WATER ENFORCEMENT BULLETIN

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April 1996 - December 1996 Cases in Review

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Disclaimer

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ENFORCEMENT UPDATE

A. CORPS ISSUES REVISED NATIONWIDE PERMITS

On December 13, 1996, the Army Corps of Engineers published in the Federal Register (61 FR 65874) a final notice of 39 nationwide permits, which authorize Section 404 Clean Water Act discharges with minor impacts that comply with specified conditions. Nationwide permits have been a part of the Corps regulatory program since the 1970's, and generally are issued, reissued and/or modified every five years.

For copies of the Corps Nationwide Permits package, call the Wetlands Information toll-free hotline (contractor operated) at 1-800-832-7828. The Corps notice is also accessible at either of the following: http://wetland.usace.mil; http://www.access.gpo.gov/su_docs.

Some of the major changes to the nationwide permits which affect water enforcement issues are:

1. NWP #32 - *Completed Enforcement Actions*

This permit has been expanded to include non-judicial settlement agreements. While it continues to apply to the terms of a final federal court decision, consent decree, or settlement agreement, it now applies to any structure, work or discharge of dredged or fill material, remaining in place, or undertaken for mitigation, restoration, or environmental benefit in compliance with a Corps non-judicial settlement agreement or EPA 309(a) order on consent provided: (1) the unauthorized activity affected no more than 5 acres of nontidal wetlands or 1 acre of tidal wetlands; (2) the settlement agreement provides for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the unauthorized activity; and, (3) the Corps issues a verification letter authorizing the activity subject to the terms and conditions of the permit.

This permit is revoked automatically if the permittee does not comply with the terms of the court decision, consent decree, or judicial/non-judicial settlement agreement or fails to complete the work by the specified completion date. In addition, this permit does not apply to discharges occurring after the date of the decision, decree, or agreement.

2. NWP #26 - *Headwaters and Isolated Waters Discharges*

The coverage of this permit has been reduced significantly. This permit now only allows discharges that cause the loss of less than 3 acres of headwaters or isolated waters provided the discharges do not cause the loss of less than 500 linear feet of stream bed. Under the terms of this permit, if the discharges cause the loss of less than 1/3 acres, the permittee must submit a report to the Corps on the discharges within 30 days of completing the project. For discharges causing the loss of greater than 1/3 acre of waters of the United States, the permittee must notify the Corps to see whether an individual permit is required or whether any special conditions may attach to the permit, including mitigation requirements. If the discharges will cause the loss of more than 3 acres of water of the United States or more than 500 linear feet or stream bed, an individual permit will be required.

Under the previous nationwide permit 26, notification to the Corps was required for discharges over 1 acre. Discharges over 10 acres required an individual permit. There was no requirement that discharges not cause the loss of more than a certain amount of linear feet of stream bed.

This permit will be valid for two years (the other nationwide permits have a term of 5 years). Over the next two years, the Corps will evaluate nationwide permit 26 and the specific types of activities it authorizes, with input from States, Tribes, Federal resource agencies, and the public. This process eventually will lead to the replacement of nationwide permit 26 with permits that focus on specific activities with minimal effects.

3. NWP #29 - *Single Family Housing*

This permit applies to discharges of less than 1/2 acre into non-tidal waters of the United States, for the purpose of the construction or expansion of a single-family home and attendant features provided the permittee notifies the District Engineer and the District Engineer determines that an individual permit is not necessary. The permittee must take all practicable actions to minimize the on-site and off-site impacts of the discharge and the discharges must be part of a single and complete project and can not be used for subdivision development.

B. SUMMARY OF EPA'S CIVIL MONETARY PENALTY INFLATION ADJUSTMENT RULE

The Environmental Protection Agency (EPA) published a new rule in the *Federal Register*—40 CFR Part 19, Adjustment of Civil Penalties for Inflation—implementing the Debt Collection Improvement Act of 1996 (DCIA), on December 31, 1996 (61 FR 69360). At the same time, we also published minor conforming amendments to 40 CFR Part 27, Program Fraud Civil Remedies. The rule took effect 30 days later, on January 30, 1997. The primary purpose of the DCIA is to restore the deterrent effect of civil statutory penalty provisions, which have been eroded by inflation. In particular, the DCIA directed each federal agency to review its respective civil monetary penalty (CMP) provisions and to issue a regulation adjusting them for inflation. The DCIA also requires periodic review and adjustment at least once every 4 years.

This first penalty inflation adjustment was limited by the DCIA to 10 percent above the existing statutory provision's maximum amount. For EPA, this means all the penalty provisions, with the exception of a few new penalty provisions added by the 1996 Safe Drinking Water Act amendments (which did not require any adjustment), have been adjusted upward by 10 percent. After this regulation became effective on January 30, 1997, EPA had the authority to seek higher civil penalties in both the administrative and judicial forums. These increases in the CMPs apply only to violations that occur after the date the increases took effect, on January 30, 1997; that is, violations that occur on or after January 31, 1997.

I. CWA

A. Jurisdictional Scope of the CWA

1. District court upholds EPA's determination of Tribes' inherent regulatory jurisdiction over nonmember lands in setting water quality standards for Reservation where activities by nonmembers affect the health or welfare of the Tribes:

Montana v. U.S. EPA, 1996 U.S. Dist. LEXIS 4753 (D. Mont., Mar. 27, 1996).

In July 1993, the Confederated Salish and Kottenai Tribes submitted an application for treatment-as-state (TAS) status under the CWA §303 for all surface waters within the Flathead Indian Reservation. Montana opposed the application, claiming that the Tribes did not possess inherent civil regulatory authority over lands owned by nonmembers.

Under the CWA §518(e), U.S. EPA is authorized to treat an Indian tribe in the same manner as a state for certain purposes, including the development of water quality standards under §303. Under a 1991 Rule (See 56 Fed. Reg. 64878) allowing for case-by-case determinations, U.S. EPA concluded that in order for a tribe to meet the application requirements of 40 CFR §131.8 the tribe need only assert that there are waters in the reservation used by the tribe or tribal members, the waters are subject to CWA protection, and impairment of those waters by the activities of non-Indians would have a serious and substantial effect on the health and welfare of the tribe. U.S. EPA based this rule on the second exception of the Montana test (See Montana v. U.S., 450 U.S. 544 (1981)) under which tribal authority over nonmember lands is allowed if the conduct by non-Indians on fee lands within its reservation "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." In February 1995, U.S. EPA approved the Tribes' application, finding that Montana did not rebut the presumption created by the Tribes' showing that pollution of surface waters traversing or appurtenant to nonmember land would have serious and substantial impact on the Tribes' health and welfare. In March 1995, the Tribes adopted water quality standards for all surface waters on the Reservation and submitted those standards to U.S. EPA for approval under the CWA §303(c).

Montana and local government plaintiffs hold Montana Pollutant Discharge Elimination System (MPDES) permits for various water and wastewater discharges on the Reservation and claimed that the Tribes' TAS would force plaintiffs to obtain NPDES permits. Plaintiffs claimed that U.S. EPA's approval of the Tribes' TAS improperly subjected them to civil regulatory authority of the Tribes and infringed on Montana's authority under the CWA §401. Further, plaintiffs claimed that U.S. EPA action granting TAS to the Tribes under the CWA §518(e) was unlawful and the Tribes were without authority to rely upon Agency action for the purpose of regulating plaintiffs' activities on the Reservation. U.S. EPA asserted that it retained NPDES permitting authority on the Reservation and that U.S. EPA, and not the State, has always held CWA regulatory jurisdiction over U.S. waters on the Reservation.

The Flathead Joint Board of Control, several Irrigation Districts, and several individual irrigators filed a motion to intervene. Proposed plaintiff-intervenors claimed that U.S. EPA's action was unlawful and that it aggrieved them under 5 USC §702. In this action, the court considered the motion to intervene and cross motions for summary judgment.

On the motion to intervene, defendants argued that proposed plaintiff-intervenors lacked a significantly protectable" interest in this litigation under Rule 24(a) since their sole interest was in irrigation. The court noted that none of the proposed intervenors possessed a NPDES permit or would in any demonstrable way be affected by the setting of water quality standards by the Tribes. Further, none of the intervenors engaged in any activity regulated by the CWA since irrigation is not regulated by the CWA under 33 USC §1362 (14) and 33 USC §1351(g). For these reasons, the court concluded that proposed intervenors were not entitled to intervene as of right. Further, the court stated that "even if proposed intervenors could establish an independent ground of jurisdiction, this court would not be inclined to grant permissive intervention for

the reason that such intervention would likely delay or complicate the resolution of this case."

In reviewing whether U.S. EPA's action was unlawful under 5 USC §706(2)(A), the court considered U.S. EPA's 1991 rule on tribal regulatory jurisdiction over nonmember lands, particularly U.S. EPA's reliance on the Montana test and Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408 (1989). Plaintiffs contended that U.S. EPA's reading of *Montana* and *Brendale* led to an erroneous legal determination that the Tribes possess inherent regulatory jurisdiction over nonmember lands within the Reservation. (See also South Dakota v. Bourland, 508 U.S. 679 (1993)). The court noted U.S. EPA's environmental regulatory policy to avoid administrative complexity such as checker boarding and fractionalizing of reservations into trust and fee lands; this policy has led U.S. EPA in its Indian policy to give tribal governments the lead role in managing programs to protect the reservation and its populace. The court also observed that the Tribes had pointed to activities by nonmembers within the Reservation that caused serious and substantial impacts on the Tribes' water resources. **The court found U.S. EPA properly interpreted *Montana* and *Brendale* in concluding that the Tribes had inherent authority to set water quality standards for all surface waters within the Reservation.** Concluding that U.S. EPA's decision was supported by the administrative record, consistent with U.S. EPA's regulations, and not contrary to law, the court granted defendants' motion for summary judgment.

2. District court holds sufficient evidence of ongoing violation to establish jurisdiction where contaminated groundwater migrated from excavation trench to bay:

United Anglers v. East Bay Municipal Utility, No. C-95-2671 SI (N.D. Cal. Oct. 24, 1996).

Plaintiff United Anglers brought a citizen suit against defendant East Bay Municipal Utility alleging that defendant discharged pollutants from a point source into navigable waters without a NPDES permit. The discharges alleged were associated with a highway construction project that involved excavation of a sewer pipe and the management of ground water from a known contaminated area. Such groundwater was collected and channeled to impoundments as well as recirculated. Both parties moved for summary judgment and challenged the court's subject matter jurisdiction over the citizen suit claims.

With regard to jurisdiction, defendant argued that 1) the court did not have jurisdiction since plaintiff could not prove that defendant's violations continued on or after the date the complaint was filed on July 24, 1995; 2) plaintiff's 60-day notice letter was legally insufficient; and 3) plaintiff's legal claims were moot.

The court held that it had subject matter jurisdiction, rejecting defendant's arguments. First, the court found that the alleged violations did continue beyond the date of plaintiffs complaint as indicated by defendant's own calculations, which showed that the discharge actually continued for at least 77 days after the compliant was filed through migration of contaminated groundwater from the excavation trench to the bay. In addition, the court found that plaintiff's notice letter was reasonably specific in providing all necessary information, including identifying the area and time frame of the violations. Finally, the court found that although plaintiff's claims for injunctive and declaratory relief were moot because the project ended in mid-December 1995, their claims for civil penalties were not. The court cited NRDC v. Texaco, 2 F.3d 493, 503 (3rd Cir. 1993) for the proposition that once an ongoing violation has been identified, "the court is obliged to assess penalties for all proven violations of that parameter."

Defendant also asserted that there had been no addition of pollutants to navigable waters because defendant collected, piped, and redeposited contaminated groundwater. **The court rejected this, holding pursuant to Committee to Save Mokelumne River v. EBMUD, 13 F.3d 305 (9th Cir. 1993), that "defendants cannot escape liability by arguing that pollution was not added because they merely transported historical pollution at the site, and channeled it elsewhere."** Defendant also argued that no pollutants had migrated via groundwater and been discharged into navigable waters. **On this point the court found that neither party had met their burden -- plaintiff**

demonstrating that there was a hydrological connection between the pollution source and the receiving waters and tracing pollutants from their source to the surface waters; and defendant demonstrating the absence of a genuine issue for trial. The court denied both motions for summary judgement.

B. Discharge of Pollutants/Point Sources

1. First Circuit finds violation of NEPA for Forest Service failure to address suggested alternatives and violation of CWA for failure to require NPDES permit for water transfers:

Dubois v. U.S. Department of Agriculture, 102 F.3d 1273 (1st Cir. 1996).

Loon Mountain Recreational Corporation requested a permit from the U.S. Forest Service to expand its ski operations in White Mountain National Forest in Lincoln, New Hampshire. To accomplish this expansion, additional water transfers would be required from nearby water bodies to support increased snow making demands. Under the existing permit, water was withdrawn from Loon Pond, an Outstanding Resource Water (OWR), and two adjacent rivers of lesser quality. The proposed expansion would increase the drawdown in Loon Pond from 4-6 feet to 15-20 feet. In addition, residual waters from the snow making process (including intake waters from the other rivers) were to be discharged into Loon Pond.

As required by NEPA, the Forest Service responded to the request for expansion by developing an EIS, which was followed by a supplemental EIS, and a Revised EIS in response to public comments. The RDEIS included an analysis of five alternatives. The public raised concerns about potential degradation of Loon Pond, as an ORW. It was suggested that additional alternatives be evaluated, including sites outside of the national forest, and the use of artificial water storage ponds. The Forest Service developed a Final EIS that included a 6th alternative that doubled the amount of water needed for snow making, using the same water sources used presently. No limits were set on contaminants that may be present in the transferred waters. Plaintiffs, Dubois (a private citizen) and Restore: the North Woods (private advocacy group), appealed the Record of Decision administratively to no avail. Plaintiffs then filed complaints in U.S. district court arguing 1) violation of NEPA for failure to prepare a supplemental EIS on alterative 6 and also a failure to "rigorously explore and evaluate all reasonable alternatives" of the project, 2) violations of NEPA and Executive Order 11,990 by failing to consider reasonable alternatives raised by the public and the failure to develop mitigation measures, 3) violation of CWA by failing to obtain NPDES permit for withdrawal and discharge of water, and 4) violation of CWA because of violations of state water quality standards.

With regard to NEPA issues, the First Circuit held that the Forest Service did not "rigorously explore all reasonable alternatives," especially related to the feasibility of building an artificial storage pond. The court indicated that the Forest Service had not responded to the related public comments and that this alternative [was] not "so facially implausible that it [could] be dismissed out of hand." The explanation by the defendant as to why this alternative was not viable was viewed by the court as an unacceptable post hoc rationalization. The court discarded Restore's argument that alternatives should have included sites outside of WMNF because of the uniqueness of the skiing experience in WMNF.

The Forest Service failed to convince the court that more specificity was needed in the plaintiff's comments to preserve their claim. The court overturned the district court's decision in favor of the defendants stating that the "purpose of public participation regulation is simply 'to provide notice' to the agency, not to 'present technical or precise scientific or legal challenges.'" (citing Adams v. U.S. EPA, 38 F.3d 43, 53).

The First Circuit viewed alternative 6 as a substantial change from prior proposals in holding that a supplemental EIS should have been developed. Alternative 6 did not fall "within the spectrum of alternatives" nor were the changes viewed as irrelevant to environmental concerns. Using the plain meaning rule, the court held that Executive Order 11,990 did not apply because the proposed expansion of ski operations was not "new construction" as set forth in the order.

With regard to CWA issues, the court held that a NPDES permit was required for the discharge of waters drawn from the East Branch, transported through the snow making system, and discharged into Loon Pond. The court rejected the district court's reasoning that the waters were all part of a "singular entity," and found them to constitute two distinct waters of the United States. It also found that the transfer from one to the other via a pump system constitutes an "addition." The court characterized the transfer as an unnatural movement where "water leaves the domain of nature and is subject to private control rather than purely natural processes" thereby losing its status as waters of the U.S., and, therefore, constituting an addition regardless of the water quality differences.

The court separated statutory NPDES requirements from the state water quality standards issue, and held that § 511(c)(2)(A) of the CWA precludes federal agencies from invoking NEPA to authorize their review of state 401 certification. Therefore, Dubois' challenge to the adequacy of the states 401 certification was not addressed by the court.

2. Eleventh Circuit holds Congress did not intend zero discharge standard for storm water discharges when: compliance is impossible, no NPDES permit covering such discharge exists, discharger in good-faith compliance with local pollution control requirements, and the discharges were minimal:

Hughey v. JMS Development Corp., 78 F.3d 1523 (11th Cir. 1996).

JMS Development Corporation ("JMS") appealed the decision of the U.S. District Court for the Northern District of Georgia finding JMS liable for violating the CWA. Plaintiff Terence Hughey alleged that JMS failed to secure an NPDES permit for the discharge of storm water runoff from the subdivision JMS was developing, which was continuing to discharge storm water resulting in ongoing violations. The district court issued permanent injunctive relief ordering JMS to cease discharge of storm water from its development if such discharge would violate the CWA; fined JMS $8,500 for continuing violations of the Act; and awarded plaintiff $115,000 in attorney fees and costs pursuant to 33 U.S.C. §1365(d). JMS appealed the orders and judgment of the district court.

The 11th Circuit Court reviewed JMS' liability under the CWA for discharging storm water in the absence of a permit. The court questioned whether attaining zero discharge of storm water is what Congress intended in this case and stated that "[I]n interpreting the liability provisions of the CWA we realize that Congress is presumed not to have intended absurd (impossible) results." U.S. v. X-Citement Video, Inc., 115 S.Ct. 464, 468, 130 L.Ed. 2d 372 (1994); Towers v. U.S. (*In re* Pacific-Atlantic Trading Co.), 64 F.3d 1292, 1303 (9th Cir. 1995). The court observed that compliance with zero discharge is factually impossible given that rain falling on the ground will flow into the streams and rivers. Further, the court noted that JMS had obtained a county permit issued pursuant to state authority and that the Georgia statute authorizing counties to regulate storm water runoff was similar to the proposed NPDES general permit. Finally, the court observed that the State of Georgia, which is responsible for developing a state NPDES permit program for storm water runoff, had not yet begun issuing such permits at the time JMS was developing its property. **Based on the above, the court held that Congress did not intend for the zero discharge standard to apply when: 1) compliance with such a standard is factually impossible; 2) an NPDES permit covering such discharge was not available; 3) the discharger was in good-faith compliance with local pollution control requirements that substantially mirrored the proposed NPDES discharge standards; and 4) the discharges were minimal.**

In reviewing the permanent injunction granted by the district court, the appeals court noted that an injunction based on an erroneous conclusion of law is invalid, U.S. v. Jefferson County, 720 F.2d 91, 95 (4th Cir. 1983). The court also stated that Federal Rule of Civil Procedure 65(d) requires standards of specificity in injunctive orders such that the person enjoined is sufficiently informed of what they are called upon to refrain from doing. The court stated that "appellate courts will not countenance injunctions that merely require someone to 'obey the law'." Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 897-98 (5th Cir. 197x), *cert. denied*, 439

U.S. 835, 99 S.Ct. 118, 58 L.Ed. 2d 131 (1974). **The court held that the injunctive relief issued by the district court was improper not only because it was premised on an error of law, but also for the alternative reasons that the injunction lacked the specificity required by Rule 65(d), and compliance with its terms was impossible.** Finally, the court found that the plaintiff was not a prevailing or substantially prevailing party and was not entitled to an award of attorney fees and costs.

3. District court holds that facility which discharges wastewater into a POTW is "point source" subject to CWA reporting and disclosure requirements:

RSR Corp. v. Browner, 924 F. Supp. 504 (S.D.N.Y. 1996).

Revere Smelting & Refining Corporation, a subsidiary of RSR Corporation, is regulated under 40 CFR §421.135(b) for its discharge of pre-treated industrial wastewater into a POTW. Under 40 CFR §403.12(e)(1), Revere submitted semi-annual reports, including monthly production rates which Revere designated confidential [proprietary and competitively sensitive -- within exemption 4 of FOIA, 5 U.S.C. §552(b)(4)]. In response to a FOIA request, U.S. EPA's Regional Counsel concluded that the monthly production data was "effluent data" under 40 CFR §2.302(a)(2)(I)(B), and thus ineligible for confidential treatment under 40 CFR §2.208. Further, U.S. EPA's Regional Counsel concluded that since under 40 CFR §421.135(b) permissible levels of pollutants for secondary lead smelters are expressed in terms of allowable discharge per unit of production or operation, the facility's production data is critical in determining its Pretreatment Standards and its compliance with CWA.

In this "reverse-FOIA" case, plaintiffs appealed U.S. EPA's determination that plaintiffs' monthly production records were not exempt under FOIA and sought an injunction to prevent U.S. EPA from disclosing the records. Plaintiffs claimed: 1) U.S. EPA failed to demonstrate that the production data was effluent data ineligible for confidential treatment; 2) Revere's plant is not a "point source" and thus not subject to CWA's reporting and disclosure requirements under 33 U.S.C. §1318(a)(A) and 40 CFR §2.302(b); 3) disclosure of the monthly production data would violate the Trade Secrets Act; and 4) the voluntary submittal of monthly production data was eligible for confidential treatment. U.S. EPA moved to dismiss the complaint, or in the alternative for summary judgment on the administrative record.

The court first pointed out that the APA dictates the applicable standard of review in an action to prevent disclosure under FOIA. See Chrysler Corp. v. Browner, 441 U.S. 281 (1979). Contrary to plaintiffs' assertions, the court stated that de novo review is warranted only if the agency's determination is adjudicatory in nature and the fact-finding procedures employed were inadequate. The court concluded that, although an agency's decision on FOIA disclosure is adjudicatory in nature, U.S. EPA's fact-finding procedures were adequate in this instance.

Regarding plaintiffs' challenge of U.S. EPA's determination that production data constitutes "effluent data," the court held that U.S. EPA's decision was reasonable. Noting that 40 CFR §421.135(b) expresses the limit in pounds of pollutant per million pounds of lead produced from smelting, the court observed that it was reasonable for U.S. EPA to conclude that the production rate data was "necessary" to determine the amount of pollutants Revere's plant was authorized to discharge. The court rejected Plaintiffs' assertion that U.S. EPA was required to consider whether the production data was used to determine the facility's compliance with the CWA, since 40 CFR §2.302.(a)(2)(I)(B) does not require the data to have been used to determine compliance.

The court rejected plaintiffs' assertion that the treatment of the facility's wastewater at the POTW prior to being discharged into "navigable waters" precluded the facility from being considered a "point source." Based on the language of 33 U.S.C. §1318(a)(A), court cases (See U.S. EPA v. Green Forest, Arkansas, 921 F.2d 1394 (8th Cir. 1990)), and the remedial purposes of the CWA, the court held that a facility that discharges into a POTW is a "point source."

In addressing the Trade Secrets Act, the court observed that plaintiffs failed to allege that the disclosure is "not authorized by law," as required under 18 U.S.C. §1905. The court also concluded that disclosure of the production data is authorized by law since production data is "effluent data," and thus ineligible for confidential treatment under 40 CFR §2.208.

Plaintiffs also claimed that since only semi-annual data was required, plaintiffs' voluntary submittal of monthly production data was eligible for confidential treatment under 40 CFR §2.302(e). Although plaintiffs failed to raise this issue before U.S. EPA, precluding its determination on appeal, the court noted that plaintiffs' decision to submit monthly data instead of semi-annual data meant that the information was submitted in fulfillment of the semi-annual requirement and, thus, was not submitted voluntarily.

4. District court holds operation of shooting range constitutes "point source" and that spent shot and target fragments conveyed into U.S. waters constitute "pollutants":

Long Island Soundkeeper Fund v. New York Athletic Club, 1996 U.S. Dist. LEXIS 3383 (S.D.N.Y. Mar. 20, 1996).

Long Island Soundkeeper Fund and New York Coastal Fishermen's Ass'n brought four claims under RCRA for alleged violations of statutory and regulatory prohibitions on solid waste disposal and two claims under CWA for alleged discharge of pollutants from a point source into navigable waters without a NPDES permit and discharge of dredged and fill materials into navigable waters without a U.S. Army Corps of Engineers (USACE) permit. For over sixty years, defendant has operated a trap shooting range facing Long Island Sound. Prior to 1994, lead shot was used at defendant's range. Since then, steel shot has been used. Plaintiffs moved for partial summary judgment on their claim that defendant violated CWA requirements for discharge of pollutants from point sources into navigable waters. Defendant moved for summary judgment on the basis of: 1) plaintiffs' failure to provide adequate notice of their intent to sue under RCRA and CWA; 2) lack of individual and organizational standing; 3) plaintiffs' inability to bring a citizen suit under RCRA; 4) inadequacy of plaintiffs' claim that defendant's actions result in disposal of solid waste and open dumping under RCRA; 5) inadequacy of plaintiffs' claim that defendant is required to obtain a dredge and fill permit under CWA; and 6) insufficiency of plaintiffs' claim that an NPDES permit is required under CWA. Defendant's motion was granted in part and denied in part, while plaintiffs' motion was granted.

On the notice issue, although plaintiff Fishermen filed timely notice, defendant argued that plaintiff Soundkeeper should be dismissed for failing to send its own notice of intent to sue. **The court held that notice by a "single plaintiff in a suit brought by multiple plaintiffs constitutes 'substantial compliance' with the notice requirements of RCRA and CWA."** Defendant further challenged plaintiffs' lack of specificity under 40 CFR §135(a) as to defendant's alleged violation of NPDES permit requirements. Observing that the regulation does not state the level of detail required in a notice of intent to sue, the court concluded that plaintiff Fishermen's letter constituted adequate notice where plaintiff stated that defendant's discharge of lead shot constitutes a "point source" under CWA §502(14) and that the discharge of lead and targets into the Lower Harbor violates CWA §301(a).

