Pace Environmental Law Review

Volume 23
Issue 2 *Summer 2006*

Article 9

June 2006

Best Brief for Appellee: Eighteenth Annual Pace National Environmental Law Moot Court Competition

Amanda Edge-Gougeon
Mississippi College School of Law

Michael Bentley
Mississippi College School of Law

BEST BRIEF FOR APPELLEE*

Civ. App. No. 05-195

IN THE UNITED STATES
COURT OF APPEALS FOR THE TWELFTH CIRCUIT

BEARCLAW RIVER KEEPER, INC.,
Appellant

and

TOWN OF NOBLESVILLE, NEW UNION,
Appellant / Appellee

v.

MAJOR ELECTRONICS, INC.
Appellee

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PROGRESS

Oral Argument Requested

BRIEF FOR APPELLEE,
MAJOR ELECTRONICS, INC.

Mississippi College School of Law
Amanda Edge-Gougeon
Michael Bentley

---

* This brief has been reprinted in its original form.

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

MAJOR ELECTRONICS, INC.
APPELLEE

CIV. APP. NO. 05-195

v.

BEARCLAW RIVER KEEPER, INC.
APPELLANTS

AND

TOWN OF NOBLESVILLE, NEW UNION

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges for the United States Court of Appeals for the Twelfth Circuit may evaluate disqualification or recusal.

1. Bearclaw River Keeper, Inc., Appellant;
2. Town of Noblesville, New Union, Appellant;
3. Major Electronics, Inc., Appellee;
4. The Honorable Romulus N. Remus, United States District Judge for the District of Progress.

Respectfully Submitted,

_____

Team Number 13

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES STATUTES

UNITED STATES SUPREME COURT DECISIONS

UNITED STATES COURTS OF APPEALS DECISIONS

UNITED STATES DISTRICT COURT DECISIONS

STATE COURT DECISIONS

OTHER SOURCES

JURISDICTIONAL STATEMENT

This controversy presents primarily federal questions arising under the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387 (2000). The United States District Court for the State of Progress had supplemental jurisdiction over the state common law claim due to its relation to the federal CWA claims. 33 U.S.C. § 1367(a). The United States Court of Appeals for the Twelfth Circuit has jurisdiction over all claims on appeal in accordance with 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether soil beneath the Major Electronics manufacturing facility, through which PCBs are carried by rain water into the Bearclaw River, is a "point source" as defined by the CWA, 33 U.S.C. §1362(14).

II. Whether a private party may bring a citizen suit under 33 U.S.C. §1365 of the CWA for the purpose of enforcing the State of New Union's state-specific water quality standards on a party operating wholly outside of the state.

III. Whether the CWA preempts any federal common law of nuisance that may apply to non-point source pollution.

IV. Whether the CWA pre-empts the application of the State of New Union's state common law of nuisance to out-of-state sources of pollution.

V. Whether Bearclaw River Keeper can show that its members suffered the requisite "special injury" that would entitle it to maintain a common law suit for public nuisance.

VI. Whether Bearclaw River Keeper and the Town of Noblesville may claim reimbursement under the Comprehensive Environmental Response, Compensation and Liability Act's contribution provision, 42 U.S.C. § 9613(f), even though neither party has been subjected to a suit under the Act, or, in the alternative, under the cost recovery provision, 42 U.S.C. §9607.

STATEMENT OF THE CASE

Appellee Major Electronics is a long-time manufacturer of electrical equipment in the State of Progress ("Progress"). (R. at 4) Pollutant discharges from Major Electronics' facility have at all times complied with the effluent discharge limitations in its NPDES permit and the water quality standards imposed by Progress. (R. at 3-4)

Appellant Bearclaw River Keeper, Inc., ("BRK") commenced this action on behalf of several of its members against Major Electronics in the United States District Court for the District of Progress under 33 U.S.C. § 1365(a) of the CWA. (R. at 3) BRK alleged that Major Electronics "discharged" PCBs from the soil beneath their facility into the Bearclaw River in violation of 33 U.S.C. § 1311(a). (R. at 3) Alternatively, BRK alleged the escaping PCBs violated New Union's water quality standards or created a public nuisance under either federal or state common law. (R. at 3)

The Town of Noblesville, New Union ("Noblesville") was granted permission to intervene and joined BRK in all claims. Noblesville also claimed reimbursement for its response costs under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675. (R. at 3) BRK then amended its complaint to include a CERCLA reimbursement claim as well. (R. at 4)

All parties moved for summary judgment. (R. at 4) The district court granted Major Electronics' motion for summary judgment in its entirety, holding:

(1) the soil beneath the facility was not a point source as defined by the CWA;
(2) whether or not New Union's water quality standards were violated, this did not provide a basis for liability under the CWA;
(3) the public nuisance claims were not cognizable because (a) the federal common law of nuisance has been entirely preempted by the CWA, (b) an affected state's law cannot be enforced against an out-of-state party, and (c) BRK lacked standing to bring a public nuisance claim as its members had not suffered a special injury;
(4) neither BRK nor Noblesville was entitled to reimbursement for their response costs under CERCLA.

(R. at 3-9)

BRK and Noblesville appealed the district court's decision and this Court certified six issues for review. (R. at 1-2) Major Electronics urges this court not to overlook its full compliance with its NPDES permit and Progress' water quality standards and to affirm the district court's grant of summary judgment.

STATEMENT OF THE FACTS

Major Electronics has manufactured electrical equipment at its facility in Progress for decades. (R. at 4) At one time, Major Electronics used PCBs in its manufacturing process, but terminated such use in 1980. (R. at 4) It acquired an NPDES permit allowing treated effluent to be discharged into the Bearclaw River. (R. at 4) Although PCBs were never a normal part of wastewater discharge, its treated effluent was occasionally contaminated by "incidental concentrations" of PCBs from "unknown origins." (R. at 4) Major Electronics reported these low levels of PCBs to the issuing authority when applying for and renewing its NPDES permit. (R. at 4) The issuing authority has never imposed a PCB limitation on Major Electronics' wastewater effluent. (R. at 4)

Over the years, the soil beneath Major Electronics' facility became impregnated with PCBs. (R. at 4) During wet weather events, precipitation flows through the valdose zone underneath Major Electronics' facility, carrying concentrations of PCBs into the Bearclaw River (R. at 4). Although during dry weather, the water downstream from Major Electronics does not contain PCBs. (R. at 6)

Progress, where Major Electronics is located, has classified a several mile reach of the Bearclaw River running to the state line as "Class C" waters, which have no water quality criterion for PCBs. (R. at 4) However, New Union has classified a fifty-mile reach beginning at the state line as "Class B" waters with specific limitations on PCBs. (R. at 5) After wet weather events, the PCB concentration in the Bearclaw River exceeds New Union's limitations. (R. at 5)

Noblesville, New Union is situated one mile downriver from Major Electronics. The Noblesville public beach and adjacent portions of the river are now contaminated with PCBs. (R. at 4) Noblesville residents fish in the Bearclaw River and use the public beach for recreation. (R. at 5) On average, Noblesville's population is just above the poverty level and eighty percent of its residents are members of a racial minority group (Proto-Litigian). (R. at 5)

In response to the presence of PCBs, Noblesville spent $50,000 on construction of an eight-foot tall fence preventing access to the beach and increased policing of the area. (R. at 5) BRK spent $500 on warning signs that it posted on Noblesville's

fence. (R. at 5) Despite these efforts, some Noblesville residents continue to fish and swim in the Bearclaw River. (R. at 5).

SUMMARY OF THE ARGUMENT

The ordinary soil underneath Major Electronics' facility is not a "point source" as defined by the CWA, § 1362(14). The definition restricts point sources to "discernible, confined, and discrete conveyance[s]" and provides a representative list of "point sources" that connote deliberately constructed discharge mechanisms. The court should not expand this definition to include what was properly excluded by omission – unconfined and unaltered soil.

Regardless of whether the PCBs escaping from the soil beneath Major Electronics contribute to a violation of New Union's water quality standards, those standards are not enforceable against out-of-state actors. Major Electronics is in full compliance with its own state water quality standards. To the extent that the PCBs entering the Bearclaw River create a conflict between the policy decisions of sovereign states, the CWA outlines an appropriate process for downstream citizens to challenge those policy decisions. Nowhere does the CWA authorize private citizen suits against compliant out-of-state actors for violations of a downstream state's water quality standards.

The federal common law of nuisance has been entirely preempted by the CWA. The Supreme Court first recognized this preemption in *Milwaukee v. Illinois (Milwaukee II)*, 451 U.S. 304 (1981), and has adamantly re-affirmed its holding in numerous subsequent decisions. In 1972, Congress occupied the field of water pollution control by adopting a comprehensive statutory scheme that provides for the regulation of both point source and nonpoint source pollution. Federal common law, now twenty-four years superseded, does not provide a remedy for BRK and Noblesville.

BRK may not apply New Union's state common law to Major Electronics, an out-of-state party. The Supreme Court prohibited just such an attempt in *International Paper Co. v. Ouellette*, noting that allowing such claims would lead to a "chaotic confrontation between sovereign states." 479 U.S. 481, 496-97 (1987). BRK's allegation that *International Paper* does not control because it dealt with point source pollution ignores the fact that allowing states to enforce state-specific nonpoint source pollution standards would lead to the same "chaotic confrontation." BRK's source-distinguishing effort is unavailing. If Major Electronics is

to be held liable at all for common law nuisance violations, it must be under Progress' common law.

Further, BRK's common law nuisance claims are not cognizable because it lacks standing to bring a suit for public nuisance. A private party suing for a public nuisance must have suffered a "special injury," different in kind and not just degree from the general public. The injuries alleged by BRK – loss of recreation and fishing opportunities – are the same injuries suffered by everyone who once used the Bearclaw River and the public beach. The fact that BRK's members were more vulnerable to the PCBs in the Bearclaw River than the general public does not prove that they suffered a special injury, somehow different from the general public. Heightened vulnerability to an alleged public nuisance, while it may lead to a greater *degree* of inconvenience, does not lead to a different *kind* of injury.

