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Judges Memorandum: First Annual Pace National Environmental Moot Court Competition

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UNITED STATES COURT OF APPEALS
TWELFTH CIRCUIT

ACME INDUSTRIES, INC., Appellant,

v.

NATIONAL COUNCIL
FOR THE PROTECTION
OF THE ENVIRONMENT,
Appellee,

v.

STATE OF NEW UNION, Intervenor.

No. 88-1001

JUDGES MEMORANDUM

THE CLEAN WATER ACT

The Clean Water Act, 33 U.S.C. §§ 1251-1376, was enacted in 1972 and amended in 1977 and 1987. Its primary purpose is to establish uniform national end-of-the pipe effluent limitations for the most commonly discharged pollutants. Basically the Act provides for a floor of federal standards based on technological capability. Additional treatment is required if necessary to achieve water quality standards assigned to the receiving waters by the state. State water quality standards must meet a variety of federal requirements. States may have more stringent requirements of either a technological or water quality nature. The Act contains a federally controlled permit program to enforce these national standards.

THE NPDES PERMIT

Under section 301(a) of the Act, it is unlawful to discharge a pollutant from a point source without a permit. Section 402 contains the mechanism which implements this mandate, the National Pollutant Discharge Elimination System (NPDES) permit program. The NPDES permit program es-

establishes specific levels of performance that the discharger must maintain and requires the discharger to monitor its own compliance with those levels.

Technology Based Standards. A small number of pollutant parameters form the basis of the technology based effluent limitations. Included are biochemical oxygen demand (BOD), total suspended solids (TSS), pH, fecal coliform bacteria, oil and grease, cyanide, various metals, phenols (an organic chemical pollutant), and chemical oxygen demand.

Section 304(b), 33 U.S.C. § 1344(b), provides for the establishment of nationally applicable technology based effluent limitations on an industry by industry basis. The first, and least stringent, is the Best Practicable Technology (BPT) effluent limitation required by section 304(b)(1). BPT requires that a treatment technology be determined for each industrial class, based on the best technology in use at the time the guidelines were developed. BPT, to have been in place by 1977, required that the Environmental Protection Agency (EPA) use a cost benefit balancing test in setting BPT effluent limitations, taking such engineering factors as the age of the equipment and facilities involved, the process used, and non-water quality environmental impacts into consideration.

The second level of control, Best Available Control Technology (BAT), section 304(b)(2), is more restrictive than BPT, and was designed to be in place by 1983. BAT requires dischargers to use the best available technology economically achievable. Contained within BAT guidelines are limitations for four different classes of pollutants: conventional pollutants, which includes BOD, suspended solids, pH, fecal coliform bacteria, and oil and grease; toxic pollutants; unconventional pollutants, such as ammonia, chlorides, nitrates, iron, and color; and heat.

BAT, defined as the "very best control and treatment measures that have been or are capable of being achieved," allows in-plant process changes as well as end-of-the-pipe treatment measures to be used in determining BAT limitations. Though BAT also requires EPA to consider the cost of achieving the effluent reduction, there is no requirement that cost be balanced against the effluent reduction. The conven-

tional pollutants were the primary focus of BAT limitations prior to 1977.

Best Conventional Technology (BCT), section 304(b)(4), effluent limitations, adopted on an industry by industry basis, were to have been in place by 1984. The conventional pollutants were specifically excluded from BAT in the 1977 amendments and made subject to BCT treatment standard. BCT effluent limitations were to be adopted based on a balance between the cost of attaining a reduction in effluents and the effluent reduction benefits which would result.

Water Quality Standards. Water quality standards are simple in concept. A state classifies a water body or a portion of a stream or river consistent with the use or uses for which it is to be maintained. The classification scheme typically breaks down use into several categories: drinking water quality; water that is fishable and swimmable; water that is moderately degraded by industrial and municipal waste but still able to support some aquatic life; and water that is an open sewer.