In rejecting Defendant's assertion that Plaintiffs' injuries were "mere conjecture" and plaintiffs therefore lacked standing, the court determined that plaintiffs' affidavits identified members of each group who regularly used the Lower Harbor for recreational purposes, who intended to continue to use it, and who attested to aesthetic injury caused by defendant's activities. The court also rejected defendant's claim that plaintiffs failed to demonstrate that their claims fall within the "zone of interests" protected by RCRA, finding that the "zone of interests" test is not constitutionally mandated and that Congress has extended standing under RCRA §6972(a)(1)(A) to the limits allowed by the Constitution. The court concluded plaintiffs met constitutional requirements for standing for their RCRA claims and denied defendant's motion on plaintiffs' lack of standing.

As to plaintiffs' CWA claims, the court granted defendant's motion to dismiss plaintiffs' claim that

defendant failed to obtain a dredge and fill permit in violation of CWA §1344. **The court concluded that defendant's activities were not oriented towards changing the bottom elevation, nor did they result in removal of anything from navigable waters of the United States.** Further, plaintiffs did not provide any support to the position that defendant's activities generate "dredge" or "fill" material within the meaning of 33 CFR §323.2(c) and (e).

As to the second CWA claim, the court granted plaintiffs' motion for partial summary judgment as to defendant's failure to obtain a NPDES permit. **The court ruled that defendant's trap shooting range "which is designed to concentrate shooting activity from a few specific points and systematically direct it in a single direction--over Long Island Sound--is an identifiable source from which spent shot and target fragments are conveyed into navigable waters of the United States."** On the issue of whether spent shot and target fragments constitute "pollutants," the court noted that the CWA does not require any showing that a pollutant has caused environmental damage to enforce the NPDES permitting requirement (see City of Milwaukee v. Illinois, 451 U.S. 304 (1981)). The court also observed the Second Circuit's decision in Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1313 (2d Cir. 1993) that spent ammunition from fired guns, whether lead or steel, which lands in navigable waters constitutes a "pollutant." **The court held that shot and target debris generated by defendant's operation of a trap shooting range constituted "pollutants" under 33 U.S.C. §1362(a).**

C. State Water Quality Standards

1. Ninth circuit upholds EPA's approval of Isleta Pueblo Indian Reservation's water quality standards, which are more stringent than the State of New Mexico's standards:

City of Albuquerque v. Browner, 97 F.3d 415 (10th Cir. 1996).

Plaintiff City of Albuquerque operates a waste treatment facility which discharges into the Rio Grande River five miles north of Isleta Pueblo Indian Reservation. EPA recognized Isleta Pueblo as a state for purposes of the CWA on October 12, 1992. Isleta Pueblo adopted water quality standards for Rio Grande water flowing through the tribal reservation and EPA approved these standards on December 24, 1992. Isleta Pueblo's water quality standards are more stringent than the State of New Mexico's standards. As EPA was revising Albuquerque's NPDES permit to meet Isleta Pueblo's water quality standards, the City challenged EPA's approval of those standards on numerous grounds. The district court denied Albuquerque's request for a temporary restraining order and a preliminary injunction. The district court then denied Albuquerque's motion for summary judgment while granting EPA's motion for summary judgment.

On April 15, 1994, Albuquerque, EPA, the State of New Mexico, and Isleta Pueblo agreed to a new four-year NPDES permit for Albuquerque pursuant to a stipulation and agreement. The stipulation and agreement did not mention the claims of this suit or that Isleta Pueblo's revised water quality standards were in effect.

Albuquerque filed a motion to vacate the district court's judgment on the grounds of mootness and remand with instructions to dismiss its complaint without prejudice. Albuquerque alleged: (1) the district court's opinion and order should be vacated because the case was mooted by an agreement negotiated by the parties; (2) EPA erroneously interpreted § 1377 of the CWA as providing Isleta Pueblo the authority to adopt water quality standards that are more stringent than required by the statute, and allowing Isleta Pueblo's standards to be applied to upstream permit users; (3) EPA failed to comply with the APA's notice and comment requirements in approving Isleta Pueblo's standards under the CWA; (4) EPA's approval of Isleta Pueblo's standards was unsupported by a rational basis; (5) EPA's dispute resolution mechanism failed to meet the statutory requirements § 1377(e) of the CWA; (6) EPA's approval of Isleta Pueblo's ceremonial use designation offended the Establishment Clause of the First Amendment; and (7) Isleta Pueblo's standards approved by EPA were so vague as to deprive Albuquerque of due process.

The Tenth Circuit found that the case was not moot, since the stipulation and agreement settled issues concerning only EPA's issuance of Albuquerque's NPDES permit. The court reasoned that because Albuquerque challenged EPA's regulations and approval of water quality standards under the CWA, not the issuance of an NPDES permit, a "live" controversy still existed. The court observed that the agreement was not a final settlement of all claims brought in the City's suit, and that even if the case were moot the court would not vacate because dismissing the suit could unfairly expose EPA to the possibility of renewed actions by the Plaintiff.

With regard to the stringency of the water quality standards, the court followed *Chevron v. NRDC*, 467 U.S. 837 (1984) in finding that EPA's construction, allowing tribes to set standards more stringent than the state's, was reasonable and permissible because it was in accord with powers inherent in Indian tribal sovereignty. In addition, the court found that under §§ 1311, 1341, 1342, and 1377, EPA had the authority to require upstream NPDES dischargers, such as Albuquerque, to comply with downstream tribal standards.

The court found there was full opportunity for notice, comment, and hearing both for adoption of the Isleta standards (conducted by the Pueblo) and for issuance of the City's NPDES permit (conducted by EPA). It also held that Albuquerque failed to demonstrate that EPA's approval of Isleta Pueblo's standards lacked a rational basis.

The court also rejected Albuquerque's argument that EPA's dispute resolution mechanism failed to meet the statutory requirement because it deprived interested third parties from initiating the process. The court observed that § 1377(e) gives EPA broad discretion in establishing the dispute resolution process. EPA regulations permit only states and tribes to initiate the resolution process because they are the entities authorized to revise or modify the water quality standards in dispute. The court found that EPA's decision to use mediation and non-binding arbitration was consistent with the CWA, and EPA's establishment of a dispute resolution mechanism that relies on tribal and state cooperation was a reasonable interpretation of § 1377(e).

The court further rejected Albuquerque's claim that EPA's approval of Isleta Pueblo's ceremonial use designation offends the Establishment Clause of the First Amendment. The court found that EPA's approval of the ceremonial use designation served a clear secular purpose: promoting the goals of the CWA. EPA was not advancing or promoting religion through its own actions. Similarly, the court declared Albuquerque's claim of vagueness meritless. EPA's regulations allow water quality standards, such as Isleta Pueblo's, to be narrative descriptions. 40 CFR § 131.11 (1995). These standards did not require any particular conduct by Albuquerque. Rather, they put the plaintiff on notice that its NPDES permit might contain the specific standards to be satisfied. Since the regulated party had a means of obtaining clarification as to what conduct was required, the standards were not unconstitutionally vague.

The Tenth Circuit affirmed the district court's judgment and upheld EPA's approval of Isleta Pueblo's water quality standards.

2. District court holds U.S. EPA has mandatory duty to promulgate antidegradation policy where State policy does not comply with CWA requirements and U.S. EPA violated duty by not "promptly" promulgating standard for Pennsylvania:

Raymond Proffitt Found. v. U.S. EPA, 930 F. Supp. 1088 (E.D.Pa. Apr. 16, 1996).

Plaintiff brought an action against U.S. EPA for its failure to "promptly prepare and publish" an antidegradation policy for Pennsylvania consistent with the CWA, 40 CFR §131.12. Pennsylvania first adopted a water quality standard, including an antidegradation policy, in 1971. Although this policy was approved by U.S. EPA in 1973, after several years it was found to be deficient. U.S. EPA notified the State from 1989 to 1994 that its antidegradation policy failed to comply with the CWA, 33 U.S.C. §1313(d)(4)(B); 40 CFR §131.6(d). Following submittal of the State's 1994 Triennial Review U.S. EPA again notified the State that its antidegradation policy failed to comply with the CWA, 40 CFR §131.12, governing Tier 1, Tier 2, and Tier 3 waters. In March 1995, Pennsylvania notified U.S. EPA of its

plans to enter into a regulatory-negotiation process (with stakeholders other than U.S. EPA) for reviewing all policy and regulatory aspects of its antidegradation program. The reg-neg process was scheduled for June 1995 - March. Pennsylvania had not adopted a standard in compliance with the CWA at the time of this decision, and U.S. EPA had not commenced work on promulgating a standard for Pennsylvania.

Count I alleged that U.S. EPA's failure to draft a policy violated a nondiscretionary duty under 33 U.S.C. §1313(c)(4)(A), while Count II alleged violation of a nondiscretionary duty under 33 U.S.C. §1313(c)(4)(B). Plaintiff also sought recovery under the APA, 5 U.S.C. §§701-706. The parties filed cross motions for summary judgment.

In examining the language and purpose of the CWA as to Counts I and II, the court concluded that 33 U.S.C. §1313(c)(3) and 33 U.S.C. §1313(c)(4) impose a mandatory, nondiscretionary duty on the Administrator to "promptly prepare and publish proposed regulations setting forth a revised or new water quality standard." The court stated that "[w]hatever the state's program is, and no matter how well-meaning its reg-neg procedure is concerning the time and course it is expected to take, it is neither an exemption or an excuse to forestall the U.S. EPA in carrying out its §1313(c) duty."

The court rejected the reasoning of Defenders of Wildlife v. Browner, 888 F. Supp. 1005 (D. Ariz. 1995) in which the court held that, for citizen-suit purposes, a nondiscretionary duty is imposed only when a statutory provision sets bright-line, date-specific deadlines for specified action. First, the court pointed out that the two categories of statutory deadlines, inferable deadlines versus bright-line/date-certain deadlines, created by Sierra Club v. Thomas, 264 U.S. App. D.C. 203 (D.C. Cir. 1987) were developed in response to the bifurcated jurisdictional scheme of the Clean Air Act. Observing that a citizen suit alleging unreasonable delay under §1313 can only be brought in the district court under 33 U.S.C. §1365(a)(2), the court concluded that applying the *Sierra Club* decision to this case would lead to a result inconsistent with the CWA's goals. For this reason, the court concluded that "allegations of all mandatory duties, including violations of duties of timeliness based on readily ascertainable inferences, may be the subject of a citizen-suit under §1365(a)(2)." Further, the court noted that the Third Circuit has not followed the holding in *Sierra Club*.

The court then concluded that the Administrator violated the mandatory duty imposed under §1313(c)(4) by not "promptly" promulgating a standard. Pennsylvania failed to make the necessary changes within 90 days of notification from the Administrator of the deficiencies in its standard. **Without defining "promptly," the court stated that a 19-month delay by U.S. EPA was unreasonable, and thus U.S. EPA must "now proceed to promulgate a federal regulation setting forth a water quality standard for Pennsylvania. That is its duty!"**

As to Plaintiff's APA claims, the court held in favor of Plaintiff on Count III that U.S. EPA's failure to promulgate a standard was agency action "unlawfully withheld or unreasonably delayed" in violation of 5 U.S.C. §706(1). The court relied on the four factors set out *In re* International Chemical Workers Union, 958 F.2d 1144 (D.C. Cir. 1992) for determining "unreasonable delay." The court concluded that U.S. EPA's 19-month delay was unreasonable in light of the 60- and 90-day deadlines and the triennial review procedure set out in §1313(c). Further, the court determined the environmental effects of this delay to be significant. Finally, the court concluded that the administrative record did not support U.S. EPA's claims of inconvenience and practical difficulty in promulgating a standard.

The court concluded, as to Count IV, that U.S. EPA failed to "act in accordance with the law" under 5 U.S.C. §706(2)(A) by deciding not to promulgate a standard for Pennsylvania. The court noted again that a State's failure to develop a water quality standard under 33 U.S.C. §1313(c) and 40 CFR §131.22(a) once the State has received disapproval of its standard by U.S. EPA imposes a mandatory duty on U.S. EPA to promulgate a standard. The court granted Proffitt's notion for summary judgment on courts I, III, and IV.

3. District court orders EPA to develop TMDLs for Georgia and specifies development process:

Sierra Club v. Hankinson, 939 F. Supp. 872 (N.D. Ga. 1996).

On March 26, 1996, the court granted plaintiff's motion for summary judgement as to EPA's failure to prepare Total Daily Maximum Loads (TMDLs) for Georgia. This order addressed the appropriate remedy for defendant's TMDL violations.

Key components of the order include the following:

- U.S. EPA shall establish TMDL's for all Water Quality Limited Segments (WQLS's) identified in Georgia's existing and future § 303(d) lists for all pollutants of concern on each WQLS.
- The TMDL's shall include daily loads and shall account for seasonal variations.
- The development schedule specified allows the option of coordinating EPA-derived TMDLs with Georgia's River Basin Management Plan (RBMP).
- If EPA does not follow the river basin approach of the RBMP, TMDL's must be developed on a schedule of no less than 20 percent of the total number of TMDL's per year for five years so that all TMDL's are established within 5 years of this Order.
- EPA shall implement TMDL's through the NPDES program, including 1) modifying, revoking and reissuing, or terminating permits as necessary to implement TMDL's within one year of TMDL establishment; and 2) complying with 40 C.F.R. 122.4(i) regarding the prohibition on new sources or new dischargers that cause or contribute to a violation of water quality standards.
- EPA shall take TMDL's into account in its review of Georgia's NPDES program.
- If Georgia fails to implement TMDL's through the NPDES process, or EPA is unable to implement TMDL's due to State action or inaction, EPA shall review the State NPDES program to incorporate the TMDL process. If the State refuses to implement TMDL's through the State NPDES program, EPA shall withdraw certification under CWA § 402(c)(3).
- EPA must submit an annual progress report to plaintiffs and the court.

The court also awarded attorneys fees and costs to plaintiffs.

4. District court leaves intact EPA's National Toxic Rule, and remands back to EPA several comments from Industry that were not adequately addressed:

American Forest & Paper Ass'n v. EPA, 1996 U.S. Dist. Lexis 13230 (D.D.C. Sept. 4, 1996).

On November 19, 1991 EPA published a proposed rule setting water quality criteria and implementation procedures for ninety toxic pollutants. 56 Fed. Reg. 58,420. The National Toxics Rule (NTR) is binding only on those states that have not issued their own water quality criteria for toxic pollutants. EPA accepted public comments and the American Forest and Paper Association, Inc., (AFPA) filed more than 800 pages of comments including the following four primary topics: 1) that the period for comment was too short, 2) that EPA failed to explain its recalculation of water quality criteria recommendations, 3) that pollution exposure rates (water intake and fish consumption) are substantially overestimated, and 4) that the scientific evidence relied on to set dioxin criteria was outdated. On December 22, 1992, EPA promulgated the Final NTR (57 Fed. Reg. 60,848), with no changes made to the dioxin or pentachlorophenol criteria.

In its complaint, AFPA objected to the informal rulemaking as arbitrary and capricious in violation of the APA. Specifically, AFPA alleged that EPA promulgated water quality criteria for 2,3,7,8-tetrachlorodibenzo-p-dioxin [dioxin] and pentachlorophenol ["PeCP"]: 1) based on inaccurate estimates of pollution exposure, 2) based on discredited scientific evidence ; 3) without adequately explaining the derivation of criteria, and 4) without responding to certain comments filed by AFPA during rulemaking.

The court held that EPA acted reasonably in promulgating the water quality criteria, except in its failure to address to AFPA's comments regarding 1) water intake assumptions, and 2) EPA's assumption that all fish consumed is contaminated at the criteria level. The court did

not vacate the criteria pending EPA's response on remand.

5. State Certification

a. District Court sets aside EPA's approval of Idaho's 25 year schedule to complete TMDLs as arbitrary and capricious, an abuse of discretion and contrary to law:

Idaho Sportsmen's Coalition v. Browner, 1996 U.S. Dist. Lexis 16232 (W. D. Wash. Sept. 26, 1996).

Idaho submitted to EPA lists of water-quality limited segments (WQLSs) in 1989 and 1992. The 1992 list, which included 36 segments, was approved by EPA. Plaintiffs filed a citizen suit in 1994, and in a 1994 court order, the court determined that EPA's approval of the 1992 list was contrary to law. EPA was directed to promulgate a WQLS list for Idaho, and in response, compiled a list of 962 WQLS. In 1995, the court ordered EPA to determine, with Idaho, a reasonable schedule for the development of TMDLs. In response, EPA approved Idaho's proposed schedule for completion of TMDLs over a 25 year period. The proposed schedule includes short-term goals for high priority waters, with 43 TMDLs to be developed by the year 1999, and an additional 12 TMDLs to be submitted every two years, beginning in 1997. Other WQLS would be monitored and assessed over time.

EPA moved for dismissal of the case, contending that it had complied with the 1995 court order by approving a "complete and reasonable" schedule for the development of TMDLs. Plaintiffs opposed the motion, contending that the proposed time period for completion of the TMDLS was too long (suggesting instead a year 2000 completion date), and that the proposed schedule did not meet either the requirements of the court order or the CWA.

The court found several fatal deficiencies with EPA's proposed schedule including: 1) its extreme slowness and 2) its failure to include a schedule for completing all 962 WQLS. The court disagreed with EPA's argument that developing TMDLs would be premature because of the lack of monitoring data. Congress provided that TMDLs incorporate "a margin of safety which takes into account any lack of knowledge," 33 U.S.C. § 1313(d)(1)(C), which the court interpreted as "showing that a lack of precise information must not be a pretext for delay." *Idaho Coalition*, at *11. The court disagreed with EPA's interpretation of the flexibility in establishing short and long term schedule for TMDLs stated in Alaska Center for the Environment v. Reilly, 796 F. Supp. 1374, 1380 (W.D. Wash. 1992), aff'd, 20 F.3d 981 (9th Cir. 1994). The district court, in this case, interpreted short and long term as being months and years, but not decades.

The court disagreed with EPA's assumption that not all of the 962 TMDLs would need to be scheduled. Even if the list of WQLS may be amended over time to reflect more recent monitoring data, the court held that the CWA required that a schedule for TMDLs be developed for all WQLS.

The court dismissed EPA's motion for dismissal, and granted the plaintiff's cross-motion for partial summary judgment and set aside EPA's approval of Idaho's proposal for TMDL development as arbitrary and capricious, an abuse of discretion and contrary to the law. The court dismissed without prejudice the plaintiff's motion for a ruling that a "constructive submission" of no TMDLs had occurred, and instead remanded to EPA with direction to work with Idaho to establish within 6 months a reasonable schedule for the development of TMDLs for all WQLSs. The court suggested that a time period of five years would be reasonable.

b. District court holds pollution caused by cattle grazing constitutes a discharge into navigable waters for purposes of CWA § 401 and state certification was required before the USFS issued a cattle grazing permit on the Camp Creek allotment:

Oregon Natural Desert Association v. U.S. Forest Service, 904 F. Supp. 1534 (D. Or. 1996).

A collection of environmental groups brought a citizen suit under the Clean Water act (CWA) and the Administrative Procedures Act (APA) against Jack Thomas as Chief of the U.S. Forest Service (USFS) seeking a declaratory judgement establishing that applicants for federal grazing

permits must receive, as a precondition to issuance of the permit, certification from the state in which grazing is to occur that the grazing activity will not adversely impact state water quality standards (i.e., CWA § 401 certification).

After rejecting defendants claims that plaintiffs and plaintiff intervenors lack standing, the right to judicial review to enforce water quality standards, and jurisdiction, the court addressed the central issue of whether § 401 of the CWA applies to impacts resulting from cattle grazing under permit by the USFS. The court observed that § 401 requires that before a federal permit may be issued for "any activity ... which may result in any discharge into navigable waters," a state certificate must be obtained. It then stated the primary issue to be whether the reference to "any discharge into navigable waters" under § 410 is limited to point sources. **Upon examining the relevant statutory definitions and applicable case law, the court concluded that the plain meaning of the term "discharge" is not limited to point sources, or to non-point sources with conveyances, as USFS had argued.** The court also rejected the Forest Service's claim that the it was entitled to deference in interpreting § 401, finding that EPA, not the USFS, administers the CWA.

The court then reviewed relevant legislative history of the Water Quality Improvement Act of 1970, which added what is now § 401, and concluded that Congress intended to regulate all polluting activities through the use of water quality standards. The court stated that "even though non-point sources are not mentioned in the 1972 amendments, the court cannot construe that Congress intended to preclude their application to § 401." (See, Northwest Environmental Advocates v. City of Portland, 56 F.3d 979, 986 (9th Cir. 1995). **The court then held "that § 401 applies to all federally permitted activities that may result in a discharge, including discharges from non-point sources." The court went on to find that pollution caused by cattle grazing constitutes a discharge into navigable waters for purposes of § 401 and, therefore, state certification was required before the USFS issued a cattle grazing permit on the Camp Creek allotment.**

The court granted plaintiffs motion for summary judgement, declaratory judgement, and an injunction, and denied all other motions.

c. EAB rules NPDES permit conditions implementing U.S. EPA's Combined Sewer Overflow Policy are not "attributable to State certification" where the certification letter allows the possibility that such conditions could be made less stringent and still comply with state water quality standards:

In re District of Columbia, Department of Public Works, 1996 NPDES LEXIS 3 (May 3, 1996).

The District of Columbia's Department of Public Works (Department) brought this petition requesting review of denial of its request for an evidentiary hearing by the Regional Administrator for Region III. On July 25, 1995, Region III issued Permit Amendment No. 2 modifying a NPDES permit issued to the Department for pollutant discharges from the Blue Plains Waste Water Treatment System. Permit Amendment No. 2 added, in addition to other changes, combined sewer overflow (CSO) conditions consistent with U.S. EPA's 1994 Combined Sewer Overflow Policy (U.S. EPA 830-8-94-001). On August 28, 1995, the Department requested an evidentiary hearing on various aspects of Permit Amendment No. 2. Deciding that the CSO conditions were "attributable to state certification" under 40 CFR §124.53 and therefore not appealable to the Agency under 40 CFR §124.55(e), the Regional Administrator denied the Department's evidentiary hearing request relating to those conditions. The Department appealed the Regional Administrator's decision with respect to all six permit conditions intended to implement the 1994 CSO policy. Three of the conditions which the Region chose to delete were not an issue on appeal.

The Environmental Appeals Board (EAB) agreed with the Department's argument that the CSO conditions were not "attributable to state certification" and remanded the challenged conditions to the Regional Administrator for reconsideration. In reviewing state certification requirements under the §401(a)(1) of the CWA (33

U.S.C. §1341), the EAB admitted that the wording of the certification letter issued by the District of Columbia's Department of Consumer and Regulatory Affairs was ambiguous. It was unclear as to whether the certification letter's reference to "limitations on the discharge" related to every form of limitation identified in Permit Amendment No. 2 or only those that directly and numerically limit the allowable level of pollutants in the discharge. Although none of the CSO conditions at issue were numeric limitations, the Region argued that the term "limitations on the discharge" equaled the broader term of "effluent limitations," which is not restricted to numeric standards. The EAB rejected the Region's reading and interpreted the letter within the context of the draft permit amendment, which only used the term "discharge limitations" to describe numerical limits on the concentration or amount of pollutants. The EAB concluded that this reading leaves open the possibility that those conditions could be made less stringent and still comply with State water quality requirements. **In light of the ambiguities, the EAB ruled that "[u]nder such circumstances, the Regional Administrator does not have a sufficient basis for concluding that a permit condition is 'attributable to State certification' and thus may not decline to consider an evidentiary hearing request relating to such a condition on that basis."**

d. EAB agrees to consider whether state statute that delays the effective date of more stringent effluent limits is of a type that could authorize a schedule of compliance and whether lack of U.S. EPA approval of the statute precludes the Region from considering it for the purpose of a compliance schedule:

In re City of Ames, 1996 NPDES LEXIS 1 (April 4, 1996)

In an appeal seeking review of the denial of its evidentiary hearing request by the Regional Administrator of the U.S. EPA Region VII, the City of Ames, Iowa raised a number of issues, which the court distilled to two main points. First, the City argued that the Regional Administrator is required to give effect to Iowa Code §455B.173(3), (the "moratorium statute") which provides that newly constructed POTWs shall not be required to comply with effluent limitations more stringent than those contained in the original permit for a period of 10 to 12 years. Specifically, the City contended that it was entitled to inclusion of a permit provision allowing the City to delay compliance with effluent limitations for ammonia nitrogen and CBOD5 until 1998. Second, the City maintained that 40 CFR §122.45(d) requires, that "unless impracticable," discharge limits for POTWs must be stated as weekly and monthly averages rather than as maximum daily limits. The Region argued that the Iowa statute fails to comply with federal law and does not authorize the City to postpone compliance.

Regarding the issue of delaying compliance with effluent limitations for ammonia nitrogen and CBOD5, the EAB observed that the Region can include a schedule of compliance in the City's permit without contravening the CWA only if the State's water quality program authorizes such a provision. *In re* Star-Kist Caribe, Inc. 3 E.A.D. 172, 175 (Adm'r. 1990), *modification denied*, 4 E.A.D. 33 (EAB 1992). **The EAB then granted review of the City's appeal, and directed the parties to brief the issues of whether the moratorium statute is of a type that could lay the necessary groundwork for authorizing a schedule of compliance, as contemplated in *Star-Kist*, and whether the fact that the statute was never approved by U.S. EPA precludes the region from considering it for the purpose of a compliance schedule.**

On the issue of the use of daily maximum limits for ammonia nitrogen and CBOD5, the court remanded the matter to the Regional Administrator to determine whether weekly average limits for those two pollutants are impractical for the purposes of 40 CFR 122.45(d). The court found that the Regional Administrator had erroneously believed that the limits were a condition of the State's certification and thereby concluded the Agency did not have authority to review the issue. Thus, the court found it was not certain that the Administrator gave the issue the full consideration necessary to support a limit in the absence of state certification. The court also found that the Administrator had misread 40 CFR §122.45(d) in that without first determining that a weekly average is impracticable he decided that the inclusion of the maximum daily limit was not a

"material" issue and that the maximum daily limit reflected the same level of stringency as weekly averages. **The court held that (1) the Regional Administrator erroneously relied upon State certification in denying a hearing on the permit's maximum daily limits for ammonia nitrogen and CBOD5; and (2) the Regional Administrator appears to have misread §122.45(d) to mean that maximum daily limits may be included in the permits even if the Region can insure compliance with Iowa's water quality standards by including weekly average limits.**

e. EAB remands issue to determine whether City is fundamentally in compliance or may be entitled to compliance schedule:

In re City of Ames, Iowa, 1996 NPDES LEXIS 4 (June 4, 1996)

This actions involves issues remanded by the EAB *In re* City of Ames, NPDES Appeal No. 94-6, Apr. 4, 1996. Specifically, it involves the question of whether the Iowa "moratorium statute" (which provides that new constructed POTWs shall not be required to comply with effluent limits more stringent than those contained in the original permit for a period of 10 to 12 years) can provide the basis for authorizing a schedule of compliance regarding limits for ammonia nitrogen and CBOD5 as part of the City of Ames wastewater treatment plant's NPDES permit. In addition, it considers whether the Region was precluded from giving effect to the moratorium statute because the statute was never approved by EPA.

