the Federal Court of Claims. Gunn appealed, arguing that the relevant regulations were not a reasonable interpretation of the Food Security Act (16 U.S.C. §§ 3801, 3821-24). He also maintained that the SCS failed to followed its own regulations in deciding his eligibility.

The Circuit Court held that the SCS regulations were consistent with the statute, and that the SCS followed their regulations in making its decisions. Perceiving no inconsistency between the SCS's regulations and the statute they are intended to effectuate, the court rejected Gunn's challenge to the definition of a converted wetland in the SCS's regulations. Similarly, the court rejected Gunn's challenge to the regulations' definition of the term "commenced." (The statute allows the farming of wetlands the conversion of which was commenced before December 23, 1985). The court agreed with the SCS that Gunn's land was originally converted to "farmed wetland" in 1906, and that it became converted wetland when drained in 1992. The court observed that Gunn had not presented any evidence that the 1906 drainage and the 1992 drainage were actually one actively pursued conversion.

The court also rejected Gunn's assertion that the conversion came within the "outside agent" exception to the anti-conversion rules. [7 C.F.R. § 12.5(b)(1)(iv)(D)]. Rather, the court found that Gunn failed to show that the conversion was conducted by an unassociated third person, since Gunn had joined with other land owners to petition to have the improvement made. Finally, the court held that SCS did not violate it own regulations exempting converted wetlands from regulation, since Gunn's property did not become converted wetland prior to 1992. [7 C.F.R. § 12.33(b)]. The court declined to transfer the takings claim to the Court of Claims but noted Gunn was free to file his taking claim as a separate action in that court.

2. Eleventh Circuit holds that wetlands hydrologically connected to other waters are adjacent wetlands, not isolated wetlands:

U.S. v. Banks, 115 F.3d 916 (11th Cir. 1997).

Defendant Parks B. Banks appealed the district court's ruling that he violated the CWA by discharging dredged materials and fill onto wetlands. Defendant raised four issues on appeal: 1) that the statute of limitations specified in 28 U.S.C. § 2462 applied to claims for equitable relief; 2) the filled lots did not qualify as jurisdictional wetlands; 3) the lots was not adjacent wetlands; and 4) even if his lands qualified as wetlands, some of his discharge activities were permissible under Nation Wide Permit (NWP) 26.

On appeal, Banks asserted that although the limitation specified in § 2462 traditionally was not controlling as to measures of equitable relief, the court should have adopted the "concurrent remedy rule," which provides that "equity will withhold relief…where the applicable statute of limitations would bar the concurrent legal remedy." Cope v. Anderson, 331 U.S. 461, 464 (1947). In support of his position Banks relied on U.S. v. Windward Properties, Inc., 821 F. Supp. 690 (N.D. Ga. 1993) (government action seeking equitable relief and civil penalties under CWA § 1319 for unpermitted discharge of dredged or fill material into streams and adjacent wetlands, barred under the concurrent remedy rule). **The appellate court, however, observed that the Winward court did not address the well-established rule that "an action on behalf of the United States in its governmental capacity…is subject to no time limitation, in the absence of congressional enactment clearly imposing it," E.I. duPont de Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924), or the canon of statutory construction that "any statute of limitations sought to be applied against the United States must receive a strict construction in favor of the Government."** U.S. v. Alvarado, 5 F.3d 1425, 1428 (11th Cir. 1993). **The court concluded that since Congress has not clearly indicated that § 2462 applies to equitable relief, its provisions apply only to civil penalties. Consequently , the court held that the concurrent remedy rule cannot properly be invoked against the government when it seeks equitable relief in its official enforcement capacity.**

The court dismissed Banks claims that the lots where the filling took place were not jurisdictional wetlands. Banks contended that the lots did not meet the hydric soil criterion of wetlands and asserted that the USACE's use of its 1989 manual, (which was eventually banned in favor of the 1987 manual) to evaluate some of his lots was improper. In reviewing the factual findings, the court determined that the district court's conclusion about the hydric soils criterion was clearly not erroneous. The court also determined that the experts reviewing Banks' property had testified that even under criteria specified in the 1987 manual, Banks' lands were wetlands. The court held that sufficient plausible evidence supported the districts court's decision.

The court also rejected Banks' claim that the lots, if wetlands at all, were isolated wetlands since they had no hydrological connection with local surface waters. The court found that the expert's testimony -- establishing that a hydrological connection existed between Banks' lands and the local surface waters and that this connection was primarily through groundwater -- was not clearly erroneous. **Based upon U.S. v. Tilton, 705 F.2d 429 (11th Cir. 1983), in which similar evidence was used to establish that lands hydrologically connected through groundwater were adjacent wetlands, the court held that Banks' lands had the hydrological connection needed to qualify as adjacent wetlands.**

Finally, regarding potential coverage under the nationwide permit (NWP 26), Banks maintained that because the USACE expanded and contracted the scope of "non-tidal waters not part of a surface tributary system to interstate waters or navigable waters" into which discharges were authorized by NWP 26 in 1982 and 1991, respectively, some of his discharge activity was covered by NWP 26. The government countered that Banks' lots were always considered within the term surface tributary system and that the USACE has always enforced this provision. The court found that the USACE's interpretation of its own regulations was entitled to substantial deference, that the USACE had consistently construed Banks' acts to be outside the scope of NWP 26, and that the USACE had specifically told Banks this. **The court held that Banks had failed to demonstrate that his activities were authorized by NWP 26.**

3. Federal Circuit upholds finding that USACE prohibition on development of 12 of 51 lots within a development does not constitute a categorical taking requiring compensation under the Fifth Amendment, but remands for determination of whether a partial regulatory taking has occurred:

Broadwater Farms v. United States, 1997 U.S. App. LEXIS 19859 (Fed. Cir. July 31, 1997).

The U.S. Court of Federal Claims denied Broadwater Farms Joint Venture (Broadwater) compensation for an alleged taking of real property under the Fifth Amendment on the basis that the U.S. Army Corps of Engineers (USACE) prohibition on further development under § 404 of the CWA did not constitute a compensable taking. This appeal followed.

Appellant Broadwater acquired 51 lots that had been subdivided for development. The lots were separated into two phases, Phase II had 24 lots substantially developed at the time of purchase, and Phase III consisted of 27 unimproved lots. Broadwater was in the process of installing the Phase III infrastructure, (roads, etc.) and had completed 85 percent of the work when a USACE inspection determined that Broadwater had discharged dredged materials into federally regulated wetlands without a permit. The USACE ordered all work to cease and in November 1989 instructed Broadwater to restore certain areas and perform mitigation in exchange for preservation of use rights in other areas. As a result of the USACE's determination Broadwater was unable to develop 12 of the original 51 lots.

In its review, the Court of Appeals cited to Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), and observed that parties seeking compensation under the takings clause of the Fifth Amendment must prove that the government's action constituted either a categorical or compensable partial taking. The court stated to find a categorical taking the government's enforcement of a regulation must deny the owner all economically viable use of the property. The court observed that the determination of whether there is mere diminution in value or whether the owner has been denied all economically viable uses requires an assessment of the ratio of land subject to restriction as compared to the property as a whole.

The lower court concluded that all 27 lots of Phase III constituted the relevant parcel and, on appeal, Broadwater urged the Appeals Court to consider each of the 12 lots as individual parcels making each of the 12 lots a separate categorical taking. The court stated that it would rarely consider each lot of a residential subdivision a separate parcel because doing so would cause the USACE's protection of wetlands to "constitute a taking in every case where it exercises its statutory authority." Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 802 (Fed. Cir. 1993). The court noted that factors such as contiguity of the lands, purchase dates, unity of use, and extent to which protected lands affect the value of the remaining lands are properly considered in takings analyses. Relying upon the lower court's review, the court noted that Broadwater financed and purchased the lots as a whole, contracted for improvements to the infrastructure as a whole, and envisioned development of a "community." The court determined that the lower court's finding that Phase III was one parcel for purposes of calculation of proportional loss of value was correct and that Broadwater had not lost all economic use of the entire parcel. **On this basis, the court held that a prohibition on development of the 12 parcels**

constituted merely diminution in value and did not constitute a compensable categorical taking.

The court next took up the issue of whether the government's action constituted a partial regulatory taking and identified the three factors which are to be considered and balanced when reviewing such actions. These are: 1) the economic impact of the regulation; 2) the extent to which the regulation interferes with investment-backed expectations; and 3) the character of the government action (see, Florida Rock Indus. Inc., v. United States, 18 F.3d 1560 (Fed. Cir. 1994)). The lower court had found that there was no partial regulatory taking because the economic impact on Broadwater was insignificant. **The Appeals court held that the lower court's determination that a compensable partial taking had not occurred was premature in that the lower court had failed to address the second and third Florida Rock factors, nor did it allow for the balancing of these factors.**

The Appeals Court vacated the trial court's judgment on the partial regulatory takings issue and remanded for further findings with regard to the propriety of the government's actions and the regulation's interference with Broadwater's investment-backed expectations. The court also directed that the lower court balance these factors in determining whether Broadwater is entitled to compensation under a partial regulatory taking analysis.

4. Court of Claims holds takings claim not ripe for adjudication because no substantive determination by the federal government had been made regarding plaintiff's permit applications:

Heck and Assoc. v. United States, 37 Cl. Ct. 245 (1997).

Plaintiff Howard Heck wanted to develop a 24-acre pacel of land in New Jersey, but needed to fill 13 of the acres to do so. Plaintiff obtained approval for development from the local planning board and sought a Clean Water Act (CWA) § 404 permit. Pursuant to § 401 of the CWA, the U.S. Army Corps of Engineers (USACE) conditioned granting of the permit upon plaintiff obtaining a water quality certificate (WQC) from the State of New Jersey. Plaintiff sought a water quality certificate from the State, but was informed his application was incomplete and lacked an adequate alternatives analysis. Plaintiff then challenged N.J. Department of Environmental Protection's (DEP) legal basis for requesting the additional information and, ultimately, NJDEP cancelled plaintiff's WQC application for failure to respond.

Meanwhile, plaintiff had proceeded with the CWA § 404 permit process. Following requests for additional information by the USACE and plaintiff's submittal of that information, as well as the exchange of other correspondence between USACE and plaintiff, the USACE indicated to the plaintiff that a draft § 404 permit had been sent out for public notice and reminded the plaintiff of its responsibility to obtain State approval and a water quality certification from NJDEP. Plaintiff responded that NJDEP had waived the WQC requirement, and that the other State information requests had no legal basis. Based on these assertions, plaintiff requested that USACE issue the § 404 permit expeditiously. The USACE responded that because the NJDEP cancelled plaintiff's WQC application, the USACE could not regard the WQC requirement as waived. Based on plaintiff's failure to obtain the State WQC, the USACE notified plaintiff that it had withdrawn plaintiff's application from active status.

Plaintiff subsequently alleged that the withdraw of the § 404 permit application consistutued a taking of private property. Plaintiff argued the USACE was required to consider the WQC requirement waived since NJDEP did not act on plaintiff's application within one year, and thus the State's cancellation of the WQC application could not have served as a basis for USACE's withdrawal. Plaintiff also argued that because NJDEP's cancellation was based on plaintiff's failure to comply with a legally unjustified information request, a withdrawal of the § 404 permit application based on that failure was inappropriate. Defendant moved to dismiss based on the fact that the case was not ripe and, thus, the court lacked jurisdiction. Plaintiff moved to strike defendant's ripeness defense.

The court held that plaintiff's claim was not ripe for adjudication because no substantive determination by the federal government had been made regarding plaintiff's permit

applications. The court distinguished City Nat'l Bank of Miami v. United States, 30 Fed. Cl. 715 (1994) (takings claim held ripe because language of USACE denial was based on effect project would have on wetlands, not because application incomplete) as not applicable to these facts, since the lack of the State WQC was the basis for denial here, and the plaintiff had "failed to show any reason why the court should interpret the Corps' withdrawal of plaintiff's application as a decision based on the proposed development's merits."

The court rejected plaintiff's argument that pursuing a final determination was futile, finding that a "difficult position does not necessarily equal a futile position." The court observed that neither the existence of negative comments on the permit application nor the non-water dependant nature of the development project rendered the application process futile.

The court also rejected plaintiff's argument that NJDEP's cancellation of the WQC application was based on federal requirements and that because such cancellation served as the basis for denial of the § 404 permit, it could not render plaintiff's claim unripe. The court noted that even if the actions of the NJDEP were attributable to the federal government for takings purposes, "plaintiff is merely left with two agencies, instead of one, that failed to substantively evaluate plaintiff's land-use applications because of their incompleteness." The court recognized that plaintiff may have had legitimate arguments regarding the exceedance of the one-year time period for review of WQCs, and the State's asserted lack of authority to request an alternatives analysis. However, the court stated that such claims "fall well within the scope of unauthorized agency action which *Florida Rock Industries* and progeny have clearly established as outside this court's takings jurisdiction. (See Florida Rock Industries v. United States, 791 F.2d 893, 898 (Fed. Cir. 1986); and Marrero land Improvement Assoc. v. United States, 26 Cl. Ct. 193, 197 (1992)). The court noted that plaintiff could have challenged the USACE's handling of the permit application in federal district court, and could have challenged NJDEP's demands in state court.

5. Court of Claims rejects summary judgment as to liability based on plaintiff's Fifth Amendment takings and grants summary judgment to the government on plaintiff's "implied-in-fact" contract claims:

Norman v. United States, 1997 U.S. Claims LEXIS 168 (Aug. 12, 1997).

Plaintiffs, partners and a limited partnership formed to develop commercial and industrial property, brought a takings claim in the U.S. Court of Federal Claims. The land on which the development was to occur contained potential wetlands and, in 1988, prior to plaintiffs obtaining the property, the Army Corps of Engineers (USACE) conducted a wetlands delineation, prepared in accordance with the 1987 Corps' wetlands delineation manual, which concluded that the property contained 28 acres of jurisdictional wetlands. Subsequently, the property was sold to two entities and was divided for the purpose of "residential" and "commercial" development, with the parties entering a "development agreement" which outlined how the two projects would be developed concurrently. Plaintiffs acquired the "commercial" portion of the property in June of 1989, and subsequently obtained the "residential" property in September 1994. In April 1991, the USACE prepared a new delineation, based on the 1989 version of the Corps' wetlands delineation manual, which identified 230 acres of jurisdictional wetlands. And on August 17, 1991, before the USACE forwarded the new delineation to plaintiffs, Congress enacted P.L. 102-104, which provided that where the USACE had begun, but not completed, the process of delineating property pursuant to the 1989 manual at the time the law was passed, the landowner or permit applicant would have the option of electing a new delineation under the 1987 manual or completion of the permit process or enforcement action based on the 1989 manual, unless the USACE determined that the delineation would be substantially the same under either.

Upon receipt of the new delineation in October 1991, plaintiffs informed the USACE they would not request a new delineation under the 1987 manual. In 1995, plaintiffs submitted an application for a § 404 permit, including a mitigation proposal, and the USACE approved the application and mitigation

scheme and issued a § 404 permit to the plaintiffs in May 1995.

Plaintiffs alleged that the USACE's repudiation of the 1988 delineation, and subsequent redelineation of the property in 1991 resulted in a temporary and permanent taking of the plaintiffs' ability to construct over 2000 homes on the planned residential portion of the development (resulting in a loss of $17 million); and a temporary and permanent taking of the 176 acres of the commercial portion of the development (resulting in a loss of $36 million). The plaintiffs also alleged that the USACE breached an "implied-in-fact" contract to produce a wetland delineation when it repudiated the 1988 delineation.

Regarding the takings claims for the residential portion of the property, the court, relying on holdings in U.S. v. Dow, 357 U.S. 17, 2 L. Ed. 2d 1109, 78 S. Ct. 1309 (1958) and Eastern Minerals Int'l, Inc. v. U.S., 36 Fed. Cl. 541 (1996), stated that for plaintiffs to prevail, they must demonstrate that they had a legally-cognizable property interest at the time of the alleged taking. Plaintiffs argued that they possessed a property interest in the residential property by virtue of their status as "joint venturers" with the then owner of the property, as evidenced by the terms of the development agreement, entered into in September 1991 by plaintiffs after acquisition of the commercial portion of the development. The court rejected this argument, holding that the development agreement did not give the legally-cognizable property interest at the time of the alleged taking required to maintain a takings action. Accordingly, the court granted summary judgment to the U.S. on this claim.

