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Where the Water Hits the Road: Recent Developments in Clean Water Act Litigation

by James R. May

The last 18 months have produced particularly interesting juridical and administrative pronouncements in the areas of Clean Water Act (CWA or Act)[1] jurisdiction, permits, standards, citizen suits, and other enforcement. On the jurisdictional front, we learned that "deep ripping" constitutes an "addition" of a pollutant by a "point source." We also learned that 25-year-old cases from the U.S. Court of Appeals for the D.C. Circuit hold less sway insofar as "addition" includes polluted water diverted from one water to another, and "pollutant" includes parts, foods, and medicines from fish farms and other operations that are discharged, unless exempted. We learned more about when combined animal feeding operations (CAFOs) are point sources. Post *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*,[2] we learned "navigable water" still means more than strictly navigable for commerce, and includes wetlands adjacent or hydraulically connected to non-navigable tributaries that flow into actual navigable waters.

Permit issues were less eventful. Courts still defer broadly to the U.S. Environmental Protection Agency (EPA) establishment of technology-based standards. Pollutants contemplated but not regulated by agencies can be discharged without a permit, and water quality standards not addressed by a permit can be violated under the Act's "permit shield" provision. States can waive the requirement that renewal applications need be submitted 180 days before permit expiration. Under limited circumstances, EPA must withdraw delegated national pollutant discharge elimination system (NPDES) permitting authority.

Water quality standard issues continue to provide fireworks. While litigation in the water quality standards field has slowed, the total maximum daily load (TMDL) front continues to provide a litigator's bazaar for an increasingly bizarre program that is quickly slipping into practical irrelevance and desuetude. On March 17, 2003, the Bush Administration at long last withdrew the already suspended 2000 TMDL rules left from the Clinton Administration. EPA has not proposed new TMDL rules of its own, leaving the existing 1992 rules operative.

Despite ever-increasing hurdles concerning jurisdiction, notice, preclusion, fees, and constitutional challenges under Articles II and III, the fruits of citizen enforcement persist to demonstrate the influence and import of CWA §505. All but a few of the civil cases reported under the Act in the last 18 months are environmental citizen suits.

Jurisdictional Issues

The Act prohibits the "discharge of any pollutant" without a permit.[3] This term means "any addition of any pollutant to navigable waters from any point source."[4] The Act defines each term,[5] except for "addition," which has been generally construed to mean introduced "from the outside world."

Addition of a Pollutant

"Deep Ripping" constitutes an addition by a point source. In *Borden Ranch Partnership v. U.S. Army Corps of Engineers*,[6] the U.S. Supreme Court upheld the U.S. Court of Appeals for the Ninth Circuit's ruling that "deep ripping" could result in an "addition" of a "pollutant." In *Borden Ranch*, the plaintiff wished to convert a ranch used for cattle grazing into a winery. Grape vines require deep root soil footing and, thus, the soil would need to be penetrated, known as "deep ripping." Deep ripping involves using a tractor or bulldozer to drag long, metal prongs that rip up restrictive layers of soil. The U.S. Army Corps of Engineers (the Corps) and EPA determined that "deep-ripping in wetlands 'destroy[s] the hydrological integrity of these wetlands' and therefore 'requires a permit under the [CWA].'"[7] The owner challenged this determination, arguing that "deep ripping cannot constitute the 'addition' of a 'pollutant' into wetlands, because it simply churns up soil"[8]; that a plow was not a point source; and that in any event deep ripping is exempt from the CWA.

In a split 4-4 decision, Justice Anthony Kennedy recused himself, the Court upheld the Ninth Circuit's holding in favor of the government. The Ninth Circuit ruled that the activity constituted an "addition" because "redeposits of materials can constitute an 'addition of a pollutant' under the [CWA]."[9] The Ninth Circuit also rejected the owner's exemption argument because it was converting the ranch from its original purpose, which "clearly [brought] the land 'into a use to which it was not previously subject,'"[10] and the "de-

Jim May is a Professor of Law at Widener University. The research assistance of Amy Shellenberger and Jennifer Murphy Widener is acknowledged with gratitude. This Article reports developments for the 18-month period ending March 20, 2003.

1. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
2. 531 U.S. 159, 31 ELR 20382 (2001).
3. *See* 33 U.S.C. §1311(a)(1), ELR STAT. FWPCA §301(a)(1).
4. *Id.* §1362(12), ELR STAT. FWPCA §502(12).
5. *See id.* §1362, ELR STAT. FWPCA §502.
6. No. 00-15700, 2002 U.S. LEXIS 9430 (U.S. Dec. 16, 2002), *aff'g*, 261 F.3d 810, 32 ELR 20011 (9th Cir. 2001).
7. *Id*. at 810, 32 ELR at 20011.
8. *Id*. at 810, 32 ELR at 20012.
9. *Id.*
10. *Id.*

struction of the soil layer . . . constitutes an impairment of the flow of nearby navigable water."[11]

It appears fairly well settled that diversion of pollution from one water to another constitutes an "addition" of a "pollutant." In *Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*,[12] the U.S. Court of Appeals for the Eleventh Circuit affirmed the lower court's decision that polluted water pumped from one water to another is an "addition" of a pollutant. In this case, the water district used a pumping station to divert phosphorous-laden water from navigable water through a levee to water in a conservation area. The court ruled the diversion to be an "addition" of a "pollutant" to the receiving water, notwithstanding that the pollutant was added at the pumping station.

The court, however, vacated the lower court's injunction forbidding operation of the station in the absence of a permit, fearing it could lead to severe flooding. Instead, the circuit court instructed the lower court to give the water district time to obtain a permit and to use fines and penalties to encourage compliance.

Likewise, in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*,[13] the U.S. Court of Appeals for the Second Circuit held that New York City's diversion of polluted water from a reservoir through a city-owned tunnel for release into Esopus Creek, a trout stream from which the city withdrew drinking water, amounted to an "addition" of "pollutants." On remand, the U.S. District Court for the Southern District of New York, after an unusual bench trial litigated by law students with the Pace Environmental Litigation Clinic, used a "top-down" approach to fine the city $5.75 million, the maximum allowed for each day of violations after the decision of the Second Circuit, taking into account the terrorist attacks of September 11, 2001.[14] The court also ordered the city to provide the New York Department of Environmental Conservation (DEC) with all information needed to issue a discharge permit, and, pursuant to the court's authority under the All Writs Act, ordered DEC, as third-party defendant, to complete the application process and issue a discharge permit within 18 months.