The Region maintained that the Board need not decide either issue, first, because Iowa law, independent of the moratorium statute, specifically authorizes schedules of compliance; and second, because EPA has approved those provisions of state law that authorize schedules of compliance. The EAB accepted these arguments, and found that this mooted the moratorium-related issues.

The EAB then turned to the issue of whether Region properly denied the City's request for an evidentiary hearing on the issue of need for a compliance schedule, or, more specifically, whether the immediate imposition of the daily minimum limits for ammonia nitrogen and CBOD5 would create a risk of non-compliance. The Region maintained that the City was already fundamentally in compliance and, therefore, since compliance was "possible," any compliance schedule would violate 40 CFR 122.47(a)(1) by not requiring compliance as soon as possible. The City countered that there was an immediate risk of non-compliance and had been two prior violations. **The EAB found that since it could not conclude as a matter of law that the City was "fundamentally incompliance" with the permit's ammonia nitrogen and CBOD5 limits, or that no compliance schedule can be included for one or both of these limits, the issue of whether the City is able to comply with those limits is an issue of fact that should be decided by the region. The EAB remanded the issue accordingly.**

D. Section 404/Wetlands

1. Eleventh Circuit holds decision of U.S. EPA Administrator not to overrule the decision of the USACE is discretionary:

Preserve Endangered Areas of Cobb's History v. U.S. Army Corps of Engineers, 1996 U.S. App. LEXIS 16634 (11th Cir. July 11, 1996).

Plaintiffs challenged a proposed highway construction project, alleging violations of the CWA, NEPA, ESA, and the National Historic Preservation Act. The district court dismissed certain claims and granted defendants summary judgment on the remaining claims. Plaintiffs appealed. The Eleventh Circuit affirmed.

The court held that the U.S. Army Corps of Engineers (USACE) did not unlawfully segment the construction project and did not arbitrarily determine that no environmental impact statement was required. The court found the USACE considered each of the factors used under federal highway guidelines to determine what constitutes a stand-alone project (23 CFR §771.111(f)), and concluded that with regard to the most important of these -- that the project have independent utility -- the USACE based its decision on the well supported position of the county. The court also found that USACE did consider the project's possible impact on protected wetlands,

including: the impact upon 3.8 acres of wetlands directly affected, the county's plan to preserve 19.7 acres of wetlands within county land holdings, and the county's plan to restore 7.8 acres of previously drained wetlands, and reasonably concluded that the impact on wetlands would not be significant. Finally, the court found that in making the §404 permit contingent on the county's historic district mitigation plan, the USACE properly considered the project's potential effect on those interests. **Given that USACE did not unlawfully segment the construction project or ignore its environmental impact, the court concluded USACE was not arbitrary and capricious in issuing a §404 permit.**

The court also considered whether the district court erred in dismissing claims brought under the citizen suit provision of the CWA. The court first observed that it is well established that the U.S. must expressly and unambiguously waive its sovereign immunity before it can be sued. The court then noted that while the CWA does allow suits against the Administrator where there is a failure of the Administrator to perform any act or duty under the CWA which is not discretionary, no such waiver is provided with regard to suits against the USACE. **The court then found that although the Administrator has the authority to overrule the USACE, such authority is discretionary. And where the Administrator's obligation is discretionary, the citizen suit provision of the CWA does not apply.**

2. District court finds that §1365(a)(2) authorizes actions only against the Administrator, but court allows action against the Army Corps to Engineers under APA:

Sierra Club v. Pena, 915 F. Supp. 1381 (N.D. Ohio, Filed Feb. 9, 1996)

Numerous plaintiffs, including Sierra Club, brought an action against the Secretary of Transportation and other federal, state, and local defendants seeking to prevent the construction of an urban corridor development project known as the Buckeye Basin Greenbelt Project. Plaintiffs challenged the approval, funding and planned construction of the project, alleging violations of several federal statutes, including NEPA, the National Historic Preservation Act, the Intermodal Surface Transportation Act, the Clean Water Act, and the Clean Air Act. Claims under the Clean Water Act focused on whether the defendants complied with federal wetland regulations in conducting the construction project. This action concerned motions for dismissal and summary judgement

With regard to the CWA claims, defendants first argued that plaintiffs lacked subject matter jurisdiction under the citizen suit provisions of the CWA to challenge the issuance or denial of a §404 permit by the U.S. Army Corps of Engineers (USACE). Defendants maintained that neither 33 U.S.C. 1365(a)(1) or (2) authorized a private right of action against USACE for failure to comply with wetland regulations. Defendants observed that the Corps itself was not in violation of an effluent standard, as required to support jurisdiction under §1365(a)(1), and that §1365(a)(2) only authorizes actions against the Administrator of U.S. EPA. **The court agreed, but held that plaintiff's action is properly brought under the Administrative Procedure Act (APA) (5 U.S.C. §701 et seq.), which provides the district court with jurisdiction to review any "final agency action for which there is no other adequate remedy in a court." (5 U.S.C. §704).** Defendants also cited cases holding that a decision of the Corps to deny a permit or not bring an enforcement action is unreviewable. **However, the court distinguished between a decision to deny a permit, which is unreviewable because it is discretionary, and a decision to grant a permit, which is reviewable (see Conservation Law Foundation v. Federal Highway Administration, 24 F.3d 1465, 1471 (1st Cir. 1994), and held that district courts have jurisdiction to review the Secretary's determination that a permit may issue.**

The federal defendants next argued that plaintiff's wetlands claims were barred by the statute of limitations. Defendants urged the use of the six-year limitations period generally applicable to suits brought against the U.S. (28 U.S.C. §2401(a)). Plaintiffs argued that the Sixth Circuit has never held a statute of limitations applicable to claims brought pursuant to NEPA and, therefore, only laches should apply. **The court held that because this claim is brought under the APA, alleging violations of NEPA and other laws, a six-year statute of**

limitations is applicable. See Village of Elk Grove Village v. Evans, 997 F.2d 323, 331 (7th Cir. 1993). Plaintiffs wetlands claims arising before June 8, 1989 were thus dismissed.

Finally, the court considered the merits of the summary judgement claims. As for the CWA claims, plaintiffs argued: 1) the wetlands permit application was not properly signed by an Ohio DOT official; 2) the application failed to include 3 acres of wetlands; 3) the application fails to fully characterize the project; 4) there was inadequate opportunity for public notice and comment on the amended application; 5) the USACE issued the §404 permit without requiring a final mitigation and implementation plan; 6) the USACE failed to prepare a full EIS; and 7) the USACE violated its regulations by failing to makes its historic properties findings available in the §404 permit proceedings. The court rejected each of these arguments. The court found the application was properly signed, the action affecting the 3 acres of allegedly excluded wetlands occurred before June 8, 1989, and that there had been no improper segmentation of the project. With regard to the opportunity for notice and comment, the court found that the Corps complied with the technical requirements of 33 CFR §325.3 and the public was aware of the project's potential effects and knew how to comment on these effects to the appropriate officials. The court accepted defendant's position that a §404 permit conditioned on future implementation of a mitigation plan does not violate the CWA and found that the record fully supported a decision of no significant adverse impacts on the environment. Finally, on the issue of the USACE failing to makes its historic properties findings available in the §404 permit proceedings, the court found that the Federal Highway Administration submitted its findings of no adverse impact to the Advisory Council on Historic Preservation, and such findings were identical to those of the Corps. Hence, the purpose of the statute was satisfied and any error was harmless.

3. **District court holds waiver of sovereign immunity under citizen suit provision of §1365(a)(2) does not apply to U.S. Corps of Engineers but is limited to the Administrator of U.S. EPA and that U.S. EPA does not have a nondiscretionary duty under 33 U.S.C. §1344(c) to review every decision of the Army Corps of Engineers:**

Cascade Conservation League v. M.A. Segale, Inc., 921 F. Supp. 692 (W.D. Wash. 1996).

The Army Corps of Engineers (USACE) delineated a portion of land owned by M.A. Segale and La Pianta as wetlands subject to regulation under the CWA 33 U.S.C. §1251. The USACE did not make any determination as to the remainder of the parcel. The USACE determined that Segale's activities on the portion of the parcel designated as wetlands constituted "normal farming" and thus was not subject to permit requirements under 33 U.S.C. §1344(f). Plaintiff Cascade Conservation League brought action against the owners as well as U.S. EPA and USACE, alleging: 1) under the citizen suit provision of the CWA (33 U.S.C. §1365(a)(2)), all federal defendants failed to perform nondiscretionary duties to make reasoned wetlands determinations; 2) under the APA 5 U.S.C. §702, U.S. EPA failed to review and overturn the "normal farming" determination by the USACE; and, 3) in violation of the APA, the USACE failed to delineate the entire parcel and U.S. EPA failed to compel such delineation. In this motion for summary judgment, federal defendants moved for dismissal claiming lack of subject matter jurisdiction.

Finding that 33 U.S.C. §1365(a)(2) does not waive the USACE' sovereign immunity, the court dismissed the claim against the USACE on the first issue for lack of subject matter jurisdiction. **Relying on the plain meaning of the statute and a narrow construction of the waiver of immunity, the court concluded that the waiver of immunity in the consent to suit provision of §1365(a)(2) is limited to the Administrator of U.S. EPA.** The court expressly disagreed with the court's reasoning in National Wildlife Fed'n v. Hanson, 859 F.2d 313 (4th Cir. 1988) (the USACE is subject to suit under §1365(a)(2)). Rejecting the plaintiff's argument that a strict reading would insulate the USACE from suit, the court cited Oregon Natural Resources Council v. U.S. Forest Serv., 834 F.2d 842 (9th Cir. 1987) (where CWA action is unavailable, plaintiff may base jurisdiction on the federal question statute, 28 U.S.C. §1331, and the APA). In a footnote, the court observed that even if the USACE does not have

immunity, plaintiff incorrectly characterized the USACE' wetlands delineation as failure to perform nondiscretionary duties.

The court dismissed the claim against U.S. EPA on the first issue, concluding that the plaintiff failed to identify a nondiscretionary duty that U.S. EPA did not perform. Since §1365(a)(2) waives U.S. EPA's immunity, the court reasoned that "a duty must be identifiable from the statutory text in order for it to form the basis of a citizen's suit against the U.S. EPA." Disagreeing with Environmental Defense Fund v. Tidwell, 837 F. Supp. 1344 (E.D.N.C. 1992) (permitting citizen suit against U.S. EPA for failing to review USACE' decision under §1344(f)), the court rejected plaintiff's argument that Congress intended the citizen suit provisions to apply to broadly-defined duties. **In its reading of 33 U.S.C. §1344(c), the court held that "[n]othing in the subsection states or implies that the Administrator is required to review every decision the USACE makes."**

In dismissing plaintiff's second claim, the court relied on Heckler v. Chaney, 470 U.S. 821 (1985) in holding that "U.S. EPA's decision not to act is committed to its discretion and thus is not subject to judicial review under the APA. 5 U.S.C. §701(a)(2)."

On the third issue, plaintiff maintained that the USACE' letter of May 1994 to Segale, stating that the USACE would not make a wetlands determination on the remainder of the parcel absent new evidence or a change in usage, constituted final agency action. The court used the test in FTC v. Standard Oil, 449 U.S. 232 (1980) (see also Hecla Min. Co. v. U.S. EPA, 12 F.3d 164 (9th Cir. 1993)) in determining that the letter lacked finality. The court concluded that the USACE' decision not to investigate the remainder of the parcel did not have the force of law and did not fix any legal relationships, and that judicial review of the USACE' decision would interfere with agency operations. In dismissing the claim, the court held that it was prohibited from reviewing the USACE' decision not to take immediate action on the remainder of the parcel since the decision was not final agency action under the APA 5 U.S.C. §701. Based on this conclusion, the court held that U.S. EPA's failure to compel further action was unreviewable.

4. District court grants deference to U.S. EPA's interpretation of 40 CFR §233.16(d) that U.S. EPA is not required to review a state's entire wetlands program when a state makes revisions to parts of its program:

National Wildlife Fed. v. Adamkus, 936 F. Supp. 435 (W.D. Mich. 1996).

National Wildlife Federation and Michigan United Conservation Clubs filed a citizen suit contending that the procedures used by U.S. EPA in approving revisions made by Michigan to its federally-approved wetlands program violated CWA §404 and the Administrative Procedure Act (APA). After U.S. EPA approved Michigan's wetlands dredge-and-fill permitting program in 1984 a State Executive Order (E.O.), issued in 1991, restructured some state agencies, including the Michigan Department of Natural Resources. In 1991, plaintiffs requested that U.S. EPA undertake a "formal review" of whether, in light of the 1991 E.O., Michigan's wetlands program complied with minimum federal standards. U.S. EPA determined that the 1991 E.O. did not constitute a substantial revision to Michigan's wetlands program. Based on public interest, U.S. EPA requested public comments on the matter, although the Agency was not obligated to do so. In 1994, plaintiffs submitted written comments alleging a number of substantial changes to Michigan's wetlands program that warranted U.S. EPA's withdrawal of its approval of the program. After responding to plaintiffs' comments related to the 1991 E.O., U.S. EPA published its final approval of the revisions to Michigan's wetlands program. U.S. EPA stated that it would consider plaintiffs' "unrelated" comments in the context of its "ongoing oversight" of Michigan's program. Defendants filed a motion to dismiss and plaintiffs filed a summary judgment motion.

Plaintiffs' first count alleged that U.S. EPA's failure to commence proceedings to disapprove Michigan's wetlands program violated a nondiscretionary duty under §404(l) of the CWA. The court pointed out that under §404(l) U.S. EPA has no mandatory duty to commence withdrawal proceedings in response to a citizen's petition. The court also rejected plaintiffs' argument that U.S. EPA was required to commence

withdrawal proceedings under §404(l) because Michigan's program submission was incomplete and deficient on its face.

The court noted that the CWA is ambiguous regarding whether §404(g) requires U.S. EPA to conduct "full and complete" review only when a State initially sets up a program or whether such review also must occur when revisions to existing programs are undertaken. The court also noted that it is unclear as to whether the "complete program submission" required when a State "seeks to administer a 404 program" under 40 CFR §233.10 is required when a State attempts to revise its existing program under §233.16. **Not finding U.S. EPA's interpretation plainly wrong, the court gave deference to U.S. EPA's argument that, in acting under 40 CFR §233.16(d), U.S. EPA is not required to review a State's entire wetlands program when a State makes revisions to parts of its program**. Relying on the language of §404(l) and 40 CFR §233.53, the court concluded that U.S. EPA may accept public comments on whether the State's program may be noncompliant in the future. The court stated that "requiring public hearings every time a state seeks to make insubstantial amendments to its wetlands program could result in the very intrusive U.S. EPA shadow program that the statute seeks to avoid."

Plaintiffs further alleged that U.S. EPA's approval of the State program revisions without considering and responding to public comment violated the CWA and the APA. U.S. EPA contended that plaintiffs' request for formal proceedings in their public comments did not constitute a petition under 40 CFR §233.53. In noting the irrelevance of the content and form of the petition, the court found that U.S. EPA violated a nondiscretionary duty by not responding to plaintiffs' petition. **However, the court dismissed plaintiffs' second count as to the CWA claim based on the fact that 40 CFR §233.53(c)(1) contains no date-specific deadline, which is required for citizen suit jurisdiction where timeliness is at issue. The court declined to infer a deadline from the overall statutory framework.**

In rejecting plaintiffs' argument that U.S. EPA's refusal to consider public comments prior to approving the revised program constituted an illegal and reviewable final agency decision, the court held that "U.S. EPA's failure to respond to public comment itself is not a final agency action under the APA. Further, the court upheld U.S. EPA's decision to respond only to comments "related" to the 1991 E.O. As to U.S. EPA's decision not to consider "unrelated" issues, the court declined to exercise judicial review. The court pointed out that it lacked a meaningful standard against which to measure those comments U.S. EPA considered significant versus insignificant.

5. District court holds that for purposes of applying the statute of limitations under 28 U.S.C. § 2462 the "discovery rule" applies to CWA § 404 cases:

U.S. v. Material Service Corp., 1996 U.S. Dist. LEXIS 14471 (N.D. Ill. Sept. 30, 1996).

From 1987 to 1993 Materials Service Corporation (MSC) conducted land clearing and active mining of their dolomite quarry, which involved the deposit of dredged and fill materials into water of the U.S. In March, 1993, MSC asked the U.S. Army Corps of Engineers (USACE) to determined whether the quarry was in jurisdictional wetlands. Following such inspection, USACE issued a cease and desist order forbidding further disturbance of the wetlands. On June 16, 1995, the U.S. filed an action to 1) enjoin MSC from further unpermitted discharge; 2) require restoration and equitable mitigation; 3) impose penalties of up to $ 25,000 per day per violation; and 4) collect costs. MSC moved to dismiss those parts of the complaint that involve violations occurring prior to January 1, 1990, based on the five year statute of limitations imposed under 28 U.S.C. § 2462. The U.S. asserted that the claims at issue accrued when the government first discovered the violations in 1993, and hence, none of the claims are barred by the statute of limitations.

The court observed that the 7th Circuit has yet to decide whether the "discovery rule" applies in a Clean Water Act context. The "discovery rule" provides that a claim does not accrue for purposes of applying the statute of limitations under 28 U.S.C. § 2462 until the plaintiff discovers or should have discovered the violation (See U.S. v. Windward Properties, Inc., 821 F. Supp. 690, 694 (N.D. Ga. 1993). **It then held that MSC's alleged CWA § 404**

violation accrued for statute of limitations purposes when the government discovered the violation in March 1993, and therefore, none of the government's claims were barred by the statute of limitations. The court found compelling the same policy concerns that motivated other courts to apply the discovery rule, including: 1) the inherent difficulty of detecting such violations; 2) the reliance by the government on permitting and self-reporting to enforce the CWA; and 3) the CWA's goals of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. (See PIRG of N.J. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 74-74 (3rd Cir. 1990) cert. denied, 498 U.S. 1109). The court also observed that the discovery rule has been applied to CWA § 402 claims, as well as to § 404 claims, such as those made here (See Atlantic States Legal Found v. A1 Tech Specialty Steel Corp., 635 F. Supp. 284, 287-288 (N.D.N.Y. 1986) and U.S. Hobbs, 736 F. Supp.1406, 1408-1409 (E.D. Va. 1990), respectively). The court found the reasoning of these cases, and of *Windward*, sound, noting that where self-reporting is the only practical means of detecting violations, to have accrual begin on the date of the violation would seriously undermine EPA's enforcement efforts.

6. District court holds Corps complied with NEPA and other Acts in granting wetlands permit:

Sierra Club v. U.S. Army Corps of Engineers, 935 F. Supp. 1556 (S.D. Ala. 1996).

Plaintiffs Sierra Club and other environmental groups filed an action against the U.S. Army Corps of Engineers (USACE) and other defendants alleging that defendants violated the National Environmental Policy Act (NEPA), the Fish and Wildlife Coordination Act (FWCA), the Administrative Procedure Act (APA), and the Clean Water Act (CWA) in granting a permit to fill wetlands in association with construction of a AA professional baseball stadium in near Mobile, Alabama. Plaintiffs alleged that defendants failed to fully consider readily identifiable alternatives to the permit as issued. Plaintiffs also alleged that the USACE acted improperly in issuing the permit one working day after the final proposal was submitted to EPA and the Fish and Wildlife Service (FWS), without public notice, and before either agency commented on the final proposal. Plaintiffs sought an permanent injunction voiding the permit and mandating compliance with applicable laws.

The court initially observed that the USACE's environmental assessment indicated that no EIS need be developed and, therefore, the USACE need only "study, develop, and describe appropriate alternatives to recommended courses of action." 42 U.S.C. § 4332(E). The court then found that the defendants presented persuasive, unrebutted evidence that plaintiff's first suggested alternative, building a parking deck, was not a practical alternative on the basis of cost and logistics. With regard to plaintiffs second alternative, that the City obtain additional upland acreage for the facility, the court found that the USACE engaged in a reasonable and sufficiently detailed analysis of the availability of uplands. **The court concluded that the City presented adequate evidence to demonstrate that no practical alternative existed, thereby supporting the USACE's decision.**

With regard to the USACE's failure to allow the FWS to comment on the final proposal, the court held that it was sufficient for the USACE to provide the FWS a meaningful opportunity to comment after the permit application was made and before the permit was issued, and for the USACE to seriously consider the FWS's comments and incorporate a discussion of FWS's recommendations into the final report. The court found that USACE did these things, and concluded that USACE's actions were not arbitrary, capricious, or unlawful.

The court also concluded that following public notice on the original plan, no additional public notice was required under the relevant CWA regulations. Rather, such regulations provide the USACE with discretion, and USACE acted reasonably in exercising that discretion and concluding that no additional information would have been obtained from supplemental public notices that would have helped determine whether to grant or deny the permit.

The court added that the final plan qualified for a Nationwide Permit Number 26 and, therefore, any error in issuing the § 404 permit was rendered moot.

It also commented that plaintiffs failed to establish any continuing irreparable injury should the City not be enjoined from proceeding. Plaintiff's claim for an injunction was denied and the action dismissed on the merits.

7. District court considers issue of whether use of wetlands by migratory birds is an adequate connection to interstate commerce to qualify as intrastate wetlands:

U.S. v. Krilich, 1996 U.S. Dist. LEXIS 7693 (N.D. Ill., May 31, 1996).

Defendants, Robert Krilich and various corporations which he owns, violated the CWA by filling wetlands at two Chicago-area sites. In October 1992, plaintiff and defendants entered into a consent decree for defendants' violations. Under paragraph 20A of the decree, defendants were ordered to treat certain areas as wetlands and certain open waters as U.S. waters until the mandate issues in Hoffman Homes, Inc. v. U.S. EPA, 961 F.2d 1310 (7th Cir. 1992) (*Hoffman I*) and until any proceedings related to any appeal, petition for certiorari, or remand were completed. Further, paragraph 20A provided that unless pertinent portions of the Seventh Circuit's decision were reversed, certain areas (including an area known as W9) would be excluded from the decree's obligations. In this action to enforce the consent decree, plaintiff requested the court to impose monetary penalties for: 1) defendants' post-decree discharging of fill in the area known as W9, which plaintiff contended is defined as U.S. waters under the decree; and 2) defendants' alleged failure to comply with decree deadlines for creating a 3.10 acre wetland.

In the Hoffman case, U.S. EPA determined that Hoffman Homes, Inc., filled an area known as Area A, which U.S. EPA concluded was an intrastate wetland under 40 CFR §230.3(s) and 33 CFR §328.3(a), without a permit and U.S. EPA imposed a $50,000 administrative penalty. In *Hoffman I*, the Seventh Circuit held that U.S. EPA's definition of navigable waters as including isolated wetlands was unenforceable due to its inconsistency with the CWA. Further, in *Hoffman I*, the Seventh Circuit rejected the argument that the potential use of isolated wetlands by migratory birds invokes Commerce Clause protection. For these reasons, the Seventh Circuit vacated U.S. EPA's order. The Seventh Circuit granted U.S. EPA's motion for rehearing, vacating *Hoffman I*. Upon rehearing the case, the Seventh Circuit reached the same result as *Hoffman I*, vacating U.S. EPA's order, but on different grounds. See Hoffman Homes, Inc. v. Administrator, 999 F.2d 256 (7th Cir. 1993) (*Hoffman II*). The *Hoffman II* court held that the administrative finding that Area A was a suitable habitat for migratory birds was not supported by substantial evidence. Concluding that Area A did not qualify as U.S. waters under U.S. EPA's isolated wetlands regulation, the Seventh Circuit did not have to consider whether the regulation is a proper interpretation of the statute or constitutionally enforceable.

In this action, Plaintiff argued that *Hoffman II* "effectively" holds that the regulations as written are enforceable. **Rejecting this argument, the court asserted that *Hoffman II* "only concludes that the regulations provide that possible use of wetlands by migratory birds is an adequate connection to interstate commerce and the U.S. EPA's Chief Judicial Officer could so construe the regulations."** Plaintiff pointed to dictum in Rueth v. U.S. EPA, 13 F.3d 227 (7th Cir. 1993) in which the Seventh Circuit determined that under *Hoffman II* one test for whether wetlands affect interstate commerce is whether migratory birds use the wetlands. Because *Hoffman II* did not consider issues reached in *Hoffman I* that were pertinent to the consent decree, the court stated that it was not bound by *Rueth*'s observation that Congress intended to make the CWA as far-reaching as the Commerce Clause permits.