The court then examined plaintiff's temporary and permanent takings claims regarding the commercial property, which was based on plaintiff's assertion that the USACE had forced them to set aside 176 acres of commercial property for preservation as a wetland. The court first addressed the permanent takings claim made by plaintiffs, which the court acknowledged could include a categorical taking or a partial taking. In either a categorical or partial taking, however, the court stated that the critical factor in determining whether the government had effected a taking is "the relationship between the value of the property interest that was allegedly taken and the value of the property owner's interest in the parcel as a whole." Because several disputed genuine issues of material fact regarding time of property ownership, remaining economic viability of the property and the costs of wetland mitigation efforts remained, the court declined to grant summary judgment in favor of either party.

Regarding the temporary takings claim as to the commercial property, which was premised on plaintiff's assertions that government action and inaction precluded all development for more than six years and that the USACE repeatedly missed opportunities to bring the delineation process to a close, the court again determined there were genuine issues of material fact with respect to the economic impact of the government's actions on the plaintiffs, as well as the reasonableness of the government's actions. Accordingly, the court concluded that neither party was entitled to summary judgment at this time.

Finally, the court addressed plaintiffs' third claim for relief based on the USACE's alleged breach of an implied-in-fact contract to conduct a wetlands determination for the property. Plaintiffs alleged that in 1987, the USACE entered into a contract with the then owners of the property to conduct a wetlands delineation, and breached this contract when it repudiated the 1988 delineation and redelineated the property according to the 1989 manual. **The plaintiffs offered as evidence of this contract the fact sheet prepared for the proposed delineation. The court held that the fact sheet did not support the existence of an implied-in-fact contract, but instead revealed that the process was mandated by the CWA and accelerated by the discovery of apparent discharge violations. Thus, the court granted the government's motion for summary judgment on the contract claim.**

6. ALJ holds respondents liable for discharging fill into waters of the U.S. without a § 404 permit, but reduces penalty based on low degree of culpability, full implementation of a mitigation plan, and limited ability to pay the fine:

In the Matter of: Britton Construction Co., Docket No. CWA-III-096 (May 21, 1997).

On November 18, 1994, U.S. EPA Region III charged Britton Construction, BIC Investments, Inc., and William and Mary Hammond (respondents) with the discharge of fill material into waters of the United States without a permit, in violation of the CWA §§ 301(a) and 404. The Region had requested and received authority to serve as lead enforcement authority on this matter from the U.S. Army Corps of Engineers (USACE). EPA sought assessment of a civil penalty of $125,000. Respondents challenged EPA's determination that the site consisted of regulated wetlands; asserted that EPA's claim was barred by the five-year statute of limitations (28 U.S.C. § 2462); claimed EPA should be estopped from enforcement given that EPA's action occurred near the conclusion of a lengthy enforcement and mitigation process conducted between the USACE and respondents; and argued that res judicata and lack of due process should bar EPA's enforcement action.

The court examined each of respondents defenses in turn, beginning with the claim that the lots at issue were not regulated wetlands. The court determined that based upon the testimony of complainant's expert witnesses, soil survey maps, and aerial photographs, as well as the lack of any contrary evidence presented by respondents, most if not all of the site met the definition of wetlands in 40 C.F.R. § 230.3(t). The court also noted that the site was adjacent to a tributary to Chincoteague Bay, which is an arm of the territorial sea of the United States, and held the wetlands on the site were waters of the United States for which a permit is required under CWA § 404 to discharge fill material.

Respondents maintained that the activity which gave rise to this enforcement action was trash removal and associated site disturbance, which was undertaken in July 1988, more than five years before the complaint was filed and, hence, enforcement was barred by the statute of limitations. The court observed that, based on the record, road fill had washed into the site just prior to February 1994, and the exact dates of the earlier fill and clearing activities were not certain. In addition, aerial photographs taken in February 1990 showed the site scraped completely clean, covered with bare sand, and fresh vehicle tracks traversing the area. **Finally, the court stated that the discharge of fill material into regulated wetlands without a permit is a continuing violation that tolls the statute of limitations so long as the illegal fill remains in place.** See, U.S. v. Reaves, 923 F.Supp. 1530, 1534 (D. Fla. 1996). **On this basis the court held that the proceeding was commenced within five years of the accrual of the violation, and is not barred by the statute of limitations in 28 U.S.C. § 2462.**

Reviewing respondents' estoppel claim, the court noted that to uphold such a claim against the government there must be a showing that the claimant relied to its detriment on an affirmative misrepresentation or misconduct by the other party, and that there was egregious government misconduct at the policy-making level. Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 59, 61 (1984). After acknowledging that there was dilatory dual enforcement that caused understandable confusion, the court found no evidence of affirmative misconduct that resulted in respondents detrimental reliance. **The court held that due to the lack of affirmative misrepresentation by either EPA or USACE, and the respondents' lack of detrimental reliance, respondents' claim of estoppel was without merit.**

Regarding the claims of res judicata and lack of due process, the court stated that at the time of EPA's intervention there had been no final adjudication or formal settlement, which would be a prerequisite for a claim of res judicata. The court also found that EPA's intervention did not deprive respondents of due process as CWA § 309(g)(6)(A) contemplates dual enforcement by the EPA and USACE and provides that the authority of one party is not limited by any action of the other except in cases where there has been a final administrative action assessing a penalty. **Since no final action had occurred at the time of EPA's intervention, the court held there was no violation of respondents' due process rights that would require dismissal of the charges.**

EPA sought a civil penalty of $125,000. In its evaluation, the court examined the penalty factors identified in CWA § 309(g)(3). Respondents contended that consideration of the record as a whole justified a drastic reduction in the amount of any civil penalty. The court agreed, citing the fact that respondents stopped the site from being used

as a garbage dump, the area disturbed was small, and mitigation was completed successfully, which restored virtually all lost wetland functions and benefits to the site, and the respondents had limited ability to pay. On this basis the court found that a penalty of the magnitude sought by EPA was completely unjustified under all statutory penalty factors and held that a small penalty, combined with mitigation, would sufficiently deter similar violations in Chincoteague. The court ordered the defendants, jointly and severally, to pay the civil penalty in the amount of $2,000.

7. Court of Claims holds no taking of real property where property retained economic value after denial of § 404 permit and plaintiff was aware of restrictive regulations prior to purchase and during investment in property:

Good v. United States, 1997 U.S. Claims LEXIS 179 (Cl. Ct. Aug. 22, 1997).

Plaintiff Floyd Good brought a takings claim for $2,500,000 pursuant to the Fifth Amendment premised on the U.S. Army Corps of Engineers (USACE) denial of a dredge and fill permit associated with plaintiff's attempted preparation of 40 acres of property in Lower Sugarloaf Key, Monroe County, Florida, for development. Thirty-two of the acres were wetlands. Ultimately, plaintiff's permit was denied on endangered species grounds. Specifically, the U.S. Fish and Wildlife Service (FWS) determined that plaintiff's plans for development would place two endangered species located on the property in jeopardy and recommended that the USACE deny the permit. The USACE did deny the permit, but only after identifying and offering conditional approval of the permit based on implementation by the plaintiff of reasonable and prudent alternatives (RPAs), which the plaintiff declined to implement.

The plaintiff argued that the USACE's action deprived his property of all economic value in that any development would violate the Endangered Species Act (ESA) and, in the alternative, even if development would not violate the ESA, development pursuant to the FWS's RPAs would not be economically viable, and thus function as a prohibition on development. Plaintiff also argued that the USACE's action constituted a taking in that it negated his reasonable, investment-back expectations in his development plans. Defendant argued that "the only economically viable interest belonged to the federal government" (since the economic value of the property was dependent on access to navigable waters of the U.S. and the U.S. held complete rights to the navigational servitude), plaintiff did not acquire a vested right in his development plan under Florida law, and plaintiff could not show a reasonable probability that the development would be permitted under State and county law.

The court held that no taking occurred in this case. With regard to plaintiff's alleged "per se" taking (see, Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992)), the court found that plaintiff had a property interest that could be subject to a takings claim, but held that the development of the property could be conducted without violating the ESA and, thus, compliance with ESA requirements did not deprive the property of all economic value. Based on a professional appraisal, the court found that the property retained value both for development and the sale of development rights. Thus, the court rejected plaintiff's argument that USACE's actions had deprived plaintiff's property of all economic value.

The court also rejected plaintiff's argument that USACE's action deprived him of his reasonable, investment-backed expectations. (See, Penn Central Transp. Co., v. New York, 438 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978)). The court observed that when plaintiff purchased the property development of the property was already subject to pervasive Federal and State regulation (citing as Federal examples the Rivers and Harbors Act and the Fish and Wildlife Coordination Act) and the plaintiff was expressly aware of such regulation (plaintiff had signed an acknowledgment of such). It also found that plaintiff continued to invest in the property following the initial purchase, even after the ESA regulatory scheme was in place. Since the plaintiff appeared to have knowledge of these regulatory restraints, the court declined to find a taking. The court noted that where plaintiff knew of potential regulatory restrictions but choose to continue and such

restrictions were ultimately imposed, no reasonable expectations were upset.

G. Citizen Suit

1. Enforcement Under Comparable Law as Bar to Citizen Suit

a. ALJ holds CWA § 1319(d) does not bar assessment of civil penalties pursuant to subsection 1319(g)(1):

In the Matter of: Labarge, Inc., Docket No. CWA-VII-91-W-0078 (Mar. 26, 1997).

Respondent, Labarge, Inc., owned and operated an electronic cable and harness manufacturing facility in Joplin, Missouri and was charged with having violated the Clean Water Act (CWA) 33 U.S.C. §§ 1311(a) and 1311(d) for discharging wastewater containing copper in excess of federal and local limits to the city wastewater treatment plant. Respondent did not deny the alleged violations, but answered that the charging paragraphs consist of conclusions of law and required no answer. Responded also asserted six affirmative defenses including lack of authority on the part of the federal government to proceed, that the action should be held in abeyance until the City exercised authority, and defenses such as laches, waiver, and estoppel among others. In response to complainant's summary judgment motion, respondent denied, without providing any evidence, that the alleged violations had occurred and raised the affirmative defense that as a defense contractor engaged in the production of missile harnesses it could not be held liable for the wastewater violations that occurred as a result of the missile production.

The court observed that to defeat the motion for summary judgment the responding party must set forth specific facts to show the existence of a genuine issue for trial, and that in this instance, "respondent put forward not a single fact, by affidavit or otherwise, upon which a finding could reasonably be made that a material factual issue remains to be determined." **On that basis, the court held "that nothing shown here even begins to counter the government's well supported motion."** With regard to the "government contractor" affirmative defense put forward by respondent, the court noted that the general rule is that the defendant has the burden of supporting any such defense with a showing sufficient to survive summary determination and that respondent "failed to support any of the defenses with anything more than bare assertions." **The court held that none of the affirmative defenses were sufficient to defeat the motion.**

In its findings of fact and conclusions of law the court stated that respondent was subject to the requirements of the CWA; complainant was entitled to a judgment as a matter of law on the issue of liability; and respondent violated 33 U.S.C. §§ 1311(a) and 1311(d) by discharging copper in excess of local limits and federal categorical pretreatment standards.

In the penalty phase, respondent maintained that assessment of a penalty in this action was barred by § 309(g)(6)(A)(ii) (state prosecution under comparable law) of the CWA as read together with § 309(d) (factors to be considered in assessing civil penalties), and that the principles of collateral estoppel and *res judicata* barred assessment of penalties. The court observed that § 309(d) refers only to factors to be considered in arriving at penalty amounts in civil enforcement actions and it does not refer to administrative actions which result in the imposition of civil penalties (the court observed that the civil administrative penalty authority and factors to be considered in setting penalties appear in § 309(g)(1) and (3)). The court further noted that one purpose of subsection (g)(6)(A) is to bar civil actions and civil penalties under subsection (d) when a State is diligently prosecuting an action under State law comparable to subsection (g). **The court held subsection § 309(d) does not bar the assessment of a civil penalty pursuant to subsection § 309(g)(1) in a subsection (g) action such as this one.**

The court dispensed with respondent's collateral estoppel and *res judicata* arguments, noting that these principles did not govern at that stage of the proceedings, and holding that where liability has been determined the proceedings are limited to whether the amount of penalty proposed is justified and should be assessed.

In assessing the actual penalty, the court reviewed the factors governing penalty assessments at §

309(g)(3) of the Act, which include, among other factors, the nature, circumstances, extent and gravity of the violations. **The court stated that evidence of measurable environmental harm in connection with a violation is not required in order to support the assessment of a substantial penalty under the Act.** Public Interest Research Group of New Jersey (PIRG), Inc. v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 1167 (D.N.J. 1989) rev'd on other grounds, 913 F.2d 64 (3rd Cir. 1990). With respect to the other statutory factors for assessing a penalty under § 309(g)(3), the court found no reason to reduce the proposed penalty. On the basis of the above, the court found that complainant's penalty proposal of $125,000 was supported by the record and was reasonable and fair based upon the nature, circumstances, extent, and gravity of the violations, as well as consideration of other statutory factors.

2. Standing

a. Seventh Circuit holds that to overcome summary judgment plaintiff only needs to allege in good faith the present nature of a CWA violation:

Atlantic States Legal Found. v. Stroh Die Casting, 116 F.3d 814 (7th Cir. 1997).

Plaintiff Atlantic States Legal Foundation (Atlantic) filed a citizen's suit pursuant to 33 U.S.C. § 1365 against defendant Stroh Die Casting, Co., (Stroh) for past violations of its NPDES permit. After a seven-year period the district court granted Stroh's motion for summary judgment and dismissed Atlantic's suit. This appeal followed.

In November 1988, Atlantic filed a notice of violation alleging that Stroh had violated its Wisconsin Department of Natural Resources (WDNR) discharge permit as a result of exceedences of daily maximum discharge limits for oil, grease, and BOD for outfalls 1 and 3, and followed the notice with a complaint filed in January 1989. Stroh moved for dismissal for lack of subject matter jurisdiction arguing it was not "in violation" of the statute at the time of the suit because it was neither a continuous nor an intermittent violator as defined by Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49 (1987). Atlantic did not submit a brief in opposition to Stroh's motion to dismiss, instead, on April 13, 1989, Atlantic sent Stroh a second 60-day notice of intent to sue alleging additional violations at WDNR outfall 3. The notice also alleged that Stroh was discharging die casting wastewaters to the Milwaukee Metropolitan Sewerage District (MMSD) outfall 3 (which is different from WDNR outfall 3). In the complaint Atlantic alleged that Stroh's own records indicated it was out of compliance as of January 31, 1989 and would not attain compliance until January 10, 1990. Stroh subsequently obtained an MMSD permit in July 1989 that authorized the discharge of its die casting wastewater to MMSD sewers, however, Stroh experienced violations of its MMSD permit at outfall 3 in June and October 1989.

In November 1989, the district court, assuming the case had been settled, entered an order dismissing Atlantic's suit without prejudice noting Atlantic's failure to file a reply brief to Stroh's motion to dismiss. Atlantic subsequently filed an amended complaint and the district court reopened the case on May 8, 1990. In July 1990, Stroh also abandoned existing outfall 3 and re-rerouted its industrial process wastewater to a new MMSD outfall 4. In 1992, Stroh moved to vacate the order to reopen but the court denied Stroh's motion. Later in 1992 both parties filed motions for summary judgment and, on March 22, 1996, the court granted Stroh's motion and dismissed the case.

On appeal, the court determined that the primary issue was whether Atlantic had satisfied the jurisdictional requirements of 33 U.S.C. § 1365(b) for the allegations regarding the MMSD discharges. Three subsidiary issues included: 1) was Atlantic's April 13, 1989 notice sufficiently specific regarding alleged violations to encompass claims for new outfall 4; 2) was Stroh, at the time the suit was filed (i.e., deemed when the amended complaint was filed), a continuing or intermittent violator of the CWA that would entitle Atlantic to an injunction; and 3) what was the effect of the district court's discretionary decision to accept the filing of the amended complaint in May 1990. The court also reviewed the issue of whether Atlantic presented sufficient evidence of violations at WDNR outfalls 1 and 3 to survive summary judgment.

