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Office of Continuing Legal Education at the University of Kentucky College of Law

Christopher R. Fitzpatrick
Woodward, Hobson & Fulton

Carl W. Breeding
Greenebaum Doll & McDonald PLLC

Timothy J. Hagerty
Brown, Todd & Heyburn PLLC

Marc S. Murphy
Stites & Harbison PLLC

See next page for additional authors

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Authors

Office of Continuing Legal Education at the University of Kentucky College of Law, Christopher R. Fitzpatrick, Carl W. Breeding, Timothy J. Hagerty, Marc S. Murphy, Wanda Ballard Repasky, Clinton J. Elliott, Thomas W. Fitzgerald, Dennis J. Conniff, Laura D. Keller, W. Blaine Early, Eric A. Braun, Michael P. Healy, Glenna Jo Curry, James L. Dickinson, W. Patrick Stallard, and Richard H. Underwood

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UNIVERSITY OF KENTUCKY COLLEGE OF LAW
OFFICE OF CONTINUING LEGAL EDUCATION

College of Law Building, Suite 260
Lexington, Kentucky
40506-0048

(859) 257-2921
FAX (859) 323-9790

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— 16th Annual —
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ANNUAL CASE LAW UPDATE

1999 - 2000

**Christopher R. Fitzpatrick
Woodward, Hobson & Fulton
Louisville, Kentucky**

ANNUAL CASE LAW UPDATE

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I. EPA "Overfiling"

Assume you represent a client that generates, handles, or otherwise manages hazardous waste. Assume your state's environmental regulatory agency has filed an enforcement case against your client relating to its hazardous waste activities. Assume you have negotiated a somewhat favorable settlement with the agency and are preparing to advise your client to sign an agreed order with the agency.

Now assume that, as the negotiations are nearing closure, your client is served with an Administrative Complaint filed by the United States Environmental Protection Agency ("EPA") *relating to the same issues involved in the state's enforcement case*, except that EPA is seeking a much higher penalty amount.

What should your client do? Should it finalize the agreed order with the state agency? Should it break off negotiations with the state and begin negotiating with EPA? What if your client settles with the state (or with EPA)? Would such a settlement bar the other agency from proceeding with its enforcement case? These difficult issues are at the heart of EPA "overfiling."

A. "Overfiling" defined

The Resource Conservation and Recovery Act ("RCRA")¹ permits the EPA to delegate the authority to enforce hazardous waste regulations under RCRA to states that meet certain criteria.² States that have such

¹ 42 U.S.C. §6901 et seq.

² This "delegation" authority is contained in RCRA Section 3006(a), 42 U.S.C. 42 § 6926(a).

authority are authorized to implement and enforce RCRA in lieu of EPA. "Overfiling" occurs when the EPA files an enforcement case alleging violations under RCRA after a RCRA-authorized state has brought an enforcement case addressing the same issues.

The definition of overfiling is being debated. EPA has adopted a narrow definition, arguing that overfiling means the initiation of a federal enforcement case following the **conclusion** of a state enforcement case involving the same violation at the same facility.³ Others have adopted a broader definition, arguing that overfiling occurs if EPA files an enforcement case following the **initiation** of a state enforcement case.⁴

B. Statutory authority for Overfiling

RCRA contains several provisions dealing with EPA's authority to act after it has delegated enforcement authority to a state.

RCRA provides, in Section 3008(a)(2), 42 U.S.C. 6928(a)(2), that EPA, after notifying a state authorized to enforce RCRA, may bring an administrative enforcement action for civil penalties and injunctive relief against a violator of RCRA requirements in that authorized state. As previously stated, EPA has argued that this provision allows it to overfile a state enforcement case.

³ *Harmonizing Federal and State Environmental Enforcement Roles: Policy and Legal Considerations*, Gary A. Jones, U.S. Environmental Protection Agency (paper presented during American Bar Association Section on Natural Resources, Energy, and Environmental Law 28th Annual Conference, March 11-14, 1999, Keystone, Colorado).

⁴ See, e.g., Brief for Appellee Harmon Industries, Inc., Docket No. No. 98-3775, <<http://www.lathropage.com/htopic.html>>.

However, RCRA also provides, in Section 3006(d), 42 U.S.C. §6926(d), that an authorized state "is authorized to carry out [its hazardous waste program] in lieu of the Federal Program. . . ." (Emphasis added.) That section also provides that "[a]ny action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action by the Administrator" of EPA. *Id.*

C. Administrative Decisions on Overfiling

1) In Re BKK Corp.

In 1983, hazardous waste inspectors in California, a RCRA-authorized state, inspected the BKK Corporation facility. Federal inspectors also participated. After violations were discovered, California initiated an enforcement case that culminated in a consent decree providing for a fine of \$1.3 million.

EPA, dissatisfied with the settlement, then filed its own enforcement case seeking higher penalties. The Administrative Law Judge dismissed EPA's case, finding that EPA lacked jurisdiction because California had effectively enforced the same provisions EPA was seeking to enforce.⁵

On appeal, EPA's Chief Judicial Officer affirmed.⁶ The CJO relied upon the "in lieu of" and "same force and effect" language in Sections 3006(c) and 3006(d) to limit EPA's ability to overfile.⁷

⁵ *In Re BKK Corp.*, Docket No. RCRA-IX-84-0012, 1984 LEXIS 36 (April 13, 1984).

⁶ *BKK*, 2 E.A.D. 35 (1985).

2) In Re Martin Electronics, Inc.

In 1984, Florida, also a RCRA-authorized state, filed an enforcement case against Martin Electronics, Inc.⁸ The Florida Department of Environmental Regulation ("FDER") and Martin entered into a consent decree under which Martin agreed to install groundwater monitoring wells. Because FDER regulations allowed it to recover only its costs, and not penalties, when entering into RCRA consent decrees, the settlement called for Martin to reimburse FDER only \$107 in costs.

As in BKK, EPA was not satisfied with the amount of the "penalty" in Martin. EPA filed an administrative complaint seeking penalties of \$48,000.

Following *BKK*, the administrative law judge in *Martin* ruled that EPA was barred from overfiling FDER.⁹

D. EPA Reaction to Administrative Decisions

EPA General Counsel Memorandum

After these rulings, the EPA's General Counsel examined EPA's overfiling authority. In a Memorandum, the General Counsel (Francis S. Blake) compared the overfiling provisions in RCRA, the Clean Water Act, and the Safe Drinking Water Act.¹⁰ Mr. Blake concluded that while the Clean Water Act and Safe Drinking Water Act provisions allowed EPA to overfile an authorized state only if the state's enforcement initiative were

⁷ *Id.*

⁸ *In Re Martin Electronics, Inc.*, No. RCRA-84-45-R, 1985 RCRALEXIS 43 (June 21, 1985).

⁹ *Martin*, 2 E.A.D. 381 (1987).

inadequate, the RCRA overfiling provisions do not contain any such restriction. Thus, the General Counsel concluded that EPA could overfile even after a state had initiated an "adequate" enforcement case.¹¹

Armed with the General Counsel's Memorandum, the EPA's Deputy Administrator, A. James Barnes, issued a Guidance Memorandum to the EPA Regional Offices.¹² In that Memorandum, the Deputy Administrator directed the Regional Offices to overfile authorized states' enforcement cases "when the state fails to take timely and appropriate action."¹³

E. Federal Court Decisions on Overfiling

1) Where State Had Not Acted

U.S. v. Conservation Chemical Co.

In *Conservation Chemical*, the EPA brought a RCRA suit against a corporation and its president.¹⁴ Defendants filed a motion to dismiss arguing, among other things, that EPA had no authority to bring an independent enforcement action in Indiana, a RCRA-authorized state, because EPA had delegated its enforcement authority to Indiana. The court held that, so long as EPA notifies the state of EPA's intent to bring

¹⁰ The General Counsel's Memorandum is discussed in *Guidance on RCRA Overfiling*, May 19, 1986 (EPA Document # 9939, available through National Technical Information Service, Publication No. 91-140095 <<http://www.ntis.gov/ntisserv.htm>>).

¹¹ *Id.*

¹² *Guidance on RCRA Overfiling*, May 19, 1986 (EPA Document # 9939, available through National Technical Information Service, Publication No. 91-140095 <<http://www.ntis.gov/ntisserv.htm>>).

¹³ *Id.*

¹⁴ *U.S. v. Conservation Chemical Co.*, 660 F. Supp. 1236 (N.D. Ind. 1987).

an enforcement case, EPA can exercise its independent authority to do so.¹⁵

To similar effect are *U.S. v. Environmental Waste Control, Inc.*, 698 F. Supp. 1422 (N.D. Ind. 1988) and *Waste Management of Illinois, Inc. v. EPA*, 714 F. Supp. 340 (N.D. Ill 1989).

2) Where State Had Acted

Harmon Industries, Inc. v. Browner

a). Facts

Harmon Industries' plant in Missouri assembled circuit boards.¹⁶ The Missouri Department of Natural Resources ("MDNR") obtained authority to administer its own hazardous waste program in 1985.

In November, 1987, Harmon conducted an environmental audit. The audit team discovered that maintenance workers had been dumping chlorinated solvents in an area behind the plant. Harmon's management immediately ordered that the practice be stopped.

Harmon hired an environmental consultant to investigate the extent of contamination. After the consultant issued its report in May, 1988, Harmon requested a meeting with the MDNR. During that meeting, Harmon voluntarily disclosed its prior solvent disposal method. MDNR conducted an inspection and issued a Notice of Violation ("NOV").

¹⁵*Conservation Chemical*, 660 F. Supp. at 1244.

¹⁶*Harmon Industries, Inc. v. Browner*, 19 F. Supp. 2d 1998 (W.D. Mo. August 25, 1998).

Ultimately, Harmon spent about \$1.5 million to investigate and remediate the contamination.

On September 30, 1991, while Harmon was negotiating resolution of the NOV with MDNR, EPA filed an administrative action against Harmon. EPA sought penalties of \$2,343,706.

On March 5, 1993, while the EPA's case was pending, MDNR and Harmon entered into a state-court consent decree in which MDNR recognized Harmon's voluntary self-reporting and released Harmon from all RCRA claims, including any claims for monetary penalties.

In December, 1994, an EPA Administrative Law Judge entered an order holding Harmon liable for \$586,716 in civil penalties.¹⁷ Harmon appealed to the Environmental Appeals Board ("EAB"). The EAB entered an order affirming the ALJ's decision.¹⁸ On June 6, 1997, Harmon appealed the EAB's order to the United States District Court for the Western District of Missouri. On August 25, 1998, the court entered its order reversing the EAB's decision.¹⁹

b). Holding

In a case of first impression, the district court held that RCRA's Section 3006(d), as well as principles of *res judicata*, barred EPA from filing an enforcement case after Harmon and MDNR had finalized the consent decree.

¹⁷ *Harmon Electronics, Inc.*, No. RCRA-VII-91-H-0037, 1994 RCRA LEXIS 31 (December 15, 1994).

¹⁸ *Harmon Electronics, Inc.*, No. VII-91-H-0037, slip op. at 5 (EAB Mar. 24, 1997).

The district court stated:

[T]he plain language of section 3006(b) provides that the MDNR operates "in lieu of" or instead of the federal program . . . the concept of co-existing enforcement powers (advocated by EPA) is inconsistent with EPA's delegation of authority and the legislative history. Indeed, such a concept would predictably result in confusion, inefficiency, duplicative agency expenditures and would thwart the public policy of early and non-judicial dispute resolution . . . As such, the "same force and effect" language of section 3006(d) means exactly what it says. Any action by a state shall have the same binding effect as if the action was taken by EPA.

Harmon, 19 F. Supp.2d at 995-96.

The district court observed that, if EPA were dissatisfied with a state's enforcement efforts, it could withdraw authorization under Section 3006(e). The court stated that EPA does not have "the option to reject part of a program or course of action on an incident-by-incident basis." *Id.* at 996. "Such a schizophrenic approach to enforcement of RCRA would result in uncertainty in the public mind. With whom should it negotiate? Must it negotiate with both state and federal authorities? Should it insist that EPA sign off on all agreements with authorized state agencies?" *Id.*

The district court also held that EPA's overfiling was barred by *res judicata*. First, it held that Missouri law applied concerning the elements of *res judicata*. Under Missouri law, *res judicata* requires (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; and (4) identity of the quality of

¹⁹ *Harmon Industries, Inc. v. Browner*, 19 F. Supp. 2d 1998 (W.D. Mo. August 25, 1998).

the person for or against whom the claim is made.²⁰ In *Harmon*, only the third element of *res judicata* – identity of the persons and parties to the action -- was in substantial dispute.

EPA argued that it does not share an identity of interests with a state authorized to administer RCRA. Harmon argued that the “federal-state partnership,” the “same force and effect” language, and the “in lieu of” language established privity between EPA and MDNR.

The court found that because Missouri was an authorized state and because the underlying interests were “nearly identical,” the EPA was barred from seeking civil penalties against Harmon by *res judicata*.

c). Issues on Appeal

On October 22, 1998, The United States Department of Justice (“DOJ”) filed an appeal in the Eighth Circuit. In its brief, DOJ stated the following issues:

- A. Whether the State could disable EPA from maintaining an action under Section 3003(a)(2) by subsequently filing its own action regarding the same conduct and entering into a consent decree that provides limited, and in EPA's view, inadequate, relief?
- B. Whether EPA's administrative enforcement action against Harmon became barred by *res judicata* as a result of the entry of a state court settlement between Harmon and Missouri, where the United States was not a party to that proceeding, where there has been no waiver of sovereign immunity that would have allowed the United States to become a party, and where the interests of the United States were divergent from those of Missouri?

²⁰ *Id.* Under Kentucky law, *res judicata* requires essentially the same elements. See, e.g., *Napier v Jones*, Ky. App., 925 S.W.2d 193 (1996).

In its brief, Harmon stated the following issues:

- A. Whether RCRA bars EPA from seeking a penalty from a regulated entity which has settled all RCRA claims with an authorized State, since the statute provides that actions of an authorized State have "the same force and effect" as actions by EPA.
 - B. Whether EPA's penalty claim is barred by res judicata in light of the consent decree entered between Harmon and MDNR settling the same claims, under the same regulations, concerning the same facts.
 - C. Whether EPA's penalty claim is barred by the governing statute of limitations, given that, by EPA's own admission, each of its claims against Harmon "first accrued" more than 5 years before EPA filed suit.
- d) 8th Circuit's Ruling

On September 16, 1999, the Eighth Circuit affirmed the district court's opinion.²¹ The appeals court followed the district court's reasoning. First, the court found that Missouri's hazardous waste program – including its enforcement aspects -- operates "in lieu of" the federal hazardous waste program. The 8th Circuit found that the plain language of §6926(b) reveals a congressional intent for an authorized state program to supplant the federal hazardous waste program in all respects, including enforcement. If EPA becomes dissatisfied with the state agency's operation and enforcement of its program and rules, EPA can, under RCRA, withdraw its authorization. It cannot, however, file its own enforcement action.

²¹ *Harmon Industries v. Browner*, 191 F.3d 894 (8th Cir. 1999).

The 8th Circuit also relied on RCRA's §6926(d), which provides that "any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the [EPA]," to conclude that state action *substitutes for* federal action, even in the enforcement arena.

Finally, the 8th Circuit found that state law principles of *res judicata* precluded the EPA from filing its own federal enforcement action. The court held that Missouri law *res judicata* requirements had been satisfied – that EPA and Missouri were “in privity” for these purposes -- and, therefore, the EPA federal action seeking civil fines was barred.

EPA chose not to seek certiorari to the Supreme Court, apparently preferring to preserve the argument that the impact of *Harmon* should be confined to the 8th Circuit.

F. Overfiling in Kentucky

EPA and the Kentucky Environmental Protection Cabinet have engaged in a dialogue relating to whether Kentucky's hazardous waste program has been adequately enforced.²² EPA appears to be of the opinion that it has not.

Consequently, EPA has overfiled the Kentucky Division of Waste Management (“KDWM”) in at least one enforcement matter. Because EPA and KDWM both have asserted confidentiality regarding the identity of the targets of EPA attention, neither agency will identify those targets.

²² Copies of correspondence between EPA and KDWM were obtained through the Freedom of Information Act and Kentucky's Open Records Act. To obtain a copy of that correspondence, contact the author.

However, this author was currently dealing with such a case at the time these materials were prepared.

II. Passive Migration: *U.S. v. 150 Acres of Land*

Is “passive migration” – the movement of previously deposited hazardous substances through land or water without human activity – a “release” that will defeat the “innocent purchaser” defense? The 6th Circuit has held that “passive migration” is not a “release.”

Under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”),²³ “innocent purchasers” have a complete defense to liability. CERCLA’s Section 107(b) provides:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by –

- (1) an act of God;
- (2) an act of war;
- (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts

²³ 42 U.S.C. §9601, et seq.

- and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
- (4) any combination of the foregoing paragraphs.

The definition of "contractual relationship" is contained in CERCLA's Section 101(35):

- (A) The term "contractual relationship", for the purpose of sections 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:
- (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.
 - (ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.
 - (iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that he has satisfied the

requirements of section 9607(b)(3)(a) and (b) of this title.

- (B) To establish that the defendant had no reason to know, as provided in clause (i) of subparagraph (A) of this paragraph, the defendant must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. For purposes of the preceding sentence the court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.
- (C) Nothing in this paragraph or in section 9607(b)(3) of this title shall diminish the liability of any previous owner or operator of such facility who would otherwise be liable under this chapter. Notwithstanding this paragraph, if the defendant obtained actual knowledge of the release or threatened release of a hazardous substance at such facility when the defendant owned the real property and then subsequently transferred ownership of the property to another person without disclosing such knowledge, such defendant shall be treated as liable under section 9607(a)(1) of this title and no defense under section 9607(b)(3) of this title shall be available to such defendant.
- (D) Nothing in this paragraph shall affect the liability under this chapter of a defendant who, by any act or omission, caused or contributed to the release or threatened release of a hazardous substance which is the subject of the action relating to the facility.

Thus, a purchaser who can demonstrate that any release of a hazardous substance and the resulting damages were caused solely by a previous owner and that the purchaser undertook "all appropriate inquiry" concerning the environmental condition of the property before acquiring it and did not know, and had no reason to know, that the property was contaminated with a hazardous substance at the time of acquisition is an "innocent purchaser" and has a complete defense to CERCLA liability.

In *150 Acres of Land*²⁴, the district court was presented with evidence that the defendants had "failed to remove or stabilize drums" containing hazardous substances. For this reason, the court concluded that the defendants could not prove that the release was "caused solely by an act or omission of a third party...."²⁵ Based on that conclusion, the court held that the defendants could not qualify for the "innocent purchaser" defense.

On appeal, the 6th Circuit observed that "the district court evidently was not entirely clear about the elements of and defenses to CERCLA liability."²⁶ The 6th Circuit found the distinction between "disposal" and "release" significant. It stated: "in the absence of evidence that there was human activity involved in whatever movement of hazardous substances occurred on the property since the [defendants] owned it, we hold that the [defendants] have not "disposed" of hazardous substances on the

²⁴ 204 F.3d 698, (6th Cir. January 20, 2000).

²⁵ *Id.*

property.”²⁷ For this reason, the 6th Circuit reversed the district court’s ruling that the defendants could not qualify for the “innocent purchaser” defense.

III. Transfer of Environmental Liability by Contract: *White Consolidated Industries v. Westinghouse Electric Corp.*

What is the standard for an effective contractual transfer of environmental liabilities between vendor and purchaser? The 6th Circuit recently addressed this issue in *White Consolidated Industries, Inc. v. Westinghouse Electric Corp.*²⁸

In *White*, Westinghouse had operated a manufacturing facility from 1951 through 1974. In 1975, Westinghouse sold the property to White. In the purchase agreement, White assumed “[a]ll obligations and liabilities of the Business, contingent, or otherwise, which are not disclosed or known to Westinghouse on the Closing Date and are not discovered by [White] within a period of one year from the Closing Date.”²⁹

The 6th Circuit concluded from this language that White “agreed to assume...unknown environmental liabilities when it purchased Westinghouse’s business operations.”³⁰

IV. Damages Evidence in Contamination Cases: *Rockwell International Corp. v. Wilhite, et al.*

Is a real estate appraiser’s testimony that contamination diminishes property value admissible where the opinion is based on the unsupported

²⁶ *Id.*

²⁷ *Id.*

²⁸ 179 F.3d 403 ((6th Cir. May 27, 1999).

²⁹ *Id.*

conclusion that *any* quantity of contamination – no matter how small – is harmful? In this case, the Kentucky Court of Appeals held the trial court's admission of such testimony was an abuse of discretion.

Rockwell appealed from a Logan Circuit Court judgment awarding over seventy landowners more than \$7 million in compensatory damages – representing the fair market value of all their properties – and \$210 million in punitive damages. The jury had concluded that Rockwell had contaminated the properties with PCBs. On appeal, Rockwell argued that the plaintiffs failed to prove that low levels of PCBs caused any damage and that, therefore, the real estate appraiser's testimony – based upon his unsupported assumption that such damage had been caused – was inadmissible.

The Kentucky Court of Appeals observed that:

[a]n essential element of the landowners' claim is that the presence of PCBs interferes with their right to exclusive possession by causing actual harm to their property. The landowners have proved that their properties have a level of PCB contamination that, at least in some instances, exceeds the level acceptable to the Natural Resources and Environmental Protection Cabinet. What they have failed to prove is that additional PCB exposure at low levels equals additional risk to themselves, their crops or their farm animals. The landowners must prove more than the mere presence of PCBs on their property; they must prove that the PCBs have somehow harmed their property. And the only way they can do so is by showing that PCBs in the quantities present on their properties are a health hazard. This they have failed to do.³¹

³⁰ *Id.*

³¹ *Rockwell International Corp. v. Wilhite, et al.*, 2000 WL 95282 (Ky.App., Jan 14, 2000) (NO. 1997-CA-000188-MR, 1997-CA-000210-MR, 1997-CA-000348-MR) (footnotes omitted).

In so concluding, the court found that the appraiser's unsupported opinion could not form the basis for a damage award. The court therefore reversed.

V. Individual Liability Under Kentucky Environmental Law

A Hearing Officer for the Kentucky Natural Resources and Environmental Protection Cabinet has issued a Report and Recommended Secretary's Order containing an exhaustive examination of whether, and if so under what circumstances, individual liability may be imposed under Kentucky's environmental laws. *In Natural Resources and Environmental Protection Cabinet v. Cumberland Wood and Chair Corp., Robert M. Kupchick and Jerome J. Pawlak, DOW-18965-042, DWM-13064-042, filed May 8, 1998* in the Office of Administrative Hearings, the Hearing Officer issued a 109-page Report and Recommended Secretary's Order. The Hearing Officer examine Kentucky, as well as federal, environmental cases in setting forth a test for when individual liability may be imposed.

The Hearing Officer stated:

[i]n certain limited instances involving a violation which resulted in or could potentially harm the public health or environment, an individual or corporate officer can be considered an owner or operator of a hazardous waste facility for purposes of imposing liability, irrespective of the corporate formalities that may be in place.

An examination of the cases indicates that the standard for imposing liability is in effect a balancing test and ... the factors that are to be examined include: (1) the seriousness of the violation, (2) the degree of control exercised by the corporate officer or agent over the affairs of the corporation

and (3) the amount of the corporate officer's or agent's knowledge, participation, or culpability in the violation.

Id. at p.94-95.

In applying this test, the Hearing Officer found the individual defendants liable for various violations regardless of the existence of a corporation with which they were associated.

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LEGISLATIVE UPDATE:
THE KENTUCKY GENERAL ASSEMBLY
- 2000 REGULAR SESSION -

Carl W. Breeding
Greenebaum Doll & McDonald PLLC
Frankfort, Kentucky

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SECTION B

ENVIRONMENTAL LEGISLATION UPDATE
The Kentucky General Assembly 2000 Regular Session

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2000 ENVIRONMENTAL LEGISLATION

Out of the 1441 bills introduced in the 2000 regular session of the Kentucky General Assembly, relatively few, in comparison to previous sessions, dealt with environmental issues. Most of the environmental bills introduced were not enacted by the legislature. The following is a summary of certain key environmental bills introduced in the session.

WATER SUPPLY

Senate Bill 409, introduced by Senate Majority Floor Leader Dan Kelly, was passed to create a program through which incentives are provided to both public and private water concerns in order to provide water to all areas of Kentucky by the year 2020. Amended in the House to accommodate many of Governor Patton's interests, the bill establishes an account within the Kentucky Infrastructure Authority and empowers the Authority to manage a program, including low interest loans, to foster the goals of the bill. The bill is designed to meet its goals by the promotion of regionalization of water services, achieved through the management and advice of regional water planning councils, area development districts, and the Authority.

REGULATION DEVELOPMENT

House Bill 856 establishes new procedures under KRS Chapter 13A for administrative regulations proposed by state agencies. This bill was passed by both chambers of the legislature, but was vetoed by the Governor. The legislature, during the final days of the session, overrode the veto; hence, the bill will become law. In addition to several technical changes to KRS Chapter 13A, the bill requires extended notice requirements for agencies that file regulations proposing to establish or increase fees. The bill further amends an agency's obligations with respect to the contents of the regulatory impact analysis required to be attached to each proposed regulation. The amendments include a clearer set

of parameters to be followed by the agency, including the types of entities affected by the regulation, as well as the impact and costs to those entities. The bill also creates new procedures for the review of regulations during periods when the legislature is in session.

WASTE

House Bill 643 was introduced to extend in perpetuity the hazardous waste assessment fee, which is paid by generators and handlers of most types of hazardous waste. Existing law contains a provision that the fee would sunset on June 30, 2000. The bill passed the House with the sunset removed, but the Senate Appropriations and Revenue Committee amended the bill to provide a sunset date of June 30, 2002. The bill was enacted with the new sunset date intact. The new sunset provision allows the General Assembly sufficient time to study the sources of the funds, as well as the purposes for which the funds are used by the Cabinet.

House Bill 756 creates an exemption for composted waste water treatment sludge by colleges and universities from the requirements applicable to special wastes. In addition, **House Bill 579** amends the hazardous waste requirements for the treatment, storage, or disposal of chemical munition compounds.

House Bill 1, the "Bottle Bill," was introduced by Greg Stumbo. The original bill sought to establish mandatory solid waste collection, financed by the use of a tax on certain containers and an advance disposal fee for other types of containers. By the time a vote was taken on the House floor, the bill was amended to provide that the solid waste collection was to be financed through the use of a flat environmental fee to be paid by all businesses that collect sales taxes. The bill was defeated on the House floor. In an effort to rekindle the purpose of House Bill 1, Stumbo introduced **House Bill 745**, which would have created a constitutional referendum on the "Bottle Bill." The bill, which passed the House, died in the Senate Agriculture and Natural Resources Committee.

Senate Bill 290 would have created a voluntary cleanup/brownfields program to be administered in conjunction with KRS 224.01-400 and KRS 224.01-405. Several states have passed such measures, which promote the redevelopment of underused or idle property and provide incentives for persons voluntarily remediating contaminated property. The bill, co-sponsored by Senator Bob Leeper and Senator David Karem, passed the Senate and, by agreement with the Natural Resources and Environmental Protection Cabinet, municipal interests, and business interests, was substantially amended in the House Natural Resources and Environment Committee. Although the bill was poised for a vote to be taken on the House floor, it was recommitted to the House Appropriations and Revenue Committee late in the session to die.

Senate Bill 179 was introduced to address problems relating to perceived nuisances created by solid waste sites or facilities. The bill, as passed by the Senate, would have required the Natural Resources and Environmental Protection Cabinet to place conditions in permits to prevent public nuisances due to blowing litter, debris, or other waste or material, or because of odor, noise, light, or traffic congestion. The bill was not heard by the House Natural Resources and Environment Committee and died there.

VEHICLE EMISSION TESTING

Several bills were introduced during the 2000 session relating to vehicle emission testing programs conducted throughout the state. **House Bill 236** exempts motorcycles from the vehicle emission testing requirements. **House Bill 314** provides for a reciprocal vehicle emission testing certificate to be issued to a person who relocates from a state in which that person's vehicle had been tested under the previous state's program. **Senate Bill 14** prohibits local air pollution control districts from regulating sources other than those regulated under the state's program.

UNDERGROUND STORAGE TANKS

House Joint Resolution 70, primarily sponsored by Representative Robin Webb, directs the Public Protection and Regulation Cabinet and the Natural Resources and Environmental Protection Cabinet to enter into a memorandum of understanding to better coordinate their respective responsibilities regarding the underground petroleum storage tank program. **Senate Bill 21** requires that persons submitting requests for reimbursement from the Petroleum Storage Tank Environmental Assurance Fund certify by affidavit that all subcontractors and vendors have been paid, unless the subcontractor waives its right to seek payment from the owner. In addition, the bill extends the registration date for eligible tanks to July 15, 2002 and provides for liability for persons submitting false and misleading information to the Fund.

COAL, OIL & GAS

The legislature also passed several bills relating to mining and natural resources. These include:

- **House Bill 404** relating to increased training and education requirements for miners;
- **House Bill 436** relating to mine safety and the jurisdiction of the Department of Mines and Minerals;
- **House Bill 599** relating to the termination of noncompliance and cessation orders and the creation of easements of necessity to abate violations;
- **House Bill 616** relating to the issuance of permits for oil or gas wells and boundaries of leaseholds; and,
- **House Bill 792** relating to road construction on highwalls.

ISSUES UNDER
THE NATIONAL ENVIRONMENTAL POLICY ACT
AND RELATED REQUIREMENTS

Timothy J. Hagerty
Brown, Todd & Heyburn PLLC
Louisville, Kentucky

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**ISSUES UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)
AND OTHER RELATED REQUIREMENTS**

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SECTION C

I. Environmental Review Under the National Environmental Policy Act

A. Background

1. The Statute: The National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA"), was enacted to create a framework within the Federal government for including environmental considerations among the factors ordinarily examined in the decision-making process. The heart of NEPA is the environmental impact statement ("EIS"), which must be prepared for all major federal actions significantly affecting the quality of the human environment. An EIS must include a detailed statement of:

- a. the environmental impact of the proposed action;
- b. any adverse environmental effects which cannot be avoided should the proposal be implemented;
- c. alternatives to the proposed action;
- d. the relationship between local short-term uses of the human environmental and the maintenance and enhancement of long-term productivity; and
- e. any irreversible and irremediable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C). The EIS requirement must be satisfied by the federal agency responsible for the proposed action. The responsible agency must consult with other federal agencies that have jurisdiction or special expertise with respect to any environmental impact involved, and must provide the public with notice and an opportunity to comment on the proposed action.

The principal purpose of the EIS is to ensure that agencies give proper consideration to the environmental consequences of their actions and that the public is informed about the environmental impact of proposed agency actions. Nevertheless, NEPA is a procedural statute, specifying particular procedures that must be followed in making a project decision; it does not mandate any particular substantive outcome. Thus, the agency is not required to select the environmentally preferable alternative.

2. The Regulations: The Council on Environmental Quality ("CEQ") has adopted regulations to implement the requirements of NEPA, including the EIS requirements. See 40 C.F.R. parts 1500-08. In addition, many federal agencies have developed their own agency-specific regulations and

guidance documents to better integrate the NEPA requirements into that Agency's mission.

B. Categorical Exclusions and Environmental Assessments

In determining whether to prepare an EIS, the federal agency must determine whether the proposed action is one which:

1. **Normally requires an EIS:** In this case, some environmental documentation is required, and the presumption is that an EIS is required. However, if the agency believes that an EIS is nevertheless unnecessary, it may be able to demonstrate that no EIS is required through the preparation of an Environmental Assessment ("EA") (see discussion below and 40 C.F.R. §§ 1501.3, 1508.9); or
2. **Normally does not require either an EIS or an EA:** In this case, the project may fit within a "categorical exclusion," exempting the agency from the requirement to prepare any environmental documentation. Individual agencies generally adopt regulations containing categorical exclusions for certain projects typically sponsored by such agencies.
3. **EAs:** If the proposed action does not fit within a categorical exclusion, the agency must at least prepare an EA, which is a concise document that serves to provide sufficient information concerning the project's likely environmental impacts to determine whether an EIS must be prepared. The EA must describe briefly the need for and alternatives to the proposal, the environmental impacts of the proposed action and alternatives, and a list of agencies and persons contacted. 40 C.F.R. § 1508.9. (An EA need not be prepared if the agency has decided to prepare an EIS.)
4. **Final documents:** After completing an EA, the agency must prepare one of the following documents:
 - a. An EIS, if the agency determines that the proposed action may have significant effects on the human environment.
 - b. A Finding of No Significant Impact, or "FONSI," presenting the reasons why an action will not have a significant impact on the human environment, and for which an EIS therefore will not be prepared. The EA (or a summary) should be appended to the FONSI. 40 C.F.R. § 1501.4(e), 1508.13. The agency may proceed with the proposed action based on the FONSI, after sufficient notice to the public.

Note: If a proposed action is closely similar to one which normally requires an EIS, the agency must make the FONSI available for

public review for 30 days before making a final determination. 40 C.F.R. § 1501.4(e)(2).

C. Environmental Impact Statement

1. Scoping: The regulations require an “early and open” process for determining the scope of issues to be addressed in the EIS. This process includes a Federal Register notice describing the proposed action, possible alternatives, and the scoping process. The agency must invite the participation of affected government agencies, Indian tribes, the proponent of the action, and other “interested persons.” 40 C.F.R. § 1501.7.
2. Contents of EIS: An EIS must include the following elements:
 - Summary: Stresses major conclusions, areas of controversy, and issues to be resolved.
 - Statement of Purpose and Need: States the underlying purpose and need to which the agency is responding.
 - Alternatives Analysis: This is the “heart” of the EIS, presenting the environmental impacts of the proposed action and the alternatives, in comparative form. This must include all “reasonable” alternatives, including those not within the jurisdiction of the lead agency, as well as the “no action” alternative. The preferred alternatives should be identified, if one exists.
 - Affected Environment: Succinctly describes the environment of the area to be affected.
 - Environmental Consequences: Discusses the environmental impacts of the proposed action and alternatives, including: direct and indirect effects and their significance; energy and natural resource requirements and conservation potential of various alternatives and mitigation measures; urban quality, historic, and cultural resources; and means to mitigate adverse environmental impacts.
 - List of preparers.
 - Appendices (material related to EIS and its analyses).

See 40 C.F.R. § 1502.10-1502.19.

The analysis of "indirect effects" includes "cumulative effects," defined as the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes those other actions. Such effects can result from individually minor but collectively significant actions taking place over a period of time. 40 C.F.R. § 1508.7. "Indirect effects" also include "growth inducing effects" of the proposed action. 40 C.F.R. § 1508.8.

3. Summary of EIS Preparation Process: The EIS must be prepared in two stages, and also may be supplemented.

- a. A *Draft Environmental Impact Statement*, or "DEIS," must be prepared first. The DEIS must satisfy to the fullest extent possible the statutory requirements for a final EIS.

The agency must publish the DEIS and obtain comments on it from any federal agency that has jurisdiction or special expertise with respect to any environmental impact associated with the proposed action, or that is authorized to develop and enforce environmental standards (e.g., EPA, U.S. Fish & Wildlife Service, etc.). The agency also must seek comments from certain state and local agencies, Indian tribes, the applicant (if any), and the public. See 40 C.F.R. part 1503.

- b. A *Final Environmental Impact Statement*, or "FEIS," must respond to all comments received on the DEIS, including any responsible opposing view that was not adequately discussed in the DEIS and the agency's response to such views. The agency may respond to comments by modifying alternatives (including the proposed action), developing and evaluating new alternatives, supplementing or modifying its analyses, making factual corrections, or explaining why the comments do not warrant further response. All substantive comments (or summaries) must be attached to the FEIS. 40 C.F.R. § 1503.4.

The agency may (but need not) request comments on the FEIS before making a final decision. Other agencies and persons may, in any case, make comments before a final decision is made.

- c. A *Supplemental EIS* must be prepared (for either a DEIS or FEIS) if:

- (1) the agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

- (2) there are significant new circumstances or information relevant to environmental concerns that bear on the proposed action or its impacts.

The agency also may prepare a Supplemental EIS if it determines that the purposes of NEPA would be furthered by doing so. The same procedures and requirements apply to Supplements as apply to DEISs and FEISs. 40 C.F.R. § 1502.9(c).

4. Record of Decision: After making a final project decision, the responsible agency must provide a concise statement of its decision—called a Record of Decision, or “ROD.” The ROD should identify all alternatives considered and specify the alternative(s) deemed to be environmentally preferable. The agency also must identify the considerations that entered into its decision. Finally, the ROD must state whether all practicable means to avoid or minimize environmental harm have been adopted, and if not, why they were not. 40 C.F.R. § 1505.2.

An agency may not issue a ROD until the later of 90 days after the Federal Register notice of the public availability of the DEIS or 30 days after the Federal Register notice of the public availability of the FEIS.

5. Agency Cooperation: If more than one agency is involved in the proposed action, a “lead agency” shall supervise the preparation of the EIS. Other federal agencies with jurisdiction by law over all or a portion of the project or its impacts will be “cooperating agencies.” Agencies with special expertise also may be cooperating agencies, upon the request of the lead agency. Cooperating agencies participate in the NEPA process from the outset, including scoping, preparing the environmental documentation, and commenting on the EIS. See 40 C.F.R. §§ 1501.5-1501.6.

EISs also should, to the extent possible, be prepared concurrently and in integration with environmental analyses and studies under the Fish and Wildlife Coordination Act (16 U.S.C. § 661 et seq.), the National Historic Preservation Act (16 U.S.C. § 470 et seq.), the Endangered Species Act (16 U.S.C. § 1531 et seq.), and other environmental review laws and executive orders. 40 C.F.R. § 1502.25. EISs should include a discussion of Environmental Justice issues, pursuant to Executive Order No. 12898.

II. Judicial Review Under NEPA

- A. Private right of action: NEPA itself does not provide a private right of action for violations of its provisions. Absent any right of action in the statute, the courts have found that agency actions are reviewable under the judicial review provision of the Administrative Procedure Act, 5 U.S.C. § 701 et seq. (“APA”). Under that

provision, an agency decision may be set aside only if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” or was undertaken “without observance of procedures required by law.” Id. § 706(2)(A), (D). This review standard is narrow, and the reviewing court may not substitute its judgment for that of the agency. Marsh v. Oregon Natural Resources Council, 109 S. Ct. 1851, 1861-62 (1989). The reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.

B. Constitutional and statutory standing: In order to bring a NEPA challenge under the APA, prospective plaintiffs first must satisfy Constitutional and statutory standing requirements. Because Article III of the U.S. Constitution limits the role of the federal judiciary to resolving cases and controversies, plaintiff standing is a necessary predicate to federal court jurisdiction. Thus, any potential NEPA plaintiff must satisfy the following Constitutional standing requirements:

1. Injury-in-fact. The injury must be concrete and particularized, rather than conjectural or hypothetical.
2. Causation. It must be substantially probable that the challenged acts of the defendants will cause the particularized injury of the plaintiff.
3. Redressability. The relief sought must be shown to be likely to alleviate the particularized injury alleged by the plaintiff.

C. Final agency action and zone of interest: In addition, to bring an action under the APA, a prospective plaintiff also must identify some “final agency action” (e.g., issuance of a ROD) and must demonstrate that its claims fall within the “zone of interests” protected by the statute forming the basis of its claims (e.g., NEPA). The courts generally have found that economic injuries are not within the zone of interests protected by NEPA. It is clear, on the other hand, that injuries to a part of the environment that the plaintiff enjoys on a regular basis would satisfy the zone of interests test and establish plaintiff’s standing.

III. Selected Issues in NEPA Compliance

A. “Purpose and Need”

The CEQ regulations say very little about what is required in the statement of “purpose and need” for the proposed action, but this statement nevertheless has become the subject of increased controversy in recent years.

1. CEQ Regulation: “Purpose and need. The [EIS] shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” 40 C.F.R. § 1502.13.