Plaintiffs also argued that vacating *Hoffman I* for rehearing satisfied the "reversed" requirement of paragraph 20A, thereby subjecting W9 to the consent decree. In examining the intent of the parties to the decree and the definition of "reversal," the court pointed out that the Seventh Circuit did not change its decision by vacating *Hoffman I*. **Concluding that *Hoffman I* was not reversed, the court held that W9 was not considered U.S. waters, and thus not subject to the decree's requirements or penalty provisions for discharging fill without a permit.**

Included in the consent decree was a mitigation plan. Defendants missed the last two of three deadlines by at least 523 days. The decree provided for a stipulated penalty of $2,500 per day which would total $1,307,500 for the 523-day delay. Defendants argued that the deadlines were modified by the parties' course of dealing in implementing the decree, or that the course of dealing resulted in the plaintiff waiving its right to damages for missing the deadlines. The court noted, however, that defendants showed no evidence that plaintiff acquiesced in the extension of any deadlines. In fact, the court pointed to plaintiff's repeated requests that a penalty be paid for the missed deadlines. Defendants also argued that the stipulated penalties under the decree are an unenforceable penalty unrelated to actual damages or an estimate of damages that could have been made at the time the parties agreed to the decree. The court noted that the decree did not seek to liquidate damages but rather to reach a compromise on possible statutory penalties. Further, the court observed that even "if there were a rule that any 'liquidated penalties' contained in a consent decree be a reasonable estimate of possible penalties to be imposed, the $2500 per day penalty would not be unenforceable." In considering that the CWA provides for penalties of up to $25,000 per day under 33 USC §1319(d) and reviewing a number of cases involving consent decree penalties, the court determined that the penalty provision was not an excessive estimate. **Holding that the decree contained an enforceable penalty, the court entered judgment holding defendants, jointly and severally, liable for $1,307,500.**

8. District court holds that CWA §1313(c)(3) does not impose a nondiscretionary duty on EPA to review Michigan's decision to not designate Lake Superior as an Outstanding National Resource Water:

NWF v. Browner, 1996 U.S. Dist. LEXIS 15321 (D.D.C. Oct. 11, 1996).

Plaintiff NWF brought a citizen suit against EPA alleging that EPA failed to fulfill statutory nondiscretionary duties under the Clean Water Act (CWA) by failing to review and disapprove the State of Michigan's decision to not designate Lake Superior as an Outstanding National Resource Water (ONRW) (Count I). Plaintiffs also contended that by refusing to disapprove Michigan's decision, EPA violated the Administrative Procedure Act (APA) through acting arbitrarily and capriciously, and by unlawfully withholding and unreasonably delaying the issuance of regulations designating Lake Superior as ONRW (Counts III and IV). Count II was previously dismissed.

Plaintiffs petitioned Michigan requesting that the State designate Lake Michigan as a ONRW. Plaintiffs also requested that the State consider plaintiff's petition during Michigan's triennial review, performed pursuant to 33 U.S.C. § 1313(c). The State denied plaintiff's request, but agreed to meet to discuss the issue. Plaintiff then provided EPA with notice, and filed this suit. Plaintiffs asserted that once Michigan rejected plaintiff's petition, EPA's nondiscretionary duty was triggered by the "constructive submission" of Michigan's decision to EPA for review. By failing to review and overturn Michigan's negative decision, EPA violated its nondiscretionary duty under 33 U.S.C. § 1313(c)(3) and 40 C.F.R. 131.21.

The court held that CWA §1313(c)(3) applies only to new or revised water quality standards, not to a state's decision to preserve its existing standards. The court rejected the contention that EPA was under a nondiscretionary duty to review Michigan's decision, and denied plaintiff's motion for summary judgment on count I.

With regard to plaintiff's APA claims, the court held that to the extent these claims were based on nondiscretionary duty theories, they were dismissed (with prejudice), since APA review of mandatory duties is not available under the CWA. To the extent such claims challenged discretionary action or inaction, they were dismissed (without prejudice) based on the fact that there was no final agency decision or administrative record for the court to review (i.e., plaintiffs had not exhausted their administrative remedies).

9. District court invalidates "Tulloch Rule":

American Mining Congress v. U.S. Army Corps of Engineers, 1997 U.S. Dist. LEXIS 760 (D.D.C. Jan. 23, 1987).

Plaintiff American Mining Congress (AMC) brought suit against the U.S. Army Corps of Engineers (USACE) challenging the "Tulloch Rule." The "Tulloch Rule" revised the term "discharge of dredged material" as used in 33 C.F.R. 323.2 and 40 C.F.R. 232.2 to include incidental fallback (i.e., the redepositing during excavation, dredging, or landclearing activities of small amounts of the materials being removed into waters of the U.S.), thereby subjecting incidental fallback to Clean Water Act § 404 permitting requirements. AMC sought summary judgment on four grounds: 1) the "Tulloch Rule" is inconsistent with the language and intent of the Clean Water Act; 2) the rule is arbitrary, capricious, and not in accordance with law in violation of the Administrative Procedure Act (APA); 3) the rule violates plaintiff's due process rights because it is vague and it shifts the burden to the regulated parties of showing their activities are not regulated; and 4) the rule was promulgated in violation of the procedural requirements of the APA.

AMC argued that Congress never intended for incidental fallback to be subject to the requirements of § 404. They maintained that the CWA was enacted to regulate the disposal of dredged soils in waters, but that the Tulloch Rule impermissibly extends federal regulation to the act of removing materials from waters. The USACE and EPA contended that under CWA §301 they are empowered to regulate incidental fallback as the discharge of a pollutant, and that the court must defer to their expertise. They also contended that such fallback has always been regulated but has been excepted from the permit requirement pursuant to a narrow exception for deminimis discharges. Additionally, the agencies asserted that the Tulloch Rule closes a loophole in the CWA, thereby effectuating the goals of the Act.

The court framed the issue as "whether the inclusion of fallback that accompanies landclearing and excavation activities is 1) the discharge of dredged material, i.e., the addition of a pollutant, 2) at specified disposal sites." **Following the analytical framework specified in *Chevron*, the court held that the agencies "unlawfully exceeded their statutory authority in promulgating the Tulloch Rule" and invalidated the rule.**

The court found that incidental fallback is not the addition of a pollutant. It reasoned that neither CWA § 301 nor § 404 cover incidental fallback. First, the court stated that § 404 does not refer to excavation and dredging, and the fact that such activities are regulated elsewhere (i.e., under the Rivers and Harbors Act), is evidence that Congress did not intend to regulate such activities under § 404. Second, the court found that the legislative history indicated that the term "discharge" specifically meant open water disposal of dredged materials, but did not include small volume incidental discharges that accompany excavation and landclearing. Third, the court found that Congress, through its lack of amendment, had ratified 18 years of agency and judicial interpretation that excluded regulating incidental fallback under § 404. The court also observed that the caselaw did not support the position that the agencies possess authority to regulate incidental fallback. (See Salt Pond Assocs v. U.S. Army Corps of Engineers, 815 F. Supp. 766 (D. Del. 1993) (land clearing and excavation activities were outside the reach of § 404) and U.S. v. Lambert, 18 Env't Rep. Cas. (BNA) 1294 (M.D. Fla. 1981), aff'd 695 F.2d 536 (11th Cir. 1983) (back-spill from excavation 'does not ... constitute the discharge of a pollutant ... when the dredged spoil simply falls back into the area from which it has just been taken')). The court distinguished the holding in Aroyello Sportsman League v. Marsh, 715 F.2d 897 (5th Cir. 1983) (which held that the term "addition of pollutants" under 33 U.S.C. § 1362(12) can reasonably be read to include "redeposit" of materials from land clearing operations), and similar redeposits cases on the grounds that those cases involved substantial redeposit of materials, and that Congress never intended to regulate incidental fallback as an addition of a pollutant. Finally, the court observed that refusal on the part of Congress to pass any of several recent proposals to expand the scope of activities regulated under § 404 indicated that the issue of fallback is a significant policy question presently under consideration by the legislature and, thus, an expanded reading of § 404 is not justified.

The court observed that "even if the term 'addition of a pollutant' were broad enough to cover incidental fallback," the court would still hold that the Tulloch

Rule was unlawful, based on the CWA requirement that dredged material must be discharged at a "specified disposal site." The court found that the Tulloch Rule made the term "specified disposal site" superfluous.

The court suggested that the appropriate remedy for the agencies is Congressional action. The court granted AMC's motion for summary judgement, invalidating the Tulloch Rule and setting it aside as to both USACE and EPA.

10. Court of Claims holds USACE rendered a final agency decision when it ordered plaintiff to stop work and directed plaintiff to perform extensive restorative work inconsistent with the possibility of future development but that no regulatory taking occurred where property retained substantial residual value:

Broadwater Farms Joint Venture v. U.S., 35 Fed. Cl. 232 (Mar. 27, 1996).

Plaintiff Broadwater Farms brought a regulatory takings claim against U.S. Army Corps of Engineers (USACE) where the USACE had learned of residential property development in progress, judged that some of the development had occurred or was occurring in wetlands without a permit, and issued a cease and desist order and a settlement letter that directed restoration of 11 lots to the maximum extent possible and mitigation for wetlands impacted by construction already completed. The court focused on two issues: 1) whether the fact that the plaintiff had not applied for and been denied a permit precluded a Fifth Amendment taking claim; 2) whether the government denied the economically viable use of the property.

The court observed that a Fifth Amendment takings claim normally is not cognizable until the permit has been applied for and denied. See Conant v. U.S., 12 Cl. Ct. 689, 691 (1987). It also noted that a landowner need not engage in a futile exercise of agency review when no possibility exists that a permit will be granted. Parkview Corp. v. Dept. of the Army, 490 F. Supp. 1278 (E.D. Wisc. 1980). The court then found that plaintiffs had not applied for a permit because they believed it would have been a wasteful exercise due to the USACE's position concerning the property. It also found that federal regulations prohibit USACE from considering a permit where the landowner is required to undo its construction and restores the land to the maximum extent possible. See 33 CFR §326.3(e)(1)(i). USACE argued that their demand for complete and immediate restoration would not bar a permit, but the court disagreed. **The Court held that USACE effectively rendered a final agency decision when it ordered plaintiff to stop work, then directed it to perform extensive restorative work that was inconsistent with the possibility of future development.**

In assessing whether USACE's action constituted a taking, the court first examined whether the prohibition on the development of 12 lots amounted to a denial of economically viable use. The court noted that plaintiff purchased a 51-lot property comprised of 24 lots in Phase II and 27 lots in Phase III, and that Phase II was sold in August, 1988, a year before the USACE first examined the site. It then attempted to define what portion of plaintiff's property should be considered for purposes of measuring the impact of the governmental action. The court found that Phase III was the relevant property to be considered, based on the fact that plaintiff consistently focused on the overall development of each Phase, and Phase II was complete and sold before the USACE became involved. **The court then examined whether plaintiff's loss of 12 of 27 lots constituted the loss of all economical use of the property or a mere diminution in value. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) ("mere diminution in value cannot establish a taking"). In finding the latter, the court stated that the property retained substantial residual value, $ 1.07 million (compared with projected $ 1.48 million with the 12 lots), and that the reduction in gross sales due the loss of the 12 lots was approximately 28 percent.** The court observed that some of plaintiffs loss between actual and projected sales was attributable to a 40 percent increase in costs to sell the lots. The court cited Jentgen v. U.S., 228 Ct. Cl. 527, 657 F.2d 1210 (1981), *cert. denied*, 455 U.S. 1017, observing that there no taking was found where plaintiff retained only 20 of 80 acres. The

court viewed this case similarly, noting that plaintiff had simply been prevented from exploiting a property interest. See Penn Central, 438 U.S. at 130.

E. Citizen Suit

1. Enforcement Under Comparable Law as a Bar to Citizen Suit

a. Ninth Circuit holds settlement payment is not penalty where neither party characterizes payment as penalty and payment was not subject to the procedural requirements imposed upon penalties under state law:

Citizens for a Better Environment v. Union Oil Co., 83 F.3d 1111 (9th Cir. 1996).

Citizens for a Better Environment (CBE) brought a citizen suit under the CWA against Union Oil (Unocal) that alleged that Unocal's discharges violated applicable selenium effluent standards, water quality standards, and formed the basis for dependent state law claim. The district court dismissed the water quality standards claim, but not the effluent standards and dependent state law claim. Unocal and others challenged the State's listing of San Francisco Bay as a hot spot in State court, and reached a settlement under which the Unocal paid the State $780,000 and the State issued a cease and desist order (CDO) delaying the effective date of the selenium limits.

Unocal subsequently appealed the original district court dismissal of its motion to dismiss the effluent standards and dependent state law claim, asserting 1) that the citizen suit is barred under §1319(g)(6)(A)(ii) and (iii); and 2) that a cease and desist order issued as settlement of a state lawsuit extended until 1998 the date for compliance with the final selenium permit limits.

The 9th Circuit Court held that because Unocal had not paid a "penalty...assessed under comparable state law," as required under §1319(g)(6)(A), CBE's claim was not barred by §1319(g)(6)(A)(iii). The court found that Unocal did not pay "penalty" because the payment was not characterized by either party as a penalty nor was it subject to the procedural requirements imposed upon penalties under State law. The court noted that Unocal insisted on characterizing the financial transfer as a "payment," not a penalty, due to the "bad conduct implications" the public associated with the term "penalty." Thus, the court agreed with CBE that the fairest characterization of the payment was as the "the price of avoiding the stigma of a formal enforcement action." Moreover, the court observed that the payment did not comply with the procedural requirements imposed under California Water Act §13385 for setting a penalty, such as consideration of economic benefit. In addition, Unocal exceeded the 30 day time-frame for payment of State administrative penalties by nearly 11 months.

The court found that its holding was further supported by its interpretation of the term "comparable state law." In departing from the First Circuit's holding in North and South Rivers Watershed Ass'n v. Scituate, 949 F.2d 552 (1st Cir. 1991) the Ninth Circuit found that for a penalty to be issued under a "comparable state law" for purposes of §1319(g)(6)(A)(iii), the penalty at issue must have been assessed under "that provision of state law comparable to §1319(g)," not simply under a statutory scheme that is comparable. This court noted that such a result is dictated by the plain statutory language, that it ensures public participation consistent with 1319(g), and that state administrative enforcement actions do not preclude citizen suits to any greater extent than similar federal actions.

The court also found that §1319(g)(6)(A)(ii) did not preclude this citizen suit, since no enforcement action was being prosecuted under a comparable state law at the time the citizen suit was filed. In addition, for the reasons noted above, the courted observed that the district court did not err in concluding that the state action was not taken under a comparable state law.

Regarding the second issue, the court concluded that the CDO did not modify the terms of Unocal's NPDES permit. Rather, the court found that the CDO was an exercise in prosecutorial discretion and that it did not comport with the regulations that govern the modification of NPDES permits. Even if the CDO were construed as having extended the compliance date in the NPDES permit, the court

observed that such a modification would have likely violated the anti-backsliding restrictions imposed under 33 U.S.C. §1346(o). The court affirmed the district court's denial of Unocal's motion to dismiss.

b. District court rejects motion for stay of discovery where defendant not likely to prevail on claim that state action bars CWA citizen suit:

California Sportfishing Protection Alliance v. El Dorado Irrigation Dist., No. CIV. 5-95-0699-DFL-GGH (E.D. Cal., Nov. 28, 1995).

Defendant El Dorado owns and operates a sludge waste water treatment and disposal system. Plaintiff filed a citizen suit against defendant on April 18, 1995, which alleged various CWA violations. On August 22, 1995, the District Attorney filed a complaint in state court against El Dorado that alleged unfair business practices and involved factual allegations similar to those in the citizen suit. On November 3, 1995, the California Regional Water Quality Board filed an administrative liability complaint against El Dorado for the same or similar acts complained of in the citizen suit. The Board's action was resolved approximately two weeks after it was brought, with El Dorado paying $100,000 in civil penalties. On November 3, 1995, Defendant filed a motion for dismissal or abstention of the citizen suit based on pendant state actions. At issue before the court in this action was defendant's motion to stay further discovery until the defendant's motion for abstention could be heard.

The district court denied defendant's motion for a stay of discovery pending hearing of dispositive motions. The court held that the applicable standard in determining whether to grant a stay of discovery is whether defendant "has shown that it will probably prevail on the merits of its dispositive motion." The court noted its reliance on the two-prong discovery stay test enunciated in Panola Land Buyer's Ass'n v. Shuman, 762 F.2d 1550 (11th Cir. 1985). Plaintiff contended that since defendant would not ultimately be successful on its abstention motion, the first prong would not be met because the motion was not dispositive of the proceedings.

The court denied defendant's motion based on its conclusion that: (1) defendant did not show a probability of prevailing; and, (2) the equities of the facts did not favor a stay of discovery. The court noted that its conclusions on the merits of the abstention motion were not binding on the district court. **As to its first conclusion, the court determined that the defendant's involvement in state actions would not statutorily bar the citizen suit. Relying on California Sportfishing Protection Alliance v. City of West Sacramento, 905 F. Supp. 792 (E.D. Cal. 1995), the court reasoned that judicial or administrative litigations initiated after the commencement of a citizen suit are not state actions that will bar a citizen suit under the CWA.** In its reading of §1365 and §1319 of the CWA and case law, the court further concluded that state action must precede the filing of a citizen suit. The court further determined that defendant's abstention motion was probably not meritorious. Defendant contended that under the CWA, federal courts should defer to state actions. Differentiating RCRA claims from CWA claims (See Friends of Santa Fe County v. LAC Minerals, 892 F. Supp. 1333 (D.N. Mex. 1995)), the court noted that CWA cases have clearly rejected abstention.

As to its second conclusion, the court pointed out that the state actions and defendant's motion for stay of discovery appeared to "have been instituted for the purpose, at least in significant part, as a litigation strategy for blunting this citizen's suit." The court observed that Congress has not preempted the filing of citizen's suits or the collection of civil penalties in such suits by collateral events in the state arena.

c. District court holds citizen suit is not barred where state action is commenced after commencement of citizen suit:

California Sportfishing Protection Alliance v. El Dorado Irrigation Dist., No. CIV. 5-95-699-DFL-GGH (E.D. Cal., Jan. 9, 1996). See case summary on page 25.

d. District court holds establishment of stipulated penalty provisions for future violations of state-issued CDO did not constitute "diligent prosecution" of NPDES permit:

United Anglers v. Sewer Authority Mid-Coastside, No. C96 1593 FMS (N.D. Cal. 1996).

Plaintiff United Anglers brought a citizen suit against defendant Sewer Authority Mid-Coastside (SAM) alleging continuing violations of SAM's NPDES permit, specifically exceedances of applicable limits for coliform and settleable solids, as well as treatment system bypasses and collection system overflows. SAM moved the court to dismiss all of the claims except those related to overflow violations (and equitable claims) based on the fact that the San Francisco Bay Regional Water Quality Board (Board) had initiated an administrative enforcement action in October 1994 that resulted in a July 19, 1995 cease and desist order which included stipulated penalty provisions for future non-compliance, which SAM argued barred the current action pursuant to Clean Water Act § 1319(g)(6)(A).

The Board had issued a complaint for administrative civil liability (ACL) on August 10,1995, which required SAM to pay a $30,000 penalty for violations of the bypass prohibition and certain effluent limits in its permit for the period up to and including February 1995. The ACL also included two stipulated penalty provisions: 1) that SAM pay $1,000 for each day of bypass when the flow is less than 3.0 million gallons per day, as prohibited in the CDO; and 2) that SAM pay $1,000 for each day of violation of the permit compliance schedule specified in the CDO.

After finding that the penalty provision in §13385 of the California Code was comparable to the penalty provision of the CWA, the court framed the issue as whether the Board's inclusion of stipulated penalty provisions in the ACL constitutes "diligent prosecution" of SAM's alleged violations. **The court held that the establishment of stipulated penalty provisions for violations of the CDO did not constitute "diligent prosecution" of the NPDES permit and therefore that plaintiffs claims for civil penalties were not barred.**

The court reasoned that plaintiffs were seeking relief based on violations of SAM's NPDES permit, whereas, the stipulated penalty provisions were imposed upon violations of the CDO, and two documents did not impose identical requirements. The court cited Citizens for a Better Environment v. Union Oil Company of California, 861 F. Supp. 889, 902 (N.D. Cal. 1994) for the proposition that where a CDO establishes different standards than does a permit, the Board "cannot shield polluters from citizen suits brought to enforce the terms of the NPDES permits." The court thus denied SAM's partial motion to dismiss.

2. Standing

a. Fifth Circuit holds that an organization, with members who recreate at a lake 18 miles and 3 tributaries from the source of unlawful water pollution, does not have standing to sue for violations of the Clean Water Act:

Friends of the Earth, Inc. v. Crown Central Petroleum Corporation, 95 F.3d 358 (5th Cir. 1996).

Crown Central Petroleum Corporation (Crown) operates an oil refinery in Tyler, Texas. Pursuant to a NPDES permit, Crown discharges storm-water run-off into Black Fork Creek. That creek flows into Prairie Creek, which joins the Neches River, which in turn flows into Lake Palestine. Lake Palestine is 18 miles "downstream" from Crown's refinery.

In June 1994, Friends of the Earth (FOE) filed a citizen suit against Crown alleging 344 violations of Crown's discharge limitations and monitoring requirements under its NPDES permit. FOE sought declaratory and injunctive relief along with civil penalties and attorneys' fees. FOE brought suit on behalf of itself and its members, who reside in the vicinity of, or own property or recreate in, on, or near the waters of Black Fork Creek, Prairie Creek, Palestine Lake, the Neches River, the Neches River Basin and tidally related waters affected by Crown's discharges. FOE asserted that Crown's allegedly unlawful conduct directly affects the health, economic, recreational, aesthetic and environmental interests of FOE's members.

FOE filed three separate complaints, which were all consolidated with this suit. The district court granted Crown's motion for summary judgment, holding that FOE lacked standing to pursue the suit. The court found that only one of three affiants was a FOE member at the time the first complaint was filed. The court held that this member had suffered no

injury-in-fact and that, even if he had, he could not trace that injury to Crown's alleged NPDES permit violations. The court further held that FOE itself lacked standing to sue Crown regarding its NPDES permit monitoring violations since FOE had failed to demonstrate that it, as an organization, had suffered an injury-in-fact.

On appeal, the Fifth Circuit focused on whether FOE's members have standing to sue in their own right. **The court observed that to demonstrate that FOE's members have standing, FOE must show that: 1) its members have suffered an actual or threatened injury; 2) the injury is "fairly traceable" to the defendant's actions; and 3) the injury will likely be redressed if it prevails in the lawsuit.** Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). Under the "fairly traceable" test delineated in Public Interest Research Group v. Powell Duffrn Terminals, 913 F.2d 64 (3rd Cir. 1990), the court focused on the plaintiffs' interest in the "waterway" into which unlawful pollution flows.

Crown discharges into Black Fork Creek. The court found that none of the FOE's members use that creek; nor do they use Prairie Creek or the Neches River. Rather, the court found that FOE's members only use Lake Palestine, which is located three tributaries and 18 miles "downstream" from Crown's refinery. Without deciding that Lake Palestine is part of the same "waterway" as Black Fork Creek," the court found that the "waterway" is too large to infer causation solely from the use of some portion of it. FOE offered no competent evidence that Crown's discharges have made their way to Lake Palestine or would otherwise affect the lake. The court observed that relying solely on the truism that water flows downstream is insufficient evidence to prove that FOE's members have suffered an injury that is "fairly traceable" to Crown's discharges. **Therefore, the court held that FOE's members did not have standing to sue for discharge violations.**

The court went on to hold that because FOE's members do not have standing to sue for Crown's discharge, they do not have standing to sue for alleged reporting violations. (See Sierra Club v. Simkins Industries, 847 F.2d at 1113 (An individual's standing to sue for reporting violations depends upon her standing to sue for discharge violations). The court noted that since FOE only has standing to bring suit on behalf of its members if its members would otherwise have standing in their own right, FOE lacks standing as a representational organization to sue Crown for its discharge and reporting violations.

The circuit court affirmed the judgment of the district court dismissing the case for lack of standing.

b. District court holds no representational standing where incorporated entity fails to adhere to membership formalities:

Friends of the Earth v. Chevron Chem. Co., 919 F. Supp. 1042 (E.D. Tex. Filed Mar. 21, 1996).

In July 1994, plaintiff, a non-profit corporation, brought a citizen suit under §505 of CWA alleging that defendant violated its NPDES permit for its facility in Orange, Texas. In September 1994, plaintiff filed a second suit alleging additional permit violations. Both actions were consolidated. Prior to bench trial, the court denied defendant's motion for summary judgment, concluding that plaintiff had constitutional standing. Upon both parties' motions for reconsideration, the court ruled that issues on constitutional and statutory standing remained for trial.

According to National Treasury Employees Union v. Department of Treasury, 919 F. Supp. 1042 (5th Cir. 1994), the court noted that an association may have standing solely as the representative of its members, even in the absence of injury to itself. However, the court observed that the organization must still meet the three-part test for representational standing set out in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).

The first prong of the *Hunt* test requires that members of the association would have standing individually. The court ruled that plaintiff did not satisfy the test due to its failure to demonstrate that individuals aggrieved by defendant's actions are members of the organization. As a District of Columbia corporation, plaintiff was allowed to designate its membership in its articles of incorporation or bylaws. Plaintiff's bylaws stipulated

that plaintiff shall have one class of members to be designated by the board of directors. The court's review of the record showed that plaintiff's Board of Directors failed to take the requisite action to define and create a class of members within the corporation. As a result, the court found that plaintiff FOE had no class of members from which aggrieved members could be identified. The court rejected plaintiff's assertion of a de facto policy regarding membership. The court noted that informal membership policy would be appropriate for an unincorporated association (see Karl Rove & Co. V. Thornburgh, 39 F.3d 1273 (5th Cir. 1994).

Further, plaintiff failed to introduce evidence to support constitutional standing in its own right. For these reasons, the court dismissed the case for lack of subject matter jurisdiction.

c. District court holds that irrigators may not intervene in lawsuit challenging Tribes treatment-as-state application:

Montana v. U.S. EPA, 1996 U.S. Dist. LEXIS 4753 (D. Montana, Mar. 27, 1996). See case summary on page 1.

d. District court rules that U.S. EPA's failure to require an after-the-fact §404 permit or on-site remediation for filled federal wetlands does not constitute a continuing violation for citizen suit purposes where defendant complies with terms of valid off-site remediation order:

Orange Environmental, Inc. v. County of Orange, 923 F. Supp. 529 (S.D.N.Y. 1996).