Finally, neither BRK nor Noblesville is entitled to reimbursement for their respective "responses" under CERCLA. Noblesville's claim necessarily sounds in contribution under § 9613(f) because, as the owner of the PCB-impregnated public beach, it is a potentially responsible party under CERCLA. Thus, at present Noblesville's contribution claim is barred because it has never been subjected to a suit under CERCLA. BRK's claim for reimbursement fails because its response costs (incurred for the placement of signs on an impassable fence) were neither consistent with the National Contingency Plan nor necessary under the circumstances.

In light of the forgoing, the decision of the United States District Court for the District of Progress should be affirmed in its entirety.

STANDARD OF REVIEW

The grant or denial of summary judgment is reviewed de novo, applying the same standard as the district court and may be affirmed on grounds supported by the record. *Williams v. Mo. Dept. of Mental Health*, 407 F.3d 972, 975 (8th Cir. 2005). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that

there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original).

Further, the argument over whether "ordinary soil" is properly included within the CWA's definition of "point source" requires interpretation of 33 U.S.C. § 1362(14). Issues of statutory construction are reviewed de novo. *U.S. v. Phillips*, 303 F.3d 548, 550 (5th Cir. 2002).

ARGUMENT

I. *THE SOIL BENEATH MAJOR ELECTRONICS IS NOT A POINT SOURCE UNDER 33 U.S.C. § 1362(14).*

BRK and Noblesville argue the soil beneath Major Electronics is a "point source" as defined by the CWA. (R. at 5) The CWA defines a point source as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft . . . ." 33 U.S.C. § 1362(14). The district court rejected the claim based on the plain language of the CWA, noting that the statute lists representative structures that are indicative of "human-made or human-induced conveyances." (R. at 5); *see U.S. v. Plaza Health Labs., Inc.*, 3 F.3d 643, 646 (2d Cir. 1993) ("Although by its terms, the definition of 'point source' is nonexclusive, the words used to define the term and the examples given . . . evoke images of *physical structures* and instrumentalities that *systematically act* as a means of conveying pollutants from an industrial source to navigable waterways") (emphasis added).

A familiar canon of statutory construction (*inclusio unius est exclusio alterius*) teaches that the inclusion of certain things indicates the exclusion of the others. The Supreme Court has applied the canon "when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003).

In *Original Honey Baked Ham Co. v. Glickman*, the D.C. Circuit applied this canon in rejecting an attempt to expand the Poultry Inspection Act ("Act") to include retail stores. 172 F.3d 885, 887 (D.C. Cir. 1999). The Act provided a representative list of establishments that were subject to federal inspection, including "any slaughtering, meat-canning, salting, packing, rendering, or similar establishment." *Id.* (citing 21 U.S.C. § 606). The *Glick-*

man Court refused to expand this non-exhaustive list beyond its plain intention, noting that "[t]he functions of slaughtering and packing plants differ considerably from those of retail establishments." *Id.* Like the statute at issue in *Glickman*, § 1362(14) includes a representative list of "discernible, confined and discrete conveyance[s]" – structures such as pipes, tunnels, and conduits. Because this list does not include natural, amorphous sources (i.e. soil) the district court properly held that the soil beneath Major Electronics can not be characterized as a "point source."

The argument that the list in § 1362(14) does not provide an exhaustive list of point sources does not leave room for the court to read into the statute any object it wishes. The statutory language confines "point sources" to "discernible, confined and discrete conveyance[s]." § 1362(14). In order to read "soil" into the definition of "point source," the court must conclude that soil is analogous to man-made conveyances or structures that modify the natural disposition of the land. *See Barnhart*, 537 U.S. at 169 (suggesting that for an unlisted item to be read into a nonexhaustive list it must go "hand in hand" with those expressly listed). Because regular soil is not a discrete human-made conveyance, it cannot rationally be read into the CWA's clear definition of "point source." *See Carter v. Tennant Co.*, 383 F.3d 673, 682 (7th Cir. 2004) ("When possible, the court should interpret [a] statute according to the plain and ordinary meaning of the language.").

In an attempt to circumvent the CWA's clear statutory language, Appellants cite *Sierra Club v. Abston Construction Co.*, as support for the proposition that soil can be classified as a point source. 620 F.2d 41 (5th Cir. 1980). However, *Abston* held that spoil piles and basins *dug by miners* were point sources under the CWA. *Id.* at 45. The "erosion" at issue in *Abston* "constitute[d] a component of a mine drainage system" that fits the statutory definition of a point source. *Id.* at 44. The *Abston* Court expressly stated that the definition of point source excluded "unchanneled and uncollected" waters. *Id.* at 46; *see also Shanty Town Assocs. Ltd. Partnership v. EPA*, 843 F.2d 782, 785 (4th Cir. 1988) ("This definition excludes unchanneled and uncollected surface runoff, which is referred to as 'nonpoint source' pollution."). Unlike the waters that were deliberately collected in connection with mining activities in *Abston*, the rainwater that carries the PCBs from the soil beneath Major Electronics flows "unchanneled and uncollected" into the river.

The Tenth Circuit has noted that "[n]onpoint source pollution is not statutorily defined, although it is commonly understood to be pollution arising from dispersed activities over large areas that is not traceable to a single, identifiable source or conveyance." *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1141 (10th Cir. 2005) ("[G]roundwater seepage that travels through fractured rock would be nonpoint source pollution . . . ."). The EPA recognizes that nonpoint source pollution is caused by diffuse sources. *See* United States Environmental Protection Agency, *What is Nonpoint Source (NPS) Pollution? Questions and Answers.*[1] According to the EPA, "[n]onpoint source pollution is caused by rainfall or snowmelt moving over and through the ground. As the runoff moves, it picks up and carries away natural and human-made pollutants . . . depositing them into lakes, rivers, [and other bodies of water]" *Id.* This is precisely what is happening at Major Electronics. Only "following wet weather events" does the concentration of PCBs exceed the New Union's water quality criterion. (R. at 5)

Simple gravitational flow of water resulting in discharge of material into navigable waters does not constitute a point source. There must be "some effort to change the surface, to direct the waterflow or otherwise impede its progress." *Abston*, 620 F.2d at 44; *see also Comm. to Save Mokelumne River v. East Bay Util.*, 13 F.3d 305, 308 (9th Cir. 1993) (an NPDES permit is required for "surface runoff that is *collected or channeled*") (emphasis added). These cases support the district court's finding that the CWA's definition of point source connotes a human-made conveyance, or human modification of natural terrain. Major Electronics did nothing to modify the soil in such a way that would change the natural flow of water.

Admittedly, some courts have interpreted the definition of point source broadly. *See e.g. Borden Ranch P'ship v. U.S. Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 1991) (bulldozers and tractors used to spread waste were point sources). Generally, however, courts have confined the definition of "point source" to cover man-made conveyances. *See e.g. Inland Steel Co. v. E.P.A.*, 901 F.2d 1419, 1423-24 (7th Cir. 1990) (wells); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982) (pipes or spillways); *Dague v. City of Burlington*, 732 F. Supp. 458, 470 (D. Vt. 1989)

1. Taken from EPA's "Polluted Brochure" (EPA-841-F-94-005, 1994), *available at* http://www.epa.gov/OWOW/NPS/qa.html (last updated August 18, 2003)

(culverts). Even in unique cases, such as *Borden Ranch*, the point source, unlike the soil beneath Major Electronics, was *man made*.

As the Fourth Circuit aptly noted, "Congress has limited the definition of 'point source' to 'any discernible, confined or discrete conveyance.'" *Appalachian Power Co. v. Train* 545 F.2d 1351, 1373 (4th Cir. 1976). "Broad though this definition may be, it does not include unchanneled and uncollected surface waters." *Id.* The fact that groundwater flows naturally through the soil beneath Major Electronics during periods of rain does not transform that unaltered soil into a CWA "point source."

II. *MAJOR ELECTRONICS' DISCHARGE OF PCBs INTO THE BEARCLAW RIVER IS NOT ACTIONABLE UNDER THE CWA.*

Progress has designated a portion of the Bearclaw River beginning upstream from Major Electronics' facility and extending to the Progress-New Union border as "Class C." (R. at 4) These waters – where the discharge actually occurs – are suitable for industrial and non-contact recreational use and have no water quality criterion for PCBs. (R. at 4) Beginning immediately at this same border, New Union has classified a portion of the Bearclaw River as "Class B" waters. New Union designated these waters for fishing and contact recreational use and set a water quality criterion for PCBs. (R. at 4)

A. *CWA 33 U.S.C. §1365(a)(1) provides redress in a citizen suit for "effluent limitation" violations and is not applicable to the discharge of PCBs from the nonpoint source soil beneath Major Electronics" facility.*

BRK and Noblesville seek to enforce the water quality standards adopted by New Union under § 1313 through a §1365(a)(1) citizen suit. Section 1365(a)(1) provides redress against any person who is alleged to be in violation of an "effluent standard or limitation under this chapter." Section 1365(f) defines "effluent standard or limitation" as:

> (1) an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or con-

> dition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345 (d) of this title

The failure of § 1365(f) to expressly mention §1313 indicates deliberate exclusion of a federal remedy for violations of state water quality standards. "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). In *National R.R.*, the Supreme Court refused to expand the provision for enforcing railroad safety under the Amtrak Act to include suits by private parties where such actions were not among the enumerated mechanisms for enforcement. *Id.* at 464-65; *see also Aminoil U.S.A., Inc. v. California State Water Res. Control Bd.*, 674 F.2d 1227, 1235 (9th Cir. 1982) ("[W]hen interpreting a statute as detailed as the [CWA], the remedies provided are presumed to be exclusive . . . .").

BRK and Noblesville assert that *Northwest Environmental Advocates v. City of Portland* provides authority for the position that state water quality standards can be enforced under the CWA. 56 F.3d 979 (9th Cir. 1995). However, the *Northwest* Court enforced Oregon water quality standards that were expressly included as a condition of an NPDES permit – the suit itself was brought to enforce that permit. *Id.* at 985. Suits to enforce *permit* effluent limitations are expressly provided for in § 1365(a)(1). The permit issued to Major Electronics contains no provision requiring compliance with the water quality standards of New Union. Therefore, BRK and Noblesville, quite unlike the plaintiffs in *Northwest*, are seeking to enforce general water quality standards against Major Electronics.