Accumulated sediment released during dam maintenance, however, does not constitute an "addition." In *Greenfield Mills, Inc. v. O'Bannon*,[15] the court held that the Indiana Department of Natural Resources did not need to have an NPDES permit for dam maintenance work that released accumulated sediment, killed fish, and dirtied property. Disruption, churning, and moving of sediment during dam maintenance does not constitute a "discharge of a pollutant." Although the dam is a "point source," and the sediment a "pollutant," the maintenance activity did not "add" the sediment to the water. The court also ruled that the activity did not require a dredge or fill permit because §404(f)(1)(b) exempts dam maintenance from the §404 program.[16]

Courts are split over whether frolicking, farm-raised fish and shellfish and their byproducts add pollutants. In *Association to Protect Hammersley, Eld & Totten Inlets v. Taylor Resources, Inc.*,[17] the court held shells, feces, and natural materials released by mussels grown on harvesting rafts does not constitute an addition of "pollutants." Given one of the Act's purposes is "protection and propagation of . . . shellfish," the court interpreted the term "biological materials" within the definition of "pollutant" to mean "waste material of a human or industrial process."[18] The court stated: "It would be anomalous to conclude that the living shellfish sought to be *protected* under the Act are, at the same time, 'pollutants,' the discharge of which may be *proscribed* by the Act."[19]

In comparison, in *U.S. Public Interest Research Group v. Atlantic Salmon of Maine*,[20] the court held non-North American origin salmon and their byproduct who "escape" from a fish farm into an adjacent navigable water constitute "discharge of a pollutant." The court found released fish, fish feed, fish medicine, pathogens, fish excrement, and copper on sea cages all "pollutants" "added" to the Machias and Pleasant Bays off the coast of Maine. The court subsequently forbade defendant from introducing any new class of fish into its net pens until it adjudicated abatement.[21]

In *Bufford v. Williams*,[22] the court affirmed a lower court's dismissal of a citizen suit because plaintiffs did not prove fecal coliform on their property resulted from an interceptor trench from a municipal sewage treatment plant. The city showed the trench was an outlet for groundwater, and the fecal coliform could have originated from cattle on the landowner's property.

In *Association to Protect Hammersley*,[23] the court declined to dismiss a citizen suit alleging unpermitted discharge for want of jurisdiction. The court ruled inapposite a state's decision that discharges from a shellfish producer did not require a permit. As the plaintiffs properly pled a claim for unpermitted discharge and met notice requirement, the court found that the state did not have exclusive authority to decide CWA jurisdictional issues.

Fumigant "drift" continues to raise the specter of CWA jurisdiction. In *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*,[24] the Ninth Circuit enjoined the U.S. Forest Service from spraying without a permit, holding insecticides meet the definition of "pollutant" under the CWA. In so doing, the court held that aerial spraying is not subject to the exemption for silvicultural activities.[25] The court concluded that the exemption only ap-

11. *Id.*

12. 280 F.3d 1364, 32 ELR 20475 (11th Cir. 2002), *reh'g denied*.

13. 273 F.3d 481, 32 ELR 20229 (2d Cir. 2001).

14. *See* Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 2003 WL 346217 (S.D.N.Y. Feb. 6, 2003).

15. 189 F. Supp. 2d 893, 32 ELR 20507 (N.D. Ind. 2002).

16. *Cf.*, California Sportfishing v. Diablo Grande, 209 F. Supp. 2d 1059 (E.D. Cal. 2002) (construction activities were "point sources" that "added" "pollutant" sediment); Colvin v. United States, 54 Env't Rep. Cas. (BNA) 1796 (E.D. Cal. 2001) (bulldozer spreading of more than 5.4 million pounds of screw press rejects on the northern shoreline of the Salton Sea was addition of pollutant by point source); and Reynolds v. Rick's Mushroom Serv., Inc., No. CIV. A. 01-3773, 2003 WL 462280 (E.D. Pa. Feb. 24, 2003) (holding wastewater flowing from water runoff from spent mushroom substrate (SMS) constitutes discharge of pollutants, and that system designed to prevent discharge of pollutants from SMS is point source).

17. 299 F.3d 1007, 33 ELR 20001 (9th Cir. 2002).

18. *Id.* at 1010, 33 ELR at 20002.

19. *Id.* at 1011, 33 ELR at 20002.

20. No. 00-151-B-C, 32 ELR 20535 (D. Me. Feb. 19, 2002).

21. *See id.*

22. 42 Fed. Appx. 279, 32 ELR 20824 (10th Cir. 2002).

23. 299 F.3d at 1007, 33 ELR at 20001.

24. 309 F.3d 1181, 33 ELR 20107 (9th Cir. 2002).

25. *See* 40 C.F.R. §122.27.

plies to insecticides released from natural runoff, rather than all silvicultural pest control activities.

In *Altman v. Town of Amherst, New York*,[26] the Second Circuit held that whether pesticide spraying on federal wetlands is an "addition of a pollutant" is a question of fact.

Addition of Fill Material

Section 404 governs the addition of a specific kind of pollutant, dredge, or fill material, including mountaintop mining wastes. In *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*,[27] the court held that filling navigable waters with mountaintop mining wastes is not an "addition" that the Act permits. The court enjoined the Corps from issuing any further permits allowing valley fill of "mountaintop removal" mining wastes. The court found this practice to be inconsistent with the language and purpose of the Act. That there was a long-standing practice of allowing this practice is irrelevant. Similarly, the court found the practice inconsistent with EPA's definition of "fill," which involves purposeful, intentional fills, and not fills solely for waste disposal. To the extent EPA's definition of "fill" is controlling, it is ambiguous. Regardless, EPA cannot "legalize" an illegal interpretation by converting it into a rule.

The U.S. Court of Appeals for the Fourth Circuit reversed.[28] It ruled that the Corps had discretion to issue §404 permits to allow discharge of excess overburden from mountaintop mining into a valley stream. The court upheld the Corps' authority even if the discharge has no beneficial purpose, and is solely for waste disposal. It also ruled that the relief granted was too broad and upheld both the Corps' 1977 regulation defining "fill material" and the Corps' interpretation of the rule.