In December 1991, plaintiffs brought a citizen suit under 33 U.S.C. §1365(a) of the CWA against Orange County for unpermitted discharges of pollutants in violation of §301 of the CWA (33 U.S.C. §1311), and the filling of federal wetlands at the County's expansion landfill without a §404 permit. Plaintiffs sought restoration of the wetlands and penalties for the unpermitted discharges. In settling the CWA violations in July 1992, U.S. EPA and the County entered into a compliance order requiring the County to restore lost wetlands off-site at an amount twice what U.S. EPA concluded had been lost (98 acres to replace 49) by the unpermitted filling at the landfill expansion site. In 1993, the court granted plaintiffs' motion for summary judgment, thereby enjoining the County from further expansion of the site until the County obtained a §404 permit from the USACE for commencing operations at the expansion site (Orange Environmental, Inc. v. County of Orange, 811 F. Supp. 926 (S.D.N.Y. 1993)). Later that year the County decided to abandon the expansion project. In 1994, the court dismissed plaintiffs' claim for civil penalties (and other RCRA-related claims) but not the claim for injunctive relief (Orange Environmental, Inc. v. County of Orange, 1996 U.S. Dist. LEXIS 5290 (S.D.N.Y. 1994)). In this action of cross-motions for summary judgment, plaintiffs sought an injunction, claiming that the County's lack of on-site remediation constituted a continuing violation of the CWA.

In relying on the test in Atlantic States Legal Found. v. Tysons Foods, 897 F.2d 1128 (11th Cir. 1990), the court held that plaintiffs' injunctive claims were moot based on the fact that the County came into compliance with the CWA by complying with U.S. EPA's compliance order. Observing that this action involved the CWA's enforcement function and not its permitting function, the court observed that U.S. EPA determined that a compliance order for off-site remediation was the appropriate enforcement action (one of several options under 33 CFR §§326.1, 326.2). The court noted that U.S. EPA acted as the lead agency on this enforcement action, with the USACE' concurrence. The court further noted U.S. EPA's independent enforcement authority under the CWA for unauthorized discharges. The court concluded that the "agency charged with implementation and enforcement of the section 404 program has interpreted the section not to require an after-the-fact permit or on-site remediation" and the court should "give deference to that administrative interpretation."

In rejecting plaintiffs' argument that the lack of on-site remediation constituted a continuing violation, the court concluded that adoption of this position would undermine U.S. EPA's ability to negotiate compliance orders. The court cited Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1987) and Atlantic States Legal Found. v.

Eastman Kodak, Co., 933 F.2d 124 (2d Cir. 1991) in emphasizing that citizen suits are confined to ongoing contamination threats. In upholding U.S. EPA and the USACE' determination in the compliance order, the court noted that the "present situation comes down to a question of whether the private citizens can overrule the judgment of the U.S. EPA and demand an additional and different type of remediation than that settled upon by the federal authorities. We do not believe they do have, or should have, such a power." The court further ruled the expansion site's lack of wetlands does not constitute "wrongful behavior" precluding a finding that plaintiff's injunctive claims were moot (see Connecticut Coastal Fishermans Assoc. v. Remington Arms Co., 686 F. Supp. 1044 (S.D.N.Y.)).

3. Notice

a. District court holds notice by a single plaintiff in suit with multiple plaintiffs constitutes 'substantial compliance' with RCRA and CWA notice requirements:

Long Island Soundkeeper Fund v. New York Athletic Club, 1996 U.S. Dist. LEXIS 3383 (S.D.N.Y. Mar. 20, 1996). See case summary on page 6.

b. District Court holds plaintiffs' notice of intent to sue letter adequate regarding failure to prepare BMPs, storm water pollution prevention plan, and monitoring and reporting requirements:

NRDC v. Southwest Marine, 945 F. Supp. 1330 (S.D. Cal. 1996).

Plaintiffs filed suit against Southwest Marine for allegedly violating numerous provisions of the Clean Water Act (CWA). Plaintiffs allege: 1) that Southwest's unlawful and excessive discharges of water pollution from its bayside facility contributed noxious pollutants to, and harmed, the San Diego Bay and the Pacific Ocean; and 2) that Southwest failed to develop and implement a Best Management Practices Program ("BMP"), a Storm Water Pollution Prevention Plan ("SWPP"), and a monitoring and reporting plan as required by the CWA

Plaintiffs gave notice of alleged violations and their intent to file suit on April 30, 1996. More than 60 days passed after defendants were given notice, without any action by EPA, State, or Regional environmental regulatory agencies. Southwest contended that plaintiffs' notice letter failed to meet the requirements of 40 CFR 135.3(a) in that it did not identify 1) the specific standards at issue, 2) the activities which gave rise to the alleged violations, 3) the persons responsible for the alleged violations, 4) the location of the alleged violations, 5) the dates of the alleged violations, and 6) the full name of the person giving notice.

The court observed that challenging the failure to develop and implement the compliance and monitoring plans noted above is far different than challenging specific instances of illegal discharge. **Consistent with the holding in City of New York v. Anglebrook Ltd. Partnership, 891 F. Supp. 900 (S.D.N.Y 1995), the court held that the notice provided by plaintiffs complied with the CWA for the following reasons.**

First, the court found that plaintiffs' notice letter specifically identifies three standards that the SWPP violates, six standards that the monitoring plan violates, and two standards that the BMP plan violates. For each violation, the letter states the prohibited actions and the regulations and NPDES permit provisions which it violates.

Second, the court observed that the defendant's failure to prepare and implement legally sufficient environmental compliance plans is the activity that constitutes the violation. The court recognized that when describing the failure to perform an act, it is impossible to describe the time, date, activities, and persons responsible with the specificity used when describing an affirmative act. Thus, plaintiffs can only allege who was supposed to act or what they were supposed to do and that they have failed to do it.

Third, the court found that the notice letter adequately alleged that Southwest is the person responsible for failure to prepare and implement a SWPP plan, a BMP plan, and monitoring and

reporting plan. The notice letter was sent to Southwest and the Port of San Diego alleging that violations of the CWA were the responsibility of both parties.

Fourth, the court stated the letter adequately described the location of the alleged violations because the violations are within the SWPP plan, the BMP, and the monitoring and reporting plans themselves. Further the notice letter states that the violations occur at the Southwest corporate headquarters at the foot of Sampson Street in San Diego, CA. The court observed that the alleged violations involve the failure to prepare and implement plans for the entire facility at this location, and that this is unlike a discrete discharge from an industrial location.

Fifth, the deficiencies in these plans are ongoing, so there is no specific date that can be alleged as a date of violation. As long as Southwest operates without legally adequate BMP, SWPP, or monitoring and reporting plans, the violations continue each day, by contrast with normal citizen suits where plaintiffs are suing over specific discrete discharges which occur over a finite period, see California Sportfishing v. City of West Sacramento, 905 F. Supp. 792 (E.D. Cal. 1995).

Finally, the court found that the notice letter provides sufficient information to identify the parties and their council. The letter 1) states that it is being sent on behalf of NRDC and San Diego Baykeeper, 2) provides the full name and address of both NRDC and San Diego Baykeeper, 3) is signed by the senior project attorney for San Diego Baykeeper and NRDC, and the executive director for San Diego Baykeeper.

The court held that the notice of intent to sue letter was consistent with the requirements of 40 CFR 135.3(a) and denied defendant's motion to dismiss for lack of subject matter jurisdiction.

4. Eleventh Amendment Immunity

a. Second Circuit holds State Transit Authority not immune form CWA citizen suit under Eleventh Amendment:

Mancuso v. New York Thruway Auth., 86 F.3d 289 (2nd Cir. 1996).

Plaintiffs Frank and Ellen Mancuso ("Mancusos") brought an action in federal court against the New York Thruway Authority ("Authority") and the City of New Rochelle, New York, alleging the defendants had violated the Clean Water Act, 33 U.S.C. §1251 et seq., by discharging pollutants into Echo Bay. Plaintiffs also raised a number of state law claims. The district court rejected the Authority's defense that it is entitled to Eleventh Amendment immunity under the arms-of-the-state doctrine, and the Authority appealed. In its appeal, the Authority also argued that it is entitled to sovereign immunity because the plaintiffs failed to give proper notice of this suit to the New York Attorney General, and the Authority raised a number of defenses to the plaintiff's state law claims.

In examining the Authority's argument for Eleventh Amendment immunity, the court reviewed Feeney v. Port Authority Trans-Hudson Corp., 873 F.2d 628, 630-31 (2d Cir. 1989), *aff'd on other grounds*, 495 U.S. 299, 109 L.Ed. 2d 264, 110 S.Ct. 1868 (1990) which lays out a six part test for deciding whether an entity is covered by the immunity afforded by the Eleventh Amendment. The *Feeney* elements include: 1) how the entity is referred to in the documents that created it; 2) how the governing members of the entity are appointed; 3) how the entity is funded; 4) whether the entity's function is traditionally one of local or state government; 5) whether the state has a veto power over the entity's actions; and 6) whether the entity's obligations are binding upon the state. The court found that the six *Feeney* factors must be equally balanced and could not alone provide a basis for deciding the Eleventh Amendment immunity issue.

The court next considered the two underlying purposes of the Eleventh Amendment: 1) protection

against state liability and 2) respect for state sovereignty. Finding that the state treasury is not even minimally at risk the court turned to the issue of whether the action was an affront to state sovereignty and determined that subjecting the Authority to a suit in federal court would not be an affront to the dignity of New York. **On this basis the court held that the Thruway Authority was not entitled to Eleventh Amendment immunity.**

Taking up the Authority's second defense, that plaintiffs had failed to file their suit in a timely manner, the court stated that the New York Court of Claims Act §11(a) requires the Authority to assert, either before or in its responsive pleadings, any defense based on plaintiff's failure to serve the Attorney General. The court held that the Authority failed to assert a defense based on §11(a) and, therefore, the defense had been waived.

Based on the above holdings, the court affirmed the district court's rejection of Eleventh Amendment immunity and state law immunity for the Authority. The court declined to review the Authority's other defenses on the basis of lack of jurisdiction.

b. Ninth Circuit holds that the Eleventh Amendment does not preclude state officials from being held liable for violations of federal statutes:

NRDC v. California Department of Transportation, 96 F.3d 420 (9th Cir. 1996).

Plaintiff brought a citizen suit against California Department of Transportation, "Caltrans" and its Director, James Van Loben Sels for noncompliance with the storm water provisions of the CWA. Defendants submitted a motion to dismiss for lack of subject matter jurisdiction claiming that the case was barred by the 11th Amendment. The district court dismissed the claims against Caltrans, but rejected the motion for dismissal against Lobens, in part, recognizing the exception to the 11th Amendment for state officials that violate federal law established in *Ex parte Young*, 209 U.S. 123 (1908). The district court dismissed all claims against Loben Sels pertaining to past violations of the CWA, leaving intact the claims pertaining to prospective injunctive relief against Loben Sels.

The Ninth Circuit affirmed the district court's decision, and addressed the issue raised by the plaintiff regarding the effect of a recent 11th Amendment case, Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114 (1996), on claims against Van Loben Sels. In *Seminole Tribe*, the Supreme Court held that "where Congress has prescribed a detailed remedial scheme for the enforcement against a state of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer base upon Ex parte Young." Id. at 1132. **The Ninth Circuit, in this case, held that Congress enacted the CWA with the implicit intention of allowing citizens to bring Ex parte Young suits against state officials responsible for clean water standards and permits.** Therefore, the court held that the district court did not err in refusing to dismiss claims against Van Loben Sels.

F. Administrative Practice

1. Seventh Circuit holds it lacks jurisdiction to review Agency interpretive ruling:

South Holland Metal Finishing v. Browner, 97 F.3d 932 (7th Cir. 1996).

Plaintiff South Holland Metal Finishing Company operated an electroplating operation in South Holland, Illinois which generated polluted wastewater that was treated before being discharged into the sewer system. In 1986, South Holland moved its operation to a nearby building. The Metropolitan Water Reclamation District of Greater Chicago ("Water District") ruled that, as a result of South Holland's move, South Holland's classification changed from that of an "existing source" of pollution to a "new source," thus subjecting South Holland to more stringent pretreatment standards. In September 1994, the Water District sought a formal ruling from Region V of the EPA in the form of a "category determination." Region V responded to the Water District's request by letter, dated November 17, 1994, stating that the time had passed for requesting a formal category determination. However, Region V gave an interpretive ruling that concluded that South Holland became a "new source" as defined by the Clean Water Act and 40 C.F.R. 403.3(k) once it moved to

the new building in 1986. South Holland submitted additional written comments to Region V, seeking a hearing to reconsider the ruling, but Region V only confirmed its initial determination. Thereafter, South Holland filed suit and sought reversal of Region V's interpretive ruling.

EPA contended that this court was without jurisdiction to review its interpretive ruling, pursuant to § 509(b)(1) of the Clean Water Act, 33 U.S.C. 1369(b)(1), and also maintained that Region V correctly decided the issue on its merits. The plaintiff cited Modine Mfg. Corp. v. Kay, 791 F.2d 267(3d Cir. 1986), as support for their claim that the court did, in fact, have jurisdictional authority under § 509 (b)(1)(C) which provides: "review of the Administrator's action... in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title... may be had by any interested person in the Circuit Court of Appeals of the United States..." In *Modine*, the Third Circuit held that it had jurisdiction to review a category determination. However, the court noted that in *Modine* EPA had made a formal category determination under 40 C.F.R. 403.6(a)(1), while in the present case, Region V explicitly denied in the November 17, 1994 letter that it was making a formal category determination.

The court found a more suitable analogy in American Paper Institute v. EPA, 882 F.2d 287 (7th Cir. 1989). In that case, the American Paper Institute sought review of Region V's policy statement concerning dioxin discharges from pulp and paper mills. The court determined that Section 509(b)(1)(E) did not cover Region V's policy statement and, therefore, it was not reviewable. The court applied the same reasoning they used in *American Paper Institute* to the present case. First, since Region V's interpretive ruling had not been adopted by the EPA, the ruling couldn't be considered the "Administrator's action." Second, like the policy statement at issue in *American Paper Institute*, Region V's interpretive ruling was not "promulgated." Third, the interpretive ruling was not an "effluent standard, prohibition, or pretreatment standard." Instead, the ruling was Region V's opinion concerning which pretreatment standard the EPA would deem applicable to South Holland based on whether it is a "new source" or an "existing source." Because Region V's interpretive ruling was not a formal category determination and does not otherwise qualify for review under § 509 (b)(1), the court found that they lacked the jurisdiction to review South Hollands' petition and dismissed it accordingly.

2. EAB denies review of permit where petition lacks specificity as to why the Region's decision is erroneous to such an extent that EAB has no basis for review:

In re Puerto Rico Electric Power Auth. (Cambalache Combustion Turbine Project), 1995 PSD LEXIS 1 (Dec. 11, 1995).

Citizens in Defense of the Environment (CEDDA) sought review of a final Prevention of Significant Deterioration (PSD) permit issued by U.S. EPA Region II to Puerto Rico Electric Power Authority (PREPA). CEDDA's petition alleged claims concerning environmental justice, the inadequacy of data used by the Region, PREPA's history of alleged environmental violations, PREPA's plans to expand the plant, and a claim that construction activities were undertaken prior to issuance of the permit.

The issue presented to the EAB was whether CEDDA's two-page letter petition met the standards delineated under 40 CFR §124.19 to invoke Board review of the Region's decisions. **The Board held that, in this instance, the petition was so lacking in specificity as to why the Region's decision was erroneous that the petitioner had provided the Board with no basis for review.** In addition, the petition did not identify any specific permit conditions being challenged.

The Board observed that the petitioners had neither identified their specific objections to the permit, nor explained why the Region's basis for the permit was erroneous. The Board observed that the petition did not explain how the Region's decision violated the Executive Order on Environmental Justice or the Constitution. It noted that, while no epidemiology study addressing the facility was prepared, the Region responded to environmental justice issues raised during the comment period by ensuring public participation in the permit process and conducting a comprehensive environmental justice analysis, which included assessing data from three data bases in the Region's GIS data library. Based on

this analysis, the Region concluded that no disproportionate adverse health impacts would occur to lower-income populations. Given that the petition did not attempt to refute either the methods of conclusions of this analysis, the EAB found that review must be denied.

The Board found that the petition suffered similar problems with regard to the remaining assertions. The meteorological data used to model the emissions from the generating station did simulate the presence of the facility, thereby ensuring that changes in meteorological conditions caused by the new structure were taken into account. Specific historic violations were not identified by CEDDA nor were such assertions linked with current permit conditions. CEDDA presented no evidence of imminent plans to change or expand the plant, and the petition did not clearly state what activities PREPA undertook prior to permit issuance that violated any law or regulation. The Board therefore denied CEDDA's petition for review.

3. EAB holds that res judicata does not bar an administrative complaint where no prior adjudication of related penalty liability has occurred or where the claims alleged had not occurred as of the time a similar, prior complaint was filed:

In re Borough of Ridgway, 1996 CWA LEXIS 2 (May 30, 1996).

In July, 1994, Region III issued an administrative complaint alleging that the Ridgway sewage treatment plant violated its NPDES permit during January - April of 1994. The complaint proposed a Class I administrative penalty in the amount of $24,800. In January, 1995, Region III filed a second complaint for Class I penalties ($21,500) for violations of Ridgway's NPDES permit during May - August of 1994. Both complaints alleged daily violations of Carbonaceous Biochemical Oxygen Demand (CBOD[5]) and daily violations of TSS limits. The July 1994 complaint also alleged a single violation of the effluent pH limit during March, 1994.

Ridgway objected that the two complaints arose from the same "transaction"and, therefore, the Region could not arbitrarily divide them to fit within the Class I penalty cap limits. Ridgway argued that because the Region knew that the alleged violations would continue until ongoing modifications to the treatment plant were completed, and chose to file the initial Class I complaint regardless of that knowledge, the Region should be subject to the limits of the Class I process and the second complaint should be dismissed. The Region denied any attempt to manipulate the penalty amounts such that each remained below $25,000 and would not trigger Class II administrative penalty hearing procedures. The Region asserted that it had chosen to examine Ridgway's compliance at 4-month intervals and that its choice among enforcement strategies was a discretionary matter.

Based on the initial hearing, the Presiding Officer decided, and the Regional Administrator agreed, that the second complaint must be withdrawn with prejudice, since the second complaint constituted impermissible claim splitting, barred under the doctrine of res judicata. The Environmental Appeals Board (EAB) subsequently suspended the Regional Administrator's final decision and undertook review sua sponte.

The EAB found that the Regional Administrator's order to withdraw the second complaint based on res judicata grounds was erroneous, and remanded the matter to the Regional Administrator to determine whether Ridgway raised a sufficient claim regarding the avoidance of the Class I penalty cap. The EAB determined that the Regional Administrator erred in applying res judicata in the absence of any prior adjudication of Ridgway's CWA penalty liability. See U.S. v. Athlone Indus., 746 F.2d 977, 983 (3d Cir. 1984) (the claim preclusive aspect of res judicata requires a showing that there has been a final judgment on the merits on a prior suit). The EAB also found that the Regional Administrator erred in applying res judicata to preclude the assertion in the second complaint of claims based on conduct that had not occurred as of the time the first action was filed. The Board noted that the Regional Administrator failed to consider that the second complaint was based on new conduct by Ridgway (i.e., conduct that was new in time), not merely new consequences of the conduct alleged in the first complaint. The EAB stated that "Region III cannot possible be held, by filing a complaint on July

14, 1994, to have forfeited its authority to penalize Ridgway for NPDES permit violations that Ridgway had not yet committed, or had not yet reported to the Region, as of July 14, 1994."

In addressing the Class I penalty cap issue, the EAB found that the statutory text of the CWA makes it clear that the Region's discretion in its choice of enforcement actions is not wholly unconstrained. Rather, the Board found that the Region's action must be subject to review to ensure the Region has not pursued a series of Class I penalty actions for the improper purpose of denying a respondent an opportunity for an APA hearing. The EAB acknowledged that the question of whether use of several Class I actions constitutes an abuse of the Region's authority is fact-dependent, properly decided by the Regional Administrator. The Board noted that in light of U.S. EPA's broad enforcement discretion, any Agency decision on this point should be viewed as presumptively valid. The EAB added that such enforcement strategy decisions may only be judged based on the information available to the Region at the time of its decision, and that such decisions should be overturned only where there is a clear abuse of the Class I process. Finally, the EAB observed that where an abuse has occurred, and withdrawal of one or more complaints is ordered, the complainant may request leave to withdraw its remaining Class I actions so that they may be consolidated into a proper Class II or civil action, or into a Class I action seeking a penalty below the specified maximum.

4. EAB denies petition for review of Region's denial of evidentiary hearing request where no legal basis exists for inclusion of "duty to serve" condition in City's NPDES permit:

In re City of Forth Worth, 1996 NPDES LEXIS 2 (Apr. 5, 1996).

The City of Arlington, Texas entered into a contract with the Village Creek Regional Wastewater Treatment Plant (Village Creek RWTP) for wastewater treatment for western Arlington. The contract will expire on February 14, 2001. The 1995 regional wastewater management plan for the Upper Trinity River Basin, prepared pursuant to CWA §208, indicates that the Village Creek RWTP will meet Arlington's wastewater treatment needs through the year 2000. Under CWA §101(a)(4), Fort Worth received federal funds for expansion and improvement of the Village Creek RWTP based on the fact that the facility serves 22 municipalities, including Arlington, in accordance with an approved wastewater management plan. Failed contract negotiations led Fort Worth to inform Arlington on December 12, 1988, that it would not serve western Arlington after expiration of the contract. Arlington filed suit in State court, claiming that Fort Worth has a duty under the CWA to provide wastewater treatment services to Arlington as long as the Village Creek is operating. The State court's ruling in favor of Fort Worth was upheld on appeal (see City of Arlington v. City of Fort Worth, 844 S.W.2d 875 (Tex. App.--Fort Worth,1992)).

In May 1993, Fort Worth applied for renewal of the NPDES permit for the Village Creek RWTP. Arlington's comments on the draft permit maintained that the permit should include a "duty to serve" condition for the useful life of Village Creek RWTP. The Region issued the final permit on June 25, 1994, and denied Arlington's request for a public hearing. On June 30, 1995, the Region also denied Arlington's requests for an evidentiary hearing, and Arlington petitioned for review of the Region's denial under 40 CFR §124.91.

In support of its request for review, Arlington alleged that the Region erred by: (1) issuing a permit inconsistent with a regional wastewater management plan approved under CWA §208; (2) issuing a permit which failed to include a "duty to serve" condition in violation of Arlington's rights as a "beneficiary" of the grants to Fort Worth under CWA §§201 and 204; (3) denying the evidentiary hearing request which set forth material issues of fact under 40 CFR §§124.74(b)(1) and 124.75(a)(1); (4) denying the public hearing request under 40 CFR §124.12(a); and, (5) denying a supplemental evidentiary hearing request under 40 CFR §124.74(c)(5).

In denying the petition for review, the Environmental Appeals Board concluded that the Region's decision to issue the NPDES permit without a "duty to serve" condition "was neither clearly erroneous nor an exercise of discretion or policy that warrants review." The EAB observed

that since the NPDES permit is effective from August 1, 1994, through July 31, 1997, and the Arlington-Fort Worth contract lasts until 2001, inserting the condition would have no effect on Fort Worth's obligation to provide services for the term of the NPDES permit.

The EAB determined that Arlington's legal arguments for insertion of the condition in the permit lacked merit. As to Arlington's first claim of inconsistency between the permit and the plan, the EAB concluded there was no inconsistency since there was no "specific language in the permit affirmatively contravening the plan." Further, the EAB observed that the plan does not decree that Arlington is entitled to use the Village Creek RWTP past the year 2000. As to the grants issue, the EAB referred to 40 CFR §122.44(n) requiring permits to reflect those grant obligations reasonably necessary to achieve effluent limitations. The EAB held that Arlington failed to demonstrate that the "duty to serve" condition would be necessary to meet permit requirements. Based on the Arlington's failure to establish a legal basis for including the condition, the EAB determined that a dispute over the factual basis for the evidentiary hearing request was not material to the permit.

In pointing out that the "decision to hold a public hearing under 40 CFR §124.12(a) is 'largely discretionary'" (citing *In re* Avery Lake Property Owners Assoc., 4 E.A.D. 251 (EAB 1992)), the EAB concluded that Arlington failed to meet its burden of showing that the Region erred or abused its discretion in deciding not to hold a public hearing. The EAB ruled that the Region also did not err in denying the supplemental evidentiary hearing request as Arlington's request failed to identify any contested permit condition implicated by its allegations, as required by 40 CFR §124.74(c)(5). In rejecting Arlington's arguments on this issue, the EAB observed that it is not aware of any authority that imposes an "absolute duty" on the Region to investigate allegations of permit violations through a NPDES evidentiary hearing.

5. EAB upholds Region IV's denial of request for an evidentiary hearing finding minimal comments on draft permit inadequate to preserve issue for evidentiary hearing:

In re Broward County, Florida, 1996 NPDES LEXIS 5 (Aug. 27, 1996).

Broward County Public Works Department (Broward) sought review of U.S. EPA Region IV's denial of a request for an evidentiary hearing on certain conditions of the NPDES permit for Broward's Northern Regional Wastewater Treatment Plant. The petition raised issues concerning the permits limit on total residual chorine (TRC) in the effluent, lack of a positive reopener clause, and acute toxicity testing requirements.

Broward first challenged the imposition of a State Class III water quality standard limit for TRC until the basis for such a limit was established and the State completed its mixing zone review. Broward asserted that there had been no demonstration that the wastewater treatment plant poses a reasonable potential to cause or contribute to an exceedance of State standards and, therefore, there exists an issue of material fact. The Environmental Appeals Board (EAB) rejected this argument, finding that the permit's fact sheet clearly specifies the Region's findings that '...the Broward daily average 3.5 mg/l TRC treatment plant discharge exceeds the Florida 0.01 mg/l TRC at the end of the pipe and that a 0.01 mg/l TRC limit is required under 40 C.F.R. 122.44(d)(1)(iii).' Moreover, the EAB found that Broward produced no acceptable evidence indicating that the data relied upon by the Region supports Broward's position in any way. The EAB also rejected Broward's argument that a TRC limit was unnecessary because TRC will be addressed by a mixing zone, finding that Broward had no authorization for a mixing zone at the time of the Region'a decision.