2. Judicial Interpretation. Federal courts generally will accord a high degree of deference to an agency's formulation of purpose and need, but that deference is not absolute. Several recent decisions have emphasized the importance of the statement of purpose and need.
- a. Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664 (7th Cir. 1997): "When a federal agency prepares an Environmental Impact Statement (EIS), it must consider 'all reasonable alternatives' No decision is more important than delimiting what these 'reasonable alternatives' are To make that decision, the first thing an agency must define is the project's purpose. [Citation omitted.] The broader the purpose, the wider the range of alternatives; and vice versa. The 'purpose' of a project is a slippery concept, susceptible of no hard-and-fast definition. One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role." Id. at 667.
- b. Sierra Club v. U.S. Department of Transportation, 962 F. Supp. 1037 (N.D. Ill. 1997): The District Court rejected the subject EIS because, among other things, the final statement "relies on the implausible assumption that the same level of transportation needs will exist whether or not the tollroad is constructed. In particular, the final impact statement contains a socioeconomic forecast that assumes the construction of a highway such as the tollroad and then applies that forecast to both the build and no-build alternatives. The result is a forecast of future needs that only the proposed tollroad can satisfy. As a result, the final impact statement creates a self-fulfilling prophecy that makes a reasoned analysis of how different alternatives satisfy future needs impossible" The court also faulted the EIS for failing to justify current transportation "needs" that it relied on in defining alternatives. The court also noted that the objectives of "providing a 'north-south transportation corridor linking Interstate Route 55 and Interstate Route 80', and completing a project that has been 'an element of regional and county transportation plans for over thirty years'" were goals that could only be satisfied by the proposed tollroad. The court concluded that, "[w]ithout justifying these current needs and without justifying project needs, it becomes impossible to assess any of the possible alternatives." Id. at 1042-44.

- c. City of Carmel-by-the-Sea v. U.S. Dep't of Transportation, 95 F.3d 892 (9th Cir. 1996): By materially changing the statement of purpose and need between the Draft EIS and Final EIS without also considering an acceptable range of alternatives designed to meet the changed purpose, the agency failed to consider a range of alternatives which were dictated by the nature and scope of the proposed action and which were sufficient to permit a reasoned choice. A reasonable range of alternatives must remain open to consideration under a new statement of purpose and need.
- d. Citizens Against Burlington v. Busey, 938 F.2d 190 (D.C. Cir. 1991), cert. denied, 502 U.S. 994 (1991): "We have held before that an agency bears the responsibility for deciding which alternatives to consider in an environmental impact statement. We have also held that an agency need follow only a 'rule of reason' in preparing an EIS, and that this rule of reason governs 'both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them.' It follows that the agency thus bears the responsibility for defining at the outset the objectives of any action. As the phrase 'rule of reason' suggests, we review an agency's compliance with NEPA's requirements deferentially. We uphold an agency's definition of objectives so long as the objectives that the agency chooses are reasonable, and we uphold its discussion of alternatives so long as the alternatives are reasonable and the agency discusses them in reasonable detail. . . . Deference, however, does not mean dormancy, and the rule of reason does not give agencies license to fulfill their own prophecies, whatever the parochial impulses that drive them. . . . [A]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would become a foreordained formality. Nor may an agency frame its goals in terms so unreasonably broad that an infinite number of alternatives would accomplish those goals and the project would collapse under the weight of the possibilities. Instead, agencies must look hard at the factors relevant to the definition of purpose. When an agency is asked to sanction a specific plan, the agency should take into account the needs and goals of the parties involved in the application. Perhaps more importantly, an agency should always consider the view of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives." Id. at 195-96.

B. Range of Alternatives

1. The Statute.

- a. Section 402(2)(C) of NEPA (the EIS requirement) calls for a “detailed statement by the responsible official on . . . (iii) alternatives to the proposed action.” 42 U.S.C. § 4332(2)(C)(iii).
- b. Section 402(2)(E) also states: “The Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the Federal Government shall . . . study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E) (emphasis added).

2. The Regulations.

- a. The alternatives analysis is the “heart of the environmental impact statement.” 40 C.F.R. § 1502.14.
- b. The alternatives analysis must:
 - i. “Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.”
 - ii. “Devote substantial treatment to each alternatives considered in detail” to ensure a fair evaluation of their comparative merits.
 - iii. Examine alternatives that are not within the jurisdiction of the lead agency, if those alternatives would accomplish the agency’s purpose and need.
 - iv. Include the “no action” alternative.
 - v. Identify the agency’s “preferred alternative.
 - vi. Include appropriate mitigation measures not already included in the proposed action or alternatives.

40 C.F.R. § 1502.14.

- c. The agency must not “commit resources prejudicing selection of alternatives before making a final decision.” 40 C.F.R. § 1502.2(f). Prior to issuance of the ROD, the agency cannot take any action to “limit the choice of reasonable alternatives,” or allow any non-Federal applicant to take such action. 40 C.F.R. § 1506.1(a)(1), (b).

3. Selected Judicial Decisions.

- a. NRDC v. Morton, 458 F.2d 827, 837-38 (D.C. Cir. 1972): Mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion, “particularly since NEPA was intended to provide a basis for consideration and choice by the decisionmakers in the legislative as well as the executive branch.”
- b. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978): “[C]oncept of alternatives must be bounded by some notion of feasibility. . . . [EIS] cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man.”
- c. Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm’n, 449 F.2d 1109, 1128 (D.C. Cir. 1971): “NEPA requires that an agency must—to the fullest extent possible under its other statutory obligations—consider alternatives to its actions which would reduce environmental damage.”
- d. Roosevelt Campobello Int’l Park Comm’n v. EPA, 684 F.2d 1041, 1046-47 (1st Cir. 1982): “EPA’s evaluation of alternatives was explicitly based on the premise that its role in reviewing privately sponsored projects ‘is to determine whether the proposed site is environmentally acceptable,’ and not, as in the case of a publicly funded project, ‘to undertake to locate what EPA would consider to be the optimum site for a new facility.’ . . . EPA’s duty under NEPA is to study all alternatives that ‘appear reasonable and appropriate for study at the time’ of drafting the EIS, as well as ‘significant alternatives’ suggested by other agencies or the public during the comment period. In order to preserve an alternatives issue for review, it is not enough simply to make a facially plausible suggestion; rather, an intervenor must offer tangible evidence that an alternative site might offer ‘a substantial measure of superiority’ as a site.”

C. Connected Actions and "Segmentation"

1. The Regulations.

a. The CEQ regulations provide that "[t]o determine the scope of environmental impact statements, agencies shall consider 3 types of actions They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. Any agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement."

40 C.F.R. § 1508.25.

b. The CEQ regulations also provide that "[w]hen preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

- (1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.
- (2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.
- (3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment.”

40 C.F.R. § 1502.4(c).

- c. In evaluating the “intensity” of a proposed action—in order to determine whether it will have a “significant” environmental effect—an agency is required to consider “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or breaking it down into small component parts.” 40 C.F.R. § 1508.27(b)(7) (emphasis added).

2. Selected Judicial Decisions.

- a. Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976):
 - i. When several proposals for coal-related actions that will have cumulative or synergistic environmental impact on region are pending concurrently before an agency, their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.
 - ii. Statute requires preparation of EIS only for “proposed” actions; it does not require agency consideration of possible environmental impacts of less imminent actions when preparing the impact statement on proposed actions.
- b. City of Tenakee Springs v. Clough, 915 F.2d 1308, 1312 (9th Cir. 1990): “NEPA requires that where several actions have a

cumulative or synergistic environmental effect, this consequence must be considered in an EIS. . . . Where there are large scale plans for regional development, NEPA requires both a programmatic and site-specific EIS. . . . This court has held that where several foreseeable similar projects in a geographical region have a cumulative impact, they should be evaluated in a single EIS." Thus, where agency had examined single project in isolation without considering net impact of all projects, court remanded to agency for further consideration of cumulative impact of all actions.

c. Thomas v. Peterson, 753 F.2d 754, 758-59 (9th Cir. 1985):

- i. Agency is not allowed to divide a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.
- ii. Construction of timber access road and sale of timber in National Forest meet second and third (and possibly first) criteria for "connected actions." "It is clear that the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales. . . . The road construction and the contemplated timber sales are inextricably intertwined, and "connection actions" within the meaning of the CEQ regulations."
- iii. See also Save the Yaak Committee v. Block, 840 F.2d 714 (9th Cir. 1988).

D. Indirect and Cumulative Impacts

1. The Regulations.

- a. "Effects" include "direct effects, which are caused by the action and occur at the same time and place," and

"Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological . . . aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.”

40 C.F.R. § 1508.8 (emphasis added).

- b. “Cumulative impact” is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7 (emphasis added).

2. Selected Judicial Decisions.

- a. Preliminary note: Growth-inducing and cumulative impacts are most often important in determining whether a proposed action may have a “significant impact” on the human environment, and thus, whether an EIS must be prepared. The goal of the proponent often is to avoid having to “take ownership” of the effects of other actions that may or may not occur in the area.
- b. Coalition on Sensible Transportation v. Dole, 826 F.2d 60, 70-71 (D.C. Cir. 1987): It “makes sense to consider . . . cumulative effects by incorporating the effects of other projects into the background ‘data base’ of the project at issue, rather than by restating the results of the prior studies.” In this case, the EA and FONSI were “sufficient to alert interested members of the public to any arguable cumulative impacts.” See also Piedmont Heights Civic Club v. Moreland, 637 F.2d 430, 441-42 (5th Cir. 1981) (“NEPA does not require an agency to restate all of the environmental effects of projects presently under consideration. Where the underlying data base includes approved project and pending proposals, the ‘statutory minima’ of NEPA has been met.”)
- c. Fritiofson v. Alexander, 772 F.2d 1225, 1245-46 (5th Cir. 1985): Cumulative effects analysis must identify “(1) the area in which effects of the proposed project will be felt, (2) the impacts that are expected in that area from the proposed project, (3) other actions – past, proposed, and reasonably foreseeable—that have had or are expected to have impacts in the same area, (4) the impacts or expected impacts from these other actions, and (5) the overall impact that can be expected if the individual impacts are allowed

to accumulate." EA should "consider (1) past and present actions without regard to whether they themselves triggered NEPA responsibilities and (2) future actions that are 'reasonably foreseeable,' even if they are not yet proposals and may never trigger NEPA-review requirements." See also City of Carmel-by-the-Sea v. Dep't of Transportation, 772 F.2d 1225, 1245 (5th Cir. 1985) (adopting Fifth Circuit's Fritiofson analysis of cumulative impact analysis requirements).

- d. Landmark West! V. U.S. Postal Service, 840 F. Supp. 994 (S.D.N.Y. 1993), aff'd, 41 F.3d 1500 (2d Cir. 1994) (cumulative impact analysis considers other actions as context/background against which incremental effect of proposed action is measured; agency sponsoring proposed action need not "take ownership" of environmental consequences of other actions that provide background for proposed action).
- e. Davis v. Coleman, 521 F.2d 661, 674-76 (9th Cir. 1975): DOT must analyze growth effects of constructing highway interchange in otherwise undeveloped area.
- f. Sierra Club v. Marsh, 769 F.2d 868, 878-79 (1st Cir. 1986): "[A]gencies should have taken account of the 'secondary impacts.' First, . . . building the causeway [to Sears Island] and port [on island] will lead to further development [on island]. . . . Once Maine completes the causeway and port, pressure to develop the rest of the island could well prove irreversible."
- g. Laguna Greenbelt, Inc. v. Dep't of Transportation, 42 F.3d 517, 525-26 (9th Cir. 1994): "Discussion and documentation in the EIS, however, support the EIS's conclusion that the tollroad will not affect the amount and pattern of growth in Orange County." "Record shows that 98.5% of all land in the project's 'area of benefit' is already accounted for by either existing or committed land uses not contingent on construction of the corridor."
- h. Citizens Comm. Against Interstate Route 675 v. Lewis, 542 F. Supp. 496, 563 (S.D. Ohio 1982): Growth discussion unnecessary because Final EIS reflects view of no anticipated "secondary impact primarily because 'the facility has been a part of the regional and community planning for years . . . to control the development of an expanding urban area'" and "impacts and growth have occurred even without the construction."

E. The "Small Federal Handle" Problem

1. The Issue: At what point does federal participation in a project proposed by a non-federal entity (private party, state or local government, etc.) "federalize" the action and subject it to the requirements of NEPA? Also, when must the non-federal portion of an overall project with both federal and non-federal elements be included within the NEPA scope of analysis?
2. Common Situations:
 - a. Nonfederal actions that require federal permits or approvals, such as permits from the U.S. Army Corps of Engineers under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act; or Secretary of the Interior approval of Indian contracts.
 - b. Nonfederal actions eligible for federal assistance, such as mass transit systems; highway construction; housing developments HUD mortgage insurance; and HUD funding for a portion of a project.
3. The Corps' NEPA regulations. This problem seems to arise most commonly in the context of Corps of Engineers permitting actions. In 1984, the Corps adopted its own regulations governing the NEPA process, at 33 C.F.R. part 325, App. B (hereinafter "Appendix B"). The Appendix B regulations codified two seminal cases from 1980 that addressed the "small federal handle" issue in the Corps permitting context.
 - a. Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269 (8th Cir. 1980): The Corps was asked to permit a 1.25-mile river crossing on a proposed 67-mile, nonfederal power line. The Corps' EA focused solely on the river crossing and concluded that no significant environmental impacts could be expected. Plaintiffs challenged the Corps' EA, arguing that, "but for" the Corps' permit, the power line could be built, and therefore, the Corps had sufficient control over the proposal to require an environmental analysis of the entire 67-mile power line.

The Eighth Circuit analyzed the situation under both an "enablement" (or legal control) framework and under a factual control test. In this case, the Corps permit was not found to be "a legal condition precedent" to the entire nonfederal power line project. Likewise, the court found that the Corps lacked sufficient factual, or "veto," control over the project. The court outlined a three-part test to determine factual control, including

- (1) the degree of discretion exercised by the agency over the federal portion of the project;
- (2) whether the federal government has given any direct financial aid to the project; and
- (3) whether the overall federal involvement with the project is sufficient to turn essentially private action into federal action.

621 F.2d at 272. These factors were found lacking in this case.

- b. Save the Bay v. U.S. Army Corps of Engineers, 610 F.2d 322 (5th Cir. 1980): The Corps was asked to issue a permit for the construction of a 2200-foot wastewater discharge pipeline associated with a proposed massive nonfederal titanium dioxide manufacturing facility adjacent to Bay St. Louis, Louisiana. In its EA, the Corps only analyzed the effects of building the outfall pipeline, not the associated nonfederal facility. In upholding the Corps' action, the Fifth Circuit determined that there was an insufficient nexus between the Corps and the construction of the nonfederal plant to make the agency a partner in that construction and thereby "federalize" its construction. Although it explicitly refused to adopt a "but for" test, the court nevertheless noted that the pipeline was not necessary to operate the plant (because another method of discharge, not requiring a Corps permit, was available), and therefore, the Corps lacked factual control over the construction as well.
- c. Appendix B: The Corps' response to the "small federal handle" problem and the decisions of the Fifth and Eighth Circuits is codified in Appendix B. The Corps has identified its "scope of analysis," which defines the scope of activities on a nonfederal project that will be included in the Corps' environmental analysis under NEPA. Appendix B closely tracks the rationale behind Winnebago and Save the Bay, although it was modified somewhat at the suggestion of CEQ, after EPA objected to its initial publication. The goal of the procedures set forth in Appendix B is to allow the NEPA document to "address the impacts of the specific activity requiring a [Corps] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review. . . . The district engineer is considered to have control and responsibility for portions of the project beyond the limits of Corps jurisdiction where the Federal involvement is sufficient to turn an essentially private action into a Federal action. These are cases where the environmental consequences of the larger project are essentially

products of the Corps permit action.” 33 C.F.R. part 325, App. B(7)(b).

4. Selected Judicial Decisions.

- a. Enablement, or Legal Control: Landmark West! v. U.S. Postal Service, 840 F. Supp. 994 (S.D.N.Y. 1993), aff'd, 41 F.3d 1500 (2d Cir. 1994). This case provides one of the most thorough, exhaustive treatments of this issue and provides an excellent introduction to the “small federal handle” issue. In the case, private developers were constructing a mixed use building in New York City that would include a post office, in addition to numerous private commercial and residential facilities. The plaintiffs sought to “federalize” the entire project because of the Postal Service’s involvement. The Postal Service has prepared an EA and FONSI, based on its limited participation in the overall project.

The court concluded that determining the extent of federal involvement requires determining the ability of the federal entity to influence or control the outcome of the project in material respects. That, in turn, depends on a consideration of both de jure and de facto influence. 840 F. Supp. at 1005. Notably, the court stated that “the fact that a federal action is a ‘but for’ cause of a non-federal action does not, in itself, subject the non-federal action to NEPA.” Id. at 1006. The court also found that in the New York project, the Postal Service lacked sufficient legal or factual control—via such factors as its financial participation, contractual rights, and leasing leverage—to “federalize” the project. See also Goos v. Interstate Commerce Comm’n, 911 F.2d 1283, 1294 (8th Cir. 1990); NRDS v. U.S. EPA, 822 F.2d 104 (D.C. Cir. 1987).

- b. Macht v. Skinner, 916 F.2d 13 (D.C. Cir. 1990): Although state light rail project required Section 404 permit to cross wetlands, Corps’ ability to prevent proposed route was insufficient to “federalize” project, even coupled with additional federal funding for preliminary engineering studies and state EISs.
- c. Factual Control: Four general factors have been identified by the courts in determining whether agency has “veto” control over nonfederal project:
- (i) The degree of discretion exercised by the agency over the nonfederal portion of the project, see Save Barton Creek Ass’n v. Federal Highway Adm’n, 950 F.2d 1129, 1134 (5th Cir. 1992);

- (ii) Whether the federal government has given any direct financial aid to the nonfederal project, see Save Barton Creek Ass'n, 950 F.2d at 1135.
- (iii) Whether the overall federal involvement with the project is sufficient to turn an essentially nonfederal action into a federal action, see Landmark West!, 840 F. Supp. 994; Winnebago, 621 F.2d at 272.
- (iv) Whether the nonfederal project will go forward even if the federal action does not (known as the “but for” test):
 - (a) Sugarloaf Citizens Ass'n v. FERC, 959 F.2d 508 (4th Cir. 1992) (no federal control where state authority could have lawfully disregarded FERC criteria and constructed its facility, although without obtaining FERC benefits).
 - (b) Sylvester v. U.S. Army Corps of Engineers, 884 F.2d 394, 400-01 (9th Cir. 1989) (Corps lacked sufficient control over nonfederal resort complex where resort could have gone forward without federal wetlands permit for golf course).
 - (c) Save the Bay, 610 F.2d 322 (entire plant was not “federalized,” because alternative method of effluent discharge was available which did not require Corps permit).

IV. Other Federal Statutes

A. National Historic Preservation Act

Section 106 of the National Historic Preservation Act (“NHPA”) requires every federal agency with jurisdiction over a proposed federal or federally assisted undertaking to “take into account” the effect of that undertaking on historic properties, prior to approving the expenditure of federal funds or issuing a license for the undertaking. 16 U.S.C. § 470f. The Section 106 review process is governed by regulations promulgated by the Advisory Council on Historic Preservation (“ACHP” or “Council”), see 36 C.F.R. part 800 (“Protection of Historic Properties”).

1. Regulatory Framework

The purpose of §106 of the NHPA is to take into account the effect of Federal undertakings on historic properties by identifying historic

properties potentially affected by the undertaking, assessing the effects of the undertaking and seeking to avoid, minimize or mitigate any adverse effects on those properties. 36 C.F.R. § 800.1(a). The process is administered by the sponsoring Federal Agency, in consultation with the State Historic Preservation Officer (“SHPO”), representatives of local governments, the applicant(s) for Federal assistance, if any, and individuals and organizations which have demonstrated an interest in the undertaking. 36 C.F.R. § 800.2. The Agency must “seek and consider views of the public” with due respect to the complexities and individual circumstances of the undertaking. 36 C.F.R. § 800.2(d). The Council also may participate in the consultation when “its involvement is necessary to ensure that the purposes of section 106 and the Act are met” 36 C.F.R. § 800.2(b)(1).

a. The Roles and Obligations of the Parties

- i. Agency Official: The Federal Agency has the statutory responsibility of fulfilling the Section 106 requirements. Id. § 800.2(a). The Agency must ensure that an Agency Official with jurisdiction over the undertaking takes financial and legal responsibility for Section 106 compliance, and that all actions taken on behalf of the Agency meet professional standards. Id. § 800.2(a), (a)(1).
- ii. Contractors: The regulations permit the Agency to use the services of a contractor to prepare information, analyses, or recommendations. Id. § 800.2(a)(3). The Agency, however, remains responsible for satisfying the regulations and for making sure that the contractor’s work meets the appropriate standards. Id.
- iii. Council: Although the Council’s primary responsibility is to implement Section 106 review through promulgating regulations, by giving advice and guidance on the procedures, and by generally overseeing the process, it has some responsibilities involving individual undertakings. Id. § 800.2(b). The Council is to consult with and make comments to the Agency regarding Section 106 review for individual undertakings as needed. There are several stages of the Section 106 review process at which the Council may become involved based upon its own initiation or at the behest of the Agency or the consulting parties.
- iv. State Historic Preservation Officer: The role of the SHPO is to reflect the interests of the State and its citizens in preserving cultural heritage. SHPOs are to advise and

assist the Agency in carrying out Section 106 review. Id. § 800.2(c)(1).

If, at any stage, the SHPO fails to respond to the Agency within thirty days of receipt of a request for review of a finding or determination, the Agency may either proceed to the next step in the Section 106 process using the finding or determination, or may consult with the Council in lieu of the SHPO. If the SHPO later reenters the process, the Agency is not required to reconsider these findings and determinations. Id. § 800.3(c)(4).

- v. Other Consulting Parties: Other parties who have consultative roles in the Section 106 process are the Tribal Historic Preservation Officer; Indian Tribes and Native Hawaiian organizations that attach religious or cultural significance to the historic properties; representatives of local governments that have jurisdiction over the area in which the undertaking may have effects; applicants for federal assistance; and certain individuals and organizations that have a demonstrated interest in the undertaking because of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties. Id. § 800. (c). The regulations define "consultation" as "the process of seeking, discussing, and considering the views of the other participants, and, where feasible, seeking agreement with them" Id. § 800.16(f).

- vi. Public: The regulations state that the views of the public are "essential to informed Federal decisionmaking in the section 106 process." Id. § 800.2(d). However, the Agency is to consider the public's views "in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking." Id. Thus, the Agency can determine what topics are suited to public discussion and how to involve the public on those issues.

b. Initiating the §106 Process

Initiating the §106 Process essentially involves determining if §106 is applicable to the proposed project and contacting all of the parties essential to the review process.

- i. Establishing an Undertaking: The first step in the §106 process is determining whether the Federal action constitutes an “undertaking.” Id. § 800.3(a). An “undertaking” is defined as a “project, activity, or program funded in whole or part under the direct or indirect jurisdiction of a Federal agency . . .” Id. § 800.16(y). Also, the Federal agency needs to determine whether the undertaking is the type of action which could potentially cause effects on historic properties. Id. § 800.3(a).
- ii. Identify the appropriate SHPO and Other Consulting Parties: The next step requires the Agency to identify and contact the SHPO(s) involved, the local governments that have jurisdiction over the area which may be affected, the applicant for federal assistance or approval, if any, and any Indian tribe or Native Hawaiian organizations which may attach religious or cultural significance to historic properties in the project area. Id. § 800.3(f). The agency, in consultation with the SHPO(s), also must consider all written requests from individuals and organizations which have requested to be involved as consulting parties. Id. §§ 800.3(f)(3), 800.2(c)(6).
- iii. Plan to Involve the Public: The Agency should also determine what issues are appropriate for public input and plan how it will notify and involve the public on those issues. Id. § 800.3(e). Public involvement is an important and pervasive requirement in the revised Section 106 regulations.

c. Identifying Historic Properties

The next major step in the § 106 review process involves determining the number and significance of the historic properties which might be affected by the undertaking.

- i. Determining the Area of Potential Effects: The Agency, in consultation with the SHPO, must determine the geographic area in which the undertaking may cause changes to historic properties. Id. §§ 800.4(a), 800.16(d).

Next, the Agency must gather existing information on historic properties within that area and seek new information from the consulting parties, those “individuals and organizations likely to have knowledge of” historic properties in the area, and any tribes identified earlier. Id. § 800.4(a).

- ii. Identify and Evaluate Historic Properties: Using the information gathered, the Agency must then make a good faith effort to identify the historic properties which exist within the Area of Potential Effects. Id. § 800.4(b). Next, the Agency must work with the SHPO to determine whether identified historic properties that are not already listed on the National Register are eligible for registry. Id. § 800.4(c). If there are no historic properties or there will be no effect upon the historic properties that are present, the Agency may conclude the Section 106 process. Id. § 800.4(d)(1). However, if historic properties exist which may be affected, the Agency must continue the Section 106 review and invite the consulting parties’ views on the potential effects. Id. § 800.4(d)(2).

d. Assessing Adverse Effects

If the Agency and the SHPO determine that some eligible historic properties might be affected by the undertaking, they must assess the extent of the adverse effects. Id. § 800.5. An adverse effect exists if the undertaking might diminish, “directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register.” Id. § 800.5(a)(1). Examples of adverse effects include:

- i. “Physical destruction of or damage to all or part of the property,” Id. § 800.5(a)(2)(i);
- ii. “Alteration of the property . . . that is not consistent with the Secretary’s Standards for the Treatment of Historic Properties . . .,” Id. § 800.5(a)(2)(ii); and
- iii. “Introduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features.” Id. § 800.5(a)(2)(v).

Once these determinations are made, the process requires the Agency to seek the agreement of the SHPO and consulting parties concerning its adverse effect findings. If they cannot agree and no

resolution can be made, the regulations look to the Council to help resolve the matter. Id. § 800.5(c).

e. Resolving Adverse Effects

If the agency decides that adverse effects may occur, it must consult with the SHPO and other parties “to develop and evaluate alternatives or modifications that could avoid, minimize or mitigate adverse effects on historic properties.” Id. § 800.6(a).

- i. Memorandum of Agreement: If the Agency, the SHPO, and the Council – if it is a consulting party – agree on how to resolve the adverse effects, they are to execute a Memorandum of Agreement (“MOA”) which details their plans and governs the undertaking. Id. § 800.6(b)(1)(iv). They also may invite the other consulting parties or any party that assumes a responsibility under the MOA to be a signatory, but even if those parties refuse to sign, the MOA is still effective. Id. § 800.6(c)(2). If the Council does not participate in this resolution process, then the Agency must also submit the MOA to the Council before approving the undertaking. Id. § 800.6(b)(1)(iv). The MOA evidences the Agency’s compliance with §106 and terminates the review process. Id.
- ii. Council Involvement: The Council may become involved in the process if the Agency and the SHPO cannot agree, or if it is invited to join by the Agency or another consulting party. Id. §§ 800.6(a)(1), 800.7(a). If it joins the process, the Council will work with the Agency and the SHPO to resolve the adverse effects and to sign an MOA. Id. § 800.6(b)(2).
- iii. Failure to Resolve Adverse Effects: If no agreement can be reached or if the Agency terminates consultation, the Agency must ask the Council to comment on the undertaking. Id. § 800.7(a). The Council also may terminate consultation on its own initiative (if it has been involved) and opt to provide comments. The Agency then must take the Council’s comment into account in reaching a final decision on the undertaking (but is not legally bound by it). Id. § 800.7(c)(4). If the SHPO terminates the consultation, the Council and the Agency may still agree and sign an MOA. Id. § 800.7(a)(2).

2. Special Requirements for Protecting National Historic Landmarks

When the Agency determines that a National Historic Landmark (“NHL”) may be directly and adversely affected by an undertaking, Section 110(f) of the NHPA requires the Agency to minimize harm to the maximum extent possible. 16 U.S.C. § 470h-2(f); 36 C.F.R. § 800.10(a). The Agency must request that the Council participate in consultation to resolve the adverse effects on the NHL and must follow the process outlined in above. 36 C.F.R. § 800.10(b). The Agency also must notify the Secretary of the Interior and invite him to participate in the consultation. Id. § 800.10(c).

3. Similarities Between NEPA and NHPA

While not identical, NEPA and Section 106 of the NHPA are similar in a number of respects. First and foremost, the requirement to prepare an EIS and the requirement to engage in Section 106 consultation are both procedural in nature, not mandating any particular result, but instead specifying a particular process that must be followed in arriving at a result. Further, both statutes explicitly call for coordination between the EIS and Section 106 processes (among others) for projects that implicate issues under each statute. Thus, proposed actions with some sort of federal involvement, funding, or approval will often involve similar compliance issues under both NEPA and Section 106.

Other similarities between NEPA’s EIS requirement and Section 106 consultation include:

- **Actions affected:** Both statutes inject specific concerns—for NEPA, environmental; for Section 106, historic preservation—into the decision-making of federal agencies concerning proposed actions within their jurisdiction. As a practical matter, an action that qualifies as a “major federal action” under NEPA often will qualify as a federal “undertaking” under Section 106 as well, and vice versa.
- **Alternatives:** Both statutes require a consideration of alternatives to the proposed action, with a goal of avoiding or minimizing adverse effects to the extent possible.
- **Coordination with other agencies:** Both statutes require the responsible federal agency to coordinate with and involve other federal, state, and local agencies that have jurisdiction over, or expertise with respect to, the proposed action and its impacts.
- **Public involvement:** Both statutes require public notice and opportunity to comment.

- Effect on project decision: Neither statute ultimately may hold up a project decision, as long as the procedural requirements have been satisfied. The responsible agency must consider and respond to criticisms from other agencies and the public, and include such responses in its final decision documents.

Despite these similarities, certain differences should be kept in mind:

- Study area: The area of potential effects studied under Section 106 may not be the same geographic area that should be studied under an EIS or an EA.
- Adverse effects: Adverse effects may have a different level of significance under NEPA and under Section 106. For example, a particular effect that is “adverse” for Section 106 purposes may be considered an “indirect effect” under NEPA and, thus, may not be as central in the NEPA analysis as it is under Section 106.
- Independent obligations: Although agencies routinely include impacts to cultural resources or historic resources in their EIS analyses, their obligations under Section 106 are independent from NEPA, and must be met even when NEPA obligations do not arise.

B. Section 4(f) of the Department of Transportation Act

Unlike NEPA and Section 106, which are procedural requirements, Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 303 (“Section 4(f)”), imposes substantive requirements on the Department of Transportation and its constituent agencies (primarily the Federal Highway Administration, Federal Transit Administration, and U.S. Coast Guard). Those requirements include the avoidance of certain protected resources, where possible, and the minimization of impacts to such resources, where avoidance is not possible.

1. The Statute. What is commonly referred to as Section 4(f) has been recodified at 49 U.S.C. § 303 and provides:

(a) It is the policy of the United States Government that special effort should be made to preserve the natural beauty of the country-side and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. . . .

(c) The Secretary [of Transportation] may approve a transportation program or project . . . requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of

an historic site of national, State, or local significance (as determined by the Federal, State, or local officials having jurisdiction over the park, area, refuge, or site) only if –

(1) there is no prudent and feasible alternative to using that land; and

(2) the program or project includes all possible planning to minimize the harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.

2. Judicial Interpretation.

a. Substantive standard. The seminal case interpreting Section 4(f) is the decision of the U.S. Supreme Court in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). In that case, the Court found that Section 4(f) is a “plain and explicit bar to the use of federal funds for construction of highways through parks—only the most unusual situations are exempted.” Id. at 411. “The few green havens that are public parks [are] not to be lost unless there [are] truly unusual factors present in a particular case or the cost or community disruption [that would] result[] from alternative routes [would] reach[] extraordinary magnitudes.” Id. at 413. See 23 C.F.R. § 771.135(a)(2) (“Supporting information must demonstrate that there are unique problems or unusual factors involved in the use of alternatives that avoid these properties or that the cost, social, economic, and environmental impacts, or community disruption resulting from such alternatives reach extraordinary magnitudes.”)

b. Review standard. In reviewing Section 4(f) compliance, a court is to consider first “whether the Secretary acted within the scope of his authority,” and second, whether the ultimate decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Id. at 415-17. In applying the arbitrary standard, the court must engage in substantial inquiry in order to determine whether the agency, in its conclusions, made a good faith judgment after considering all relevant factors, including possible alternatives or mitigation measures. Coalition for Responsible Reg’l Dev. V. Coleman, 555 F.2d 398, 399-400 (4th Cir. 1977). The reviewing court will accord substantial deference to the agency’s findings, but must undertake a “thorough, probing, in-depth review” and canvass the facts of Section 4(f) cases “searching[ly] and careful[ly]” because the reviewing court is entrusted to “ensur[e] that the agency looked hard at the pertinent facts and thought hard about the relevant factors.” Citizens

Against Burlington v. Bussey, 938 F.2d 190, 203 (D.C. Cir 1991). Nonetheless, the ultimate standard of review is a narrow one—the court is not empowered to substitute its judgment for that of the agency. Overton Park, 401 U.S. at 416.

3. Identification of Section 4(f) Resources

- a. Historic properties. An historic property is considered a “Section 4(f) resource” if it listed on, or determined to be eligible for listing on, the National Register of Historic Places. See, e.g., 23 C.F.R. § 771.135(e).
- b. Parks, recreation areas, wildlife and waterfowl refuges. Unlike historic properties, which may be considered Section 4(f) resources whether publicly or privately owned, parks, recreation areas, and wildlife and waterfowl refuges must be publicly owned in order to qualify for protection under Section 4(f). Generally, the subject property also must evidence indicia of public access and use.

4. Defining “Use” of a Section 4(f) Resource

A Section 4(f) resource may be “used” by a proposed project either through a “direct use” of the land or through a “constructive use.”

- a. Direct use. A direct use occurs “when land is permanently incorporated into a transportation facility” or “when there is a temporary occupancy of land that is adverse in terms of the statute’s preservationist purposes” 23 C.F.R. § 771.135(p)(1)(i), (ii).
- b. Constructive use. A “constructive” use occurs “when the transportation project does not incorporate land from a section 4(f) resource, but the project’s proximity impacts are so severe that the protected activities, features, or attributes that qualify a resource for protection under section 4(f) are substantially impaired. Substantial impairment occurs only when the protected activities, features, or attributes of the resource are substantially diminished.” 23 C.F.R. § 771.135(p)(2) (emphasis added). See 23 C.F.R. § 771.135(p)(4), (5) (discussion of when constructive use does and does not occur). (NB: A “constructive use” is just as much a use of the property as a “direct use,” and the statute and regulations do not call for any different treatment of the two.)

5. Avoidance Requirement.

An alternative that entirely avoids Section 4(f) resource must be selected unless it is not "feasible and prudent."

- a. Prudent. An alternative is to be considered "prudent" if it will meet the transportation needs of the project. The DOT Act "is similar to NEPA in that the agency bears the responsibility for defining at the onset the transportation goals for a project and for determining which alternatives would reasonably fulfill those goals." Citizens Against Burlington, 938 F.2d at 203-04; see also Committee to Preserve Boomer Lake Park v. Dep't of Transp., 4 F.3d 1543, 1550 (10th Cir. 1993) (holding that "[t]he inability of an alternative to accommodate future traffic volume is justification for rejecting that alternative" and that "[s]afety and cost concerns are also valid considerations in rejecting an alternative"); Hickory Neighborhood Defense League v. Skinner, 910 F.2d 159, 164 (4th Cir. 1990) ("Alternatives which will not solve or reduce existing traffic problems may be properly rejected by the Secretary as not prudent"); Coalition on Sensible Transp. v. Dole, 642 F. Supp. 573, 598 (D.D.C. 1986), aff'd, 826 F.2d 60 (D.C. Cir. 1987) (noting that many courts have concluded that an alternative may be rejected as imprudent for failure to fulfill the traffic needs of a highway project).
- b. Feasible. An alternative is feasible if it is capable of being built, given current engineering standards. This is generally not a source of great controversy.

6. Minimization Requirement.

If there is no "feasible and prudent" alternative that would entirely avoid the use of Section 4(f) resources, the agency then must undertake "all possible planning to minimize the harm" to protected resources. However, the statute has not been interpreted to require the agency to use all means technically possible to minimize harm to the Section 4(f) resources. Rather, under Section 4(f)(2), the agency must "utilize a balancing process that totals the harm caused by each alternative so that an option can be selected which does the least total harm." COST, 642 F. Supp. at 599 (quoting Druid Hills Civic Ass'n v. Federal Highway Adm'n. 772 F.2d 700, 716 (11th Cir. 1985)); see also Conservation Law Found. V. Federal Highway Adm'n., 827 F. Supp. 871, 883-84 (D.R.I. 1993), aff'd, 24 F.2d 1465 (1st Cir. 1994) (noting that § 4(f)(2) calls for simple balancing). The agency may freely choose between plans causing substantially equal damage to Section 4(f) resources. See Druid Hills Civic Ass'n, 772 F.2d at 717.

C. Other Statutes

1. Section 404 of the Clean Water Act: Many public and private projects require permits from the U.S. Army Corps of Engineers for impacts to “navigable waters,” including wetlands, under Section 404 of the Clean Water Act, 33 U.S.C. § 1344. Because the issuance of such permits constitutes federal action, NEPA compliance is generally required for such actions. The Corps’ Section 404 regulatory program contains its own substantive environmental standards, most notably in the EPA-promulgated “Section 404(b)(1) Guidelines,” 40 C.F.R. part 230. These guidelines require the analysis of alternatives and measures to avoid, minimize, and mitigate impacts to aquatic resources. Care must be taken to harmonize the alternatives analysis requirements of NEPA and Section 404, as well as the evaluation of environmental consequences.

Current Hot Topics:

- “Replacement” Nationwide permits: These permits will restrict the use of nationwide permits in situations in which Nationwide Permit 26 could have been used formerly. To the extent that individual permits are required, NEPA compliance issues are complicated.
 - NEPA/404 “merger”: Efforts are being taken in some agencies to integrate the NEPA process and 404 permit process to ensure greater predictability and coordination between the two review processes.
2. Endangered Species Act: Section 7 of the federal Endangered Species Act (“ESA”) requires consultation by federal agencies with the U.S. Fish & Wildlife Service and the National Marine Fisheries Service (where appropriate) to ensure that their actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). Again, compliance with Section 7 of the ESA generally must be coordinated with NEPA review efforts.
 3. Environmental Justice: Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” requires that “each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health and environmental effects of its programs, policies, and activities on minority populations and low-income populations.” The memorandum from the President to the heads of departments and agencies specifically recognized the importance of NEPA procedures for identifying and addressing environmental justice concerns.

**AVOIDING CRIMINAL LIABILITY
IN ENVIRONMENTAL INVESTIGATIONS**

**Marc S. Murphy
Stites & Harbison PLLC
Louisville, Kentucky**

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**AVOIDING CRIMINAL LIABILITY
IN ENVIRONMENTAL INVESTIGATIONS**

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AVOIDING CRIMINAL LIABILITY IN ENVIRONMENTAL INVESTIGATIONS

Marc S. Murphy
Partner, Stites & Harbison



"Your résumé states that while you were C.E.O. no one got busted."

I. INTRODUCTION

The first days of a federal criminal investigation are usually the most important, yet, they often occur without the assistance of counsel. As a result, your most important work may actually be accomplished before there is any formal charge. Educating your clients to make them sensitive to these issues, and to their need to call you immediately, is the most valuable thing you may ever do for them.

a. Relevant statistics

Criminal enforcement of environmental regulatory violations continues to rise. In 1998, 266 criminal cases were referred to the Department of Justice, and \$92.8 million in criminal fines were assessed. (See, Attachment A)

A review of select recent cases can be a sobering and important exercise for your clients. (See, Attachment B).

b. A brief summary of criminal provisions and penalties

c. Perspective - what is happening and why it is happening

- Your clients are businessmen and women. They do not consider themselves people who should have to know how to deal with the most dangerous and most powerful branch of our government: the criminal investigator and prosecutor.
- Your clients are probably successful businessmen and women, who pride themselves on having dealt successfully with people of all kinds as they were building or growing their companies. They have dealt with the government before, too, generally successfully. This will give them a false sense of security and confidence that is dangerous under these circumstances.
- The investigators and prosecutors do not care whether your clients have been good and successful corporate citizens before now. In fact, the better and bigger the business, the bigger the professional challenge to the prosecutor and those who investigate for him or her.
- Know this: if the prosecutor believes that your client committed a crime, he will think of him as the enemy, and as a bad person, or a bad company. He will consider it his sworn duty to convict and punish him. This is inconceivable to your client, who MAYBE has a parking ticket or two.
- Finally, it is likely that your client has no idea that regulatory violations can be punished as crimes.

d. Why the "first days" are so important

- Before the government arrives, they have been working on the investigation for a long time - they have a huge head start.
- They will use that head start to their advantage - and try to catch your client and his/her employees and agents off-guard. You can "gird" them against this.
- The government investigative team will often arrive as a SWAT Team, and create an atmosphere of fear, distrust and panic among employees.
- The investigators will arrive with a subpoena or search warrant and will begin the execution of it immediately.
- The press and media will also often learn of the investigation or search and the company is usually ill-prepared to respond to inquiries or to put the appropriate spin on the case.
- The investigators will attempt to obtain statements from key personnel before they "lawyer-up".