On the issue of the sufficiency of notice, Atlantic argued that its April 1989 notice (the second notice) clearly informed Stroh that the action complained of concerned unauthorized discharges of die casting process wastewaters. Stroh countered that to meet the Act's jurisdictional requirements notice of suit must specifically identify the point source from which the alleged offense is originating. Stroh cited Hallstrom v. Tillamook County, 493 U.S. 20, 107 L. Ed. 2d 237, 110 S. Ct. 304 (1989) for the proposition that 60-day notice is a mandatory precondition for a citizen suit, and Public Interest Research Group of New Jersey v. Hercules, Inc., 50 F.3d 1239 (3rd Cir. 1995) for the proposition that post-notice violations may be included in a claim only where the violations were of the same type (i.e., they involved the same parameters). However, the court did not read these cases as requiring outfall-by-outfall notice in all cases. Rather, the court stated **"[T]he key to notice is to give the accused company the opportunity to correct the problem," and that based upon the factual record, which included Stroh securing a permit, building a wastewater treatment system, redirecting the wastewater to a new outfall, and its admission of May 29, 1990 that it was not in compliance, there was sufficient evidence that Stroh was on notice. The court held that the April 1989 notice satisfied the jurisdictional requirements of the statute**.

Regarding the allegation of an ongoing violation, the court noted that Atlantic needed only have alleged Stroh was an ongoing violator (i.e., in a state of continuous or intermittent violation) at the time the suit was filed. The court determined that Atlantic had adequately alleged violations that were ongoing as of the date the amended complaint was filed and, that for purpose of a summary judgment, the allegations of ongoing violations were a factual question which were the obligation of the defendant to prove false at the summary judgment stage. **On the basis of the factual record and pleadings, the court reversed the summary judgment with respect to the MMSD discharges and concluded that Stroh had failed to show that Atlantic's allegations regarding the die casting wastewater discharges were in bad faith, and that if the notice encompasses new outfall 4, the violations had not ceased at the time the amended complaint was filed.**

Finally, regarding the WDNR discharges (outfalls 1 and 3), the court determined that the record was devoid of evidence with respect to discharges from outfall 1 and affirmed the district court's dismissal of that claim. With respect to the claim related to outfall 3 (an exceedence of 1 mg/l of the oil and grease standard), the court reviewed the laboratory report documenting potential errors (only 50% recovery was achieved for the oil and grease test for the February 1992 test for which a violation was reported on Stroh's DMR) and concluded that, viewed in the light most favorable to the party opposing the motion, such facts could support a finding of continued violations and, therefore, reversed the district court's dismissal of Atlantic's claim regarding WDNR outfall 3.

b. District Court holds that plaintiffs did not have standing to bring citizen suit action as they had not proven the existence of ongoing violations or the reasonable likelihood of continuing violations:

Russian River Watershed Protection Comm. v. City of Santa Rosa, 1997 U.S. Dist. LEXIS 145 (N.D. Cal. Jan. 6, 1997).

The Russian River Watershed Protection Committee and an individual (plaintiffs) brought a Clean Water Act (CWA) citizen suit against the City of Santa Rosa (City) for alleged repeated and continuous violations of the City's NPDES permit, issued for the Santa Rosa Subregional Wastewater Treatment System. Pursuant to earlier motions, the court had previously determined the proper method of measuring compliance with the City's NPDES permit. The court then heard arguments on whether the plaintiffs could demonstrate continuing violations or otherwise establish standing under the CWA.

In its Finding of Fact, the court established the specific violations of the City's NPDES permit that had occurred. All violations determined to have occurred were the result of specific circumstances: Coliform violations were the result of changes in the treatment process requested by a State regulatory authority, required maintenance, and flood conditions resulting in high flows requiring a bypass and a corresponding problem in the plant's ammonia

feed system; pH violations also had occurred because of a change in the treatment process requested by a State regulatory authority. All violations had been promptly corrected and had not reoccurred. **Based on this finding, the court held that the plaintiffs had not established intermittent or continuing violations of the NPDES permit that would give the plaintiffs standing to bring a CWA citizen suit against the City. The court stated that the plaintiffs had shown no violations that had continued on or after the complaint in the case was filed, had shown no pattern of violations in the past, and had not proven the continuing likelihood of a reoccurrence in intermittent or sporadic violations.** Relying on Gwaltney v. Chesapeake Bay Foundation, 484 U.S. 49, 98 L. Ed. 2d 306, 108 S. Ct. 376 (1987), the court emphasized that the CWA does not permit citizen suits for wholly past violations, and for the plaintiffs to have standing, they must have shown the existence of ongoing violations or the reasonable likelihood of continuing future violations. Because the plaintiffs had not done so, the court held that they did not have standing under the CWA citizen suit provision, dismissed the case, and awarded costs of the suit to the City.

3. Notice

a. Seventh Circuit holds that notice of citizen suit was adequate and did not need to address violations on outfall-by-outfall basis where discharger was aware of action complained of:

Atlantic States Legal Found. v. Stroh Die Casting, 116 F.3d 814 (7th Cir. 1997). See case summary on page 24.

4. Eleventh Amendment Immunity

a. District court holds that the California Department of Fish and Game and its Director are immune under the Eleventh Amendment from any type of suit in federal court absent consent to suit by the State:

Southfork of the Eel River Envt'l League v. United States Army Corps of Engineers, 1997 U.S. Dist. LEXIS 9260 (N.D. Cal. 1997).

Plaintiffs brought a federal civil action against the U.S. Army Corps of Engineers (USACE), Millbank La Famiglia (Millbank), the California Department of Fish and Game, and Jacqueline Schafer, Director of the California Department of Fish and Game, alleging the defendants had violated NEPA, ESA and the CWA by issuing an USACE permit for an erosion problem on Millbank's property along the Eel River. The district court held that plaintiffs had failed to prove that defendants' had violated NEPA, ESA or CWA and thereby granted defendants motion for summary judgment and dismissal of the case. On the issue of Eleventh Amendment immunity, the court found that jurisdiction over the California Department of Fish and Game was barred for any type of suit in federal court absent consent to suit by the State. The court indicated that plaintiff failed to cite any authority that would undermine this established principle of law. As for Jacqueline Schafer, the court found that the Eleventh Amendment prevented plaintiffs from pursuing a State law claim against a state official when the relief sought and ordered has an impact directly on the state itself. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 117 (1984). The plaintiffs also sought action against Jacqueline Schafer under NEPA. The court found that it was not the state agency's responsibility to conduct an EIS, but rather it was the federal agencies responsibility to conduct a review. 42 U.S.C. §4332(2).

The court next considered the claims against defendants Millbank and the USACE. First, the court dismissed plaintiffs' cause of action against Millbanks for violating terms of the USACE permit because the plaintiffs had not presented any legal authority for pursuing a citizen suit against a permit violator. Second, under ESA, the court found that plaintiffs failed to notify the Secretary (Interior or Commerce) sixty days prior to bringing an action as required by the statute. The court indicated, however, that if the plaintiffs had identified a significant risk to a protected species, it would have permitted them to file an action immediately upon notice to the Secretary. Third, under NEPA, the court found that plaintiffs had not provided sufficient evidence to prove that the USACE violated the statute. Under the CWA, the court found that plaintiffs had not stated a claim upon which relief

could be granted. Plaintiffs' final cause of action alleged that the USACE and Schafer failed to enforce the terms of the permit. **The court dismissed this issue as unreviewable based on the principle that an agency's decision not to take enforcement action is presumed to be immune from judicial review under 5 U.S.C. §701(a)(2).** Based upon the above findings, the court granted defendants' motions for dismissal and summary judgment.

5. Costs

a. District court upholds magistrates determination of reasonable attorney's fees and expenses:

Environmental Defense Fund v. Hankinson, No. 5:91-CV-467-F2 (E.D. N.C. 1997).

The district court upheld an earlier recommendation from a Magistrate Judge on total recovery of litigation costs upon appeal by both the plaintiff and defendant. The issue in the original case involved CWA § 404 claims against a forestry operation. The U.S. EPA determined that most of the activities onsite did not require a § 404 permit, then provided guidance on where silvicultural site preparation elsewhere might require a permit, and the case later settled. On appeal, the plaintiffs argued that the award of costs should be higher, and the defendants argued that there should be no award at all. The court held in favor of the plaintiffs, finding that the award of $325,243.75 was a reasonable amount for the attorney's fee, plus $11,918.98 in expenses, pursuant to 33 U.S.C. § 1365(d).

6. Admissibility of Expert Testimony

a. District Court admits and excludes expert testimony based on Rule 702 of the Federal Rules of Evidence:

Mancuso v. Consolidated Edison Co. of New York, Inc., 1997 U.S. Dist. LEXIS 9423 (S.D.N.Y. July 2, 1997).

Plaintiffs (the Mancusos) brought a Clean Water Act (CWA) citizen suit against Consolidated Edison Company (ConEd), with pendant claims under New York State law for personal injuries and property damage allegedly caused by PCB contamination of their property by ConEd. The Mancusos owned a marina, on which the family resided, adjacent to an electrical substation owned and formerly operated by ConEd. At the time of the action, ConEd was remediating PCB contamination on its property pursuant to direction from the New York State Department of Environmental Conservation. In this action the court, after reaffirming an earlier decision dismissing the property damage claim based on statute of limitations, considered a two-part motion brought by ConEd seeking an order excluding the testimony of two doctors who served as plaintiffs' experts, and partial summary judgment against the Mancusos on all of their personal injury claims.

Regarding the motion to exclude the expert testimony, the court examined the parameters of Rule 702 of the Federal Rules of Evidence (Federal Rules), which governs the admissibility of expert testimony in federal courts, and Second Circuit decisions interpreting the primary Supreme Court case on Rule 702, Daubert v. Merrell Dow Pharm., 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1983), in which the Supreme Court held that the traditional "Frye" rule barring expert testimony that was not based on a theory generally accepted by the scientific community had been superseded by Rule 702. The court observed that although Rule 702 expanded the scope of allowable purportedly scientific evidence in the form of expert testimony, Daubert, a trial judge must ensure that any and all scientific evidence admitted is not only relevant, but reliable. The court stated that in Daubert, the Supreme Court established five factors that judges must examine to determine whether an expert's testimony is "scientifically valid:" 1) whether the theory has been tested, 2) whether it had been subjected to peer review, 3) what the potential or known rate of error is, 4) what sort of standards control the techniques operation, and 5) whether the theory or technique h as been generally accepted. Borawick v. Shay, 68 F.3d 597, 610 (2d Cir.), *cert. denied*, 134 L. Ed. 966, 116 S. Ct. 1869 (1996), (citing Daubert, 509 U.S. at 593-94).

ConEd argued the testimony of the Mancusos' two experts should be excluded based on limitations established by Rule 702. **Based on the language of Rule 702 and Second Circuit decisions**

interpreting the rule and Daubert, the court excluded the testimony of the Mancusos' first expert, while allowing that of the second. Regarding the first expert, who testified as to whether PCB exposure caused the Mancuso's ailments, ConEd contended that the expert did not have sufficient knowledge or experience to express an opinion and failed to follow proper scientific methods in arriving at his conclusions. Relying on McCullock v. H.B. Fuller Co., 61 F. 3d 1038, 1043, (2d Cir. 1993), the court held that even under the "lenient" Rule 702 standards, the first expert's lack of such training and credentials in general or PCB toxicology, or in environmental or occupational medicine, his inability to answer basic questions about PCB toxicology, his reliance on Plaintiffs' attorney to provide him with scientific literature on which he based his opinion, and his extremely limited experience in treating patients with PCB exposure made his testimony inadmissible. As for the second expert, the court held that although the second expert did not rely on what was recognized as a widely respected methodology for determining the cause of the child's learning disability, her methodology was acceptable, and thus her testimony admissible. The court did hold that the second expert would not be allowed to testify that PCBs caused the ailment because of her lack of qualifications as a doctor.

Despite holding inadmissable the testimony of the Mancusos' first expert who would have stated that PCBs were the cause of their complaints, the court declined to grant summary judgment in favor of ConEd. The court stated that it was unwilling to concede the fact that none of the plaintiffs' ailments were caused by PCB exposure and granted the Mancusos a brief period to find a qualified expert.

H. Administrative Practice

1. EAB upholds Regional Administrator's denial of an evidentiary hearing request on grounds that permit limit was attributable to State certification:

In re: Portland Water District, NPDES Appeal 95-10, (Feb. 11, 1997).

In July 1995, EPA Region I prepared and submitted to the Maine Department of Environmental Protection (MEDEP) a draft NPDES permit for the Portland Water District (Portland) which contained a total residual chlorine limit (TRC) of 0.22 mg/l. In August 1995, the state certified the permit as complying with the requirements of the CWA and Maine law subject to two modifications, one of which was a TRC limit of 0.23 mg/l. Following the State certification, the Region issued the final permit in September 1995 with the State certified 0.23 mg/l limit.

Portland subsequently contested the TRC limit in its NPDES permit issued by the Region. The Regional Administrator denied a request for an evidentiary hearing on the grounds that under 40 C.F.R. § 124.55(e), the Region did not have authority to review decisions attributable to State certification and, that review of the TRC limit must therefore be made in State court. Portland appealed the Administrator's action to the Environmental Appeals Board (EAB) alleging that the State certification failed to comply with the provisions of 40 C.F.R. § 124.53(e).

The EAB determined that the sole issue was whether the Region's denial of Portland's evidentiary hearing request was properly based on the Region's finding that the contested permit limit was attributable to state certification. As a preliminary matter, the Board stated that ordinarily, a petition for review is denied unless the Regional Administrator's decision to deny was clearly erroneous or involved an exercise of discretion or policy that is important, thereby warranting review by the EAB. Further, referring to it own prior ruling, the Board stated that "[C]hallenges to permit limitations and conditions attributable to State certification will not be considered by the Agency." *In re* General Electric Co., Hooksett, New Hampshire, 4 E.A.D. 468, 473 n.7 (EAB 1993), (see also, 40 C.F.R. § 124.55(e)).

The Board noted that MEDEP, in its certification letter, made clear that certification was conditioned on the TRC limit being set at 0.23 mg/l, rather than the Region's draft permit limit of 0.22 mg/l. The draft permit also required compliance immediately (i.e., it did not include a compliance schedule) and the certification emphasized that "[a]ny change in the terms or conditions [of the permit]… is not certified by this document." Thus, the EAB

observed that although MEDEP had not used express language to the effect that TRC limits were necessary or that they could not be made less stringent, the Board felt confident that based on the language of the certification, those were MEDEP's intentions. **On that basis, the Board held that the TRC limits were attributable to state certification within the meaning of 40 C.F.R. § 124.55(e), and therefore could not be reviewed by the EAB.**

I. Enforcement Actions/Liability/Penalties

1. Eleventh Circuit holds the statute of limitations in 28 U.S.C. § 2462 applies only to civil penalties, and that the concurrent remedy rule cannot be invoked against the government when it seeks equitable relief in its official enforcement capacity:

U.S. v. Banks, 115 F.3d 916 (11th Cir. 1997). See case summary on page 16.

2. District court denies motion to stay civil proceedings pending the conclusion of criminal investigations regarding contamination of the Anacostia River by the U.S. Navy:

Barry Farm Resident Council v. U.S. Department of the Navy, 1997 U.S. Dist. LEXIS 2754 (D.D.C. Feb. 14, 1997).

Two community association groups and two environmental groups brought an action to compel the U.S. Department of the Navy and the GSA to comply with the Clean Water Act (CWA) and to remediate hazardous contamination of the Anacostia River. The Navy and GSA have known about contamination at the Washington Navy Yard and the Southeast Federal Center since the late 1980's. The government moved to stay the civil proceedings pending the conclusion of an investigation into criminal violations of federal environmental laws at the same facility. The court denied the government's motion for two reasons: government investigations had been going on for years without any subsequent remediation; and, there was no reason why the civil action would seriously interfere with the progress of the criminal investigation.

The court indicated that, in the absence of substantial prejudice to the rights of the parties involved, parallel proceedings were "unobjectionable." The court stated that the following factors should be used to decide if a stay should be allowed: 1) a balancing of the interests of the plaintiffs in proceeding expeditiously and the prejudice to them from delay; 2) the public interest in the pending civil and criminal suit; 3) the interests and burdens on the defendant; 4) the interests of people not party to the suit; and 5) judicial efficiency.