Second, Broward argued that the Region erred by not including a positive reopener clause that would allow permit modifications when research or new discoveries demonstrate that effluent standards or limits are either no longer applicable or are more stringent than necessary to protect the environment. After noting that this was a legal issue that does not require review, the EAB found that since nothing in the permit denied Broward the ability to modify its permit should justification arise, it was not error to refuse to include a positive reopener.

Finally, Broward asserted that the testing species and 96-hour test duration for toxicity testing were

inappropriate for open ocean conditions. Based on this, Broward also contended that toxicity testing should be required for monitoring purposes only. **The EAB rejected these arguments, finding that Broward's one sentence comment on the species required in the draft permit was inadequate to preserve the issue for its evidentiary hearing request.** Additionally, the EAB found that as for the issues of test duration and whether toxicity testing should be used for monitoring, no issue of fact existed, since both requirements were dictated by Florida law and are thus required to be incorporated by the CWA. The EAB concluded that the Region correctly denied Broward's request for an evidentiary hearing on the above-mentioned issues.

6. EAB denies review of Region VII's denial of a request for an evidentiary hearing concerning NEPA and ESA issues related to NPDES permit issuance:

In re Dos Republicas Resources Co., Inc., NPDES Appeal No. 96-1, (Dec. 2, 1996).

The National Parks and Conservation Association and the Lone Star Chapter of the Sierra Club (petitioners) sought review of the denial of their request for an evidentiary hearing by U.S. EPA Region VII. The request concerned EPA Region VII's compliance with the Endangered Species Act (ESA) and National Environmental Policy Act (NEPA) in the issuance of a NPDES permit to the Eagle Pass Mine, a new source.

With regard to NEPA, petitioners first argued that the Region gave insufficient attention to a project alternative that would have required relocating the railroad right of way that runs through the site and allowing mining under the right-of-way instead of under Elm Creek and the associated brush corridor. **The EAB disagreed, finding that the Region considered this alternative, albeit briefly, and determined that for reasons of cost, restrictions on necessary property rights, and the quality of coal accessible, determined that this option was not feasible. The EAB found that the Region's treatment of the relocation alternative fully met the "rule of reason" standard for consideration of alternatives under NEPA. (See *In re Spokane Regional Waste-To-Energy*, 2 E.A.D. at 816-817).**

Petitioners next asserted that the Region should have used information developed in the NEPA process to attach conditions to the NPDES permit. **Again, the EAB disagreed, observing that petitioners had made no contention that the discharges allowed under the NPDES permit contravene the Clean Water Act, and that nothing in NEPA provides EPA with authority to put conditions into the NPDES permit that have nothing to do with discharges to Elm Creek. NRDC v. EPA, 859 F.2d 156, 168-170 (D.C. Cir. 1988).**

Under the ESA, petitioners raised four issues: 1) the ESA process resulted in ambiguity based on the Fish and Wildlife Service's (FWS) inability to state that the loss of even one animal would not jeopardize the cat species of concern, and that such ambiguity presents an issue of material fact; 2) the Region should not have issued the permit since the biological opinion required completion of a trapping survey but the permit did not; 3) the Region should have done more to ensure that mitigation efforts would be successful; and 4) the Region had an affirmative legal duty to complete the trapping survey as a conservation measure.

The EAB disagreed that any ambiguity existed between EPA and FWS, finding that the two agencies did not disagree on any material point. The EAB observed that because the FWS could not say with certainty what the effect of a take would be, it suggested the Region take reasonable and prudent measures to reduce the likelihood of a take, and petitioners interpreted such statements as inconsistent. The EAB noted that the Region took such action and that it was appropriate to do so.

The EAB also found that petitioners did not raise the issue of failure to complete the trapping survey before the Region, and were thus barred from doing so. With regard to ensuring the success of the mitigation efforts, the Board observed that neither NEPA or ESA require that mitigation measures be certain to succeed. Moreover, the EAB stated that the Region had agreed to reinstitute consultation in the event a take occurred and to take remedial action. Finally, as to completing the survey as a conservation measure, the EAB found that EPA lacked authority to require respondent to complete the trapping survey as a

conservation measure. Review of the denial of the request for an evidentiary hearing was denied.

7. ALJ holds "bare" assertions, including "form book" affirmative defenses and status as "defense contractor" rejected:

In the Matter of LeBarge Inc., CWA VII-91-W-0078 (Feb. 5, 1996).

On February 5, 1996 Judge Greene issued an order granting EPA's motion for determination as to liability for violations alleged in the complaint. The complaint charged respondent with violations of §§ 301(a) and 307(d) of the Clean Water Act. Respondent, in its answer, pleaded general denials but asserted six affirmative defenses. The affirmative defenses asserted generally the lack of authority for the federal government to proceed in the matter, as well as "laches, waiver, estoppel and all other legal and equitable defenses not specifically set forth." EPA filed a motion for accelerated decision. Respondent's response generally denied the alleged violations and asserted another affirmative defense - as a federal defense contractor it cannot be held liable. The Judge granted EPA's motion for an accelerated decision on liability only and held that neither mere pleadings, nor mere conclusionary assertions are sufficient to defeat a motion for summary judgment. In responding to such a motion, a party may not rest upon mere denials or allegations, but must set forth specific facts to show the existence of a genuine issue for trial. The Judge, likewise, rejected all of respondent's affirmative defenses because the respondent failed to carry its burden to support these defenses with anything more than bare assertions.

8. ALJ holds location of a headwater is a mixed question of law and fact under CWA:

In the Matter of Urban Drainage and Flood Control, CWA VIII-94-20-PII (Dec. 19, 1996).

On December 19, 1996 Judge Pearlstein issued an order on motions for accelerated decision and an order scheduling the hearing in this Clean Water Act § 301(a) action. The complaint alleged that respondents discharged fill into the waters of the U.S. without a permit issued pursuant to Section 401 and proposed a penalty of $125,000. Both parties filed motions for accelerated decision on liability, however, the Judge denied both motions on the basis that a genuine issue of material fact exists. The respondent has asserted, and will bear the burden of proving as an affirmative defense, that the Nationwide Permit 26 was applicable to respondent's activities. Central to respondent's burden will be evidence as to the location of the headwaters of Coal Creek. Judge Pearlstein found that the location of the headwaters is a mixed question of law and fact, and is in dispute. A hearing is scheduled for March 11, 1997.

9. ALJ holds NPDES permit provisions for Alaska placer mines sufficient regarding effluent volume limits but insufficient regarding metals limits and turbidity monitoring:

In the Matter of 1988-1991 NPDES Permits for Alaska Placer Miners, 1996 NPDES LEXIS 6 (August 8, 1996).

A non-profit environmental group, "Trustees," challenged NPDES permits issued to Alaska placer miners in 1989. The Trustees contend that the permits are insufficient in three respects: 1) they fail to require monitoring and reporting regarding compliance with the effluent volume limit (i.e., partial recycling) required as BAT; 2) the permits lack effluent limits for toxic metals other than arsenic; and 3) the permits do not impose appropriate requirements with respect to monitoring for turbidity.

With regard to monitoring compliance with effluent volume limits, Trustees argued that permittees must confirm compliance with the partial recycling requirement by monitoring and submitting periodic reports, because to do less would be inconsistent with the Clean Water Act's technology-based provisions and permit reporting requirements. EPA maintained that compliance with the partial recycling requirement was not determined by flow monitoring but by other permit conditions, including limits on the amount of new water allowed to enter the site and visual inspections. Based on the requirements of 40 CFR 122.44, EPA offered to amend the permits to require miners to report any violation of the recycling

requirement within the shortest reasonable period of time after the permittee becomes aware of the circumstances. The ALJ adopted this approach, finding that the wastewater recycling requirements need not be subject to regular testing and reporting requirements, but only non-compliance reporting.

Regarding permit limits for toxic metals, Trustees argued that the existing indirect permit controls for such metals (i.e., partial recycling, and controls on settleable solids and turbidity) are inadequate to ensure compliance with Alaska water quality standards (AWQS). Trustees presented testimony and data to this effect. **The ALJ agreed, finding that "these indirect controls do not adequately limit levels of toxic metals in the effluent so as not to cause, have reasonable potential to cause, or contribute to, an excursion above the AWQS for any of those metals."** The ALJ required that the permit include limits in addition to arsenic for nine other toxic metals most frequently found in placer mining effluent, as determined by EPA.

Finally, with respect to monitoring for turbidity, Trustees maintained that the permit conditions only required comparison of turbidity at the discharge point with turbidity at a point immediately above the placer mine, and thus did not compare resultant turbidity with "natural conditions," (i.e., the stream condition without human caused pollution) as required by AWQS. **The ALJ agreed, and held that EPA, in consultation with the State and the permittee, must determine the point for sampling background turbidity for each permit.**

10. ALJ holds no right to a jury in administrative cases:

In the Matter of Condor Land Co., CWA-404-95-106 (Dec. 5, 1996).

On December 5, 1996, Judge Charneski issued an order denying respondent's request for a trial by jury in this Clean Water Act case. Citing Atlas Roofing Company v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977) as dispositive on this issue, the Judge held that the Seventh Amendment right to a jury trial does not extend to administrative proceedings.

G. Consent Decrees

1. District court holds that res judicata bars claim that could have been brought in earlier administrative hearing:

U.S. v. Avatar Holdings, Inc. (Florida Cities Water Co.), 1995 U.S. Dist. LEXIS 20450 (M.D. Fla. Filed Nov. 22, 1995).

U.S. EPA brought a civil action under CWA §309(b) against defendant Florida Cities Water, operator of several wastewater treatment plants in Florida and Avatar Holdings, Florida Cities' parent company. U.S. EPA alleged violations of §301, and failure to comply with the conditions of NPDES permits issued under §402 to three of Florida Cities' wastewater treatment plants. The alleged violations included 1) discharging without a NPDES permit (Barefoot Bay, Carrollwood, and Waterway Estates); 2) violation of an U.S. EPA administrative Order (Barefoot Bay); 3) discharging at an unpermitted location (Waterway Estates); 4) exceeding NPDES effluent limits (all three facilities); and 5) failure of tests required by an NPDES permit (Barefoot Bay and Waterway Estates). This action addressed cross-motions for partial summary judgement and Avatar's motion for judgement on the pleadings.

U.S. EPA alleged that Florida Cities was discharging without a permit from Barefoot Bay from July 1, 1990 to October 31, 1991, and from Carrollwood between August 1990 and June 30, 1991. Florida Cities argued the unpermitted discharges from Barefoot Bay and Carrollwood were addressed in consent agreements and orders assessing administrative penalties dated November 11, 1991, and April 19, 1991, respectively. Each required Florida Cities to pay a penalty for the unpermitted discharges. Relying on *In re* Borough of Ridgeway, NPDES Permit No. PA0023213, Florida Cities argued that U.S. EPA was barred from bringing these claims since U.S. EPA had the knowledge and opportunity to address all claims relating to Barefoot Bay and Carrollwood in the administrative proceedings. Florida Cities asserted that a review of the administrative record established that both parties

intended to settle all violations for unpermitted discharges at Barefoot Bay and Carrollwood, and that the consent agreements with their attached notes settled all such matters. U.S. EPA argued that the agreements were, by their terms, limited to violations that occurred during specific periods, that the present claims were different than the claims previously alleged, and that the settlements reserved U.S. EPA right to pursue these claims.

On the issue of the unpermitted discharges from Barefoot Bay and Carrollwood, the court held that these claims were barred by res judicata. The court concluded that U.S. EPA could have raised the claims in the prior administrative proceedings and that the principle of res judicata applies to consent decrees. The court also rejected Florida's Cities' argument that the unpermitted discharges by Waterway Estates were a result of U.S. EPA erroneously rejecting Florida Cities' permit application.

As to U.S. EPA's allegation that Florida Cities violated an administrative order (9/26/90) for unpermitted discharges from Barefoot Bay, the court held that U.S. EPA's claim was also barred by res judicata since U.S. EPA could have raised this claim in the prior administrative proceeding.

On U.S. EPA's claim of discharges to an unpermitted location from Waterway Estates, U.S. EPA asserted that its permit of November 1, 1989, required Florida Cities to discharge directly to the Caloosahatchee River rather than to a tributary canal of the river. U.S. EPA asserted that Florida Cities knowingly discharged pollutants between November 1, 1989 and July 14, 1991, into the canal, an unpermitted location, from Waterway Estates. Florida Cities maintained that according to U.S. EPA's regulations (40 CFR §122.21(g)), the plant's outfall was within the permitted area of discharge. **Concluding that the canal was not a permitted area of discharge, the Court held U.S. EPA was entitled to summary judgment. The Court observed that discharge into the canal was not mentioned in the permit application, the draft permit, or the final permit, and there was no objection or discussion regarding the discharge location during the permitting process.** Further, the Court noted that the U.S. EPA regulation cited by Florida Cities was irrelevant.

U.S. EPA further alleged that Florida Cities repeatedly violated the conditions and limitations of the NPDES permits held by all three facilities. **The court agreed with U.S. EPA that §509(b) of the CWA bars Florida Cities from challenging the permit limits in the district court in the context of an enforcement action. Determining that U.S. EPA fully set forth the violations and that Florida Cities had sufficient notice of the violations, the court found U.S. EPA entitled to summary judgment with respect to the NPDES violations involving all three facilities.**

On the issue of parent company liability, U.S. EPA argued that Avatar Holdings be held directly liable for Florida Cities' CWA violations on the basis of its actual and pervasive control of the environmental practices of Florida Cities. See Jacksonville Electric Auth. v. Bernuth Corp., 996 F.2d 1107 (11th Cir. 1993). **The court held that "in order for Avatar Holdings to be held liable for a violation of the Clean Water Act by Florida Cities, Avatar Holdings must have acted in such a way that it may be considered a 'person who violates' under §309(d) of the Clean Water Act, through such actions as directing or causing the violations, or exercising actual and pervasive control of Florida Cities to the extent of actually being involved in the daily operations of Florida Cities."** Upon examining the facts asserted by both parties, the court concluded that a genuine issue of material fact exists as to whether Avatar Holdings' actions are sufficient to satisfy the legal standard for parent company liability.

The court then granted Avatar Holdings' motion for partial summary judgment on the pleadings. Avatar maintained that it was added as a party in U.S. EPA's revised amended complaint filed on May 5, 1995, and although U.S. EPA sought to file a second amended complaint nun pro tunc as of March 31, 1995, the court denied U.S. EPA's motion to do so. Relying on the holding in 3M Co. (Minnesota Min. & Mfg.) v. Browner, 17 F.3d 1453 (D.C. Cir. 1994), Avatar Holdings argued that claims against it based on alleged discharges prior to May 5, 1990, were barred by the statute of limitations. **The Court held that Avatar Holdings was entitled to partial summary judgment on the pleadings, reasoning that "this court has not permitted the second**

amended complaint to be filed nunc pro tunc, and both the parties assert and the court agrees that 28 U.S.C. §2462 provides the applicable statute of limitations."

2. District court reaffirms its holding that res judicata bars claims that could have been brought in earlier administrative hearing:

U.S. v. Avatar Holdings, Inc., 1996 U.S. Dist. LEXIS 12229 (M.D. Fla. Aug. 16, 1996).

Plaintiff United States brought an action against defendants Florida Cities Water Company and its parent company, Avatar Holdings, alleging NPDES permit violations and unpermitted discharges in violation of the Clean Water Act at three wastewater treatment plants owned and operated by defendants (e.g., Barefoot Bay, Carrollwood, and Waterway Estates). In a prior decision the court had granted plaintiff summary judgement on liability against defendant Florida Cities NPDES permit violations at Barefoot Bay and Carrollwood, and claims for unpermitted discharges, discharges to an unpermitted location, and NPDES violations at Waterway Estates. The court granted Florida Cities summary judgment on several allegations (paragraphs 16-23 and 30 of the second amended complaint), which included claims for discharging from Barefoot Bay and Carrollwood without a NPDES permit, and a claim for violating an administrative order for discharging without an permit from Barefoot Bay. The court also granted Avatar holdings partial summary judgement regarding all allegations dating back more than five years, based on the statute of limitations.

The court then requested the parties to brief the issues of what effect *In re* Borough of Ridgway Pennsylvania, CWA Appeal No. 95-2, and Manning v. City of Auburn, 953 F.2d 1355 (11th Cir. 1992) had, if any, on the courts order precluding the claims in paragraphs 16-23 and 30 of the second amended complaint.

Plaintiffs argued that *Manning* set out principles that should be understood as barring, not requiring, the application of res judicata to certain claims in the instant case. Further, plaintiffs maintained that under *Manning* res judicata cannot bar claims that arose after the dates of the administrative complaints in the instant case, and that EPA was under no duty to supplement its administrative complaint to include subsequent violations. Plaintiffs maintained that under *Ridgway* only those claims that arose before the dates of the violations alleged in the administrative complaints may be barred, and that any claim that arose after the date of the violations in the complaint was a "new wrongful act," that could be the subject of a separate action.

Defendants argued that although the underlying legal principles of *Manning* and *Ridgway* are applicable here, the facts of the two cases are distinguishable and thus the results in those cases are irrelevant. Defendants asserted that the issue in *Manning* was whether the two suits involved the same cause of action, and the Eleventh Circuit found the they did not. Defendants pointed out that here the allegations arose out of the same nucleus of facts. Defendants further asserted *Ridgway* turned on whether the prior suit was a final judgement, and here final adjudication had occurred. Defendants also presented a timeline that demonstrated that the Region knew with certainty when it issued the administrative complaint that unpermitted discharges would continue until the effective date of the permit (the permit was issued September 16, 1991, and became effective November 1, 1991).

The court held that *Manning* and *Ridgway* were distinguishable, and that the claims asserted in this case were not different claims based on new conduct, but that they were the same type of claim asserted in the administrative complaint and were known to the Region at the time the original pleading was filed. The court, thus, reaffirmed its order granting res judicata effect to the claims in paragraphs 16-23 and 30 of the second amended complaint.

3. District court holds consent agreement between U.S. and District of Columbia re Blue Plains fair, reasonable, and in public interest:

U.S. v. District of Columbia, 933 F. Supp. 42 (D.D.C. 1996).

The United States' filed a complaint against the District of Columbia asserting violations of § 309(b) and 204 of the Clean Water Act (CWA) in connection with the District's operation of the Blue Plains Wastewater Treatment Plant. The U.S. moved to enter a stipulated agreement and order but the Commonwealth of Virginia, an intervenor in the action, opposed the motion. Virginia argued that the agreement did not adequately protect its citizens' interests. The court then examined whether the agreement fairly and reasonably resolved the controversy in a manner consistent with the public interest.

The court first examined whether the agreement was fair. Virginia claimed that the consent agreement did not go far enough in punishing the District of Columbia for its poor management of Blue Plains and its misappropriation of user's fees. The United States maintained that the agreement was a product of good-faith negotiations and fully accounted for the merits of the government's case, the risks and uncertainties of litigation, and the environmental benefits that would accrue from immediate implementation. After noting that EPA is due broad deference in determining the appropriate settlement, the court concluded that the agreement was indeed fair, finding that the government has litigated these violations since 1984 and that the problems at Blue Plains, although far-reaching, have not resulted in significant environmental harm.

The court then turned to whether the agreement was reasonable (i.e., technically adequate to accomplish the goals of cleaning the environment; likely to compensate the public for the cost of remedial measures; and reflective of the strength or weakness of the government's case). Virginia maintained that the agreement did not subject to the District to any penalty for past violations, and that the District can not be trusted to comply with the conditions of the agreement. The United States countered that the agreement contained several provisions that would ensure adequate protection of the environment and emphasized that the situation at Blue Plains was so serious that it required immediate attention. The United States also maintained that given the District's dire financial condition, the decision not to seek civil penalties as punishment for past conduct was deliberate, designed to focus all efforts on current and future compliance.

Finally, the court considered whether the agreement was in the public interest. Virginia argued that the agreement did not require permit compliance or forbid/punish Blue Plains' behavior of the last 16 years. It also maintained that notions of corrective justice and accountability were ignored, since no large civil penalty or criminal charges were levied. **The court found, however, that the terms of the agreement contribute to fulfillment of the purposes of the CWA. The court noted that Blue Plains appeared to be in compliance with the agreement, and emphasized that the government's decision of which violations to charge and which remedies to seek are within the prosecutorial discretion of the United States. Based on the foregoing, the court held that the consent agreement was fair, reasonable, and in the public interest, and granted the motion of the United States to enter the decree.**

H. Enforcement Actions/Liability/Penalties

1. Fifth Circuit rejects defendant's arguments as to the excessiveness of penalty but vacates CWA fine and remands for recalculation where district court made erroneous factual determination and did not differentiate what portion of the penalty resulted from each type and quantity of violation:

U.S. v. Marine Shale Processors, 81 F.3d 1329 (5th Cir. 1996).

This discussion addresses only the CWA issues raised on appeal. The district court fined Marine Shale Processors (MSP) for two types of CWA violations; thermal pollution and storm water discharges. MSP conceded that it violated the CWA, however, it argued that the fine imposed for these CWA violations -- $3,000,000 -- was excessive.

MSP discharged large quantities of non-contact cooling water heated to temperatures that at times exceeded 100 degrees Fahrenheit. MSP never held a NPDES permit that authorized the discharge of such cooling water, although in July 1986 MSP did receive a NPDES permit and in February 25, 1987,

MSP did apply for a modification to its NPDES permit to allow for the discharge of hot water.

With regard to the thermal pollution violations, MSP argued that the district court made an erroneous finding of fact in concluding that MSP's increase in the discharge of non-contact cooling water were profit driven. Regarding the storm water violations, MSP argued 1) the district court insufficiently reduced the penalty in light of U.S. EPA's seven-year delay in ruling on MSP's NPDES permit amendment; 2) the district court erroneously excluded evidence of measurement error; 3) all samples were first flush; 4) U.S. EPA guidance stated that in a single monitoring observation, a properly operated facility had a 95 - 99 percent chance of complying with its permit limits, and that its compliance for oil and grease was within this range; and 5) the district court did not differentiate the number or severity of the violations.

The court rejected MSP's arguments as to the excessiveness of the penalty for the storm water violations. The court observed that MSP never sought the aid of the federal judiciary in compelling U.S. EPA to act more expeditiously, and that the district court, did, in fact, factor U.S. EPA's delay into the penalty calculation. The court also noted that the district court heard evidence from MSP's expert on measurement error, but that since such error can be "plus or minus," such error could have caused compliant samples to be exceedances. The court observed that the first flush samples were valid samples and the rules in effect at the time "rendered illegal any storm water discharge in excess of permit limits." The court pointed out that MSP did not achieve a 95-99 percent rate of compliance and that these rates, published in guidance, do not curtail U.S. EPA's enforcement authority. Finally, the court disagreed that the district's court's findings of fact were insufficiently specific to support the penalty.

On the thermal pollution issue, the court found some merit in MSP's attack on the district court's findings of fact. **The court held that the district court's finding that MSP's substantial increase in the amount of hot water it was discharging was a result of MSP's desire to increase capacity and thus maximize profits was clearly erroneous.** Rather, the court observed that the record supported MSP's contention that the increase in hot water discharges resulted from technological improvements, and that the government had presented no evidence to the contrary.

The court then observed that the district court did not differentiate "what portion of the [CWA] fine resulted from each type and quantity of violation," which prevented the court from being able to determine whether the district court's fact finding error was harmless, or whether the penalty should be reduced. Hence, the court vacated the entire fine and remanded the matter to the district court for recalculation.

2. District court holds parent company not liable under §309(d):

U.S. v. Avatar Holdings, Inc. (Florida Cities Water Co.), 1996 U.S. Dist. 12312 (M.D. Fla. Aug. 20, 1996). See case summary on page 39.

3. District court finds stipulated penalty of $2,500 per day for failure to comply with terms of consent decree for CWA violations not excessive:

U.S. v. Krilich, 1996 U.S. Dist. LEXIS 7693 (N.D. Ill., May 31, 1996). See case summary on page 20.

4. District court awards statutory maximum penalty finding U.S. EPA penalty policy gravity methodology to be a fair and reasonable means to quantify the seriousness of a violator's non-compliance:

Public Interest Research Group v. Magnesium Elektron, 1995 U.S. Dist. LEXIS 20748 (D.N.J. March 9, 1995)

Plaintiff Public Interest Research Group of New Jersey (PIRG) brought a citizen suit under the CWA against defendant Magnesium Elektron, a chemical manufacturing facility, alleging multiple violations of defendant's discharge limits and monitoring and reporting requirements under defendant's NPDES permit. Defendant stipulated to liability for 123 permit violations that occurred between February 1984 and July 1989. On January 23, 1992, defendant was found liable for an additional 27 TOC

discharge violations and a permanent injunction was issued. In this action plaintiffs sought imposition of a civil penalty for defendant's 150 violations of the CWA. Plaintiffs urged that the statutory maximum penalty of $2,625,000 be imposed.

In considering the amount of civil penalty to be imposed, the court systematically considered the statutory factors set out in 33 U.S.C. 1319(d). Based on expert testimony, the court concluded that numerous violations were not serious because they did not did not seriously impact the receiving waterway. **However, the court found the 76 monitoring and four reporting violations were serious due to their number, the fact that defendant had 167 prior monitoring violations barred by the statute of limitations, and the fact that monitoring violations undermine the self-reporting system central to the NPDES program.** The court found the four reporting violations to be serious because they involved failing to reveal a discharge violation and incorrectly reporting the number of exceedances.

In assessing the economic benefit, the court looked at the action the defendant should have taken to comply with its permit, and calculated the present after-tax value of the expenditures the company avoided or delayed by not complying. Plaintiff's expert calculated that the economic benefit of not hauling all of its wastewater to Trenton was $5,330,000 (cost avoided) and of not installing treatment equipment was $9,930,000 (cost delayed). The court acknowledged that theoretically defendant could have hauled or treated less than all of its wastewater and achieved compliance with its permit limits, but noted that defendant was not able to pursue these options because the flow in the receiving water was so highly variable as to make it impossible to determine what proportion of its wastewater needed to be hauled. Thus, the court accepted the $5,330,000 figure, presuming the defendant would select the lower cost option. The court noted, however, that the economic benefit calculation was accepted based on the unique character of this case (i.e., the highly variable flow of the receiving water) and that plaintiff's expert opinion is otherwise questionable.