- The working relationship between the company and the government will often be established, for better or worse, during those first few days.
- Memories fade. People do forget what they tell the authorities.

e. The breadth and depth of the subpoena

For practical purposes, your client should assume that the government will demand the production of nearly everything. (See, Attachment D) The lawyer (not the client) should negotiate the terms of the response. The primary goal of counsel and client is to keep live witnesses from the grand jury.

II. MODERN CORPORATE CRIMINAL LAW: THE RESPONSIBLE CORPORATE OFFICER DOCTRINE AND OTHER DANGEROUS FICTIONS

a. Is your client in a heavily-regulated industry?

- Does your client make paint, food, drugs, contract with the government, or discharge matter into the sewers or into the air?
- Does your client have a good handle on the regulations that, in fact, govern his industry?
- Is there a designated compliance officer? Is that person qualified and trustworthy? How does that person feel about federal prison?
- The only foolproof approach is to hire a full-time environmental consultant.

b. In a heavily-regulated industry, the law presumes that the corporation knows the law and regulations that apply. The corporation is presumed to be aware of everything that is being done on its behalf by even the most lowly of employees.

c. What type of compliance program does the corporation have? Is it followed? Who is in charge?

d. Corporate Criminal Liability: the corporation can be charged with conduct that was committed by a low-level employee, even if it is contrary to instructions by the company, as long as the company benefitted in some way from the conduct.

e. The responsible corporate officer doctrine.

Let us reflect upon Mr. Hanousek.

III. WHAT COUNSEL SHOULD DO BEFORE THERE IS AN INVESTIGATION

- a. The pros and cons of self-reporting (see attached Dept. of Justice, Document 102, Attachment E).
- b. Address all of the questions and issues in section II, above with the client. Consider it a "corporate check-up".
- c. Good employment law practice can prevent bad environmental law experiences.
 - Many criminal investigations begin with an anonymous complaint, often from "disgruntled ex-employees". Endeavor to not have any "disgruntled ex-employees".
 - In lieu of that, conduct appropriate exit interviews, as permitted by relevant labor law principles and statutes. The employees should be asked whether they are aware of any conduct - by the company or by any individuals - that is violative of the relevant regulations. They should be asked if they had heard any rumors or hearsay of any such conduct.
 - If the answer to any such questions is "no", that person is unlikely to ever be an effective witness against the company. (Although this does not necessarily prevent the anonymous complaint OR the fact that the government will pursue the criminal investigation upon purely regulatory or minor violations even if the original complaint is false).
 - If the answers to any of the questions are "yes", then immediate and documented action should be taken.
- d. Finally, you must convince your client to call you immediately upon the arrival of a subpoena or an investigator at the company premises.

IV. WHAT COUNSEL SHOULD DO UPON BEING CALLED BY THE CLIENT

- a. **Immediately advise the client to not talk, under any circumstances, with the government agents.** It is permissible, also, to advise him to tell his employees that they do not have to speak with the government agents until you arrive, or, ever. It is their personal decision. (It's not likely that the government will attempt to conduct any formal interviews on site that day, anyway. They prefer to be "alone" when they do their interviewing.) A sample letter to your client is attached as Attachment F.
- b. Get all of the facts ABOUT THE INVESTIGATION over the phone from the client.
 - What type of document was he served with?

- Have him fax everything he has received from the government to you immediately.
 - Who is there? Which agency? How many? Who is in charge? Have him obtain identification/calling cards from all of the principals. The likely agencies will be:
 - (i) The EPA
 - (ii) The state regulatory agency
 - (iii) The FBI
 - (iv) An "escort" agency (state or local police)
 - Find out immediately who has already spoken with the agents.
 - Determine precisely as possible where the agents have been, where, physically, they are conducting any investigation or sampling, who is escorting them from the company, if anyone.
 - Keep track of the documents that are being taken and reviewed.
- c. Ask to speak immediately with the lead investigator.**
- Advise him that you represent the company and, as much as they may be considered to be speaking for the company, the employees. Advise him that no one should be interviewed without your knowledge or presence, and that you are on your way to the scene (if this is practical).
 - Obtain as much information as possible. You won't get much. You will likely be referred for all of your inquiries to the supervising U.S. Attorney's office, and a particular Assistant U.S. Attorney. His or her name may also be on one or more of the documents that were served upon the client.
- d. Call the supervising Assistant U.S. Attorney.**
- Advise her that you represent the company, etc.
 - Advise her that no one should be interviewed without your knowledge and presence.
 - Tell her that you are on your way to the site of the investigation.
 - Ask her everything about the case
 - Promise her cooperation

- Ask for a meeting as soon as possible, with her and the agents. She would not likely meet with you outside the presence of the agents, anyway.

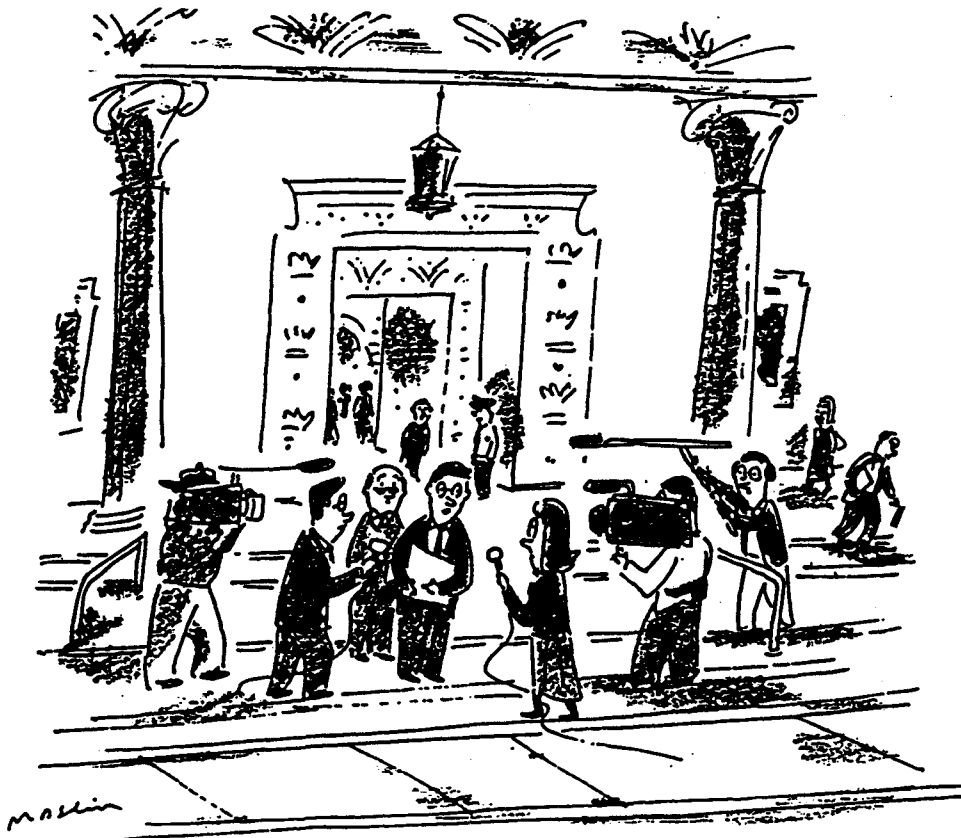
e. Go to the site of the investigation.

- Take as many people as you can. The more bodies the better. Take a video camera and a still photo camera. Take a dictaphone.
- Your initial task will be to retrace and recreate, as best as possible, the government's work to that point. Normally it will have been substantial. You can accomplish a lot in that regard on that first day.
- Follow the investigators around. Look over their shoulder. Have your business cards ready and available. Videotape the actions of the government agents. Pinpoint, especially, the precise points of any sampling that is taking place. DEMAND SPLIT SAMPLES.
- Dictate what you observe immediately.
- VERY CAREFULLY SUPERVISE THE PRODUCTION OF DOCUMENTS FROM COMPANY FILES. You may or may not be able to observe this very closely. But, your client has a right to a return on the search warrant and an inventory.
- Ensure that the scope of the warrant is not being exceeded. BE AWARE OF AND AVOID CASUAL EXTENSIONS OR ENLARGEMENTS OF THE SEARCH WARRANT. "Cooperation" doesn't = "being nice".

f. Ensure that when the investigators leave, "their" crime scene is preserved before it is disturbed, especially with regard to samples. Endeavor to duplicate those samples (even if split samples were taken) as soon as possible, to duplicate the same environmental conditions, etc.

g. Do a complete inventory of documents and items seized.

h. De-brief all employees who had any contact, even non-verbal, with the investigators. You may not have seen everything.



"The proof was in the pudding, but the pudding was ruled inadmissible as evidence."

V. CONCLUSION

The Justice Department tells us who they will prosecute ahead of time. (See, Attachment G). We might as well take advantage of it.

 **United States
Environmental Protection Agency**
Headquarters Press Release
Washington, DC

Date 03/26/99
Published:
Title: ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM
HIGHLIGHTS FY 1998 EFFORTS

FOR RELEASE: FRIDAY, MARCH 26, 1999

**ENFORCEMENT AND COMPLIANCE ASSURANCE PROGRAM
HIGHLIGHTS FY 1998 EFFORTS**


EPA announced today that 266 criminal cases were referred to the Department of Justice and \$92.8 million in criminal fines were assessed in fiscal year 1998. EPA also referred 411 civil cases and assessed \$91.8 million in civil penalties. The combined 677 referrals and \$184.6 million in fines and penalties were second only to the 704 referrals and \$264.4 million in fines and penalties assessed in fiscal year 1997. The Agency also reached settlements to recover \$230 million in Superfund Trust Fund expenditures. For the third year, the Agency reported performance measure data on pollution reduction amounts result from enforcement actions. The data show that during FY 1998 chlorofluorocarbons were reduced by over five million pounds, asbestos by more than seven million pounds, carbon monoxide by 188 million pounds and nitrogen oxide by 23.6 million pounds. About 46 percent of the civil enforcement settlements required violators to change the way they manage their facilities or reduce emissions or discharges into the environment, while another 54 percent required violators to improve their environmental management systems, take preventive action to avoid future non-compliance, or to enhance the public's right-to-know. Also, polluters spent just over \$2 billion dollars to correct violations, take additional steps to protect the environment, and clean up Superfund sites -- over \$200 million more than was collectively spent the previous year.

As a part of EPA's compliance incentive policies and strategies in FY 1998, at least 200 companies disclosed potential violations at 950 facilities under the auspices of the Agency's self-disclosure (audit) policy and 63 companies have corrected violations at 390 facilities. Since the inception of the audit policy, a total of 450 companies have disclosed violations at 1,870 facilities and relief was granted to 164 companies at 540 facilities that returned to compliance. Working in partnership with business and labor, EPA created five new National Compliance Assistance Centers for the paints and coatings industry, small and medium sized chemical manufacturing, transportation and printed wiring board industries, as well as one for local governments. There now are nine compliance assistance centers. In another emphasis on compliance assistance, EPA published nine new Sector Notebooks - a series of industry-specific multi-media profiles, which helps

owners and operators of regulated industries understand their regulatory obligations and identify ways to run their businesses more economically and efficiently. There are now a total of 28 Sector Notebooks. During fiscal year 1998, EPA also took a major step in furthering the Administration's "public right-to-know" efforts by establishing the Sector Facility Indexing Project. This project made environmental data publicly available on 653 facilities in five key industrial sectors -- automobile assembly, pulp manufacturing, petroleum refining, iron and steel production and primary smelting. The information includes the size of the facilities, their annual estimated release of chemicals into the environment and their historical compliance record. A summary of major criminal and civil enforcement actions and compliance activities, as well as, enforcement highlights for FY 1998 are available upon request. Information regarding the Compliance Centers, Sector Notebooks and Sector Facility Indexing Project, can be accessed at: <http://www.epa.gov/oeca/bgs2.html>.

SUMMARY OF ENFORCEMENT AND COMPLIANCE ASSURANCE EFFORTS FOR FY 1998
United States Environmental Protection Agency Press Release — March 26, 1999

ATTACHMENT A

 **United States
Environmental Protection Agency**
Headquarters Press Release
Washington, DC

Date: 02/10/2000
Published:
Title: ALABAMA MAN PLEADS GUILTY TO
CLEAN WATER ACT VIOLATION

FOR RELEASE: THURSDAY, FEBRUARY 10, 2000
ALABAMA MAN PLEADS GUILTY TO
CLEAN WATER ACT VIOLATION

Joseph Magazzu of Mobile, Ala., pleaded guilty on Feb. 2, in U.S. District Court in Biloxi, Miss., to violating the Clean Water Act (CWA). Magazzu was the former environmental coordinator for Morton International's Moss Point, Miss., plant which produces synthetic rubber, sealants, adhesives, plasticizers and rocket polymers. The plant has a CWA permit to discharge treated industrial and sanitary waste water into the Escatawpa River. Magazzu admitted that in July 1995 he falsely reported the amount of fecal coliform bacteria in the wastewater, which was 31 times the amount allowed under the permit. High levels of fecal coliform bacteria in surface waters can cause a variety of infections in people who are exposed and can harm birds, aquatic life and wildlife who come into contact with the water. When sentenced, Magazzu faces up to two years in prison and or a fine up to \$250,000. The case was investigated by EPA's Criminal Investigation Division and the FBI. The case is being prosecuted by the Environmental Crimes Section of the U.S. Department of Justice and the U.S. Attorney's Office for the Southern District of Mississippi.

 **United States
Environmental Protection Agency**
Headquarters Press Release
Washington, DC

Date: 02/10/2000
Published:
Title: ALASKA OIL EXPLORATION FIRM SENTENCED
IN HAZARDOUS WASTE CASE

FOR RELEASE: THURSDAY, FEBRUARY 10, 2000
ALASKA OIL EXPLORATION FIRM SENTENCED
IN HAZARDOUS WASTE CASE

British Petroleum Exploration (Alaska) Inc. (BPXA), was sentenced in U.S. Federal Court in Anchorage, Alaska on Feb. 1, to pay \$500,000 in criminal fines for failing to report illegal hazardous waste disposals in violation of the Comprehensive Environmental Response, Compensation and Liability Act. BPXA is a subsidiary of BP Amoco, p.l.c., which is the third largest oil company in the world. From 1993 to 1995, employees of Doyon Drilling, a contractor of BPXA, illegally discharged hazardous substances, including solvents, waste paint, paint thinner and waste oil containing lead and toxic chemicals such as benzene, toluene and methylene chloride by injecting them down the outer rim of oil wells. All of these chemical contaminants make groundwater resources undrinkable. BPXA failed to report these illegal injections as soon as it learned of its contractor's conduct as required by CERCLA. Also, BPXA was ordered to establish a nationwide environmental management system to prevent future violations after admitting that it failed to provide adequate oversight, audits and funding to ensure proper environmental management at its Alaska facilities. This management program will cost an additional \$15 million to implement. A court-appointed environmental monitor will ensure compliance with the management plan during a five-year probation term. Doyon Drilling and three of its employees were previously convicted and sentenced. BPXA has also paid \$6.5 million in civil penalties in a related case. This case was investigated by EPA's Criminal Investigation Division and the FBI. It was prosecuted by the Environmental Crimes Section of the Department of Justice and the U.S. Attorney's Office for the District of Alaska.

SELECTED RECENT CASES INVOLVING CRIMINAL CONVICTIONS
FOR VIOLATION OF ENVIRONMENTAL STATUTES
- United States Environmental Protection Agency Press Releases -

ATTACHMENT B

 **EPA** United States
Environmental Protection Agency
Headquarters Press Release
Washington, DC

Date 01/20/2000
Published:
Title: COMPANY AND EMPLOYEE PLEAD GUILTY TO CLEAN WATER VIOLATIONS

FOR RELEASE: THURSDAY, JANUARY 20, 2000

**COMPANY AND EMPLOYEE PLEAD GUILTY
TO CLEAN WATER VIOLATIONS**

Chemetco Inc., a Delaware corporation, pleaded guilty to one count of conspiracy and one count of violating the Clean Water Act at its secondary copper smelter near Hartford, Ill. The plea was made on Jan. 11 in U.S. District Court in East St. Louis, Ill. Chemetco also pleaded no contest to charges that it made false statements to EPA and to the Army Corps of Engineers. The charges arose from the installation of a secret, illegal discharge pipe at the smelter. From September 1986 through September 1996 the secret pipe was used to discharge pollutants such as zinc, lead and cadmium into Long Lake, a tributary of the Mississippi River, without a permit. In sufficient quantities these pollutants can be harmful to fish and aquatic life and can make water undrinkable. When sentenced, Chemetco faces up to \$2 million in fines. The case was investigated by EPA's Criminal Investigation Division, the Federal Bureau of Investigation, the U.S. Department of Transportation, the Illinois State Police and the Illinois EPA. The case was prosecuted by the U.S. Attorney for the Southern District of Illinois.

 **EPA** United States
Environmental Protection Agency
Headquarters Press Release
Washington, DC

Date 12/22/99
Published:
Title: AMERICAN AIRLINES TO PAY \$8 MILLION FOR HAZARDOUS WASTE VIOLATION

FOR RELEASE: THURSDAY, DEC. 22, 1999
AMERICAN AIRLINES TO PAY \$8 MILLION FOR HAZARDOUS WASTE VIOLATION

American Airlines, the nation's second-largest air carrier, pleaded guilty on Dec. 16 in U.S. District Court for the Southern District of Florida in Miami to violating the Resource Conservation and Recovery Act by illegally storing hazardous waste. The plea agreement calls for American to pay a fine of \$8 million and establish a court-supervised hazardous materials safety program at every airport where American accepts cargo for shipment. Two million dollars of the fine will be paid to the Miami-Dade Fire Department to enhance its hazardous materials division. In its plea, American admitted that it illegally stored a container of Dioxital at an American facility in Miami. Dioxital is an oxidizer that can explode when it comes into contact with heat. Employees of American Airlines violated federal law when they failed to properly dispose of a drum of Dioxital that was partially consumed by fire in Miami when its lid blew off after it was taken from an American flight that had arrived from Mexico City on July 27, 1995. After the fire was put out, they also illegally stored the drum and remaining Dioxital at the Miami airport for more than three years. The case was investigated by EPA's Criminal Investigation Division with the assistance of EPA's National Enforcement Investigations Center, the U.S. Department of Transportation Inspector General's Office, the U.S. Customs Service and the FBI. The case was prosecuted by the U.S. Attorney's Office for the Southern District of Florida.



Headquarters Press Release

Washington, DC

Date 10/20/99

Published:

Title: ALLIED ENVIRONMENTAL CONVICTED OF CONSPIRACY TO DUMP WASTEWATER

FOR IMMEDIATE RELEASE
WEDNESDAY, OCTOBER 20, 1999
WWW.USDOJ.GOVTTDD

ALLIED ENVIRONMENTAL CONVICTED OF CONSPIRACY TO DUMP WASTEWATER

Allied's President and a Trucking Company Officer Also Convicted in the Scheme

WASHINGTON, D.C. - A federal jury today convicted Allied Environmental Services, Inc. and its president with conspiracy to dump more than 300,000 gallons of wastewater contaminated with petroleum into underground wells - an activity that can pollute drinking water. The jury in Tulsa, Okla., also convicted the owner of Overholt Trucking, which transported the wastewater to Oklahoma.

The jury found that both Allied Environmental and its president, Koteswara Attaluri, conspired to violate federal clean water and hazardous waste laws and committed fraud. Federal prosecutors identified Attaluri as the leader of an illegal scheme to dump the wastewater into injection wells in Oklahoma. The jury also convicted Overholt Trucking owner Mac DeWayne Overholt for the same conspiracy and fraud charges, as well as criminal charges under the Clean Water Act and Resource Conservation and Recovery Act.

"We are pleased with today's verdict," said Lois J. Schiffer, Assistant Attorney General for the Environment and Natural Resources Division. "We will continue to vigorously prosecute cases involving threats to our nation's drinking water."

To protect underground drinking water sources, the Safe Drinking Water Act prohibits the unauthorized use of injection wells that are associated with oil and gas production. As part of its environmental consulting business, Overland Park, Kan.-based Allied was involved in the removal of underground storage tanks and petroleum-tainted wastewater from military facilities in Kansas and Missouri.

"Protecting drinking water is vital to the health of the American people," said EPA Assistant Administrator Steve Herman. "Criminal disregard for public health and the environment will not be tolerated. Today's action should serve as notice that clean water and hazardous waste laws will be enforced and will be prosecuted to the fullest extent of the law."

The government charged that Allied and Attaluri arranged with Overholt to transport the


wastewater to Oklahoma and inject it into wells in Cushing, Beggs, and Lincoln County without a permit issued by the Oklahoma Corporation Commission.

The scheme occurred over a 15-month period during 1994 and 1995 and involved the disposal of more than 310,000 gallons of petroleum-contaminated wastewater into injection wells.

The defendants will be sentenced on January 31, 1999 in U.S. District Court in Tulsa.

They were immediately jailed following the verdicts today. The remaining defendant who was charged in the case, Allied employee Gary Bicknell, was acquitted today.

The case was investigated by the U.S. Environmental Protection Agency, Criminal Investigation Division; the Department of Defense, Criminal Investigative Services; and the Oklahoma Department of Environmental Quality. It was prosecuted by United States Attorney Stephen Lewis of the Northern District of Oklahoma and Senior Trial Attorney Andrew Goldsmith of Environment and Natural Resources Division of the Justice Department.

 **EPA** United States
Environmental Protection Agency
Headquarters Press Release
Washington, DC

Date: 09/23/99
Published:
Title: **BP Exploration [Alaska] Pleads Guilty To Hazardous Substance Crime Will Pay \$22 Million, Establish Nationwide Environmental Management System**

FOR IMMEDIATE RELEASE ENRD
THURSDAY, SEPTEMBER 23, 1999
WWW.USDOJ.GOV

BP Exploration [Alaska] Pleads Guilty To Hazardous Substance Crime Will Pay \$22 Million, Establish Nationwide Environmental Management System

WASHINGTON, D.C. -- BP Exploration (Alaska) Inc. today pleaded guilty to one felony count related to the illegal disposal of hazardous waste on Alaska's North Slope, and it agreed to spend \$22 million to resolve the criminal case and related civil claims, the Justice Department announced.

BP Exploration (Alaska) Inc., or "BPXA," admitted in U.S. District Court in Anchorage that it failed to immediately notify authorities of a release of hazardous substances to the environment, and it agreed to pay the maximum criminal fine of \$500,000. As part of the plea agreement, BPXA also admitted that it failed to provide adequate oversight, audits and funding to ensure proper environmental management on Endicott Island, Alaska.

Under the terms of the plea agreement, the U.S. subsidiary of BP Amoco p.l.c. - the third largest oil company in the world -- will establish an environmental management system at all of BP Amoco's facilities in the United States and Gulf of Mexico that are engaged in the exploration, drilling or production of oil. This system will be the first of its kind in the oil industry to result from a federal prosecution.

"This has been one of largest and most complex criminal investigations ever conducted in Alaska," said Robert Bundy, U.S. Attorney for the District of Alaska. "The case underscores our commitment to investigate and prosecute violations of environmental laws. Corporations that benefit from Alaska's resources must also be good stewards of Alaska's environment."

The federal government and BPXA today also agreed to a civil settlement involving related environmental claims. The settlement, filed in federal court in Anchorage, requires BPXA to pay \$6.5 million in civil penalties to resolve allegations that BPXA illegally disposed of hazardous waste and also violated federal drinking water law.

"This case forces a company that should have known better to do better," said Lois J. Schiffer, Assistant Attorney General for Environment and Natural Resources at the Department of Justice. "Our goal is to deter such violations by all oil companies."

The criminal plea and civil claims stem from the injection of hazardous wastes on Endicott Island over a three-year period beginning in 1993. The manmade, gravel island northeast of Prudhoe Bay was built for the purpose of extracting and processing oil reserves under the Beaufort Sea. Endicott Island is operated by BPXA, which contracts with Doyon Drilling Inc. to drill oil-producing wells there.

From 1993 to 1995, Doyon Drilling employees illegally discharged waste oil and hazardous substances by injecting them down the outer rim, or annuli, of the oil wells. BPXA failed to report the illegal injections as soon as it learned of the conduct, in violation of the Comprehensive Environmental Response, Compensation and Liability Act. The illegally injected wastes included paint thinner and toxic solvents containing lead and chemicals such as benzene, toluene and methylene chloride.

Steven A. Herman, EPA Assistant Administrator for Enforcement and Compliance Assurance, said, "Rules governing the proper management of hazardous waste apply everywhere, but it's of critical importance in areas like the North Slope. It is absolutely essential that oil companies aggressively self-police their employees and their contractors working in remote places."

In April 1998, Doyon Drilling pleaded guilty to 15 counts of violating the Oil Pollution Act. Doyon agreed to pay a \$1 million fine and spend \$2 million to develop an environmental compliance program and environmental training program for employees. Three Doyon employees were convicted in 1998, and one was sentenced to a year in jail.

George Burtram, FBI Special Agent in Charge in Anchorage, said, "The FBI places a high priority on investigating environmental crimes in Alaska. This investigation demonstrates our commitment to dedicating the necessary resources to ensure that corporations and individuals are held accountable for their actions. The FBI will continue to investigate these complex cases in cooperation with other federal law enforcement agencies."

BPXA spent approximately \$5 million to improve environmental management within Alaska during the criminal investigation, and the corporation has taken steps to cooperate with the government's continuing investigation. Because of these efforts, additional criminal charges relating to the illegal injections were not filed, in accord with the Department of Justice's 1991 Voluntary Disclosure Policy, which grants prosecutors the discretion to forego prosecution when certain conditions -- including cooperation, remedial measures, and the existence of an adequate compliance program -- are met, according to U.S. Attorney Bundy.

As a result of the criminal plea agreement, BPXA must use best environmental practices to protect workers, the public, and the environment. The court will appoint an environmental monitor to oversee BPXA's nationwide implementation of the \$15 million management system during a five-year probation.

"This case would not be possible without the outstanding efforts of the FBI and EPA's

Criminal Investigation Division and Regional Counsel's Office," Bundy said. "I'd like to thank the Justice Department's Environmental Crimes Section, especially the leadership of Deputy Chief Deborah Smith, for extraordinary support and expertise during the investigation." The Department's Environmental Enforcement Section handled the civil settlement with BPXA.

Both the civil settlement and the plea agreement must be approved by the court before they become final.



Headquarters Press Release

Washington, DC

Date: 07/15/99

Published:

Title: OIL EXECUTIVE CONVICTED OF VIOLATING TWO LAWS IN MISSISSIPPI

FOR RELEASE: THURSDAY, JULY 15, 1999

OIL EXECUTIVE CONVICTED OF VIOLATING TWO LAWS IN MISSISSIPPI

John R. Cooke, an executive and part owner of M&S Petroleum Inc., which operated the Barrett oil refinery near Vicksburg, Miss., was convicted on ten counts of violating environmental and other federal laws on July 8, by a jury sitting in U.S. District Court for the Southern District of Mississippi in Natchez. Cooke, who is from the Houston, Texas area, was found guilty of one count of conspiracy, four counts of violating the Resource Conservation and Recovery Act (RCRA), two counts of violating the Clean Air Act, and three counts of making false statements. Between April 1995 and May 1996, Cooke engaged in a conspiracy to illegally discharge benzene and other pollutants into the Mississippi River and Hatcher Bayou south of Vicksburg. He also made false statements to the state Department of Environmental Quality and intentionally failed to perform required environmental testing at the refinery. An additional result was the release of benzene into the air. In sufficient quantities, benzene is acutely toxic and a possible cause of cancer. In addition, more than one million gallons of hazardous waste was abandoned at the refinery in violation of the RCRA law. Cooke can be sentenced to a maximum imprisonment of 50 years and/or fines of up to \$2.5 million. The case was investigated by EPA's Criminal Investigation Division with assistance from EPA's National Enforcement Investigations Center, the U.S. Department of Transportation, the FBI, and the state Department of Environmental Quality, and was prosecuted by the U.S. Department of Justice.



Headquarters Press Release

Washington, DC

Date 02/19/99

Published:

Title: BROOKLYN MAN AND COMPANY PLEAD TO ILLEGAL ASBESTOS REMOVAL

FOR RELEASE: FEBRUARY 19, 1999
BROOKLYN MAN AND COMPANY PLEAD TO ILLEGAL ASBESTOS REMOVAL

Salvatore Napalitano and his company, ECCO Construction Inc., both of Brooklyn, N.Y., pleaded guilty on Feb. 12, in U.S. District Court for the District of Connecticut in New Haven to violating the Clean Air Act. Documents submitted at the time of the plea agreement indicated that Napalitano and ECCO conspired with others to illegally use unskilled workers to avoid the cost of proper asbestos abatement at a former YMCA building in New Haven in 1997. When sentenced, Napalitano faces a maximum sentence of up to five years in prison and/or a fine of up to \$250,000. ECCO faces a maximum fine of up to \$500,000. The case was investigated by EPA's Criminal Investigation Division and is being prosecuted by the U.S. Department of Justice.



Headquarters Press Release

Washington, DC

Date 01/22/99

Published:

Title: AUTO SALVAGE COMPANY AND MANAGER SENTENCED

FOR RELEASE: FRIDAY, JANUARY 22, 1999
AUTO SALVAGE COMPANY AND MANAGER SENTENCED

Kempton Brothers Inc., an auto salvage firm operating in the Tampa area, and Robert B. Kempton, owner and President of Kempton Brothers were sentenced on Jan. 15, in U.S. District Court for the Middle District of Florida in Tampa for violating the Resource Conservation and Recovery Act (RCRA). Kempton Brothers was ordered to pay a \$150,000 fine and serve five years of probation for its conviction on two RCRA Counts. Robert Kempton, who previously pleaded guilty to one count of illegally disposing of a hazardous waste and one count of making a false statement to a law enforcement officer, was sentenced to one year in prison and was ordered to pay a \$100,000 fine. Kempton Brothers was in the business of recovering and cleaning used automobile parts. In the process, solvents, lacquer thinner and waste automobile fluids such as antifreeze, oil, gasoline, transmission fluid and brake fluid were illegally flushed into a gravel-lined pit. At various times, the defendants excavated sludge containing hazardous waste from the pit and illegally disposed of it by placing it in automobiles destined for the scrap yard. Groundwater studies conducted by the Florida Department of Environmental Regulation indicate contamination of a well at the Kempton Brothers facility with benzene, toluene, ethylbenzene xylene and other chemicals. Ingestion of these substances can cause damage to the kidneys and other internal organs and benzene from gasoline contamination is a cause of cancer in humans. The case was investigated by the EPA's Criminal Investigation Division with the assistance of the EPA's National Enforcement Investigations Center, the FBI, the Hillsborough County Sheriff's Department and the Florida Department of Environmental Protection Division of Law Enforcement, and was prosecuted by the U.S. Department of Justice.

KNOWING VIOLATIONS OF MAJOR ENVIRONMENTAL STATUTES

STATUTE	CRIMINAL ACTS	PENALTIES
Clean Air Act	<p>Knowingly fails to pay a fee owed the United States 42 U.S.C. § 7413(c) (3)</p> <p>Knowingly makes false statement, representation or certification, in any application, or falsifies, tampers with or knowingly renders inaccurate any monitoring devices 42 U.S.C. § 7413(c) (2)</p> <p>Knowingly violate a substantive requirement of the act (such as a requirement or prohibition of an applicable state implementation plan requirement) 42 U.S.C. § 7413(c) (2)</p>	<p>Fine up to \$100,000 and/or up to 1 year in prison (doubled for subsequent conviction)</p> <p>Fine up to \$250,000 and/or up to 2 years in prison (doubled for subsequent conviction)</p> <p>Fine up to \$250,000 and/or up to 2 years in prison (doubled for subsequent)</p>
Clean Water Act	<p>Knowingly violates of the Act 33 U.S.C. § 1319(c) (2)</p>	<p>Fine up to \$50,000 per day and/or imprisonment up to 3 years (doubled for subsequent conviction)</p>
CERCLA	<p>Knowingly fails to notify EPA of existence of identified facilities 42 U.S.C. § 9603(c)</p> <p>Knowingly destroys, disposes of or conceals records to be provided to the EPA 42 U.S.C. § 9603(d) (2)</p> <p>Failure to report a known release/ knowingly submitting false information 42 U.S.C. § 9603(b)</p>	<p>Fine of up to \$10,000 and/or imprisonment of up to 1 year</p> <p>Fine and/or imprisonment of up to 3 years</p> <p>Fine up to \$250,000 and/or imprisonment up to 3 years (or up to 5 years for subsequent conviction)</p>
RCRA	<p>Knowingly transports to a non-permit facility or knowingly treats, stores or disposes of hazardous waste in violation or with a permit 42 U.S.C. § 6928(a) (1)</p> <p>Knowingly violates of other requirements applicable to the handling of hazardous waste 42 U.S.C. § 6928(d) (7)</p>	<p>Fine up to \$50,000 per day and/or imprisonment up to 5 years (doubled for subsequent conviction)</p> <p>Fine up to \$50,000 per day and/or imprisonment up to 2 years (doubled for subsequent).</p>

**SUMMARY OF CRIMINAL PROVISIONS AND PENALTIES
FOR KNOWING VIOLATIONS OF MAJOR ENVIRONMENTAL STATUTES**

STATUTE	CRIMINAL ACTS	PENALTIES
EPCRTKA	<p>Knowingly violates emergency notification requirements</p> <p>42 U.S.C. §11045(b) (4)</p> <p>Violation with respect to trade secrets:</p> <p>42 U.S.C. §11046(d) (2)</p>	<p>Fine up to \$25,000 and/or up to 2 years imprisonment (up to \$50,000 and/or up to 5 years imprisonment for subsequent conviction)</p> <p>Fine up to \$20,000 and/or imprisonment for up to 1 year</p>
FIFRA	<p>Knowing violation by registrant, applicant or producer</p> <p>7 U.S.C. § 1361(1) (b)</p> <p>Knowing violation by any commercial applicator of a restricted use pesticide</p> <p>7 U.S.C. § 1361(1) (b)</p> <p>Disclosure of information relative to formulas of products with intent to defraud</p> <p>7 U.S.C. § 1361(1) (b)</p>	<p>Fine up to \$50,000 and/or imprisonment up to 1 year</p> <p>Fine up to \$25,000 and/or imprisonment up to 1 year</p> <p>Fine up to \$20,000 and/or imprisonment up to 3 years</p>
MPRSA	<p>Knowingly violates the Act</p> <p>33 U.S.C. § 1415(b)</p> <p>Knowingly violates provision relating to dumping of medical waste into ocean waters</p> <p>33 U.S.C. § 1415(b)</p>	<p>Fine up to \$50,000 and/or imprisonment up to 1 year</p> <p>Fine up to \$250,000 per day and/or imprisonment up to 5 years; in addition, forfeiture to the United States of any property derived from any proceeds obtained as a result of the violation and of any property used to commit or facilitate the violation</p>
TCSA	<p>Knowingly or willfully violates the statute</p> <p>15 U.S.C. § 2615(b)</p>	<p>Fine up to \$25,000 for each day of violation and/or imprisonment for up to 1 year</p>

United States District Court

WESTERN DISTRICT OF KENTUCKY AT BOWLING GREEN

TO: Custodian of Records
[REDACTED]

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:

PERSON DOCUMENT(S) OR OBJECT(S)
XX

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE FEDERAL BUILDING 241 EAST MAIN STREET BOWLING GREEN, KY 42101	COURTROOM ROOM NO. 317 DATE AND TIME 7/7/99 at 12:30 pm
--	--

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):*

See Attachments.

Compliance with this subpoena can be made by furnishing copies of information requested in the subpoena to S/A Libby Iwaga, Environmental Protection Agency CID, c/o Federal Bureau of Investigation, 500 Romano L. Messall Federal Building, 600 Dr. Martin Luther King Jr. Place, Louisville, KY 40202, telephone 502-569-3848, on or before 6/30/99, for delivery to the Grand Jury.

Please see additional information on reverse

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK JEFFREY A. APPERSON [Signature]	DATE 5/25/99
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This subpoena is issued on application of the United States of America	NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY JOHN L. CAUDILL 510 WEST BROADWAY, 10 TH FLOOR BANK OF LOUISVILLE BLDG. LOUISVILLE, KY 40202 502/502-5911
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*If not applicable, enter "none"

SUBPOENA TO TESTIFY BEFORE FEDERAL GRAND JURY
AND TO PRODUCE DOCUMENTS
- Environmental Investigation Example -

ATTACHMENT A OF SUBPOENA FOR:

Custodian of Records
[REDACTED]

- 2 -

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

I. INSTRUCTIONS

- A. This subpoena requires that your company, through an authorized, knowledgeable representative, appear before the Grand Jury at the time and place specified and produce to the Grand Jury all documents described herein.

In lieu of personal appearance before the Grand Jury, the documents may be submitted by personal delivery to:

Special Agent Libby Zuege
EPA-CID
600 MLK Place
Rm 500
Louisville, KY 40202
(502) 569-3848

by 10 AM on June 30, 1999 or at such earlier time as is convenient to you and the above identified SA Libbey Zuege.

If you desire to comply without personal appearance, each submission responsive to a paragraph or subparagraph must be accompanied by a separate affidavit.

Return of the documents should be accompanied by a date stamp, index, or outline, clearly stating the specific Paragraph listed below to which the returned documents are responsive.

- B. Documents to be produced include all documents in the possession, custody or control of your company, wherever located, including documents in the possession, custody or control of your company's

directors, officers, employees, representatives or agents. Without limitation on the term "control," a document is deemed to be in your control if you have the right to secure that document or a copy thereof from another person.

- C. TIME: Unless otherwise stated, this demand for documents is limited to documents prepared, written sent, dated, received or in effect at any time from January 1, 1994 through the date of the subpoena.
- D. Any document demanded by the subpoena that is withheld on a claim of privilege, or otherwise must be preserved. If the document contains privileged material, produce the entire document with the privileged material deleted. For any document or any portion of a document withheld under a claim of privilege, submit a sworn statement from your counsel or one of your employees in which you identify the document by author(s) addressee(s), date, number of pages, current location, and subject matter; specify the nature and basis of the claimed privilege and paragraph of this demand for documents to which the document is responsive; and identify each person to whom the document or its contents, or any part thereof, was disclosed.
- E. If you claim that any of the required documents listed below have already been returned pursuant to an earlier subpoena, please indicate when and where.
- F. If you have any questions regarding the scope, meaning or intent of these document demands, contact: Daniel W. Doher, Trial Attorney, Environmental Crimes Section, (202) 305-0351 and/or John Caudill, Assistant U.S. Attorney, (502) 625-7103.

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II. DOCUMENTS TO BE PRODUCED

- 4 -

1. Any and all documents, including memoranda, tabulations, inventory sheets, used to estimate the volume of the discharge of "910,000 gallons with possible contamination of styrene and Ethyl-Benzene," as reported to the Kentucky Division of Water, Department of Natural Resources and Environmental Protection, in a letter dated February 19, 1999, and signed by [REDACTED] Plant Manager, [REDACTED] (Attachment B).

2. Any and all documents, including memoranda, tabulations, production records used to estimate the time of the discharge dates of "1 April 1997 and 12 February 1999," as reported in the letter referenced in Paragraph 1.

3. Any and all documents, including memoranda, environmental assessments, test results used to make the conclusion "Expected environmental effects are minimal," as reported to Kentucky Division of Water, Department of Natural Resources and Environmental Protection, as reported by [REDACTED] in the letter referenced in Paragraph 1.