From a Point Source

In *Borden Ranch*, discussed above, the Court upheld the Ninth Circuit's determination that a plow could be a "point source."[29] The Ninth Circuit was persuaded that because courts had consistently found bulldozers and backhoes to be point sources, it could "think of no reason why [a tractor or bulldozer] would not satisfy the definition of 'point source.'"[30]

CAFOs and other animal operations are presumed "point sources." In *Water Keeper Alliance v. Smithfield Foods, Inc.*,[31] the court declined to dismiss a citizen suit for discharge without a permit because: (1) farms in question may be CAFOs; (2) citizens may enforce CAFO permits; and (3) a question of fact exists as to whether a particular farm qualifies for CWA exemption under the definition of "point source."[32]

On February 12, 2003, EPA issued final rules to identify NPDES requirements for CAFOs.[33] The rule establishes a mandatory duty for all CAFOs to apply for an NPDES permit and to develop and implement a nutrient management plan. Companion effluent guidelines establish performance expectations for existing and new sources to ensure appropriate storage of manure, as well as expectations for proper land application practices at the CAFO. The required nutrient management plan would identify the site-specific actions to be taken by the CAFO to ensure proper and effective manure and wastewater management, including compliance. The rule also has new regulatory requirements for dry-litter chicken operations. EPA believes that these regulations will "substantially benefit human health and the environment by assuring that an estimated 15,500 CAFOs effectively manage the 300 million tons of manure that they produce annually."[34]

Statutory and regulatory exemptions from the CWA are construed broadly. Rainwater discharges from agricultural operations fall under the Act's "point source" exemption for agricultural irrigation return flows. In *Fishermen Against the Destruction of the Environment v. Closter Farms, Inc.*,[35] the court dismissed a citizen suit after concluding: (1) discharge of rainwater from a sugar farm into a lake is "agricultural stormwater" discharge subject to "point source" exemption even though it is pumped to the lake; (2) discharge of groundwater withdrawn into irrigation canals and seepage from a lake are "return flow from irrigation agriculture" within CWA exemption, even though the farm uses flooding for crop irrigation; and (3) there was insufficient evidence of discharge of nonexempt pollutants stemming from a farm serving as a drainage area for adjacent landowners.

For different reasons, in an alternate holding to the one described above, the court in *Association to Protect Hammersley*,[36] narrowly applied an EPA rule and held that shellfish harvesting facilities are not "point sources." Although EPA rules identify "concentrated aquatic animal production facilities" as point sources, the rules exempt such facilities that feed less than approximately 5,000 pounds of food a month. Because the defendant did not "feed" the mussels grown on harvesting rafts at issue in the case, it fell within the rule's exemption.[37]

Into a Navigable Water

In *SWANCC*, the Court held that "navigable waters" does not include isolated, intrastate waters not connected to otherwise navigable waters that may be visited by migratory birds.[38]

26. 47 Fed. Appx. 62, 33 ELR 20037 (2d Cir. 2002). *Accord* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 31 ELR 20535 (9th Cir. 2001) (aquatic herbicides).

27. 204 F. Supp. 2d 927, 32 ELR 20588 (S.D. W. Va. 2002).

28. Kentuckians for the Commonwealth, Inc. v. Rivenburgh, 317 F.3d 425 (4th Cir. 2003).

29. *See* 2002 U.S. LEXIS at 9430.

30. 261 F.3d at 810, 32 ELR at 20012.

31. Nos. 4:01-CV-27-H(3), -30-H(3), 32 ELR 20320 (E.D.N.C. Sept. 20, 2001).

32. *See id.* holding that the CWA subjects CAFOs to the NPDES permit requirement, sprayfields are part of CAFOs, and denying the CAFO's motion to dismiss. *Accord* U.S. Pub. Interest Research Group v. Atlantic Salmon of Maine, No. 00-151-B-C, 32 ELR 20535 (D. Me. Feb. 19, 2002) (holding fish farm "net pens" to be "point sources," as they are discrete, discernible "concentrated aquatic animal production facilities").

33. *See* 68 Fed. Reg. 2900 (Feb. 12, 2003).

34. *Id.*

35. 300 F.3d 1294, 33 ELR 20014 (11th Cir. 2002).

36. 299 F.3d at 1007, 33 ELR at 20001.

37. *But see* League of Wilderness Defenders/Blue Mountains Biodiversity Project, 309 F.3d 1181, 33 ELR 20107 (9th Cir. 2002), discussed *supra*, where the Ninth Circuit held an airplane conducting aerial spraying of insecticides is a point source not eligible for exemption for release of pesticides in silvicultural operations.

38. 531 U.S. at 159, 31 ELR at 20382.

Courts have thus far applied the principles of *SWANCC* sparingly. Wetlands adjacent to tributaries that flow into navigable waters are "waters of the United States." In *United States v. Lamplight Equestrian Center, Inc.*,[39] the court held a horse training center's discharge of sand into an adjacent wetland required a permit. The court distinguished *SWANCC*, finding compelling that the water (wetland) in *Lamplight* is adjacent to a tributary that is hydraulically connected to an actual navigable water. It is irrelevant that the tributary itself is not navigable as long as it flows into navigable water, the court concluded.[40]

In *FD&P Enterprises v. U.S. Army Corps of Engineers*,[41] the court ruled that the Corps has jurisdiction over filling activities in wetlands adjacent to a non-navigable stream if (1) it is hydraulically connected to a navigable stream, and (2) the activity would substantially affect the navigable water. The court also ruled that the Corps' assertion of jurisdiction over the wetlands does not violate the U.S. Commerce Clause. In contrast, in *United States v. Newdunn Associates*,[42] the court held that the landowner's isolated wetland is not "waters of the United States" because its connection to navigable water is too attenuated. Only by myriad hydraulic connections, including drainage ditches, a culvert, and miles of non-navigable waters, was the wetland connected to a navigable water.[43]

On January 15, 2003, EPA and the Corps published an advanced notice of proposed rulemaking to re-define "waters of the United States."[44] The advanced rule restricts the term beyond the "migratory bird rule" at issue in *SWANCC*, which removes the Act's application, for example, to waters that are thought to be isolated and intrastate, even if they are habitat to threatened and endangered species. Further, EPA and the Corps concurrently issued field guidance that requires headquarters to approve staff determinations of jurisdiction. It does not, however, require approval of negative declarations of jurisdiction.

Permit Issues[45]

The CWA vests EPA and states with delegated programs the authority to issue NPDES permits and provides for EPA withdrawal of this delegated state authority.[46] NPDES permits are used to implement technology and water quality-based effluent limitations and other conditions.[47] Compliance with an NPDES permit suffices for compliance with the Act.[48]

39. No. 00 C 6486, 32 ELR 20526 (N.D. Ill. Mar. 8, 2002).
40. *See also* California Sportfishing v. Diablo Grande, 209 F. Supp. 2d 1059 (E.D. Cal. 2002) (the San Joaquin River is navigable "in fact" and thus too are its tributaries).
41. 239 F. Supp. 2d 509 (D.N.J. Jan. 15 2003).
42. 195 F. Supp. 2d 751, 32 ELR 20573 (E.D. Va. 2002).
43. *Accord* United States v. Rapanos, 190 F. Supp. 2d 1011 (E.D. Mich. 2002) (no jurisdiction over tributaries of navigable waters, or wetlands adjacent to such tributaries). *Cf.*, United States v. Pauly, No. 01-2107, 2003 WL 397545 (6th Cir. Feb. 24, 2003) (vacating fine in connection with trenching, grading, and filling of wetlands without permit, finding district court lacked power to grant relief sua sponte).
44. 68 Fed. Reg. 1991 (Jan. 15, 2003).
45. Section 404 permit issues are addressed elsewhere in this program.
46. 33 U.S.C. §1342, ELR Stat. FWPCA §402.
47. *See id.* §1314, ELR Stat. FWPCA §304.
48. *See id.* §1342(k), ELR Stat. FWPCA §402(k).