A large part of the court's reasoning focused on the government's argument that to deny that the stay will prevent the defendants from presenting an effective defense. Specifically, the court disagreed with the government's argument about the potential effects of Fifth Amendment invocations by employees and the exclusion of evidence deemed to be "coerced statements." In general, the court viewed these arguments as speculative and noted that if these situations arise, suitable solutions could be developed at that time. **After evaluating the five factors, the court concluded that the harm plaintiffs and the general public would incur if a stay was granted greatly outweighed any burden on the defendants or the defendant's employees.**

3. District court holds that defendant, parent company, and responsible individuals were all liable for violating the CWA by discharging pollutants into a navigable water without an NPDES permit:

U.S. v. Gulf Park Water Co., 1197 U.S. Dist. LEXIS 10654 (S.D. Miss. Apr. 21, 1997).

Defendants Gulf Park Water Company, Inc., Johnson Properties, Inc., Glenn Johnson and Michael Johnson were owners and operators of a wastewater treatment facility in Jackson County, Mississippi. The U.S. brought a civil action alleging defendants violated the Clean Water Act (CWA) by discharging pollutants into U.S. waters without a NPDES permit. The court addressed the following issues: whether the defendants violated §301 of the CWA; whether Gulf Park Water Company functioned as an alter ego of the parent company, Johnson Properties; and whether Michael and Glenn Johnson were individually liable for the violations under the

CWA. The court granted partial summary judgment to the U.S. for violations of the CWA on the issue of liability, and denied defendants motion for summary judgment.

The defendants admitted that their facility discharged treated wastewater effluent from a chlorine contact chamber, a point source, into bayous that eventually reached the Mississippi sound. It was also undisputed that the defendants did not have an NPDES permit. **The court held that because the defendants violated the CWA by discharging pollutants into navigable waters of the U.S. without an NPDES permit, Gulf Park Water Company was clearly liable under the CWA. See 33 U.S.C. §1311 (a).**

With regard to the corporate liability of Johnson Properties, the parent company of Gulf Park Water Co., the court examined the following factors to determine whether the subsidiary functioned as the alter ego of its parent and, thus, liability should be imposed on the parent company: 1) was there common stock ownership; 2) were there common directors or officers; 3) did the companies share common business departments; 4) did the companies file consolidated financial statements and tax returns; 5) whether the parent financed the subsidiary; 6) whether the parent caused the incorporation of the subsidiary; 7) if the subsidiary operated with grossly inadequate capital; 8) whether the parent paid the salaries and other expenses of the subsidiary; 9) whether the subsidiary's sole source of business was the parent company; 10) whether the parent used subsidiary's property as its own; and 11) whether the subsidiary did not observe basic corporate formalities. See U.S. v. Jon-T Chemicals, Inc., 786 F.2d at 686, 691-92 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986). The court also indicated that under federal common law a corporate entity may be disregarded in the interest of public convenience, fairness and equity. See *In re* Acushet River & New Bedford Harbor Proceedings, 675 F. Supp. 22, 33 (D. Mass. 1987). **The court found that uncontested facts support most, if not all, of the factors articulated by the Fifth Circuit. Therefore, as a matter of law, the court held that Gulf Park Water was an alter ego of Johnson Properties and the distinction between them could be disregarded in the interest of public convenience, fairness and equity.**

The court also discussed the issue of individual liability for any person who violated specific provisions of the CWA. See 33 U.S.C. §1319(a)(1). The court indicated that individuals can be liable for violations of the CWA where they participated in or were responsible for the violation, even when the individuals purported to act through a responsible corporate entity. See U.S. v. Brittain, 931 F.2d 1413, 1419 (10th Cir. 1991). The court found both Michael and Glenn Johnson had actual, hands-on control of the facility's activities, were responsible for on-site management, corresponded with regulatory bodies, were directly involved in the decisions concerning environmental matters, and were aware of continuous discharges without a permit. **The court held both individually liable for violations of the CWA.**

4. District Court holds that terms of compliance agreements between discharger and State NPDES permitting authority do not supersede NPDES permit conditions where such agreements were not incorporated into the NPDES permit:

U.S. v. Smithfield Foods, Inc., 965 F. Supp. 769, U.S. Dist. LEXIS 7754 (E.D. Va. May 30, 1997).

The U.S. initiated an enforcement action against defendants Smithfield Foods, Inc. (Smithfield Foods), the owner and operator of two pork processing and packing plants, and the two plants themselves, Smithfield Packing Company, Inc. (Smithfield Packing), and Gwaltney of Smithfield, LTD. (Gwaltney), seeking permanent injunctive relief and civil penalties for violations of the NPDES permit issued by the Virginia State Water Control Board (Board) to Smithfield Foods. Wastewater generated by the two processing and packing plants was treated at two wastewater treatment plants operated by Smithfield Foods. In its complaint, the U.S. alleged that from 1991 defendants continuously violated permit effluent limits and reporting and record keeping requirements, and submitted false information in its discharge monitoring reports (DMRs). Defendants offered several affirmative defenses to these allegations, maintaining that the

NPDES permit was "actually or constructively conditioned or amended, or an actual or constructive variance granted, or the underlying standards were revised by the issuance of several special orders and amendments thereto" by the Board, making the NPDES permit conditions unenforceable. Defendants Smithfield Packing and Gwaltney also contended that neither could be held liable because they were not holders of the NPDES permit. Finally, defendants asserted that the U.S.'s claims for civil penalties were barred by the doctrines of estoppel, waiver, and/or laches, and by §309(g)(6)(A) of the CWA. The federal action followed a State enforcement action seeking injunctive relief and civil penalties for permit violations and violations of "consent special orders."

Smithfield Foods' defenses were based on a long and complicated history of dealings with the Board to address compliance issues. These interactions resulted in certain "Special Orders" being issued by the Board, but these orders were not incorporated into defendants' permit.

In its motion for partial summary judgment on liability and CWA §309(g)(6) issues, the U.S. argued that there was no issue of material fact regarding whether defendants committed thousands of days of violations of the CWA by discharging wastewater in excess of established permit effluent limits and committed over 100 days of violations by submitting required reports late. The U.S. based its contentions on the fact that the special orders negotiated between the Board and Smithfield Foods were never incorporated into the NPDES permit and that its claims were not barred by CWA Section 309(g)(6)(A).

The court held that the U.S. was entitled to summary judgment based on several factors. First, the court held that although not named as permittees in Smithfield Foods' NPDES permit, both Smithfield Packing and Gwaltney were "persons" liable for the permit violations by virtue of the fact that these two entities generated the wastewater being discharged into the Smithfield Foods wastewater treatment plant, which was then discharged into the receiving stream. Second, the court stated that granting of summary judgment for the two alleged incidents of late reporting, resulting in 164 days of violations, was appropriate because the violations were uncontested by defendants.

Third, regarding defendant's alleged violations of permit effluent limits, the court, relying on Sierra Club v. Simkins Indus., Inc., 847 F. 2d 1109, 1115 n.8 (4th Cir. 1988), *cert. denied*, 49 U.S. 904, 105 L. Ed. 2d 694, 109 S. Ct. 3185 (1989), stated that the data reported by Smithfield Foods in its DMRs could be accepted as true and, thus, could be used as admissions to the court to establish defendants' liability. The Smithfield Foods' DMRs clearly established that it repeatedly violated effluent limits as established in its NPDES permit. The court stated that the 1992 permit did not incorporate, nor was it conditioned, revised, or superseded by, the Board's special orders with regards to the effluent limitations established for phosphorus, TKN, CBOD, cyanide and ammonia-nitrogen. Thus, CWA compliance should be determined solely on the basis of whether defendants had complied with established effluent limits and compliance schedules in the Smithfield Foods' NPDES permit. The court specifically rejected defendants' argument that EPA had agreed that the 1991 special order and other special orders and agreements between the Board and Smithfield Foods took precedence over the NPDES permit by virtue of EPA's failure to object or comment on letters from the Board regarding the agreements and EPA's approval of the 1992 NPDES permit. The court also rejected defendants' contention that under U.S. v. AM General Corp., 34 F. 3d 472 (7th Cir. 1994), and U.S. v. Solar Turbines, Inc., 732 F. Supp. 535 (M.D. Pa. 1989), it should be able to rely on the statements of the Board without fear of being subjected to a federal enforcement action that is really a challenge to the agreement between the defendant and the Board. The court distinguished the cases relied upon by defendants, where the permittees had complied with their permits and the government's actions was viewed as challenging the permit conditions, from the present case in which Smithfield Foods had not complied with the terms of its permit. Finally, the court rejected defendants' arguments that the 1991 special order exempted Smithfield Foods from the requirement to comply with phosphorus limits by the date established in the NPDES permit if it agreed to hook up to the regional wastewater treatment system. The court also rejected defendants' assertions that the 1991 special order conditioned, revised, superseded, altered, modified, amended or changed the terms of the 1992 permit in any way. Because the 1992 permit was not modified in any

way, defendants were required to comply with TKN limits therein and schedule for full compliance with phosphorus, CBOD, cyanide, and ammonia-nitrogen limitations or subject themselves to CWA liability.

The court rejected the assertion that the U.S. was estopped from maintaining the enforcement action because of EPA's alleged endorsement of Smithfield Foods and the Boards actions. **The court emphasized that EPA never engaged in "affirmative misconduct," as required to prevail in an estoppel claim under I.N.S. v. Miranda, 459 U.S. 14, 17, 74 L. Ed. 2d 12, 103 S. Ct. 281 (1982).** The court observed that EPA never affirmatively stated to defendants that they were not required to comply with the permit; that the special orders changed, or were incorporated into, the permit; or that EPA concurred with the Board's alleged agreement with Smithfield Foods.

Finally, the court addressed defendants' arguments that the enforcement action was barred under CWA Section 309(g)(6)(A)(ii) because the Board, by issuing the special orders, had commenced and was diligently prosecuting an administrative action against defendants under Virginia law that was comparable to § 309(g). The court first stated that §309(g) applies only to civil penalty actions; thus, the U.S.'s claim for injunctive relief could not be barred under this section. The court then held that Virginia law was not "comparable" to CWA § 309(g) because the State did not have the authority to unilaterally impose administrative penalties (such penalties required violator consent), and the State process, at the time of the issuance of the special orders, failed to provide adequate procedures for public participation.

5. District court upholds administrative penalty, finding the filling of wetlands and the failure to restore the wetlands in timely manner to be a serious violation:

Buxton v. United States, 961 F. Supp. 6 (D.D.C 1997).

Appellant Buxton purchased Chompist Farm with the intent to convert the property into a horse farm. As part of the conversion, fill material was discharged into a portion of three acres of wetlands on the property. The U.S. Army Corps of Engineers informed Buxton of the violations, and offered a choice of obtaining an "after-the-fact" permit or restoring the wetland. Buxton chose to restore the wetlands, but after four years had not fully completed the work. EPA filed an administrative order and then an administrative complaint seeking penalties of $5,000 (the maximum potential penalty for a Class I violation was $25,000). Buxton requested a hearing, following which the EPA Regional Administrator, after considering the nine statutory factors found in CWA § 309(g)(3), assessed a penalty of $5,000. Buxton sought review of the penalty.

The court found that the Regional Administrator committed no clear error of judgment, and, therefore, the penalty must be upheld. Buxton argued that the Administrative Law Judge (ALJ) and EPA Regional Administrator (RA) failed to consider the extensive restoration conducted. The court rejected this argument, finding that completion of restoration by a CWA violator does not equate with dismissal of an administrative penalty. The court observed that EPA fines serve to deter violations in the first instance, and that waiving the penalty would not serve to deter future violations. Moreover, the court observed that a small portion of the wetland remained illegally filled, four years after discovery of the violation. In addition, the court noted that the appellant failed to comply with an EPA enforcement order, and repeatedly failed to respond to EPA letters or other attempts at communication.

The court also rejected Buxton's contention that the ALJ and RA failed to consider conflicting governmental orders and communication problems, finding that the RA did in fact weigh this element in his final determination. Nor did the court allow Buxton to claim reliance on a county permit that authorized appellant to replace drain tiles. Rather, the court found that the county permit did not provide Buxton with authority to violate the CWA by dumping the discarded drain tile into the wetland.

Buxton also argued that her actions were normal in the context of a property owner, and that the relatively small size of the unrestored wetlands (0.89 acres) diminish her culpability. **The court disagreed, finding that filling wetlands is a serious problem and imposition of a monetary**

penalty to deter future violations is not an abuse of discretion. The court noted that the RA considered the nearly four years it took to remediate the wetlands to be "lengthy" and "unwarranted," and that this, coupled with the other factors, justify imposition of an economic sanction.

The court summarized that the RA considered and balanced all relevant and required factors in his opinion and, finding a serious violation that was unnecessarily allowed to continue for several years, reasonably determined that a fine of $5,000 was appropriate.

6. District court imposes penalty that is substantially less than economic benefit where violator acted in good faith in attempting to meet stringent NPDES permit limit and no environmental harm occurred:

Friends of the Earth v. Laidlaw Envt'l Services, 956 F. Supp. 588 (D.S.C. 1997).

Plaintiffs Friends of the Earth and others brought a citizen suit asserting that the wastewater discharge from defendant Laidlaw's hazardous waste incinerator violated the conditions of its NPDES permit. In prior litigation the court held plaintiff's suit was not barred by diligent prosecution by the South Carolina Department of Health and Environmental Control (DHEC) (See, Friends of the Earth v. Laidlaw Envt'l Services, 890 F. Supp. 470 (D.S.C. 1995)). That court also had barred plaintiff's allegations of violations for pollutants other than mercury, since such other alleged violations were not viewed as ongoing as of the time the lawsuit was filed. As for the mercury violations, plaintiffs here sought declaratory and injunctive relief, civil penalties, costs, and attorneys' fees. The court issued Findings of Fact and Conclusions of Law.

Laidlaw purchased the facility in 1986 and was issued a new NPDES permit in 1987 for the waterwater treatment system associated with the incinerator (Laidlaw operated under the previous owner's permit conditions in the interim). The court found that under the NPDES permit issued in 1987, Laidlaw's applicable NPDES permit limit for mercury was dramatically lower than under its prior permit (the limit for mercury decreased from 20 ppb to 10 ppb (an interim limit), and again to 1.3 ppb, effective January 1, 1988). Given the significant change in the limit, DHEC authorized Laidlaw to conduct a study of the feasibility of meeting the new limit, and provided a reopener clause in Laidlaw's new permit. Laidlaw conducted the feasibility study and evaluated and tested numerous mercury control technologies, but was not able to identify a combination of technologies that would meet the 1.3 ppb limit until 1993. From 1987 until 1993 Laidlaw's effluent discharge exceeded its permit limits 489 times. In addition, the company committed numerous monitoring and reporting violations during that period.

In establishing the civil penalty, the court examined the six factors specified in § 309(d) of the CWA. The court found that despite the permit exceedances, numerous studies indicated that there had been no adverse environmental impacts. In addition, despite monitoring and reporting deficiencies, the DHEC was made aware on a continuous basis of Laidlw's compliance efforts and problems. Experts on each side calculated the economic benefit at $3,139,418 (plaintiff) and $884,797 (defendant). The court found such benefit to be $1,092,581. The court examined the issue of whether the good faith purchase of equipment that ultimately proved unnecessary to achieve compliance should be treated as a credit item. The court found that EPA's policy, as set forth in the BEN User's Guide, was sound, and allowed the credit, since Laidlaw had reasonably relied on the advice of a competent consultant in purchasing equipment that ultimately did not aide compliance. The court also found that Laidlaw acted in good faith in attempting to come into compliance with a very stringent limit, and that the data in the records demonstrated that Laidlaw could not have achieved compliance by simply altering the amount of mercury in the waste feed. The court also weighed the fact that Laidlaw did not seek to use the reopener clause in its permit to relax the mercury limit, but rather worked to, and ultimately did, achieve compliance with the 1.3 ppb limit. Moreover, Laidlaw demonstrated a good recent compliance history.

The court recognized that even though Laidlaw's permit limit for mercury was adjusted to 10 ppb in a separate action initiated following the start of this litigation, the company would continue to be bound by "a limit that is determined in part by the fact that

it has purchased the technology to achieve a much lower limit." The court cited dicta in Gwaltney v. Chesapeake Bay Found., 484 U.S. 49, 60-62, L. Ed. 2d 306, 108 S. Ct. 376 (1987) for the proposition that a reduced penalty may be appropriate when an administrative sanction is assessed against a violator who has purchased equipment that will allow it to stay far below what would otherwise be required.