4. Any and all documents, including and all production records, time sheets, inventory sheets, production orders, that document the commencement of operations and production in Building 3, located at the [REDACTED] located at [REDACTED]

5. Any and all documents, including and all production records, requisition records, time sheets, inventory sheets, that document the chemicals and substances used in operations and production in Building 3, located at the [REDACTED]

6. Any and all documents, invoices, requisition records purchase orders, inventory records that document the solid and liquid wastes generated in operations and production in [REDACTED] located at the [REDACTED]

7. Any and all documents, invoices, purchase orders, manifests, that document the disposal of solid and liquid wastes from operations and production in Building 3, located at the [REDACTED]

8. Any and all documents and memoranda that reference the installation and operation of all piping at both the interior and exterior of Building 3, located at the [REDACTED]

9. Any and all documents and memoranda that reference the removal of any piping from the interior or exterior of Building 3, located at the [REDACTED]

11. All documentation including charts and memoranda that outline and explain the corporate structure and relationship between [REDACTED]

12. All documents, including internal memoranda, phone logs, telefaxes, letters that document discussion of treatment, storage and/or disposal of wastes from the [REDACTED] that were sent by any [REDACTED] individuals from the [REDACTED] to any individuals of [REDACTED] or any of its subsidiaries.

13. All documents, including internal memoranda, phone logs, telefaxes, letters that document discussion of treatment, storage and/or disposal of wastes from the [REDACTED] that were sent by [REDACTED] or any of its subsidiaries to any [REDACTED] individuals at the [REDACTED]

14. All documentation of corporate meetings, including minutes of such meetings and any memoranda memorializing such meetings concerning the treatment, storage and/or disposal of wastes from the [REDACTED] facility, and such meeting that took place between any individuals from the [REDACTED] and individuals of [REDACTED] or any of its subsidiaries.

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IMPORTANT WITNESS INFORMATION

CONTACT PERSON: 502/582-3911 United States Attorney's Office
510 West Broadway, 10th Floor, Louisville, KY 40202

CHECK TO SEE IF ATTENDANCE IS REQUIRED:

Please call the above person the **working** before you leave your residence to attend court to make sure your attendance is still required. This call is to prevent a wasted trip if the trial has been postponed or canceled.
 If you are calling long distance, you may call collect (502/582-3911). You must identify the call as "Code 1" or the recipient will not be able to accept the collect call.

ATTENDANCE:

Witnesses must check in with personnel from the U. S. Attorney's Office on the first day requested and be prepared to provide your current address, including zip code, phone number and social security number in order to insure receipt of payment for attendance. Absence is required for more than one day, you must check in with personnel from the U.S. Attorney's Office each day for your appearance to be recorded on the witness certificate and insure payment for attendance each day.

Witnesses must remain in the assigned waiting area unless otherwise instructed. Witnesses are not allowed in the courtroom except when they testify and after they have been dismissed by both attorneys and the court.
 Do not discuss your testimony with others until the trial is over. After you have testified, you may not leave until you have the permission of the U. S. Attorney's Office.

REIMBURSEMENT:

When you are no longer needed for court and are officially dismissed by the U. S. Attorney's Office, the witness certificate that you signed will be processed through the U. S. Marshall's Office for payment of allowed expenses connected with your court appearance. You should usually receive this check within 7-10 working days.

Federal government employees are paid by their agencies. If you are a government employee, please contact the U. S. Attorney's Office as soon as you receive your subpoena.)

If you do not have enough money to pay your expenses, we can usually arrange for a small advance. Please ask the U. S. Attorney's Office for assistance early in the day to allow enough time to process an advance check and get it cashed. (Federal employees must obtain advance from their individual agencies.)

Witnesses who have testified in court will receive a \$40 per day witness fee at the end of their testimony. A check for the witness fee and allowable expenses will be mailed to you. (This does not apply to employees of the federal government.)

To avoid any expenses that cannot be reimbursed, it is recommended that travel arrangements and hotel accommodations be made through the U. S. Attorney's Office. All changes and/or cancellations for travel arrangements and hotel accommodations made through the U. S. Attorney's Office First Witness Government Travel Account (GTA) must be made through the U. S. Attorney's Office to avoid any expenses that cannot be reimbursed. Please contact the Office of the U. S. Attorney if any changes/cancellations are necessary. If there is an emergency during travel on the weekend or work nights after close of business, please contact Carlton Wagnon, Travel at 1-800-633-6664 (outside KY) or 1-800-626-2717 (outside KY).

If you decide to make your own travel arrangements and hotel accommodations without assistance from the U. S. Attorney's Office, you will be reimbursed for the most economical method reasonably available and within the federal guidelines for reimbursement of witness expenses. You will need to provide receipts for all expenses.

TRANSPORTATION:

Reimbursement for mileage from your home to a courthouse in a city other than your residence will be paid at the automobile rate of 31¢ cents per mile. Mileage will be calculated according to distance listed between the two cities in the Road Mileage Guide. If more than one subpoenaed witness rides in the same car, only the driver will be paid the mileage.

Please consult with the U. S. Attorney's Office personnel listed on the first page concerning methods of transportation. Reimbursement for travel will be made by the least expensive method reasonably available. (For long distance travel—over 200 miles, if you choose to drive rather than fly, you may be reimbursed for the coach fare if it is the least expensive mode of travel when comparing all expenses. If any special circumstances exist, please discuss these with the U. S. Attorney's Office.)

4. AIRLINE RESERVATIONS: For your convenience, the U. S. Attorney's Office has established an account with a local travel agency to arrange for prepaid airline tickets. All airline tickets needed in connection with this court appearance should be arranged through the U. S. Attorney's Office. If you will require an airline ticket to travel to the court appearance, please contact the person listed on the first page as soon as you receive this subpoena and/or later. The U. S. Attorney's Office personnel will coordinate your travel arrangements with the travel agency. Airline tickets must be for coach fares at the government rate and must not include any non-refundable provisions, such as penalties for changes or cancellations. Travel arrangements made through the U. S. Attorney's Office First Witness GTA can only be changed through the U.S. Attorney's Office. If you are traveling after hours or on weekends and an emergency occurs which necessitates a change, you should contact Carlton Wagnon, Travel at 1-800-633-6664 (outside KY) or 1-800-626-2717 (outside KY).

Rental vehicles and other transportation expenses will not be reimbursed without special justification and approval in advance.

LODGING:

If you are required to stay overnight, the government will reimburse you for the actual cost of a motel room at the SINGLE RATE to each witness, but: (1) unless the maximum allowed depending on the city (see applicable box). The maximum lodging allowed per night is as follows:

Louisville	\$60.00 plus applicable tax
Bowling Green	\$50.00 plus applicable tax
Hopkinsville	\$30.00 plus applicable tax
Owensboro	\$50.00 plus applicable tax
Pudlovich	\$50.00 plus applicable tax

Special government rates are available at some hotels if you tell them you are a federal witness. If you need assistance with lodging arrangements, please contact the U. S. Attorney's Office.

If more than one subpoenaed witness stays in the same room, please have the hotel give you separate receipts

You are responsible for room charges for extra people, phone calls, and anything else charged to your hotel. Hotel accommodations arranged and paid by the U.S. Attorney's First Witness GTA will be for room charges only.

If you choose to make your own hotel arrangement without the assistance from the U. S. Attorney's Office, you must have a hotel receipt in order to be reimbursed by the government. You will be reimbursed for the cost of the room, not to exceed the amount listed above.

MEALS:

If you are required to stay overnight, you are allowed the following meal and incidental expenses:

LOCATION IN KENTUCKY	MEAL & INCIDENTAL EXPENSES FOR 1ST DAY OF TRAVEL	MEAL & INCIDENTAL EXPENSES FOR LAST DAY OF TRAVEL	MEAL & INCIDENTAL EXPENSES FOR DAYS BETWEEN 1ST & LAST
Bowling Green	\$15.00	\$15.00	\$30.00
Hopkinsville			
Owensboro			
Pudlovich			
Louisville	\$19.00	\$19.00	\$38.00

If you have any questions or need assistance, please contact the U. S. Attorney's Office. We appreciate your cooperation as a witness and will try to make your contact with the criminal justice system a positive experience.

"THE PROS AND CONS OF SELF-REPORTING"
FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS
IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE
OR DISCLOSURE EFFORTS BY THE VIOLATOR
 - U.S. Department of Justice, Document 102, July 1, 1991 -

Document 102

U.S. Department of Justice

Washington D.C. 20530
 July 1, 1991

**FACTORS IN DECISIONS ON CRIMINAL
 PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS
 IN THE CONTEXT OF SIGNIFICANT VOLUNTARY
 COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR**

I. Introduction

It is the policy of the Department of Justice to encourage self-auditing, self-policing and voluntary disclosure of environmental violations by the regulated community by indicating that these activities are viewed as mitigating factors in the Department's exercise of criminal environmental enforcement discretion. This document is intended to describe the factors that the Department of Justice considers in deciding whether to bring a criminal prosecution for a violation of an environmental statute, so that such prosecutions do not create a disincentive to or undermine the goal of encouraging critical self-auditing, self-policing, and voluntary disclosure. It is designed to give federal prosecutors direction concerning the exercise of prosecutorial discretion in environmental criminal cases and to ensure that such discretion is exercised consistently nationwide. It is also intended to give the regulated community a sense of how the federal government exercises its criminal prosecutorial discretion with respect to such factors as the defendant's voluntary disclosure of violations, cooperation with the government in investigating the violations, use of environmental audits and other procedures to ensure compliance with all applicable environmental laws and regulations, and use of measures to remedy expeditiously and completely any violations and the harms caused thereby.

This guidance and the examples contained herein provide a framework for the determination of whether a particular case presents the type of circumstances in which lenience would be appropriate.

II. Factors to be Considered

Where the law and evidence would otherwise be sufficient for prosecution, the attorney for the Department should consider the factors contained herein, to the extent they are applicable, along with any other relevant factors, in determining whether and how to prosecute. It must be emphasized that these are examples of the types of factors which could be relevant. They do not constitute a definitive recipe or checklist of requirements. They merely illustrate some of the types of information which is relevant to our exercise of prosecutorial discretion.

It is unlikely that any one factor will be dispositive in any given case. All relevant factors are considered and given the weight deemed appropriate in the particular case. See Federal Principles of Prosecution (U.S. Dept. of Justice, 1980), Comment to Part A.2; Part B.2.

A. Voluntary Disclosure

The attorney for the Department should consider whether the person made a voluntary, timely and complete disclosure of the matter under investigation. Consideration should be given to whether the person came forward promptly after discovering the noncompliance, and to the quantity and quality of information provided. Particular consideration should be given to whether the disclosure substantially aided the government's investigatory process, and whether before a law enforcement or regulatory authority

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(federal, state or local authority) had already obtained knowledge regarding noncompliance. A disclosure is not considered to be "voluntary" if that disclosure is already specifically required by law, regulation, or permit."

B. Cooperation

The attorney for the Department should consider the degree and timeliness of cooperation by the person. Full and prompt cooperation is essential, whether in the context of a voluntary disclosure or after the government has independently learned of a violation. Consideration should be given to the violator's willingness to make all relevant information (including the complete results of any internal or external investigation and the names of all potential witnesses) available to government investigators and prosecutors. Consideration should also be given to the extent and quality of the violator's assistance to the government's investigation.

C. Preventive Measures and Compliance Programs

The attorney for the Department should consider the existence and scope of any regularized, intensive, and comprehensive environmental compliance program; such a program may include an environmental compliance or management audit. Particular consideration should be given to whether the compliance or audit program includes sufficient measures to identify and prevent future noncompliance, and whether the program was adopted in good faith in a timely manner.

Compliance programs may vary but the following questions should be asked in evaluating any program: Was there a strong institutional policy to comply with all environmental requirements? Had safeguards beyond those required by existing law been developed and implemented to prevent noncompliance from occurring? Were there regular procedures, including internal or external compliance and management audits, to evaluate, detect, prevent and remedy circumstances like those that led to the noncompliance? Were there procedures and safeguard to ensure the integrity of any audit conducted? Did the audit evaluate all sources of pollution (i.e., all media), including the possibility of cross-media transfers of pollutants? Were the auditor's recommendations implemented in a timely fashion? Were adequate resources committed to the auditing program and to implementing its recommendations? Was environmental compliance a standard by which employee and corporate departmental performance was judged?

D. Additional Factors Which May be Relevant

1. Pervasiveness of Noncompliance

Pervasive noncompliance may indicate systemic or repeated participation in or condonation of criminal behavior. It may also indicate the lack of a meaningful compliance program. In evaluating this factor, the attorney for the Department should consider, among other things, the number and level of employees participating in the unlawful activities and the obviousness, seriousness, duration, history, and frequency of noncompliance.

2. Internal Disciplinary Action

Effective internal disciplinary action is crucial to any compliance program. The attorney for the Department should consider whether there was an effective system of discipline for employees who violated company environmental compliance policies. Did the disciplinary system establish an awareness in other employees that unlawful conduct would not be condoned?

3. Subsequent Compliance Efforts

The attorney for the Department should consider the extent of any efforts to remedy any ongoing noncompliance. The promptness and completeness of any action taken to remove the source of the noncompliance and to lessen the environmental harm resulting from the noncompliance should be considered. Considerable weight should be given to prompt, good-faith efforts to reach environmental compliance agreements with federal or state authorities, or both. Full compliance with such agreements should be a factor in any decision whether to prosecute.

III. Application of These Factors to Hypothetical Examples

These examples are intended to assist federal prosecutors their exercise of discretion in evaluating environmental cases. The situations facing prosecutors, of course, present a

wide variety of fact patterns. Therefore, in a given case, some of the criteria may be satisfied while others may not. Moreover, satisfaction of various criteria may be a matter of degree. Consequently, the effect of a given mix of factors also is a matter of degree. In the ideal situation, if a company fully meets all of the criteria, the result may be a decision not to prosecute that company criminally. Even if satisfaction of the criteria is not complete, still the company may benefit in terms of degree of enforcement response by the government. The following hypothetical examples are intended to illustrate the operation of these guidelines.

Example 1:

This is the ideal case in terms of criteria satisfaction and consequent prosecution leniency.

1. Company A regularly conducts a comprehensive audit of its compliance with environmental requirements.
 2. The audit uncovers information about employees' disposing of hazardous wastes by dumping them in an unpermitted location.
 3. An internal company investigation confirms the audit information. (Depending upon the nature of the audit, this follow-up investigation may be unnecessary.)
 4. Prior to the violations the company had a sound compliance program, which included clear policies, employee training, and a hotline for suspected violations.
 5. As soon as the company confirms the violations, it discloses all pertinent information to the appropriate government agency; it undertakes compliance planning with that agency; and it carries out satisfactory remediation measures.
 6. The company also undertakes to correct any false information previously submitted to the government in relation to the violations.
 7. Internally the company disciplines the employees actually involved in the violations, including any supervisor who was lax in preventing or detecting the activity. Also, the company reviews its compliance program to determine how the violations slipped by and corrects the weaknesses found by that review.
 8. The company discloses to the government the names of the employees actually responsible for the violations, and it cooperates with the government by providing documentation necessary to the investigation of those persons.
- Under these circumstances Company A would stand a good chance of being favorably considered for prosecutorial leniency, to the extent of not being criminally prosecuted at all. The degree of any leniency, however, may turn upon other relevant factors not specifically dealt with in these guidelines.⁴

Example 2:

At the opposite end of the scale is Company Z, which meets few of the criteria. The likelihood of prosecutorial leniency, therefore, is remote. Company Z's circumstances may include any of the following:

1. Because an employee has threatened to report a violation to federal authorities, the company is afraid that investigators may begin looking at it. An audit is undertaken, but it focuses only upon the particular violation, ignoring the possibility that the violation may be indicative of widespread activities in the organization.
2. After completing the audit, Company Z reports the violations discovered to the government.
3. The company had a compliance program, but it was effectively no more than a collection of paper. No effort is made to disseminate its content, impress upon employees its significance, train employees in its application, or oversee its implementation.
4. Even after "discovery" of the violation the company makes no effort to strengthen its compliance procedures.
5. The company makes no effort to come to terms with regulators regarding its violations. It resists any remedial work and refuses to pay any monetary sanctions.
6. Because of the non-compliance, information submitted to regulators over the years has been materially inaccurate, painting a substantially false picture of the company's true compliance situation. The company fails to take any steps to correct that inaccuracy.
7. The company does not cooperate with prosecutors in identifying those employees (including managers) who actually were involved in the violation, and it resists disclosure of any documents relating either to the violations or to the responsible employees.

In these circumstances leniency is unlikely. The only positive action is the so-called audit, but that was so narrowly focused as to be of questionable value, and it was undertaken only to head off a possible criminal investigation. Otherwise, the company demonstrated no good faith either in terms of compliance efforts or in assisting the government in obtaining a full understanding of the violation and discovering its sources.

Nonetheless, these factors do not assure a criminal prosecution of Company Z. As with Company A, above, other circumstances may be present which affect the balance struck by prosecutors. For example, the effect of the violation (because of substance, duration, or amount) may be such that prosecutors would not consider it to be an appropriate criminal case. Administrative or civil proceedings may be considered a more appropriate response.

Other examples: Between these extremes there is a range of possibilities. The presence, absence, or degree of any criterion may affect the prosecution's exercise of discretion. Below are some examples of such effects:

1. In a situation otherwise similar to that of Company A, above, Company B performs an audit that is very limited in scope and probably reflects no more than an effort to avoid prosecution. Despite that background, Company B is cooperative in terms of both bringing itself into compliance and providing information regarding the crime and its perpetrators. The result could be any of a number of outcomes, including prosecution of a lesser charge or a decision to prosecute the individuals rather than the company.
2. Again the situation is similar to Company A's, but Company C refuses to reveal any information regarding the individual violators. The likelihood of the government's prosecuting the company are substantially increased.
3. In another situation similar to Company A's, Company D chooses to "sit on" the audit and take corrective action without telling the government. The government learns of the situation months or years after the fact.

A complicating fact here is that environmental regulatory programs are self policing: they include a substantial number of reporting requirements. If reports which in fact presented false information are allowed to stand uncorrected, the reliability of this system is undermined. They also may lead to adverse and unfair impacts upon other members of the regulated community. For example, Company D failed to report discharges of X contaminant into a municipal sewer system, discharges that were terminated as a result of an audit. The sewer authority, though, knowing only that there have been excessive loadings of X, but not knowing that Company D was a source, tightens limitations upon all known sources of X. Thus, all of those sources incur additional treatment expenses, but Company D is unaffected. Had Company D revealed its audit results, the other companies would not have suffered unnecessary expenses.

In some situations, moreover, failure to report is a crime. See, e.g., 33 U.S.C. §1321(b)(5) and 42 U.S.C. §9603(b). To illustrate the effect of this factor, consider Company E, which conducts a thorough audit and finds that hazardous wastes have been disposed of by dumping them on the ground. The company cleans up the area and tightens up its compliance program, but does not reveal the situation to regulators. Assuming that a reportable quantity of a hazardous substance was released, the company was under a legal obligation under 42 U.S.C. §9603(b) to report that release as soon as it had knowledge of it, thereby allowing regulators the opportunity to assure proper clean up. Company E's knowing failure to report the release upon learning of it is itself a felony. In the cases of both Company D and Company E, consideration would be given by prosecutors for remedial efforts; hence prosecution of fewer or lesser charges might result. However, because Company D's silence adversely affected others who are entitled to fair regulatory treatment and because Company E deprived those legally responsible for evaluating cleanup needs of the ability to carry out their functions, the likelihood of their totally escaping criminal prosecution is significantly reduced.

4. Company F's situation is similar to that of Company B. However, with regard to the various violations shown by the audit, it concentrates upon correcting only the easier, less expensive, less significant among them. Its lackadaisical approach to correction does not make it a strong candidate for leniency.

5. Company G is similar to Company D in that it performs an audit and finds violations, but does not bring them to the government's attention. Those violations do not involve failures to comply with reporting requirements. The company undertakes a program of gradually correcting its violations. When the government learns of the situation, Company G still has not remedied its most significant violations, but claims that it certainly planned to get to them. Company G could receive some consideration for its efforts, but its failure to disclose and the slowness of its remedial work probably mean that it cannot expect a substantial degree of leniency.

6. Comprehensive audits are considered positive efforts toward good faith compliance. However, such audits are not indispensable to enforcement leniency. Company H's situation is essentially identical to that of Company A, except for the fact that it does not undertake a comprehensive audit. It does not have a formal audit program, but, as a part of its efforts to ensure compliance, does realize that it is committing an environmental violation. It thereafter takes steps otherwise identical to those of Company A in terms of compliance efforts and cooperation. Company H is also a likely candidate for leniency, including possibly no criminal prosecution.

In sum, mitigating efforts made by the regulated community will be recognized and evaluated. The greater the showing of good faith, the more likely it will be met with leniency. Conversely, the less good faith shown, the less likely that prosecutorial discretion will tend toward leniency.

IV. Nature of this Guidance

This guidance explains the current general practice of the Department in making criminal prosecutive and other decisions after giving consideration to the criteria described above, as well as any other criteria that are relevant to the exercise of criminal prosecutorial discretion in a particular case. This discussion is an expression of, and in no way departs from, the long tradition of exercising prosecutorial discretion. The decision to prosecute "generally rests entirely in [the prosecutor's] discretion." *Rordenkircher v. Hayes*, 454 U.S. 357, 364 (1978).⁶ This discretion is especially firmly held by the criminal prosecutor.⁷ The criteria set forth above are intended only as internal guidance to Department of Justice attorneys. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States, nor do they in any way limit the lawful litigative prerogatives, including civil enforcement actions, of the Department of Justice or the Environmental Protection Agency. They are provided to guide the effective use of limited enforcement resources, and do not derive from, find their basis in, nor constitute any legal requirement, whether constitutional, statutory, or otherwise, to forego or modify any enforcement action or the use of any evidentiary material. See *Principles of Federal Prosecution* (U.S. Dept. of Justice, 1980) p. 4; *United States Attorneys' Manual* (U.S. Dept. of Justice, 1956) 1-1.000.

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July 12, 1997

Mr. John Jones
CEO
Big, Really Big Company
Ourtown, USA

RE: Legal Advice

Dear John:

**DON'T TALK TO ANYONE
FROM THE GOVERNMENT
FOR ANY REASON UNTIL
YOU CALL YOUR LAWYER.**

Sincerely,


Lawyer

"LEGAL ADVICE LETTER"

ATTACHMENT F

JUSTICE DEPARTMENT GUIDANCE ON PROSECUTIONS OF CORPORATIONS

U.S. Department of Justice
Office of the Deputy Attorney General

June 16, 1999

MEMORANDUM

TO: Heads of Department Components
All United States Attorneys

FROM: Eric H. Holder, Jr.

SUBJECT: Bringing Criminal Charges Against Corporations

More and more often, federal prosecutors are faced with criminal conduct committed by or on behalf of corporations. The Department is committed to prosecuting both the culpable individuals and, when appropriate, the corporation on whose behalf they acted.

The attached document, *Federal Prosecution of Corporations*, provides guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case. In believe these factors provide a useful framework in which prosecutors can analyze their cases and provide a common vocabulary for them to discuss their decision with fellow prosecutors, supervisors, and defense counsel. These factors are, however, not outcome-determinative and are only guidelines. Federal prosecutors are not required to reference these factors in a particular case, nor are they required to document the weight they accorded specific factors in reaching their decision.

The factors and the commentary were developed through the hard work of an ad hoc working group coordinated by the Fraud Section of the Criminal Division and made up of representatives of United States Attorneys' Offices, the Executive Office of United States Attorneys, and Divisions of the Department with criminal law enforcement responsibilities. Experience with these guidelines may lead to changes or adjustments in the text and commentary. Therefore, please forward any comments about the guidelines, as well as instances in which the factors proved useful or not useful in specific cases to Shirah Nelman, Deputy United States Attorney, Southern District of New York, and Philip Urofsky, Trial Attorney, Fraud Section, Criminal Division. I look forward to hearing comments from the field as to the application of these factors in practice.

FEDERAL PROSECUTION OF CORPORATIONS

I. Charging Corporations: General

A. *General Principle:* Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.

B. *Comment:* In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed herein. First and foremost, prosecutors should

be aware of the important public benefits that may flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain crimes that carry with them a substantial risk of great public harm, e.g., environmental crimes or financial frauds, are by their nature most likely to be committed by businesses, and there may, therefore, be a substantial federal interest in indicting the corporation.

Charging a corporation, however, does not mean that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Further, imposition of individual criminal liability on such individuals provides a strong deterrent against future corporate wrongdoing.

Corporations are "legal persons," capable of suing and being sued, and capable of committing crimes. Under the doctrine of *respondeat superior*, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To be held liable for these actions, the government must establish that the corporate agent's actions (i) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should consider the corporation, as well as the responsible individuals, as potential criminal targets.

Agents, however, may act for mixed reasons — both for self-aggrandizement (both direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation. Thus, in *United States v. Automated Medical Laboratories*, 770 F.2d 399 (4th Cir. 1985), the court affirmed the corporation's conviction for the actions of a subsidiary's employee despite its claim that the employee was acting for his own benefit, namely his "ambitious nature and his desire to ascend the corporate ladder." The court stated, "Partucci was clearly acting in part to benefit AML since his advancement within the corporation depended on AML's well-being and its lack of difficulties with the FDA." Similarly, in *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982), the court held, "criminal liability may be imposed on the corporation only where the agent is acting within the scope of his employment. That, in turn, requires that the agent be performing acts of the kind which he is authorized to perform, and those acts must be motivated—at least in part—by an intent to benefit the corporation." Applying this test, the court upheld the corporation's conviction, notwithstanding the substantial personal benefit reaped by its miscreant agents, because the fraudulent scheme required money to pass through the corporation's treasury and the fraudulently obtained goods were resold to the corporation's customers in the corporation's name. As the court con-

GUIDANCE MEMORANDUM TO UNITED STATES ATTORNEYS
ON THE BRINGING OF CRIMINAL CHARGES AGAINST CORPORATIONS

U.S. Department of Justice — June 16, 1999

ATTACHMENT G

cluded, "Mystic—not the individual defendants—was making money by selling oil that it had not paid for."

Moreover, the corporation need not even necessarily profit from its agent's actions for it to be held liable. In *Automated Medical Laboratories*, the Fourth Circuit stated:

[B]enefit is not a "touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact." Thus, whether the agent's actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which be inimical to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.

Id. at 407 (emphasis added; quoting *Old Monastery Co. v. United States*, 147 F.2d 905, 908 (4th Cir.), cert. denied, 328 U.S. 734 (1945)).

II. Charging Corporations—Factors to Be Considered

A. General Principle: Generally, prosecutors should apply the same factors in determining whether to charge a corporation as they do with respect to individuals. See U.S.A.M. § 9-27.220, *et seq.* Thus, the prosecutor should weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence, the likelihood of success at trial, the probable deterrent, rehabilitative, and other consequences of conviction, and the adequacy, of non-criminal approaches. See *id.* However, due to the nature of the corporate "person," some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime (see section III, *infra*);

2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management (see section IV, *infra*);

3. The corporation's history of similar conduct, including prior criminal civil, and regulatory enforcement actions against it (see section V, *infra*);

4. The corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges (see section VI, *infra*);

5. The existence and adequacy of the corporation's compliance program (see section VII, *infra*);

6. The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies (see section VIII, *infra*);

7. Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable (see section IX, *infra*); and

8. The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions (see section X, *infra*).

B. Comment: As with the factors relevant to charging natural persons, the foregoing factors are intended to provide guidance rather than to mandate a particular result. The factors listed in this section are intended to be illustrative of those that should be considered and not a complete or exhaustive list. Some or all of these factors may or may not apply to specific cases, and in some cases one factor may override all others. Further, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others.

In making a decision to charge a corporation, the prosecutor generally has wide latitude determining when, whom, how, and even whether to prosecute for violations of Federal criminal law. In exercising that discretion, prosecutors should consider the following general statements of principles that summarize appropriate considerations to be weighed and desirable practices to be followed in discharging their prosecutorial responsibilities. In doing so, prosecutors should ensure that the general purposes of the criminal law—assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities—are adequately met, taking into account the special nature of the corporate "person."

III. Charging a Corporation: Special Policy Concerns

A. General Principle: The nature and seriousness of the crime, including the risk of harm to the public from the criminal conduct, are obviously primary factors in determining whether to charge a corporation. In addition, corporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, taxation, and criminal law enforcement policies. In applying these principles, prosecutors must consider the practices and policies of the appropriate Division of the Department, and must comply with those policies to the extent required.

B. Comment: In determining whether to charge a corporation, prosecutors should take into account federal law enforcement priorities as discussed above. See § 9-27.230. In addition, however, prosecutors must be aware of the specific policy goals and incentive programs established by the respective Divisions and regulatory agencies. Thus, whereas natural persons may be given incremental degrees of credit (ranging from immunity to lesser charges to sentencing considerations) for turning themselves in, making statements against their penal interest, and cooperating in the government's investigation of their own and others' wrongdoing, the same approach may not be appropriate in all circumstances with respect to corporations. As an example, it is entirely proper in many investigations for a prosecutor to consider the corporation's pre-indictment conduct, e.g., voluntary disclosure, cooperation, mediation or restitution, in determining whether to seek an indictment. However, this would not necessarily be appropriate in an antitrust investigation, in which anti-

trust violations, by definition, go to the heart of the corporation's business and for which the Antitrust Division has therefore established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government. As another example, the Tax Division has a strong preference for prosecuting responsible individuals, rather than entities, for corporate tax offenses. Thus, in determining whether or not to charge a corporation, prosecutors should consult with the Criminal, Antitrust, Tax, and Environmental and Natural Resources Divisions, if appropriate or required.

IV. Charging a Corporation: Pervasiveness of Wrongdoing Within the Corporation

A. General Principle: A corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees or by all the employees in a particular role within the corporation, e.g., salesmen or procurement officers, or was condoned by upper management. On the other hand, in certain limited circumstances, it may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict *respondent superior* theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.

B. Comment: Of these factors, the most important is the role of management. Although acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged. As stated in commentary to the Sentencing Guidelines:

Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority . . . who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization.

U.S.S.G. § 8C2.5, comment. (n.4).

V. Charging the Corporation: The Corporation's Past History

A. General Principle: Prosecutors may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges.

B. Comment: A corporation, like a natural person, is expected to learn from its mistakes. A history of similar conduct may be probative of a corporate culture that encouraged, or at least condoned, such conduct, regardless of any compliance programs. Criminal prosecution of a corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or

previous criminal charges, and yet it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the conduct in spite of the warnings or enforcement actions taken against it. In making this determination, the corporate structure itself, e.g., subsidiaries or operating divisions, should be ignored, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates should be considered. See U.S.S.G. § 8C2.5(c) & comment. (n. 6).

VI. Charging the Corporation: Cooperation and Voluntary Disclosure

A. General Principle: In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges.

B. Comment: In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying the culprits and locating relevant evidence.

In some circumstances, therefore, granting a corporation immunity or amnesty may be considered in the course of the government's investigation. In such circumstances, prosecutors should refer to the principles governing non-prosecution agreements generally. See USAM § 9-27.600-650. Specifically, these principles permit a non-prosecution agreement in exchange for cooperation when a corporation's "timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective." Prosecutors should note that in the case of national or multi-national corporations, multi-district or global agreements may be necessary. See USAM § 9-27.641.

In addition, the Department, in conjunction with regulatory agencies and other executive branch departments, encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose their findings to the appropriate authorities. Some agencies, such as the SEC and the EPA, as well as the Department's Environmental and Natural Resources Division, have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation

for amnesty or reduced sanctions.¹ Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure in evaluating the adequacy of the corporation's compliance program and its management's commitment to the compliance program. However, prosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation's willingness to cooperate. For example, the Antitrust Division offers amnesty only to the first corporation to agree to cooperate. This creates a strong incentive for corporations participating in anti-competitive conduct to be the first to cooperate. In addition, amnesty, immunity, or reduced sanctions may not be appropriate where the corporation's business is permeated with fraud or other crimes.

One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation's voluntary disclosure and cooperation. Prosecutors may, therefore, request a waiver in appropriate circumstances.² The Department does not, however, consider waiver of a corporation's privileges an absolute requirement, and prosecutors should consider the willingness of a corporation to waive the privileges when necessary to provide timely and complete information as only one factor in evaluating the corporation's cooperation.

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees,³ through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation. By the same token, the prosecutor should be wary of attempts to shield corporate officers and employees from liability by a willingness of the corporation to plead guilty.

Finally, a corporation's offer of cooperation does not automatically entitle it to immunity from prosecution. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or

agents as in lieu of its own prosecution. Thus, a corporation's willingness to cooperate is merely one relevant factor, one that needs to be considered in conjunction with the other factors, particularly those relating to the corporation's past history and the role of management in the wrongdoing.

VII. Charging a Corporation: Corporate Compliance Programs

A. General principle: Compliance programs are established by corporate management to prevent and to detect misconduct and to ensure that corporate activities are conducted in accordance with all applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees, or agents. Indeed, the commission of such crimes in the face of a compliance program may suggest that the corporate management is not adequately enforcing its program. In addition, the nature of some crimes, e.g., antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

B. Comment: A corporate compliance program, even one specifically prohibiting the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior*. See *United States v. Basic Construction Co.*, 711 F.2d 570 (4th Cir. 1983) ("a corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation even if . . . such acts were against corporate policy or express instructions."). Thus, in *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973), the Ninth Circuit affirmed antitrust liability based upon a purchasing agent for a single hotel threatening a single supplier with a boycott unless it paid dues to a local marketing association, even though the agent's actions were contrary to corporate policy and directly against express instructions from his superiors. The court reasoned that Congress, in enacting the Sherman Antitrust Act, "intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act."⁴ It concluded that "general policy statements" and even direct instructions from the agent's superiors were not sufficient;

"Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks." See also *United States v. Beusch*, 596 F.2d 871, 878 (9th Cir. 1979) ("[A] corporation may be liable for the acts of its employees done contrary to express instructions and policies, but . . . the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation."); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174 (3rd Cir. 1970) (affirming conviction of corporation based upon its officer's participation in price-fixing scheme, despite corporation's defense that officer's conduct violated its "rigid anti-fraternization policy" against any socialization (and exchange of price information) with its competitors; "When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held legally responsible for it, although what he did may be contrary to his actual instructions and may be unlawful.").

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formal guidelines for corporate compliance programs. The fundamental questions any prosecutor should ask are: "Is the corporation's compliance program well designed?" and "Does the corporation's compliance program work?" In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program, the extent and pervasiveness of the criminal conduct, the number and level of the corporate employees involved, the seriousness, duration, and frequency of the misconduct, and any remedial actions taken by the corporation, including restitution, disciplinary action, and revisions to corporate compliance programs.⁵ Prosecutors should also consider the promptness of any disclosure of wrongdoing to the government and the corporation's cooperation in the government's investigation.

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed and implemented in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. In addition, prosecutors should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies,

⁴ For a detailed review of these and other factors concerning corporate compliance programs, see United States Sentencing Commission, Guidelines Manual, § 8A1.2, comment. (n.3(k)) (Nov. 1997). See also U.S.S.G. § 8C2.5(f).

may result in a decision to charge only the corporation's employees and agents.

Compliance programs should be designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business. Many corporations operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program's design and implementation. For instance, state and federal banking, insurance, and medical board, the Department of Defense, the Department of Health and Human Services, the Environmental Protection Agency, and the Securities and Exchange Commission have considerable experience with compliance programs and can be very helpful to a prosecutor in evaluating such programs. In addition, the Fraud Section of the Criminal Division, the Commercial Litigation Branch of the Civil Division, and the Environmental Crimes Section of the Environment and Natural Resources Division can assist U.S. Attorneys' Offices in finding the appropriate agency office and in providing copies of compliance programs that were developed in previous cases.

VIII. Charging the Corporation: Restitution and Remediation

A. General Principle: Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so, as well as other remedial actions such as implementation of an effective corporate compliance program, improving an existing one, and disciplining wrongdoers, in determining whether to charge the corporation.

B. Comment: In determining whether or not a corporation should be prosecuted, a prosecutor may consider whether meaningful remedial measures have been taken, including employee discipline and full restitution.⁶ A corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporation that fully recognize the seriousness of their misconduct and accept responsibility for it should be seen to be taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated. Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined the wrongdoers and disclosed information concerning their illegal conduct to the government.

Employee discipline is a difficult task for many corporations because of the human element involved and sometimes because of the seniority of the employees concerned. However, while corporations need to be fair to their employees, they must also be unequivocally committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees. In evaluating a corporation's response to wrongdoing, prosecutors may evaluate the willingness of the corpo-

⁶ For example, the Antitrust Division's amnesty policy specifically requires that "[w]here possible, the corporation [make] restitution to injured parties. . . ."

¹ In addition, the Sentencing Guidelines reward voluntary disclosure and cooperation with a reduction in the corporation's offense level. See U.S.S.G. § 8C2.5(g).

² This waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation.

³ Some states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with government law should not be considered a failure to cooperate.

⁴ Although this case and *Basic Construction* are both antitrust cases, their reasoning applies to other criminal violations. In the *Hilton* case, for instance, the Ninth Circuit noted that Sherman Act violations are commercial offenses "usually motivated by a desire to enhance profits," thus bringing the case within the normal rule that a "purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his employment." 467 F.2d at 1008 & n.4. In addition, in *United States v. Automated Medical Laboratories*, 770 F.2d 399, 406 n.5 (4th Cir. 1985), the Fourth Circuit stated that *Basic Construction* states a generally applicable rule on corporate criminal liability despite the fact that it addresses violations of the antitrust rules."

ration to discipline culpable employees of all ranks and the adequacy of the discipline imposed. The prosecutor should satisfy himself or herself that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.

In addition to employee discipline, two other factors in evaluating a corporation's remedial efforts are restitution and reform. As with natural persons, the decision whether or not to prosecute should not depend upon the target's ability to pay restitution. A corporation's efforts to pay restitution even in advance of any court order is, however, evidence of its "acceptance of responsibility" and, consistent with the practices and policies of the appropriate Division of the Department entrusted with enforcing specific criminal laws, may be considered in determining whether to bring criminal charges. Similarly, although the inadequacy of a corporate compliance program is a factor to consider when deciding whether to charge a corporation, that corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider.

IX. Charging the Corporation: Collateral Consequences

A. General Principle: Prosecutors may consider the collateral consequences of a corporate criminal conviction in determining whether to charge the corporation with a criminal offense.

B. Comment: One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possible substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (e.g., publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it. Further, prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federal funded programs such as health care. Whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, a decision that will be made based on the applicable statutes, regulations, and policies.

Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation. Therefore, in evaluating the severity of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs should also be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained within a corporate division (or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern

where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity. Similarly, where the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing and the conduct at issue was accepted as a way of doing business for an extended period, debarment may be deemed no collateral but a direct and entirely appropriate consequence of the corporation's wrongdoing.

The appropriateness of considering such collateral consequences and the weight to be given them may depend on the special policy concerns discussed in section III, *supra*.

X. Charging a Corporation: Non-Criminal Alternatives

A. General Principle: Although non-criminal alternatives to prosecution often exist, prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution, e.g., civil or regulatory enforcement actions, the prosecutor may consider all relevant factors, including:

1. The sanctions available under the alternative means of disposition;
2. the likelihood that an effective sanction will be imposed; and
3. the effect on non-criminal disposition on Federal law enforcement interests.

B. Comment: The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to an egregious violation, a pattern of wrongdoing, or a history of non-criminal sanctions without proper remediation. In other cases, however, these goals may be satisfied without the necessity of instituting criminal proceedings. In determining whether federal criminal charges are appropriate, the prosecutor should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution, i.e., the strength of the regulatory authority's interest, the regulatory authority's ability and willingness to take effective enforcement action, the probable sanction if the regulatory authority's enforcement action is upheld, and the effect of a non-criminal disposition on Federal law enforcement interests. See USAM §§ 9-27.240, 9-27.250.

XI. Charging a Corporation: Selecting Charges

A. General Principle: Once a prosecutor has decided to charge a corporation, the prosecutor should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's conduct and that is likely to result in a sustainable conviction.