B. *Violations of state-specific water quality standards cannot form the basis for liability in a § 1365(a) citizen suit against an out-of-state actor.*

Congress struck a "delicate balance" between state and the federal government power to regulate water quality standards under the CWA. *Shanty Town*, 843 F.2d at 790. Progress has exercised its "primary authority" to set water quality standards for waters that traverse the state. *Miss. Comm'n on Natural Res. v.*

Costle, 625 F.2d 1269, 1272 (5th Cir 1980). Major Electronics is now, and at all times has been, in compliance with both the effluent limitation NPDES permit and Progress' water quality standards. Both of these necessarily comply with the EPA's federal regulations. (R. at 4); *see* §§ 1342(c)(3), 1313(a)(3)(C).

Not satisfied with Major Electronics' compliance with applicable federal and State of Progress standards, BRK and Noblesville argue that Major Electronics is also subject to New Union's more stringent water quality standards. In an effort to sidestep the Supreme Court's mandate that a court "must apply the law of the state in which the point source is located," Appellants argue that New Union's state water quality standards are enforceable against out-of-state actors under the guise of the federal CWA. *International Paper*, 479 U.S. at 487. Under Appellants' theory, these more stringent state standards – reflecting only the policy decisions of New Union's citizens and legislators – become federal standards, enforceable by private parties against any and all out-of-state actors who discharge effluent into interstate waters that happen to flow through New Union. Such a rule would seriously upset Congress' "delicate balance" of federal and state regulation of water pollution. *See Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 358-59 (2d Cir. 1993) (holding that, even in an intrastate dispute, more stringent effluent limitations are enforceable only by the state or EPA under § 1342(h) and not by private party citizen suits under § 1365).

BRK and Noblesville cite *PUD #1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994), for the proposition that state water quality standards are actionable under the CWA. However, *PUD #1* dealt with an intra-state dispute between a municipality and the state environmental agency over the applicability of state minimum flow requirements. *Id.* at 708-09. The Supreme Court held that states have the authority to ensure compliance with state water quality standards by requiring applicants for NPDES permits to certify (under § 1341) that their activities do not violate those standards. *Id.* at 712. As noted above, Major Electronics is not violating the applicable state water quality standards (those issued by Progress). Further, the instant case presents an interstate dispute, implicating the "delicate balance" of federalism struck under the CWA. Such implications were not present in *PUD #1*. *Id.* at 707 (noting that the case implicated state regulation of "intrastate waters").

The Appellants also cite *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), in support of their position. In *Arkansas*, the State of Oklahoma alleged that the EPA approved an Arkansas permit without properly considering downstream communities. *Id.* at 95. However, prior to bringing suit, Oklahoma publicly opposed the permit and challenged it at an administrative hearing before the EPA. *Id.* Only after the EPA ignored Oklahoma's efforts did it resort to challenging the permit in federal court. *Id.* at 97. Unlike the petitioners in *Arkansas*, neither Noblesville nor BRK ever challenged the issuance of Major Electronics' NPDES permit or Progress' water quality standards. *Arkansas* stands for the proposition that the EPA Administrator's decision to approve a NPDES permit may be challenged under the familiar "arbitrary and capricious" standard; it does not signal the Court's willingness to impose liability on an out-of-state actor in full compliance with the permit and water quality standards of his own state. *Id.* at 113-14.

The *Arkansas* Court outlined the appropriate process for parties in an affected state to challenge the proposed standards for or issuance of a permit in another state. The *Arkansas* Court noted that the CWA protects affected states by:

> providing a downstream state with an opportunity for a hearing before the source State's permitting agency, by requiring the latter to explain its failure to accept any recommendations offered by the downstream State, and by authorizing the EPA, in its discretion, to veto a source State's issuance of any permit if the waters of another State may be affected.

Id. at 98; *see also Costle*, 625 F.2d at 1275 ("EPA allows input on [a permit] proposal through public hearings and comment before promulgating the standard."). As the Supreme Court has noted, "[a]n affected state's *only* recourse is to apply to the EPA Administrator, who then has the discretion to disapprove of the permit if he concludes that the discharges will have undue impact on interstate waters. § 1342(d)(2)." *Arkansas*, 503 U.S. at 100 (emphasis added).

In addition to public input on NPDES permits, the CWA provides mechanisms for private parties to have input in the adoption and renewal of another state's water quality standards. The CWA requires states "to hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting [those] standards" at least once every three

years. § 1313(c)(1). Further, whenever a state revises its water quality standards, the proposed revisions must be published for public review and comment. § 1313(c)(4).

The process for challenging permits issued or water quality standards promulgated by Progress are available to BRK and Noblesville. Assuming that BRK and Noblesville had made an attempt to utilize these processes and were still unsatisfied with the response, the CWA provides for one further remedy – political pressure. CWA contemplates the "threat or promise of federal financial assistance" as a method of indirect control over state pollution control efforts. *Shanty Town*, 843 F.2d at 791 (noting that the EPA may withhold § 1288 waste management grant funds). BRK and Noblesville may call on their congressmen to exert political influence over neighboring states. In fact, a ready-made time to do this would be when Progress submits its required biennial water quality report to the EPA and Congress. *See* § 1315(b)(1)

The CWA provides ample opportunity for public and private input on the development of another state's water quality standards, requires that such standards meet minimum federal guidelines, and even allows for actions challenging the EPA's decision to issue a permit. However, it does not provide a mechanism for enforcing a state's water quality standards on out-of-state actors. In fact, "the Act makes it clear that affected States occupy a subordinate position to source States in the federal regulatory program." *International Paper*, 479 U.S. at 490. In light of the fact that the CWA provides only indirect mechanisms by which subordinate states can influence a source state's water quality standards, it would be inconsistent to interpret the CWA to allow private parties to unilaterally impose their state's standards on compliant out-of-state actors. As the *International Paper* Court noted, "if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'" *Id.* at 494.

III. *THE FEDERAL CLEAN WATER ACT PRE-EMPTS THE FEDERAL COMMON LAW OF NUISANCE*

To the extent that any federal common law survived the Supreme Court's decision in *Erie Railroad Company v. Tompkins*,[2]

2. 304 U.S. 64 (1938). In *Erie*, the Court stated that "[e]xcept in matters governed by the Federal constitution or by acts of Congress, the law to be applied in any

Congress finally buried it under a mound of statutory language with the passage of the CWA. In *Milwaukee II*, the Court analyzed the extensive legislative history surrounding the CWA's passage before determining that "[t]he establishment of such a self-consciously comprehensive program by Congress . . . strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." 451 U.S. at 318-19. In resolving a dispute over pollutant discharges into Lake Michigan, the *Milwaukee II* Court noted:

> Congress has not left the formulation of appropriate federal standards to the courts through application of often vague and indeterminate nuisance concepts and maxims of equity jurisprudence, but rather has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency.

Id. at 317. The Court subsequently interpreted its decision in *Milwaukee II* as holding that "the comprehensive regulatory regime created by the 1972 amendments *pre-empted* [a State's] federal common law remedy [of nuisance]." *Arkansas*, 503 U.S. at 99 (emphasis added); *see also Middlesex County Sewerage Authority v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981) ("the federal common law of nuisance in the area of water pollution is *entirely pre-empted* by the more comprehensive scope of the [CWA]") (emphasis added).

The CWA consists of ninety-one (91) sections, spread across 177 pages of an official United States Code book[3] and provides for everything from the development and implementation of local waste treatment plans, *see* 33 U.S.C. § 1281, and the provision of scholarships for individuals interested in pursuing careers in waste management, 33 U.S.C. § 1261, to a precise definition of the term "pollution." 33 U.S.C. § 1362(19); *see also International Paper*, 479 U.S. at 492 (noting the broad scope and "elaborate" remedial provisions of the CWA). Among other things, these statutes establish a "national pollutant discharge elimination system" ("NPDES") to be developed and primarily administered by the federal Environmental Protection Agency ("EPA"). 33 U.S.C. § 1342.

---

case is the law of the state" and then flatly declared that "[t]here is no federal general common law." *Id.* at 78.

3. *See* Volume 18 of the Official United States Code, 2000 Edition, pp. 356-533 (setting forth the statutory provisions of the Clean Water Act, 33 U.S.C. §§ 1251-1387)

The EPA develops "effluent limitation guidelines" to which every NPDES discharge permit must comply. 33 U.S.C. § 1314. Although a state may establish its own NPDES permitting agency, the EPA may withdraw approval of any state permitting system that it deems out of compliance with federal guidelines. § 1342(b), (c).

The EPA also promulgates "minimum water quality standards" to which all states must adhere when adopting state water quality standards. § 1313. States must seek approval of their standards from the EPA, which is empowered to reject any state plan that it deems out of compliance and impose federal water quality standards on the noncompliant state. § 1313.

In addition to the statutes, the EPA has promulgated extensive regulations governing water quality and pollutant discharges in the navigable waters of the United States. *See generally* 40 C.F.R. §§ 104.1 to 149.111 (water programs), §§ 401.10 to 471.106 (effluent guidelines and standards). In so doing, the EPA has exercised Congress' demand for "broad federal authority to control pollution." *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) (citing S. Rep. No. 92-414 (1972) that accompanied passage of the CWA).

Notwithstanding the broad sweep of the CWA, the extensive regulatory authority of the federal EPA, and the Supreme Court's admonition that the federal common law of nuisance has been "entirely pre-empted," the Appellants (BRK and Noblesville) argue that the CWA cannot pre-empt common law suits over nonpoint source pollution because the CWA does not regulate nonpoint source pollution. (R. at 8) This argument ignores the plain language and clear import of the CWA.

The CWA addresses nonpoint source pollution in numerous places. In fact, one of Congress' express goals under the CWA is to ensure "that programs for the control of nonpoint sources of pollution be developed and implemented . . . ." § 1251(a)(7). The CWA provides for the EPA to make grants to states for the development of nonpoint source pollution control techniques and treatment programs. *See* §§ 1255(b), 1281(g)(1), 1288. Mandatory biennial state reports on water quality, which are submitted to the EPA and reviewed by Congress, must include "a description of the nature and extent of nonpoint sources of pollutants, and recommendations as to the programs which must be undertaken to control each category of such sources . . . ." § 1315(b)(1)(E).

Most significantly, the EPA is required to regularly publish "(1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from [certain nonpoint sources]." § 1314(f). Based on these guidelines, and with additional technical assistance from the EPA if needed, each state "shall . . . prepare and submit to the Administrator for approval a management program . . . for controlling pollution added from nonpoint sources to the navigable waters within the State . . . ." §1329(b)(1).