Acknowledging that Laidlaw's economic benefit equaled $1,092,581, the court imposed a penalty of $405,800. The court reasoned that other factors in addition to economic benefit must be weighed, including the difficulty of compliance, and the fact that there was no proven damage to the environment. The court also stated that the fact that the mercury limit has changed significantly while this litigation was pending was further proof that compliance with the prior stricter standard was not absolutely necessary to avoid environmental harm.

The court noted that although the penalty was less than the economic benefit, deterrence was served because Laidlaw will be required to pay significant legal fees (plaintiffs and its own). The court denied equitable relief finding that there was not threat of irreparable harm.

7. EAB holds it was error for the ALJ to introduce the statute of limitations as a limit on economic benefit without allowing the parties to address the issue and holds that where record supports partial economic benefit of violation it is error to find none:

In re: B. J. Carney Industries, 1997 CWA LEXIS 1 (June 9,1997).

B.J. Carney operated a non-pressure wood pole treating facility that used pentachlorophenol (PCP) applied in below ground-level tanks to weatherproof wood poles. The PCP from the treatment process found its way into the soil surrounding the treatment tanks and, consequently, into groundwater and/or precipitation in the vicinity of the tanks, which was removed by a sump pump and discharged to a publicly owned treatment works (POTW) operated by Sandpoint, Idaho. EPA issued a complaint that alleged that B.J. Carney's discharge violated § 301 of the Clean Water Act (CWA) and 40 C.F.R. § 429.75, which prohibits the discharge of process wastewater. Administrative Law Judge (ALJ) D. Head found Carney liable for 18 discharges of process wastewater containing PCP to the Sandpoint POTW and assessed a penalty of $9,000, rather than the $125,000 sought by EPA Region X. B.J. Carney appealed the ALJ's initial decision that Carney violated the no discharge of process wastewater restriction of 40 C.F.R. § 429.75. The Region appealed the decision's conclusion that the economic benefit of non-compliance could not be determined on the record presented.

Regarding liability, B.J. Carney argued: 1) the PCP was contained in non-process wastewater; 2) that 40 C.F.R. §429.75 was too vague to provide adequate notice of the conduct it prohibits and thus violated the due process provisions of the U.S. Constitution; 3) the government should have been found to be equitably estopped from bringing the enforcement action because the Region acquiesced in Sandpoint's limited response; 4) the Region could not administratively enforce CWA requirements based on conduct that occurred prior to February 4, 1987; and 5) the Region was not "substantially justified" in filing its complaint and, thus, B.J. Carney was entitled to an award of fees under the Equal Access to Justice Act (EAJA).

The EAB rejected each of these claims and held that B.J. Carney was liable for violating the pretreatment requirements contained in 40 C.F.R. § 429.75. The EAB found that the wastewater discharges were a result of spills of PCP -- a raw material -- as well as boilovers from the treatment tanks and these events fell clearly within the definition of process wastewater (40 C.F.R. § 401.11(q)). Moreover, the EAB found that the discharges were an integral part of Carney's process, for without collection and removal of the PCP-contaminated wastewaters the treatment tanks would have floated, thereby damaging the treatment process. The Board also observed that no exclusions applied to such discharges (see 40 C.F.R. § 429.11(c)). With respect to Carney's due process claim, the EAB rejected Carney's argument that the phrase "process wastewater" was too vague to serve as a basis for liability. Rather, the EAB found that although broad, the term "process wastewater," as defined, was "nonetheless clear in

its terms." The Board stated that given the regulatory language, which specified a no discharge standard, there was little doubt about what behavior was prohibited. The Board added that Carney had been notified by the Region twice in writing regarding its noncompliance, and the Region's actions had been consistent with its statements.

With regard to Carney's equitable estoppel argument, which maintained that EPA acquiesced in Carney's conduct and unduly delayed enforcement, the EAB found that Carney failed to establish that the government committed affirmative misconduct upon which Carney reasonably relied to its detriment. (See, U.S. v. Hemmen, 51 F.3d 83, 892 (9th Cir. 1995). The Board found that the record included ample evidence that indicated Carney knew EPA did not believe the discharges were lawful. The EAB also found that mere delay by EPA in responding to the industrial waste acceptance (IWA) form issued by Sandpoint (which allowed continued discharges) did not constitute affirmative misconduct. The Board added that, given Carney's knowledge of EPA's position, any reliance upon the IWA was not reasonable. As for EPA's delay in bringing an enforcement action, the EAB held that EPA did not waive any right to bring this enforcement action, that the Agency's delay cannot be considered affirmative misconduct since the government may not be estopped from enforcing the law (see, U.S. v. Chevron, 757 F. Supp. 512 (E.D. Pa. 1990), and Carney did suffer detriment due to the delay.

The EAB cited Sasser v. Administrator, U.S. EPA, 990 F.2d 127 (4th Cir. 1993) in dismissing Carney's claim that EPA could not bring an administrative action to enforce violations that occurred prior to February 4, 1987. It also dismissed Carney's EAJA claim, finding that the Region was substantially justified in bringing this action.

Regarding the penalty calculated by the ALJ, the Region argued that the ALJ misconstrued the applicable standard for evaluating an economic benefit presentation and incorrectly concluded that no economic benefit could be calculated form the record. The Region also argued that the ALJ erred in ruling: 1) the economic benefit calculation cannot include time beyond the statute of limitations or after compliance; 2) the Region's discount rate was defective; 3) the Region's calculations should have "offset" sums spent to achieve compliance; 4) the Region's calculations should have "offset" sums spent to close the facility; and 5) profits made by Carney were a measure of economic benefit. **The EAB held that the ALJ made several errors in his analysis of economic benefit, most notably failing to find any economic benefit from the record and introducing the statute of limitations as a limit on economic benefit without requesting the parties to address the implications of the statute of limitations on the economic benefit calculation.**

The EAB observed that EPA need not have shown "with precision the exact amount of the economic benefit enjoyed by the respondent" but only a "reasonable approximation" of the benefit (see, Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc., 73 F.3d at 546, 576 (5th Cir. 1996)). It then stated that "[i]f the record supports a partial economic benefit and the only choice is between finding a partial economic benefit or non at all, it is error to find none." The Board also found that because EPA had no opportunity to demonstrate what Carney's economic benefit would have been within the federal statute of limitations period (the period of violation extended beyond five years and the statute of limitations was made applicable to administrative proceedings after the initial hearing), a remand was appropriate to allow the Agency to address that issue. The Board added that it was wrong of the ALJ to conclude that "an economic benefit calculation is necessarily defective if it uses a discount rate outside the [statute of] limitations period." The Board also found that the end date for calculating Carney's economic benefit was when the "benefit is disgorged," not when Carney came into compliance, since Carney retained and enjoyed the benefits of the money it saved by its non-compliance. The Board found the ALJ erred in rejecting the use in the economic benefit calculation of a 1984 discount rate (16 percent) for a benefit that spanned a ten-year period, especially since the assumption by EPA's expert was plausible and properly supported and there was no evidence in the record supporting rejection of that assumption. Regarding offsets, the Board found that Carney failed to quantify on the record amounts spent on compliance and that compliance efforts had been considered in the assessment of environmental harm and the consideration of good faith. The EAB concluded that the ALJ erred in concluding

compliance cost offsets would have negated any economic benefit.

In summary, the EAB affirmed the ALJ's holding regarding Carney's liability for violating pretreatment standards, and the ALJ's ruling that any penalty must exclude any economic benefit that occurred outside the statute of limitations. The EAB reversed the ALJ's other rulings pertaining to the economic benefit of non-compliance, and remanded the case to determine how much of the $167,000 economic benefit occurred within the statute of limitations, and an appropriate penalty based on consideration of all of the factors specified under CWA 309(g)(3), including economic benefit.

J. Criminal Cases

1. Sixth Circuit finds open fields exception negates reasonable expectation of privacy, and reverses district court's granting of new trial based on use of testimony asserting Fourth Amendment rights:

U.S. v. Rapanos, 115 F.3d 367 (6th Cir. 1997).

The U.S. appealed the grant of a new trial to defendant Rapanos, who had been found guilty of discharging pollutants into wetlands without proper regulatory authorization. The grant of a new trial was based on the trial court's belief that it committed plain error in allowing Mr. Rapanos to be questioned regarding his assertion of his Fourth Amendment rights.

The defendant owned property he was marketing for commercial development. To make the property more marketable, the defendant spent substantial sums to clear the property and to eradicate wetlandson site. Defendant provided the Michigan Department of Natural Resources (DNR) with an outline of plans for development and a survey of the property. And DNR, upon visiting the site, advised defendant that the property appeared to contain wetlands and that the defendant would need a permit, including a wetlands delineation, before development could begin. Subsequently, the defendant hired a wetlands consultant who identified nearly 50 acres of wetland on the property, however, the defendant continued site preparation without regard for the wetlands. During such time, DNR investigators made numerous unaccompanied visits to the site. DNR sent numerous notices to defendant to cease his activities, and on two occasions met with defendant at the site and at defendant's corporate office to request access to the site to make a "wetlands determination." On both occasions, the defendant denied access to DNR. DNR investigators ultimately obtained a search warrant, entered the property, took numerous plant and soil samples, and were able to document the presence of at least 28 acres of wetlands notwithstanding the degradation that had occurred from site preparation.

Defendant was charged with knowingly discharging pollutants into wetlands in violation of 33 U.S.C. §1311(a). The defendant's first trial ended in a mistrial. The defendant was recharged, and during the trial government witnesses provided testimony regarding defendant's assertion of his alleged Fourth Amendment rights. Government prosecutors also questioned defendant persistently about his alleged conduct of "practicing concealment" by not allowing DNR officials on site. After hearing all the evidence, the jury found the defendant guilty. Defendant submitted a motion asking for a new trial. The trial court granted the motion, basing its decision on the government's questioning of defendant about his "practicing concealment" when he refused to consent to warrantless searches by DNR officials. Although the defense raised no objection to the testimony at the second trial, the court concluded that its introduction impermissibly infringed on the defendant's Fourth Amendment rights and constituted "plain error" under FED. R. CRIM. P. 52(b). The trial court analogized to Supreme Court cases holding that a prosecutor cannot comment on a defendant's exercise of his Fifth Amendment right against self incrimination, and stated that in recent years, some courts had extended this rule to prohibit prosecutorial comment on a defendant's exercise of his Fourth Amendment rights. The district court denied the government's motion for reconsideration and the government filed a notice of appeal.

On the issue of whether the admission of the questioned testimony constituted plain error, the Circuit Court stated that only if the defendant had a Fourth Amendment right to prevent DNR personnel from coming on to his property would the district

court's "plain error" ruling be correct. To determine whether defendant had such a right, the court stated that it must consider whether the "open fields" doctrine applied. Under this doctrine, first developed by the Supreme Court in Hester v. United States, 265 U.S. 57, 68 L. Ed. 898, 44 S. Ct. 445 (1924), and reaffirmed in Oliver v. United States, 466 U.S. 170, 80 L. Ed. 2d 214, 104 S. Ct. 1735 (1984), the government's "intrusion onto open fields without a search warrant is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment." Basically, the court stated that under this doctrine a person has no expectation of privacy in an open field, and thus cannot raise any Fourth Amendment rights if a warrantless search is conducted thereon.

Defendant contended that his property did not qualify as an open field because it was surrounded by a fence and a tall hedgerow of cleared debris, entry thereon could only be made by entry through a locked gate, and that by the time of the attempted searches, the land had undergone extensive alteration and development and was, therefore, a "commercial property." The defendant also argued that the open fields doctrine should not apply because he and his lawyer were present on two occasions when the DNR officials attempted to gain access to his property. Finally, the defendant contended that the open fields doctrine was not applicable to this case because it only permits visual inspections, as opposed to seizures, of property, and that DNR contemplated "full scale seizure activity" when it made its inspections.

The Circuit Court rejected all of defendant's arguments. The court stated that none of the factors raised by defendant regarding the character of the site had any bearing on whether the property should be considered an open field. See, Dow Chemical Co. v. United States, 476 U.S. 227, 90 L. Ed. 2d 226, 106 S. Ct. 1819 (1986) (a 2,000 acre industrial complex constituted an open field). In addition, the court rejected defendant's argument that his presence at the property at the time of the searches created a reasonable expectation of privacy, stating that for constitutional purposes, a landowners's presence does not differ in consequence from the erection of a fence or the placement of a "No Trespassing" sign: none of these activities creates a reasonable expectation of privacy. The court recognized that the doctrine is limited to visual searches, but observed that the record indicates DNR officials intended to do no more than make a visual inspection of the property and discuss with the defendant his need to obtain a permit, and that samples were obtained as part of a wetlands delineation only after the execution of a federal search warrant. The court determined that because the defendant was not able to establish an expectation of privacy, the visual inspection made during the warrantless entry onto defendant's property did not constitute an unreasonable search for Fourth Amendment purposes.

Accordingly, the court held that the district court abused its discretion by granting a new trial because it had failed to apply settled law regarding the open fields doctrine. The court stated that under Oliver it was clear that the defendant's property qualified as an "open field;" thus, the district court did not commit plain error by failing to exclude the questioning upon which it based its motion for a new trial. The court reversed the decision, reinstated the jury's guilty verdict, and remanded the case to the district court for sentencing.

2. Eighth Circuit upholds criminal convictions for knowing violations of the CWA and reaffirms that the word "knowingly" as used in 33 U.S.C. § 1319(c)(2)(A) applies to the underlying conduct prohibited by the statute:

U.S. v. Sinskey & Kumm, 1997 U.S. Appeals LEXIS 17353 (8th Cir. 1997).

Defendants Timothy J. Sinskey and Wayne Kumm were convicted of knowing violations of the CWA. Both were found guilty of knowingly rendering inaccurate a monitoring method required to be maintained under the CWA in violation of 33 U.S.C. § 1319(c)(4), and Sinskey was found guilty of knowingly discharging a pollutant into waters of the U.S. in amounts exceeding CWA permit limitations, in violation of 33 U.S.C. § 1319(c)(2)(A). Both appealed their convictions.

Sinskey and Kumm were respectively, the plant manager and plant engineer at John Morrell & Co. (Morrell), a meat packing plant in Sioux Falls, South Dakota. The facility wastewater treatment plant

(WWTP) provided treatment for, among other things, high levels of ammonia originating from the slaughtering and processing activities. In 1991, Morrell doubled its processing at the plant, which resulted in increased wastewater flows and increased ammonia in the discharge. The WWTP manager and assistant manager (Greenwood and Milbauer respectively) manipulated the wastewater flow rate and the ammonia testing process in an effort to demonstrate compliance with the facility NPDES permit limits. When these efforts failed to yield satisfactory outcomes, the two falsified the test results which Sinskey signed and submitted to EPA.

Sinskey challenged the jury instructions with respect to 33 U.S.C. § 1319(c)(2)(A), which provides criminal penalties for anyone who "knowingly violates" CWA § 1311 (prohibition on the discharge of pollutants except in compliance with provisions of an NPDES permit). The trial court gave an instruction that in order to find the defendant guilty of acting "knowingly," the proof had to show that he was "aware of the nature of his acts, performed them intentionally, and [did] not act or fail to act through ignorance, mistake, or accident." The instructions also told the jury that the government was not required to prove that Sinskey knew his acts violated the CWA or permits issued under that act. Sinskey argued that since the adverb "knowingly" immediately proceeds the verb "violates" the government had to prove that he knew that his conduct violated either the CWA or his NPDES permit.