EPA Authority to Establish Technology-Based Standards

In *Environmental Defense Center. v. EPA*,[49] the Ninth Circuit upheld EPA's standards and exemptions for small municipal separate storm sewers (MS4s) respecting industrial and forest roads. The court struck some aspects of the rule, however, for failing to provide for review of notices of intent and public participation.

In *National Wildlife Federation v. U.S. Environmental Protection Agency*,[50] the D.C. Circuit deferred to most of EPA's revised technology-based standards for the bleached paper grade kraft and soda segment of the pulp and paper industry. First, the court upheld EPA's evaluation of economic consequences of best available technology (BAT) standards as not "arbitrary and capricious." EPA provided detailed explanations for its economic analysis, and reasonably relied upon "Z-score" analysis to predict likelihood of attendant bankruptcies. The court also upheld EPA's decision for the same industry (1) not to set BAT standards for color, (2) to set limits and daily monitoring for the composite pollutant surrogate AOX, and (3) to set maximum monthly effluent limits at the 95th percentile of average performance for model projections using BAT. The court remanded EPA's conclusion, however, that supplemental fiber lines are "new sources" subject to new source performance standards.

Permit Shield

The Act's permit shield provision exempts pollutants known to but not regulated by the issuing agency from claims for unpermitted discharges. In *Piney Run Preservation Ass'n v. County Commissioners of Carroll County, Maryland*,[51] the lower court held that it was unlawful for a wastewater treatment plant to discharge heated wastewater without express authorization in its NPDES permit. The Fourth Circuit reversed. Applying the "permit shield" provision of 33 U.S.C. §1342(k), it found the discharge not to be prohibited because: (1) a permit provision prohibiting "discharge of pollutants not shown shall be illegal" is ambiguous and did not limit thermal discharges; (2) the permit did not expressly prohibit discharges of unenumerated pollutants; and (3) the state was aware of the potential for thermal discharge when it issued the permit, yet did not set a corresponding effluent limit.

In *Mississippi River Revival, Inc. v. City of St. Paul*,[52] the court dismissed a claim that the city's storm water discharges caused violations of state water quality standards. The court held the permit's silence respecting water quality standards dispositive, opining the Act on its face does not require storm water discharge permits to incorporate such standards.

Permit Renewal

States may waive the requirement that permit holders apply for permit renewal at least 180 days prior to permit expiration. In *ONRC Action v. Columbia Plywood, Inc.*,[53] a ply-

49. 319 F.3d 398 (9th Cir. 2003).
50. 286 F.3d 554, 32 ELR 20607 (D.C. Cir. 2002).
51. 268 F.3d 255, 32 ELR 20208 (4th Cir. 2001).
52. No. 01-1887 (DSD/SRN), 33 ELR 20131 (D. Minn. Dec. 2, 2002).
53. 286 F.3d 1137, 32 ELR 20638 (9th Cir. 2002).

wood company submitted its permit renewal application substantially less than 180 days before expiration of its existing permit. Nevertheless, the court upheld Oregon Department of Environmental Quality's (DEQ's) decision to waive the 180-day requirement. Oregon DEQ based its decision on a state enforcement shield law that allows licensed applicants to continue operating under the terms of an expired permit until the state takes final action on an application, regardless of when it is submitted. The court found this decision to be within the state's province.

Notice and Comment for General Permit

EPA need provide notice and an opportunity for comment before incorporating state changes to general NPDES permits that are not a logical outgrowth of those proposed for public comment by the state. In *Natural Resources Defense Council v. U.S. Environmental Protection Agency*,[54] the court held that EPA failed to provide adequate notice and opportunity for comment prior to issuing two general permits for discharges allowing log transfer operators in Alaska to release bark and woody debris into marine waters. The proposed general permit the state noticed to the public would have authorized the discharge of debris into one-acre zones. The final general permit, which was not subject to public notice-and-comment proceedings, contained no such limit. Instead, it allowed discharges into the whole area covered by the transfer operations. EPA incorporated the change into the final general permits for transfer operations in Alaska.

The court found that the final general permit was not a logical outgrowth of the proposed permit and could not have been reasonably anticipated by interested parties. In addition, the final general permit incorporated a fundamentally different zone of deposit than that allowed in the existing state water quality certificate. Thus, the court remanded the permit to EPA.

Obligation to Withdraw NPDES Authority

EPA has a mandatory duty to initiate proceedings to withdraw delegated NPDES permitting authority when it has actual knowledge of shortfalls in the state's program. In *Save the Valley v. Environmental Protection Agency*,[55] the court granted plaintiff's motion for summary judgment based on EPA's failure to perform the mandatory duty of initiating proceedings under 33 U.S.C. §1342(c)(3) to withdraw approval of Indiana's NPDES program. The court agreed with the plaintiff that EPA had actual knowledge that the state had failed to adopt and enforce adequate laws and regulations concerning the discharge of pollutants from CAFOs, particularly industrial hog farms, and failed to require those operations to obtain NPDES permits.

Section 303: Water Quality Standards, TMDLs, and Continuing Planning

Section 303 requires states to set water quality standards to protect various uses of state waters.[56] States must identify waters for which technology-based standards alone are not sufficient to achieve standards (impaired waters list), set TMDLs necessary to achieve applicable standards, and incorporate the TMDLs into water quality management plans established under the state's continuing planning process (CPP).[57] The CPP must describe the current process for implementing the standards.[58] EPA must approve or disapprove revisions to state standards, as well as impaired waters lists, TMDLs, and initial CPPs.[59]

Water Quality Standards

Litigation surrounding §303(c) is continuous. Resolving a case in federal court in Virginia, EPA agreed by consent decree to establish state standards for toxics, fecal coliform, and other pollutants.[60] Similar litigation is underway in Puerto Rico[61] and Florida.[62]

In addition to overseeing state water quality standards, EPA has broad authority to grant Native American tribes status to set water quality standards. In *Wisconsin v. U.S. Environmental Protection Agency*,[63] the U.S. Court of Appeals for the Seventh Circuit affirmed the lower court's upholding of EPA's decision that the Sokoagon Chippewa Native American tribe qualified under §303 for "treatment-as-state" status. This status gave the tribe the authority to establish water quality standards for off-reservation waters flowing through the reservation into a lake on the reservation. In accordance with EPA regulations, the court held that the tribe had demonstrated that it had authority over the reservation and that off-site waters were essential to its survival.