B. Comment: Once the decision to charge is made, the same rules as govern charging natural persons apply. These rules require "a faithful and honest application of the Sentencing Guidelines" and a "individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime." See USAM § 9-27.300. In making this determination, "it

is appropriate that the attorney for the government consider, *inter alia*, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range . . . is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." See Attorney General's Memorandum, dated October 12, 1993.

XII. Plea Agreements with Corporations

A. General Principle: In negotiating plea agreements with corporations, prosecutors should seek a plea to the most serious, readily provable offense charged. In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context. Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.

B. Comment: Prosecutors may enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons. See USAM §§ 9-27.400-500. This means, *inter alia*, that the corporation should be required to plead to the most serious, readily provable offense charged. As is the case with individuals, the attorney making this determination should do so "on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime. In making this determination, the attorney for the government consider, *inter alia*, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range . . . is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." See Attorney General's Memorandum, dated October 12, 1993. In addition, any negotiated departures from the Sentencing Guidelines must be justifiable under the Guidelines and must be disclosed to the sentencing court. In addition, corporations should be made to realize that pleading guilty to criminal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business. Thus, as with natural persons, pleas should be structured so that the corporation may not later

"proclaim lack of culpability or even complete innocence." See USAM §§ 9-27.420(b)(4), 9-27.440, 9-27.500. Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.

A corporate plea agreement should also contain certain provisions that recognize the nature of the corporate "person" and ensure that the principles of punishment, deterrence, and rehabilitation are met. In the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters. See U.S.S.G. §§ 8B1.1, 8C2.1, et seq. In addition, where the corporation is a government contractor, permanent or temporary debarment may be appropriate. Where the corporation was engaged in government contracting fraud, a prosecutor may not negotiate away an agency's right to debar or to list the corporate defendant.

In negotiating a plea agreement, prosecutors should also consider the deterrent value of prosecutions of individual within the corporation. Therefore, one factor that a prosecutor may consider in determining whether to enter into a plea agreement is whether the corporation is seeking immunity for its employees and officers or whether the corporation is willing to cooperate in the investigation of culpable individuals. Generally, prosecutors should rarely negotiate away individual criminal liability in a corporate plea.

Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one. As discussed above, prosecutors may consult with the appropriate state and federal agencies and components of the Justice Department to ensure that a proposed compliance program is adequate and meets industry standards and best practices. See section VII, *supra*.

In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is complete and truthful. To do so, the prosecutor may request that the corporation waive the attorney-client and work product privileges, make employees and agents available for debriefing, disclose the results of its internal investigation, file appropriate certified financial statements, agree to government or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible culprits are identified and, if appropriate, prosecuted. See generally section VIII, *supra*.

ENVIRONMENTAL ISSUES AFFECTING REAL ESTATE

**ENVIRONMENTAL CONSULTANTS
AND HOW TO USE THEM**

**Wanda Ballard Repasky
Perkins Law Group
Louisville and Lexington, Kentucky**

ENVIRONMENTAL ISSUES AFFECTING REAL ESTATE
~ Environmental Consultants—When and How to Use Them ~

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Introduction

Twenty years have passed since the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)¹ first imposed liability for the environmental sins of predecessors in interest in real estate. All people involved in buying and selling land now understand the need to consider some "environmental stuff" before closing the deal. Unfortunately, for most buyers, sellers, realtors, appraisers, bankers and lawyers, the understanding of the need to consider the "environmental stuff" extends only that far.

Most sophisticated clients today understand that the deal's due diligence includes a review of the property's environmental condition. Investigating the environmental condition of a property can be complicated. An elementary understanding of the requirements of environmental due diligence should at least include the knowledge that a preliminary survey of commercial or industrial properties is necessary to avoid the potentially astronomical liability associated with contaminated properties. However, it is not enough to know that an environmental assessment should be performed, you should also know where to find a qualified consultant to do the survey, what to ask for, and then how to decipher the information contained in the report.

The purpose of this presentation is to provide practical advice on answering the most basic questions concerning environmental due diligence on commercial and industrial properties. Since few involved in real estate transactions maintain the technological expertise required to assess with the impacts of hazardous pollutants on land, or an understanding of the implications of those impacts under the complicated environmental regulatory scheme, a basic "How To Guide" for finding, hiring, and using environmental consultants in land transactions has been designed to answer the following questions:

1. Why do you need an environmental survey?
2. How do you find a competent environmental consultant?
3. What is the scope of work you ask for in a Phase I Environmental Site Assessment (ESA)?
4. What do you need to watch out for in consultant contracts?
5. How do you read and interpret a Phase I ESA?
6. What do you do with the recommendations and conclusions offered by the consultant?

I. Why Do You Need An Environmental Survey

A. Statutory Liability for Cleanup

The primary federal statute governing the ownership of contaminated properties is the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act (SARA),² commonly known as "Superfund". This statute imposes liability for the cleanup of historic releases of hazardous substances, outlines available defenses to such liability, defines appropriate inquiry under the exclusions to CERCLA; and provides a statutory definition of hazardous substances, petroleum products, and petroleum exclusion to CERCLA. Kentucky has essentially adopted the provisions of Superfund in KRS 224.01-400 and both state and federal statutes apply to contaminated land in Kentucky.

The effect of Superfund was to make current and/or former owners and/or operators of property contaminated with hazardous substances responsible for the remediation of the substances and for environmental impacts to land as a result of the contamination. This liability includes damages to adjacent and

¹ 42 U.S.C § 9601 *et seq.*

² 42 U.S.C. § 9601 *et seq.*

adjoining properties not owned by the actual polluter. CERCLA provides a right to sue for damages to the government and to third parties, such as neighbors and certain public interest groups, when a court finds that they have a legal interest in the quality of the environment. The law imposes "joint and several" liability on potentially responsible parties (PRPs) for the contamination. Superfund is a "strict liability" statute, in that if a party meets the statutory definition of a potentially responsible party, then it has liability for the cleanup. Effectively, Superfund requires PRPs prove they are not a responsible party under the definitions in the law on the site.

B. Defenses to Liability

Among the statutory defenses to CERCLA liability are acts of God, acts of war, and an act or omission of a third party who does not have a contractual relationship with the PRP, if the PRP can establish that he "(a) exercised due care with respect to the hazardous substance concerned. . . , and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably be a result from such actions or omissions."³

Under Section 9601(35)(A), a contractual relationship includes, but is not limited to "land contracts, deeds, or other instruments transferring title or possession . . . ". These contractual relationships eliminate the defense to liability unless the defendant is an innocent purchaser.

Present owners of a CERCLA facility are liable for the costs incurred in removing hazardous substances from the facility unless (1) they can establish by a preponderance of the evidence that the release of the substances and the damages resulting from the release were caused solely by a third party who had no relationship with the owner and that the owners exercised due care with

³ 42 U.S.C. § 9607(b).

respect to the substances in light of all relevant facts and circumstances, and that they took precautions against the foreseeable actions and omissions of third parties.⁴ The “innocent purchaser” defense also requires that a PRP must have undertaken, at the time of the acquisition, “all appropriate inquiry” into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.

In considering whether “all appropriate inquiry” was made, courts will take into account factors such as: any specialized knowledge of the PRP; the relationship between the purchase price to the value of the property if uncontaminated; commonly known or reasonably ascertainable information about the property; and the ability to detect such contamination with appropriate inspection.⁵

C. *Appropriate Inspection*

“Appropriate inspection” is generally considered to include a Phase I Environmental Site Assessment (ESA) and a follow-up Phase II if the Phase I recommends further investigation of suspected environmental concerns on the property. The PHASE I ESA is a preliminary tool designed to assess environmental liability associated with the site. It is a non-invasive process that generally consists of a record review, a site visit, data base review and a written report. The PHASE I ESA is intended to constitute “all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice” as is required to meet the innocent purchaser exclusion from CERCLA liability found at 42 U.S.C. Section 9601(35)(B).⁶

⁴ United States v. 150 Acres of Land, More or Less Located in Medina County, Ohio, 204 F 3d 698 (6th Circuit, 2000).

⁵ 42 USC § 9601(35)(B).

⁶ Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process. American Society for Testing and Materials, ASTM Standard E 1527-97.

If the PHASE I ESA indicates that further investigation is required, then a Phase II Environmental Site Assessment (Phase II) will be recommended. The Phase II may include the collection and analysis of soil, surface water and/or groundwater samples to determine the presence or absence of hazardous constituents in these media.

While there are legitimate reasons to consider using an environmental consultant to assess the environmental condition of a residential property, (lead paint, radon, heating oil tanks, asbestos), the competitive nature of residential loans usually prevents lenders from requiring PHASE I ESAs on residential properties. Most lenders do not require Phase I ESAs on residential properties because of the added cost to the loan.

While environmental due diligence would inappropriately raise the cost of closing a residential loan, banks are generally willing to assume the calculated business risk factors associated with residential properties. Exceptions occur in cases involving older properties where the likelihood of asbestos or underground petroleum storage is higher, or in areas with known environmental hazards.

Commercial, industrial and large agricultural properties are another matter. The United States Office of the Comptroller of the Currency requires environmental due diligence on commercial properties when the loans are made by federally insured banks. Some sites bear no more risk of environmental hazards than residential properties. For instance, sandwich shops, restaurants, clothing stores, depending on their location, would not generally give rise to the concern of the potential for significant environmental problems. Paint stores, any business using underground petroleum storage or chemical storage or usage would likely warrant at least a PHASE I ESA, whether or not the lender insists. Again, the neighborhood in which the property lies should be a major factor in the determination of whether environmental investigation is appropriate. Industrial

properties will almost always warrant a due diligence investigation, including Phase II sampling and analysis.

D. *Why Do You Want a Phase I ESA?*

“Don’t ask the question unless you know what you’ll do with the information.” This major law of litigation applies doubly to environmental issues. Creating “knowledge” of an environmental condition may require action on the part of the owner, whether current or future. It may require reporting to the Natural Resources and Environmental Protection Cabinet, and/or remediation of the site.⁷ While its very important for a potential owner of property to have this information before the purchase, if you represent the current owner you should consider the risks associated with allowing any investigation that would confirm a release of hazardous substances on the property.

II. *How Do You Find A Competent Environmental Consultant?*

A. *Look for a Competent, Experienced Professional*

Environmental consultants, like lawyers, are a necessary evil in the due diligence process. In the limited context of real estate transfers, consultants assist in the assessment of the risk that environmental concerns will either impact the value of the property, result in remediation costs to correct a problem, or present a threat of third party actions. Phase I and II ESAs should be performed by competent professionals with a background in the environmental issues commonly involved in real estate transactions. Not all environmental consulting firms perform ESAs, and some that do, shouldn’t. While Phase I ESAs are not rocket science, an insufficient scope of work, or a poorly performed investigation, may result in millions of dollars in losses to those who purchase property in reliance on an incompetent consultant’s report.

⁷ KRS 224.01-400

While health and safety concerns are a factor, the primary reason consultants are engaged in real estate transactions is to establish whether there is a real or potential environmental threat to the value of the property. It is safe to say that the majority of environmental due diligence investigations on commercial properties are likely to be prompted by the financiers of the transaction. Beyond the liability associated with environmental impacts to property, environmental concerns, whether real or merely perceived may have a major impact on the property's market value and therefore, to the value of the loan for which it is collateral.

While there are no statutes or regulations requiring that a consultant perform environmental due diligence, common practice dictates that a competent, experienced professional do the work. It is doubtful that hiring a consultant of questionable credentials at an unreasonably low price will meet the requirements for "appropriate inquiry".

Environmental consultants can be found in the Yellow Pages, through professional and business groups, through a bank loan officer, or through word of mouth. Finding a consultant competent to perform PHASE I ESAs is no easy task. Environmental consultants have no licensing requirements per se. Firms are generally staffed with engineers, geologists and various denominations of earth scientists. Kentucky certifies geologists and engineers, but there is no specific training required for these people to call themselves "environmental consultants" to perform Phase I ESAs.

In addition to a lack of certification requirements, the search for a competent consultant is made even more difficult by the fact that the result is only as good as the professional performing the work. Consulting firms work on notoriously low margins, usually between 5 and 8 percent. Phase I ESAs are loss leaders for many firms. Therefore, most of the work on due diligence

investigations are generally performed by the lowest paid, least experienced, professionals on the staff. Good firms assure quality through strict oversight by more experienced members of the company. Many firms do not.

Lenders typically maintain a list of pre-qualified consultants, approved for the sole purpose of providing PHASE I ESA reports to the bank. The pre-qualification will generally require that the company have a minimal level of errors and omissions insurance coverage (usually \$1 million), that the contract meet certain requirements for the bank's ability to rely on the report, that contractual limitations of liability aren't prohibitive, and that the report comply with the American Society for Testing and Materials (ASTM) standard for environmental site assessments. They may also require a specified format for the report. The competence of the consultant staff may not have been addressed in the lender's assessment of the company; however, some lenders set minimum requirements for personnel performing work on developed sites.

B. *Who Should Hire the Consultant?*

A threshold question that should be addressed is whether to have the consultant hired through an attorney in order to protect the information gained through the assessment. While Kentucky law offers an environmental audit privilege,⁸ the privilege offers little if any protection from federal inquiry and is burdensomely specific in its requirements for qualification. The attorney client privilege is therefore the most reliable means of protecting information and the thought processes that would be inherent in the decision as to whether to disclose a problem. The need to run the request for a Phase I ESA through an attorney should be made in consideration of the circumstances specific to the property. The higher the potential for discovering contamination, the greater the need for legal counsel at the outset.

⁸ KRS 224.01-040

C. Preliminary Questions An Informed Client Should Ask of the Environmental Consultant

When contacting an environmental consultant to perform a PHASE I ESA there are a number of preliminary questions an informed client should ask:

- Who will perform the site work?
- How many PHASE I ESA's of this type has the person performed?
- What is his/her educational background and training for PHASE I ESAs?
- What are the company's training requirements for this level of work?
- Who will review the work of the underling doing the investigation?
- What are that person's qualifications?
- What are the firm's quality assurance procedures for PHASE I ESAs?
- What are the firm's limits on its errors and omissions policy?
- What does the contract say about liability should the report miss something significant?

The answers to these questions should confirm that:

- the individual doing the work is competent, having done several PHASE I ESAs on the type of property at issue;
- the training has included supervised work on PHASE I ESAs on this type of property;
- the reviewer has much more experience with PHASE I ESAs than the person doing the records review and field work;

- the QA/QC includes a double check of all information used by the person doing the field work;
- the insurance is sufficient to address losses associated with mistakes; and
- the consultant's contract gives the client access to all of the insurance and that there are no unreasonable limitations of liability in the event that the report is inadequate.

III. What is the Scope of Work for a Phase I ESA?

A. Factors to Consider

The level of environmental inquiry that is appropriate to afford a purchaser protection under CERCLA cannot be the same for every property or every party to a real estate transaction. The "innocent purchaser" defense requires that a "potentially responsible party" (PRP) must have undertaken, at the time of the acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.⁹ In considering whether "all appropriate inquiry" was made, courts will take into account factors such as: any specialized knowledge of the PRP, the relationship of the purchase price to the value of the property, if uncontaminated commonly known or reasonably ascertainable information about the property and the ability to detect such contamination by appropriate inspection.¹⁰

As with most anything else, you can buy a Ford version of a PHASE I ESA right up to a Mercedes. Competition for the work has lead to a shakeup in the market for PHASE I ESAs. Consulting companies have been developed that do nothing except Phase I ESAs. These companies compete with full service

⁹ 42 U.S.C. § 9601(35)(A).

¹⁰ 42 U.S.C. § 9601(35)(B).

consulting firms that generally have much higher overhead, and therefore cannot meet the bargain prices offered by the boutique firms. What is included in the assessment is often greatly affected by the amount the consumer is willing to pay.

B. ASTM Minimum Standard

If the goal is to meet the due diligence requirements of CERCLA, the minimum scope of work should be the ASTM E 1527-97 Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process. The American Society for Testing and Materials (ASTM)¹¹ developed the scope of work in response to a public pleading for an answer to the question: "What is an "appropriate inquiry" to meet the CERCLA innocent purchaser test?". Compliance with the ASTM standard does not guarantee that the CERCLA requirements are met, however, court decisions since its adoption indicate that conformity with the standard is a factor in determining eligibility for the innocent purchaser defense. The standard states that its objective "is to identify, to the extent feasible, pursuant to the process described herein, recognized environmental conditions in connection with the property."¹²

The ASTM standard includes four primary elements. They are: 1) Review of publicly available records, from standard environmental sources, including data bases and/or documents concerning the environmental status of the site;¹³

2) Site Reconnaissance of the subject site and surrounding properties; (3) Interviews with local government officials, site personnel and persons with

¹¹ The standard can be obtained through the American Society for Testing and Materials (ASTM), 100 Barr Harbor Drive, West Conshohocken, Pennsylvania 19428.

¹² ASTM E 1527-97 Section 6.1.

¹³ Documentation may include agency records, aerial photographs, USGS maps, Sandborn insurance maps, and/or computer databases.

knowledge of the uses and environmental condition of the property; and 4) Evaluation and written report.¹⁴

While the ASTM standard is comprehensive, it does include limiting language designed to define the scope of the issues it addresses. In defining a standard of good and customary practice for conducting an ESA, ASTM limited its goal to the identification of "recognized environmental conditions." "Recognized environmental conditions" means, within the context of the standard,

the presence or likely presence of any hazardous substances or petroleum products on the property under conditions that indicate an existing release, a past release or a material threat of a release of any hazardous substances or petroleum products into structures on the property or into ground, groundwater, or surface water of the property. The term includes hazardous substances and petroleum products even under conditions in compliance with laws. The term is not intended to include de minimis conditions that generally do not present a material risk of harm to public health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies.¹⁵

The ASTM standard gives a detailed description of the minimum, and expanded requirements for a PHASE I ESA. Additional inquiry, or reduced inquiry, may be appropriate depending upon the condition of the property, its history of use, and its intended future use. For example, the standard calls for an historical review back to the property's first use, or until 1940, whichever is earlier.¹⁶ However, if it can be confirmed that the property was a farm until 1975, further investigation of available historical data may not be warranted, given the expense of collecting the information, to confirm that it had the same use in 1940.

¹⁴ Section 6, ASTM E 1527-97.

¹⁵ ASTM E 1527-97 1.1.1.

¹⁶ ASTM E 1527-97 7.3.2.

On the other hand, there may be issues that the parties may wish to include in the scope of work that are outside the defined limitations of the ASTM standard, or that would be imposed because of regulatory agency concern. These may include: the presence of asbestos containing materials, radon, lead-based paint, lead in drinking water, and the existence of wetlands. While none of these items meets the definition of "recognized environmental concerns" they all may impact either the value of the property, costs associated with the development of the property, or in the case of wetlands, the ability to develop the property at all.

C. Permit Review

In addition to the standard scope of work for the Phase I ESA, the preliminary inquiry for properties that will be developing undeveloped land or that have existing industrial activity may warrant a permit review. The purpose of a permit review is to determine the transferability of environmental permits or licenses necessary to operate the business. Outstanding violations and/or fines may prevent a new owner from continuing operations at the facility, making the property useless for its intended purpose.

D. Tailor the Work to the Property

A competent consultant will tailor the scope of work to the specific property, and should be able to readily explain to the client why the scope of the inquiry should be revised. This is why it is important to have a comprehensive discussion with the consultant prior to contracting for a Phase I ESA. The consultant needs to know as much of the history of the property as possible, as well as its intended future use, before developing a scope of work. Further, some properties will obviously warrant invasive, Phase II testing even before a PHASE I ESA is completed. Therefore, a Phase I report will likely be a waste of

the client's time and money since it will recommend a Phase II and the Phase I and Phase II reports can be combined.

IV. What Do You Need To Watch Out For In Consultant Contracts?

A. Key Elements of the Consultant Contract

Consulting contracts vary greatly from company to company, but key elements remain the same in those offered by informed companies. As far as the consultant is concerned, there are two primary reasons for a contract: to assure payment and to limit the company's liability in the event that the client makes a claim for errors in the report.

The client should also have two primary goals in contracting with the consultant. The first is to attempt to assure the highest professional standards on the part of the consultant in providing the product. The second is to guarantee access to the consultant's insurance and other assets in the event that something significant is missed in the environmental assessment.

Environmental consulting contracts are most often based on the prototypes developed by professional design engineering companies.¹⁷ There is a significant body of case law that has guided the development of design engineering contracts over the last 20 years. Many of these decisions have resulted from lawsuits involving environmental issues.

B. Limitation of Liability for Professional Errors

While assuring payment is fairly straightforward, the limitation of liability for professional errors is more complicated for both consultants and clients. Like

¹⁷ These prototypes are published by the National Society of Professional Engineers, the American Consulting Engineers Council, the American Society of Civil Engineers, and the Construction Specification Institute.

most professionals, environmental consultants use insurance in their risk management planning. Premiums for professional liability coverage range from about 1 percent to about 5 percent of gross revenues with deductible limits or risk retentions ranging from \$250,000 to \$500,000.¹⁸ With deductibles like that, the contract language becomes essential for consultants doing low margin, high risk Phase I ESAs.

The contract provisions of choice used to limit liability are limitations on the amount of recovery available to clients and indemnification for the consultant's losses to third parties.

Consulting firms may attempt to limit their liability to a specific dollar amount or to the limits of their insurance coverage. The economic rationale for the limitation is straightforward. There must be some link between the risk and the reward involved in the provision of professional services. PHASE I ESA's constitute the highest liability item for consultants. Environmental consultants are sued more often and lose more money for Phase I work than any other area of their practice. Phase I ESAs usually run less than \$2,000. Margins for this kind of work are very narrow, usually between 5 and 8 percent. Agreeing to a limitation of liability of \$50,000 is a highly leveraged approach to risk: This is 25x the fee.

Consulting firms may attempt to limit liability to the amount of fees collected on the project, the amount of their insurance coverage, or something less than the deductible on their errors and omissions policies. A typical limitation provision that has survived more than one skirmish in the courts, and yet has not met with total success, is this one used by a large multi-national firm:

PROFESSIONAL LIABILITY. For additional consideration from Firm of \$10.00, receipt and adequacy of which is hereby

¹⁸ Bundschuh & Collings, Risk Management Study of Large Design Firms, in 1997 Wiley Construction Law Update. 39, fig. 2-21 (N.Sweeney and John Wiley & Sons, Inc. Eds, 1997).

acknowledged, Client agrees that Firm's liability, and that of its officers, directors, employees, agents and subcontractors, to Client or any third party due to any negligent professional acts, errors or omissions or breach of contract by Firm will be limited to an aggregate of \$50,000, or Firm's total charges, whichever is greater. If Client prefers to have higher limits of professional liability, Firm agrees to increase the aggregate limit, up to a maximum of \$1,000,000, upon Client's written request at the time of accepting our proposal, provided Client agrees to pay an additional consideration of ten percent of Firm's total charges, or \$500 whichever is greater. The additional charge for the higher liability is because of the greater risk assumed by the Firm and is not a charge for additional professional liability insurance. This limitation shall not apply to the extent prohibited by law.

The enforceability of these limitations of liability has often been found to be dependent upon demonstrating to a court that the professional consultant is in jeopardy of a meaningful "hit" in the event of negligence. There should be some penal nature to the amount, so that there is an incentive for the consultant to exercise due care. Limitations of liability clauses are not always enforced. They can fail because of considerations of public policy, application of anti-indemnity statutes in the state, or a specific defect in the limitation of liability clause itself.¹⁹

On the other hand, a missed underground storage tank (UST) or on-site landfill may mean hundreds of thousands of dollars to an unknowing landowner. The purpose of having a Phase I ESA done, in addition to securing the innocent landowner defense under CERCLA, is to protect the owner from economic impacts resulting from environmental conditions. The Phase I ESA is often looked to as an "insurance policy" or at least a risk management tool for the property owner. There is some truth to the analysis, but only to the extent that the consultant's report is sound, its contract requires that it adhere to a reasonable standard of care, and its financial condition and insurance are such that losses by the client will be covered.

¹⁹ Dillingham v. CH2M Hill Northwest, Inc., 873 P.2d 1335 (Alaska 1994) and W. William Graham v. City of Cave City, 709 S.W. 2d 94 (Ark. 1996).

In actuality, due to the competitive market in which environmental consultants operate, many consultants will raise limits of liability without the additional charge. The ability of local personnel to revise the contract is influenced by the control exercised over the staff by the company's lawyers and risk managers. Another factor influencing the consultant's ability to negotiate contract terms is that in order to receive errors and omissions coverage, firms are required to present their terms and conditions to the underwriter. Excursions from the approved language may compromise the firm's insurance coverage, and in turn, compromise the client's ability to recover damages under the contract.

Consultants will also attempt to limit their liability to their clients through indemnification and "hold harmless" clauses. Since such clauses are disfavored generally, they are interpreted strictly when challenged in court. Because the law prefers persons to be responsible for their actions (or inactions when a duty exists) such clauses are permitted but are scrutinized closely by the courts.²⁰

With that in mind, you wonder why consultants would attempt to use the following language as their standard.

a. General. CLIENT agrees to defend, indemnify and hold CONTRACTOR, its directors, officers, employees, subcontractors and agents harmless against any claims by third parties for personal injury, property damage, or economic loss caused by the negligence of CLIENT or arising from the work performed by CONTRACTOR under this Agreement, unless such injury or damage is caused by CONTRACTOR's sole negligence or willful misconduct.

In the event a claim is made by CLIENT against CONTRACTOR for negligence, misconduct, or design errors, and subsequent investigation reveals that the claim is unfounded, the reasonable cost of such investigation, including CONTRACTOR personnel time and expenses, and outside consultant and attorneys' fees, shall be deemed a change of the Scope of Work and will be reimbursable under the standard billing rates and other terms set forth in the Proposal.

²⁰ Georgetown Steel Corp. v. Union Carbide Corp., 806 F. Supp. 74, 77 (D.S.C. 1992).

CONTRACTOR shall not be liable to CLIENT for any indirect or consequential damages (including, but not limited to, lost production revenue or profits) incurred due to the actions of CONTRACTOR, its subcontractors or agents.

CLIENT agrees that CONTRACTOR will assume no responsibility resulting from the implementation of instructions by CLIENT with which CONTRACTOR is in disagreement, provided CONTRACTOR has communicated the objections in writing to CLIENT.

Courts have also taken into account the relative sophistication of the persons entering into the contract in determining the validity of indemnity clauses in consulting contracts.²¹ In commercial transactions, often the parties are not on the same level in their understanding of the law. This may impact the enforceability of the terms, but that is unlikely when lawyers are involved.

Another means of limiting consultant liability for Phase I ESAs is to limit the ability of third parties to rely on the report. Most consulting contracts limit the use of the reports to the parties to the contract, absent specific authorization for other third party use. Courts have generally upheld this interpretation of the law.²²

In general these terms will be negotiable. Clients can almost always get the benefit of the additional insurance without paying additional funds. Further, onerously limiting language, such as provisions requiring "sole" negligence in order to recover damages from the consultants, may not be enforceable on the one hand, and are often negotiable on the other.

C. Pointers For Negotiating Consulting Contracts to the Benefit of the Client

²¹ Valhal Corp. v. Sullivan Associates, Inc., 44 F. 3d 195 (3rd Cir. 1995).

²² Maxwell Morris v. Dames and Moore, Inc. (1997 Conn. Super LEXIS 1248, (May 2, 1997); William Fords v. Hartford Courant, 232 Conn. 557; 657 A2d 212 (1995); Markborough v. Superior Court, 227 Cal. App. 3rd 705 (1991); Florida Power and Light v. Mid Valley Inc., 763 F 2d 1316 (1985);and Long Island Lighting Company v. IMO Delaval, Inc., 668 F. Supp. 237 (1987).

A careful reading of the consultant's contract is warranted before engaging any environmental consultant to perform environmental assessments of real estate. If the consultant has no financial incentive to follow professional standards, then the report may be less than useless. It may offer a false sense of security that can result in significant costs to the client. The following pointers are geared only to Phase I ESAs and cover only the minimum standards for these contracts:

1. Make sure that the contract names the correct clients. In most cases both the client and the lender should be named as clients so that they will both have the ability to legally rely on the content of the report.
2. Review the scope of work to assure that it addresses the questions the client needs answered.
3. The standard of care should require at least the degree of care and skill ordinarily exercised under similar conditions by reputable professionals performing the same work.
4. Minimum insurance amounts for professional liability should be \$1 million and the client should have access to the full amount of those limits.
5. Indemnification clauses should not require the client to reimburse the consultant for losses to third parties, unless the client is at fault.
6. The contract should require that the consultant keep all information gained through the assessment confidential.

V. How Do You Read and Interpret a Phase I ESA?

The publication of the ASTM standard for Phase I ESAs inarguably achieved one of its primary goals - the standardization of environmental reports. The standard not only defined the content of the Phase I ESA, but it also resulted in reports that are easier to read and understand. The meaning of the results however, can still be evasive.

“So what does this mean to me?” remains the most common question associated with Phase I ESA reports. For non-environmental types, the “Executive Summary” or the “Findings and Conclusions” are the only sections of the report that they read because the rest of the report seems to have little use to the question at hand. That is, whether the property is clear of environmental concerns that would impact the loan value of the property or would lead to significant financial liability resulting from environmental contamination.

The ASTM standard includes a recommended report format.²³ It recommends that supporting documentation be included with the report, along with the credentials of the environmental professional, any information provided by the user, the opinions, findings and conclusions of the environmental professional, an explanation of any deviation from the standard, any additional services contracted for by the user and a signed certification of the document from the environmental professional performing the assessment. Supporting documentation should include copies of documents reviewed by the consultant, photographs of the property, and a site plan illustrating the boundaries of the property assessed.

The significance of the information included in the report varies with the property, however, every section is there for a reason.

²³ ASTM 1527 E at 11 and Appendix X2.

A. Introduction

Generally, the report will include an introduction that will restate the scope of work and its limitations. This should confirm that the client received what it requested. If the scope varied from the proposal or from the ASTM standard, the deviation and the reason for it should be stated up front.

B. Site Description

The site description should first confirm that the appropriate property was assessed. It should describe the current and past uses of the property. Geology and hydrogeology will also be included. This information is included in the report because it assists in the formation of the basis for the consultant's opinion. Subterranean data is vital to the assessment of contaminant migration. Property use is indicative of the types of contaminants that would be expected to be found on the property.

C. Records Review

The record review affords the consultant the benefit of known environmental contamination in doing the assessment. The search includes computer database searches of records maintained by environmental regulatory agencies. Local agencies will also be contacted for information about reported spills, releases, fires, or other incidents that may impact the environmental condition of the site.

D. Site Reconnaissance

The site reconnaissance information is only as good as the person performing the work. This is the portion of the assessment where unreported landfills and underground storage tanks are found. The report of the reconnaissance should include only those items that have significant

environmental impacts and not minor concerns such as trash or insignificant soil staining.

VI. What to do with the Recommendations and Conclusions Offered by the Consultant

Any report of a review of the environmental condition of real estate should include a conclusion that, within the scope of work performed, the consultant sees no reason for further inquiry, or that the findings indicate that further investigation is warranted. The frustration of many Phase I ESA reports is that the consultant will not take a position with regard to the environmental condition of the property. Also, consultants whose primary business in Phase II assessments will use the Phase I investigation to mine for additional work and will recommend environmental testing when its logic is questionable. Any item listed in the Findings and Conclusions as a potential environmental concern should include a clear explanation as to why the item is of concern. However, there are no hard and fast rules concerning what is "acceptable" contamination of a property.

The analysis of what is acceptable to the user of the Phase I is personal, and the Phase I ESA report is but a tool in cost/benefit analysis that must be completed to assess the economic value of the property. Environmental liability concerns need not be automatic deal killers. Costs associated with UST remediation may be reimbursed by the state assurance fund. Contamination may be the responsibility of an off-site polluter.

Specific recommendations for further action, whether it is additional investigation, remediation of known contaminants, or a report to a regulatory agency, generally should not be included in the report. In some cases the circumstances of the underlying transaction would suggest that the recommendations be included in a separate document. Determinative

circumstances may include whether the report will be a matter of public record, whether it is to be submitted to a regulatory agency, or whether it will be released to other third parties.

The client's decision to act upon the consultant's recommendation should not be based solely on the consultant's opinion. Reporting requirements, for instance, are a matter of legal interpretation, which engineers and scientists are not qualified to make.



ENVIRONMENTAL ISSUES AFFECTING REAL ESTATE

**ASSESSING ENVIRONMENTAL LIABILITIES
AND ALLOCATING RISK**

**Clinton J. Elliott
Wyatt, Tarrant & Combs
Louisville, Kentucky**

ASSESSING ENVIRONMENTAL LIABILITIES AND ALLOCATING RISK

I. Environmental Laws Affecting Real Estate

A. Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") - 42 U.S.C. § 9601 *et. seq.*

1. strict, joint and several liability
2. broad categories of PRPs
 - [a] United States v. Bestfoods, 118 S.Ct. 1876 (1998) (corporate affiliates and piercing the corporate veil)
 - [b] Carter-Jones Lumber v. Dixie Distributing Company, 166 F. 3d 840 (6th Cir. 1999) (shareholder and "arranger" liability)
 - [c] IBC Manufacturing Company v. Velsicol Chemical Corporation, 1999 U.S. App. LEXIS 15140 (6th Cir. 1999) (successor liability)
 - [d] Kelley v. Tiscornia, 104 F. 3d 361 (6th Cir. 1996) (lender safe harbor)
3. innocent landowner defense
 - [a] "all appropriate inquiry"
 - [b] due care requirements
 - [c] United States v. 150 Acres of Land, 204 F. 3d 698 (6th Cir. 2000) (inheritance/bequest)
 - [d] Anheuser-Busch, Inc. v. Ford Motor Company, 1997 U.S. Dist. LEXIS 3556 (W.D. Ky.1997) (failure to disclose upon sale can void defense)

B. Resource Conservation and Recovery Act ("RCRA")- 42 U.S.C. § 6901 *et. seq.*

1. waste management and permitting requirements
2. citizens suits enjoining "imminent and substantial endangerment"
 - [a] "against any person . . . contributing to . . ."

3. underground storage tanks ("USTs")
- C. Clean Water Act - 33 U.S.C. § 1251 *et. seq.*
 1. prohibits the discharge of pollutants . . .
 - [a] KPDES permit
 2. storm water permitting requirements
 - [a] Phase II storm water regulations - 64 Fed. Reg. 68721 (Dec. 8, 1999)
 3. Section 404 dredge and fill permits
 - [a] recent modification of NWP's - 65 Fed. Reg. 12818 (March 9, 2000)
- D. Clean Air Act - 42 U.S.C. § 7401 *et. seq.*
 1. permit and compliance status
 2. operational flexibility
 - [a] PSD/non-attainment areas
 - [b] MACT
- E. OSHA
 1. asbestos containing material
 - [a] disclosure, management and abatement requirements
- F. Endangered Species Act
 1. prohibition against "taking" endangered species
 - [a] potential impact on development
- G. Comparable State and Local Laws and Regulations

II. Due Diligence Investigation

A. Buyer's Concerns

1. innocent purchaser defense
2. identify environmental conditions, impacts and use restrictions
3. avoid liability for pre-existing conditions

B. Seller's Concerns

1. no contingent residual liability
2. protection from future action/conditions
3. confidentiality/disclosure issues

C. Practical Considerations For Both Parties

1. right to rely on report
2. establish factual baseline
3. sufficient information to support business decision
4. sufficient information to support risk allocation

D. Assessing the Assessment

1. ASTM E 1527
2. sufficiency of "all appropriate inquiry"

[a] BCW Assoc. v. Occidental Chem. Corp., 1988 U.S. Dist. LEXIS (E.D.Pa. 1988) (court held that buyer should have investigated further based on suspicion)

3. Phase II investigation and beyond

E. Additional Considerations

1. site access

- [a] KC 1986 Limited Partnership v. Read Manufacturing, 33 F. Supp. 2d 820 (W.D. Mo. 1998) (claims against prospective purchaser and consultant as PRPs under CERCLA)

2. reporting obligations

III. Risk Allocation

A. Defined Terms

B. Representations and Warranties

1. scope of due diligence

2. past and present activities/operations

3. presence or absence of hazardous substances/wastes

4. compliance with regulatory obligations

5. status of necessary permits

6. past, present or pending notices, NOVs, administrative or judicial actions

7. necessary schedules

C. Indemnification

1. environmental baseline

[a] due diligence

[b] evidentiary presumptions

2. scope of coverage

[a] White Consolidated Industries, Inc. v. Westinghouse Electric Corporation, 179 F. 3d 403 (6th Cir. 1999)

[b] ejusdem generis

[c] legal "requirements"

[d] basket and cap

3. financial strength
4. avoid inadvertent admissions of liability
5. indemnification beneficiaries

D. Addressing Known Conditions

1. reduction of purchase price
2. escrow funds
3. "carve out"
4. lease rather than purchase
5. creation of separate entity
6. pre-purchase remediation agreement
7. environmental insurance

IV. Brownfields Redevelopment

A. EPA Comfort Letters - 62 Fed. Reg. 4624 (Jan. 30, 1997)

1. EPA's intentions concerning CERCLA response action
2. "purely informational only"

B. EPA Prospective Purchaser Agreement - 65 Fed. Reg. 1381 (Jan. 10, 2000)

1. PPA criteria - 60 Fed. Reg. 34792 (July 3, 1995)
2. covenant not to sue
 - [a] limitations
3. public participation

- C. Kentucky "Brownfields" Statute - KRS 224.01-450
 - 1. public entity application
- D. KRS 224.01-400 and Kentucky's Voluntary Cleanup Program
 - 1. September 10, 1998 guidance
 - 2. risk management
 - [a] engineering controls
 - [b] institutional controls

ENVIRONMENTAL JUSTICE

**STATE AND CITIZEN ABILITY TO INFLUENCE
ENVIRONMENTAL CLEANUP ACTIONS**

**Thomas J. FitzGerald
Kentucky Resources Council
Frankfort, Kentucky**

SECTION G



EXECUTIVE ORDER 12898

FEDERAL ACTIONS TO ADDRESS ENVIRONMENTAL JUSTICE IN MINORITY POPULATIONS AND LOW-INCOME POPULATIONS

February 11, 1994

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1-1. IMPLEMENTATION

1-101. Agency Responsibilities. To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Marian islands.

1-102. Creation of an Interagency Working Group on Environmental Justice (a) Within 3 months of the date of this order, the Administrator of the Environmental Protection Agency ("Administrator") or the Administrator's designee shall convene an Interagency Federal Working Group on Environmental Justice ("Working- Group"). The Working Group shall comprise the heads of the following executive agencies and offices, or their designees: (a) Department of Defense; (b) Department of Health and Human Services; (c) Department of Housing and Urban Development; (d) Department of Labor; (e) Department of Agriculture; (f) Department of Transportation; (g) Department of Justice; (h) Department of the Interior; (i) Department of Commerce; (j) Department of Energy; (k) Environmental Protection Agency; (l) Office of Management and Budget; (m) Office of Science and Technology Policy; (n) Office of the Deputy Assistant to the President for Environmental Policy; (o) Office of the Assistant to the President for Domestic Policy; (p) National Economic Council; (q) Council of Economic Advisers; and (r) such other Government officials as the President may designate. The Working Group shall report to the President through the Deputy Assistant to the President for Environmental Policy and the Assistant to the President for Domestic Policy.

(b) The Working Group shall: (1) provide guidance to Federal agencies on criteria for identifying disproportionately high and adverse human health or environmental effects on minority populations and low-income populations;

(2) coordinate with, provide guidance to, and serve as a clearinghouse for, each Federal agency as it develops an environmental justice strategy as required by section 1-103 of this order, in order to ensure that the administration, interpretation and enforcement of programs, activities and policies are undertaken in a consistent manner; (3) assist in coordinating research by, and stimulating cooperation among, the Environmental Protection Agency, the Department of Health and Human Services, the Department of Housing and Urban Development, and other agencies conducting research or other

activities in accordance with section 3-3 of this order;

(4) assist in coordinating data collection, required by this order;

(5) examine existing data and studies on environmental justice;

(6) hold public meetings at required in section 5-502(d) of this order; and

(7) develop interagency model projects on environmental justice that evidence cooperation among Federal agencies.