The court stated that it was guided in its decision based on the generally accepted construction of the word "knowingly" in criminal statutes, the CWA's legislative history, and decisions of other courts of appeals that have addressed the issue. The court noted that it has repeatedly held that the word "knowingly" modifies the acts constituting the underlying conduct. (see, U.S. v. Farrell, 69 F.3d 891, 893 (8th Cir. 1995)). **The court held that "[W]e see no reason to depart from that commonly accepted construction in this case, and we therefore believe that in 33 U.S.C. § 1319(c)(2)(A), the word knowingly applies to the underlying conduct prohibited by the statute."**

In explaining its decision, the court stated that the underlying conduct of which Sinskey must have had knowledge was that Morrell had a permit prohibition on discharges of ammonia higher than one part per million. Thus, the government was not required to prove that the defendant knew that his acts violated either the CWA or the NPDES permit (the relevant law) but merely that he was aware of the conduct (the material fact of a discharge of a waste higher than one part per million) that resulted in the permit's violation. The court further explained that in 1987, 33 U.S.C. § 1319(c)(2)(A) was amended such that the word "willfully" was changed to "knowingly," a lower mens rea requirement. The court further distinguished Sinskey's situation from the holding in U.S. v. Ahmad, 101 F.3d 386 (5th Cir. 1996), stating that Ahmad was a classic mistake-of-fact defense, whereas a mistake-of-law defense was asserted by Sinskey and Kumm.

Sinskey and Kumm also challenged the trial court's instruction with respect to 33 U.S.C. § 1319(c)(4) (which penalizes a person who knowingly falsifies tampers with, or renders inaccurate any monitoring device or method required to be maintained by the CWA) arguing that the government had to prove that the defendants knew that their acts were illegal. The court rejected this defense on the basis that the defendants' knowledge in this case referred to rendering monitoring methods inaccurate and aiding and abetting in the flow and sampling manipulations, and held that there is no requirement that a defendant know of the illegal nature of his or her acts under 33 U.S.C. § 1319(c)(4).

Sinskey also contended that the trial court abused its discretion by admitting into evidence the "secret logs" that Milbauer kept which recorded the actual levels of ammonia being discharged. He claimed that the logs were expert scientific evidence that did not meet threshold standards of accuracy and reliability because of deviations in the standard protocol for using the sampling probe. The court noted that after a two-day hearing by the trial court and expert testimony at trial, the probe results were deemed sufficiently reliable such that the admission of the secret logs was well within the trial court's discretion.

Kumm attacked his conviction for violating 33 U.S.C. § 1319(c)(4) on the basis of the sufficiency of the evidence and the jury instructions. Kumm claimed that he only failed to stop others from rendering inaccurate Morrell's monitoring methods, not that he

affirmatively participated in the deceit. The court noted that in order to secure a conviction, the government had to prove more than Kumm's mere association with, and knowledge of the activities of the others. Rather, the government had to show Kumm associated himself with the misleading monitoring scheme, participated in it "as something [he] wished to bring about" and acted in such a way as to ensure its success. U.S. v. Hernandez, 986 F.2d 234, 238 (8th Cir. 1993). However, the court did note that encouraging the perpetrators of a crime in their efforts to effect the crime is aiding and abetting the commission of a crime. Hernandez, at 238. **The court found that the evidence supported the verdict in that Kumm aided and abetted the misleading monitoring scheme through encouraging others to render data inaccurate, and discouraging any complaints about the practice.**

Kumm also challenged the jury instructions on several grounds that the trial court abused its discretion when it refused to give an instruction to the jury that he had no affirmative legal duty to report violations of the CWA permits or to intervene to prevent them; and that the prosecutor, in his closing argument, misstated the law in telling the jury that if the defendants knew the illegal activities were going on, they are guilty. With respect to the first claim, the court rejected Kumm's contention that the emphasis on his supervisory capacity led the jury to convict him of failing to report violations, noting that he was not convicted of failure to report violations, rather he was convicted of rendering inaccurate the monitoring methods required under the permit and that his actions were proof of concealment that allowed the illegal activities to camouflage Morrell's violations. With respect to the second challenge, the court reasoned that though the prosecutor did misstate the law with respect to the violation of 33 U.S.C. § 1319(c)(4), the statement was not objected to during trial and the jury instructions, which directed the jury to follow the court's instructions regarding the law, sufficiently cured any unfair prejudice created by the prosecutor's statements.

3. Tenth Circuit denies the introduction of extrinsic evidence to explain alternative interpretations of a plea agreement:

U.S. v. Rockwell Int'l, 1997 U.S. App. LEXIS 22523 (Aug. 26, 1997).

Rockwell International Inc., operator of U.S. DOE's Rocky Flats Nuclear Weapons Plant, entered into a plea agreement with the U.S. government, pleading guilty to a variety of environmental crimes. In exchange, the U.S. government agreed to refrain from bringing additional criminal charges stemming from Rockwell's management of Rocky Flats. The government also agreed not bring civil suit or take other actions against Rockwell based on violations of certain environmental statutes. The provision of the agreement limiting civil actions against Rockwell listed actions not encompassed or precluded by the covenant. In particular, the agreement stated actions taken regarding a civil suit filed under the False Claims Act by a private plaintiff, James Stone, were not precluded. On the same day that the plea agreement was filed, the U.S. government filed a notice declining intervention in the Stone suit.

Several months later, the U.S. moved to intervene in the Stone suit. Rockwell filed suit against the U.S. for failure to uphold the consent agreement. Rockwell claimed that the agreement reflected a negotiated settlement that Rockwell would incur no additional financial liability apart from the $18.5 million fine included in the agreement, and that the government's intervention into the civil suit violated that agreement. The district court denied Rockwell's motion to enforce the plea agreement, and in a separate action, granted the government's motion to intervene in the civil suit. Having found no ambiguity in the U.S. government's statement regarding intervention, the district court disallowed the introduction of extrinsic information by Rockwell to explain its interpretation of the agreement.

The appellate court addressed two issues on appeal: whether the district court improperly refused to consider Rockwell's interpretation of the plea agreement; and, whether it impermissibly refused to grant an evidentiary hearing to consider the evidence supporting Rockwell's interpretation of the agreement. In its interpretation of the agreement, the court found that the agreement was completely integrated and, therefore, under the parole evidence rule, there was no justification for considering extrinsic evidence to interpret the agreement. This determination was based primarily on the presence of the clearly written integration clause that stated

"[t]his document states the parties' entire agreement. There are no other agreements, terms, or conditions, express or implied. In entering into this agreement, neither the Department of Justice nor Rockwell have relied, or are relying, on any terms, promises, or conditions not expressly stated herein."

The court dismissed Rockwell's argument that "good cause" must be shown to justify the government's intervention in the civil suit, as set forth under the False Claims Act. The court looked to the plain language of the agreement and found no mention of good cause. The plaintiff's interpretation of the government's early notice not to intervene as a promise was also discarded by the court, which found instead that the declination notice was a statement of fact. Thus, the court upheld the lower court decision on this issue.

With regard to the evidentiary hearing, the court held that the district court did not abuse its discretion in denying the hearing. The court determined that the lower court did not, as argued by Rockwell, deny the Rockwell Corporation due process. Instead, the court held that Rockwell could not have had a different understanding of its legal rights under the consent agreement than did its legal counsel. Again, the lower court decision on the issue was upheld.

K. Pretreatment

1. EAB holds contaminated groundwater and precipitation contaminated by spilled raw material is process wastewater discharged in violation of 40 C.F.R. 429.75:

In re: B. J. Carney Industries, 1997 CWA LEXIS 1 (June 9,1997). See case summary on page 34.

L. Sludge

1. Fifth Circuit reverses award of damages for defamation finding no actual malice in broadcast addressing sludge land application:

Scalamandre & Sons, Inc., v. Kaufman, 113 F.3d 556 (5th Cir. 1997).

Appellants H. Kaufman and Tristar Television appealed a defamation judgment awarding appellee Merco Joint Venture nominal damages of $1 against each appellant and punitive damages of $500,000 against Kaufman and $4.5 million against Tristar. Tristar produced and broadcast a program about sewage sludge generated by New York City and shipped to Texas for land application. Merco Joint Venture was the company under contract with New York City to ship and manage the sewage sludge. Kaufman was an EPA employee interviewed as part of the program.

Kaufman and Tristar appealed on two grounds, that Merco failed to prove they acted with actual malice, and that it was error under Texas and constitutional law for the court to award such large punitive damages in light of the nominal actual damages awarded.

The court observed Kaufman and Tristar were public figures and that, therefore, Merco must prove actual malice. The court noted that "proving actual malice is a heavy burden" which requires proving that the alleged statements were made with knowledge that they were false or with reckless disregard for whether the statements were false or not. Merco alleged that Kaufman and Tristar were responsible for broadcasting certain statements and alleged making implications regarding the sludge disposal that appellants knew were false. **The court disagreed, and held that Merco presented no proof that Tristar and Kaufman knew or should have known that any part of the "Sludge Train" broadcast was false.** The court added that Merco failed to show that any part of the broadcast was false. The court observed that expert opinion varied regarding the land application of sludge, and Kaufman's testimony expressed his honest and reasonably supported beliefs. The court noted that "[d]efamation law should not be used as a threat to force individuals to muzzle their truthful, reasonable opinions and beliefs."

The court did not reach the issue of the reasonableness of the punitive damages in relation to the actual damage award, but suggested in dicta that under both Texas and constitutional law the recovery of actual damages may be a prerequisite to the recovery of exemplary damages.

II. CASES UNDER OTHER STATUTES

A. SDWA

1. District court holds that EPA's interpretation of the term "underground injection" as excluding hydraulic fracturing activities associated with methane gas production was inconsistent with SDWA, and grants petition for review of EPA order denying citizens' petition requesting withdraw of Alabama UIC program:

Legal Environmental Assistance Foundation, Inc., v. EPA, 1997 U.S. Dist. LEXIS 20992 (11th Cir. , Aug. 7, 1997).

Plaintiff Legal Environmental Assistance Foundation, Inc. (LEAF), filed a petition for review of an EPA order, in which the Agency denied LEAF's petition to promulgate a rule withdrawing approval of the Alabama UIC program. LEAF's petition alleged that the Alabama UIC program was deficient because it did not regulate hydraulic fracturing activities associated with methane gas production, and that such action was required under the SDWA. LEAF contended that EPA was obligated to withdraw approval of the Alabama UIC program. EPA had denied the petition because it determined that hydraulic fracturing did not fall within its regulatory definition of "underground injection," and, thus, the State program met EPA requirements. EPA interpreted the definition as encompassing only those wells whose "principal function" was the underground emplacement of fluids, and concluded that the principal function of methane production wells was methane gas production, not the underground emplacement of fluids. LEAF's petition to the Eleventh Circuit alleged that EPA's interpretation of the regulation was incorrect because it rendered the regulations inconsistent with the SDWA.

The court first addressed whether LEAF had established a jurisdictional basis for the petition, since the assertion that the UIC regulations were inconsistent with the SDWA was a direct challenge to the regulations, which had been promulgated several years before the petition was filed. The Eleventh Circuit explained that LEAF's contention that the UIC regulations, as interpreted by EPA, were invalid because they were inconsistent with the SDWA constituted a substantive challenge since, if the UIC regulations were inconsistent with the statute, they would be void ab initio and could not be relied upon by EPA to deny LEAF's petition for withdrawal of the Alabama UIC program. The court concluded that as part of the review of LEAF's petition to review EPA's order denying LEAF's withdrawal petition, it also had jurisdiction to entertain LEAF's contention that the regulations were contrary to the statute.

The court analyzed EPA's interpretation under the principles set forth in the Administrative Procedure Act (APA) and the Supreme Court in Chevron, USA., Inc. v. NRDC, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). EPA argued that the definition of the term "underground injection" in § 300h(d)(1) of the SDWA was ambiguous, and that Congress intended to exclude wells whose principal function was not the injection of fluids, from the UIC regulatory scheme. The court disagreed, and finding no ambiguity in the statutory language. Using the dictionary definition for "injection," the court stated that the term means "the act of forcing (a fluid) into a passage, cavity, or tissue," with "underground injection" meaning "the subsurface emplacement of fluids by forcing them into cavities and passages in the ground through a well." The court observed that the process of hydraulic fracturing clearly fell under this category of activities, and that nothing in the statutory definition suggested that EPA has the authority to exclude covered activities. The court also rejected EPA's reliance on legislative history to bolster its assertions, finding that the statute was clear on its face and, thus, there was no reason to resort to legislative history (the court did note the legislative history also undercut EPA's arguments). The court also rejected EPA's argument that its interpretation of the statutory language as excluding hydraulic fracturing from regulatory coverage should be entitled special deference because it was "long-standing and consistent over a long period" or that Congress had ratified EPA's interpretation. Relying on Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 171, 109 S. Ct. 2854, 2863, 106 L. Ed. 2d 134 (1989), the court stated that no deference is due to agency interpretations at odds with the plain language of the statute. The court observed that

EPA had made no showing that Congress was aware that EPA's interpretation of "well injection" excluded hydraulic fracturing from UIC program requirements when it reenacted the statute.

The court concluded that hydraulic fracturing activities constituted "underground injection" under Part C of the SDWA. Accordingly, because EPA had denied LEAF's petition for withdrawal of the Alabama UIC program based on this improper interpretation, the court granted LEAF's petition for review and remanded the matter for further consideration.

2. EAB denies petition challenging UIC permit granted by Region V under the rationale that petitioners concerns did not raise issues over which the EAB has review authority:

In re: Federated Oil & Gas of Traverse City, Michigan, UIC Appeal No. 95-38 (Jan. 8, 1997).

Petitioners sought review of a decision made by EPA Region V to grant a Class II UIC permit to Federated Oil & Gas (Federated) authorizing the injection of brines, generated at oil and gas recovery operations conducted elsewhere by Federated, at the permitted injection well in Traverse City, Michigan. The petitioners owned the land on which the permitted injection well was located. Federated was the assignee of a lease executed by the petitioners allowing oil or gas production wells on their property, and as assignee, Federated believed that it had the authority to operate an injection well thereon.

Petitioners requested that the Board reverse the Region's decision to issue the permit, which the Board viewed as essentially asking EPA to implement the lease as interpreted by petitioners. The EAB explained that with respect to UIC appeals, it was well established that the Board will only review permit "conditions," and only those conditions claimed to violate the requirements of the SDWA or of the applicable UIC regulations. Thus, the Board explained that the petitioners' arguments based on the terms of their lease with federated were beyond the scope of the UIC permitting process and beyond the limits of the Board's review authority.

The Board, citing *In re* Suckles Farms, Inc., 4 E.A.D. 686 (EAB 1993), stated that "in order to obtain review of a contested permit condition, a petitioner must demonstrate why the Region's response to a particular objection or set of objections is clearly erroneous or otherwise warrants review." Because of these limits, the Board stated that it would only address "matters as to which a minimally sufficient claim of error actually" appeared in the petition for review. The Board identified six such arguments: 1) well operators other than Federated had allowed contamination of the petitioners drinking water supply in the past; 2) Michigan was not competent to monitor Federated's compliance with permit conditions; 3) Federated connected piping to the well before the permit was issued, demonstrating a disregard for regulatory requirements; 4) the permit did not limit the allowable injection rate; 5) injection should not have been authorized because the cement used to construct the well was not dense enough to create an effective casing; and 6) even if the permit was not for "commercial" disposal, it could be sold and then used by the purchaser for such purpose, placing petitioners' water supply at greater risk. All such concerns had been submitted as comments to the Region on the draft permit.

Regarding past risks to the petitioners' water supply, the Board characterized the Region's initial response adequate and the permit sufficient to protect against contamination of drinking water. The EAB then stated that the same contention made in the petition did not demonstrate that the Region erred by granting the permit to Federated because the conduct complained of was not that of Federated, the well complained of was not subject to UIC regulation, and the objection was totally unrelated to any permit condition. Regarding the ability of Michigan to ensure compliance with the requirements of the permit, the EAB stated that, again, the objection did not challenge the validity of any permit condition. Turning to allegations that Federated's alleged disregard for regulatory requirements should have dictated that the Region not issue the permit, the Board stated that the allegation again did not establish clear error on the part of the Region, nor did it otherwise invalidate the decision to grant the permit. On petitioners' argument that the Region should have included an express condition limiting the permissible injection

rate, the Board stated that the Region adequately responded to the initial comment, even though petitioners argued that the Region's failure to include the requested provision left the concern unaddressed. Because petitioners did not argue that the Region's explanation was erroneous, the Board denied the petition for review insofar as it was based on the permit's alleged failure to regulate the injection rate. Regarding the density of the cement used for the casing, the Board again found that the Region had adequately addressed the integrity of the cement casing in its response to comments and in its response to the petition, and that petitioners had identified no legal or factual error in the Region's treatment of the issue. Finally, regarding the fear of "commercial" brine disposal, the Board indicted that for a transfer of permit rights to occur, all UIC procedural requirements would have to be met, including providing notice to the Region, which would in turn begin either modification or revocation and reissuance procedure, either of which would address the identity of the proposed transferee and such other permit amendments as would be necessary to ensure continued compliance with SDWA requirements. Likewise if Federated requested an amendment to the permit to undertake commercial brine injection, this would again trigger Regional review. The Board denied the petition for review in all respects.