The CWA does not ignore nonpoint source pollution, rather it affirmatively delegates the regulation of such sources to the individual states with assistance, and some oversight, from the federal government. This fact is demonstrated most poignantly by Congress' own interpretation of its treatment of nonpoint source pollution under the CWA:

> In 1972, the Congress made a clear and precise distinction between point sources, which would be subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local governments through the section 208 process.[4]

Nat'l Wildlife Federation v. Gorsuch, 693 F.2d 156, 176 (D.C. Cir. 1982) (quoting S. Rep. No. 95-370, at 8-9 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4334-35). According to the *Gorsuch* Court, this Senate Report was evidence of Congress' "positive intent to leave certain pollution problems to the states." *Id.*

Numerous circuit courts have drawn the same conclusions regarding Congress' treatment of nonpoint source pollution. In *Oregon Natural Resources Council v. U.S. Forest Service*, the Ninth Circuit noted that Congress "drew a distinct line between point and nonpoint sources" under the CWA. 834 F.2d 842, 849 (9th Cir. 1987). The Ninth Circuit pointed out that although nonpoint sources "are not regulated under the NPDES . . . Congress addressed nonpoint sources of pollution in a separate portion of the Act which encourages states to develop areawide waste treatment management plans." *Id.* (citing 33 U.S.C. § 1288); *see also Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 588 (6th Cir.

4. Section 208, 33 U.S.C. § 1288, encourages nonpoint source pollution control through the development of areawide waste treatment management plans by the states and provision of federal grant money to assist states in this effort.

1988) (describing 33 U.S.C. § 1314(f) as "the 'nonpoint source' part of the CWA"); *American Wildlands v. Browner*, 260 F.3d 1192, 1194 (10th Cir. 2001) ("Rather than vest the EPA with authority to control nonpoint source discharges through a permitting process, Congress required states to develop water quality standards for intrastate waters."); *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002) ("[T]o regulate non-point pollution, the Act requires states to establish water quality standards.")

The absence of a *federal* remedy in the CWA for violations of *state* nonpoint source regulations does not leave federal courts free to create one out of the "vague and indeterminate nuisance concepts" that have been rejected by the Supreme Court. *Milwaukee II*, 451 U.S. at 317. In *Mobil Oil Corp v. Higginbotham*, 436 U.S. 618 (1978),[5] the Court refused to provide "loss of society" damages under general maritime law although Congress had not provided such damages under its Death on the High Seas Act ("DOHSA"), 46 App. U.S.C. § 761 *et seq.* *Id.* at 625. The Court noted that the statute addressed numerous issues of wrongful-death law, including remedies, and concluded that when an Act "speaks directly to a question, the courts are not free to supplement Congress' answer so thoroughly that the Act becomes meaningless." *Id.* If supplementing the DOHSA's wrongful-death remedies with "loss of society" damages under general maritime law would render the DOHSA "meaningless," continuing to provide a federal common law nuisance remedy for nonpoint source pollution even after Congress has "[spoken] directly to [the] question" would surely undercut the CWA's carefully drawn nonpoint source regulatory scheme.

It seems highly unlikely, if not implausible, that Congress would go to such lengths to craft and preserve the delicate balance of federal and state regulatory authority under the CWA, with the expectation that federal courts would continue to apply federal (common) law to disputes under that part of the regulatory scheme that it "specifically reserved" to the states. In response to extensive amendments to the CWA, the Supreme Court declared the federal common law of nuisance (as it pertains to water pollution) dead in 1981. *See generally Milwaukee II*, 451 U.S. 304. Over the twenty-four years since that decision, Congress has made no attempt to revive any of the rights that may have been

5. *Mobile Oil Corp. v. Higginbotham* was discussed by the *Milwaukee II* Court and used to support their conclusion that the CWA had pre-empted the federal common law remedy of nuisance for disputes involving water pollution. *See Milwaukee II*, 451 U.S. at 314-15.

lost to citizens or states. Congress intended that the states would provide mechanisms for enforcing their own state standards for nonpoint source pollution after they had developed those standards as required by the CWA. Appellants may not conjure up the spirit of yesterday's federal law to govern today's state pollution control efforts.

IV. *THE CLEAN WATER ACT PROHIBITS THE APPLICATION OF STATE OF NEW UNION COMMON LAW TO MAJOR ELECTRONICS, AN OUT-OF-STATE (ALLEGED) POLLUTER.*

In *International Paper*, the Supreme Court rejected an attempt by citizens of Vermont to apply Vermont common law to a polluter located in New York, holding that "[i]n light of [the CWA's] pervasive regulation and the fact that the control of interstate pollution is primarily a matter of federal law, it is clear that the only state suits that remain available are those specifically preserved by the Act." 479 U.S. at 492. Based on the language of the CWA's "saving clause," §§ 1365(e), 1370, and the legislative history concerning those provisions, the Court "conclude[d] that the CWA precludes a court from applying the law of an affected State against an out-of-state source." *Id.* at 494.

Yet, Appellants argue that New Union's common law of public nuisance may be brought to bear on the acts of Major Electronics, occurring wholly outside of New Union's borders. (R. at 8) According to Appellants, the Supreme Court's contrary holding in *International Paper* is not applicable here because their lawsuit "deals with unregulated non-point source pollution." (R. at 8) This argument is both misleading and flawed.

Appellants' characterization of nonpoint source pollution as "unregulated" is misleading because the CWA actually provides mechanisms for regulation of nonpoint source pollution. As discussed *supra* pp. 18-20, Congress empowered the states to regulate such pollution. Appellants ignore the federal-state "regulatory partnership" model embraced by the CWA, *International Paper*, 479 U.S. at 490, and ask this court to view anything over which the federal government did not retain *direct* regulatory authority as "unregulated." Such a construction of the CWA ignores "the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . ." § 1251(b).

The argument is flawed because the *International Paper* Court's prudential reasoning was broad enough to proscribe attempts to regulate of out-of-state pollution, regardless of its form or source, by applying the affected state's laws:

> For a number of different states to have independent and plenary regulatory authority over a single discharge would lead to chaotic confrontation between sovereign states. Dischargers would be forced to meet not only the statutory limitations of all states potentially affected by their discharges but also the common law standards developed through case law of those states. It would be virtually impossible to predict the standard for a lawful discharge into an interstate body of water.

Int'l Paper, 479 U.S. at 496-97 (quoting *Illinois v. Milwaukee (Milwaukee III)*, 731 F.2d 403, 414 (7th Cir. 1984)). Allowing New Union's common law to regulate out-of-state *nonpoint* sources would create a similar conflict of standards and lead to the same "chaotic confrontation between sovereign states."

Under the CWA's regulatory regime, a state may decide to regulate nonpoint source pollution aggressively, loosely, or not at all. Individual states express their policy of nonpoint source pollution regulation by incorporating § 1288 waste treatment management plans, if any, into their state water quality standards. § 1313(e)(3)(B); *see Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1096-97 (9th Cir. 1998). While the federal government cannot directly regulate nonpoint sources under the CWA, it may use the "threat and promise of federal grants" to encourage state regulation of such sources. *Dombeck*, 172 F.3d at 1097.

Notably, both Progress and New Union have adopted state water quality standards pursuant to § 1313 that set limits on certain pollutants, including PCBs. (R. at 4-5) Each state's policy decisions regarding the tolerable levels of PCBs in the relevant portions of the Bearclaw River, including any entering the river from nonpoint sources, are necessarily reflected in these standards. Unfortunately, but perhaps not unexpectedly, the policy decisions reflected in the water quality standards of these two sovereigns are not identical. (R. at 4-5) Any release of PCBs through the soil under Major Electronics' plant does not exceed the limits of Progress' "Class C" standards for the Bearclaw River. (R. at 4) In other words, Major Electronics is in complete compliance with the water quality standards of the state in which it operates.

Appellants persist in their argument that these Progress-compliant PCBs are a nuisance under New Union's common law. However, applying New Union's common law to Major Electronics' nonpoint source PCBs will "effectively override . . . the policy choices made by [Progress]" by attaching liability for PCB pollution in spite of Progress' decision not to regulate PCBs in the relevant portion of the Bearclaw River. *International Paper*, 479 U.S. at 495. The "inevitable results" of such a suit would be those which the Supreme Court found intolerable in *International Paper* because it would permit states to "do indirectly what they could not do directly – regulate the conduct of out-of-state sources." *Id.*; *see also Milwaukee III*, 731 F.2d at 414 ("[I]t seems implausible that Congress meant to preserve or confer any right of the state claiming injury (State II) or its citizens to seek enforcement of limitations of discharges in State I by applying the statutes or common law of State II.").

The Appellants' lawsuit will effectively *force* Major Electronics to comply with water quality standards more stringent than those adopted by the state in which it operates – something that neither the federal government nor the State of New Union can compel. *See Dombeck*, 172 F.3d at 1097 (the CWA provides "no direct mechanism" for federal control of nonpoint source pollution); *International Paper*, 479 U.S. at 490 ("Even though it may be harmed by the discharges, an affected State only has an advisory role in regulating pollution that originates beyond its borders."). Like the inevitable and intolerable effect on an NPDES permit that the *International Paper* Court foresaw if Vermont's common law were applied to a point source in New York, this court must recognize that any water quality standards adopted by the source state, and the protections they supply to private actors within that state, "would be rendered meaningless" should Appellants argument prevail. *Id.* at 497.

V. *BRK's MEMBERS DID NOT SUFFER A "SPECIAL INJURY" FROM DUE TO THE PRESENCE OF PCBs IN THE BEARCLAW RIVER AND BRK IS THEREFORE BARRED FROM BRINGING AN ACTION UNDER THE COMMON LAW OF PUBLIC NUISANCE.*

Regardless of whether any common law of nuisance that might be applicable to this dispute actually survived the CWA,

BRK lacks standing to bring suit under such law.[6] The district court held that the members of BRK did not suffer a "special injury" due to the presence of PCBs in the Bearclaw River and are therefore barred from pursuing this suit. (R. at 8) It is both well-accepted and longstanding law that "a private litigant cannot recover damages for a public nuisance unless he or she can show a special injury different in kind from that suffered by the general public." *In re Exxon Valdez (Alaska Native Class)*, 104 F.3d 1196, 1197 (9th Cir. 1997) (citing Rest. 2d Torts § 821C); *see also Arizona Copper Co. v. Gillespie*, 230 U.S. 46, 57 (1913) (individual must "suffer a special injury not borne by the public").