The court rejected Wisconsin's argument that the tribe did not have inherent authority to regulate water quality within the borders of its reservation when a state owned the land underlying the affected water. The court determined that because EPA could have set the standards, it was within its discretion to delegate this responsibility to the tribe.

TMDLs

Citizen suits continue to catalyze the TMDL program, albeit with decreasing promise. Although EPA so far has survived dubious challenges to its authority to set TMDLs for waters impaired by nonpoint sources, it has nonetheless largely succeeded in pressing a counteroffensive against citizen action that reduces water quality standards to dead letter. In EPA's view, it need not intervene unless states do nothing. TMDLs need not be "total," "daily," or reflect "loads." And, most importantly, TMDLs need not include implementation plans, and need not be implemented. EPA is intent on devolving the program back to the states and transporting the water quality program back to the Johnson Administration.

54. 279 F.3d 1180, 32 ELR 20459 (9th Cir. 2002).
55. No. IP 99-0058-C-B/G, 2002 WL 31103739 (S.D. Ind. Sept. 17, 2002).
56. 33 U.S.C. §1313(c), ELR STAT. FWPCA §303(c).
57. *See id.* §1313(d), ELR STAT. FWPCA §303(d).
58. *See id.* §1313(e), ELR STAT. FWPCA §303(e).
59. *See id.*
60. *See* American Canoe Ass'n v. EPA, Nos. 01-2822 & 02-0018 (S.D. W. Va. 2002).
61. *See* Coralations v. EPA, No. 02-1266(JP) (D.P.R. 2002).
62. *See* Florida Pub. Interest Research Group v. EPA, No. 4:02CV408-WS (N.D. Fla. 2003) (notice of intent to sue by coalition).
63. 266 F.3d 741, 32 ELR 20177 (7th Cir. 2001).

(That would be Lyndon, but could just as well be Andrew.) Thus, at least as a matter of federal administration, the TMDL game is about up. On March 19, 2003, EPA at long last withdrew the 2000 TMDL rules.[64] The rules had not gone into effect anyway; the U.S. Congress suspended them until April 30, 2003.

The 2000 rules were controversial because they required states and EPA to take water quality standards seriously. EPA withdrew the rules "because [it] believes that significant changes would need to be made to the July 2000 rule before it could represent a workable framework for an efficient and effective TMDL program."[65] EPA also said that it needed beyond April 30, 2003, "to decide whether and how to revise the currently-effective regulations implementing the TMDL program in a way that will best achieve the goals of the CWA."[66] Thus, as EPA observed, the existing rules remain operative:

> Regulations that EPA promulgated in 1985 and amended in 1992 remain in effect for the TMDL program. EPA has been working steadily to identify regulatory and nonregulatory options to improve the TMDL program and is reviewing its ongoing implementation of the existing program with a view toward continuous improvement and possible regulatory changes in light of stakeholder input and recommendations.[67]

Curiously, EPA believes "the withdrawal of the July 2000 rule will not impede ongoing *implementation* of the existing TMDL program."[68] This means a whole lot less than it seems. EPA and the states have hardly "implemented" the existing TMDL program at all.

Federal TMDL jurisprudence has blossomed and withered recently in a half dozen ways. First, the Ninth Circuit recently upheld EPA's interpretation of §303(d) to include all impaired waters.[69] Thus, states still need to have their §303(d) lists include waters impaired by point sources, nonpoint sources, or a combination of the two (blended waters). But it matters little.

Second, regardless of legal theory (constructive submission, mandatory duty, arbitrary and capricious, abuse of discretion, unreasonable delay, etc.), the U.S. Court of Appeals for the Fifth Circuit, the Ninth Circuit, and a lower court in New Jersey declined to order EPA to step in to set TMDLs.[70] The standard for ordering EPA to comply is nearly insurmountable, requiring both an explicit refusal by a state to take *any* TMDL action and unreasonable EPA delay in declaring such refusal a "constructive submission" of no TMDLs.

Third, the Eleventh Circuit agreed with EPA that neither §303(d) nor a consent decree in a Georgia TMDL case require EPA to ensure TMDLs have implementation plans.[71]

Fourth, the Second Circuit upheld EPA's interpretation that TMDLs do not have to be expressed in daily loads, and that an annual load may suffice. It also upheld EPA's approval of margins of safety on a TMDL by TMDL basis in the absence of guidance.[72]

Fifth, EPA resolved TMDL litigation in six states by entering into consent decrees to backstop TMDL development. The U.S. Court of Appeals for the Eighth Circuit dismissed industry appeals of a consent decree in a Missouri TMDL case due to lack of ripeness for want of concrete effect.[73]

Sixth, a federal court in a New Jersey TMDL case upheld EPA rationales for approving state §303(d) lists of impaired waters de-listing previously listed waters if the state "considers" but elects not to list the water, or omitting arguably impaired waters when there is a lack of "quality assured data."[74] It also reversed and remanded EPA list approvals when presented with irrefutable evidence of impairment. In the same case the court ruled that EPA's TMDL and listing decisions are not "rules" implicating notice-and-comment rulemaking under the Administrative Procedure Act.[75] Further, the court agreed that EPA's TMDL and listing decisions trigger the ESA's consultation requirements and ruled that post decisional consultation is sufficient to moot such claims.[76]

In an effort to introduce market principles to TMDLs and standards, EPA has developed a policy on water quality trading.[77] EPA believes the policy has "elements of environmentally sound trading programs," but acknowledges it is entirely "voluntary."

Continuing Planning Process

A recent case in Maryland underscores EPA's mandatory duty to approve or disapprove CPPs for each state. In *Sierra Club v. U.S. Environmental Protection Agency*,[78] the court determined EPA had never approved or disapproved a CPP for Maryland, and ordered it to do so within 90 days. It rejected EPA's reliance on circumstantial evidence purporting to have performed the duty (the preamble to the 1985 TMDL rule).[79]

That TMDLs need not include implementation plans raises the stakes of litigation surrounding CPP content. A recent case challenging EPA's approval of West Virginia's CPP due to shortfalls in TMDL process and standards implementation marks the first of what promises to be just the

64. Withdrawal of Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation, 68 Fed. Reg. 53 (Jan. 2, 2003).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* (emphasis added).

69. *See* Pronsolino v. Nastri, 291 F.3d 1123, 32 ELR 20689 (9th Cir. 2002).