1-103. Development of Agency Strategies. (a) Except as provided in section 6-605 of this order, each Federal agency shall develop an agency-wide environmental justice strategy, as set forth in subsections (b) - (e) of this section that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. The environmental justice strategy shall list programs, policies, planning and public participation processes, enforcement, and/or rulemakings related to human health or the environment that should be revised to, at a minimum: (1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify differential patterns of consumption of natural resources among minority populations and low-income populations. In addition, the environmental justice strategy shall include, where appropriate, a timetable for undertaking identified revisions and consideration of economic and social implications of the revisions.

(b) Within 4 months of the date of this order, each Federal agency shall identify an internal administrative process for developing its environmental justice strategy, and shall inform the Working Group of the process.

(c) Within 6 months of the date of this order, each Federal agency shall provide the Working Group with an outline of its proposed environmental justice strategy.

(d) Within 10 months of the date of this order, each Federal agency shall provide the Working Group with its proposed environmental justice strategy.

(e) Within 12 months of the date of this order, each Federal agency shall finalize its environmental justice strategy and provide a copy and written description of its strategy to the Working Group. During the 12 month period from the date of this order, each Federal agency, as part of its environmental justice strategy, shall identify several specific projects that can be promptly undertaken to address particular concerns identified during the development of the proposed environmental justice strategy, and a schedule for implementing those projects.

(f) Within 24 months of the date of this order, each Federal agency shall report to the Working Group on its progress in implementing its agency-wide environmental justice strategy.

(g) Federal agencies shall provide additional periodic reports to the Working Group as requested by the Working Group.

1-104. Reports to The President. Within 14 months of the date of this order, the Working Group shall submit to the President, through the Office of the Deputy Assistant to the President for Environmental Policy and the Office of the Assistant to the President for Domestic Policy, a report that describes the implementation of this order, and includes the final environmental justice strategies described in section 1-103(e) of this order.

Sec. 2-2. Federal Agency Responsibilities For Federal Programs Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons

(including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such, programs, policies, and activities, because of their race, Color, or national origin.

Sec. 3 -3. Research, Data Collection, and Analysis

3-301. Human Health and Environmental Research and Analysis. (a) Environmental human health research, whenever practicable and appropriate, shall include diverse segments of the population in epidemiological and clinical studies, including segments at high risk from environmental hazards, such as minority populations, low-income populations and workers who may be exposed to, substantial environmental hazards.

(b) Environmental human health analyses, whenever practicable and appropriate, shall identify multiple and cumulative exposures.

(c) Federal agencies shall provide minority populations and low-income populations the opportunity to comment on the development and design of research strategies undertaken pursuant to this order.

3-302. Human Health and Environmental Data Collection and Analysis. To the extent permitted by existing law, including the Privacy Act, as amended (5 U.S.C. section 552a): (a) each federal agency, whenever practicable and appropriate, shall collect, maintain, and analyze information assessing and comparing environmental and human health risks borne by populations identified by race, national origin, or income. To the extent practical and appropriate, Federal agencies shall use this information to determine whether their programs, policies, and activities have disproportionately high and adverse human health or environmental effects on minority populations and low-income populations;

(b) In connection with the development and implementation of agency strategies in section 1-103 of this order, each Federal agency, whenever practicable and appropriate, shall collect, maintain and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding facilities or sites expected to have substantial environmental, human health, or economic effect on the surrounding populations, when such facilities or sites become the subject of a substantial Federal environmental administrative or judicial action. Such information shall be made available to the public unless prohibited by law; and

(c) Each Federal agency, whenever practicable and appropriate, shall collect, maintain, and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding Federal facilities that are: (1) subject to the reporting requirements under the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. section 11001-11050 as mandated in Executive Order No. 12856; and (2) expected to have a substantial environmental, human health, or economic effect on surrounding populations. Such information shall be made available to the public unless prohibited by law.

(d) In carrying out the responsibilities in this section, each Federal agency, whenever practicable and appropriate, shall share information and eliminate unnecessary duplication of efforts through the use of existing data systems and cooperative agreements among Federal agencies and with State, local, and tribal governments.

Sec. 4-4. Subsistence Consumption Of Fish And Wildlife

4-401. Consumption Patterns. In order to assist in identifying the need for ensuring protection of populations with differential patterns of subsistence consumption of fish and wildlife, Federal agencies, whenever practicable and appropriate, shall collect, maintain, and analyze information on the consumption patterns of populations who principally rely on fish and/or wildlife for subsistence. Federal agencies shall communicate to the public the risks of those consumption patterns.

4-402. Guidance. Federal agencies, whenever practicable and appropriate, shall work in a coordinated manner to publish guidance reflecting the latest scientific information available concerning methods for

evaluating the human health risks associated with the consumption of pollutant-bearing fish or wildlife. Agencies shall consider such guidance in developing their policies and rules.

Sec. 5-5. Public Participation and Access to Information (a) The public may submit recommendations to Federal agencies relating to the incorporation of environmental justice principles into Federal agency programs or policies. Each Federal agency shall convey such recommendations to the Working Group.

(b) Each Federal agency may, whenever practicable and appropriate, translate crucial public documents, notices, and hearings relating to human health or the environment for limited English speaking populations.

(c) Each Federal agency shall work to ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public.

(d) The Working Group shall hold public meetings, as appropriate, for the purpose of fact-finding, receiving public comments, and conducting inquiries concerning environmental justice. The Working Group shall prepare for public review a summary of the comments and recommendations discussed at the public meetings.

Sec. 6-6. General Provisions

6-601. Responsibility for Agency Implementation. The head of each Federal agency shall be responsible for ensuring compliance with this order. Each Federal agency shall conduct internal reviews and take such other steps as may be necessary to monitor compliance with this order.

6-602. Executive Order No. 12250. This Executive order is intended to supplement but not supersede Executive Order No. 12250, which requires consistent and effective implementation of various laws prohibiting discriminatory practices in programs receiving Federal financial assistance. Nothing herein shall limit the effect or mandate of Executive Order No. 12250.

6-603. Executive Order No. 12875. This Executive order is not intended to limit the effect or mandate of Executive Order No. 12875.

6-604. Scope. For purposes of this order, Federal agency means any agency on the Working Group, and such other agencies as may be designated by the President, that conducts any Federal program or activity that substantially affects human health or the environment. Independent agencies are requested to comply with the provisions of this order.

6-605. Petitions for Exemptions. The head of a Federal agency may petition the President for an exemption from the requirements of this order on the grounds that all or some of the petitioning agency's programs or activities should not be subject to the requirements of this order.

6-606. Native American Programs. Each Federal agency responsibility set forth under this order shall apply equally to Native American programs. In addition the Department of the Interior, in coordination with the Working Group, and, after consultation with tribal leaders, shall coordinate steps to be taken pursuant to this order that address Federally- recognized Indian Tribes.

6-607. Costs. Unless otherwise provided by law, Federal agencies shall assume the financial costs of complying with this order.

6-608. General. Federal agencies shall implement this order consistent with, and to the extent permitted by, existing law.

6-609. Judicial Review. This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.

William J. Clinton

THE WHITE HOUSE,
February 11, 1994.

Background Information on Brownfields and Title VI

Under Title VI of the Civil Rights Act of 1964, citizens can file complaints with EPA alleging discriminatory effects resulting from the issuance of pollution control permits by state and local government agencies that receive EPA funding. In February 1998, EPA issued an interim guidance to inform the public of EPA's current approach for processing Title VI complaints and to provide an opportunity for public comment. On June 20, 1998, the U.S. Conference of Mayors passed a resolution which raises concerns that EPA's interim guidance is at odds with efforts to cleanup and redevelop urban brownfields and calls for its immediate suspension. EPA strongly believes that there is no inherent contradiction between Title VI and good, community-centered brownfields cleanup and redevelopment.

Interim Guidance For Investigating Title VI Administrative Complaints Challenging Permits

Introduction

This interim guidance is intended to provide a framework for the processing by EPA's Office of Civil Rights (OCR) of complaints filed under Title VI of the Civil Rights Act of 1964, as amended (Title VI)¹, alleging discriminatory effects resulting from the issuance of pollution control permits by state and local governmental agencies that receive EPA funding.

In the past, the Title VI complaints filed with EPA typically alleged discrimination in access to public water and sewerage systems or in employment practices. This interim guidance is intended to update the Agency's procedural and policy framework to accommodate the increasing number of Title VI complaints that allege discrimination in the environmental permitting context.

As reflected in this guidance, Title VI environmental permitting cases may have implications for a diversity of interests, including those of the recipient, the affected community, and the permit applicant or permittee. EPA believes that robust stakeholder input is an invaluable tool for fully addressing Title VI issues during the permitting process and informally resolving Title VI complaints when they arise.

Background

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
- Title VI

On February 11, 1994, President Clinton issued Executive Order 12,898, "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations." The Presidential memorandum accompanying that Order directs Federal agencies to ensure compliance with the nondiscrimination requirements of Title VI for all Federally-funded programs and activities that affect human health or the environment. While Title VI is inapplicable to EPA actions, including EPA's issuance of permits, Section 2-2 of Executive Order 12,898 is designed to ensure that Federal actions substantially affecting human health or the environment do not have discriminatory effects based on race, color, or national origin. Accordingly, EPA is committed to a policy of nondiscrimination in its own permitting programs.

Title VI itself prohibits intentional discrimination. The Supreme Court has ruled, however, that Title VI authorizes Federal agencies, including EPA, to adopt implementing regulations that prohibit discriminatory effects. Frequently, discrimination results from policies and practices that are neutral on their face, but have the effect of discriminating.² Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative.

EPA awards grants on an annual basis to many state and local agencies that administer continuing environmental programs under EPA's statutes. As a condition of receiving funding under EPA's continuing environmental program grants, recipient agencies must comply with EPA's Title VI regulations, which are incorporated by reference into the grants. EPA's Title VI regulations define

a "[r]ecipient" as "any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient"³ Title VI creates for recipients a nondiscrimination obligation that is contractual in nature in exchange for accepting Federal funding. Acceptance of EPA funding creates an obligation on the recipient to comply with the regulations for as long as any EPA funding is extended.⁴

Under amendments made to Title VI by the Civil Rights Restoration Act of 1987,⁵ a "program" or "activity" means all of the operations of a department, agency, special purpose district, or other instrumentality of a state or of a local government, any part of which is extended Federal financial assistance.⁶ Therefore, unless expressly exempted from Title VI by Federal statute, all programs and activities of a department or agency that receives EPA funds are subject to Title VI, including those programs and activities that are not EPA-funded. For example, the issuance of permits by EPA recipients under solid waste programs administered pursuant to Subtitle D of the Resource Conservation and Recovery Act (which historically have not been grant-funded by EPA), or the actions they take under programs that do not derive their authority from EPA statutes (e.g., state environmental assessment requirements), are part of a program or activity covered by EPA's Title VI regulations if the recipient receives any funding from EPA.

In the event that EPA finds discrimination in a recipient's permitting program, and the recipient is not able to come into compliance voluntarily, EPA is required by its Title VI regulations to initiate procedures to deny, annul, suspend, or terminate EPA funding.⁷ EPA also may use any other means authorized by law to obtain compliance, including referring the matter to the Department of Justice (DOJ) for litigation.⁸ In appropriate cases, DOJ may file suit seeking injunctive relief. Moreover, individuals may file a private right of action in court to enforce the nondiscrimination requirements in Title VI or EPA's implementing regulations without exhausting administrative remedies.⁹

Overview of Framework for Processing Complaints

While this guidance is directed at the processing of discriminatory effects allegations, as a general proposition, Title VI complaints alleging either discriminatory intent and/or discriminatory effect in the context of environmental permitting will be processed by OCR under EPA's Title VI regulations at 40 C.F.R. Part 7. The steps that the Agency will follow in complaint processing are described below. EPA's Title VI regulations encourage the informal resolution of all complaints with the participation of all affected stakeholders (see step 8 below).

1. Acceptance of the Complaint

Upon receiving a Title VI complaint, OCR will determine whether the complaint states a valid claim. If it does, the complaint will be accepted for processing within twenty (20) calendar days of acknowledgment of its receipt, and the complainant and the EPA recipient will be so notified. If OCR does not accept the complaint, it will be rejected or, if appropriate, referred to another Federal agency. 40 C.F.R. § 7.120(d)(1).

2. Investigation/Disparate Impact Assessment

Once a complaint is accepted for processing, OCR will conduct a factual investigation to determine whether the permit(s) at issue will create a disparate impact, or add to an existing disparate impact, on a racial or ethnic population. If, based on its investigation, OCR concludes that there is no disparate impact, the complaint will be dismissed. If OCR makes an initial finding of a disparate impact, it will notify the recipient and the complainant and seek a response from the recipient within a specified time period. Under appropriate circumstances, OCR may seek comment from the recipient, permittee, and/or complainant(s) on preliminary data analyses before making an initial finding concerning disparate impacts.

3. Rebuttal/Mitigation

The notice of initial finding of a disparate impact will provide the recipient the opportunity to rebut OCR's finding, propose a plan for mitigating the disparate impact, or to "justify" the disparate impact (see step 4 below regarding justification). If the recipient successfully rebuts OCR's finding, or, if the recipient elects to submit a plan for mitigating the disparate impact, and, based on its review, EPA agrees that the disparate impact will be mitigated sufficiently pursuant to the plan, the parties will be so notified. Assuming that assurances are provided regarding implementation of such a mitigation plan, no further action on the complaint will be required.

4. Justification

If the recipient can neither rebut the initial finding of disparate impact nor develop an acceptable mitigation plan, then the recipient may seek to demonstrate that it has a substantial, legitimate interest that justifies the decision to proceed with the permit notwithstanding the disparate impact. Even where a substantial, legitimate justification is proffered, OCR will need to consider whether it can be shown that there is an alternative that would satisfy the stated interest while eliminating or mitigating the disparate impact.

5. Preliminary Finding of Noncompliance

If the recipient fails to rebut OCR's initial finding of a disparate impact and can neither mitigate nor justify the disparate impact at issue, OCR will, within 180 calendar days from the start of the complaint investigation, send the recipient a written notice of preliminary finding of noncompliance, with a copy to the grant award official (Award Official) and the Assistant Attorney General for Civil Rights. OCR's notice may include recommendations for the recipient to achieve voluntary compliance and, where appropriate, the recipient's right to engage in voluntary compliance negotiations. 40 C.F.R. § 7.115(c).

6. Formal Determination of Noncompliance

If, within fifty (50) calendar days of receipt of the notice of preliminary finding, the recipient does not agree to OCR's recommendations or fails to submit a written response demonstrating that OCR's preliminary finding is incorrect or that voluntary compliance can be achieved through other steps, OCR will issue a formal written determination of noncompliance, with a copy to the Award Official and the Assistant Attorney General for Civil Rights. 40 C.F.R. § 7.115(d).

7. Voluntary Compliance

The recipient will have ten (10) calendar days from receipt of the formal determination of noncompliance within which to come into voluntary compliance. 40 C.F.R. § 7.115(e). If the recipient fails to meet this deadline, OCR will start procedures to deny, annul, suspend, or terminate EPA assistance in accordance with 40 C.F.R. § 7.130(b) and consider other appropriate action, including referring the matter to DOJ for litigation.

8. Informal Resolution

EPA's Title VI regulations call for OCR to pursue informal resolution of administrative complaints wherever practicable. 40 C.F.R. § 7.120(d)(2). Therefore, OCR will discuss, at any point during the process outlined above, offers by recipients to reach informal resolution, and will, to the extent appropriate, endeavor to facilitate the informal resolution process and involvement of affected stakeholders. Ordinarily, in the interest of conserving EPA investigative resources for truly intractable matters, it will make sense to encourage dialogue at the beginning of the investigation of complaints accepted for processing. Accordingly, in notifying a recipient of acceptance of a complaint for investigation, OCR will encourage the recipient to engage the complainant(s) in informal resolution in an effort to negotiate a settlement.

Rejecting or Accepting Complaints for Investigation

It is the general policy of OCR to investigate all administrative complaints that have apparent merit and are complete or properly pleaded. Examples of complaints with no apparent merit might include those which are so insubstantial or incoherent that they cannot be considered to be grounded in fact.

A complete or properly pleaded complaint is:¹⁰

1. in writing, signed, and provides an avenue for contacting the signatory (e.g., phone number, address);
2. describes the alleged discriminatory act(s) that violates EPA's Title VI regulations (i.e., an act of intentional discrimination or one that has the effect of discriminating on the basis of race, color, or national origin);
3. filed within 180 calendar days of the alleged discriminatory act(s)¹¹; and
4. identifies the EPA recipient that took the alleged discriminatory act(s).

EPA's Title VI regulations contemplate that OCR will make a determination to accept, reject, or refer (to the appropriate Federal agency) a complaint within twenty (20) calendar days of acknowledgment of its receipt. 40 C.F.R. § 7.120(d)(1). Whenever possible, within the twenty-day period, OCR will establish whether the person or entity that took the alleged discriminatory act is in fact an EPA recipient as defined by 40 C.F.R. § 7.25. If the complaint does not specifically mention that the alleged discriminatory actor is an EPA financial assistance recipient, OCR may presume so for the purpose of deciding whether or not to accept the complaint for further processing.

Timeliness of Complaints

Under EPA's Title VI regulations a complaint must be filed within 180 calendar days of the alleged discriminatory act. 40 C.F.R. § 7.120(b)(2). EPA interprets this regulation to mean that complaints alleging discriminatory effects resulting from issuance of a permit must be filed with EPA within 180 calendar days of issuance of the final permit. However, OCR may waive the 180-day time limit

for good cause. 40 C.F.R. § 7.120(b)(2).

OCR will determine on a case-by-case basis whether to waive the time limit for good cause. EPA believes that, in order to encourage complainants to exhaust administrative remedies available under the recipient's permit appeal process, thereby fostering early resolution of Title VI issues, it is appropriate to consider in making a good cause determination a complainant's pursuit of its Title VI concerns through the recipient's administrative appeal process. Under such circumstances and after considering other factors relevant to the particular case, OCR may waive the time limit if the complaint is filed within a reasonable time period (e.g., 60 calendar days) after the conclusion of the administrative appeal process.

In addition, it is OCR's policy not to reject automatically complaints challenging permits where such complaints are filed prior to final permit issuance by the recipient. Rather, OCR should provide the recipient with the information contained in the complaint for consideration in the permit issuance process. OCR also may notify the complainant that the complaint is premature, but that OCR is keeping the complaint on file in an inactive status pending issuance of a final permit by the recipient. Should the recipient issue a final permit, OCR could initiate an investigation if OCR or the complainant believe that issuance of the final permit may be discriminatory.

Permit Modifications

EPA believes that permit modifications that reduce adverse impacts and improve the environmental operation of the facility should be encouraged. Similarly, the Agency does not want to discourage merely administrative modifications, such as a facility name change, or otherwise beneficial modifications that are neutral in terms of their impact on human health or the environment. Because such modifications do not cause or add to adverse impacts, Title VI discriminatory effects claims based on them are likely to be dismissed.

Permit modifications that result in a net increase of pollution impacts, however, may provide a basis for an adverse disparate impact finding, and, accordingly, OCR will not reject or dismiss complaints associated with permit modifications without an examination of the circumstances to determine the nature of the modification.

In the permit modification context (as opposed to permit renewals), the matter under consideration by the recipient is the modified operation. Accordingly, the complaint must allege, and, to establish a disparate impact OCR must find, adverse impacts specifically associated with the modification.

Investigations of Allegedly Discriminatory Permit Renewals

Generally, permit renewals should be treated and analyzed as if they were new facility permits, since permit renewal is, by definition, an occasion to review the overall operations of a permitted facility and make any necessary changes. Generally, permit renewals are not issued without public notice and an opportunity for the public to challenge the propriety of granting a renewal under the relevant environmental laws and regulations.

Impacts and the Disparate Impact Analysis

Evaluations of disparate impact allegations should be based upon the facts and totality of the circumstances that each case presents. Rather than use a single technique for analyzing and evaluating disparate impact allegations, OCR will use several techniques within a broad framework. Any method of evaluation chosen within that framework must be a reasonably reliable indicator of disparity.

In terms of the types of impacts that are actionable under Title VI in the permitting context, OCR will, until further notice, consider impacts cognizable under the recipient's permitting program in determining whether a disparate impact within the meaning of Title VI has occurred. Thus, OCR will accept for processing only those Title VI complaints that include at least an allegation of a disparate impact concerning the types of impacts that are relevant under the recipient's permitting program.¹²

The general framework for determining whether a disparate impact exists has five basic steps.

Step 1: Identifying the Affected Population

The first step is to identify the population affected by the permit that triggered the complaint. The affected population is that which suffers the adverse impacts of the permitted activity. The impacts investigated must result from the permit(s) at issue.

The adverse impacts from permitted facilities are rarely distributed in a predictable and uniform manner. However, proximity to a facility will often be a reasonable indicator of where impacts are concentrated. Accordingly, where more precise information is not available, OCR will generally use proximity to a facility to identify adversely affected populations. The proximity analysis should reflect the environmental medium and impact of concern in the case.

Step 2: Determining the Demographics of the Affected Population

The second step is to determine the racial and/or ethnic composition of the affected population for the permitted facility at issue in the complaint. To do so, OCR uses demographic mapping technology, such as Geographic Information Systems (GIS). In conducting a typical analysis to determine the affected population, OCR generates data estimating the race and/or ethnicity and density of populations within a certain proximity from a facility or within the distribution pattern for a release/impact based on scientific models. OCR then identifies and characterizes the affected population for the facility at issue. If the affected population for the permit at issue is of the alleged racial or ethnic group(s) named in the complaint, then the demographic analysis is repeated for each facility in the chosen universe(s) of facilities discussed below.

Step 3: Determining the Universe(s) of Facilities and Total Affected Population(s)

The third step is to identify which other permitted facilities, if any, are to be included in the analysis and to determine the racial or ethnic composition of the populations affected by those permits. There may be more than one appropriate universe of facilities. OCR will determine the appropriate universe of facilities based upon the allegations and facts of a particular case. However, facilities not under the recipient's jurisdiction should not be included in the universe of

facilities examined.

If in its investigation OCR finds that the universe of facilities selected by the complainant is not supported by the facts, OCR will explain what it has found and provide the complainant the opportunity to support the use of its proposed universe. If the complainant cannot adequately support the proposed universe, then OCR should investigate a universe of facilities based upon the facts available and OCR's reasonable interpretation of the theory of the case presented. Once the appropriate universe(s) of facilities is determined, the affected population for each facility in the universe should be added together to form the Total Affected Population.

Ordinarily, OCR will entertain cases only in which the permitted facility at issue is one of several facilities, which together present a cumulative burden or which reflect a pattern of disparate impact.¹³ EPA recognizes the potential for disparate outcomes in this area because most permits control pollution rather than prevent it altogether. Consequently, permits that satisfy the base public health and environmental protections contemplated under EPA's programs nonetheless bear the potential for discriminatory effects where residual pollution and other cognizable impacts are distributed disproportionately to communities with particular racial or ethnic characteristics. Based on its experience to date, the Agency believes that this is most likely to be true either where an individual permit contributes to or compounds a preexisting burden being shouldered by a neighboring community, such that the community's cumulative burden is disproportionate when compared with other communities; or where an individual permit is part of a broader pattern pursuant to which it has become more likely that certain types of operations, with their accompanying burdens, will be permitted in a community with particular racial or ethnic characteristics.

Step 4: Conducting a Disparate Impact Analysis

The fourth step is to conduct a disparate impact analysis that, at a minimum, includes comparing the racial or ethnic characteristics within the affected population. It will also likely include comparing the racial characteristics of the affected population to the non-affected population. This approach can show whether persons protected under Title VI are being impacted at a disparate rate. EPA generally would expect the rates of impact for the affected population and comparison populations to be relatively comparable under properly implemented programs. Since there is no one formula or analysis to be applied, OCR may identify on a case-by-case basis other comparisons to determine disparate impact.

Step 5: Determining the Significance of the Disparity

The final phase of the analysis is to use arithmetic or statistical analyses to determine whether the disparity is significant under Title VI. OCR will use trained statisticians to evaluate disparity calculations done by investigators. After calculations are informed by expert opinion, OCR may make a prima facie disparate impact finding, subject to the recipient's opportunity to rebut.

Mitigation

EPA expects mitigation to be an important focus in the Title VI process, given the typical interest of recipients in avoiding more draconian outcomes and the difficulty that many recipients will encounter in justifying an "unmitigated," but

nonetheless disparate, impact. In some circumstances, it may be possible for the recipient to mitigate public health and environmental considerations sufficiently to address the disparate impact. The sufficiency of such mitigation should be evaluated in consultation with experts in the EPA program at issue. OCR may also consult with complainants. Where it is not possible or practicable to mitigate sufficiently the public health or environmental impacts of a challenged permit, EPA will consider "supplemental mitigation projects" (SMPs), which, when taken together with other mitigation efforts, may be viewed by EPA as sufficient to address the disparate impact. An SMP can, for example, respond to concerns associated with the permitting of the facility raised by the complainant that cannot otherwise be redressed under Title VI (i.e., because they are outside those considerations ordinarily entertained by the permitting authority).

Justification

If a preliminary finding of noncompliance has not been successfully rebutted and the disparate impact cannot successfully be mitigated, the recipient will have the opportunity to "justify" the decision to issue the permit notwithstanding the disparate impact, based on the substantial, legitimate interests of the recipient. While determining what constitutes a sufficient justification will necessarily turn on the facts of the case at hand, OCR would expect that, given the considerations described above, merely demonstrating that the permit complies with applicable environmental regulations will not ordinarily be considered a substantial, legitimate justification. Rather, there must be some articulable value to the recipient in the permitted activity. Because the interests of a state or local environmental agency are necessarily influenced and informed by the broader interest of the government of which it is a part, OCR will entertain justifications based on broader governmental interests (i.e., interests not limited by the jurisdiction of the recipient agency). While the sufficiency of the justification will necessarily depend on the facts of the case at hand, the types of factors that may bear consideration in assessing sufficiency can include, but are not limited to, the seriousness of the disparate impact, whether the permit at issue is a renewal (with demonstrated benefits) or for a new facility (with more speculative benefits), and whether any of the articulated benefits associated with a permit can be expected to benefit the particular community that is the subject of the Title VI complaint.

Importantly, a justification offered will not be considered acceptable if it is shown that a less discriminatory alternative exists. If a less discriminatory alternative is practicable, then the recipient must implement it to avoid a finding of noncompliance with the regulations. Less discriminatory alternatives should be equally effective in meeting the needs addressed by the challenged practice. Here, again, mitigation measures should be considered as less discriminatory alternatives, including additional permit conditions that would lessen or eliminate the demonstrated adverse disparate impacts.

The statements in this document are intended solely as guidance. This document is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA may decide to follow the guidance provided in this document, or to act at variance with the guidance, based on its analysis of the specific facts presented. This guidance may be revised without public notice to reflect changes in EPA's approach to implementing the Small Business Regulatory Enforcement Fairness Act or the Regulatory Flexibility Act, or to clarify and update text.

Footnotes

1. 42 U.S.C. §§ 2000d to 2000d-7
2. Department of Justice, Attorney General's Memorandum for Heads of Departments and Agencies that Provide Federal Financial Assistance, *The Use of the Disparate Impact Standard in Administrative Regulations Under Title VI of the Civil Rights Act of 1964*, (July 14, 1994).
3. 40 C.F.R. § 7.25 (1996). Title VI applies to Indian Tribes as EPA recipients only when the statutory provision authorizing the Federal financial assistance is not exclusively for the benefit of Tribes. Otherwise, Tribes are exempt from Title VI.
4. 40 C.F.R. § 7.80(a)(2)(iii)(1996).
5. Pub. L. No. 100-259, 102 Stat. 28 (1988); S. Rep. No. 64 at 2, 11-16, 100th Cong., reprinted in 1988 U.S. Code Cong. & Admin. News at 3-4, 13-18.
6. 42 U.S.C. § 2000d-4a.
7. 40 C.F.R. §§ 7.115(e), 7.130(b)(1996); Id. at 7.110(c).
8. 42 U.S.C. § 2000d-1; 40 C.F.R. § 7.130(a).
9. Chester Residents Concerned for Quality Living v. Seif, No. 97-1125, U.S. App. LEXIS 36797 (3d Cir. Dec. 30, 1997).
10. EPA's Title VI regulations require that the complaint be in writing, describe the alleged discriminatory acts that violate the regulations, and be filed within 180 calendar days of the alleged discriminatory act(s). 40 C.F.R. § 7.120(b)(1),(2). The criteria listed above satisfy these regulatory requirements.
11. Also, see discussion below on Timeliness of Complaints.
12. Even where a recipient's authority to regulate is unclear concerning cumulative burden or discriminatory permitting pattern scenarios (see step 3 below), OCR will nonetheless consider impacts measured in these terms because Title VI is a Federal cross-cutting statute that imposes independent, nondiscrimination requirements on recipients of Federal funds. As such, Title VI, separate from and in addition to the strictures of state and local law, both authorizes and requires recipients to manage their programs in a way that avoids discriminatory cumulative burdens and distributional patterns. Thus, while Title VI does not alter the substantive requirements of a recipient's permitting program, it obligates recipients to implement those requirements in a nondiscriminatory manner as a condition of receiving Federal funds.
13. In some rare instances, EPA may need to determine whether the impacts of a single permit, standing alone, may be considered adequate to support a disparate impact claim. While such a case has not yet been presented to EPA, it might, for example, involve a permitted activity that is unique (i.e., "one of a kind") under a recipient's program

**EMERGENCY PLANNING AND
COMMUNITY RIGHT TO KNOW ACT
(EPCRA)
COMPLIANCE AND ENFORCEMENT ISSUES**

**Dennis J. Conniff
Brown, Todd & Heyburn PLLC
Louisville, Kentucky**

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**EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT
(EPCRA) COMPLIANCE AND ENFORCEMENT ISSUES**

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EPCRA Compliance and Enforcement Issues

The Emergency Planning and Community Right-to-Know Act of 1986, 42 USC §§ 11001 *et seq.* (“EPCRA”), also known as Superfund Amendments and Reauthorization Act of 1986 (“SARA”) Title III, establishes requirements concerning local emergency planning and the filing of information concerning the identification, location, and amounts of hazardous chemicals present in communities.

The scope of this presentation is limited to addressing recent enforcement initiatives by the United States Environmental Protection Agency Region 4 against facilities that fail to comply with EPCRA Section 311 – relating to the filing of Material Safety Data Sheets with emergency planning agencies, and EPCRA Section 312 – relating to the annually filing of emergency and hazardous chemical inventory information. The EPCRA provisions relating to release notification and the filing of toxic chemical release information are beyond the scope of this presentation.

I. Applicable Definitions

“**Extremely Hazardous Substance**” means a substance listed in the Appendices to 40 CFR Part 355.

“**Hazardous Chemical**” means any hazardous chemical defined under 29 CFR § 1910.1200(c), but does not include:

(a) any food, food additive, color additive, drug, or cosmetic regulated by the Food and Drug Administration;

(b) any substance present as a solid in any manufactured item to the extent exposure to this substance does not occur under normal conditions of use;

(c) any substance to the extent it is used for personal, family, or household purposes, or is present in the same form or concentration as a product packaged for distribution and use by the general public;

(d) any substance to the extent it is used in a research laboratory or hospital or other medical facility under the direct supervision of a technically qualified individual; or

(e) any substance to the extent it is used in routine agricultural operations or as fertilizer held for sale by retailer to the ultimate customer.

“Local Emergency Planning Committee” or “LEPC” means the local committee to assist in the implementation of EPCRA.

“Material Safety Data Sheet” or “MSDS” means the sheet required to be developed under 29 CFR § 1910.1200(g).

“Threshold Planning Quantity” or “TPQ” means the threshold planning quantity for an extremely hazardous substance as defined in 40 CFR Part 355.

II. Administration of EPCRA in Kentucky

In Kentucky, EPCRA is administered by the Kentucky Emergency Response Commission, established pursuant to the provisions of KRS Chapter 39E and 106 KAR Chapter 1. The KERC is assisted administratively by the Division of Emergency Management of the Department of Military Affairs.

Local responsibility for administration of EPCRA is handled by Local Emergency Planning Committees. Although the members of the LEPCs are appointed by the KERC, pursuant to KRS

39E.100(2), the appointments are essentially made by the County Judge/Executive, who recommends the appointments to the Commission.

The local fire department with jurisdiction over a facility is also involved in emergency planning.

III. Compliance with EPCRA Section 311

EPCRA Section 311, 42 USC § 11021, requires the owner or operator of any facility which is required to prepare or have available a **Material Safety Data Sheet** for hazardous chemicals to submit a copy of the **MSDS** for each such chemical to:

- (1) Kentucky Emergency Response Commission;
- (2) The LEPC; and,
- (3) The fire department with jurisdiction over the facility.

This requirement applies to facilities that have quantities of a hazardous chemical exceeding **minimum threshold levels**.

This **minimum threshold levels** are:

- (1) **Extremely Hazardous Substances** - 500 pounds or the Threshold Planning Quantity, whichever is lower;
- (2) **Gasoline at a retail gas station** - 75,000 gallons (all grades combined), in tanks entirely underground, if the facility was in compliance at all times during the previous preceding calendar year with all applicable underground storage tank requirements (40 CFR Part 280 or 401 KAR Chapter 42). **Retail gas station** means a retail facility engaged in selling gasoline and/or diesel fuel principally to the public, for motor vehicle use on land;

(3) **Diesel Fuel at a retail gas station** - 100,000 gallons (all grades combined), in tanks entirely underground, if the facility was in compliance at all times during the preceding year with all applicable underground storage tank requirements (40 CFR Part 280 or 401 KAR Chapter 42);

(4) All other **Hazardous Chemicals** - 10,000 pounds.

40 CFR Section 370.20.

A facility is only required to submit the MSDS once. The original submittal was to have been on or before October 17, 1990. Subsequent submittals are required to be made within three months after the facility first stored quantities of a hazardous chemical in excess of the minimum threshold, or new hazardous chemicals are stored at the facility.

IV. Compliance with EPCRA Section 312

Any facility subject to EPCRA Section 311 is subject to EPCRA Section 312, 42 USC § 11022. The owner or operator of a facility shall submit a **Tier II inventory form** to:

- (a) The Kentucky Emergency Response Commission;
- (b) The Local Emergency Planning Committee;
- (c) The fire department with jurisdiction over the facility.

40 CFR 370.25.

Reporting shall be made on **Form DES/SARA-312**. The Tier II form shall be updated and submitted annually by March 1 of each year.

V. Enforcement

Failure to comply with EPCRA Section 311 or 312 is subject to the assessment of civil penalties. Federal penalties are established by 40 CFR 370.5, which applies a maximum civil penalty of \$10,000 for failure to submit MSDS in compliance with EPCRA Section 311, and a

maximum civil penalty of \$25,000 for failure to submit a Tier II form. Each day that the violation continues constitutes a separate violation.

Although Kentucky also establishes penalties for violation of these provisions in KRS 39E.990, the Kentucky Emergency Response Commission has yet to pursue enforcement.

Federal enforcement is conducted pursuant to the *Interim Final Enforcement Response Policy for Sections 304, 311 and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act* (January 8, 1998).

Under the penalty policy, the minimum penalty for a violation of EPCRA Section 311 is \$625, but if the violation is not abated within 30 days after the violation first occurred, the minimum penalty is \$2,500. The minimum penalty under EPCRA Section 312 is \$1,562, but if the violation is not abated within 30 days after the violation first occurred, the minimum penalty is \$6,251. These amounts are increased annually based upon the rate of inflation.

VI. Voluntary Disclosure

A facility that may be in violation of EPCRA Section 311 or 312 may conduct an environmental audit and voluntarily self-disclose any violations under the *Incentives for Self Policing: Disclosure, Correction and Prevention of Violations, Final Policy Statement*, 60 Fed.Reg. 66706 (December 22, 1995). The **Self-Disclosure Policy** authorizes EPA to substantially reduce or eliminate gravity-based civil penalties. However, EPA may in its discretion recover any economic benefit gained as a result of non-compliance. The economic benefit of non-compliance with EPCRA Section 311 or 312 is considered by USEPA to be negligible, and is usually waived.

To qualify for waiver of the penalty, a facility must

- (1) Discover the violations as part of a systematic, documented, periodic and objective audit of the facilities operations;
- (2) The audit must have been conducted voluntarily, and not through a legally mandated monitoring or sampling requirement;
- (3) The violations must be promptly disclosed, typically within 10 days of the discovery of the violation;
- (4) The discovery of the violations cannot be the result of
 - (i) commencement of a federal, state or local agency inspection or investigation, or the information of an information request;
 - (ii) a notice of a citizen's suit;
 - (iii) the filing of a complaint by a third party;
 - (iv) reporting of the violations to the EPA by a "whistle blower" employee;or
 - (v) the imminent discovery of the violations by regulatory agency;
- (5) The violations must be promptly corrected, typically within 60 days;
- (6) The facility must take steps to prevent recurrence of the violations;
- (7) The violations cannot have occurred within the previous three years at the same facility;
- (8) The violations must not have resulted in serious actual harm, nor did the present an imminent and substantial danger to human health or the environment, or violate the specific terms of any judicial or administrative order, or consent agreement; and
- (9) The facility must agree to cooperate voluntarily with EPA.

CONCLUSION

The conclusion is simple. Determine whether the facility is storing Extremely Hazardous Substances or Hazardous Chemicals in excess of the minimum threshold level. If so, submit the necessary MSDS and Tier Two forms to avoid costly civil penalties.

**THE EMERGENCY PLANNING
AND COMMUNITY RIGHT TO KNOW ACT**

**Section 301
(42 USC § 11001)**

§ 11001. Establishment of State commissions, planning districts, and local committees

(a) Establishment of State emergency response commissions

Not later than six months after October 17, 1986, the Governor of each State shall appoint a State emergency response commission. The Governor may designate as the State emergency response commission one or more existing emergency response organizations that are State-sponsored or appointed. The Governor shall, to the extent practicable, appoint persons to the State emergency response commission who have technical expertise in the emergency response field. The State emergency response commission shall appoint local emergency planning committees under subsection (c) of this section and shall supervise and coordinate the activities of such committees. The State emergency response commission shall establish procedures for receiving and processing requests from the public for information under section 11044 of this title, including tier II information under section 11022 of this title. Such procedures shall include the designation of an official to serve as coordinator for information. If the Governor of any State does not designate a State emergency response commission within such period, the Governor shall operate as the State emergency response commission until the Governor makes such designation.

(b) Establishment of emergency planning districts

Not later than nine months after October 17, 1986, the State emergency response commission shall designate emergency planning districts in order to facilitate preparation and implementation of emergency plans. Where appropriate, the State emergency response commission may designate existing political subdivisions or multijurisdictional planning organizations as such districts. In emergency planning areas that involve more than one State, the State emergency response commissions of all potentially affected States may designate emergency planning districts and local emergency planning committees by agreement. In making such designation, the State emergency response commission shall indicate which facilities subject to the requirements of this subchapter are within such emergency planning district.

(c) Establishment of local emergency planning committees

Not later than 30 days after designation of emergency planning districts or 10 months after October 17, 1986, whichever is earlier, the State emergency response commission shall appoint members of a local emergency planning committee for each emergency planning district. Each committee shall include, at a minimum, representatives from each of the following groups or organizations: elected State and local officials; law enforcement, civil defense, firefighting, first aid, health, local environmental, hospital, and transportation personnel; broadcast and print media; community groups; and owners and operators of facilities subject to the requirements of this subchapter. Such committee shall appoint a chairperson and shall establish rules by which the committee shall function. Such rules shall include provisions for public notification of committee activities, public meetings to discuss the emergency plan, public comments, response to such comments by the committee, and distribution of the emergency plan. The local emergency planning committee shall establish procedures for receiving and processing requests from the public for information under section 11044 of this title, including tier II information under section 11022 of this title. Such procedures shall include the designation of an official to serve as coordinator for information.

(d) Revisions

A State emergency response commission may revise its designations and appointments under subsections (b) and (c) of this section as it deems appropriate. Interested persons may petition the State emergency response commission to modify the membership of a local emergency planning committee.

(Pub.L. 99-499, Title III, § 301, Oct. 17, 1986, 100 Stat. 1729.)

EXCERPTS FROM
THE EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT
42 USC §§ 11001 et seq.