In addition to use classification, states also set water quality criteria. The criteria specify the pollutant level in the water body itself, unlike technology based effluent limitations which specify the pollutant limits of the discharge. Basically, these criteria represent the levels of different pollutants a water body can tolerate while assuring that its designated use will be maintained. For example, a water body to be used as a cold water fishery (trout) may require a dissolved oxygen level of 5.0 part per million (ppm), while a water body to be used as a warm water fishery (bass) may require a level of 4.0 ppm.

Water quality based limitations, in addition to technology based effluent limitations discussed above, may be imposed. Technology based limits are end-of-the-pipe numerical limitations, applicable to all point sources. Water quality based limits may be imposed as additional, more stringent, conditions when the discharge causes the water quality standards of the receiving water body to be violated.

Both water quality standards and water quality related effluent limitations may require levels of treatment considerably higher than those required by the technology based efflu-

ent limits.

State Certification. Under section 401 of the Act, states are empowered to certify that federally licensed activities are in compliance with state laws and regulations and the Clean Water Act. The provision requires that every applicant for a federal permit, e.g., an EPA issued NPDES permit, which may result in any discharge to navigable waters is to provide the permitting agency certification from the state in which the discharge originates that any discharge will comply with the law. Such a certification, unless waived by the states, becomes a condition to the issuance of the federal permit. The federal NPDES permit must include any effluent limitation required in the state certification. A state's certification may require more stringent effluent limitations than are required under the Clean Water Act.

Permit Conditions. The core of a permit is the effluent limitations, usually expressed in single numbers or ranges for each pollutant parameter. Effluent limitations do not have to be in numerical form. Water quality criteria may be narrative in form, such as a requirement that a water body will not be toxic to the indigenous biota, or based on bioassay results, such as the requirement that a 10% concentration of toxic materials in the treated effluent not kill more than 50% of a test species in a 96 hour bioassay.

EPA developed several different levels of technology based effluent guidelines designed to implement the requirements of the Clean Water Act. The guidelines began with the least restrictive limitations, becoming more restrictive over time, to achieve the national goal of eliminating the discharge of all pollutants.

All NPDES permits, whether issued by EPA or a state agency, contain standard conditions which are not waivable or modifiable. 40 C.F.R. § 122.41. These conditions include enforcement provisions, procedural requirements, and substantive requirements.

The requirement that each permittee self-monitor and maintain discharge monitoring reports (DMRs) is a standard permit condition.

Upset and bypass provisions are also standard. An upset

is an exceedence that is unintentional and temporary, due to factors beyond the control of the permittee. A bypass is an intentional diversion. Unavoidable exceedences are dealt with through enforcement rather than included as a substantive provision of a permit.

PUBLIC PARTICIPATION

Section 509(b) contains the authority for judicial review of rulemaking in the courts of appeals. The grant of authority is broad, and available to "any interested person." The public is also allowed to participate when EPA issues permits under section 402.

The Clean Water Act also contains a provision which authorizes citizens to function as public attorneys general. Section 505 allows a citizen to commence a civil action on the citizens' own behalf against any person alleged to be in violation of an effluent limitation or standard.

There are several defenses to citizen suits. The upset defense, 40 C.F.R. § 122.41(n), allows permittees to raise upset as an affirmative defense to an enforcement action. An upset occurs when a permit limitation is exceeded because of exceptional circumstances beyond the control of the discharger.

Defendants have also argued that their violations were de minimis, that the violations were authorized by administrative waivers, or that governmental enforcement authorities have tolerated their violations. The construction of permit terms has also been used to defend against citizen suits.

Section 505 authorizes both injunctive relief and civil penalties available under section 309(d). Costs and reasonable attorneys fees may also be awarded under section 505(d). The majority of citizen plaintiffs seek to either compel defendants to install equipment to adequately treat the effluent or to institute procedures which will prevent or minimize future violations.