BRK relies on the minority status and income-level of its members to allege that its clients are "more vulnerable to exposure to PCBs in the soil, water and fish than the ordinary population." (R. at 8) BRK elaborates on its members' vulnerability by arguing that (1) the lack of a municipal swimming pool in Noblesville leaves clients dependent on the Bearclaw River public beach for recreation and (2) because many Noblesville residents engage in sustenance fishing in the waters of the Bearclaw River from positions at or near the public beach. (R. at 5) Both of these activities, according to BRK, have been effected by the PCBs in the Bearclaw River and, because its members arguably make greater use of the river for fishing and recreating, its members have suffered a "special injury." The district court, however, found that BRK's damages were not "different in kind, but only different in degree, from injury to the public." (R. at 8)

The RESTATEMENT (SECOND) OF TORTS elaborates on what it means to suffer a type of harm different in kind from the general public:

> It is not enough that [a private individual] has suffered the same kind of harm or interference but to a greater extent or degree. Thus when a public highway is obstructed and all who make use of it are compelled to detour a mile, no distinction is to be made between those who travel the highway only once in the course of a month and the man who travels it twice a day over the entire period. For both there has been only interference with the public right of travel and resulting inconvenience, even though the interference and the inconvenience have been much greater in the one case than in the other.

6. Notably, Noblesville has abandoned BRK on this issue to join Major Electronics in arguing that BRK lacks standing to bring suit under the common law of nuisance. (R. at 2)

Rest. 2d Torts § 821C, cmt. b. The "special injury" principle "recognizes the necessity of guarding against the multiplicity of lawsuits that would follow if everyone were permitted to seek redress for a wrong common to the public." *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia*, 750 N.E.2d 1097, 1104 (N.Y. 2001).

Noblesville's decision to close its public beach in response to PCBs in the Bearclaw River has not caused BRK's members an injury that is "different in kind" from the general public. The beach has been closed to everyone, regardless of race, not just those individuals of Proto-Litigian descent. Further, inability to resort to a municipal swimming pool (because there is not one in Noblesville) is a problem faced by all citizens of Noblesville – not just Proto-Litigians. BRK does not allege that its members recreate in any special way (somehow differently than other citizens) at the public beach; rather, it alleges only that its members recreate more often. This is the exact type of "extent or degree" argument that the Restatement rejects. *See* Rest. 2d Torts § 821C, cmt. b. Like the twice-daily commuter who travels the obstructed highway more often than the once-monthly user, the fact that the more river-frequenting Proto-Litigians will suffer a greater "inconvenience" than others does not make their injury "different in kind."

Further, the argument that a loss of recreational opportunities is a "special" injury simply because an individual recreates more frequently than other members of the community has been rejected by courts that have confronted the issue. In *Gibbons v. Hoffman*, a group of seventy-five (75) citizens alleged that the erection of a fence that prevented access to an ocean-front lot that had been used generally by the public to access the ocean constituted at public nuisance. 115 N.Y.S.2d 632, 633 (N.Y. Sup. Ct. 1952). The Court rejected the claim, noting that while loss of access was "an inconvenience to [the plaintiffs] and may cause loss of time and the expenditure of effort to travel to a public beach," it did not "establish special or substantial damage." *Id.* at 635; *see also Int'l Shoe Co. v. Heatwole*, 30 S.E.2d 537 (W. Va. 1944) (riparian landowner's loss or river use for purposes of "bathing" was not a special injury different from the public even if landowner accessed river more easily and frequently); *Bouquet v. Hackensack Water Co.*, 101 A. 379 (N.J. 1917) (same). Again, the fact that BRK's members may be "inconvenienced" by having to travel to another point of access to the Bearclaw River, or another source for recreation altogether, does not indicate that they have been

specially injured. Everyone who once used the beach is faced with the same dilemma as the Proto-Litigians.

The second "special" injury alleged by BRK is the contamination of fish that its members take from the Bearclaw River. These fish are not taken for sale, but for personal consumption. (R. at 5) While courts have recognized the standing of *commercial* fishermen to sue for a public nuisance when polluted waters lead to a diminution in catch or profits, such standing has not been recognized for *recreational* fishermen. *Compare Burgess v. M/V Tomano*, 370 F. Supp. 247, 250 (D. Me. 1973) *with In re Exxon Valdez*, No. A89-095 Civ., 1993 WL 735037, at *2 (D. Alaska 1993); *see also State of La. ex rel Guste v. M/V Testbank*, 752 F.2d 1019, 1021 (5th Cir. 1985).

BRK attempts to add a twist to their claim by describing its members' fishing as "sustenance" fishing. (R. at 5) A state survey concluded that the average resident of Noblesville consumes twelve (12) pounds of fish annually from the Bearclaw River. (R. at 5) It is debatable whether a person who relies on the Bearclaw River for only twelve (12) of the 199.4 pounds of meat consumed by the average American in one year is engaging in "sustenance" fishing.[7] The average Noblesville citizen depends on the Bearclaw River for his daily serving of meat for roughly thirty-two (32) days out of a 365-day year.[8] Such a minor reliance hardly seems to make fishing the Bearclaw River necessary to support the life or health of BRK's members.[9]

Even assuming, *arguendo*, that BRK's members are somehow more dependent on the Bearclaw River for food and recreation – for sustaining their lifestyle – than the rest of Noblesville or New Union, its claim still fails. In *Alaska Native Class*, the Ninth Circuit rejected a claim by Alaska Natives that interference with their "subsistence way of life" was a compensable injury resulting from the pollution of local waters. *Alaska Native Class*, 104 F.3d

7. The United States Department of Agriculture (USDA) groups fish along with meat and poultry in the "Meat and Beans" food group for purposes of making recommended daily allowances. *Available at* www.mypyramid.gov/pyramid/meat.html. In 2003, the USDA estimated that the average American consumed 199.4 pounds of meat. Statistics *available at* www.ers.usda.gov/Data/FoodConsumption/spreadsheets/mtpcc.xls#Leading!A1.

8. Calculations based on the USDA's recommended daily allowance for the "Meat and Beans" food group (of which fish is an included food choice). *Available at* www.mypyramid.gov/pyramid/meat.html.

9. "Sustenance" is defined as "the supporting of life or health, maintenance." *The American Heritage College Dictionary* 1368 (Robert Costello ed., 3d ed., Houghton Mifflin co. 1997).

at 1198.[10] While admitting that the "oil spill may have affected Alaska Natives more severely than other members of the public," the Ninth Circuit held that "whatever injury they suffered . . ., though potentially different in degree than that suffered by other Alaskans, was not different in kind." *Id.* The natives had not suffered a "special injury" because "the right to lead subsistence lifestyles is not limited to Alaska Natives." *Id.* Similarly, while loss of access to the Bearclaw River may work a somewhat greater hardship on BRK's Proto-Litigian members, the right to depend on the Bearclaw River for recreation and food is not limited to Proto-Litigians.

In essence, BRK claims not that its members suffered some injury different in kind from the general public, but that they were *more vulnerable* to the effects of that injury due to their economic and minority status. Such "vulnerability" claims are properly rejected under the special injury rule. In *Venuto v. Owens-Corning Fiberglas Corp.*, a California court denied a claim that aggravation of pre-existing allergies and respiratory disorders by pollutants discharged into the air from a nearby plant constituted a "special injury." 99 Cal. Rptr. 350, 356 (Cal. App. 1971). Characterizing the injuries as simply "more severe irritation" than that experienced by the general public, the court held that "such allegations merely indicated that plaintiffs and the members of the public are suffering from the same kind of ailments but that plaintiffs are suffering from them to a greater degree." *Id.* While BRK's members may be more vulnerable to or "more severely irritated" by PCBs in the Bearclaw River, they have not experienced a "special injury" – different in kind, not just in degree, from the general public.

VI. *NEITHER BRK NOR NOBLESVILLE IS ENTITLED TO REIMBURSEMENT UNDER CERCLA.*

Both BRK and Noblesville seek reimbursement from Major Electronics for their "responses" to the presence of PCBs in the Bearclaw River under CERCLA. 42 U.S.C. §§ 9601-9675 (2000).

10. In a separate order, the Court allowed natives who "fished for subsistence" to pursue a claim under the special injury rule. 104 F.3d at 1197. However, a "subsistence" claim is quite different from the "sustenance" claim raised by BRK. The Alaska Natives essentially claimed that the fish they harvested from the now-polluted waters were necessary for them "[t]o stay in existence." *American Heritage College Dictionary* 1354 (definition of "subsist"). BRK does not claim that its members will cease to exist if they cannot fish the Bearclaw River.

The district court noted that the claims were only cognizable, if at all, under § 9613(f) (the contribution provision) or § 9607(a) (the liability provision). BRK expended $500 on signs "which warned against the dangers of the PCBs in the river and on the public beach." (R. at 5) Noblesville spent $50,000 to construct a fence around the beach and increase policing of the beach. (R. at 5) Neither of these responses has been completely effective. (R. at 5)

A. *A claim for reimbursement under CERCLA § 9613 may only be brought by a party who has been sued under CERCLA §§ 9606 or 9607(a).*

The claims of both BRK and Noblesville are barred under § 9613(f) because neither party has ever been sued regarding the Bearclaw River PCBs. CERCLA provides that "[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 or section 9607(a) of this title." § 9613(f)(1). The Supreme Court has expressly held that § 9613(f) actions are only available to parties who have actually been subjected to a suit under the relevant provisions of CERCLA. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S. Ct. 577, 580 (2004).

BRK's claim under § 9613(f) is also barred by the fact that there is no allegation or intimation that it is responsible for the presence of PCBs in the Bearclaw River. "The language of CERCLA permits only [potentially responsible persons] to bring contribution actions under [§ 9613(f)]." *OHM Remediation Servs. v. Evans Cooperage Co.*, 116 F.3d 1574, 1583 (5th Cir. 1997). Such a reading of § 9613(f) is commensurate with the traditional understanding of "contribution" as a remedy among *liable* parties and avoids an interpretation of the section that is merely duplicative of innocent party rights to recovery under § 9607(a). *Id.* at 1581-82 (citing the definition of "contribution" from *Black's Law Dictionary* 328 (6th ed. 1990)).

Even though Noblesville itself would qualify as a responsible party under its argument against Major Electronics (R. at 9), there has been no legal allegation or adjudication against Noblesville under CERCLA § 9606 or § 9607(a). Since it is "undisputed that [Noblesville] has never been subject to such an action . . . [Noblesville] therefore has no § 9613(f)(1) claim." *Cooper Industries*, 125 S. Ct. at 584 (denying such a claim brought by a party who admitted its partial responsibility for contamination, but had never actually been sued under CERCLA).

B. *Noblesville's "response" reimbursement claim is not cognizable under the CERCLA liability provision, § 9607(a), because Noblesville is not an "innocent party."*

BRK and Noblesville assert, alternatively, that the costs expended in response to the Bearclaw River PCBs are recoverable under § 9607(a)(1), which provides:

> [T]he owner and operator of a vessel or facility . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be responsible for (A) all costs of removal or remedial action incurred by the United States Government or a State . . . [and] (B) any other necessary costs of response incurred by any other person . . . .

§ 9607(a). The circuits generally agree that a "section [9607] cost recovery action may only be pursued by an *innocent* party that has undertaken hazardous waste cleanup." *N.J. Turnpike Auth. v. PPG Indust.*, 197 F.3d 96, 104 (3d Cir. 1999) (emphasis added). In fact, the Fourth Circuit recently noted that "[e]very circuit that has addressed the question, including this one, has held that parties . . . who are potentially responsible for cleanup costs under § 107 cannot bring § 107 cost recovery actions." *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 415 (4th Cir. 1999). An "innocent party" is one who is "truly innocent of *any* pollution." *Id.* at 416 (emphasis in original).

Noblesville is not an "innocent" party. The district court noted that during wet weather events, PCB readings adjacent to the Noblesville public beach exceed New Union's water quality criterion. (R. at 5) The court further found that the beach was one of the "only known sources of PCBs in [the relevant] section of the Bearclaw River." (R. at 5) Thus, as owner of the PCB-impregnated public beach, Noblesville is the owner of a "facility . . . from which there is a release . . . of a hazardous substance" into the Bearclaw River. § 9607(a)(1).[11]

11. The Noblesville public beach easily fits within CERCLA's broad definition of "facility" which includes "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, *or otherwise come to be located.*" § 9601(9) (emphasis added); *see also Envtl Transp. Sys., Inc. v. ENSCO, Inc.*, 763 F. Supp. 384, 387 (C.D. Ill. 1991) (area of land that suffered contamination when truck accidentally spilled its hazardous cargo was "facility" under CERCLA).

As the owner of such a facility, Noblesville is properly considered a "potentially responsible party" ("PRP") under CERCLA. *See Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 529 (8th Cir. 2003) (defining a PRP as any party that falls within the definitions of § 9607(a)(1)-(4)). Any action brought by a PRP is necessarily limited to a claim for contribution under § 9613(f). *See Id.* at 530; *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120 (3d Cir. 1997) ("An action brought by a [PRP] is by necessity a section 113 action for contribution."); *Pneumo Abex Corp. v. High Point, Thomasville and Denton R.R. Co.*, 142 F.3d 769, 776 (4th Cir. 1998) (PRPs "must seek contribution under section 9613); *Axel Johnson*, 191 F.3d at 415 ("[A]ny claim for damages by a [PRP] – even a claim ostensibly made under § 107 – is considered a contribution claim under § 113.")

Any argument by Noblesville that it is not responsible for the presence of PCBs on its public beach and their subsequent migration into the Bearclaw River does not remove it from the definition of a PRP. *See State of N.Y. v. Shore Realty Co.*, 759 F.2d 1032, 1044 (2d Cir. 1985) ("[S]ection 9607(a)(1) unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation."); *Southfund Partners III v. Sears, Roebuck and Co.*, 57 F. Supp. 2d 1369, 1376-77 (N.D. Ga. 1999) (finding property owner to be PRP even though it did not place the contaminating structures in the soil and never actively participated in any activity that caused pollutants to be released). Thus the district court correctly characterized Noblesville's action as one for contribution under § 9613(f) and properly denied it as premature under the Supreme Court's holding in *Cooper Industries*, 125 S. Ct. at 584, because the city has not been sued for a CERCLA violation.

C. *BRK's "response costs" are not recoverable under § 9607(a) because they were neither consistent with the National Contingency Plan nor necessary under the circumstances.*

In spite of Noblesville's significant response to the presence of PCBs in the Bearclaw River and its public beach, BRK spent $500 to produce signs that "warned against the dangers of PCBs . . . ." (R. at 5) It then posted these signs on the eight-foot high fence that Noblesville had already constructed to prevent access to the beach. (R. at 5) Notwithstanding BRK's signs, Noblesville residents continue to swim and fish in other portions of the river.

(R. at 5) The district court denied BRK's claim for reimbursement under § 9607 as being inconsistent with the National Contingency Plan ("NCP"). (R. at 9)

In order to make out a prima facie case for reimbursement under § 9607(a), a plaintiff must show that the release of a hazardous substance "has caused the plaintiff to incur 'necessary costs of response' consistent with the NCP." *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 541 (6th Cir. 2001). "The burden of proof to establish compliance with NCP by a preponderance of the evidence rests with the plaintiffs." *Greene v. Prod. Mfg. Corp.*, 842 F. Supp. 1321, 1325 (D. Kan. 1993).

According to regulations issued by the EPA, "a private party response action will be 'consistent with the NCP' if the action . . . is in substantial compliance with the applicable requirements [and] results in a CERCLA-quality clean-up . . . ." 40 C.F.R. § 300.700(c)(3)(i) (2005). The mere posting of PCB warning signs may fall short of this standard for any number of reasons. *See e.g.* § 300.700(c)(5)-(6). In fact, it is questionable whether expenditures for informational signs like those posted by BRK are ever recoverable under CERCLA. *See Woodman v. U.S.*, 764 F. Supp. 1467, 1470 (M.D. Fla. 1991) (expenses for signs warning people to stay away from a contaminated landfill do not constitute CERCLA response costs).

However, it is not necessary that a district judge list all the reasons that a party has "failed to make a showing sufficient to establish the existence of an element essential to the party's case" when granting summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Where, as here, no genuine material factual issue is presented it would be ill-advised to make specific findings and separate conclusions. They would carry an unwarranted implication that a fact question was presented." *A R Inc. v. Electro-Voice, Inc.*, 311 F.2d 508, 513 (7th Cir. 1962) (rejecting a claim that the district judge had erred by not making specific findings in support of his summary judgment on a patent validity issue); *see also* 10A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2716 (3d ed. 1998) (findings of fact are unnecessary on summary-judgment motions).

Even assuming, *arguendo*, that the district court's failure to provide a laundry list of reasons as to why the signs are inconsistent with the NCP somehow saves BRK's "response," it must be remembered that CERCLA provides for the recovery only of "*nec-*

essary costs of response" incurred by private parties. § 9607(a)(4)(B) (emphasis added). Courts should "deny recovery where the costs incurred were duplicative, wasteful, or otherwise unnecessary to address the hazardous substances at issue." *Waste Mgmt. of Alameda County, Inc. v. East Bay Reg'l Park*, 135 F. Supp. 2d 1071, 1099 (N.D. Ca. 2001). BRK's $500 expenditure on PCB warning signs, coming immediately on the heels of a $50,000 fence and policing effort by Noblesville in response to the very same pollution concerns, was certainly "duplicative and wasteful." Further, the signs were posted on a virtually impassable fence that blocked access to the beach and river, the very places to which the warnings applied.

CONCLUSION

The United States Congress has made policy choices regarding the quality of our nations' waters. These policy decisions are embodied in the CWA's minimum standards for pollutant discharges affecting interstate waters. These minimum NPDES standards are applicable to all states and any private actors therein.

Major Electronics is now, and has always been, in compliance with the CWA's national water quality standards. The occasional presence of PCBs in Major Electronics effluent discharge do not violate its NPDES permit and has never exceeded the minimal levels reported in its initial application for the permit.

Progress has made policy choices regarding the quality of its waters. Following the guidelines and processes required by the CWA, Progress has established water quality standards to augment the NPDES program it has adopted. These standards are directly applicable to all private actors within Progress.

Major Electronics is now and has always been in full compliance with Progress' water quality standards. To the extent that it bears responsibility for the PCBs escaping the soil beneath its facility, these PCBs do not violate the "Class C" designation assigned to the relevant portion of the Bearclaw River within Progress.

Notwithstanding its compliance with federal and state water quality standards, BRK and Noblesville seek to hold Major Electronics liable based on another set of standards – separate water quality standards that reflect policy choices exclusive to New Union. The Appellants invoke a myriad of legal theories in an ef-

fort to circumvent the CWA's clearly defined process for challenging out-of-state sources of pollution that affect their state's waters. This process hinges on holding political actors responsible for their policy choices, not making private actors liable for complying with currently applicable law.

Neither BRK, Noblesville, nor any party in New Union has ever invoked the preferred CWA process (as far as the Record reflects) to challenge an NPDES permit issued in Progress, *see* §1342(d)(2), or Progress' water quality standards, *see* § 1313(c)(1), (4). While appellants may find this process unattractive, it is the process that Congress has chosen and "federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *U.S. v. Rutherford*, 442 U.S. 544, 555 (1979). The effort by BRK and Noblesville to craft their own, more appealing remedy and then insert it into the CWA must be rejected by this court.

APPENDIX

U.S. Environmental Protection Agency

What is Nonpoint Source (NPS) Pollution? Questions and Answers

(taken from EPA's Polluted brochure EPA-841-F-94-005, 1994)

Q: What is nonpoint source pollution?