70. *See* San Francisco Baykeeper v. Whitman, 297 F.3d 877, 32 ELR 20772 (9th Cir. 2002); American Littoral Society v. EPA, 199 F. Supp. 2d 217, 238-42 (D.N.J. 2002); and Sierra Club v. Browner, 257 F.3d 444, 31 ELR 20817 (5th Cir. 2001) (rejecting use of special master).

71. *See* Sierra Club v. Meiburg, 296 F.3d 1021, 32 ELR 20776 (11th Cir. 2002).

72. *See* Natural Resources Defense Council v. Muszynski, 268 F.3d 91, 32 ELR 20203 (2d Cir. 2001).

73. *See* American Canoe Ass'n v. EPA, 289 F.3d 509, 32 ELR 20700 (8th Cir. 2002).

74. *See American Littoral Society*, 199 F. Supp. 2d at 217.

75. *See id.*

76. *See id.*

77. *See* 68 Fed. Reg. at 8.

78. 162 F. Supp. 2d 406, 421 (D. Md. 2001).

79. *See id.*

beginning of the next wave of lawsuits under §303: CPP challenges.[80]

Jurisdictional Issues Specific to Citizen Suits

The CWA allows citizens to commence a civil action if there is a good-faith basis at the time of filing for alleging "ongoing violations."[81] Other jurisdictional hurdles to citizen suits abound. Citizen suits are precluded if notice is inadequate[82]; when an agency diligently prosecutes a civil action in a court of the United States[83]; or under certain circumstances when an agency diligently prosecutes an administrative action, collects a penalty, and the citizens do not file an action before institution of the agency action or within 120 days of the notice.[84] Citizen suits are also subject to a variety of constitutional defenses, including those under Article II (separation of powers) and Article III (standing and mootness).

Ongoing Violation

Post-complaint violations form a good-faith basis for alleging ongoing violations. In *Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*,[85] the court affirmed a lower court's finding of jurisdiction. There was ample evidence that the violations were ongoing when plaintiffs filed suit, including evidence of repeated, uncorrected violations, poor operation and maintenance, and proximity of manure piles in the vicinity of the receiving stream after plaintiff filed suit.

Similarly, in *California Sportfishing v. Diablo Grande*,[86] the court granted plaintiff's motion for partial summary judgment, holding that plaintiffs had a good-faith basis for alleging ongoing violation because additional violations occurred after commencement of the action.

Notice Adequacy

The issue of notice adequacy continues to foment ample satellite litigation, particularly in the Ninth Circuit. In *San Francisco Baykeeper, Inc. v. Tosco Corp.*,[87] the Ninth Circuit ruled that a defendant may not defeat sufficient notice of alleged violations by selling a polluting facility to a third party. In *Tosco*, plaintiff notified the company of its intent to sue for illegal discharges, waited more than 60 days, and filed suit. The company then sold the offending facility. The lower court granted its motion for dismissal based on lack of notice and mootness.

The Ninth Circuit reversed and remanded, holding that a defendant cannot defeat proper notice by selling the facility that is the subject of the notice. Citing EPA regulations, the court found that notice is sufficient if it is "reasonably specific as to the nature and time of the alleged violations."[88] Moreover, the court found plaintiff's claims for civil penalties not moot, finding a defendant cannot escape liability simply by selling the facility.

In *Henry Bosma Dairy*,[89] the Ninth Circuit affirmed the lower court's finding that plaintiff provided adequate notice of alleged discharge without a permit by two CAFO dairies in Washington. Plaintiff provided notice of 12 illegal discharges, and then filed a complaint concerning both these and 32 additional violations. The court of appeals held that notice was adequate because the additional violations listed in the complaint originated from the same source (the dairy farm); they were of the same nature (into a common drainage ditch); they were easily identifiable and involved the same claims, i.e., discharge of manure into a drainage ditch without a permit; and they were in violation of a general permit and state water quality standards.

In *ONRC Action*,[90] the Ninth Circuit upheld the dismissal of two citizen suit claims for failure to provide notice of two claims related to the one for which plaintiff gave notice. Plaintiff provided notice of intent to sue for untimely submission of a permit application. The complaint pled this and a related claim for failure to renew the permit, and challenged the state's decision to waive the grace period. The court dismissed the latter claims, holding that the notice did not adequately describe intent to sue for them.

In *Catskill Mountains Chapter of Trout Unlimited*,[91] the court dismissed without prejudice plaintiffs' thermal discharge claim for failure to provide notice of intent to sue. Plaintiffs' notice identified violations of "suspended solids." The complaint claimed violations of effluent limitations for suspended solids, turbidity, and heat. Although notice of violation of permit limits for suspended solids and turbidity requirements was sufficient, the presence of suspended solids does not necessarily cause violation of thermal standards.[92]

In *City of Olmstead Falls v. U.S. Environmental Protection Agency*,[93] the city of Cleveland applied for a §404 permit from the Corps and a corresponding §401 water quality certification from Ohio's Environmental Protection Agency (OEPA). After OEPA notified the Corps of its decision to waive the §401 process, the Corps issued Cleveland the §404 permit.

On appeal, Ohio's environmental review board found that Ohio law does not permit OEPA to waive the §401 certification process. Accordingly, the plaintiff requested that the Corps revoke the permit. The Corps declined. EPA did not exercise its authority to object to issuance of the §404 permit.

Without providing notice of its intent to sue, the plaintiff filed suit against EPA to force it to intervene and oppose the permit. The court dismissed the action due to lack of notice, agreeing with EPA that the Act waives sovereign immunity only if citizens comply with the Act's notice requirement. Therefore, because the plaintiffs did not comply with §505(b), the court lacked subject matter jurisdiction to hear the claim.

80. *See* American Canoe Ass'n v. EPA, No. 01-447 (S.D. W. Va.) (ruling on motions for summary judgment pending).
81. 33 U.S.C. §1365(a), ELR STAT. FWPCA §505(a).
82. *See id.* §1365(b)(1)(A), ELR STAT. FWPCA §505(b)(1)(A).
83. *See id.* §1365(b)(1)(B), ELR STAT. FWPCA §505(b)(1)(B).
84. *See id.* §1319(g)(6), ELR STAT. FWPCA §309(g)(6).
85. 305 F.3d 943, 33 ELR 20048 (9th Cir. 2002).
86. 209 F. Supp. 2d 1059 (E.D. Cal. 2002).
87. 309 F.3d 1153, 33 ELR 20098 (9th Cir. 2002).
88. 40 C.F.R. §135.
89. 305 F.3d at 943, 33 ELR at 20048.
90. 286 F.3d at 1137, 32 ELR at 20638.
91. 273 F.3d at 481, 32 ELR at 20229.
92. *See also* River Oaks Homeowners v. Edington, 32 Fed. Appx. 929 (9th Cir. 2002) (dismissing without prejudice CWA portions of fair credit consumer complaint for failure to send notice to EPA).
93. No. 1:02 CV 1460, 2002 U.S. Dist. LEXIS 22516 (N.D. Ohio 2002).