STATEMENT OF FACTS

The Permits. Acme operates an organic chemical manufacturing facility which discharges wastewater into the

Fairwater River. Acme has had two EPA issued permits, the first issued in 1974 and the second in 1987. The 1974 permit contained effluent limitations for the discharge of biochemical oxygen demand (BOD), total suspended solids (TSS), and pH. The 1987 permit raised the effluent limits for BOD and TSS over the limits in the 1974 permit, added toxicity as a new permit condition, but left the pH limitation the same as the 1974 permit. The toxicity limit was added in 1987 because the state of New Union required the limitation as necessary to meet its water quality standards.

There are two pending challenges before the EPA to the 1987 permit. Acme challenged the toxicity limitation, and National Council for the Protection of the Environment (NCPE), a citizen group, challenged the higher BOD and TSS effluent limitations as violative of section 402(o), the newly enacted anti-backsliding provision.

The Permit Violations. Acme has violated all of its permit limitations, under both the 1974 and 1987 permits. Acme routinely violated the pH limitation of the 1974 permit before 1985. But in 1985, Acme changed its pH treatment system from a manual addition of lime to a mechanized, computer-operated lime addition system. Since then, it has only had one pH violation, and that was due to a power outage.

Acme treats organic pollutants with a biological treatment system which uses bacteria to break down the organic pollutants in the wastewater. Using this treatment system, Acme has never consistently met BOD and TSS limitations under the 1974 permit, though its performance has improved as a result of modifications in its manufacturing process. However, Acme has been successful in meeting the new higher BOD and TSS limitations of the 1987 permit, with the exception of a two week period every winter when extreme cold causes the biological activity in the treatment system to diminish.

Acme has violated the toxicity limitation, added in the 1987, permit numerous times. Though Acme's performance has improved to the point where the effluent regularly results in 50-60% mortality as determined by a bioassay, the permit limit is 50% mortality. Acme is able to maintain a 50-60%

mortality rate during most of the year except during a two week period of extreme cold weather each winter.

Acme's permit requires that BOD and TSS be sampled and analyzed daily, and pH continuously. Toxicity must be tested once a month. Acme must report the results monthly to the EPA on a Discharge Monitoring Report (DMR), which is on file at the EPA regional office. DMRs are public information.

NCPE bases its notice of violations and complaint on the violations reported by Acme in its DMRs. NCPE's complaint did not allege violations of the toxicity limitation, because the permit containing the limitation had not been issued when the complaint was filed. NCPE has subsequently moved to amend its complaint to include toxicity limitation violations, and the motion was granted. NCPE contends that the violations reported constitute admissions for the purpose of supporting its motion for summary judgment that Acme has and continues to violate the Act.

ISSUE ANALYSIS

Issue A. (1) Mootness. Section 505 of the Clean Water Act, 33 U.S.C. § 1365, permits any citizen to commence a civil action against any person alleged *to be in violation* of an effluent standard or limitation under the Act. The Supreme Court in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), interpreted the phrase "to be in violation" and held that section 505 does not confer federal jurisdiction over citizen suits for only wholly past violations. However, section 505 does confer jurisdiction based on good-faith allegations of continuous or intermittent violations. The Fourth Circuit on remand gave two methods that citizen-plaintiffs may demonstrate an on-going violation; by proving violations that continue on or after the date the complaint is filed or by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of recurrence in intermittent or sporadic violations. *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170 (4th Cir. 1988). On remand, the district court in *Gwaltney* held that

repeated wintertime violations of a permit limitation, where there was no degree of certainty that the risk of continued violations had been eradicated, constituted an on-going violation. *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 688 F. Supp. 1078 (E.D. Va. 1988).