The court did consider U.S. EPA's penalty policy and stated that the seriousness factor in CWA §309(d) is parallel to the U.S. EPA penalty policy's gravity component. The court found U.S. EPA's gravity methodology to be a fair and reasonable means of quantifying the seriousness of a violator's noncompliance. The court also noted that the seriousness of the violations mitigate the penalty somewhat, but that the extensive history of violations warrant a small increase in the penalty. However, since the economic benefit alone exceeded the statutory maximum penalty, the penalty was based on that benefit and reduced to the statutory maximum of $ 2,626,000.

5. District court holds combined sewer overflow via manhole violates CWA and that penalty must be imposed once CWA liability is established:

State of Georgia, Plaintiffs, Robert Vickery et al., Intervenor Plaintiffs v. City of East Ridge, Tennessee, 1996 U.S. Dist. LEXIS 18862 (N.D.Ga. Nov. 20, 1996).

Defendant City of East Ridge is a municipal corporation located in Tennessee that owns and operates a sewerage system that services residents of both Tennessee and Catoosa County, Georgia. The sewer line that services the Georgia residents begins in Tennessee, dips briefly into Georgia, and returns to Tennessee, where it joins other lines and eventually discharges into a treatment facility located in Chattanooga, Tennessee. The sewer collection system services approximately 200 homes in the City of Rossville, Georgia. The defendant possesses an NPDES permit to discharge pollutants in Tennessee but not Georgia.

Defendant constructed manholes at regular intervals along its sewer lines, including manhole #462 directly in front of the homes of the intervenor plaintiffs. Intervenor plaintiffs alleged that, since February 1990, heavy rains have caused defendant's sewer line to overflow on 19 separate occasions, which has resulted in wastewater containing raw sewage and other pollutants flowing out of the manhole and into a storm drain that empties into an unnamed tributary located behind intervenor plaintiff's homes. Wastewater also flows onto their properties, down the property lines, and into the unnamed tributary.

Intervenor plaintiffs reported 12 of the overflows to the State of Georgia's Environmental Protection Division (EPD). A representative from that agency observed 2 occasions of overflows. Plaintiffs State of Georgia filed its compliant on November 10, 1994. On December 12, 1994, defendant notified its customers in Georgia that they would be terminating sewer services for all Georgia customers in March 1996. On November 11, 1995, intervenor plaintiffs filed their complaint, including the five state law claims. Six additional overflows were observed and documented after initiation the suit.

The court found that plaintiffs and intervenor plaintiffs satisfied all necessary elements to establish that defendant violated the CWA on at least 19 occasions. **The court determined that it could and in fact must assess civil penalties under CWA § 309 for violations that occurred prior to filing suit. (See Atlantic States Legal Found. v. Tyson Foods, 897 F 2d. 1142 (1990) ("once a violation has been established, some form of penalty is required").** However, the court held that punitive damages were not available under state law against governmental entities. See, e.g., Provident Mutual Life Ins. Co. v. City of Atlanta, 864 F. Supp. 1274, 1280 (N.D. Ga. 1994).

The court also held that defendant was entitled to summary judgment with respect to claims for damages to real or personal property accruing prior to October 11, 1991. The court observed that intervenor plaintiffs filed their complaint on October 11, 1995, and that under Georgia's statute of limitations, intervenor plaintiffs' claims for damages to real or personal property accruing prior to October 11, 1991, were barred as a matter of law.

With regard to the defendant's motion for summary judgment on intervenor plaintiffs' breach of contract claim, the court noted that in Georgia an agreement between a water company and its customer is governed by the provisions of the Georgia Commercial Code, and that defendant's notice of termination to intervenor plaintiffs may constitute an anticipatory repudiation of any implied contract. The court allowed that plaintiffs may litigate both abatable and permanent nuisance claims; however, the plaintiffs may not receive a damages award for both claims. Finally, the court held that intervenor plaintiffs may properly seek damages for the trespass claim and the nuisance claim in the State of Georgia.

6. District court reduces EPA-proposed penalty and holds parent company not liable:

U.S. v. Avatar Holdings, Inc., 1996 U.S. Dist. LEXIS 12312 (M.D. Fla. Aug. 20, 1996).

Plaintiff United States brought an action against defendants Florida Cities Water Company and its parent company, Avatar Holdings, alleging NPDES permit violations and unpermitted discharges in violation of the Clean Water Act at three wastewater treatment plants owned and operated by defendants (e.g., Barefoot Bay, Carrollwood, and Waterway Estates). In a prior decision the court had granted plaintiff summary judgement on liability against defendant Florida Cities NPDES permit violations at Barefoot Bay and Carrollwood, and claims for unpermitted discharges, discharges to an unpermitted location, and NPDES violations at Waterway Estates. The court granted Florida Cities summary judgment on several allegations (paragraphs 16-23 and 30 of the second amended complaint), which included claims for discharging from Barefoot Bay and Carrollwood without a NPDES permit, and a claim for violating an administrative order for discharging without an permit from Barefoot Bay. The court also granted Avatar holdings partial summary judgement regarding all allegation dating back more than five years, based on the statute of limitations.

This action addressed the amount of civil penalties imposed on Florida Cities, the liability of Avatar Holdings as Florida Cities parent company, and the amount of penalties to imposed on Avatar Holdings, if any.

On the first issue, the court held that Florida Cities must pay civil penalties of $309,710. EPA had requested a penalty of $4,861,500, while defendants argued for a penalty of no more than $48,000.

The court started its analysis with the statutory maximum, which it calculated to be $53,300,000. The court then adjusted the penalty based on the factors in CWA § 1319(d). The court found that the

seriousness of the various violations alleged ranged from not serious to somewhat serious for several reasons, including that no quantifiable risk to the environment was demonstrated. The court found that economic benefit did "... not weigh in favor of mitigation of the penalties," and that the history of violations at the three facilities supported some mitigation of the penalties, based on limited prior violations and the fact that these facilities operated pursuant to federal and state administrative orders, consent orders, and state permits during portions of the time period in question. With regard to defendant's good faith efforts to comply, the court found that these efforts supported "a small mitigation of the penalties." Such mitigation was based on recognition that although these facilities proceeded slowly in several instances due in part to concerns about the costs of upgrades, some delays were due to third party actions, and the facilities did take certain actions to come into compliance. The court recognized the economic impact of the penalty as a mitigating factor, based on testimony that Florida Cities could only afford to pay a penalty of up to $7.5 million without adverse effect on the company. The court also recognized that Florida Cities was a rate-regulated utility, and that Florida Cities and its parent company had approximately $17 million of planned capitol expenditures designed to improve these facilities, which exhausted available lines of credit. The court found no "other factors" warranted consideration.

On the second issue, the court held that Avatar Holdings was not a "person who violates" under § 309(d) of the CWA. The court found that Avatar Holdings involvement was limited to overall financial review and strategic planning, and that any knowledge and discussion of compliance issues did not amount to "the type of action or direction for which liability arises under the CWA." Because Avatar Holdings "did not make the type of operational decisions that amount to directing or causing the violations...," and because it was not "the entity responsible for decisions regarding operations and environmental compliance," the court entered judgment against plaintiff on this claim. **The court also dismissed Avatar Holding's motion for judgment as a matter of law as moot.**

7. District court establishes pretreatment penalty based on illegal profits and other factors:

U.S. v. Union Township and Dean Dairy Products Company, Inc. d/b/a Fairmont Products, 929 F.Supp. 800 (M.D. Pa. 1996).

On July 10, 1996, a Federal District Court awarded a penalty of $4,031,000 for pretreatment violations after trial on the case's penalty phase. Dean Dairy is a wholly-owned subsidiary of Dean Foods, the largest fluid milk processor in the U.S. The suit was about alleged pretreatment violations at Dean Dairy's plant in Belleville, Pennsylvania. The case was solely about penalties because Dean Dairy had substantially achieved compliance in April 1995 with new pretreatment equipment. But between July 1989 and April 1994 when suit was brought, Dean Dairy had 1754 violations of Industrial User permit and 79 instances of interference with the local POTW. Between July 1989 and February 1995, Dean Dairy violated its IU permit for BOD or TSS monthly avverage limits in 54 of 68 months.The case involved conventaional, not toxic, pollutants. In 1993, the Pennsylvania Fish and Boat Commission stooped the fish stocking program for the receiving water because of it poor quality caused by dischagres from the local POTW. However, there was no evidence before the court on Dean Dairy's degree of responsibility for the creeks degradation.

The court found that Dean Dairy "could have achieved compliance with its IU permit by reducing its production volume, and it was aware of this fact." The court assessed the economic benefit to Dean Dairy by delaying pretreatment compliance. The court placed reliance on Dean Dairy's written calculation that it would have reduced earnings by $417,000 yearly if it had reduced its production volume to comply with its IU permit limits. Accordingly, the court found that economic benefit for the period for the period from July 1989 to April 1994 was $2,015,500. This is the first case where the court determined recapture of benefit based on illegal profits. The court then doubled the total penalty to $4,031,000 based on such factors as seriousness and length of violations, willfulness of the violations, and economic impact on the violator. As to economic impact, the court also looked to the finances of the parent coproation, Dean Food,

"because it is so closely interconnected... that the two should be treated as a single entity."

Upon defendant's motion for reconsideration, the court also discarded Dean Dairy's post-trial complaint regarding economic benefit. First, the court disagreed with the defendant's argument about lack of notice on the economic benefit or wrongful profit concept, citing the pretrial memorandum, trial brief, and opening statements as sources of adequate notice. The defendant asserted the U.S. had stipulated with regard to no economic benefit from the five year delay in capitol and operating expenses necessary to achieve IU permit compliance. The court recognized this stipulation but held that U.S. had preserved its claim to other economic benefits earned by Dean Dairy. (See U.S. v. Union Township, [ ] (M.D. Pa. 1996).

In setting the appropriate penalty, the court evaluated the seriousness, history and willfulness of the violations and the need for deterrence. The court viewed the violations as serious because of the number and environmental impacts. The court distinguished between the seriousness of toxic versus conventional pollutants and noted that Dean Dairy's violations were conventional. The court noted that the exceedences were extremely high (30% and 21% over monthly averages for TSS and BOD, respectively). The court determined that Dean Dairy knowingly exceeded its permit limits and was indifferent to its violations. This indifference was observed through delays in implementing controls and its unwillingness to reduce pollutant volumes. The court indicated that deterrence could be achieved only if the penalty for noncompliance, in addition to the loss of economic benefit, is an additional sum equal to the economic benefit from noncompliance.

8. District court holds economic benefit calculation must consider condition of defendant's field:

U.S. v. Sheyenne Tooling & Manufacturing, 1996 U.S. Dist. Lexis 20341 (D.N.D. Dec. 30, 1996).

The United States brought an action against Sheyenne Tooling & Manufacturing Company for violations of 33 U.S.C. §§ 1317, 1318, and 1319, after EPA had issued an order for compliance under 33 U.S.C. § 1319(2)(A). Sheyenne, an indirect discharger, was shown at trial to have violated numerous pretreatment requirements, some violations having continued for a period of 10 years. The U.S. sought a penalty of $336,000, representing the economic benefit enjoyed by Sheyenne, plus an additional $100,000. The U.S. asserted this was reasonable because it represented a mere $0.03/$1.00 of the maximum penalty authorized. Employees of Sheyenne asserted that the company was a small, unsophisticated metal production facility, that they were unaware of the pertinent regulatory requirements, and that they worked to comply once aware of their obligations.

EPA's experts calculated the economic benefit accruing to Sheyenne to be $236,000. Sheyenne's expert calculated that benefit to be $12,564. The court found that in calculating economic benefit for purposes of "leveling the playing field" defendant "must be held to the conditions of his field, not that of larger or more wealthy players." The court found that the experts for the United States used averages and generalizations not compatible with the locality in which the defendant operated (i.e., a small, sparsely settled community), and the court reduced the penalty from that proposed by the government. **Based on the statutory factors specified in the CWA, the court held that Sheyenne was liable for a penalty of $60,150.**

9. EAB reduces penalty due to indirect involvement in violation:

In re Rybond Inc., 1996 RCRA LEXIS 6 (Nov. 8, 1996).

On November 8, 1996, EAB Judge Relch issued a final order upholding the ALJ's default order against the respondent for not filing a pre-hearing exchange. The EAB reduced the default penalty from $178,896 to $25,000, however, on the basis of Rybond's indirect involvement (i.e., its lease caused the violations), the lack of serious risk, and the likely deterrent impact of a smaller penalty. It is noteworthy that the Board did not remand the case to the ALJ to determine an appropriate penalty, but substituted its judgment on appeal. Such action may have resulted because the ALJ in this case, Judge Vanderheyden, retired.

10. EAB holds failure to consider RCRA violation's impact on statutory and regulatory program is reversible error:

In re Everwood Treatment Company, 1996 RCRA LEXIS 4 (Sept. 17, 1996).

U.S. EPA appealed an initial decision assessing a penalty of $59,700 against Everwood Treatment Company for violations of RCRA related to Everwood's disposal of soil contaminated with copper chromate, and arsenic in a pit at its wood treatment facility without obtaining a permit or complying with applicable land disposal restrictions. In the initial decision, the Region had sought a penalty of $ 497,500 for violations alleged in counts 1 and 13 (operating a hazardous waste disposal facility without a permit; and violating the land disposal restrictions, respectively). The Region found that for the permitting violation both the potential for harm and extent of deviation were "major," warranting a gravity-based penalty of $25,000. The Region added a multi-day penalty of $2,000 per day for 179 days ($358,000), which was adjusted upward by 25 percent ($89,500) based on Everwood's alleged willfulness. With respect to the LDR violation, the Region similarly found that both the potential for harm and extent of deviation were "major," warranting an additional gravity-based penalty of $25,000.

The ALJ agreed that the extent of deviation for both the permit and LDR violations was major, but classified the potential for harm for each violation as minor. In addition, the ALJ rejected the 25 percent upward adjustment for willfulness. The ALJ assessed a gravity-based penalty of $3000 for the permitting violation, with an additional penalty of $300 for each day of continued violation ($53,700). As for the LDR violation, the ALJ assessed a penalty of $3000. The ALJ asserted that the seriousness of the violations had been vastly overstated and no consideration had been given to respondent's good faith efforts to comply with applicable requirements.

On appeal, the EAB found the ALJ's classification of the potential for harm from the permitting and LDR violations as minor to be reversible error. The Board found that the ALJ failed to consider the second factor -- the adverse effect non-compliance may have on the statutory and regulatory program -- in calculating the gravity-based penalty. The Board observed that in burying hazardous without a permit or required treatment or monitoring, Everwood engaged in precisely the type of activity that RCRA was enacted to prevent, and that the 1990 RCRA penalty policy indicates that violations that are fundamental to the RCRA program "'merit substantial penalties' in that they 'undermine the statutory or regulatory purposes or procedures for implementing the RCRA program.'"

The Board classified both the potential for harm and extent of deviation for the permitting violation as major. Based on the small amount of waste involved, the Board calculated a gravity-based penalty of $20,000 for the permitting violation, with a multi-day penalty of $1,000 multiplied by 179 ($179,000). For the LDR violation, the Board again classified both the potential for harm and extent of deviation as major, and calculated a gravity-based penalty of $20,000, for a total of $219,000. The Board found no evidence of good faith on the part of Everwood to come into compliance, and agreed with the Region that Everwood's actions were willful (e.g., company employees directed that the waste be buried in an unmarked area). The Board found that this supported the imposition of a 25 percent upward adjustment ($54,750) and imposed a penalty of $273,750.

11. ALJ holds penalty calculation methodology of starting at the statutory maximum is not necessarily applicable in administrative proceedings:

In the Matter of Mahoning Valley Sanitary Dist., 1996 CWA LEXIS 1 (May 14, 1996).

U.S. EPA Region V filed an administrative complaint against Mahoning Valley Sanitation District (respondent) that alleged respondent violated §301(a) of the CWA by discharging lime sludge into Meander Creek, a navigable water of the U.S., without a NPDES permit. Respondent did not contest the factual or legal allegations, and the Presiding Judge entered judgment in favor of the complainant. An evidentiary hearing was conducted

to determine the appropriate penalty. The complaint alleged 27 violations and sought a $125,000 penalty.

The Presiding Judge (ALJ) first observed that §309(g)(3) of the CWA specifies the factors to be considered when assessing a penalty. However, the ALJ declined to start with the statutory maximum penalty and apply the statutory adjustment factors. Rather, he followed the reasoning *In re* Puerto Rico Urban Renewal & Housing Corp., Docket No. CWA-II-89-249, June 29, 1993, and found that the only relevant penalty policy for assessing penalties in administrative proceedings -- the *Addendum to Clean Water Civil Penalty Policy for Administrative Penalties*, August 28, 1987 -- is at odds with starting at the statutory maximum. See also, *In re* Port of Oakland and Great Lakes Dredge & Dock Co., MPRSA Appeal No. 91-1 (EAB, August 5, 1992) (the maximum penalty is not the starting point if this penalty clashes with the penalty calculation under the applicable penalty policy).

Contradictory assertions were made regarding the number of days of violation that resulted from annual maintenance to the clarifiers. The ALJ concluded that 27 days of violation occurred over three years. In reviewing the seriousness of the violation, the ALJ found that no harm to human health or the environment was established and, therefore, the violation should be considered minor. The ALJ noted that testimony of theoretical harm was balanced by the assertions that the creek was already degraded, that U.S. EPA had not established the health of the creek prior to or following the discharges, that these discharges were insignificant relative to the quantities of lime sludge discharged from the beginning of facility operation 64 years ago, and that any environmental effects were temporary and reversible. The ALJ assessed a penalty amount of $750 per day of discharge ($20,250 for 27 days of violation).

The ALJ then considered the statutory adjustment factors, including ability to pay, history of violations, degree of culpability, and economic benefit. Although respondent argued that it would be seriously impacted by the proposed penalty, the ALJ found respondent had the ability to pay the reduced penalty. The ALJ increased the gravity based penalty 10 percent based on the fact that respondent agreed to a prior consent decree addressing similar violations and thus was a repeat offender. However, the ALJ noted that the respondent did have a good faith misunderstanding about whether the sludge discharges were permitted under the consent decree. With regard to culpability, the ALJ noted that even though respondent mistakenly thought the discharges were allowed, conducted a compliance study prior to discovering the violations, and promptly halted the violations upon notification, it must be considered on notice that such discharges were illegal. The ALJ thus increased the gravity-based penalty by an additional 10 percent. No economic benefit was alleged and the ALJ rejected the argument that the lack of such benefit justifies mitigation of the penalty. There were no "other factors" asserted by either party. The final penalty was $ 24,300.

12. ALJ finds EPA not estopped but holds penalty calculation methodology of starting at the statutory maximum is not necessarily applicable in administrative proceedings:

In the Matter of B.J. Carney Indust., Inc., 1996 LEXIS 3 (Mar. 11, 1996).

U.S. EPA Region X filed an administrative complaint against B.J. Carney Industries, Inc., (respondent), alleging that respondent violated CWA §301(a) and 40 CFR 429.75 by discharging pentachlorophenol (PCP) into Sandpoint POTW from February 1986 to July 1990. The complaint sought a $ 125,000 penalty. Respondent argued that the discharge did not constitute process waste water and that U.S. EPA should have been estopped from bring this enforcement action.

The Administrative Law Judge (ALJ) first examined whether the discharges met the definition of process waste water under 40 CFR 401.11(q), acknowledging that if they did the PCP discharged in such waste waters were prohibited under 40 CFR 429.75 (Timber Products Regulations). A sump pump was used to prevent rain, runoff, and high ground water from "floating" the wood preserving treatment tanks. Water pumped from around the tanks was a source of the PCP in the discharged waste water. Complainant argued that the PCP that found its way into the soil around the treatment tanks escaped from the treatment process and was

part and parcel of the treatment operation. Respondent countered that no water is used in the treatment process and that relevant development documents state that there is no process waste water generated in non-pressure treatment processes (such as respondent's).

The ALJ concluded that respondent's releases did constitute process waste water prohibited under 40 CFR 429.75. The ALJ observed that the term "process waste water" is defined broadly, that applicable exceptions are narrow, and that the *Federal Register* notice issuing Part 429 suggests that PCP-contaminated water pumped from the treatment tank area is process waste water. That notice states that precipitation in the immediate area of the retort (i.e., pressurized treatment tank) is process water (44 Fed. Reg. 62,831), and clarifies that the exceptions provided under 429.11(c) include precipitation from around raw material and finished product, but not processing areas. Although in this case pressurized tanks were not used, the ALJ found the reasoning compelling. The ALJ also found that the language cited in the development document was not consistent with the language of 429.11, and thus not determinative of this issue.

Respondent also argued that U.S. EPA should be equitably estopped from bringing this enforcement action because U.S. EPA directed the Sandpoint POTW to issue an industrial waste acceptance permit, respondent believed U.S. EPA wanted respondent to rely on Sandpoint's permit, there was no indication U.S. EPA did not intend to be bound by the City's permit, and delay and inaction by U.S. EPA amounted to affirmative misconduct upon which respondent detrimentally relied. **The ALJ first observed that federal courts have a strong aversion to claims of estoppel against the federal government, and then found that respondent's claim failed to satisfy the requirements that 1) respondent reasonably relied upon U.S. EPA's action, 2) respondent suffered detriment adequate to sustain a claim, and 3) that U.S. EPA's actions constituted affirmative misconduct.**

In calculating the applicable penalty in the amount of $ 9,000, the ALJ declined to start with the statutory maximum penalty and apply the statutory adjustment factors. Rather, he followed the reasoning *In re* Puerto Rico Urban Renewal & Housing Corp., Docket No. CWA-II-89-249, June 29, 1993, and found that the only relevant penalty policy for assessing penalties in administrative proceedings -- the *Addendum to Clean Water Civil Penalty Policy for Administrative Penalties*, August 28, 1987 -- is at odds with starting at the statutory maximum. See also, *In re* Port of Oakland and Great Lakes Dredge & Dock Co., MPRSA Appeal No. 91-1 (EAB., August 5, 1992). Rejecting U.S. EPA's claim of daily violations from October 12, 1985 to July, 1990, the ALJ found samples indicated 18 days of violation. The ALJ concluded that such violations had minimal effect on the environment and were, thus, minor, subject to an unadjusted penalty of $ 1,000 for each violation. The ALJ rejected U.S. EPA's arguments regarding economic benefit, finding that U.S. EPA relied upon incorrect time frames, used an improper discount rate, and failed to account for moneys spent to eliminate the discharge. The ALJ concluded that, given these errors and the failure of U.S. EPA to quantify the benefit and profit respondent may have gained during non-compliance, an approximation of such benefit could not be made. See Student PIRG v. Monsanto, 29 E.R.C. 1078 (D.N.J. 1988) aff'd 870 F.2d 652 (3rd Cir. 1989). Finally, based on the contrasting approaches taken by the POTW and U.S. EPA to compliance (i.e., incremental versus full compliance), the ALJ reduced the base penalty by 50 percent.

13. ALJ considers status as NPDES permit holder as one mitigating factor in reducing storm water-related penalty:

In the Matter of General Motors Corp., 1996 CWA LEXIS 6 (Oct. 31, 1996).

Respondents were charged and found liable for violating the Clean Water Act based on 92 discharges during 1989-1993 that exceeded the effluent limits for copper, lead, or zinc in respondent's NPDES permit. The discharges, which consisted of rainwater containing the metals, flowed from an outfall on the plant's premises to nearby navigable waters. This decision considered the civil penalty amount.

EPA proposed a maximum penalty of $125,000 based on the number and extent of respondent's violations. EPA stated that the discharges exceeded permit limits from 3 to 1471 percent, and that the three metals were toxic pollutants. Moreover, EPA asserted that respondents delayed nine months in acting to address the violations, and then took approximately five years to come into compliance. EPA also calculated an economic benefit of $114,288.

Respondent proposed that no penalty should be imposed, arguing that the permit limits were unduly stringent as applied to rainfall, violations occurred on only 44 days over 4 years, no actual harm had resulted from the violations, and respondent had reacted reasonably quickly and spent significant resources to address the violations. The crux of respondent's argument was that it was unfairly being sanctioned for storm water discharges when hundreds of thousands of other storm water dischargers went without regulation. Respondents asserted that this disparate treatment resulted simply because respondent held a NPDES permit, whereas, other storm water dischargers did not.

The Administrative Law Judge observed that the approach for determining the penalty in this case was outlined in *Port of Oakland and Great Lakes Dredge and Dock Company*, MPRSA Appeal No. 91-1, 1992 LEXIS 1, 4.E.A.D. 170, Final Order (August 5, 1992). The ALJ noted that the proper focus should be the circumstances of the violation and the statutory criteria, and that there is no requirement to start at the statutory maximum. The ALJ then observed that the arguments of both sides had merit. The ALJ found that based on the number and size of respondent's violations, and the toxicity of the pollutants discharged, the statutory maximum penalty of $125,000 was justified. However, the ALJ also acknowledged that respondent's violations did not have a demonstrated adverse effect on the environment, respondent acted to correct its problems, and respondent is being sanctioned for storm water-related discharges in part because it in good faith obtained a NPDES permit. The ALJ stated that this last point is not a defense to the permit violations, but that it "does suggest that the sanction should be something distinctly less than the maximum."

The ALJ reduced EPA proposed penalty by half, to $62,500. He noted that the same penalty would be imposed if respondent's appeal of whether its NPDES permit expired on October 1, 1990 is upheld.

I. Criminal Cases

1. Fifth Circuit holds knowledge requirements applies to each element of criminal CWA violation:

U.S. v. Attique Ahmad, 101 F.3d 386 (5th Cir. 1996).