A: Nonpoint source (NPS) pollution, unlike pollution from industrial and sewage treatment plants, comes from many diffuse sources. NPS pollution is caused by rainfall or snowmelt moving over and through the ground. As the runoff moves, it picks up and carries away natural and human-made pollutants, finally depositing them into lakes, rivers, wetlands, coastal waters, and even our underground sources of drinking water. These pollutants include:

- Excess fertilizers, herbicides, and insecticides from agricultural lands and residential areas;
- Oil, grease, and toxic chemicals from urban runoff and energy production;
- Sediment from improperly managed construction sites, crop and forest lands, and eroding streambanks;
- Salt from irrigation practices and acid drainage from abandoned mines;
- Bacteria and nutrients from livestock, pet wastes, and faulty septic systems;

Atmospheric deposition and hydromodification are also sources of nonpoint source pollution.

Q: What are the effects of these pollutants on our waters?

A: States report that nonpoint source pollution is the leading remaining cause of water quality problems. The effects of nonpoint source pollutants on specific waters vary and may not always be fully assessed. However, we know that these pollutants have harmful effects on drinking water supplies, recreation, fisheries, and wildlife.

Q: What causes nonpoint source pollution?

A: We all play a part. Nonpoint source pollution results from a wide variety of human activities on the land. Each of us can contribute to the problem without even realizing it.

Q: What can we do about nonpoint source pollution?

A: We can all work together to reduce and prevent nonpoint source pollution. Some activities are federal responsibilities, such as ensuring that federal lands are properly managed to reduce soil erosion. Some are state responsibilities, for example, developing legislation to govern mining and logging, and to protect groundwater. Others are best handled locally, such as by zoning or erosion control ordinances. And each individual can play an important role by practicing conservation and by changing certain everyday habits.

United States Department of Agriculture: Food Pyramid (Cited at note 7)

United States Department of Agriculture

Inside the Pyramid

What foods are included in the meat, poultry, fish, dry beans, eggs, and nuts (meat & beans) group?

All foods made from meat, poultry, fish, dry beans or peas, eggs, nuts, and seeds are considered part of this group. Dry beans and peas are part of this group as well as the vegetable group. *For more information on dry beans and peas click here.*

Most meat and poultry choices should be lean or low-fat. Fish, nuts, and seeds contain healthy oils, so choose these foods frequently instead of meat or poultry. (See *Why is it important to include fish, nuts, and seeds?*)

Some commonly eaten choices in the Meat and Beans group, with selection tips, are:

Meats*
Lean cuts of:
beef
ham
lamb
pork
veal

Game meats:
bison
rabbit
venison

Lean ground meats:
beef
pork
lamb

Lean luncheon meats
Organ meats:
liver
giblets

Poultry*
chicken
duck
goose
turkey
ground chicken and turkey

Eggs*
chicken eggs
duck eggs

Dry beans and peas:
black beans
black-eyed peas
chickpeas (garbanzo beans)
falafel
kidney beans
lentils
lima beans (mature)
navy beans
pinto beans
soy beans
split peas
tofu (bean curd made from soy beans)
white beans

bean burgers:
garden burgers
veggie burgers

tempeh
texturized vegetable protein (TVP)

Nuts & seeds*
almonds
cashews
hazelnuts (filberts)
mixed nuts
peanuts
peanut butter
pecans
pistachios
pumpkin seeds
sesame seeds
sunflower seeds
walnuts

Fish*
Finfish such as:
catfish
cod
flounder
haddock
halibut
herring
mackerel
pollock
porgy
salmon
sea bass
snapper
swordfish
trout
tuna

Shellfish such as:
clams
crab
crayfish
lobster
mussels
octopus
oysters
scallops
squid (calamari)
shrimp

Canned fish such as:
anchovies
clams
tuna
sardines

United States Department of Agriculture: Consumption Statistics (Cited at note 7)

											12/27/2004
	Red meat, poultry, and fish (boneless, trimmed equivalent): Per capita consumption							Filename:	MTPCC		
Year	U.S. population, July 1[1]	Red meat					Poultry[3]				
		Beef	Veal	Pork	Lamb	Total[2] *SUM(C..F)*	Chicken[4]	Turkey	Total[2] *SUM(H..I)*	Fish and shellfish	Total[2] *SUM(G,J,K)*
	Millions	Pounds									
1909	*90.490*	*51.1*	*5.0*	*41.2*	*4.4*	101.7	*10.4*	*0.8*	11.2	*11.0*	123.9
1910	*92.407*	*48.5*	*4.9*	*38.2*	*4.2*	96.0	*11.0*	*0.8*	11.8	*11.2*	118.9
1911	*93.863*	*47.2*	*4.9*	*42.4*	*4.8*	99.3	*11.1*	*0.9*	12.0	*11.3*	122.5
1912	*95.335*	*44.5*	*4.8*	*40.9*	*5.0*	95.2	*10.6*	*0.9*	11.5	*11.3*	118.0
1913	*97.225*	*43.6*	*4.3*	*41.1*	*4.7*	93.7	*10.3*	*0.9*	11.2	*11.5*	116.4
1914	*99.111*	*42.7*	*4.0*	*40.0*	*4.7*	91.3	*10.3*	*0.9*	11.1	*11.7*	114.2
1915	*100.546*	*38.8*	*4.0*	*40.9*	*4.0*	87.7	*10.2*	*0.9*	11.2	*11.2*	110.1
1916	*101.961*	*40.6*	*4.4*	*42.4*	*3.8*	91.2	*9.6*	*0.9*	10.6	*11.0*	112.8
1917	*103.414*	*44.6*	*4.9*	*36.2*	*2.9*	88.6	*9.4*	*0.9*	10.3	*10.9*	109.8
1918	*104.550*	*47.2*	*5.0*	*37.5*	*3.1*	92.8	*9.4*	*0.9*	10.3	*10.9*	114.1
1919	*105.063*	*42.4*	*5.4*	*39.2*	*3.7*	90.7	*10.1*	*1.0*	11.2	*11.6*	113.5
1920	*106.461*	*40.7*	*5.5*	*39.0*	*3.6*	88.8	*9.7*	*1.0*	10.8	*11.8*	111.4
1921	*108.538*	*38.2*	*5.2*	*39.8*	*4.0*	87.2	*9.5*	*1.0*	10.5	*10.5*	108.2
1922	*110.049*	*40.7*	*5.3*	*40.4*	*3.4*	89.8	*10.1*	*1.0*	11.1	*11.3*	112.2
1923	*111.947*	*41.1*	*5.6*	*45.6*	*3.5*	95.7	*10.4*	*1.0*	11.4	*10.7*	117.8
1924	*114.109*	*41.0*	*5.9*	*45.5*	*3.4*	95.7	*9.7*	*1.0*	10.7	*11.0*	117.5
1925	*115.829*	*41.0*	*5.9*	*41.0*	*3.4*	91.3	*10.1*	*1.0*	11.2	*11.1*	113.6
1926	*117.397*	*41.5*	*5.6*	*39.4*	*3.6*	90.1	*10.1*	*1.0*	11.1	*11.4*	112.5
1927	*119.035*	*37.5*	*5.0*	*41.6*	*3.5*	87.6	*10.8*	*1.1*	11.9	*12.2*	111.7
1928	*120.509*	*33.6*	*4.4*	*43.5*	*3.6*	85.2	*10.4*	*1.1*	11.5	*12.1*	108.7
1929	*121.767*	*34.2*	*4.3*	*42.8*	*3.7*	85.0	*10.1*	*1.1*	11.3	*11.8*	108.1
1930	*123.188*	*33.7*	*4.4*	*41.1*	*4.4*	83.6	*11.1*	*1.2*	12.3	*10.2*	106.1
1931	*124.149*	*33.4*	*4.5*	*41.9*	*4.7*	84.6	*10.0*	*1.1*	11.1	*8.8*	104.5
1932	*124.949*	*32.1*	*4.5*	*43.4*	*4.6*	84.7	*10.2*	*1.4*	11.6	*8.4*	104.7
1933	*125.690*	*35.5*	*4.9*	*43.4*	*4.4*	88.2	*10.4*	*1.5*	12.0	*8.6*	108.8
1934	*126.485*	*43.9*	*6.4*	*39.5*	*4.2*	94.0	*9.6*	*1.4*	11.0	*9.2*	114.2
1935	*127.362*	*36.6*	*5.8*	*29.7*	*4.8*	76.9	*9.3*	*1.4*	10.7	*10.5*	98.1
1936	*128.181*	*41.6*	*5.7*	*33.8*	*4.4*	85.5	*9.6*	*1.7*	11.3	*11.6*	108.5
1937	*128.961*	*38.0*	*5.9*	*34.2*	*4.4*	82.4	*9.7*	*1.8*	11.5	*11.7*	105.7
1938	*129.969*	*37.4*	*5.2*	*35.7*	*4.5*	82.9	*9.0*	*1.8*	10.8	*10.8*	104.5
1939	*131.028*	*37.6*	*5.2*	*39.7*	*4.4*	86.9	*10.0*	*1.9*	11.9	*10.8*	109.6
1940	*132.122*	*37.8*	*5.1*	*45.1*	*4.3*	92.4	*10.0*	*2.3*	12.3	*11.0*	115.6
1941	*133.402*	*42.6*	*5.3*	*42.3*	*4.5*	94.7	*11.0*	*2.3*	13.3	*11.1*	119.1
1942	*134.860*	*45.9*	*5.8*	*42.2*	*4.9*	98.9	*12.7*	*2.4*	15.2	*8.8*	122.9
1943	*136.739*	*43.0*	*5.7*	*51.7*	*4.6*	105.0	*16.0*	*2.3*	18.2	*8.0*	131.2
1944	*138.397*	*46.6*	*8.4*	*53.6*	*4.6*	113.2	*15.3*	*2.4*	17.7	*8.7*	139.7
1945	*139.928*	*48.0*	*8.1*	*43.4*	*4.9*	104.3	*15.1*	*2.7*	17.8	*9.8*	131.8
1947	*144.126*	*49.2*	*7.5*	*43.2*	*3.6*	103.6	*12.5*	*2.9*	15.5	*10.3*	129.3
1948	*146.631*	*44.2*	*6.7*	*42.0*	*3.3*	96.1	*12.6*	*2.5*	15.1	*11.2*	122.4
1949	*149.188*	*44.7*	*6.2*	*41.9*	*2.7*	95.5	*13.5*	*2.6*	16.1	*10.9*	122.5
1950	*151.684*	*44.6*	*5.6*	*43.0*	*2.6*	95.8	*14.3*	*3.3*	17.6	*11.9*	125.2
1951	*154.287*	*41.2*	*4.7*	*45.2*	*2.2*	93.3	*15.0*	*3.6*	18.6	*11.3*	123.2
1952	*156.954*	*43.9*	*5.1*	*45.0*	*2.7*	96.7	*15.2*	*3.8*	19.0	*11.1*	126.8
1953	*159.565*	*54.5*	*6.6*	*39.2*	*3.1*	103.5	*15.1*	*3.9*	18.9	*11.3*	133.7
1954	*162.391*	*56.0*	*6.9*	*37.2*	*3.0*	103.1	*15.6*	*4.2*	19.9	*11.1*	134.1
1955	*165.275*	*57.2*	*6.5*	*50.4*	*3.0*	117.1	*14.7*	*4.0*	18.7	*10.4*	146.2
1956	*168.221*	*59.5*	*6.6*	*51.0*	*2.9*	120.0	*16.8*	*4.2*	20.9	*10.4*	151.3
1957	*171.274*	*58.7*	*6.1*	*46.4*	*2.7*	114.0	*17.5*	*4.7*	22.2	*10.2*	146.4