**THE EMERGENCY PLANNING
AND COMMUNITY RIGHT TO KNOW ACT**

Section 311
(42 USC § 11021)

§ 11021. Material safety data sheets

(a) Basic requirement

(1) Submission of MSDS or list

The owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970 [29 U.S.C.A. § 651 et seq.] and regulations promulgated under that Act shall submit a material safety data sheet for each such chemical, or a list of such chemicals as described in paragraph (2), to each of the following:

- (A) The appropriate local emergency planning committee.
- (B) The State emergency response commission.
- (C) The fire department with jurisdiction over the facility.

(2) Contents of list

(A) The list of chemicals referred to in paragraph (1) shall include each of the following:

(i) A list of the hazardous chemicals for which a material safety data sheet is required under the Occupational Safety and Health Act of 1970 [29 U.S.C.A. § 651 et seq.] and regulations promulgated under that Act, grouped in categories of health and physical hazards as set forth under such Act and regulations promulgated under such Act, or in such other categories as the Administrator may prescribe under subparagraph (B).

(ii) The chemical name or the common name of each such chemical as provided on the material safety data sheet.

(iii) Any hazardous component of each such chemical as provided on the material safety data sheet.

(B) For purposes of the list under this paragraph, the Administrator may modify the categories of health and physical hazards as set forth under the Occupational Safety and Health Act of 1970 [29 U.S.C.A. § 651 et seq.] and regulations promulgated under that Act by requiring information to be reported in terms of groups of hazardous chemicals which present similar hazards in an emergency.

(3) Treatment of mixtures

An owner or operator may meet the requirements of this section with respect to a hazardous chemical which is a mixture by doing one of the following:

(A) Submitting a material safety data sheet for, or identifying on a list, each element or compound in the mixture which is a hazardous chemical. If more than one mixture has the same element or compound, only one material safety data sheet, or one listing, of the element or compound is necessary.

(B) Submitting a material safety data sheet for, or identifying on a list, the mixture itself.

(b) Thresholds

The Administrator may establish threshold quantities for hazardous chemicals below which no facility shall be subject to the provisions of this section. The threshold quantities may, in the Administrator's discretion, be based on classes of chemicals or categories of facilities.

(c) Availability of MSDS on request

(1) To local emergency planning committee

If an owner or operator of a facility submits a list of chemicals under subsection (a)(1) of this section, the owner or operator, upon request by the local emergency planning committee, shall submit the material safety data sheet for any chemical on the list to such committee.

(2) To public

A local emergency planning committee, upon request by any person, shall make available a material safety data sheet to the person in accordance with section 11044 of this title. If the local emergency planning committee does not have the requested material safety data sheet, the committee shall request the sheet from the facility owner or operator and then make the sheet available to the person in accordance with section 11044 of this title.

(d) Initial submission and updating

(1) The initial material safety data sheet or list required under this section with respect to a hazardous chemical shall be provided before the later of—

(A) 12 months after October 17, 1986, or

(B) 3 months after the owner or operator of a facility is required to prepare or have available a material safety data sheet for the chemical under the Occupational Safety and Health Act

**THE EMERGENCY PLANNING
AND COMMUNITY RIGHT TO KNOW ACT**

Section 312
(42 USC § 11022)

of 1970 [29 U.S.C.A. § 651 et seq.] and regulations promulgated under that Act.

(2) Within 3 months following discovery by an owner or operator of significant new information concerning an aspect of a hazardous chemical for which a material safety data sheet was previously submitted to the local emergency planning committee under subsection (a) of this section, a revised sheet shall be provided to such person.

(e) "Hazardous chemical" defined

For purposes of this section, the term "hazardous chemical" has the meaning given such term by section 1910.1200(c) of title 29 of the Code of Federal Regulations, except that such term does not include the following:

- (1) Any food, food additive, color additive, drug, or cosmetic regulated by the Food and Drug Administration.
- (2) Any substance present as a solid in any manufactured item to the extent exposure to the substance does not occur under normal conditions of use.
- (3) Any substance to the extent it is used for personal, family, or household purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public.
- (4) Any substance to the extent it is used in a research laboratory or a hospital or other medical facility under the direct supervision of a technically qualified individual.
- (5) Any substance to the extent it is used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate customer.

(Pub.L. 99-499, Title III, § 311, Oct. 17, 1986, 100 Stat. 1736.)

§ 11022. Emergency and hazardous chemical inventory forms

(a) Basic requirement

(1) The owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970 [29 U.S.C.A. § 651 et seq.] and regulations promulgated under that Act shall prepare and submit an emergency and hazardous chemical inventory form (hereafter in this chapter referred to as an "inventory form") to each of the following:

- (A) The appropriate local emergency planning committee.
- (B) The State emergency response commission.
- (C) The fire department with jurisdiction over the facility.

(2) The inventory form containing tier I information (as described in subsection (d)(1) of this section) shall be submitted on or before March 1, 1988, and annually thereafter on March 1, and shall contain data with respect to the preceding calendar year. The preceding sentence does not apply if an owner or operator provides, by the same deadline and with respect to the same calendar year, tier II information (as described in subsection (d)(2) of this section) to the recipients described in paragraph (1).

(3) An owner or operator may meet the requirements of this section with respect to a hazardous chemical which is a mixture by doing one of the following:

- (A) Providing information on the inventory form on each element or compound in the mixture which is a hazardous chemical. If more than one mixture has the same element or

compound, only one listing on the inventory form for the element or compound at the facility is necessary.

(B) Providing information on the inventory form on the mixture itself.

(b) Thresholds

The Administrator may establish threshold quantities for hazardous chemicals covered by this section below which no facility shall be subject to the provisions of this section. The threshold quantities may, in the Administrator's discretion, be based on classes of chemicals or categories of facilities.

(c) Hazardous chemicals covered

A hazardous chemical subject to the requirements of this section is any hazardous chemical for which a material safety data sheet or a listing is required under section 11021 of this title.

(d) Contents of form

(1) Tier I information

(A) Aggregate information by category

An inventory form shall provide the information described in subparagraph (B) in aggregate terms for hazardous chemicals in categories of health and physical hazards as set forth under the Occupational Safety and Health Act of 1970 [29 U.S.C.A. 651 et seq.] and regulations promulgated under that Act.

(B) Required information

The information referred to in subparagraph (A) is the following:

(i) An estimate (in ranges) of the maximum amount of hazardous chemicals in each category present at the facility at any time during the preceding calendar year.

(ii) An estimate (in ranges) of the average daily amount of hazardous chemicals in each category present at the facility during the preceding calendar year.

(iii) The general location of hazardous chemicals in each category.

(C) Modifications

For purposes of reporting information under this paragraph, the Administrator may—

(i) modify the categories of health and physical hazards as set forth under the Occupational Safety and Health Act of 1970 [29 U.S.C.A. 651 et seq.] and regula-

tions promulgated under that Act by requiring information to be reported in terms of groups of hazardous chemicals which present similar hazards in an emergency, or

(ii) require reporting on individual hazardous chemicals of special concern to emergency response personnel.

(2) Tier II information

An inventory form shall provide the following additional information for each hazardous chemical present at the facility, but only upon request and in accordance with subsection (e) of this section:

(A) The chemical name or the common name of the chemical as provided on the material safety data sheet.

(B) An estimate (in ranges) of the maximum amount of the hazardous chemical present at the facility at any time during the preceding calendar year.

(C) An estimate (in ranges) of the average daily amount of the hazardous chemical present at the facility during the preceding calendar year.

(D) A brief description of the manner of storage of the hazardous chemical.

(E) The location at the facility of the hazardous chemical.

(F) An indication of whether the owner elects to withhold location information of a specific hazardous chemical from disclosure to the public under section 11044 of this title.

(e) Availability of tier II information

(1) Availability to State commissions, local committees, and fire departments

Upon request by a State emergency planning commission, a local emergency planning committee, or a fire department with jurisdiction over the facility, the owner or operator of a facility shall provide tier II information, as described in subsection (d) of this section, to the person making the request. Any such request shall be with respect to a specific facility.

(2) Availability to other State and local officials

A State or local official acting in his or her official capacity may have access to tier II information by submitting a request to the State emergency response commission or the local emergency planning committee. Upon receipt of a request for tier II information, the State commission or local committee shall,

pursuant to paragraph (1), request the facility owner or operator for the tier II information and make available such information to the official.

(3) Availability to public

(A) In general

Any person may request a State emergency response commission or local emergency planning committee for tier II information relating to the preceding calendar year with respect to a facility. Any such request shall be in writing and shall be with respect to a specific facility.

(B) Automatic provision of information to public

Any tier II information which a State emergency response commission or local emergency planning committee has in its possession shall be made available to a person making a request under this paragraph in accordance with section 11044 of this title. If the State emergency response commission or local emergency planning committee does not have the tier II information in its possession, upon a request for tier II information the State emergency response commission or local emergency planning committee shall, pursuant to paragraph (1), request the facility owner or operator for tier II information with respect to a hazardous chemical which a facility has stored in an amount in excess of 10,000 pounds present at the facility at any time during the preceding calendar year and make such information available in accordance with section 11044 of this title to the person making the request.

(C) Discretionary provision of information to public

In the case of tier II information which is not in the possession of a State emergency response commission or local emergency planning committee and which is with respect to a hazardous chemical which a facility has stored in an amount less than 10,000 pounds present at the facility at any time during the preceding calendar year, a request from a person must include the general need for the information. The State emergency response commission or local emergency planning committee may, pursuant to paragraph (1), request the facility owner or operator for the tier II information on behalf of the person making the request. Upon receipt of any information requested on behalf of such person, the State emergency response commission or local emergency planning committee shall make the information

available in accordance with section 11044 of this title to the person.

(D) Response in 45 days

A State emergency response commission or local emergency planning committee shall respond to a request for tier II information under this paragraph no later than 45 days after the date of receipt of the request.

(f) Fire department access

Upon request to an owner or operator of a facility which files an inventory form under this section by the fire department with jurisdiction over the facility, the owner or operator of the facility shall allow the fire department to conduct an on-site inspection of the facility and shall provide to the fire department specific location information on hazardous chemicals at the facility.

(g) Format of forms

The Administrator shall publish a uniform format for inventory forms within three months after October 17, 1986. If the Administrator does not publish such forms, owners and operators of facilities subject to the requirements of this section shall provide the information required under this section by letter.

(Pub.L. 99-499, Title III, § 312, Oct. 17, 1986, 100 Stat. 1738.)

39E.010. Kentucky Emergency Response Commission — Duties.

The Kentucky Emergency Response Commission is established to:

- (1) Implement all provisions of Title III, Pub. L. No. 99-499, associated federal regulations, and subsequent related legislation and regulations related to hazardous substances; develop policies related to the response of state and local governments to releases of hazardous substances; develop standards for planning for these events; develop reporting requirements for those who manufacture, use, transport, or store these substances; provide information to the public concerning hazardous substances in the community; develop training requirements; and develop requirements for local governments and covered facilities to exercise plans related to hazardous substance response; and
- (2) Perform any other functions assigned by statute or by the chairman. (Enact. Acts 1998, ch. 226, § 58, effective July 15, 1998.)

39E.020. Definitions for chapter.

As used in this chapter, unless the context requires otherwise:

- (1) "Commission" means the Kentucky Emergency Response Commission and those persons appointed by the Governor to implement provisions of Title III, Pub. L. No. 99-499 and this chapter.
- (2) "Local emergency planning committee," hereafter referred to as the "local committee," means those persons appointed by the commission to assist in the implementation of Title III, Pub. L. No. 99-499 and this chapter.
- (3) "Release" means, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, including the abandonment or discarding of barrels, containers and other closed receptacles, of any hazardous substance.
- (4) "Reportable quantity" means an amount of hazardous substances released which requires notification to local and state warning points.
- (5) "Hazardous substance" means a substance specified by Title III, Pub. L. No. 99-499, subsequent federal regulations, this chapter, and subsequent administrative regulations as requiring notification if released or if stored, manufactured, or used.
- (6) "Warning point" means that location, operated by state or local government, and identified by the state commission or local committee, and which is continuously staffed, and which has the capability or responsibility to contact governmental emergency response organizations and, if capability exists, to warn the public of hazards which may affect them.
- (7) "Emergency response organization" means a unit of local government or a unit authorized by local government which may be called to make a response because of a release of a hazardous substance, and whose responsibilities are included in plans developed under this chapter.
- (8) "Facility" means all buildings, equipment structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person, or by any person which controls, is controlled by, or under common control with such person, and which manufactures, stores, or uses substances covered under this chapter. For purposes of KRS 39E.190, the term includes motor vehicles, rolling stock, and aircraft. (Enact. Acts 1998, ch. 226, § 59, effective July 15, 1998.)

EXCERPT FROM KENTUCKY REVISED STATUTES, CHAPTER 39E
IMPLEMENTATION OF FEDERAL HAZARDOUS MATERIALS PROGRAMS
KRS 39E.010 et seq.

ATTACHMENT B

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**PHASE II NATIONAL POLLUTANT DISCHARGE
ELIMINATION SYSTEM
(NPDES)
STORM WATER PROGRAM**

**Laura D. Keller
and
W. Blaine Early, III
Stites & Harbison
Lexington, Kentucky**



PHASE II NPDES STORM WATER PROGRAM

SUMMARY

On December 8, 1999, EPA promulgated Phase II of its storm water program. This second phase extended permit requirements to smaller municipal separate storm sewer systems (MS4s) and smaller construction activities than had previously been regulated. It also expanded incentives for industrial facilities to cover areas where materials and equipment are stored to prevent exposure to precipitation. The application deadline for newly covered municipalities and activities is March 10, 2003.

The regulation now covers small MS4s in urbanized areas which serve populations of less than 100,000. These newly regulated small MS4s must obtain an individual NPDES permit or coverage under a general permit and must develop, implement and enforce a storm water management program to minimize pollution of storm water.

The regulation sets out requirements for a new class of discharges of storm water associated with "small construction activity," consisting of construction which disturbs one to five acres. Previously only sites disturbing five acres or more were regulated. The EPA addressed many comments received from the public concerning the proper scope of the regulations by providing for flexibility with the possibility of waivers and designations. The permitting authority may waive otherwise applicable requirements for small construction activities where little or no rainfall is expected during construction or where the agency determines in a particular instance that controls of discharges from such construction sites are not needed to protect water quality. The latter waiver requires consideration of actual or potential impairment of the receiving water body, generally by use of Total Maximum Daily Load (TMDL) assessments. In addition, the permitting authority may determine that normally unregulated construction activities disturbing less than one acre must be permitted due to their potential impact on water quality.

Finally, the new regulations provide additional incentives for operators of industrial activities to prevent exposure of their handling and equipment areas to storm water by extending the "no exposure" exclusion to all industrial facilities, rather than the limited types which could previously benefit. To qualify for the exclusion, the operator must cover material and equipment areas to prevent exposure to precipitation, unless the items in such areas are sealed or otherwise would not pollute storm water. Operators must also certify that no storm water discharged from the entire facility is contaminated by exposure to industrial materials or activities, and must allow the permitting authority to inspect the facility and to make inspection reports available to the public. Construction activities are not eligible for this exclusion.

In Kentucky, the Division of Water plans to adhere to the scheduled deadline for applications of March 10, 2003. The Division will likely publish draft general permits sometime in 2002 and submit them to public comment. Once they have been finalized, regulated entities may apply for coverage by submitting a Notice of Intent.

PHASE II NPDES STORM WATER PROGRAM

Outline prepared by Laura D. Keller

16th ENVIRONMENTAL LAW INSTITUTE

UNIVERSITY OF KENTUCKY COLLEGE OF LAW

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I. INTRODUCTION

- A. On December 8, 1999, EPA promulgated Phase II of its storm water program, generally covering (1) regulated small municipal separate storm sewer systems (MS4s), (2) construction activity disturbing from 1-5 acres, and (3) revision of the "no exposure" exclusion for industrial facilities.
- B. The application deadline for newly covered municipalities and activities is March 10, 2003. The permitting authority (in Kentucky, the Natural Resources and Environmental Protection Cabinet, Division of Water (DOW)) may prescribe an earlier date, but does not currently plan to do so.

II. BACKGROUND--PHASE I

- A. In 1987, the Clean Water Act was amended to require EPA to develop a tiered strategy for implementation of storm water controls, using the existing National Pollutant Discharge Elimination System (NPDES) permitting program. 33 U.S.C. § 1342(p).
- B. Phase I regulations, promulgated on November 16, 1990, covered (1) MS4s generally serving, or located in, incorporated areas or counties with populations of 100,000-249,999 people (medium MS4s) or 250,000 or more (large MS4s) and (2) 11 categories of industrial activities, including construction activities disturbing five acres or more of land. 55 Fed. Reg. 47990 (1990) (codified in 40 C.F.R. §§ 122.26 and 122.28).
- C. Operators of covered activities could apply for an individual permit, a group permit, or for one of several general permits. Id.
- D. In Kentucky, general storm water permits were issued for:
 - 1. Construction;
 - 2. Coal runoff;
 - 3. Primary metals industries;
 - 4. Wood preserving--creosote;

5. Wood preserving-arsenic, chromium;
6. Oil and gas exploration-production;
7. Landfill-land application; and
8. Other facilities.

E. In Kentucky, the most recent Phase I general permits were issued in October 1997 and are due to expire on September 30, 2002.

III. PHASE II: EXPANDED COVERAGE FOR MUNICIPAL SEPARATE STORM WATER SEWER SYSTEMS

A. The Phase II regulation expands coverage to include certain "small MS4s." Small MS4s are generally defined as separate storm sewers not defined as large or medium MS4s. 40 C.F.R. § 122.26(b)(16). Regulated small MS4s are:

1. Small MS4s located within urbanized areas, except for systems waived from the requirement by the NPDES permitting authority. Urbanized areas are determined by the latest Decennial Census by the Bureau of the Census; and
2. Other small MS4s meeting designation criteria to be established by the permitting authority. 40 C.F.R. § 122.32(a).

B. Regulated small MS4s must:

1. Apply for an individual NPDES permit or for coverage under a general permit. 40 C.F.R. § 122.33. An alternative is to apply to be a copermitee with an existing medium or large MS4 (through modification of that MS4's permit). 64 Fed. Reg. at 68768 ("Joint Permit Programs").
2. Develop, implement and enforce a storm water management program designed to reduce the discharge of pollutants to the maximum extent practicable (MEP).
 - a. Applications for an individual permit or for status as a copermitee with a medium or large MS4 allow for development of an individualized management program. 64 Fed. Reg. at 68752.
 - b. Under a general permit, the program must include at least six "minimum control measures" as follows:
 - (i) Public education and outreach on stormwater impacts. 40 C.F.R. § 122.34(b)(1).

- (ii) Public participation/involvement, including providing opportunities for citizens to participate in program development and implementation. This measure could include encouraging citizen representation on a storm water management panel. 40 C.F.R. § 122.34(b)(2).
- (iii) Illicit discharge detection and elimination: This measure should include developing, implementing, and enforcing a program to detect and eliminate illicit discharges, including development of a storm sewer system map, prohibiting through ordinance or other mechanism non-storm water discharges into the storm sewer system, implementation of a plan to detect and address non-storm water discharges, and informing the public of hazards associated with illegal discharges and improper disposal of waste. 40 C.F.R. § 122.34(b)(3).
- (iv) Construction site storm water runoff control: The MS4 must develop, implement, and enforce a program to reduce pollutants to the MS4 from construction activities disturbing greater than or equal to one acre. The program must include an ordinance or other regulatory mechanism to require erosion and sediment controls, as well as requirements for construction site operators to implement appropriate erosion and sediment control best management practices (BMP) and to control waste at the construction site. It must also include procedures for site plan review, receipt and consideration of information submitted by the public, and procedures for site inspection and enforcement. 40 C.F.R. § 122.34(b)(4).
- (v) Post-construction storm water management in new development and redevelopment. The MS4 must develop, implement and enforce a program to address storm water runoff from such projects that disturb greater than or equal to one acre or designated smaller sites that discharge into the small MS4. The MS4 must implement strategies for structural and non-structural best management practices, use an ordinance or other mechanism to address post-construction runoff from such projects, and insure adequate long-term operation and maintenance of BMPs. Locally based watershed planning efforts are encouraged. 40 C.F.R. § 122.34(b)(5).
- (vi) Pollution prevention/good housekeeping for municipal operations: The MS4 must develop and implement an operation and maintenance (O&M) program that includes

employee training to prevent and reduce water pollution from municipal operations, developing maintenance schedules and inspection for storm water controls, proper waste disposal, etc. Other pollution prevention measures suggested are regular street sweeping, reduction in the use of pesticides or street salt, and frequent catch basin cleaning. 40 C.F.R. § 122.34(b)(6).

3. Evaluation/reporting requirements. The general permit regulation requires reports to be submitted to the permitting authority annually during the first permit term and in years 2 and 4 of subsequent permit terms. The reports must include, among other information, an evaluation of the effectiveness of the chosen BMPs and an assessment of the MS4's progress in achieving the program's measurable goals. 40 C.F.R. § 122.34(g)(3). Monitoring is not required. 40 C.F.R. § 122.34(g).

IV. PHASE II: DISCHARGES ASSOCIATED WITH SMALL CONSTRUCTION ACTIVITY

- A. The new regulation lowers the threshold for regulated construction activities from five acres to one acre through the definition of "storm water discharges associated with small construction activity." 40 C.F.R. § 122.26(a)(9)(i)(B); 40 C.F.R. § 122.26(b)(15).
- B. The site is automatically designated if construction activities, including, clearing, grading, and excavating, result in land disturbance equal to or greater than one acre and less than five acres. "Small construction activity" would include disturbance of less than one acre if that area is part of a larger common plan of development or sale which will disturb one to five acres.
- C. The NPDES permitting authority will have the option of providing a waiver of otherwise applicable requirements for small construction activity in two cases.
 1. Where little or no rainfall is expected during the period of construction. To qualify, the activity must occur where the value of the rainfall erosivity factor ("R" in the Revised Universal Soil Loss Equation) is less than five during the period of construction activity. 40 C.F.R. § 122.26(b)(15)(i)(A).
 2. When a TMDL or equivalent analysis indicates that controls on construction site discharges are not needed to protect water quality.
 - a. Usually this waiver would be available only after the state or EPA develops and implements TMDLs for the pollutants of concern from the storm water discharges associated with construction activity.

- b. If the receiving water body is a non-impaired water that does not require TMDL, an equivalent analysis can be provided demonstrating that controls on small construction sites are not needed, based on consideration of existing in-stream concentrations.
- c. For purposes of this waiver, "pollutants of concern" include sediment or a parameter that addresses sediment (such as TSS, turbidity, or siltation), and any other pollutant that has been identified as a cause of impairment of the water body.
- d. In order to obtain this waiver, the operator must have certified to the permitting authority that the construction activities and discharges will occur within the drainage area addressed by the TMDL or equivalent analysis. 40 C.F.R. § 122.26(b)(15)(i)(B).

D. The permitting authority has residual designation authority. As in the case of small MS4s, the permitting authority may regulate small construction activities of less than one acre on a case by case basis if it determines that the storm water discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States. 40 C.F.R. § 122.26(b)(15)(ii).

V. PHASE II: EXPANSION OF "NO EXPOSURE" EXCLUSION FOR INDUSTRIAL ACTIVITIES

- A. Phase I storm water regulations for discharges associated with industrial activities provided that *for categories of industries listed in 40 C.F.R. § 122.26(b)(14)(xi)*, a permit was not required for storm water discharges from areas (such as material handling and equipment areas) if they were not exposed to storm water. Subsection (b)(14)(xi) included only facilities having certain designated standard industrial classification (SIC) codes. The exception has now been expanded to be a conditional exclusion *for all industrial activities except construction*.
- B. In order to qualify for the "no exposure" exclusion, dischargers must satisfy certain conditions as follows:
 - 1. Provide storm resistant shelter to protect industrial materials and activities from storm water, except for certain listed materials, such as sealed, non-leaking containers; adequately maintained vehicles; and some products. 40 C.F.R. § 122.26(g)(1)(i) and (g)(2).
 - 2. Submit a certification to the permitting authority, and to the MS4, if applicable, that, throughout the entire facility, there are no discharges of storm water contaminated by exposure to industrial materials or activities, except for materials in sealed containers, adequately maintained vehicles, and products as referenced above. 40 C.F.R. § 122.26(g)(1)(ii) and (g)(4).

3. Allow the permitting authority, and the MS4, if applicable:
 - a. to inspect the facility to verify the "no exposure" certification, and
 - b. to make its "no exposure" inspection reports available to the public on request.

40 C.F.R. § 122.26(g)(1)(iv-vi).

- C. There are limitations on the "no exposure" exclusion. 40 C.F.R. § 122.26(g)(3).
 1. Construction activities are not eligible for the exclusion.
 2. The exclusion applies only facility-wide, not to individual outfalls at a facility.
 3. Dischargers are required to advise the permitting authority if circumstances change so that materials or activities become exposed, and must obtain a permit before the changed circumstances subject it to enforcement for discharging without a permit. 40 C.F.R. § 122.26(g)(3)(iii).
 4. The permitting authority may require a permit and deny the exclusion if it determines that a discharge causes or has reasonable potential to cause or contribute to an instream excursion above the applicable water quality standard. 40 C.F.R. § 122.26(g)(3)(iv).

VI. KENTUCKY IMPLEMENTATION

- A. EPA regulations allow the states to require applications to be submitted earlier than March 10, 2003. The DOW advises that it does not intend to exercise that option.
- B. EPA regulations also allow the permitting authority to dispense with notices of intent to be covered by a general permit for discharges from small construction activity. The DOW, however, plans to model its Phase II program after the existing Phase I program. It will develop one or more general permits. Once the general permit becomes final, operators seeking coverage under it must submit a Notice of Intent, which must include information concerning the operator and the project, along with storm water best management practices plan. Once all storm water discharges associated with the construction site are eliminated, or when another operator has taken over control of the site, the operator will submit a notice of termination.

**WETLANDS REGULATION
AND (FORMER) NATIONWIDE PERMIT 26**

**Eric A. Braun
Greenebaum Doll & McDonald PLLC
Louisville, Kentucky**



WETLANDS PERMITTING AND (FORMER) NATIONWIDE PERMIT 26

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Wetlands Permitting and (Former) Nationwide Permit 26

Eric A. Braun

GREENEBAUM DOLL & MCDONALD PLLC

I. INTRODUCTION

Few areas of environmental law affect as broad a spectrum of individuals and entities as the law of wetlands permitting. Although most permitting regimes place commands and controls on the industrial discharger, emitter, or waste handler, the requirements of Clean Water Act Section 404 can restrict the activities of everyone from heavy industry down to the individual homeowner. Historically, General Permits such as the Nationwide Permits have provided relief to developers and allowed a significant number of development projects to proceed with little delay or federal interference. However, a recent overhaul to the Nationwide Permits has severely limited the extent to which development – of all kinds – will be permitted under the nationwide permit-by-rule program. These materials focus on recently-promulgated changes to the Nationwide Permitting regime, and are intended to provide the practitioner an introduction to and working knowledge of the changes that the overhaul has created. They are not intended to be a comprehensive look at wetlands permitting.

II. BACKGROUND

Section 404 of the Clean Water Act (“CWA”) and Section 10 of the Rivers and Harbors Act (“RHA”) require individuals and entities planning to undertake construction activities (*i.e.*, dredging and/or filling) in waters of the United States, including wetlands, to obtain appropriate permits for such activity from the Army Corps of Engineers (“the Corps”), which has jurisdiction over such waters. *See* 33 U.S.C. §§ 1342, 1344. Section 10 of the RHA requires a permit for construction in or obstruction of Section 10 waters (defined to generally include all waters actually navigable by boat), and Clean Water Act Section 404 requires a permit for discharges of dredge or fill material into waters of the United States, including non-tidal and isolated wetlands. *See* 33 U.S.C. § 1344 (“CWA Section 404”).

A. Individual versus Nationwide Permitting

Section 404 provides for individual dredge and fill permits under Section 404(a), and 404(e) provides for General Permits. Nationwide Permits are a type of General Permit that expressly allow individuals and entities to engage in broad categories of activity with little prior input from the Corps or the public, based on the fact that such activities have previously, by category, been determined by the Corps to pose only a minimal threat of adverse impacts to the aquatic environment. Activities which do not fall within the parameters of a Nationwide Permit (or other General Permit, such as a Regional Permit) must be permitted by an Individual Permit under Section 404(a).

Corps regulations at 33 C.F.R. Part 330 identify the procedures and conditions under which one may become authorized to conduct a particular activity via a Nationwide Permit. The regulations specify that Nationwide Permits are intended to permit activities that have minimal adverse effects on the aquatic environment with “little, if any, delay or paperwork,” and also expressly state that Nationwide Permits may be issued to satisfy both RHA Section 10 and CWA Section 404. 33 C.F.R. §§ 330.1(a), (g).

B. Key Definitions and Basic Principles (33 C.F.R. Parts 323, 328)

Navigable Waters – this always controversial term of art is what provides the Corps the jurisdictional hook with which it ensnares activities in wetlands and other water bodies into federal regulation. “Navigable Waters” is defined to include all “waters of the United States.” 33 U.S.C. § 1362(7). [Note: “Navigable waters of the United States” for purposes of RHA Section 10 – *i.e.*, those waters that are actually navigable by boat, is separately defined at 33 C.F.R. § 329.4]

Waters of the United States – according to 33 C.F.R. § 328.3, includes all waters which are currently used, were used or may be susceptible to use in interstate or foreign commerce, including:

1. All interstate waters;
2. All other waters (including intrastate waters such as intrastate lakes, rivers, streams, intermittent streams, mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, etc.), the use degradation or destruction of which could affect interstate or foreign commerce, including waters:
 - a. which are or could be used by interstate or foreign travelers for recreational or other purposes;
 - b. from which fish or shellfish are or could be taken and sold in interstate or foreign commerce;
 - c. which are or could be used for industrial purposes by industries in interstate commerce;
3. All impoundments of waters otherwise defined as waters of the United States;
4. Tributaries of waters defined above;
5. The territorial seas; and
6. Wetlands adjacent to waters defined above.

Wetlands – those areas that are: (1) inundated or saturated; (2) by surface or ground water; (3) at a frequency and duration sufficient to support a prevalence of (a) hydrophytic vegetation in (b) hydric (saturated) soils

Individual Permit – a Department of the Army authorization that is issued following a case-by-case evaluation of a specific project involving a proposed discharge of dredge or fill material

General Permit – a Department of the Army authorization that is issued on a Nationwide or Regional basis for a category or categories when those activities are substantially similar in nature and cause only minimal individual and cumulative adverse environmental impacts

Discharge of fill material – the addition of fill material into waters of the United States; this definition now expressly excludes incidental fallback, but has been interpreted to include sidelaying

Fill material – any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody [note: a recent proposal would change this definition and the EPA definition to eliminate the “primary purpose” language and replace it to cover all activities that “have the effect” of either replacing any portion of a water of the United States to make it dry land or changing the bottom elevation of any portion of such water. See 65 Fed. Reg. 21292 (April 20, 2000)].

Single and complete project – the total project proposed or accomplished by an owner/developer

III. NATIONWIDE PERMITS (“NWP”)

A. General Rules Regarding NWPs – The basic concept behind NWPs is that they authorize activities that individually and cumulatively will cause no more than minimal adverse effects to the aquatic environment. As a general rule, NWPs can be considered “permits-by-rule” because they do not require any prior involvement with or permission from the Corps, and do not mandate any public participation in the authorization process. 33 C.F.R. § 330.1(b). In order to be authorized by a given NWP, an activity must comply with the terms of the NWP and any General Conditions that may apply. Although they were originally published as regulations, the terms and conditions (including the General Conditions applicable to all NWPs) are considered permits and are no longer published in the Code of Federal Regulations. See 61 Fed. Reg. 65873, 65874 (December 13, 1996). They are instead published as “Final Notifications” in the Federal Register. Therefore, in order to review the terms of a given NWP to determine whether an activity may be authorized pursuant to it, one must consult the latest version of the permit as printed in the Federal Register.

1. Preconstruction Notice

Prospective permittees are required to provide the Corps District Engineer (“DE”) with Preconstruction Notification (“PCN”) of the proposed activity under certain circumstances. Activities undertaken pursuant to NWPs also must comply with state water quality certifications. 33 C.F.R. § 330.4(c). Whether a given NWP requires PCN depends upon the terms of the NWP itself. Even where PCN is not required, however, permittees may seek pre-verification from the DE that their proposed activities will comply with a NWP prior to engaging in the activity. 33 C.F.R. § 330.6(a).

If a permittee is required to give PCN by the terms of the particular NWP, it must do so in writing “as soon as possible” prior to commencing the activity, and await authorization from the Corps. The new timetables and procedures for PCNs are discussed below.

2. DE Discretionary Authority

The decision whether a proposed activity is authorized by the a NWP is made by the DE, which is vested with a great deal of discretion in making that determination. Pursuant to 33 C.F.R. § 330.4(e), the DE may assert “discretionary authority” and deny authorization for a proposed activity under a NWP by modifying, suspending or revoking the permit-by-rule authority to engage in that activity “whenever he determines sufficient concerns for the environment or any other factor of the public interest so requires.” 33 C.F.R. § 330.4(e)(2). The DE’s discretion appears nearly unchecked:

Whenever the DE determines that a proposed specific activity covered by an NWP would have *more than minimal individual or cumulative adverse*

effects on the environment or otherwise may be contrary to the public interest, he must either modify the NWP authorization to reduce or eliminate the adverse impacts, or notify the prospective permittee that the proposed activity is not authorized by NWP and provide instructions on how to seek authorization under a regional general or individual permit.

33 C.F.R. §330.4(e)(2) (emphasis added).

The regulations set forth a number of other factors the DE may take into account in determining whether to modify, suspend or revoke a NWP authorization for a specifically proposed activity, including:

- a. changes in circumstances since the NWP was promulgated or since the DE provided written verification of authorization to the permittee;
- b. the adequacy of specific conditions of the authorization;
- c. any significant objections to the authorization not previously considered;
- d. cumulative adverse effects that have occurred pursuant to that particular NWP authorization;
- e. the extent of the permittee's compliance with terms and conditions of the NWP;
- f. the extent to which asserting discretionary authority would effect plans, investments and actions the permittee has made or taken in reliance of the authorization; and
- g. "other concerns for the environment," including the CWA Section 404(b)(1) Guidelines (which include consideration of whether there are practicable alternatives to a project, aesthetics, and economic values) and "other relevant factors of the public interest."

33 C.F.R. § 330.5(d)(1). The regulations also provide for an informal consultation process, during which the DE and the prospective permittee may meet and attempt to determine whether special conditions to modify the authorization may be mutually agreeable or whether the permittee can supply the DE with information to alleviate his concerns. 33 C.F.R. § 330.5(d)(2). No public notice is required for the DE's final decision, whether it is to authorize the activity via NWP or assert discretionary authority to require an individual permit. 33 C.F.R. § 330.5(d)(3).

The DE is expressly authorized to condition approval of an activity by adding additional requirements on a case-by-case basis in order to insure that the activity will result in no more than minimal adverse environmental effects. 33 C.F.R. § 330.6(a)(3)(i).

3. Effects on Endangered Species

No activity may be authorized under any NWP if the activity is likely to jeopardize the continued existence of a threatened or endangered species as listed or proposed for listing under the Endangered Species Act ("ESA"). 33 C.F.R. § 330.4(f). Prospective permittees

must notify the DE if any endangered or threatened species or critical habitat "might be affected or is in the vicinity of the project." 33 C.F.R. § 330.4(f)(2). If the DE determines that the activity may affect any listed species or critical habitat, the DE must initiate ESA Section 7 consultation, and at the conclusion of the consultation may either authorize the activity with special conditions or assert discretionary authority to require the permittee to apply for an individual permit. 33 C.F.R. § 330.4(f)(2)(i)-(ii).

4. **Effects on Historic Properties**

No activity that may affect properties listed or proposed for listing on the National Register of Historic Places may be authorized by NWP until the DE has complied with the National Historic Preservation Act ("NHPA"). Again, the prospective permittee is under a duty to notify the DE of any potentially listed property or upon discovery of any previously unknown property after the activity has begun. The DE may authorize the activity with conditions or require an individual permit after complying with the requirements of 33 C.F.R. Part 325, Appendix C.

5. **Use of Multiple NWPs**

Two or more different NWPs may be used to authorize a "single and complete project." However, a single NWP may not be used twice on the same single and complete project. 33 C.F.R. § 330.6(c). The "project" can often be difficult to define, and this definition is often critical in determining whether the project can go forward under a NWP (or a series of NWPs) or whether it must be permitted individually. In addition, portions of a larger project may proceed under authority of a NWP, provided that the smaller portions of the project have "independent utility"—*i.e.*, if the permittee would go forward with the smaller portions if the other portions were not permitted and could not be completed. 33 C.F.R. § 330.6(d).

6. **Appeal Process**

Effective August 6, 1999, the Corps added an administrative appeal process for permit applications that are denied. However, this appeal process was provided only for individual permit applications that are denied, and proffered individual permits (*i.e.*, those permits that the Corps issues but that the prospective permittee declines to accept). 33 C.F.R. Part 331. The Corps recently amended and expanded the appeal process, but refused to extend it to the refusal to authorize projects under NWPs. *See* 65 Fed. Reg. 16486 (March 28, 2000). The new appeal process does not apply to the DE's exercise of discretionary authority to require an individual permit.

B. **Proposed Changes to NWPs**

Previously, most NWPs authorized the specific activity involved to proceed without any limitation on the acreage of waters of the United States filled, tempered only by the requirement that no more than minimal adverse environmental effects occurred. The former NWP 26, which governed fills and discharges into headwaters and isolated waters, including wetlands, was no exception to that rule. Although the 1977 predecessor to NWP 26 allowed unlimited filling without PCN to the Corps, it has gradually been reigned in over the years. In 1984, the Corps promulgated the first limits on NWP 26, establishing a maximum project-specific impact limit of 10 acres, and requiring PCN of all fills in excess of 1 acre. In a December 13, 1996 final rule, the Corps ratcheted those thresholds down to 3

acres maximum impact and 1/3 of an acre for PCN. *See* 61 Fed. Reg. 65873 (Dec. 13, 1996). In that final rule, the Corps also limited "stacking" NWP 26 with other NWPs on the same project, and announced that it would continue to scale back and eventually eliminate NWP 26.

On July 1, 1998, the Corps began following through with the NWP scale back. This controversial process began with the proposal of 6 new "activity-based" NWPs to replace NWP 26: NWPs A, residential, commercial and institutional activities affecting non-tidal waters of the United States of between one-third and three acres in size; B, master-planned development activities affecting up to 10 acres of non-tidal waters; C, stormwater management facilities involving construction on up to 2 acres in non Section 10 waters; D, passive recreational facilities that would disturb between one-third and one acre of non-tidal waters or 500 linear feet of stream bed; E, mining activities resulting in fill of up to three acres of non-tidal waters; and F, reconfiguration of existing drainage ditches. *Id.* As an alternative to specific acreage limits for each NWP, the proposed rule also cited a sliding scale acreage limit, where the amount of maximum fill allowed would be based on the size of the overall development. Finally, the 1998 proposed rule provided for greater emphasis on regional conditioning by District Engineers, proposed to modify 6 General Conditions, and proposed a new General Condition. The July 1, 1998 proposed rule has been very controversial, and has come under fire from environmentalists and developers alike.

In an October, 1998 proposal, the Corps issued notice of its intent to eliminate the proposed NWP for "master-planned" development activities (proposed NWP B), and left open the possibility that it may be proposed again in the future. The Corps also extended the expiration of NWP 26 until September of 1999. *See* 63 Fed. Reg. 55095 (Oct. 14, 1998). Subsequently, in response to comments received on the two previous notices, the Corps modified the new NWPs and General Conditions, and reopened the comment period on July 21, 1999. 64 Fed. Reg. 39252 (July 21, 1999). The Corps again extended the expiration date for NWP 26 (until January 5, 2000) and provided an additional comment period on September 3, 1999. 64 Fed. Reg. 48386 (Sept. 3, 1999). After extending NWP 26's expiration two additional times, the Corps finally issued its Final Notice of Issuance and Modification of Nationwide Permits, 65 Fed. Reg. 12818 (March 9, 2000). A copy of the portion of this final notice containing the terms of the new NWPs and the General Conditions is attached as Exhibit A for your reference. The new NWPs and General Conditions become effective on June 5, 2000, the date on which the former NWP 26 is set to expire.