Civil and Administrative Preclusion

In *American Canoe Ass'n v. Westvaco*,[94] the court held that the state's institution of a civil action, imposition of a $400,000 penalty, and compliance schedule for installation of a $2.5 million upgrade to a wastewater treatment plant was "diligent prosecution" precluding a citizen suit. The court rejected plaintiff's argument that the only enforcement action that could preclude its suit was one brought against the defendant. The court also found that the penalty amount suggested diligence, even though it was about half of the economic benefit enjoyed for years of not complying.

In *Altamaha Riverkeeper v. City of Cochran*,[95] however, the court found that neither fine nor compliance order imposed by the state were "diligent prosecution" precluding a citizen suit. On January 25, 2003, the court, upon recommendation of a special master, imposed a civil penalty of $1 million, and enjoined future violations.

For a state administrative action to preclude a citizen suit, state law must be "comparable" to the Act.[96] In *McAbee v. City of Fort Payne*,[97] the Fifth Circuit determined that an administrative action brought by the state of Alabama did not preclude a citizen suit because Alabama law does not provide public participation comparable to the Act. In comparison, the same circuit in *Lockett v. U.S. Environmental Protection Agency*,[98] upheld a lower court's ruling that Louisiana's public participation, though not identical to the Act's, was good enough. This may well be dicta, for the court also held the citizen landowner's suit precluded because the plaintiff neither filed suit before the state action nor filed within 120 days of sending its notice of intent to sue, so as to be allowed by the Act.

Removal of State Action to Federal Court

In *Johnson v. Calpine Corp.*,[99] the court rebuked plaintiff's efforts to litigate a citizen suit in state court. After plaintiff filed its action in state court, the federal court granted defendant's removal motion, holding the Act expressly grants federal jurisdiction. In so doing, the court rejected the argument that removal requires a demonstration of exclusive, as well as original, jurisdiction.

Constitutional Challenges

Article III (Standing and Mootness)

Standing challenges lost some steam in the aftermath of *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*[100] In *Altamaha Riverkeeper*,[101] the court found that plaintiffs had standing by demonstrating lessening of members' use and enjoyment of rivers due to a decrease in fish populations attributed to discharge violations from a sewage treatment plant. Similarly, in *Puerto Rico Campers' Ass'n v. Puerto Rico Aqueduct & Sewer Authority*,[102] and *California Sportfishing*,[103] the courts found that the plaintiffs had standing to bring their citizen suits. The court in a New Jersey TMDL case rejected EPA's challenge to plaintiffs' injuries concerning the failure to list impaired waters, finding that demonstration of the use of some impaired waters was sufficient to show injury for failure to list others.[104]

Some challenges to citizen suit plaintiffs' standing over the past 18 months were successful. In *Mississippi River Revival, Inc. v. City of St. Paul*,[105] the plaintiff alleged that the city's NPDES permit-required annual reports concerning storm sewer discharges were inadequate. The court held that plaintiffs did not allege any concrete and particularized injury stemming from the inadequate reports, and, thus, dismissed the claim for lack of standing.

In *American Canoe Ass'n v. Carrollton Utilities*,[106] in a split ruling the court held one environmental plaintiff had standing, but another did not. Plaintiff Sierra Club had standing because a member had standing, its interests were germane to the group's purpose, and neither the claim asserted nor the relief requested required participation by an individual member. On the other hand, another plaintiff in the suit lacked standing because it did not show how alleged violations injured members' interests in reviewing monitoring and discharge reports.

In *Fisher v. Chestnut Mountain Resort, Inc.*,[107] the court held individuals did not have standing to bring a citizen suit against a ski resort for discharging pollutants without a permit. The resort operated a snow-making machine that withdrew polluted water from the Mississippi River. When the artificial snow melted, it flowed into Watercress Circle, which in turn flows adjacent to both the ski resort and plaintiff's property. The court held that plaintiffs failed to show how the operation injured their aesthetic and property values, or how such injuries might be "fairly traceable" to the operation.[108]

Jurisdictional and standing issues aside, mootness lurks. In *Mississippi River Revival v. City of Minneapolis*,[109] the Eighth Circuit upheld the lower court's dismissal of a citizen suit for discharging without a permit as moot, including claims for civil penalties, after the city procured a permit from the state. In *Ozark Society v. Melcher*,[110] the court held that defendant's voluntary revocation of its permit mooted the citizen suit.

94. (D. Md. Aug. 2002) (on file with author).
95. 162 F. Supp. 2d 1368 (M.D. Ga. 2001).
96. *See* 33 U.S.C. §1319(g)(6)(A), ELR STAT. FWPCA §309(g)(6)(A).
97. 318 F.3d 1248 (5th Cir. 2003).
98. 319 F.3d 678 (5th Cir. 2003), *aff'g*, 176 F. Supp. 2d 629 (E.D. La. 2001).
99. No. 02-2242, 2002 U.S. Dist. LEXIS 22580 (E.D. La. Nov. 20, 2002).
100. 120 S. Ct. 693, 30 ELR 20246 (2000).
101. 162 F. Supp. 2d at 1368.
102. 219 F. Supp. 2d 201, 33 ELR 20033 (D.P.R. Aug. 23, 2002).
103. 209 F. Supp. 2d at 1059.
104. *See* American Littoral Society v. EPA, 199 F. Supp 2d 217 (D.N.J. 2002).
105. No. 01-1887 (DSD/SRN), 33 ELR 20131 (D. Minn. Dec. 2, 2002).
106. 54 Env't Rep. Cas. (BNA) 1380 (E.D. Ky. 2002).
107. No. 98 C 50221, 32 ELR 20559 (N.D. Ill. Mar. 19, 2002).
108. *See also* Crutchfield v. Corps of Eng'rs, No. CIV. A. 3:02CV594, 2002 WL 31497290 (E.D. Va. Oct. 31, 2002) (holding landowners lack standing to challenge Corps permit for construction of sewer line).
109. 319 F.3d 1013 (8th Cir. 2003).
110. No. 4:01 CV 00732 (WRW), 2003 WL 905280 (E.D. Ark. 2003).

Article II (Separation of Powers)

In the past year, defendants have raised separation-of-powers defenses to citizen enforcement suits brought under §505(a)(1) with more frequency. Article II vests all executive power in the president; requires that the president take care that laws are faithfully executed; and allows the president to nominate and, with the advice and consent of the U.S. Senate, appoint officers of the United States. No Article II defense has been successful. In *North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates*,[111] the court held that §505(a)(1)'s citizen enforcement authority does not offend notions of separation of powers. To the contrary, the provision amply respects separation of powers. It gives the executive branch 60 days to pursue an enforcement action of its own; if it does not pursue an enforcement action it has the authority to intervene as of right; and it has the authority to comment on any consent decree prior to the decree's lodging.

The U.S. District Court for the Eastern District of North Carolina found §505(a)(1) does not violate the Appointments Clause. In the consolidated opinions in *Holly Ridge* and *Water Keeper Alliance*,[112] the court ruled that because enforcement is not limited to the president, Congress could give enforcement authority to whomever it wanted, including those not appointed by the president. Thus, the Act's citizen suit provision does not run afoul of the Appointments Clause.

Other Enforcement

The CWA allows for injunctive relief and civil penalties in the amount of up to $27,500 per day per violation,[113] and administrative penalties up to $10,000 per day per violation, but no more than a total of $125,000.[114]

Judicial Decisions in Federal Civil and Criminal Prosecutions

In *United States v. Allegheny Ludlum Corp.*,[115] the court assessed a civil penalty of more than $8 million for 1,122 days of violations under §309(d). The court doubled the economic benefit enjoyed by the company, which was $4 million, because the violations of limits for toxic pollutants were serious, the company had a history of noncompliance and had not made good-faith attempts to comply absent enforcement, and the penalty amount would not adversely affect the economic viability of either the manufacturer or the steel industry.

In *Tamaska v. City of Bluff City, Tennessee*,[116] the court upheld the lower court's imposition of civil penalties for defendant city's violations of a consent decree between it and a property owner. The decree prohibited the discharge of untreated and partially treated waste from the city's wastewater treatment plant onto the owner's property and imposed compliance deadlines. Before entry of the decree, the city voluntarily ceased operating the treatment plant. It then failed to meet the decree's deadlines. Plaintiffs then sought to enforce the decree and the city complied.

The lower court ordered the city to pay penalties to the U.S. Treasury and plaintiffs' attorney fees. The court of appeals affirmed, deciding that the cessation of discharge does not moot the authority of the court to impose civil penalties or award fees. The court also held that it is appropriate to have the penalty amount paid to the U.S. Treasury rather than the property owner because relief was granted under the terms of the decree, not by order of contempt. The court also found that payment of attorney fees was proper, and the amount awarded was reasonable.

In *United States v. Bay-Houston Towing Co.*,[117] the court upheld a decision to forego any civil penalty for an unpermitted discharge when the underlying activity preceded enactment of the CWA. Additionally, the company gained no economic advantage through the unpermitted discharge, had no history of noncompliance, and made good-faith efforts to comply. Further, EPA took no action during the company's application process.

Criminal prosecutions over the past 18 months continued apace against both companies and responsible corporate officers for knowingly discharging without a permit and for falsifying reports.[118]

No Duty to Enforce

Courts are loath to mandate administrative enforcement. In *Sierra Club v. Whitman*,[119] the court held EPA's failure or refusal either to find a violation or to take enforcement action against an Arizona wastewater treatment facility did not constitute failure to perform a nondiscretionary duty. After expiration of a permit and 128 violations over 5 years, the plaintiff argued that §309(a)(3), which states that EPA shall issue a compliance order or commence a civil action when presented with information of a violation, imposes a mandatory duty to enforce the Act, actionable under §505(a)(2). The court disagreed, holding that to require EPA to investigate all complaints would infringe upon sovereign immunity, prosecutorial discretion/separation of powers, and would hinder EPA's ability to investigate more serious offenses. Moreover, in light of the Act's language, structure, and legislative history, the court held that Congress intended for "shall" to mean "may" in §309(a)(3).

111. 200 F. Supp. 2d 551, 32 ELR 20320 (E.D.N.C. 2001).

112. 32 ELR at 20320.

113. 33 U.S.C. §1319(d), ELR STAT. FWPCA §309(d).

114. *See* §1319(g)(2), ELR STAT. FWPCA §309(g)(2).

115. 54 Env't Rep. Cas. (BNA) 1908 (W.D. Pa. 2002).

116. 26 Fed. Appx. 482, 32 ELR 20404 (6th Cir. 2002).

117. 54 Env't Rep. Cas. (BNA) 1556 (E.D. Mich. 2002).

118. United States. v. Billabong II, No. 2:02-771 (D.S.C. 2003) (assessment of $500,000 criminal penalty to settle criminal charges against Norwegian shipping company for spill of more than 23,000 gallons of fuel oil off the coast of South Carolina in January 1999 due to a malfunctioning pump system); United States v. Technic Servs., 314 F.3d 1031 (9th Cir. 2003) (upholding conviction of asbestos remediation contractor and its secretary/treasurer for violating Act, observing there is evidence sufficient to support convictions for knowingly discharging pollutants without a permit, and report falsification); United States v. Tin Prods., No. 02-563 (D.S.C. 2003) (guilty plea from vice president of an industrial coating company in Lexington for discharging wastewater containing organotins into a municipal water and sewer system); United States v. Moore, No. 3:03-DR-3-001 (E.D. Tenn. 2003) (criminal sentences for metal processing company and its president for violating the Act).

119. 268 F.3d 898, 32 ELR 20214 (9th Cir. 2001).

Remedies

In *Crutchfield v. U.S. Army Corps of Engineers*,[120] the court overturned the Corps' issuance of a CWA nationwide permit to a county for a proposed sewage treatment plant. Although the court agreed with plaintiff landowners that the Corps had violated the CWA, it refused to grant injunctive relief while the Corps reconsidered the permit. Using traditional principles of injunction, the district court ruled that the legal remedy of remand was adequate, and that neither the balance of equities nor public interest favored an injunction.

In *Lessard v. City of Allen Park*,[121] the federal court held that prior consent judgments entered pursuant to the Act conferred subject matter jurisdiction over class action lawsuits pursuing state common-law claims.

Dischargeability in Bankruptcy

In *Rhode Island v. Laroche*,[122] the court held that a civil penalty an individual agreed to pay under a consent decree to settle an enforcement action brought by Rhode Island was not discharged by subsequent bankruptcy. The U.S. Court of Appeals for the First Circuit held that federal bankruptcy laws do not discharge civil penalties stipulated in consent decrees even though called "reimbursement" costs, and that the state did not forfeit its claim by not raising the issue in bankruptcy proceedings.

120. 230 F. Supp. 2d 687, 33 ELR 20112 (E.D. Va. 2002).

121. No. 00-74306, 2003 WL 485395 (E.D. Mich. Feb. 25, 2003).

122. 53 Env't Rep. Cas. (BNA) 1934 (1st Cir. 2002).