1958	***174.141***	***55.9***	***4.7***	***45.3***	***2.7***	108.7	***19.2***	***4.7***	24.0	***10.6***	143.3
1959	***177.073***	***56.6***	***4.0***	***51.0***	***3.1***	114.7	***19.7***	***5.0***	24.7	***10.9***	150.4
1960	***180.671***	***59.1***	***4.2***	***48.6***	***3.1***	115.1	***19.1***	***4.9***	24.0	***10.3***	149.4
1961	***183.691***	***61.0***	***4.0***	***46.8***	***3.3***	115.0	***20.5***	***5.9***	26.4	***10.7***	152.2
1962	***186.538***	***61.7***	***3.8***	***47.4***	***3.4***	116.3	***20.5***	***5.6***	26.1	***10.6***	153.1
1963	***189.242***	***65.4***	***3.4***	***48.5***	***3.2***	120.5	***21.0***	***5.5***	26.5	***10.5***	157.5
1964	***191.889***	***70.6***	***3.7***	***48.8***	***2.7***	125.7	***21.3***	***5.9***	27.1	***10.5***	163.4
1965	***194.303***	***70.4***	***3.7***	***43.6***	***2.4***	120.1	***22.8***	***6.0***	28.8	***10.9***	159.8
1966	***196.560***	***73.7***	***3.2***	***42.8***	***2.6***	122.3	***24.5***	***6.3***	30.7	***10.9***	163.9
1967	***198.712***	***75.3***	***2.8***	***47.0***	***2.5***	127.6	***25.1***	***6.8***	31.9	***10.6***	170.2
1968	***200.706***	***77.3***	***2.6***	***48.3***	***2.4***	130.6	***25.2***	***6.4***	31.6	***11.0***	173.2
1969	***202.677***	***77.8***	***2.3***	***46.9***	***2.3***	129.4	***26.3***	***6.6***	32.9	***11.2***	173.4
1970	***205.052***	***79.6***	***2.0***	***48.1***	***2.1***	131.9	***27.4***	***6.4***	33.8	***11.7***	177.5
1971	***207.661***	***79.2***	***1.9***	***53.0***	***2.1***	136.1	***27.4***	***6.6***	34.0	***11.5***	181.6
1972	***209.896***	***80.5***	***1.6***	***48.1***	***2.2***	132.3	***28.3***	***7.1***	35.4	***12.5***	180.2
1973	***211.909***	***75.9***	***1.2***	***43.2***	***1.8***	122.1	***27.1***	***6.6***	33.8	***12.7***	168.6
1974	***213.854***	***80.7***	***1.6***	***47.0***	***1.5***	130.8	***27.0***	***6.8***	33.9	***12.1***	176.8
1975	***215.973***	***83.2***	***2.8***	***38.4***	***1.3***	125.8	***26.3***	***6.5***	32.8	***12.1***	170.7
1976	***218.035***	***88.8***	***2.7***	***40.7***	***1.2***	133.4	***28.6***	***7.0***	35.6	***12.9***	181.8
1977	***220.239***	***86.3***	***2.6***	***42.3***	***1.1***	132.3	***29.0***	***6.9***	35.9	***12.6***	180.9
1978	***222.585***	***82.2***	***2.0***	***42.3***	***1.0***	127.5	***30.3***	***6.9***	37.2	***13.4***	178.1
1979	***225.055***	***73.5***	***1.4***	***48.6***	***1.0***	124.4	***32.9***	***7.3***	40.2	***13.0***	177.6
1980	***227.726***	***72.1***	***1.3***	***52.1***	***1.0***	126.4	***32.7***	***8.1***	40.8	***12.4***	179.6
1981	***229.966***	***72.8***	***1.3***	***49.9***	***1.0***	125.1	***33.7***	***8.3***	42.0	***12.6***	179.7
1982	***232.188***	***72.5***	***1.4***	***44.9***	***1.1***	119.8	***33.9***	***8.3***	42.2	***12.4***	174.5
1983	***234.307***	***74.1***	***1.4***	***47.4***	***1.1***	123.9	***34.0***	***8.7***	42.7	***13.3***	179.9
1984	***236.348***	***73.8***	***1.5***	***47.2***	***1.1***	123.6	***35.3***	***8.7***	44.0	***14.1***	181.8
1985	***238.466***	***74.6***	***1.5***	***47.7***	***1.1***	124.9	***36.4***	***9.1***	45.6	***15.0***	185.5
1986	***240.651***	***74.4***	***1.6***	***45.2***	***1.0***	122.2	***36.9***	***10.2***	47.1	***15.4***	184.7
1987	***242.804***	***69.5***	***1.3***	***45.6***	***1.0***	117.4	***39.4***	***11.6***	51.0	***16.1***	184.5
1988	***245.021***	***68.6***	***1.1***	***48.8***	***1.0***	119.5	***39.6***	***12.4***	51.9	***15.1***	186.6
1989	***247.342***	***65.1***	***1.0***	***48.4***	***1.0***	115.6	***40.5***	***13.1***	53.6	***15.6***	184.7
1990	***250.132***	***63.9***	***0.9***	***46.4***	***1.0***	112.2	***42.4***	***13.8***	56.2	***14.9***	183.4
1991	***253.493***	***62.9***	***0.8***	***46.8***	***1.0***	111.5	***44.1***	***14.0***	58.1	***14.8***	184.4
1992	***256.894***	***62.4***	***0.8***	***49.1***	***1.0***	113.4	***46.4***	***14.0***	60.4	***14.6***	188.4
1993	***260.255***	***61.0***	***0.8***	***48.5***	***1.0***	111.2	***48.1***	***13.9***	62.0	***14.8***	188.0
1994	***263.436***	***62.9***	***0.8***	***49.0***	***0.9***	113.5	***48.7***	***13.9***	62.6	***15.0***	191.1
1995	***266.557***	***63.5***	***0.8***	***48.4***	***0.9***	113.6	***48.2***	***13.9***	62.1	***14.8***	190.4
1996	***269.667***	***64.0***	***1.0***	***45.2***	***0.8***	111.0	***48.8***	***14.3***	63.1	***14.5***	188.6
1997	***272.912***	***62.6***	***0.8***	***44.7***	***0.8***	109.0	***50.0***	***13.6***	63.6	***14.3***	186.9
1998	***276.115***	***63.6***	***0.7***	***48.2***	***0.9***	113.2	***50.4***	***13.9***	64.3	***14.5***	192.1
1999	***279.295***	***64.3***	***0.6***	***49.3***	***0.8***	115.1	***53.6***	***13.8***	67.4	***14.8***	197.3
2000	***282.388***	***64.5***	***0.5***	***47.8***	***0.8***	113.7	***54.2***	***13.7***	67.9	***15.2***	196.8
2001	***285.321***	***63.1***	***0.5***	***46.9***	***0.8***	111.4	***54.0***	***13.8***	67.8	***14.7***	193.9
2002	***288.205***	***64.5***	***0.5***	***48.2***	***0.9***	114.0	***56.8***	***14.0***	70.7	***15.6***	200.4
2003	***291.049***	***62.0***	***0.5***	***48.5***	***0.8***	111.9	***57.5***	***13.7***	71.2	***16.3***	199.4

Numbers in bold italics are linked.

[1] Prior to 1930, except for the war years, 1917-19, resident population only; from 1930 and thereafter, resident population plus Armed Forces overseas. [2] Computed from unrounded data. [3] Includes skin, neck meat, and giblets. [4] Excludes the amount of ready-to-cook chicken going to pet food as well as some water leakage that occurs when chicken is cut up before packaging.

Source: USDA/Economic Research Service.
Data last updated Dec. 21, 2004.

United States Department of Agriculture: Daily Recommendations (Cited at note 8)

Inside the Pyramid

How much food from the meat & beans group is needed daily?

The amount of food from the Meat and Beans Group you need to eat depends on age, sex, and level of physical activity. Most Americans eat enough food from this group, but need to make leaner and more varied selections of these foods. Recommended daily amounts are shown in the chart.

		Daily recommendation*
Children	2-3 years old	2 ounce equivalents**
	4-8 years old	3-4 ounce equivalents**
Girls	9-13 years old	5 ounce equivalents**
	14-18 years old	5 ounce equivalents**
Boys	9-13 years old	5 ounce equivalents**
	14-18 years old	6 ounce equivalents**
Women	19-30 years old	5 ½ ounce equivalents**
	31-50 years old	5 ounce equivalents**
	51+ years old	5 ounce equivalents**
Men	19-30 years old	6 ½ ounce equivalents**
	31-50 years old	6 ounce equivalents**
	51+ years old	5 ½ ounce equivalents**

*These amounts are appropriate for individuals who get less than 30 minutes per day of moderate physical activity, beyond normal daily activities. Those who are more physically active may be able to consume more while staying within calorie needs. Click here for more information about physical activity.

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned do hereby certify that the foregoing brief has been prepared in full compliance with all applicable rules and is solely the work of the members of Team 13. The undersigned further certify that a true and correct copy of the foregoing Brief for the Appellee has been delivered via United States Mail and electronic mail to:

Pace University School of Law
National Environmental Law Moot Court Competition
Competition Coordinator, P212
78 North Broadway
White Plains, New York 10603

This the 5th day of December 2005

_____

Team Number 13