Efforts to derail the new rules have been swift and furious. The National Association of Homebuilders filed a lawsuit challenging the NWPs on March 9, the same day they were issued. The suit challenges the Corps' requirements for vegetated buffers, the 1/2 acre limitation and 1/10 acre notice requirements, and the Corp's failure to define "minimal impact." Certain legislative and appropriations efforts have also been lodged to delay or stifle the new NWPs.

C. Overview of the March 9, 2000 Final Notice (65 Fed. Reg. 12818 (March 9, 2000))

1. In general, the Corps abandoned the proposal to utilize a sliding scale to limit the number of acres allowed to be filled under the new NWPs. The sliding scale was rejected in favor of much tighter limits on the maximum number of acres that may be affected, and smaller thresholds requiring PCN to be provided to the Corps. More specifically, the following three themes permeate the preamble to the final notice:

- a. Almost every NWP affected by the new rules limit total wetlands losses to 1/2 acre;

- (1) in fact, all NWP's *except* NWP 41 (reshaping of existing drainage ditches) are limited to ½ acre; some of the modified NWP's are also limited to ½ acre;
 - b. Almost every NWP affected by the new rules requires PCN to the Corps if the project will cause the loss of greater than one-tenth (1/10) of an acre; and
 - c. Reliance on the discretion of the District Engineer to add regional and case-specific conditions to NWP authorizations is significantly increased.
2. The Corps acknowledges that the decreased acreage limits will result in substantial cost and delay increases to the regulated public.
 - a. The Corps cited a Workload and Compliance Costs Study that was conducted on the July 21, 1999 reproposal, which estimated that the number of Individual Permit applications received by the Corps would increase by 4,429 per year, costing regulated entities an estimated 46 million additional dollars and increasing the Individual Permit processing time to three to four times the 1998 average. 65 Fed. Reg. at 12820.
 - b. In support of the NWP's as promulgated, the Corps claims that the newly-minted nationwides will result in 40% fewer Individual Permit applications, 30% less in compliance costs, and a mere doubling of the permit processing time compared to what the July 21, 1999 proposal would have caused. *Id.*
3. Effective Dates
 - a. The new NWP's and General Conditions become effective on June 5, 2000 and expire on June 5, 2005. When the other current NWP's are proposed for reissuance in 2002, the new NWP are likely to be repropoed also in order to consolidate the repromulgation schedule.
 - b. PCNs submitted prior to March 9, 2000 will be reviewed under the existing NWP's, and if authorized, they will remain authorized until February 11, 2002.
 - (1) Any permittee granted an authorization according to this grandfather provision will have an additional 12 months (*i.e.*, until February 11, 2003) to complete the project, provided they begin the work or have it under contract by February 11, 2002.
 - c. NWP activities that are authorized under the existing permits and which do not require PCN are authorized until June 5, 2000; provided that construction begins or is under contract prior to that time, the permittee will have an additional 12 months to complete the project under the current NWP's.
4. Linear Foot Limits – For new NWP's 39, 40, 42, and 43, a new 300 linear foot limit has been created for filling and excavating stream beds.
5. Time frames for NWP authorizations – the Corps has imposed a new PCN review period of 30 days. Far from a model of clarity, the new provision still requires PCN to be provided

by the permittee "as soon as possible" prior to commencing the activity; however, the new rule provides that:

- a. The Corps has 30 days in which to determine whether the application is complete;
 - (1) if the PCN is not complete, the Corp has one opportunity to request additional information;
 - (2) 45 days from the date of receipt of complete information (which the permittee has no way to determine), the Corps must review and take action on the PCN;
 - (3) if no action is taken within 45 days of the date of receipt, the permittee may consider the activity authorized and proceed.
6. "Minimal Effects" – the Corps refused to elaborate further on what sorts of effects can be considered more than "minimal" for purposes of NWP authorization, stating that "minimal effect as it is used in the context of general permits, including NWPs, cannot be simply defined." 65 Fed. Reg. at 12822.
7. Jurisdictional Issues – the Corps refused to revise the NWP regulations and the terms of the NWPs themselves to delete all references to "excavation" as an activity being regulated, based on *National Mining Ass'n v. Corps of Engineers*. 145 F.3d 1399 (D.C. Cir. 1998). The Corps maintained that some excavation activity results in the discharge of fill material (through, for example, temporary sidecasting), and is therefore regulated under CWA Section 404. In addition, all construction activity (including excavation) in Navigable waters requires a RHA Section 10 permit, and therefore, according to the Corps, references to excavation in the NWPs is required.
8. Applicable waters – the new and modified NWPs apply to activities that are proposed to take place in all non-tidal waters (including non-tidal wetlands), except for non-tidal wetlands adjacent to tidal waters.
9. Mitigation
 - a. If the NWP activity does not require PCN, no compensatory mitigation will generally be required.
 - b. If PCN is required, then an acre-for-acre (i.e., 1:1 ratio) compensatory mitigation plan will be required;
 - (1) the DE has the discretion to require more mitigation on a case-by-case basis;
 - (2) in-kind, on-site replacement is preferred; however, off-site (preferably within the same watershed) is acceptable, and out-of-kind mitigation may also be used in some cases.
 - c. Vegetated Buffers may be used as an alternative form of compensatory mitigation, but is limited in the amount that may be used;

- (1) vegetated buffers are required if there are perennial or intermittent streams or open waters on the project site;
 - (a) where wetlands are being filled, vegetated buffers will only be required where a 1:1 acreage ratio of compensatory mitigation has been achieved, and only 1/3 of the additional mitigation required may be vegetated buffers.

10. The Corps imposed a 6 month moratorium on Regional General Permits.

D. The Modified NWP's

1. *NWP 3 - Maintenance.* This NWP authorizes:

- a. the repair, replacement, or rehabilitation of any previously authorized, currently serviceable structure or fill, provided the fill or structure is not to be put to any use differing from those specified;
- b. discharges of dredged or fill material, including excavation, into waters of the U.S. to remove accumulated sediments and debris in the vicinity of and within existing structures, and the replacement of new and existing riprap; and
 - (1) PCN is required for activities under this portion of NWP 3
- c. discharges of dredged or fill material, including excavation, associated with the restoration of upland areas damaged by storm, flood or other discrete event;
 - (1) permittee must notify the Corps within 12 months of the damage, and work must commence or be under contract within 2 years of the damage.
- d. Maintenance dredging for the primary purposes of navigation or beach restoration are not authorized by NWP 3.

2. *NWP 7 - Outfall Structures and Maintenance.* This NWP authorizes:

- a. construction of outfall structures and associated intake structures for outfalls related to NPDES (or NPDES exempt) discharges; and
- b. maintenance excavation, including dredging, to remove accumulated sediments blocking or restricting outfall and intake structures.
 - (1) PCN is required for all activities.
 - (a) PCN must include details of the original design capacities of the intake and outfall structures when maintenance dredging or excavation will be involved.
 - (2) amount of excavated or dredged material must be kept to a minimum necessary to restore the outfalls', intakes', or canals' original design capacities;

- (3) excavated or dredged material must be deposited and retained at an upland site; and
- (4) proper soil erosion measures must be used.

3. ***NWP 12 – Utility Line Activities.*** This NWP authorizes:

a. **Utility Lines** – the construction, maintenance, or repair of utility lines, including outfall and intake structures and the associated excavation, backfill, or bedding for utility lines, provided there is no change in preconstruction contours.

- (1) maximum loss allowed: ½ acre; loss is defined to include the filled area plus the area adversely affected by flood as a result of the fill; temporary losses (*i.e.*, where a trench is excavated and then backfilled for an underground line) do not count as “losses”;
- (2) “Utility Line” is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication;
 - (a) the definition includes pipes conveying drainage from another area; it excludes french tile or other tile drainage systems.
- (3) Temporary sidelaying of dredged or fill material is permitted for up to three months (may be extended to 180 days at the discretion of the DE);
- (4) the top 6 to 12” of soil must be backfilled over the trench, and the trench must not be constructed so as to cause excessive draining through the trench.

b. **Utility Line Substations** – the construction, maintenance, or expansion of a substation facility associated with a power line or utility line in non-tidal waters, provided the activity does not result in the loss of greater than ½ acre of non-tidal waters of the U.S.

- (1) maximum loss allowed: ½ acre.

c. **Foundations for Overhead Utility Line Towers, Poles and Anchors** – the construction, maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the U.S., provided that the foundations are the minimum size necessary and separate footings for each tower leg are used where feasible.

- (1) maximum loss allowed: ½ acre.

d. **Access Roads** – the construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the U.S., excluding non-tidal wetlands adjacent

to tidal waters, provided the discharge does not cause the loss of greater than ½ acre of non-tidal waters of the U.S.

(1) maximum loss allowed: ½ acre.

4. ***NWP 14 – Linear Transportation Crossings.*** This NWP authorizes activities required for the construction, expansion, modification or improvement of linear transportation crossings (*i.e.*, highways, railways, trails, and airport runways);

a. Public crossings are authorized:

(1) in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause greater than ½ acre of losses; and

(2) in tidal waters or non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause greater than 1/3 acre of losses and does not exceed 200 linear feet.

b. Private crossings are also authorized, but the discharge cannot exceed 1/3 acre and 200 linear feet.

(1) PCN is required for all types of transportation crossing activity resulting in greater than 1/10 acre losses or which involve discharges to special aquatic sites;

(2) PCN must include compensatory mitigation proposal to offset permanent losses;

(3) the width of the fill must be limited the amount necessary for the structure; NWP 14 cannot be used to authorize vehicle maintenance or storage buildings, parking lots, train stations, aircraft hangars, etc.; and

(4) the crossing must be a single and complete project for crossing a water of the U.S.

5. ***NWP 27 – Stream and Wetland Restoration Activities.*** This NWP authorizes activities in waters of the U.S. associated with the restoration of former waters, the enhancement of degraded tidal and non-tidal wetlands and riparian areas, and the restoration and enhancement of non-tidal streams and non-tidal open water areas, provided:

a. The activity is conducted on

(1) non-federal public lands and private lands, in accordance with the terms and conditions of a binding wetland enhancement, restoration creation agreement between the landowner and the U.S. Fish and Wildlife Service (“FWS”) of the Natural Resources Conservation Service; or

(2) any federal land; or

- (3) reclaimed surface or coal mined lands in accordance with a SMCRA permit; or
 - (4) any private or public land;
 - (a) PCN is required for (4) above only;
 - (b) only native plant species may be used to vegetate the site;
 - (c) separate permits are required for reversion to original (*i.e.*, non-waters) status.
6. ***NWP 40 – Agricultural Activities.*** This NWP authorizes discharges of dredged or fill material to non-tidal waters of the U.S., excluding non-tidal wetlands adjacent to tidal waters, for the purpose of improving agricultural production and the construction of building pads or farm buildings.
- a. If the permittee is a USDA program participant:
 - (1) the permittee must obtain a minimal effect exemption;
 - (2) the activity cannot result in loss greater than ½ acre;
 - (3) the permittee must have a NRCS-certified wetland delineation;
 - (4) the permittee must implement an NRCS approved mitigation plan; and
 - (5) the permittee must submit a post-project report to the DE.
 - b. If the permittee is not a USDA program participant:
 - (1) the activity cannot result in a loss greater than ½ acre; and
 - (2) PCN is required for losses greater than 1/10 acre; the PCN must include:
 - (a) a wetlands delineation; and
 - (b) a mitigation plan.
 - c. For the construction of building pads for farm buildings, if the proposed activity does not involve the filling of non-tidal wetlands that were in agricultural production prior to December 23, 1985, the activity is authorized.
 - (1) PCN is required for such activity.
 - d. Activities in other waters of the U.S. are limited to relocation of existing drainage ditches constructed in non-tidal streams;
 - (1) this activity cannot exceed 300 linear feet.

- e. "Farm Tract" refers to a parcel of land identified by the farm service agency; activities authorized by NWP 40 may not exceed ½ acre for a single farm tract.

E. The New NWPs

- 1. ***NWP 39 – Residential, Commercial and Institutional Developments.*** This NWP authorizes discharges of dredged or fill material into non-tidal waters except non-tidal wetlands adjacent to tidal waters for the construction or expansion of residential, commercial and institutional building foundations and building pads and attendant features that are necessary for the maintenance of the structures.
 - a. Commercial developments include construction and expansion of retail stores, industrial facilities, restaurants, business parks and shopping centers;
 - b. Institutional developments include schools, fire stations, government office buildings, judicial buildings, public works structures, libraries, hospitals, places of worship;
 - c. Residential developments include single and multiple unit developments (*i.e.*, apartment buildings);
 - (1) "attendant features" include roads, parking lots, garages, yards, utility lines, stormwater management facilities, and recreation facilities such as playgrounds, playing fields and golf courses (provided the golf course is an "integral part" of the residential development), but NOT new ski areas or oil and gas wells.
 - d. Conditions:
 - (1) discharge cannot cause the loss of greater than ½ acre of waters of the U.S.; and
 - (2) discharge cannot cause loss of greater than 300 linear feet of stream bed.
 - e. PCN is required:
 - (1) for discharges causing losses greater than 1/10 acre;
 - (2) for discharges that cause the loss of open waters; and
 - (3) where NWP 39 is used in conjunction with any other NWP, the cumulative loss of greater than 1/10 acre requires PCN.
 - f. The activity must involve a single and complete project.
 - g. PCN must include a written statement as to how avoidance and minimization of losses of waters were achieved on the project site.
 - h. For discharges involving less than 1/10 acre, the permittee must provide written report to the Corp after the work is complete which must include:

- (1) the name, address and telephone number of the permittee;
 - (2) the location of the project;
 - (3) a description of the work; and
 - (4) the type and acreage of the loss involved.
- i. If the project site was previously used for project purposes and the owner/operator used NWP 40 to authorize activities in waters of the U.S. to increase production or construct farm buildings, **NWP 39 cannot be used by the developer to authorize additional activities in waters of the U.S. on the project site in excess of the acreage limit for NWP 39 (i.e., the combined waters loss under NWPs 39 and 40 cannot exceed ½ acre).**
 - j. Subdivision Waiver – subdivisions resulting in greater than 1/10 acre must be noticed; subdivisions which will cause an aggregate loss greater than ½ acre cannot be authorized unless:
 - (1) the DE exempts a particular parcel (on a subdivision basis) by making a written determination that:
 - (a) the individual and cumulative effects will be minimal; and
 - (b) the property owner had, after October 5, 1984 but prior to July 21, 1999 committed substantial resources in reliance on NWP 26 with regard to a subdivision, in circumstances where it would be inequitable to frustrate the property owner's investment-backed expectations.
 - i) the waiver appears to apply across the board once the exemption is granted to a subdivision
2. ***NWP 41 – Reshaping Existing Drainage Ditches.*** This NWP authorizes discharges of dredged or fill material into non-tidal waters of the U.S., excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of currently serviceable drainage ditches constructed in these waters.
 - a. The reshaping activity cannot increase drainage capacity or expand the area drained by the ditch;
 - b. compensatory mitigation is NOT required for NWP 41, because it is designed to improve water quality by regrading the ditch with gentler slopes to reduce erosion, increase vegetation growth, and increase uptake of nutrients;
 - c. PCN is required if more than 500 linear feet of ditch will be reshaped;
 - d. temporary sidecasting (3 months which can be extended to 180 days) is permitted;
 - e. NWP 41 does not permit stream channelization or stream relocation projects.

3. ***NWP 42 – Recreational Facilities.*** This NWP authorizes discharges of dredged or fill material into non-tidal waters of the U.S., excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of recreational facilities, provided:
 - a. the loss does not exceed ½ acre;
 - b. the discharge does not cause the loss of greater than 300 feet of linear stream bed;
 - c. PCN is required for losses greater than 1/10 acre;
 - (1) Discharges to special aquatic sites must include a delineation of the site;
 - (2) PCN must also include a compensatory mitigation proposal providing for 1:1 replacement.
 - d. “Recreational Facility” means a recreational activity that is integrated into the natural landscape and does not substantially change preconstruction grades or deviate from natural landscape contours.
 - (1) For NWP 42, the primary function of recreational facilities does not include the use of motor vehicles, buildings, or impervious surfaces;
 - (a) examples: hiking trails, bike paths, horse paths; nature centers and campgrounds (excluding trailer parks);
 - (b) the construction or expansion of golf courses and the expansion (but not new construction) of ski areas may be authorized, provided they do not substantially deviate from natural landscape contours and they are designed to minimize adverse effects to waters of the U.S. through:
 - i) integrated pest management;
 - ii) adequate stormwater management facilities;
 - iii) vegetated buffers;
 - iv) reduced fertilizer use, etc.
 - e. NWP 42 also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables, that are directly related to the recreational activity;
 - (1) does NOT authorize other buildings, such as restaurants, hotels, etc.;
 - (2) does NOT authorize ball fields, such as tennis courts, baseball and softball fields, soccer fields, and football stadiums.
 4. ***NWP 43 – Stormwater Management Facilities.*** This NWP authorizes discharges of dredged or fill material into non-tidal waters of the U.S., excluding non-tidal wetlands

adjacent to tidal waters, for the construction and maintenance of stormwater management facilities, including activities for the excavation of stormwater ponds/facilities, detention basins; the installation and maintenance of water control structures, outfall structures and emergency spillways; and the maintenance dredging of existing stormwater management ponds/facilities and detention and retention basins, provided:

- a. the discharge cannot cause the loss of greater than ½ acre of waters;
- b. the discharge cannot cause the loss of greater than 300 linear feet of stream bed;
- c. the construction of new stormwater management facilities in perennial streams cannot be authorized;
- d. PCN is required for losses exceeding 1/10 acre; the notification must include:
 - (1) a stormwater maintenance plan;
 - (2) a delineation of any special aquatic sites;
 - (3) a compensatory mitigation plan to offset water losses; and
 - (4) a written statement detailing the permittee's efforts to minimize discharges and effects on water quality.
- e. The stormwater management facility must comply with GC 21 and be constructed using Best Management Practices ("BMP") and watershed protection techniques.

5. ***NWP 44 – Mining Activities.*** This NWP authorizes discharges of dredged or fill material into:

- a. isolated waters, streams where the annual average flow is 1 cubic foot per second or less, and non-tidal wetlands adjacent to headwater streams, for aggregate mining and associated support activities (*i.e.*, rock, sand, gravel, and crushed stone mining, etc.);
- b. lower perennial streams, excluding wetlands adjacent to lower perennial streams, for aggregate mining activities (but NOT associated or support activities); and/or
- c. isolated waters and non-tidal wetlands adjacent to headwater streams, for hard rock/mineral mining activities (*i.e.*, the extraction of mineral ores from subsurface locations) and associated support activities; provided:
 - (1) the mined area in waters of the U.S. plus any acreage loss cannot exceed ½ acre; and
 - (2) discharges must be avoided to the maximum extent possible.
 - (3) PCN is required, which must include:
 - (a) a statement detailing compliance with minimization;

- (b) a description of the waters affected by the project;
 - (c) a description of measures taken to comply with the conditions of the permit; and
 - (d) a reclamation plan.
- (4) Other conditions. The permittee must:
- (a) not substantially alter the sediment characteristics of shellfish beds;
 - (b) implement measures to prevent increases in stream gradient and water velocities and prevent upstream and downstream effects to channel conditions;
 - (c) not affect the course, capacity or condition of the navigable water;
 - (d) take measures to minimize downstream turbidity;
 - (e) implement a compensatory mitigation plan;
 - (f) refrain from engaging in beneficiation and mineral processing activities within 200 feet of the ordinary high water mark; and
 - (g) comply with GCs 9 and 21, certain flow and location limitations, and the single and complete project requirement.

F. The New and Modified General Conditions ("GCs ")

As a housekeeping matter, the Corps combined the Section 404-only GCs with the others, providing for a single comprehensive list of conditions. Additionally, the Corps pointed out that all of the new GCs apply to all NWP's (*i.e.*, including those still left in effect from the December 13, 1996 Final Notice, 61 Fed. Reg. 65873), unless a particular GC expressly limits its application to certain NWP's only. *See* 65 Fed. Reg. at 12861.

The new and modified GCs are as follows:

1. **GC 4 – Aquatic Life Movements.** The Corps added a provision to this GC requiring that culverts placed in streams to maintain low flow conditions.
2. **GC 9 – Water Quality.** The Corps added a paragraph requiring that for NWP's 12, 14, 17, 18, 32, 39, 40, 42, 43, and 44, where a state's water quality certification does not require a water quality management plan, the permittee must include design criteria and techniques that will insure that the proposed work does not result in more than minimal degradation of water quality.
 - a. This GC does NOT create a no-degradation policy.

3. **GC 11 – Endangered Species.** The Corps added a provision to this GC requiring the permittee to identify any potentially affected listed species in the vicinity of the proposed project by name in the PCN.
 - a. The Corps declined to elaborate on the “vicinity” requirement.
 - b. The Corps rejected a proposal to make all projects potentially affecting listed species to be permitted by IP.

4. **GC 13 – Notification.** The Corps made several important changes to this GC. The permittee is still required to notify the Corps “as early as possible” where the terms of the NWP require PCN. The PCN may still be submitted by letter or via IP application form. The DE then “must determine if the PCN is complete within 30 days of the date of receipt and can request the additional information necessary to make the PCN complete only once.” If the permittee does not provide all of the requested information, then the DE can continue to notify the permittee that the PCN is incomplete (but apparently cannot request any additional information).

The DE has 45 days from the day of receipt of a complete PCN to authorize the activity (with or without additional conditions), require a mitigation plan, or require an IP. If the PCN includes losses of greater than ½ acre of waters, the DE must immediately (by fax or overnight mail) notify the FWS, the NMFS, and the SHPO, who then have 10 calendar days to state that they will submit substantive comments; the DE must then wait an additional 15 days before making a decision on the notification.

- a. The Permittee cannot begin activity:
 - (1) until it receives written notice from the DE that the activity is authorized or authorized subject to additional conditions;
 - (2) if notified in writing that an IP will be required; or
 - (3) unless 45 days have passed since the DE’s receipt of complete information and the permittee has not received any written notice from the DE.

- b. The Corps claims that the 30 and 45 day periods are NOT intended to be independent periods, and should not amount to a cumulative 75 day period;

- c. It is unclear how the permittee will know that his 45 days have passed; the DE is not obligated to notify the permittee that it has received the PCN or that the PCN is complete.

- d. Contents of notice (the Corps added several specific provisions for purposes of particular NWPs):
 - (1) name, address and telephone numbers of the permittee;
 - (2) location of the proposed project;

- (3) brief description of the project; the project's purpose; the direct and indirect adverse environmental effects the project will cause; any other permits, NWP's or IP's the permittee intends to use on the project;
- (4) For NWP's 7, 12, 14, 18, 21, 34, 38, 39, 40, 41, 42, and 43, the PCN must include a delineation of special aquatic sites, including wetlands;
- (5) For NWP 7, outfall structures and maintenance, the PCN must include information regarding the original design capacities and configurations of those areas where maintenance dredging is proposed;
- (6) For NWP 14, Linear Transportation Crossings, the PCN must include:
 - (a) a compensatory mitigation proposal to offset waters losses; and
 - (b) a statement describing how temporary losses are minimized to the maximum extent practicable.
- (7) For NWP 21, Surface Coal Mining Activities, the PCN must include an OSM or state approved mitigation plan;
- (8) For NWP 27, Stream and Wetland Restoration, the PCN must include documentation of the prior condition of the site that will be reverted by the permittee;
- (9) For NWP 29, Single Family Housing, the PCN must include:
 - (a) any past use of the residence by the permittee or their spouse;
 - (b) a statement that the single-family housing is for personal use of the permittee;
 - (c) a description of the entire parcel, including delineation of wetlands (except for parcels smaller than 1/4 acre);
 - (d) a written description of all land owned by the permittee or the permittee's spouse within a one mile radius of the project.
- (10) For NWP 31, Maintenance of Existing Flood Control Projects, the PCN must include a five year maintenance plan and detailed information about configuration of the existing facilities;
- (11) For NWP 33, Temporary Construction, Access and Dewatering, the PCN must include a restoration plan;
- (12) For NWP's 39, 43, and 44, the PCN must include a statement regarding how the permittee has achieved avoidance and minimization of losses of waters of the U.S.;

- (13) For NWP 39, the PCN must also include a compensatory mitigation proposal or an explanation why such mitigation is not required;
 - (14) For NWP 40, Agricultural Activities, the PCN must include a compensatory mitigation proposal;
 - (15) For NWP 43, Stormwater Management Facilities, the PCN must include a maintenance plan and compensatory mitigation plan for new facilities;
 - (16) For NWP 44, Mining Activities, the PCN must include:
 - (a) a description of all waters affected;
 - (b) a description of all measures taken to minimize adverse effects on waters of the U.S.;
 - (c) a description of the measures taken to comply with the criteria of the NWP; and
 - (d) a reclamation plan.
 - (17) For activities that may affect endangered species, the PCN must include the name of the potentially affected species and/or the designated habitat that may be affected;
 - (18) For activities that may affect historic properties, the PCN must include a description of such property and a vicinity map; and
 - (19) For NWPs 12, 14, 29, 39, 40, 42, 43, and 44, where the activity involves permanent, above-grade fills in waters of the United States in the 100-year floodplain, the PCN must include documentation that the proposed construction complies with FEMA construction requirements.
5. **GC 15 – Use of Multiple Nationwide Permits.** The Corps added language to this GC to clarify that multiple NWPs may be used to authorize activities on a single and complete project *provided that* the total acreage of losses on the entire project does not exceed the maximum acreage limit of the NWP with the highest limit (*i.e.*, if two NWPs are to be used, one with a ½ acre limit and another with a 1/3 acre limit, the total losses for the entire project cannot exceed ½ acre).
6. **GC 19 – Mitigation.** This GC was modified to require a 1:1 replacement ratio for all wetlands impacts requiring a PCN.
- a. Mitigation proposal must be “practicable,” meaning it must be available and capable of being accomplished in light of costs, existing technology, and logistics in light of overall project purposes.
 - b. Vegetated buffers now take on increased importance in mitigation planning; buffers are required to be made of native plant species and will generally be 25 to 50 feet wide along all open waters.

- (1) if there are open waters on the project site and the DE requires compensatory mitigation for wetlands losses, the vegetated buffer requirement will comprise no more than 1/3 of the remaining mitigation required (*i.e.*, after a 1:1 ratio of wetlands replacement has been achieved).
 - c. Mitigation planning cannot be used to reduce the threshold number of acres that are to be filled for purposes of determining whether a given activity may be authorized by the NWP in the first instance.
- 7. **GC 20 – Spawning Areas.** The Corps modified this GC by adding the word “important” before “spawning area.” The GC now only prohibits the destruction of important spawning areas, *i.e.*, those that are used by species harvested commercially for human consumption.
- 8. **GC 21 – Management of Water Flows.** The Corps modified this GC to require permittees to maintain, to the maximum extent practicable, preconstruction surface water flows.
- 9. **GC 25 – Designated Critical Resource Waters.** This is a new GC which limits NWP authorized activities in “Critical Resource Waters.”
 - a. Critical Resource Waters (“CRWs”)– are defined to include: NOAA-designated marine sanctuaries, National Estuarine Research Reserves, national Wild and Scenic Rivers, critical habitat for federally listed threatened and endangered species, coral reefs, state natural heritage sites, and outstanding national resource waters or other waters officially designated by a state as having particular environmental significance which are identified by the DE through notice and comment.
 - b. NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 cannot be used to authorize activity within, or directly affecting CRWs, including wetlands adjacent to CRWs; however,
 - (1) activities in Wild and Scenic Rivers may be authorized if they comply with GC 7; and
 - (2) activities affecting listed species or habitats may be authorized if they comply with GC 11 and the FWS or NMFS concurs in the authorization.
- 10. **GC 26 – Fills Within the 100-Year Floodplain.** (This GC was originally proposed as GC 27; the proposed GC 26, Impaired Waters, was withdrawn, and this GC was redesignated GC 26). This is a new GC which governs the discharge of dredged or fill material into waters of the U.S. resulting in permanent, above-grade fills within the 100-year floodplain. The activities are broken down into the following categories:
 - a. Discharges below headwaters – discharges below the point on a stream where the average annual flow is five cubic feet per second are not authorized by NWPs 29, 39, 40, 42, 43, and 44. For NWPs 12 and 14, PCN is required and must include documentation that FEMA construction requirements are met;

- b. Discharges in headwaters – discharges above the point in the stream where the average annual flow is five cubic feet per second:
 - (1) Flood Fringe – discharges in the flood fringe resulting in permanent above grade fills are not authorized by NWP's 12, 14, 29, 39, 40, 42, 43, or 44 unless the permittee provides PCN, including documentation of FEMA construction compliance.
 - (2) Floodway – discharges in the floodway resulting in permanent above grade fills are not authorized by NWP's 29, 39, 40, 42, 43, and 44. For NWP's 12 and 14, PCN is required, including documentation of FEMA construction compliance.

IV. OTHER CURRENT DEVELOPMENTS

A. Rules and Proposals of Interest

- 1. Final Rule Revising the Clean Water Act Definition of "Discharge of Dredged Material", 64 Fed. Reg. 25120 (May 10, 1999) – this Final Rule responded to the Tulloch Rule decisions by expressly excluding "incidental fallback" from the definition of discharge of dredged or fill material.
- 2. Final Policy on the National Wildlife Refuge System and Compensatory Mitigation Under the Section 10/404 Program, 64 Fed. Reg. 49229 (Sept. 10, 1999) – this Final Rule, promulgated by the Fish and Wildlife Service, establishes guidelines for use of the National Wildlife Refuge System for compensatory mitigation programs in which permittees are required to participate under RHA Section 10 and CWA Section 404.
- 3. Final Rule Establishing an Administrative Appeal Process for the Regulatory Program of the Corps of Engineers, 65 Fed. Reg. 16486 (March 28, 2000) – this Final Rule expands and clarifies the internal appeals process for appealing denials of Individual Permits which was originally promulgated in 1999.
- 4. Proposed Revisions to Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material", 65 Fed. Reg. 21292 (April 20, 2000) – this Proposed Rule, if promulgated, will modify both the EPA and Corps definitions of discharge of fill material to be identical; all references to the "primary purpose" of the fill activity in the current Corps rule will be eliminated. "Fill material" will be any material that "has the effect of" replacing a water of the U.S. with dry land or changing the bottom elevation of such waters.

B. Significant and Interesting Cases

- 1. *National Ass'n of Homebuilders v. Corps of Engineers*, 2000 WL 433072 (E.D. Va.) – dismissed a challenge to an internal Corps policy, holding that a Corps Guidance Memorandum directing field offices to continue asserting jurisdiction over isolated waters (including wetlands) that serve as habitat for migratory birds despite the Fourth Circuit's holding in *United States v. Wilson* was not "final agency action" and therefore the court lacked subject matter jurisdiction.

2. *United States v. Deaton*, 2000 WL 359755 (4th Cir.) – this case retreats significantly from the Fourth Circuit's holding in *United States v. Wilson*, and declares that the definition of discharge as "any addition of any pollutant to navigable waters" appropriately encompasses sidcasting.
3. *Solid Waste Agency of Northern Cook County v. Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999) – upholds Corps authority to regulate isolated waters based on the migratory bird rule, because the destruction of migratory bird habitat "substantially affects" interstate commerce.
4. *Allens Creek/Corbetts Glen Preservation Group, Inc. v. Caldera*, 88 F. Supp.2d 77 (W.D.N.Y. 2000) – rejected a citizen challenge to the authorization of a fill by Nationwide Permit on laches grounds where plaintiffs had been involved in and vocally opposed to the proposed project from the outset but waited 8 months after the Corps authorized the fill and after most of the work was complete to file their complaint.
5. *Vaizburd v. United States*, ___ F. Supp. 2d ___, 2000 WL 309787 (E.D.N.Y.) – holds that where plaintiffs seek damages based on the alleged negligence of the Corps in carrying out a beach nourishment project, the Corps is immune from such claims under the "discretionary function" exception to the Federal Tort Claims Act.
6. *Defenders of Wildlife v. Ballard*, 73 F. Supp. 2d 1094 (D. Ariz. 1999) – held that the Corps DE failed to carry out its duties under NEPA to take a "hard look" at the cumulative environmental impacts of the issuance of NWPs 13, 14, and 26. The court enjoined any further authorizations under those NWPs until the DE, as the Corps promised in the December 13, 1996 Final Notice, performs an EA or EIS regarding them.
7. *Broadwater Farms Joint Venture v. United States*, 45 Fed. Cl. 154 (Ct. Fed. Cl. 1999) – held that where a sophisticated developer has actual knowledge of the CWA and the potential presence of non-tidal wetlands on his property, his investment-backed expectations were not "reasonable," and therefore his takings claim was rejected.

V. CONCLUSION

In general, several themes dominate the new NWPs and GCs: an across-the-board decrease in the amount of acreage any given activity may affect; broadened notification requirements; more specific mitigation rules; an increase in discretion of the DE and additional reliance on setting case-specific and regional conditions on projects; and finally, overall increased burden on the regulated public.

Unless industry or legislative efforts to stop the new rules are successful, it is clear that the new and modified NWPs and GCs will (1) cause many activities that would have previously been authorized on a nationwide basis to be captured in the more arduous Individual Permitting process; (2) cause increased delay to the regulated public; (3) cause substantial cost increases to industry and developers; (4) increase the burden on the Corps DEs; and (5) generally complicate wetlands regulation. It is also arguable that the Individual Permitting process will begin to ensnare activities that pose a minimal threat to the aquatic environment. While the Nationwide Permits previously provided a certain assurance of streamlined action to developers and landowners, the use of NWPs will be limited substantially in the future. In addition, the likelihood of inadvertent violations may increase given the widened grasp of the Individual Permitting process. Practitioners, members of industry, developers, and environmentalists should consult the new NWPs in detail to determine compliance in the event activity involving any waters, including wetlands, is contemplated.

Federal Register

Thursday,
March 9, 2000

Part III

Department of Defense

Department of the Army, Corps of
Engineers

Final Notice of Issuance and Modification
of Nationwide Permits; Notice

12818

Federal Register / Vol. 65, No. 47 / Thursday, March 9, 2000 / Notices

DEPARTMENT OF DEFENSE

Department of the Army, Corps of
Engineers

Final Notice of Issuance and Modification of Nationwide Permits

AGENCY: Army Corps of Engineers, DoD.
ACTION: Final notice.

SUMMARY: The Corps of Engineers (Corps) is issuing 5 new Nationwide Permits (NWP) and modifying 6 existing NWP to replace NWP 26 which expires on June 5, 2000. The Corps is also modifying nine NWP general conditions and adding two new NWP general conditions. The new NWP general conditions will increase protection of designated critical resource waters and waters of the United States within 100-year floodplains. In December 1996, the Corps decided to replace NWP 26, which authorizes discharges of dredged or fill material into headwaters and isolated waters of the United States, with activity-specific NWP. The new and modified NWP authorize many of the same activities that NWP 26 authorized, but the new and modified NWP are activity-specific, with terms and conditions to ensure that these activities result in minimal adverse effects on the aquatic environment. The new and modified NWP will substantially increase protection of the aquatic environment, while efficiently authorizing activities with minimal adverse effects on the aquatic environment. The maximum acreage limits of most of the new and modified NWP is 1/2 acre. Most of the new and modified NWP require notification to the district engineer for activities that result in the loss of greater than 1/10 acre of waters of the United States. This notice also constitutes the Corps application to States, Tribes, and the Environmental Protection Agency (EPA) for Section 401 water quality certification (WQC) and Coastal Zone Management Act (CZMA) consistency determinations. These agencies have 90 days to determine if the new and modified NWP meet state or Tribal water quality standards and are consistent with state coastal zone management plans.

DATES: The new and modified NWP and general conditions will become effective on June 5, 2000. The expiration date for NWP 26 is June 5, 2000.

ADDRESSES: HQUSACE, ATTN: CECW-OR, 20 Massachusetts Avenue, NW, Washington, DC 20314-1000.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson or Mr. Sam Collinson at

(202) 761-0199 or access the Corps of Engineers Regulatory Home Page at: <http://www.usace.army.mil/inet/functions/cw/cecwa/reg/>.

SUPPLEMENTARY INFORMATION:

Background

In the December 13, 1996, issue of the Federal Register (61 FR 65874) the Corps reissued NWP 26 for a period of two years and announced its intention to replace NWP 26 with activity-specific NWP. NWP 26 authorizes discharges of dredged or fill material into headwaters and isolated waters, provided the discharge does not result in the loss of greater than 3 acres of waters of the United States or 500 linear feet of stream bed. Headwaters are non-tidal streams, lakes, and impoundments that are part of a surface tributary system to interstate or navigable waters of the United States with an average annual flow of less than 5 cubic feet per second. Isolated waters are non-tidal waters of the United States that are not part of a surface tributary system to interstate or navigable waters and are not adjacent to such surface tributary systems to interstate or navigable waters.

In the July 1, 1998, issue of the Federal Register (63 FR 36040) the Corps published its initial proposal to replace NWP 26, including 6 new NWP, modifying 6 existing NWP, modifying 6 NWP general conditions, and adding one new NWP general condition. In the October 14, 1998, issue of the Federal Register (63 FR 55095), the Corps published a supplementary proposal to limit the use of the proposed new and modified NWP in 100-year floodplains, impaired waters, and designated critical resource waters. In the October 14, 1998, Federal Register notice, the Corps also announced the withdrawal of the proposed NWP for master planned development activities and the extension of the expiration date of NWP 26 to September 15, 1999. The Corps also announced, in the October 14, 1998, Federal Register notice, its intent to solicit additional comments on the proposed new and modified NWP and regional conditions proposed by Corps districts.

As a result of the comments received in response to the July 1, 1998, and October 14, 1998, Federal Register notices, the Corps made changes to the proposed NWP and general conditions. The Corps also modified and re-proposed the three new NWP general conditions to limit the use of NWP in 100-year floodplains, impaired waters, and designated critical resource waters. The draft NWP and general conditions were published in the July 21, 1999, issue of the Federal Register (64 FR

39252) for a 45-day comment period. Concurrent with this Federal Register notice, Corps districts proposed the latest drafts of their proposed regional conditions for the new and modified NWP. In the September 3, 1999, issue of the Federal Register (64 FR 48386), the Corps announced that the comment period for the draft NWP and general conditions was extended an additional 30 days to provide a 75-day comment period. The comment period for the July 21, 1999, Federal Register notice ended on October 7, 1999. In the September 3, 1999, Federal Register notice, the Corps also announced that the expiration date of NWP 26 was extended to January 5, 2000.

As a result of the number of substantial comments received in response to the July 21, 1999, Federal Register notice and the need for additional time to review those comments and develop the final NWP and general conditions, the Corps issued another Federal Register notice on December 15, 1999 (64 FR 69994). This Federal Register notice announced a revised expiration date for NWP 26 and the process for accepting NWP 26 PCNs. The expiration date for NWP 26 was extended to April 14, 2000.

Since the schedule published in the December 15, 1999, Federal Register notice has changed, we are extending the expiration date of NWP 26 to June 5, 2000. NWP 26 PCNs submitted on or before March 9, 2000, (whether required or not) will be reviewed under the existing terms and conditions of NWP. If those activities are authorized by NWP 26, their authorizations will be valid until February 11, 2002. If the activity is under construction or under contract prior to February 11, 2002, the permittee will have 12 additional months to complete the authorized activity. NWP 26 PCNs for activities that require notification which are submitted after March 9, 2000, will be reviewed under the new and modified NWP or other types of DA authorization, such as individual permits. NWP 26 activities that do not require a PCN are authorized by NWP 26 until June 5, 2000. For those NWP 26 activities that do not require notification, the permittee has 12 months to complete the work if construction begins or is under contract before June 5, 2000.

The terms and limits of the new and modified NWP are intended to authorize activities that have minimal adverse effects on the aquatic environment, individually and cumulatively. Most of the new NWP authorize activities in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters.

FINAL NOTICE OF ISSUANCE AND MODIFICATION OF NATIONWIDE PERMITS
- DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS -
Federal Register, Vol. 65, No. 47, March 9, 2000

Date: February 28, 2000.

Hans A. Van Winkle,
Deputy Commander for Civil Works.

Accordingly, these Nationwide Permits are issued as follows:

Nationwide Permits, Conditions, