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

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American Law Institute-American Bar Association
Clean Water Act Course of Study
February 13, 2004

Where the Water Hits the Road: Case Update to Recent Developments in Clean Water Act Litigation (33 ELR 10369)
As of Dec. 1, 2003

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A. Jurisdictional Issues

1. Addition of a Pollutant From a Point Source


*North Carolina Shellfish*, infra., (stormwater and sediment are pollutants, tract, ditches, check dams, and gullies and rills are point sources).

*U.S. v. Hummel*, infra. (sewer installation caused discharge of pollutants by digging through wetland, sidecasting, and re-depositing the dredged material as pipe cover.)

2. Into a Navigable Water


*U.S. v. Rapanos*, 339 F.3d 447 (6th Cir. Aug. 5, 2003) (Upholding criminal conviction, finding sufficient nexus because wetlands adjacent to a drain that could affect navigable waters in fact.)

*United States v. Reuth Development Co.*, 335 F.3d 598 (7th Cir. Jul. 10, 2003) (turning asunder effort to reopen consent decree after SWAANC).
U.S. v. Deaton, 332 F.3d 698 (4th Cir. June 12, 2003) (upholding jurisdiction and restoration order respecting roadside ditch where pollution reaches navigable water. Also upholds use of wetlands hydrology as indicator of navigable water pursuant to interagency Wetlands Delineation Manual.)


North Carolina Shellfish Growers Assn, infra. (ditches and wetlands waters of the United State subject to CWA jurisdiction.)


San Francisco Baykeeper v. Cargill Salt Division, No. C96-2161, 2003 U.S. Dist. LEXIS 8247 (N.D. Cal. April, 29, 2003) (dumping in a depressed area that fills with water that then seeps into navigable water is a discharge of a pollutant).


B. Permit and Certificate Issues

1. Permits and the Constitution
   a. 10th Amendment

City of Abilene v. EPA, 325 F.3d 657 (5th Cir. Apr. 2, 2003) (implementing federal storm sewer program not coercive and not violate 10th Amendment).

   b. 5th Amendment

Cooley v. EPA, 324 F.3d 1297 (Fed. Cir. Apr. 1, 2003) (Permit restrictions prohibiting less than all of land value not permanent taking. Factual issues regarding temporary takings remain.)

2. 401 Certificate
Alabama Rivers Alliance v. FERC, 325 F.3d 290 (D.C. Cir. 2003) (FERC needs CWA § 401 certificate to authorize replacement of turbines at hydroelectric power station due to increase of water flow and pollution transport).

Environmental Protection Information Center v. Pacific Lumber, Co., 266 F. Supp. 2d 1101 (June 6, 2003 N.D. Cal.) (challenge to EPA determination to identify silvicultural activity as nonpoint and thus not subject to permit requirements not reviewable in court of appeals).

C. Water Quality Standards, TMDLs and Continuous Planning

1. TMDLs


Friends of Wild Swan v. EPA, No. 00-36001, 2003 LEXIS 15271 (9th Cir. July, 25, 2003) (upholding district court's order for EPA to establish TMDLs according to schedule).


Friends of the Earth v. EPA, 333 F.3d 184 (D.C. Cir. June 20, 2003) (jurisdiction over challenges to TMDL content belong in the district court).

2. Standards

Ohio Valley Environmental Coalition v. Horinko, Civil Action No. 3:02-0059, 2003 U.S. Dist. LEXIS 15359 (S.D.W.V. Aug. 29, 2003) (overturning EPA's approval of West Virginia's antidegradation procedures due to lack of record support or inconsistency with CWA.)


D. Jurisdictional Issues Specific to Citizen Suits

1. Notice

Sierra Club v. City of Columbus, Case Num. 02-CV-722, 2003 U.S. Dist. LEXIS 15979 (S. Ohio Aug. 29, 2003) (finding notice insufficient due to failure to note dates and locations of alleged violations, aspects of permits violated, and names and addresses of those sending notice)

2. Venue

Sierra Club v. Flowers, Civil Action No.: 02-1652 (RMU), 13281 (D.D.C. Aug. 4, 2003) (changing venue to S.D. Florida in case involving Corps action there.)

3. Standing

American Canoe Ass’n v. Murphy Farms, Inc., 326 F.3d 505 (4th Cir. 2003) (remanding issue for further proceedings).


4. Mootness


E. Other Enforcement


Anacostia Watershed Society v. D.C. Water & Sewer Auth., No. 1:00CV00183 (D.D.C. June 2003) (consent agreement to help eliminate CSOs by 40%, and $2 million dollars to ameliorate storm water impacts along the Anacostia).

United States v. Phillips, No. 03-CR-43 (S.D. Tex. May, 29 2003) (sentencing former fuel terminal manager to five years probation and 100 hours community service for instructing...
employees to tamper with and manipulate wastewater samples.)


United States v. IMC Phosphates Co., M.D. Fla., No. 8:03-CV-I814-T-17, 8/27/03) ($400,000 in restoration costs and penalties for illegal discharge of fill material.)


Friends of the Earth v. Gaston Copper Recycling Corp., No. 3:92-2574-0 (D.S.C. Jul. 18, 2003) ($ 2.34 million fine for discharging cadmium, copper, lead, mercury, and polychlorinated biphenyls from a metal smelter into a lake).

United States v. High Rise Services Co., No. 701-CR-137-F, (E.D.N.C. June 2, 2003) (Refrery owner sentenced to two years in prison and fined $50,000 for discharging oil into the Cape Fear River).


United States v. Bradford Sanitary Authority, No. 03-123E (W.D. Pa Apr. 11, 2003) ($40,000 penalty $ 60,000 project to plug abandoned oil and gas wells.)
United States v. Puerto Rico Aqueduct and Sewer Authority, No. 01-1707, (D.P.R. Mar. 13, 2
(agreement to spend $310 million on pollution-control measures and take other actions at 185
sewage pump stations).
for illegal discharges into Robinson Creek, a tributary of the Little Coal River).
penalty and $25,000 for environmental upgrades for jet-fuel spill caused by a derailment).