Defendant Attique Ahmad was found guilty of 1) knowingly discharging a pollutant from a point source into a navigable water of the U.S. without a permit, and 2) knowingly operating a source in violation of a pretreatment standard. These charges arose from the discharge of 4,690 gallons of gasoline into the sewers of Conroe, Texas, in January of 1994. Defendant operated a convenience store/gas station. Upon learning that one of two 8000 gallons underground storage tanks had a leak that allowed water to enter the gasoline storage tank, defendant had pumped gasoline and water from the leaking tank into the street and into a manhole in front of the store. The defendant did not dispute that he had discharged the gasoline from the tank or that it had found its way to Possum Creek and the sewage treatment plant. Rather, he asserted that the discharge was not "knowing" because he believed he was discharging water. In this action, defendant argued that the court improperly instructed the jury on the mens rea required for counts one and two, and that the court improperly excluded the testimony of two defense witnesses whose testimony was to support the lesser violation of negligence.

Defendant asserted that the statutory mens rea -- knowledge -- was required as to each element of the offenses charged and that the instructions given to the jury only required that the " defendant knowingly discharged" a pollutant, and that the defendant "knowingly operated" a source discharging into a POTW, respectively. The government asserted that Clean Water Act violations are "public welfare offenses," which in some instance have been held not to require a showing of mens rea.

The court held that the offenses were not public welfare offenses, and that the usual requirement of a mens rea requirement applies. The court specified, "[W]ith the exception of purely jurisdictional elements, the means rea of knowledge applies to each element of the crimes." The court cited U.S. v. X-Citement Video Inc., 115 S. Ct. 464 (1994) (applying the term "knowingly"to each element of a child pornography offense, and reaffirming that "the presumption in favor of a scienter requirements should apply to each of the statutory elements which criminalize otherwise innocent behavior" Id at 469). It also found U.S. v. Baytank (Houston) Inc., 934 F.2d 599, 613 (5th Cir. 1991) ("a conviction for knowing and improper storage of hazardous wastes ... requires 'that the defendant know factually what he is doing -- storing, what is being stored, and that what is being stored factually has the potential for harm to others or the environment, and that he has no permit..'..") analogous to the facts of this case.

Regarding exclusion of the two defense witnesses, the court concluded that they were excluded based on district court's improper interpretation of the CWA as reflected by the improper jury instruction. The court reversed the case and remanded it with instructions that if it is retried, the admissibility of such testimony be reconsidered in light of this opinion.

J. Pretreatment

1. Seventh Circuit holds it lacks jurisdiction to review EPA pretreatment category determination:

South Holland Metal Finishing v. Browner, 97 F.3d 932 (7th Cir. 1996). See case summary on page 32.

2. District Court holds that Industrial Pretreatment Program requirements must be incorporated into an NPDES permit to be enforceable:

U.S. v. City of Detroit, 940 F. Supp. 1097 (E.D. Mich. 1996).

The City of Detroit operates a POTW which treats industrial sewage, and because of its size, is required to develop an Industrial Pre-Treatment Program (IPP). An NPDES permit issued in 1983 included a provision stating that Detroit would 'implement and enforce' its IPP within 30 days of State approval.

A complaint was filed by Michigan and the United States claiming that Detroit had violated its NPDES permit by not implementing several provisions of the IPP. Detroit filed a motion for summary judgment arguing that the plaintiffs had no cause of action because the IPP was never incorporated into the permit. Plaintiffs argued that the CWA authorizes enforcement of the IPP independently of permit terms. The CWA, as interpreted by the plaintiffs, allows for enforcement using 1) substantive provisions of the CWA, 2) conditions in a permit, or 3) a requirement imposed in a pretreatment program.

The court disagreed with the plaintiffs arguments, and granted summary judgment for the defendants. In its decision, the court interpreted the regulatory language of 40 C.F.R. § 403.8, which requires the incorporation of program conditions as "enforceable conditions of the permit", as implying that a program is not otherwise enforceable. The court also linked enforceability with the standard permit approval process, noting the importance of public notice, comment, and hearing requirements in permit development and modifications. The court rejected the plaintiff's argument that the language of the 1983 permit, which required the defendants to implement and enforce, created an enforceable term of the permit. The plaintiff's final arguments pointed to the existence of independent authorities for enforceability including other sections of the CWA. The court disagreed, and held that the statute establishes direct linkages between permitting provisions and the pretreatment program. Summary judgement was granted to the defendant.

K. Natural Resource Damages

1. District court holds CWA authorizes compensation for damages arising from the public's loss of use of natural resources, and that the government may seek damages based on the lost use of surface waters for period waterway was closed:

Montauk Oil Transp. Corp. v. Steamship Mut., 1996 U.S. Dist. LEXIS 8500 (S.D.N.Y. June 18, 1996).

The U.S. government sought summary judgment against Montauk Oil Transportation Corp. ("Montauk") and its insurer, the Steamship Mutual Underwriting Association Limited ("Steamship'), seeking recovery of damages resulting from a spill of over 100,000 gallons of heating oil into the waters of the Arthur Kill, a navigable waterway between New York and New Jersey. The spill closed the waterway to all public use and maritime traffic for nine days.

33 U.S.C. §1321(b)(3) prohibits the discharge of harmful quantities of oil into navigable waters of the U.S. In addition, 33 U.S.C. §1321(f)(4) provides that in the event of a spill, the violating party is liable for costs or expenses incurred by the Federal or State governments in restoration or replacement of natural resources.

Steamship and Montauk ("defendants") contended that the government was not entitled to recovery for lost use of surface waters. It was the defendants' position that during the period when the resource is being restored by the government, the costs incurred by the government in restoring and replacing natural resources do not include the costs incurred by the public for its loss of the natural resources. In addressing this issue, the court noted that the "lost use" costs incurred in the restoration of Arthur Kill were incurred as an unavoidable incident to the cleanup operation that followed the spill. Further, the court stated that one purpose of CWA §1321(f)(5) was to ensure that the public would not loose the use of natural resources that the government holds in trust. **For this reason, the court held that the CWA authorizes compensation for damages arising from the public's loss of use of natural resources, and that the government may seek damages based on the lost use of the surface waters of the Arthur Kill for the nine days that it was closed.**

The court next took up the defendants' argument that summary judgment was improper because the government had not submitted sufficient proof of damages. The court reviewed the governments evidence of damage, including water quality sampling, scientific observations, the presence of oil sheens on the surface of the water, and the lost viability for use by maritime traffic for the nine days during which the waters were closed by the Coast Guard while cleaning up the spill. The court was satisfied that the government had shown beyond any factual dispute that the surface waters of Arthur Kill were used for maritime vessel traffic immediately preceding the spill, that the spill disrupted this use, and that contrary to the defendants' argument, the government's estimate of the amount of maritime traffic disrupted was accurate. **The court held that there was no genuine issue of material fact as to whether the government's proof of injury from lost use is sufficient, or whether its related "lost use" damage was legally proper.**

The court granted summary judgment in favor of the government as to the defendants' liability for the lost use of the surface waters of Arthur Kill.

II. CASES UNDER OTHER STATUTES

A. Administrative Procedure Act

1. District court holds six-year statute of limitation applies to private action brought pursuant to Administrative Procedure Act to review issuance of wetland permit:

Sierra Club v. Pena, 915 F. Supp. 1381 (N.D. Ohio 1996). See case summary on page 15.

2. District court upholds U.S. EPA's determination that monthly production records submitted by lead smelter for industrial pre-treated wastewater compliance summaries are "effluent data" which EPA may release under FOIA:

RSR Corp. v. Browner, 924 F. Supp. 504 (S.D.N.Y. 1996). See case summary on page 5.

3. District court holds that U.S. EPA's refusal to respond to public comment prior to approving revisions to State's wetlands program is not final agency action under the APA:

National Wildlife Fed'n v. Adamkus, 936 F. Supp. 535 (W.D. Mich. 1996). See case summary on page 17.

4. District court holds U.S. EPA's failure to promulgate an antidegradation standard for Pennsylvania was violation of APA 5 U.S.C. §706(1) and §706(2)(A):

Raymond Proffitt Found. v. U.S. EPA, 930 F. Supp. 1088 (E.D.P.A. 1996). See case summary on page 8.

B. Safe Drinking Water Act

1. Fifth Circuit holds §300j-24(d) of Lead Contamination Control Act violates Tenth Amendment:

ACORN v. Edwards, 81 F.3d 1387 (5th Cir. Apr. 22, 1996).

The Association of Community Organizations for Reform Now (ACORN) and two citizens sued Louisiana State officials to force the State to comply with the Lead Contamination Control Act (LCCA) of 1988 (codified in relevant part at 42 U.S.C. §§300j-21 to 300j-26). The LCCA amends the Safe Drinking Water Act and requires U.S. EPA and the States to address the problem of electric drinking water coolers containing lead solder or lead-lined tanks located in schools. Under the LCCA, State responsibilities stem from two provisions: 300j-24(c) requires States to disseminate guidance, testing protocols, and a list of targeted water coolers; and 300j-24(d) requires the States to establish remedial action programs for the removal of lead contaminants from school drinking water systems. After the original suit was dismissed as moot, plaintiffs successfully moved for the award of attorney's fees. Defendant's appealed, raising numerous alleged errors in the district court's award of fees, including, whether there was a violation of a requirement of the LCCA upon which an award of fees could be based.

Defendants contended that they fully complied with 300j-24(c) by distributing a February, 1990 U.S. EPA Fact Sheet that listed non-lead free drinking water coolers. ACORN argued that the term "publish" in 300j-23(a) and 24(c) requires publication in the *Federal Register*. **The court found that regardless of how the term "publish" is defined, defendant's distribution of the Fact Sheet was sufficient to bring them into compliance with the LCCA, since the Fact Sheet contained all the suspect drinking water coolers that were later included in the notice published in the Federal Register.**

With regard to 300j-24(d), defendants argued the provision violated the Tenth Amendment, which provides that "The powers not delegated to the United States by the Constitution, nor prohibited to the States, are reserved to the States respectively, or to the people." Defendants argued that Congress cannot impose any requirement on the States pursuant to its exercise of its Commerce Clause power. Acknowledging that Congress may, pursuant to the Commerce Clause, regulate lead-contaminated drinking water coolers, the court focused on whether the method of regulation impermissibly intruded upon state sovereignty. **Relying on New York v. U.S., 505 U.S. 144, 112 S.Ct. 2408 (1992) (Congress may not commandeer the legislative process of a state by directly compelling them to enact and enforce a federal regulatory program), the court held that 300j-24(d) falls squarely within the method of regulation prohibited by the Tenth Amendment as interpreted in *New York*.** The court observed that this provision requires a state to establish a program to assist local schools and agencies, and that failure or refusal to establish the mandated program

subjects the state to civil enforcement proceedings. The court found that the LCCA provisions gives the states no alternative but to enact the federal regulatory plan as prescribed by Congress. As a result, the court found it to be clearly prohibited under the Tenth Amendment.

Because ACORN failed to establish that defendants were in violation of any lawful requirement of the LCCA at the time suit was commenced, the court reversed the award of attorney's fees and dismissed ACORN's claims.

2. EAB holds during UIC permitting when U.S. EPA has basis to believe a facility may disproportionately impact minority or low income community U.S. EPA should exercise its discretion to assure full public involvement in the permitting process and use available omnibus permit authority to conduct impact assessment focused on affected minority or low income community:

In re Envotech, L.P. Milan, UIC Appeals Nos. 95-2 through 95-37, U.S. EPA, 1996 LEXIS 1 (February 15, 1996).

Thirty-six petitioners challenged U.S. EPA Region V's decision to issue two Class I underground injection control permits to Envotech Limited Partnership. The permits authorized Envotech to drill, construct, and test two hazardous waste injection wells for the disposal of hazardous leachate from a landfill being remediated by Envotech. Multiple grounds for review were alleged. However, the EAB found that only one issue was raised that warranted remand of the permits to U.S. EPA: failure to include the waste minimization certification required by 40 CFR §146.70(d)(1).

The EAB found that four of the petitions for review were not timely because they failed to meet the May 9, 1995 deadline specified by the U.S. EPA for receipt of petitions for review by the Board (see, 40 CFR §124.19(a)). The Board also found that six petitioners lacked standing to appeal because they failed to either submit written comments on the permits or participate by offering comments during the public hearing. See Beckman Prod. Serv., 5 EAD UIC Appeal Nos. 92-9 through 92-16, at 8. Finally, the Board found that four of the petitions lacked sufficient specificity to provide the Board with an adequate basis for review. These petitions did not clearly identify the conditions of the permits at issue and present arguments that such conditions warrant review. The remaining claims -- grouped into seven areas of concern -- did not meet the standards necessary to invoke Board review and, therefore, were denied on the merits.

First, the Board found that general allegations that UIC is not a safe disposal technology were insufficient to justify review where such allegations did not explain how the permit conditions were inconsistent with regulatory standards or how such conditions created a risk of failure of the wells. Second, the Board concluded that local opposition to issuance of the permits was a matter for state and local government, not a basis delineated in the SDWA or its regulations, upon which U.S. EPA could deny the permits. Third, the Board found that Envotech's record of environmental compliance was not, by itself, a basis upon which a permit could be denied since those past violation do not establish a link with a condition of the present permits. See 40 CFR §124.19(a). The Board noted that petitioners had not shown that no matter what conditions or terms were put into the permits, compliance with the permit could not ensure protection of USDWs. See, *In re* Marine Shale Processors, 5 EAD RCRA Appeal no. 94-12, slip op. at 48, n. 64 (EAB 1995).

The fourth issue involved claims that the federal permits should not issue until Envotech received all other State and local permits and approvals, and that the permits interfered with private property rights. The Board disagreed, observing that the UIC regulations explicitly state that a UIC permit "does not convey any property rights" nor "authorize any injury to persons or property or invasion of other property rights, or any infringement of state or local law or regulations." 40 CFR §144.35(c). Moreover, the Board noted that U.S. EPA is not the proper forum for litigating contract or property law disputes that are related to waste disposal activity.

The fifth issue involved environmental justice concerns. Petitioners alleged that under E.O. 12898 the permits should be denied because the area surrounding the site is already host to numerous burdensome land uses. The Board, following the

reasoning *In re* Chemical Waste Management, 5 EAD RCRA Appeal Nos. 95-2 & 95-3 (EAB June 29, 1995) (slip op.) (Holding: 1) when the Region has a basis to believe that operation of a facility may have a disproportionate impact on a minority or low income segment of the affected community the Region should, as a matter of policy, exercise its discretion to assure early and ongoing public involvement in the permitting process; and, 2) given plausible claims that operation of a facility may have a disproportionate impact on a minority or low income segment of the affected community the Region should, as a matter of policy, exercise its discretion under available omnibus permit authority to include in its health and environmental impacts assessment an analysis focused on such impacts within the minority or low income community affected) held that the Region took adequate steps to implement E.O. 12898 by ensuring the participation of the community in the permitting process and by conducting an analysis of the impact of the proposed wells on minority or low income community potentially affected. The Board explicitly recognized that the Region held a two-day informal hearing to gather the views of all persons potentially impacted, including views regarding environmental justice. In addition, the Board acknowledged that the Region's demographic analysis indicated that the impact of the proposed wells on the minority or low income community would be minimal, and deferred to the Region regarding the two-mile scope of the analysis.

Sixth, the Board addressed numerous claims that Region's geological assessment was inadequate. In rejecting these claims, the Board noted that petitioners failed to demonstrate that such claims would have led the Region to a different conclusion, as well as that only drilling and testing has been authorized. Overall, the Board found that petitioners failed to show that the Region's approach or decision to allow construction and testing was clearly erroneous.

Finally, the Board considered waste characterization and disposal issues. Petitioners argued the leachate was F039 (multi-source leachate), not F006 (waste water treatment sludges from electroplating), and should have been subject to the land disposal treatment standards for F039. The Board rejected this assertion, finding that the Region reasonably concluded that the only hazardous waste in the landfill was F006. The Board also found that the Region was under no obligation to include in the permits the waste stream from a new hazardous waste landfill Envotech was attempting to permit. Finally, the Board found no error in permitting two wells.

C. Water Rights

1. Ninth Circuit reverses dismissal of case seeking damages under state law for water diversion from the Clark Fork River:

Thomas Beck v. Atlantic Richfield Co. (ARCO), 62 F.3d 1240 (9th Cir., Filed Aug. 17, 1995).

A group of water users along the Clark Fork River in Montana appealed the dismissal without prejudice of their claim under state law against ARCO for compensatory damages for diversion of water from the river. ARCO had been ordered by U.S. EPA under CERCLA to clean up contamination caused by ARCO's corporate predecessor's discharge of mining wastes into the river. As a part of this order, ARCO was to divert the water into tailing ponds where the waste could settle, allowing cleaner water to flow back into the river. The order specified that ARCO was not to cause any injury to vested water rights, and that the order did not alter any obligation ARCO might have to pay for use of the water.

Plaintiffs claimed that the diversion diminished that amount of water available to downstream users, and sought compensatory damages in state court for crop loss, lost profits, and property devaluation. The district court held that the plaintiffs' claim constituted a claim against the United States for inverse condemnation over which the Court of Federal Claims had exclusive jurisdiction. Alternatively, the court held that to the extent the plaintiffs alleged ARCO had violated U.S. EPA's order by injuring their water rights, their claim constituted a "challenge" to the cleanup and was therefore barred by CERCLA's "timing of review" provision.

Upon examining the complaint on appeal, the circuit court concluded that the plaintiffs asserted neither a claim for inverse condemnation nor a "challenge" to the cleanup effort, but that they sought instead to recover damages under state law for violation of

their water rights, a claim over which the district court lacks jurisdiction. **The dismissal was reversed and remanded to state court.**

D. RCRA

1. District court concludes that a citizen suit under RCRA's statutory and federal regulatory provisions is available where an authorized state hazardous waste program exists:

Long Island Soundkeeper Fund v. New York Athletic Club, 1996 U.S. Dist. LEXIS 3383 (S.D.N.Y. Mar. 20, 1996). See case summary on page 30.

2. Absent "actual notice," EPA provided insufficient notice of its interpretation of RCRA's F006 listing to regulate waste from gravure cylinder preparation as hazardous:

In the Matter of R.R. Donelly & Sons Co., RCRA Docket No. V-W-004-95 (Dec. 16, 1996).

On December 16, 1996 Judge Pearlstein issued rulings on motions for accelerated decision in this RCRA § 3008 proceeding. EPA alleged in its complaint that respondent violated certain RCRA land disposal and storage requirements when it transported shipments of wastewater treatment sludge from its "gravure cylinder preparation process" without complying with the regulations applicable to F006 hazardous waste. In its motion for an accelerated decision EPA argued that such waste constitutes "wastewater treatment sludges from electroplating operations" and is within the scope of the F006 hazardous waste listing in 40 CFR 261.31(a). In its cross-motion for accelerated decision seeking dismissal of the complaint respondent argued that its waste was specifically excluded from the F006 listing when EPA defined "electroplating operations" by referring to a definition found in the CWA Effluent Guidelines Division's regulations, which excluded wastewater from gravure cylinder preparation. EPA argued that it never intended to and did not exclude waste from gravure cylinder preparation from the definition of "electroplating operations in the F006 context. Judge Pearlstein found that a "plain" reading of the statute and regulation indicated that EPA's interpretation was permissible, however, he held that it could be upheld only if respondent had *fair notice*. The Judge held that "[t]his is apparently a situation where the implications of one program division's reliance on another program's definitions and regulation had unintended consequences. The respondent should not be required to be a bureaucratic mind reader. Respondent was entitled to rely on a published reference and definition that on its face excluded its operations from the EGD's regulations, and, in turn, from the F006 listing." Hence, the Judge found insufficient notice to respondent up until the date respondent received actual notice of EPA's interpretation by way of a letter sent in response to a clarification inquiry by respondent. After receipt of that letter, respondent had fair notice and, therefore, could be found in violation. EPA's motion for accelerated decision on the scope of the F006 listing was granted due to respondent's actual notice of EPA's permissible interpretation of the F006 listing.

3. ALJ holds that failure to respond to EPA motion warrants full proposed penalty of $220,825:

In the Matter of B & B Wood Treating and Processing, 1996 RCRA LEXIS 7 (Oct. 28, 1996).

On October 28, 1996, Judge Greene issued an order granting EPA's motion for an accelerated decision and an initial decision in this RCRA proceeding. The EPA proposed a penalty of $220,825 for one statutory violation and four regulatory violations based upon respondent's failure to notify EPA as a generator of hazardous waste and failure to comply with Part 265 at its wood treatment and processing facility in Puerto Rico. Respondent failed to respond to EPA's motion, therefore, the Judge found no outstanding issue of material fact. The Judge held that the RCRA Penalty Policy provides a reasonable framework for incorporating the statutory factors which must be considered before imposing a penalty. After examining how EPA derived the penalty, the Judge concluded that the penalty policy was properly applied and, given that respondent failed to supply evidence to support any penalty adjustment after

being ordered to so, assessed the full penalty as proposed by EPA.

E. EPCRA

1. Citizens may seek penalties against EPCRA violators who filed required reports after the statutory deadlines but before a complaint was filed:

Citizens for a Better Environment v. The Steel Co., 90 F.3d 1237 (7th Cir. 1996).

On July 23, 1996, the Seventh Circuit Court of Appeals ruled that citizens may seek penalties against EPCRA violators who filed required reports after the statutory deadlines but before a complaint was filed. In Citizens for a Better Environment v. The Steel Co., No. 967-1136, the Seventh Circuit rejected the Sixth Circuit's decision in Atlantic States Legal Foundation v. United Musical Instruments, 61 F.3d 473 (6th Cir. 1995), and reversed the district court's holding that citizens suits for failure to file required reports cannot be maintained if the regulatee files the untimely reports before a compliant is filed, even after the citizens file notice of intent to sue and no matter how late the reports might be. The Seventh Circuit recognized that the interpretation adopted by the district court and by the Sixth Circuit would render the citizen enforcement provision virtually meaningless (i.e., if citizens can't sue, they can't recover the costs of their effort [to uncover violations]).

F. Oil Pollution Act

1. District court concludes that the Limited Liability Act does not apply to claims relating to an oil spill:

In the Matter of Complaint of Plaintiffs Jahre Spray II K/S/ Joergen Jahre Shipping A/S and Jahre Wallem A/S/ as Owners and Operators, 1996 U.S. Dist. LEXIS 11594 (D.N.J. 1996).

On July 1, 1995, the Jahre Spray (Spray) was involved in an oil spill while docked at a discharge terminal on the Delaware River. The spill was a result of high winds pushing the vessel away from the dock and detaching three hoses, which allowed 1000 barrels of oil to flow into the river from the terminal. Twenty to thirty barrels of oil also flowed into the river from the ship. Following the spill, the U.S. Coast Guard designated the Spray and the terminal facility (Coastal) as "responsible parties" under the Oil Pollution Act, 33 U.S.C. §§ 2701 et seq.

The vessel's owners and operators (plaintiffs) filed a petition for limitation of liability under the Limited Liability Act, 46 U.S.C. §§ 181 et seq. The district court granted the petition, and ordered all spill-related claims consolidated. Various claimants then challenged the court's application of the provisions of the Limited Liability Act to claims based on the oil spill. These claimants brought claims under the Oil Pollution Act, the Clean Water Act, the Rivers and Harbors Act, and various state laws.

Claimants argued that the court lacked jurisdiction to enjoin actions cognizable under the Oil Pollution Act and to compel consolidation of all OPA-related claims. The court agreed, citing the language of § 2702(a) of the OPA, which expressly makes responsible parties liable for oil spill removal costs and damages "notwithstanding any other rule or provision of law..." The court also found that the legislative history of the OPA "confirms the court's interpretation that the Limited Liability Act should not be applied to claims stemming from oil spills. **The court concluded that the Limited Liability Act does not apply to claims relating to an oil spill. The court also observed that the Limited Liability Act does not limit civil penalties sought under the Clean Water Act or the Rivers and Harbors Act.** The court terminated the limitation proceeding and deferred release of the bond held to allow claimants to move to obtain such security as they may be legally due.

G. State Law

1. A valid NPDES permit is not a shield to liability for a discharge made unlawful under the California Fish and Game Code:

People v. General Motors Corp., 51 Cal. Rptr. 2d 651 (April 8, 1996).

While decommissioning its Van Nuys, California plant, GM employees released cooling water into the

storm drain system. One release contained over 1,500 gallons of a mixture of water and an anticorrosion and scale inhibitor called Dearborn 547 (an alkaline substance containing sodium hydroxide, sodium nitrite, and a red tracer dye, with a pH of 11.5 to 12). A second release contain a clear liquid. The plant's permit prohibited discharges with a pH above nine.

The Los Angeles City Attorney filed a four-count complaint, however, the prosecution dropped count two (i.e., reporting violations) and the trial court dismissed counts one and four (i.e., violation of the permit based on no authorization to discharge color; and a discharge deleterious to fish, plant life, and bird life, respectively). The trial court found GM guilty on the remaining count, which alleged that GM violated the State's Fish and Game Code by discharging "refuse" into State waters.

On appeal, GM argued that it could not be criminally prosecuted under the State's Fish and Game Code when its discharge was in compliance with its permit, which had been issued by the State in compliance with the CWA and relevant State law (i.e., because no permit violation had been shown, the permit served as a shield to criminal liability under the State Fish and Game Code for a discharge otherwise authorized under its NPDES permit). **The appellate court disagreed. The court found that the CWA and the State statute do not concern identical subject matter and thus there was no need for harmonization. In addition, the court found that the CWA expressly authorizes stricter enforcement of provisions addressing pollutants through state laws.** Finally, the court observed that § 5650 of the Fish and Game Code expressly allows a NPDES permit to be used as a shield against the imposition of additional fines under § 5650, but not as a shield against § 5650 criminal prosecutions. The court observed that "there would be no need for the exemption from additional fines if the State Legislature intended discharges in compliance with a valid NPDES permit could not violate § 5650."

The court also dismissed GM's argument for the "rule of lenity," finding no ambiguity in the restriction on discharging "any refuse." It also dismissed GM's argument that § 5650 prohibits acts that GM is legally permitted to conduct under its NPDES permit and, thus, places permit holders in constant jeopardy of criminal prosecution. The court observed that implicit in this argument is a claim that the discharge at issue is an ongoing discharge resulting from routine operation. The court observed that the stipulated facts specify that this discharge was not part of GM's routine discharge of wastewater, but appeared as a result of GM's negligence of inadvertence.

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