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**Recent Developments in Clean Water Act Litigation
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By

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RECENT DEVELOPMENTS IN CLEAN WATER ACT LITIGATION

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The last twelve months produced interesting juridical pronouncements in the areas of Clean Water Act ("CWA" or "Act") jurisdiction, permits, standards, citizen suits and other enforcement. On the jurisdictional front, "addition" includes polluted water diverted from one to another water. "Pollutant" includes parts, foods and medicines from fish farms and other operations that are discharged, unless exempted. Combined animal feeding operations, or "CAFOs," are sometimes "point sources." Post *SWAANC*, some courts are still interpreting "navigable water" with some elasticity to include 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 EPA establishment of technology-based standards. Pollutants contemplated but not regulated by agencies can be discharged without a permit under the Act's "permit shield" provision. States can waive the requirement that renewal applications need be submitted 180 days before permit expiry. Under certain circumstances, EPA must withdraw delegated NPDES permitting authority.

Water quality standard issues continue to provide fireworks. While litigation in the water quality standards field has slowed, the TMDL front continues to provide a litigator's bazaar for an increasingly bizarre program that is quickly slipping into practical irrelevance and desuetude.

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 majesty of § 505. The vast majority of cases reported under the Act in the last 12 months are citizen suits.

I. Jurisdictional Issues

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The Act prohibits the “discharge of any pollutant” without a permit. 33 U.S.C. § 1311(a) (1). This term means “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). The Act defines each term, 33 U.S.C. § 1362, except for “addition,” which has been generally construed to mean introduced “from the outside world.”

A. Addition of a Pollutant

It appears fairly well settled the diversion of pollution from one water to another constitutes an “addition” of a “pollutant.” In Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Management Dist., 280 F.3d 1364 (11th Cir. 2002), *reh’g denied*, 2002 U.S. App. Lexis 9766, the Eleventh Circuit affirmed the lower court’s decision that polluted water pumped from one water to another is an “addition” of a pollutant. Here, the Water District used a pumping station to divert phosphorous laden water from a navigable water through a levee to a conservation area water. The court ruled the diversion to be an “addition” of a “pollutant” to the receiving water, notwithstanding whether 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 use fines and penalties to encourage compliance.

Likewise, in Catskill Mountains Chapter of Trout Unlimited v. New York City, 273 F.3d 481 (2nd Cir. 2001), the Second Circuit held New York City’s diversion of polluted water from a reservoir through a city-owned tunnel for release into a trout stream amounted to an “addition” of “pollutants.”

Accumulated sediment released during dam maintenance, however, does not constitute an “addition.” In Greenfield Mills v. O’Bannon, 189 F. Supp. 2d 893 (N. D. Ind. 2002), the court held the Indiana Department of Natural Resources does 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 the activity did not require a dredge or fill permit because § 404(f) (1) (b) exempts dam maintenance from the § 404 program. *Cf.*, California Sportfishing v. Diablo Grande, 209 F. Supp. 2d 1059 (E. D. Cal. 2002) (construction activities were “point sources” that “added” “pollutant” sediment); and Colvin v. U.S., 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).

Courts are split over whether frolicking, farm raised fish and shellfish and their by-products add pollutants. In Ass’n to Protect Hammersley v. Taylor Resources, 299 F.3d 1007 (9th Cir. 2002) 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." 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."

By comparison, in U. S. Pub. Interest Research Group v. Atlantic Salmon of Maine, No. 00-151-B-C, 32 Env'tl. L. Rptr. 20535 (D. Me. 2002), the court held non-North American origin salmon and their by-product 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.

In Bufford v. Williams, 2002 WL 1429487 (10th Cir. July 2, 2002), the court affirmed a lower court's dismissal of 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 Ass'n to Protect Hammersley v. Taylor Resources, 299 F.3d 1007 (9th Cir. 2002), 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 state does not have exclusive authority to decide CWA jurisdictional issues.

B. Addition of Fill Material

Section 404 governs the addition of a specific kind of pollutant, dredge or fill material. Filling navigable waters with mountaintop mining wastes is not an "addition" the Act permits. In Kentuckians for the Commonwealth v. Rivenburgh No. 2:01-0770, 32 Env'tl. L. Rptr. 20588 (S.D. W. Va. 2002), 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 longstanding practice of allowing this practice is irrelevant. The practice is 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 into a rule.

C. From a Point Source

CAFOs and other animal operations are presumed "point sources." In Waterkeeper Alliance v. Smithfield Foods, 53 Env't Rep. Cas. (BNA) 1508 (E. D. N. Ga. 2001), the court declined to dismiss citizen suit for discharge without a permit because: (1) farms in question may be "concentrated animal feeding operation," (2) citizens may enforce CAFO permits, and (3) question of fact exists to whether particular farm qualifies

for CWA exemption under definition of “point source.” See also, Water Keeper Alliance v. Smithfield Foods, Civ. Action Nos. 4:01-CV-27-H(3) –30-H(3), 32 Env’tl. L. Rptr. 20320 (E.D.N.C. Sept. 20, 2001) (holding Act subjects CAFO’s to the NPDES permit requirement, sprayfields are part of CAFO’s, and denying CAFO’s motion to dismiss.) Accord, U. S. Pub. Interest Research Group v. Atlantic Salmon of Maine, No. 00-151-B-C, 32 Env’tl. L. Rptr. 20535 (D. Me. 2002) (holding fish farm “net pens” to be “point sources,” as they are discrete, discernible “concentrated aquatic animal production facilities.”)

Statutory and regulatory exemptions 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 Env’t v. Closter Farms, 300 F.3d 1294 (11th Cir. 2002), the court dismissed a citizen suit after concluding (1) discharge of rainwater from sugar farm into 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 lake is “return flow from irrigation agriculture” within CWA exemption, even though farm uses process of flood irrigation; and (3) there was insufficient evidence of discharge of non-exempt pollutants stemming from farm serving as drainage area for adjacent landowners.

For different reasons, in an alternate holding to the one described supra, the court in Ass’n to Protect Hammersley v. Taylor Resources, 299 F.3d 1007 (9th Cir. 2002), applied narrowly an EPA rule and held 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 defendant does not “feed” the mussels grown on harvesting rafts, it falls within the rule’s exemption.

D. Into a Navigable Water

Wetlands adjacent to tributaries that flow into navigable waters are “waters of the U.S.” In U.S. v. Lamplight Equestrian Ctr., No. 00 C 6486, 32 Env’tl. L. Rptr. 20526 (N.D. Ill. Mar. 8, 2002), the court held a horse training center’s discharge of sand into an adjacent wetland required a permit. The court distinguished Solid Waste Auth. of Northern Cook County, 531 U.S. 159 (2001), remanded 248 F.3d 1159 (7th Cir. Ill. 2001), 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 said. See also, Cal. 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).

U.S. v. Newdunn Associates, 195 F. Supp. 2d 751 (E.D. Va. 2002), the court applied SWAANC and held the landowner’s isolated wetland is not a navigable water because its connection to a navigable water is too attenuated. The property owner’s wetland is not adjacent to, nor is it directly hydraulically connected with a navigable water. Only by myriad hydraulic connections is the wetland connected to a navigable

water, including drainage ditches, a culvert, and miles of non-navigable waters. Accord, U.S. v. Rapanos, 190 F. Supp. 2d 1011 (E.D. Mich. 2002) (no jurisdiction over tributaries of navigable waters, or wetlands adjacent to such tributaries).

II. Section 402 Permit Issues²

The Act vests EPA and states with delegated programs the authority to issue NPDES permits, and provides for EPA withdrawal of such delegated authority. 33 U.S.C. § 1342. NPDES permits are used to implement technology and water-quality based effluent limitations and other conditions. 33 U.S.C. § 1314. Compliance with an NPDES permit suffices for compliance with the Act. 33 U.S.C. 1342(k).

A. EPA Authority to Establish Technology Based Standards

In Nat'l Wildlife Fed'n v. EPA, 54 Env't Rep. Cas. (BNA) 1510 (D.C. Cir. 2002), 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 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 for color, (2) to set limits and daily monitoring for AOX, and (3) to set maximum monthly effluent limits at 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 NSPS.

B. 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. Carroll County Comm'rs, 268 F.3d 255 (4th Cir. 2001), cert. denied, 152 L.Ed. 2d 1021 (U.S. 2002), the lower court held it was unlawful for a wastewater treatment plant to discharge heated wastewater without express authorization in its NPDES. 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) permit provision prohibiting "discharge of pollutants not shown shall be illegal" is ambiguous and does not limit thermal discharges, (2) permit does not expressly prohibit discharges of unenumerated pollutants, and (3) state was aware of the potential for thermal discharge when it issued the permit, yet did not have set a corresponding effluent limit.

C. 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, 286 F. 3d 1137 (9th Cir. 2002), a plywood company submitted its permit renewal application

² Section 404 Permit issues are beyond the scope of this paper.

substantially less than 180 days before expiration of its existing permit. Nevertheless, the court upheld Oregon 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.

D. 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 NRDC v. EPA, 278 F.3d 1180 (9th Cir. 2002), the court held 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, 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 the final general permit was not a logical outgrowth of that proposed, and could not have been reasonably anticipated by interested parties. In addition, the final general permit incorporated fundamentally different zone of deposit than that allowed in the existing state water quality certificate. Thus, the court remanded the permit to EPA.

E. 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. EPA, 2002 WL 31103739 (S.D. Ind. September 17, 2002), the court granted plaintiff's motion for summary judgment that EPA failed to perform a mandatory duty to initiate proceedings under 33 U.S.C. § 1342(c) (3) to withdraw approval of Indiana's NPDES program. The court agreed with 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.

III. 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. 33 U.S.C. § 1313(c). States must identify waters for which technology based standards alone are not sufficient to achieve standards ("impaired waters list"), and set "total maximum daily loads" ("TMDLs") necessary to achieve applicable standards, and incorporate them into water quality management plans established under the state's "continuing planning process" ("CPP"). 33 U.S.C. § 1313(d). The CPP must describe the

current process for implementing standards. 33 U.S.C. § 1313(e). EPA must approve or disapprove revisions to state standards, as well as impaired waters lists, TMDLs and initial CPPs. Id.

A. Water Quality Standards

Litigation surrounding § 303(c) continues. Resolving a case in federal court in Virginia, EPA agreed by consent decree to establish standards for toxics, fecal coliform, and other pollutants for Virginia. Am. Canoe Ass'n v. EPA, (E.D. Va. 2001). Similar litigation is underway in Puerto Rico, Coralations et al. v. EPA, (D.P.R. 2002) and Florida (notice of intent to sue by coalition).

EPA has broad authority to grant Native American tribes status to set water quality standards. In Wis. v. EPA, 266 F.3d 741 (7th Cir. 2001), mot. granted, cert. denied, 153 L.Ed. 2d (U.S. 2002), 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 shared by the reservation. In accordance with EPA regulations, the court held the tribe had demonstrated (1) it has authority over the reservation, and (2) off-site waters are essential to its survival.

The court rejected Wisconsin's argument that the tribe does not have inherent authority to regulate water quality within the borders of its reservation when a state owns the land underlying the affected water. The court noted EPA could set the standards, so it was reasonable to allow the tribe to do so. Last, the tribe's inherent authority is not defeated by EPA's activities on standards in the area.

B. Total Maximum Daily Loads and Continuing Planning Process

It has been a busy year in TMDL jurisprudence. (For a detailed discussion of current developments from 1999-2002, please refer to separately provided materials). First, the Ninth Circuit recently upheld EPA's interpretation of § 303(d) to include all impaired waters. Pronsolino v. Nastri, 291 F.3d 1123, 1132-1133 (9th Cir. May 31, 2002). 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").

Second, regardless of legal theory (constructive submission, mandatory duty, arbitrary and capricious, abuse of discretion, unreasonable delay, etc), the Fifth and Ninth Circuits, and a lower court in the New Jersey TMDL case declined to order EPA to step in to set TMDLs. San Francisco Baykeeper v. Browner, 2002 U.S. App. LEXIS 14394 at *13 (9th Cir. July 17, 2002); Am. Littoral Soc'y et al. v. EPA et al., 199 F. Supp. 2d 217, 238-242 (D.N.J. March 28, 2002); and Sierra Club v. Browner, 257 F.3d 444 (5th Cir. 2001) reh'g denied, 2001 U.S. App. Lexis 22360 (5th Cir. La. Sept. 21, 2001), (rejecting use of special master). The standard for ordering EPA to comply is nearly insurmountable, requiring both (1) an explicit refusal by a state to take *any* TMDL action,

and (2) unreasonable EPA delay in declaring such refusal a “constructive submission” of no TMDLs.

Third, the Eleventh Circuit held that neither § 303(d) nor the consent decree in the Georgia TMDL case require EPA to ensure TMDLs have implementation plans. Sierra Club v. Whitman, 296 F.3d 1021 (11th Cir. July 2, 2002).

Fourth, the Second Circuit upheld EPA’s interpretation that “total maximum daily loads” 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, here one of just 10 percent. NRDC et al. v. EPA et al., 268 F. 2d 91 (S.D.N.Y. 2001).

Fifth, EPA resolved TMDL litigation in one-half dozen states by entering into consent decrees to backstop TMDL development. The Eighth Circuit dismissed industry appeals of a consent decree in the Missouri TMDL case due to lack of ripeness for want of concrete effect. Am. Canoe Ass’n et al. v. EPA et al., 289 F.3d 509 (8th Cir. May 6, 2002).

Sixth, a federal court in the New Jersey TMDL case upheld EPA rationales for approving state § 303(d) lists of impaired waters (1) de-listing previously listed waters if the state “considers” but elects not to list the water, or (2) omitting arguably impaired waters when there is a lack of “quality assured data.” Am. Littoral Soc’y et al. v EPA et al., 199 F. Supp 2d, 217 (D.N.J. March 28, 2002). It also reversed and remanded EPA list approvals when presented with irrefutable evidence of impairment.

Seventh, the court in the New Jersey TMDL case ruled that EPA’s TMDL and listing decisions are not “rules” implicating notice and comment rulemaking under the APA. Id.

Eighth, the court in the New Jersey TMDL case agreed EPA’s TMDL and listing decisions trigger the ESA’s consultation requirements. It ruled post decisional consultation is sufficient to moot such claims. Id.

A new TMDL rulemaking may undo whatever progress TMDL litigation has spurred. Litigation surrounding EPA’s withdrawn 2000 TMDL rule has been suspended until at least March 2003. EPA recently announced its intent to promulgate new rules that largely concede the program to state and industry interests. If EPA ever gets around to issuing a new TMDL rule, more litigation is certain.

IV. Jurisdictional Issues Specific to Citizen Suits

The Act allows citizens to commence a civil action if there is good faith basis at the time of filing for alleging “ongoing violations.” 33 U.S.C. § 1365(a). Other jurisdictional hurdles to citizen suits abound. Citizen suits are precluded if notice is inadequate, 33 U.S.C. § 1365(b)(1)(A), when an agency diligently prosecutes a civil action in a court of the U.S., 33 U.S.C. § 1365(b)(1)(B), or under certain circumstances

when an agency diligently prosecutes an administrative action and collects a penalty, and the citizens do not file an action before institution of the agency action or within 120 days of the notice. 33 U.S.C. § 1319(g)(6). 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).

A. Ongoing Violation

Post-complaint violations form a good faith basis for alleging ongoing violations. In Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 2002 WL 31051547 (9th Cir. Sept. 16, 2002), the circuit court affirmed the lower court's finding of jurisdiction. There was ample evidence 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 Cal. Sportfishing v. Diablo Grande, 209 F. Supp. 2d 1059 (E. D. Ca. 2002), the court granted plaintiff's motion for partial summary judgment, holding plaintiffs had a good faith basis for alleging ongoing violation because additional violations occurred after commencement of the action.

B. Notice Adequacy

Notice law continues to mature. In Community Assn. for Restoration of the Env't v. Henry Bosma Dairy, 2002 WL 31051547 (9th Cir. Sept. 16, 2002), 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 Circuit Court held notice was adequate because (1) the additional violations listed in the complaint originated from the same source (dairy farm), (2) were of the same nature (into a common drainage ditch), (3) were easily identifiable, and involved the same claims, i.e., discharge of manure into a drainage ditch without a permit, and (4) in violation of a general permit and state water quality standards.

In ONRC Action v. Columbia Plywood, 286 F.3d 1137 (9th Cir. 2002), the court upheld dismissal of two citizen suit claims for failure to provide notice of two claims related to the one for which plaintiffs 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 the notice did not adequately describe intent to sue for them.

In Catskill Mountains Chapter of Trout Unlimited v. New York City, 273 F.3d 481 (2nd Cir. 2001), 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 was sufficient for it and turbidity requirements, the presence of suspended solids does not necessarily cause violation of thermal standards. See also, River Oaks Homeowners v. Edington, 32 Fed. Appx. 929. (9th Cir. April 1, 2002) (dismissing without prejudice CWA portions of fair credit consumer complaint for failure to send notice to EPA).

C. Civil and Administrative Preclusion

In Am. Canoe Ass'n v. Westvaco, (D. Md. Aug. 2002) (on file with author), the court held the state's institution of civil action, imposition of \$400k penalty, and compliance schedule to install \$2.5 million upgrade to a wastewater treatment plant plaintiffs did not sue was "diligent prosecution." 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 the penalty amount suggested diligence, even though it is about half of the economic benefit enjoyed for years of not complying.

In Altamaha Riverkeeper v. City of Cochran, 162 F. Supp. 2d 1368 (M.D. Ga. 2001), the court found neither fine nor compliance order imposed by state were "diligent prosecution" precluding citizen suit.

In Lockett v. EPA, 176 F. Supp. 2d 629 (E.D. La. 2001), the court dismissed citizen suit because (1) state had commenced and diligently prosecuted an enforcement action under state law comparable to § 309(g), and (2) citizen landowner could not invoke an exception under § 309(g) (6) (B) because it neither filed suit before the state action nor filed within 120 days of sending its notice of intent to sue.

D. Constitutional Challenges

1. Article III (Standing and Mootness)

Standing challenges lost some steam in the aftermath of Laidlaw. In Altamaha Riverkeeper v. City of Cochran, 162 F. Supp. 2d 1368 (M.D. Ga. 2001), the court found plaintiffs had standing by demonstrating lessening of members' use and enjoyment of rivers due to decrease in fish populations attributed to discharge violation from sewage treatment plant. In Puerto Rico Campers' Ass'n v. Puerto Rico Aqueduct and Sewer Auth., 2002 WL 2018813 (D.P.R. Aug. 23, 2002) (finding plaintiffs had standing to pursue citizen suit, and granting its motion for summary judgment on liability); Cal. Sportfishing v. Diablo Grande, 209 F. Supp. 2d 1059 (E.D. Cal. 2002) (standing found). The court in the New Jersey TMDL case rejected EPA's challenge to plaintiffs' injuries concerning the failure to list impaired waters, finding demonstration of use of some impaired waters sufficient to show injury for failure to list others. Am. Littoral Soc'y et al. v EPA et al., 199 F. Supp 2d 217 (D.N.J. March 28, 2002).

Some standing challenges were successful. In Am. Canoe Ass'n v. Carrollton Utilities, 54 Env't Rep. Cas. (BNA) 1380 (E.D. Ky. 2002), in a split ruling, the court held one environmental plaintiff had standing, but another did not. Plaintiff Sierra Club had standing because (1) a member had standing, (2) its interests are germane to the group's

purpose, and (3) neither the claim asserted nor relief requested require participation by an individual member. On the other hand, plaintiff ACA 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, 54 Env't Rep. Cas. (BNA) 1093 (N.D. Ill. 2002), mot. denied, 2002 U.S. Dist. Lexis 8987 (M.D. Ill. May 20, 2002), 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 plaintiffs failed to show how the operation injured their aesthetic and property values, or how such injuries might be "fairly traceable" to the operation.

2. Article II (Separation of Powers)

Defendants 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 ("Vesting Clause"), has the President "take care" that laws are "faithfully executed" ("Take Care Clause"), and allows the President to nominate and, with the advice and consent of the Senate, appoint officers of the U.S. ("Appointments Clause"). No Article II defense has been successful. In N.C. Shellfish Growers Ass'n v. Holly Ridge Associates, 2001 U.S. Dist. LEXIS 22977 (E.D.N.C. 2001) the court held § 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 (1) 60 days to pursue enforcement action of its own, (2) and if not, the authority to intervene as of right, and (3) the authority to comment on any consent decree prior to lodging.

The Federal District Court for the Eastern District of Carolina found § 505(a)(1) does not violate the Appointments Clause. In the consolidated opinions in Holly Ridge and Water Keeper Alliance v. Smithfield Foods, 2001 U.S. Dist. LEXIS 21314 (E.D.N.C. 2001), 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.

V. Other Enforcement

The Act allows for injunctive relief and civil penalties in the amount of up to \$27,500 per day per violation, 33 U.S.C. § 1319(d), and administrative penalties up to \$10,000 per day per violation, but no more than a total of \$125,000. 33 U.S.C. § 1319(g)(2).

A. Civil Penalties Amount

In U.S. v. Allegheny Ludlum Corp., 54 Env't Rep. Cas. (BNA) 1908 (W.D. Pa. 2002), the court assessed civil penalty of more than \$8 million for 1,122 days of violations under 33 U.S.C. § 1319(d). The court doubled the economic benefit enjoyed by the company (\$4 million) because (1) violations of limits for toxic pollutants were serious, (2) the company had a history of noncompliance and had not made good faith attempts to comply absent enforcement, and (3) 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, Tenn., Nos. 00-5179-5244, 32 Env'tl. L. Rptr. 20404 (6th Cir. 2002), the court upheld the lower court's imposition of civil penalties for defendant city's violations of a consent decree between it and 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 Circuit Court affirmed, deciding the cessation of discharge does not moot the authority of the court to impose civil penalties or award fees. The court also held 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 payment of attorney fees was proper, and the amount awarded was reasonable.

In U.S. v. Bay-Houston Towing Co., 54 Env't Rep. Cas. (BNA) 1556 (E. D. Mi. 2002), the court upheld a decision to forego any civil penalty for unpermitted discharge when underlying activity preceded Act, and company (1) gained no economic advantage, (2) had no history of noncompliance, (3) made good faith efforts to comply, and agency took no action during the company's application process.

B. No Duty to Enforce

Courts are loath to mandate administrative enforcement. In Sierra Club v. Whitman, 268 F.3d 898 (9th Cir. 2001), 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 five years, plaintiff argued § 309(a) (3), which states EPA "shall" issue a compliance order or commence a civil action when presented with information of 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 power, 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 Congress intended for "shall" to mean "may" in § 309(a) (3).

C. Dischargeability in Bankruptcy

In Rhode Island v. Laroche, 53 Env't Rep. Cas. (BNA) 1934 (1st Cir. 2002), the court held a civil penalty an individual agreed to pay under consent decree to settle an enforcement action brought by Rhode Island was not discharged by subsequent bankruptcy. The First Circuit held federal bankruptcy laws do not discharge civil penalties stipulated in consent decrees even though called "reimbursement" costs, and the state did not forfeit its claim by not raising the issue in bankruptcy proceedings.