Though *Gwaltney* precludes citizens suits when violations have ceased, it leaves several questions unanswered, and provides the basis for the competitors arguments. What types of violations are sufficient to overcome the jurisdictional constraints of citizen suits based on wholly past violations? Can citizens maintain an action for violations which are likely to recur? For those which occur intermittently? What facts are sufficient to support the argument that the violation is likely to recur? Or that the violation occurs intermittently? When a treatment system is updated and the limitation is violated once, can citizens sue on the violations which occurred under the old treatment system as well as the one which occurred under the new?

(2) *The pH violations.* NCPE includes several types of violations in its suit against Acme. All pH violations with one exception occurred when lime was added manually to the effluent, the old treatment method. After Acme installed a mechanized computer-operated lime addition system in 1985, the pH limitation was violated only once, as a result of a power outage. The pre-1985 pattern of pH violations was due to operator error during manual treatment. The one violation which has occurred under the new treatment system was from a different cause - a power outage. The question is whether one violation caused by a power outage constituted a continuing or intermittent violation of the old violation? Is there any reason to believe that violations because of the power outage will continue? Can a citizens group include permit violations caused by a treatment system no longer in use in its suit?

(3) *The BOD and TSS Violations.* Acme routinely violated the BOD and TSS limitations of the 1974 permit which remained in effect until the new permit containing higher BOD and TSS limits was issued in 1987. Acme's performance has improved such that it no longer routinely violates these parameters. In 1986 and 1987 violations occurred only during

a two week period when extremely cold weather interfered with the biological activity of the treatment system. Had the new permit conditions been in effect in 1986 (when NCPE's complaint was filed) Acme would not have violated its permit, except during that two week period of extreme cold weather each winter. The issue is whether violations of BOD and TSS which occur for two weeks every winter constitute continuing or intermittent violations under *Gwaltney*?

A single violation which has not recurred would not be a continuing violation, especially when caused by a power outage. Violations which are likely to occur for a two week period every year because of predictable weather conditions would likely be considered an intermittent violation and capable of supporting a citizen suit. Continuing violations may be inferred from past violations when there is no intervening remedial action. However, case law does not yet address these issues.

(4) *The Toxicity Violations.* NCPE amended its complaint to include violations of the toxicity limitation. Acme has never met this effluent limitation and continues to violate it, though the degree of violation has decreased.

If two permit limitations (BOD and TSS) cease to be violated (because of the new higher permit limitation), but one continues (toxicity), may the BOD and TSS violations which have ceased be included in a suit for the violations of the toxicity limitation?

An analysis should consider the likelihood of recurrence, the frequency of recurrence, the circumstances in which the violations occur, and actions taken by the permit holder to prevent future violations. In addition, consider whether the treatment systems for the various pollutants are interrelated. Does the treatment of each pollutant, pH, BOD, TSS, or toxic chemicals, depend on a separate treatment system, or are they treated by different parts of the same system?

Acme treats the pH of its effluent in a separate treatment system from the other pollutants. BOD and TSS treatments are interrelated; both are treated by the biological treatment system. TSS is further treated by flocculation. An analysis of the interrelation between pollutants and treatment systems

may be used to determine if a permit limitation continues to be violated. If a BOD violation indicates that the treatment system for BOD and TSS is not working properly, previous TSS violations may continue. But this analysis does not hold for pH and BOD violations since a different treatment system is used for pH. A pH violation would not constitute a TSS or BOD violation.

Can violations of a permit be wiped out by lessening the permit limitation instead of upgrading the treatment of pollutants? When a permit limitation is increased, are those violations which occurred before the permit change considered to be wholly past violations? If the 1987 permit is valid and Acme has never violated the new permit, arguably those violations which occurred under the old permit would be "wholly past violations." As a result, NCPE would not be able to maintain its action based on those violations.

The newly enacted section 402(o), an anti-backsliding provision, states that a NPDES permit may not be renewed, reissued, or modified to contain effluent limitations less stringent than the limitations in the previous permit. Does EPA have the authority to issue a permit containing limitations greater than those in the expired permit? Does the issuing of a new permit with limitations greater than those in the old permit violate section 402(o)? If the higher BOD and TSS effluent limitations in the new permit violated section 402(o), are the old limitations of the 1974 permit now in effect?