3. ALJ holds testimony based on the Safe Drinking Water Information System is sufficient to support finding that system is public water system:

In the Matter of: Paul Durham, 1997 SDWA LEXIS 1 (Apr. 14, 1997).

EPA filed a complaint alleging that Paul Durham failed to monitor for total coliform and report the results over 11 months for the community water system known as Windam Hill Estates Water System, in violation of 42 U.S.C. § 300j-4. Respondent argued that Windam Hill Estates Water system was not a public water system, that the failure to monitor and report was beyond his control, and that the penalty of $5,000 was excessive and beyond his ability to pay.

Respondent argued that EPA had not established, based on firsthand knowledge, that during the period of April 1993 through July, 1994, Windam Hill Estates Water System regularly served more than 25 persons. **The ALJ disagreed, and held that Windam Hill Estates Water System was a public water system and, therefore, respondent was required to gather and submit water samples on a monthly basis for total coliform and report the result to the appropriate officials.** The ALJ found that although the evidence submitted by EPA was not the best that could have been offered, the Agency introduced enough reliable, probative, and substantial evidence to afford a reasonable basis for concluding that Windham Hill's system served more than 25 full-time residents. The ALJ found that the testimony of EPA witnesses establishing the number of persons served by the water system, although technically hearsay, was worthy of substantial weight for several reasons. First, the ALJ observed that hearsay is admissible in administrative proceedings. Second, the ALJ noted that government records, such as those provided from the Safe Drinking Water Information System database and indicating the number of persons served by the water system, constitute an exception to the hearsay rule. Third, the ALJ found that the computer records were created under circumstances that sufficiently ensured their credibility and, hence, their probative value. In addition, the ALJ found it was significant that despite prior administrative orders that informed the respondent that the government concluded that his system served more than 25 year-round residents, the respondent had not made any effort during sanitary surveys to refute the findings nor had he offered any evidence to contradict EPA's conclusion. The ALJ specifically observed that respondent never even requested that a new sanitary survey be conducted to resolve the issue. Over the 11 month period, the ALJ found that respondent committed 22 violations (11 failures to conduct sampling and analysis, and 11 failures to submit the results of such analyses).

The ALJ found that the penalty of $5,000 was "entirely warranted." The ALJ first observed that in calculating the penalty it was appropriate, although not mandatory, for EPA to consider the same civil penalty factors set forth in the CWA. She also observed that the criteria used in EPA's draft public water system penalty calculation policy, which served as the basis for calculating the penalty here, were consistent with the factors set forth in the

CWA. Despite agreeing with the factors considered by the Agency, however, the ALJ stated that EPA's calculations understated the seriousness of the violations. She found that the 22 violations directly undermined the purpose of the SDWA enforcement program, and that the economic benefit calculation of $309 was far too low because it did not consider who would obtain the samples (valued at $880 - $6,600), and that the respondent was an attorney and business person, and could not credibly assert he misunderstood the applicable regulations. Further, respondent submitted no evidence of an inability to pay, or that the non-compliance was beyond his control. The ALJ noted that respondent's poor history of compliance and 11-month non-compliance here made it inappropriate to excuse or reduce the penalty on such account.

B. TSCA

1. EAB holds the requirements to register PCB transformers and to mark access door are continuing obligations:

In re: Lazarus, Inc., 1997 CWA LEXIS 8 (Sept. 30, 1997).

U.S. EPA Region V and Lazarus, Inc., appealed the initial decision by an EPA administrative law judge (ALJ) who assessed a penalty of $34,800 against Lazarus for six violations of EPA's polychlorinated biphenyls (PCBs) regulations pertaining to two PCB transformers at Lazarus' department store annex in Columbus, Ohio. In 1993, the Region brought a 12-count administrative enforcement action against Lazarus, which included a proposed a penalty of $117,000. The ALJ dismissed two counts of the complaint based on the "public protection" provision of the Paperwork Reduction Act (PRA) (44 U.S.C. § 3512) and portions of other counts based on the statute of limitations at 28 U.S.C. § 2462. The Region appealed the dismissal of the two counts on PRA grounds. Lazarus appealed rejection of the PRA defense on other counts, several issues under statute of limitations, and the level of penalty reduction (fifty percent) by the ALJ.

The Region argued that Lazarus had raised its PRA defense in an untimely manner -- in a motion for accelerated decision submitted after pre-hearing exchanges had been completed and the time for discovery had passed. The EAB acknowledged that Lazarus was late in raising the PRA defense, but held that the ALJ was correct to allow consideration of the defense since EPA had both the time and an opportunity to respond to the defense and, thus, no prejudice resulted.

The Region also argued that Lazarus could not assert a PRA defense for failure to submit PCB annual documents required prior to the effective date of the PRA requirements. The ALJ had held that EPA could not enforce counts X and XI (failure to submit PCB annual documents for July 1, 1979 - 1988) because during that period the OMB approval number was not correctly displayed on the relevant regulation. The EAB upheld the ALJ's determination that Lazarus could not be assessed a penalty for failure to produce PCB annual documents for 1978-88, but on different grounds. In response to EPA's specific arguments, the EAB first found that Lazarus could not assert a PRA defense for failure to prepare the PCB documents for calender years 1978-1980. Second, the EAB found that pursuant to the 1986 PRA amendments the public protection provisions of the PRA applied to rule-based collections of information. Finally, regarding the display of an OMB ICR approval number, the EAB found 1) Lazarus ccould not be subject to penalties for violations arising prior to February 1986 (the date when an OMB approval number was first displayed); and 2) the OMB approval number was not adequately displayed after February 1986 and before December 1989 and, hence, Lazarus could assert its PRA defense for failure to submit annual documents during this period (after December 1989 the OMB number was displayed and no PRA defense was available).

The EAB upheld the ALJ's decision that the PRA public protection provision does not provide a defense to Lazarus' failure to comply with the marking requirements on access doors to rooms holding PCB transformers. The Board agreed with the ALJ that this requirement required disclosure to third parties rather than the government, and therefore was not subject to PRA requirements.

Regarding the statute of limitations claims, the EAB upheld the ALJ's decision that the requirement to register PCB transformers with the local fire department and to mark the access door were

ongoing obligations. The Board found that an action for penalties was not barred by the statute of limitations where, as here, such violations continued into the five-year period preceding the filing of the complaint. The Board observed that the limitations period only begins to run once the violation has ceased. With regard to the requirement to prepare and maintain annual PCB documents, however, the Board found that such requirements were not ongoing in nature. Hence, the board concluded that the statute of limitations did provide a defense to the action seeking penalties for violations during the years 1978-80.

Finally, the EAB rejected Lazarus' contention that the complaint did not provide fair notice of alleged violations of transformer inspection recordkeeping requirements. The Board found that the complaint clearly alerted Lazarus it was being charged with failure to perform and keep records of transformer inspections.

2. ALJ holds failure to properly dispose of PCB-contaminated soil constitutes continuing violation:

In the Matter of: Oklahoma Metal Processing Co., TSCA Docket No. VI-659C (Apr. 29, 1997).

Newell Recycling operated a facility in Houston, Texas from 1974 until September 1982, when it sold the facility to Oklahoma Metal Processing (d/b/a Houston Metal Processing). Under an agreement between the parties, Newell excavated lead-contaminated soil from the site, and found 41 buried capacitors and PCB contamination in excavated soil. Houston Metal Processing disposed of the capacitors. The soil excavated by Newell was piled next to the excavation area but not removed because the parties disagreed about whose responsibility it was to dispose of the contaminated soil.

In 1992, EPA sampled soil piles at the site and determined that PCB-contaminated soil (exceeding 50 ppm) remained in a pile at the facility. In March, 1995, EPA filed a complaint alleging that the piles of contaminated soil constituted continuing improper disposal of PCBs, and calculated a penalty of $1,345,000 for the period of September 10, 1992 to February 21, 1994.

Respondents argued that they were not liable because disposal constituted a single act that occurred more than five years before the enforcement action was initiated and that their actions did not exacerbate the condition of the site. Specifically, respondents maintained that the complaint was barred by the statute of limitation because the action first accrued in 1985 or earlier, when the capacitors were initially buried and the PCBs released. The EPA maintained that respondents failure to properly dispose of the PCBs-contaminated soil was a continuing violation. **The ALJ held that "[r]espondents had a continuing obligation to comply with the disposal rule at least from September 10,1992, to February 21, 1994."** The ALJ observed that "pursuant to 15 U.S.C. 2615 any person who violates TSCA shall be liable for '[e]ach day such a violation continues' and each day of the continuing violation will be treated as a separate violation in determining the amount of the penalty." He also observed that the EAB has found that "'[g]iven that a continuing violation tolls the running of the five-year limitation period, . . . it is readily apparent that the date when a violation 'first accrues' is not to be confused with the date when a violation 'first occurs.'" *In re* Harmon Electronics, RCRA (3008) Appeal No. 94-4 (EAB March 24, 1997). The ALJ found that respondents argument that disposal only included the initial act of discarding the PCBs was contrary to the broad definition of disposal and the general scheme requiring that PCBs be contained. The ALJ stated that "[i]n general, once PCBs have been taken out of service for disposal, the responsible party must dispose of the PCBs in accordance with the requirements, and 'failure to do so constitutes the violation, and the violation continues as long as the PCBs remain out of service and in a state of improper disposal'" *In re* Standard Scrap Metal Company, 3 EAD 267 (CJO August 2, 1990).

In addition, Houston Metals argued that it neither disposed of PCBs nor excavated contaminated soil, but was only the facility owner. The ALJ disagreed, and found that Houston Metals was not a passive land owner, but rather discovered the lead contamination, contracted to have Newell remove the soil, undertook removal of the contaminated soil, and acquiesced in the improper disposal during the period cited in the complaint.

3. EAB holds it was error for the ALJ to reject a proposed penalty on grounds

that the Region did not offer evidence that substantiated the "findings, assump-tions, and determinations" underlying the PCB Penalty Policy:

In re: Employers Insurance of Wausau and Group Eight Technology, Inc., TSCA Appeal No. 95-6 (Feb. 11, 1997).

U.S. EPA Region V brought an administrative enforcement action against Employers Insurance of Wausau (Wausau) and Group Eight Technology (Group Eight) for violation of the PCB regulations at 40 C.F.R. Part 761. Following a fire at the Group Eight facility, seven transformers were identified at the site, six of which were mineral oil transformers and one of which was a PCB transformer. As part of demolition of the remaining Group Eight facility, arrangements were made to drain and remove the transformers. A contractor drained all seven transformers, commingled the fluids from the transformers, and delivered the waste fluid to an oil recycling facility. The recycling facility became contaminated with PCBs, and ultimately required cleanup under Superfund.

Region V filed a TSCA administrative complaint seeking a penalty of $76,000 against Group Eight for violations of the PCB regulations, and filed a separate administrative complaint against Wausau seeking a penalty of $25,000 for improper disposal of PCBs. In the initial decision, the ALJ concluded that Group Eight had violated the PCB disposal rules, as well as the storage and marking requirements. With regard to Group Eight, the ALJ disregarded the proposed penalty of $76,000, which had been calculated based on EPA's PCB Penalty Policy, and imposed a penalty of $58,000 based on an analysis of the penalty criteria of TSCA § 16(a)(2)(B). The ALJ also dismissed with prejudice the claim against Wausau, finding that Wausau had not been actively involved in the disposal.

Regarding Wausau, the EAB affirmed the initial decision and concluded that Wausau did not engage in PCB disposal either by inviting cost estimates or by agreeing to pay and paying a contractor for services that included PCB disposal. The EAB observed that the claim against Wausau must be analyzed based on Wausau's conduct, not its status as an insurer. It also observed that given the broad regulatory definition of PCB disposal, there must be some reasonable basis for applying the disposal regulations to the conduct that the Region seeks to penalize. The EAB then followed the principles of In re City of Detroit, 3 E.A.D. 514, 522 (CJO 1991), and examined whether Wausau caused or contributed to the cause of the disposal, or owned the source of the PCBs at the time of the discharge. The EAB found that the removal, testing, and return to the site of three non-PCB transformers did not constitute disposal. With regard to the ultimate disposal of the transformer fluid, the EAB found that nothing in the record indicated that Wausua decided to dispose of the transformers, selected the contractor, or exerted influence over the scope, timing or other details of the disposal job. The EAB concluded that asking for a cost estimate and paying the cost of disposal was insufficient to be deemed disposal.

The sole issue regarding Group Eight involved the ALJ's rejection of the Regions's $76,000 proposed penalty and use of the PCB penalty policy, and substitution of a penalty of $58,000. **The EAB held it was error for the ALJ to reject the proposed penalty based on the Region's failure to offer evidence that substantiated the "findings, assumptions, and determinations" underlying the PCB Penalty Policy.** In citing *In re* New Waterbury, Ltd., 5 E.A.D. 529, 538 (EAB 1994), the EAB stated that the burden imposed by 40 C.F.R. § 22.24 requires a complainant to show that it considered each factor identified in TSCA Section 16, and demonstrate that the recommended penalty is supported by an analysis of those factors. The EAB stated that in this case " . . . there is nothing that would have required Region V to substantiate the 'underpinnings' of the PCB Penalty Policy as a matter of course, as a necessary element of its prima facie case against Group Eight." The EAB acknowledged that the ALJ was free not to apply the PCB Penalty Policy, and to formulate an alternative penalty based on the statutory criteria and other relevant requirements, However, the EAB stated that the ALJ was not free to reject the Region's penalty recommendation based on an alleged failure to go forward with sufficient evidence to make out a prima facie case. The EAB agreed with the initial decision that " . . . EPA's adjudicative officers must refrain from treating the PCB Penalty Policy as a rule, . . . " but concluded that where, such as here,

a penalty addresses each of the statutory penalty factors " . . . proof of adherence to a penalty policy can legitimately form part of the complainant's prima facie penalty case." The penalty for Group Eight was vacated and remanded.

C. FIFRA

1. EAB upholds liability for use of a pesticide in a manner inconsistent with its labeling despite fair notice arguments:

In re: Richard Rogness and Presto-X Company, FIFRA Appeal No. 95-3 (July 17, 1997).

Richard Rogness and Presto-X Company appealed a decision holding Presto-X liable for violating § 12(a)(2)(G) of FIFRA, which makes it unlawful to use any registered pesticide in a manner inconsistent with its labeling. Presto-X violated FIFRA by applying a restricted use pesticide product, Phostoxin, to the contents of a moving van that contained household electrical appliances, even though the pesticide product's labeling indicated that electrical equipment "should be" protected or removed prior to treatment. A stipulated penalty of $4,500 was agreed to and imposed by joint motion.

On appeal, Presto-X challenged the Presiding Officers conclusion that the terms "should be protected or removed prior to treatment" imposed a mandatory duty, rather than being merely advisory. Presto-X argued that in other contexts related to pesticide labeling EPA had stated that the term "should" was advisory and, therefore, Presto-X did not have fair notice of its duty under the law in this instance.

After ordering the parties to submit additional briefs on the issue of fair notice, the Environmental Appeals Board (EAB) upheld the determination of liability, albeit based on different grounds than relied upon by the Presiding Officer. In its supplemental brief, EPA argued that Presto-X was liable for violating FIFRA § 12(a)(2)(G) because electrical appliances were not listed on the labeling as items that may be fumigated with Phostoxin. **The EAB agreed, and concluded that Presto-X's application of Phostoxin to these electrical appliances constituted the use of a pesticide in a manner inconsistent with its labeling, in violation of FIFRA § 12(a)(2)(G).** The EAB found that Presto-X was liable regardless of whether it had fair notice of how the term "should" would be interpreted by the Agency (i.e., as mandatory or advisory).

The EAB observed that it is well established that the Board has authority to uphold a finding of liability on grounds different than those relied on the Presiding Officer (see Securities and Exchange Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943)). In addition, the EAB observed that EPA's revised theory of liability was consistent with each complaint. In addition, the Board noted that Presto-X had both notice and the opportunity to respond to each complaint and EPA Region VII's submissions before the Board.

In dicta, the EAB expressed doubts that, had liability been premised on violation of the "should be protected or removed" language, Presto-X had fair notice that such language created a mandatory obligation. Such concern was based on the fact that EPA had stated in contexts related to pesticides and termiticide labeling that the term "should" is advisory. In contrast, Judge McCallum's concurring opinion stated that although he agreed with the decision of the Board, he would have also found liability based on the grounds relied upon by the Presiding Officer (i.e., failure to protect or remove electrical equipment). Judge McCallum reasoned that full and fair notice was provided because the respondent, a licensed and trained commercial applicator, was in a position to able to discern the meaning of the labeling language from the overall context within which he was operating (i.e., three separate warning regarding the potential for corrosion damage).

D. ESA

1. Supreme Court holds that commercial interests are within interests protected by ESA citizen suit provisions:

Bennett v. Spear, 1997 U.S. LEXIS 1921 (Mar. 19, 1997).

Several irrigation districts and ranchers in Oregon challenged a Biological Opinion developed by the U.S. Fish and Wildlife Service (FWS) regarding the management of the Klamath Project, a large Bureau of Land Management (BLM) irrigation project serving northern California and southern Oregon. The

Biological Opinion concluded that the proposed long-term operation of the Klamath Project might affect two endangered species of fish, and that a prudent alternative was to maintain minimum water levels on certain reservoirs. The BLM agreed to operate the Klamath Project in compliance with the Biological Opinion. The Petitioner's objected to the Biological Opinion, claiming violations of the Endangered Species Act (ESA) and the Administrative Procedure Act (APA).

Petitioners' made three claims. The first two claims alleged that the FWS's jeopardy determination violated § 1536 of the ESA. The third claim was that the imposition of minimum water elevations constituted an implicit determination of critical habitat for the suckers, which violated § 4 of ESA because it did not consider the economic impact of the designation. In addition, the plaintiffs claimed that the actions violated APA which prohibits agency actions that are arbitrary, capricious, and abuse of discretion and otherwise not in accordance with law. The district court dismissed the complaint stating that the recreational, aesthetic, and commercial interests of the petitioners did not fall within the zone of interests of ESA. The appellate court affirmed, holding that only plaintiffs "with an interest in the preservation of endangered species" fall within the zone of interests of ESA.

The Supreme Court, reversing the 9th Circuit's decision, held that commercial interests fall within the interests protected under the ESA citizen suit provisions, and that standing under the ESA is not limited to those interested in preserving endangered species. The Supreme Court dismissed the lower court holding with regard to standing and observed that the zone-of-interest test applied unless it was expressly negated by Congress. The Court determined that the language of the ESA citizen suit provision allowed for "any person [to] commence a civil suit" and, thus, the Court found clear Congressional intent to expressly negate the zone-of-interest test. As support for its holding, the Court compared various citizen suit provisions from other environmental legislation and found that the ESA's provision was notably less restrictive. The Court also based its holding on the overall subject matter of the legislation, the environment, and the "obvious purpose" of the provision being to encourage enforcement by "private attorneys general."

The Court dismissed the government's claim that plaintiffs had failed to meet Article III case or controversy requirements for standing. The Court stated that the threshold for proving injury in fact is relatively low at the pleading stage, and found that the plaintiff had met this burden. The Court also held that injuries were "relatively traceable" and "able to be redressed by" the biological opinion because of the "powerful, coercive effect" of the biological opinion on agency action. The Court compared the Incidental Take Statement of biological opinions to permits that it allow agencies to "take" the endangered species if the terms and conditions of the biological opinion are met.

Next the Court reviewed the government's claim that the ESA's citizen suit provision did not authorize judicial review of petitioner's claims because the Secretary had not failed to perform any discretionary duty (16 U.S.C. 1540(g)(1)(C) nor had the Secretary violated ESA (16 U.S.C. 1540(g)(1)(A). With regard to § C, the Court held that the petitioner's claim regarding the Secretary's failure to follow required procedures (taking into consideration the economic impact of specifying critical habitat) was subject to judicial review under §1540(g)(1)(C). The court stated that "[i]t is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to the required procedures of decisionmaking." With regard to § A, the Court held in favor of the government, stating that it was never intended that the effectiveness of the Secretary's implementation or enforcement of ESA was reviewable under this section.

The Court also evaluated whether claims not reviewable under ESA were reviewable under the APA. The Court discarded the Appellate Court's holding that utilized the broad purpose of the act to determine zone-of interest, and instead looked at the specific purpose of §7 of the ESA in determining zone-of-interest. The Court found that the purpose of §7 was, in part, "to prevent uneconomic . . . jeopardy determinations, and held, therefore, that the petitioners claims were within the zone-of-interest.

Lastly, the Court assessed the government's argument that the biological opinion was not a final action. The Court considered two conditions in determining whether a final action had been taken: whether the action marked a "consummation: of the agency decisionmaking process; and whether the

actions was one by which "rights or obligations have been determined" or "legal consequences will flow." The court held that the first condition was clearly met, and determined that the biological opinion, at issue, had direct and appreciable legal consequences.

E. CAA

1. District court holds that failure to obtain preconstruction permit under CAA is not continuing violation where state regulations provide for separate preconstruction and operating permits but holds that even where statute of limitations under 28 U.S.C. §2462 bars civil penalties sought under the CAA, it does not bar equitable relief:

U.S. v. Campbell Soup Co., 1997 U.S. Dist. LEXIS 3211 (E.D. Cal. Mar. 11, 1997).

Campbell Soup Company modified certain can manufacturing machines at its plant in Sacramento sometime between 1983 and 1988. Seven years later, in 1995, the U.S. brought this suit alleging that Campbell failed to comply with local Clean Air Act (CAA) regulations that required a permit before construction or modification of such machines. The following issues were before the court: 1) whether Campbell's failure to obtain preconstruction permits for modifications completed seven years before EPA brought suit were continuing violations sufficient to overcome the five-year statute of limitations (28 U.S.C.§2462); 2) whether EPA's claim for injunctive relief was barred by the five-year statute of limitations; and 3) whether EPA could sue a source for operating under a duly issued State permit alleged to be inconsistent with the State implementation plan (SIP). Campbell moved for summary judgment.

The court first addressed whether Campbell's failure to obtain CAA preconstruction permits for modifications was barred by the statute of limitations. EPA argued that since the CAA imposes a requirement on new or modified major sources to obtain permits for construction and operation, continuous operation of a facility built or modified without a preconstruction permit is a continuing violation. However, the court observed that State air quality regulations, which implemented an EPA-approved State Implementation Plan (SIP), authorized two distinct permits for the modification or alteration of a regulated source, and the operation of that source, respectively. Given this regulatory framework, and the fact that EPA had not alleged that Campbell failed to obtain, or operate in compliance with, an State operating permit, the court found that EPA was barred from seeking civil penalties by the statute of limitations. The court concluded that continuing to operate a machine built or altered without an preconstruction permit did not constitute an ongoing violation. The court indicated that it would not be reasonable to imply the contrary, especially since the State in this case requires a separate operating permit and Campbell was in compliance with that permit.

The second issue addressed whether EPA's claim for injunctive relief was barred by the statute of limitations. EPA maintained that 28 U.S.C. § 2462 set a five-year time limit for penalty actions only and does not address equitable relief. **The court, after acknowledging that there is a split on this issue among district courts, agreed with EPA that 28 U.S.C. § 2462 sets a five-year time limit for penalty actions only.** Nonetheless, the court stated that it would consider the lapse of time when deciding whether or not to grant any injunctive or other equitable relief. Further, it indicated that it would be hard for the government to show that the violation of the preconstruction permit rule has any effect separate and apart from the operation of the machine.

Finally, the court considered whether EPA could sue a source for a SIP violation where the source was operating in compliance with an authorized State permit that had been issued in a manner inconsistent with the SIP (the permit allegedly failed to include appropriate BACT and offset requirements). The government argued that the literal language of § 7413 authorized the Administrator to bring a civil action when there is a violation of either a permit or an implementation plan. Campbell argued that such an interpretation placed them and other industries in an untenable position where compliance with a duly issued permit from a State may subject them to suit by EPA. The court agreed with EPA, and held that, based on the statutory language of § 7413, "there is no categorical bar to the action . . . against Campbell for alleged violations of BACT and the offset requirements, as provided for by the SIP, simply because Campbell

holds a state permit." For the reasons stated, Campbell's motion for summary judgment was granted for the civil penalty claim concerning the modification at issue, but in all other respects the motion was denied.

F. Paperwork Reduction Act

1. EAB holds that PRA is a defense to penalties where no OMB approval number is displayed on requirement to prepare and submit documents to EPA, or where display is inadequate to provide notice of approval:

In re: Lazarus, Inc., 1997 CWA LEXIS 8 (Sept. 30, 1997). See case summary on page 45.

G. Freedom of Information Act

1. Second Circuit holds that production rate data contained in compliance reports and necessary to determine compliance with the CWA pre-treatment standards is effluent data not exempt as confidential business information pursuant to the Freedom of Information Act:

RSR v. Browner, 1997 U.S. Appeals LEXIS 5523 (2nd Cir. Mar. 26, 1997).

RSR Corporation and Revere Smelting and Refining Corporation (collectively RSR) sought review of EPA Regional Counsel's determination that monthly production rate information contained in compliance reports submitted pursuant to the CWA was effluent data and not exempt from disclosure as confidential business information under the Freedom of Information Act (FOIA) 5 U.S.C. § 552(b)(4). The district court granted summary judgment for EPA, the 2nd Circuit affirmed, and this appeal followed. In its appeal, RSR raised four issues, asserting that the district court erred: 1) in failing to review the Regional Counsel's determination de novo; 2) in upholding the Regional Counsel's determination that RSR's Wallkill plant's monthly production data was necessary to determine the plant's pretreatment standards; 3) in finding the RSR's request for discovery was inappropriate; and 4) in upholding the Regional Counsel's determination that the Wallkill plant was a "point source" under the CWA.

RSR operates a secondary lead smelter, pre-treats its wastewater, and discharges the wastewater to a publicly owned treatment works (POTW). EPA's pre-treatment standards express allowable discharges in pounds of pollutant per million pounds of lead produced from smelting. As a result of how the standards are set, the pre-treatment compliance reports contain information regarding the rate at which RSR produces lead and RSR designated this information as confidential. Carpenter Environmental Associates (Carpenter) made a request for RSR's compliance reports and EPA informed RSR of the request and asked for an explanation as to why the records were confidential. RSR objected to the release claiming the rates of production are part of the methods and process for its lead smelting operation and release of the information would provide a competitor with an unfair business advantage over RSR. Carpenter, in response to EPA's request as to why the records should be released, stated that the production rates are effluent data under the CWA, are necessary to determine compliance with the pre-treatment standards, and are therefore exempt from the confidential business information exception to FOIA.

RSR challenged the district court's use of the arbitrary and capricious standard of review and asserted it should have conducted a de novo review. The appeals court noted that the Supreme Court had previously determined that reverse FOIA actions (seeking to prevent disclosure) are not actions under FOIA but rather actions under the Administrative Procedures Act (APA), 5 U.S.C. § 704 et seq. (Chrysler Corp. v. Brown, 441 U.S. 281, 290-94 (1979)). The court also noted that in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971), the Supreme Court had determined that under § 706(2)(F) of the APA, de novo review is authorized when the action is adjudicatory in nature and the agency fact-finding procedures are inadequate. The court noted that although the administrative proceedings leading to the release of the data were adjudicatory, EPA's fact-finding procedures were not shown to be inadequate. The court found that RSR had an obligation to present facts relevant to its position to the agency, that under the regulations EPA had no duty to present Carpenter's arguments supporting the request for the confidential information to RSR, and that RSR failed to make certain arguments on its own behalf. **The court determined that these actions were not due to any inadequacy on the part of EPA's**

procedures and held that the use of the arbitrary and capricious standard of review was appropriate in this case.

With respect to the effluent data, EPA and the district court had found the information was necessary to determine compliance with the CWA pre-treatment standards as the applicable standards are expressed in terms of allowed discharge per unit of production. The court agreed. RSR argued that it was not established that EPA actually used the production rate data. The court disagreed with RSR's argument that even if it was reasonable to conclude that the data was effluent data, the record was insufficient to uphold it and held that the district court made a rational decision when it upheld the EPA's determination that the data RSR marked as confidential was effluent data subject to disclosure under FOIA.

RSR argued that summary judgment was premature in that it had not undertaken discovery. Relying on Dopico v. Goldschmidt, 687 F.2d 644, 654 (2nd Cir. 1982), RSR alleged that the administrative record could not support summary judgment where it contained nothing addressing EPA's actual use of RSR's data. However, the court found that unlike Dopio, where the absence of several "fundamental documents" rendered the administrative record incomplete and agency action premature, RSR did not allege that the administrative record before the court was incomplete or that any part of the record presented to EPA's Regional Counsel had not been put before the court, and held that the administrative record in this case supports the EPA's determination and provides a sufficient basis to evaluate the reasonableness of its decision.

Finally, RSR argued that because it did not add pollutants to navigable waters it was an indirect discharger, not a point source. Further, RSR argued that compliance reports only have to be completed by point sources, meaning that it was exempt from CWA reporting requirements and its compliance reports were not subject to FOIA. The court pointed out by this logic any indirect discharger would thereby be exempt from compliance reporting and compliance with pre-treatment standards, which would effectively nullify the pre-treatment standards. The court found RSR's argument contrary to the plain language of the statute as well as the pretreatment standards and requirements for compliance. **On that basis the court held that RSR was a point source subject to the pre-treatment standards and the reporting requirements of the CWA.**

H. State Law

1. District court holds that violation of CWA can be basis for claim under § 17200 of California's Business and Professions Code, which prohibits unlawful business acts or practices, and enforcement of NPDES permit under state law provision does not require exhaustion of administrative remedies:

Citizens for a Better Environment v. Union Oil of California, No. C94-0712 THE (N.D. Cal. 1997).

Citizens for a Better Environment and others (plaintiffs) brought a citizen's suit under the clean Water Act (CWA) alleging that Union Oil of California's (Unocal) Rodeo facility was discharging selenium into the San Pablo Bay at levels that violated Unocal's NPDES permit limit and, thus, the Clean Water Act (CWA). Defendant Unocal's motion to dismiss was denied by the district court, that denial was affirmed by the Ninth Circuit, and the U.S. Supreme Court denied cert. (See, Union Oil Co. of California v. Citizens for a Better Environment, 177 S. Ct. 789 (1997), Citizens for a Better Environment v. Union Oil Co., 83 F.3d 1111, 1119 (9th Cir. 1996), Citizens for a Better Environment v. Union Oil Co., 861 F. Supp. 889 (N.D. Cal. 1994)). Plaintiff then moved for partial summary judgment on the issue of Unocal's liability for on-going violations of the CWA and California's Unfair Practices Act (§ 17200 of the California Business and Professions Code, which prohibits any unlawful business act or practice) for discharges of selenium in excess of amounts allowed under Unocal's NPDES permit. Unocal did not dispute the violations of the CWA, but opposed plaintiff's motion on the grounds that a violation of § 17200 of the California Business and Professions Code could not be predicated upon a violation of federal law. Unocal also asserted that consideration of remedies was improper at this stage of the proceedings. As a preliminary matter the court undertook a lengthy review of plaintiff's standing to bring the action and determined that plaintiff satisfied all applicable requirements.

The court dismissed defendant's assertion regarding § 17200 as without merit, and held that § 17200 liability can be predicated upon violations of the CWA. The court based its finding in part on Farmers Insurance Exchange v. Superior Court, 2 Cal. 4th 377, 383 (1982), in which the California Supreme Court determined that § 17200 claims may be based on violation of any law. The court also disposed of defendant's assertion that plaintiff must first exhaust its administrative remedies before seeking relief under § 17200. The court rejected defendant's position, noting that there is no administrative process to invoke where plaintiff seeks to enforce defendant's NPDES permit under state law and the court also noted that defendant had failed to identify what administrative process could address plaintiff's injuries.

In granting plaintiff's motion for partial summary judgment the court held that plaintiffs had standing to bring this action; plaintiff's were entitled to summary judgment on the issue of Unocal's liability for violating the CWA and the California Unfair Practices Act; and consideration of the issue of remedies was inappropriate at this time.

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