Section 402(k) states that compliance with a section 402 NPDES permit is, for the purposes of sections 309 and 505, deemed to be compliance. Under the 1974 permit, Acme continually violated the BOD and TSS limitations. But the newly issued 1987 permit raised these limitations with the result that Acme no longer violates these conditions. The violations ceased not because Acme initiated a new, more effective treatment system but because the permit limitations were raised, perhaps illegally. If the 1987 permit limitations are valid, Acme is in compliance with three of the four parameters, with the exception of a two week violation of BOD and TSS during the winter. However, if the 1987 permit violates the anti-degradation provision and the 1974 permit limitations are still

valid, Acme is violating both the BOD and TSS limitations.

Can NCPE challenge the new permit conditions in this proceeding or is it barred by section 509? Section 509 provides for review of the Administrator's actions in promulgating any effluent standard in the U.S. Circuit Court of Appeals. An argument for allowing NCPE to maintain its suit in the district court is to avoid a bifurcated system which can lead to delays in resolving disputes, and to preserve judicial resources. See *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980).

Nevertheless, NCPE is challenging the BOD and TSS effluent limitations administratively. When a permit condition is challenged, the effect of the contested provision is stayed and cannot be subject to judicial review until the EPA has taken final action on the challenge. All other permit provisions remain fully effective and enforceable. 40 C.F.R. § 124.16. Thus, as the old permit containing the lower BOD and TSS limits remains in effect until the EPA has taken final action on NCPE's challenge, Acme continues to violate those conditions, conditions which it never met consistently under the old permit, and NCPE can maintain its suit for the BOD and TSS violations. Therefore, the district court erred in granting Acme's motion for summary judgment as to these violations.

Issue B. The Validity of the Toxicity Limitation. What is the effect of Acme's administrative challenge of the toxicity limitation? Does the challenged permit remain in effect or does the old permit continue in force? Acme is challenging the toxicity limitation administratively in the same proceeding that NCPE is challenging the new BOD and TSS limits. Under 40 C.F.R. § 124.16, the effect of the challenged provision is stayed, and the pH and old BOD and TSS permit limitations remain in effect and enforceable. Thus, NCPE cannot maintain its suit as to the toxicity violations. The stayed portions are not subject to judicial review until the EPA has taken final action on Acme's and NCPE's challenges.

Once the EPA has taken final action on the administrative challenges to the permit, what is the proper forum to challenge a permit toxicity limitation? Is the proper forum the court of appeals under section 509? Or is the district court the

proper forum?

Judicial review of the EPA's actions is governed by section 509(b). Under section 509, the circuit courts of appeal have exclusive jurisdiction over permit reviews. District courts have jurisdiction over citizen suits (section 505) and the EPA enforcement of permits (section 309).

If the toxicity limitation is valid and NCPE is successful in maintaining its suit for toxicity violations, does the district court have jurisdiction to assess penalties for toxicity violations? Section 505 gives the district court the authority to apply any appropriate civil penalties under section 309(d) for violations of effluent limitations, and under section 309(d), civil penalties may not exceed \$25,000 per day for each violation.

Additional Issues. The district court opinion contains several tangential issues that were not addressed in the appeal. What is the proper forum to challenge a section 401 state certification? Do the federal courts have jurisdiction over a challenge to the certification where state courts do not? If the federal courts have jurisdiction, is the circuit court of appeals or the district court the proper forum? If neither the federal courts or the state courts have jurisdiction, can a toxicity limitation go into a permit without any review whatsoever?

The new permit contains a toxicity limitation which provides that "the discharge shall not be toxic to the indigenous biota of the Fairwater River." Does the use of brine shrimp, a saltwater organism not native to fresh water, as the test organism to determine the toxicity of Acme's wastewater violate this condition?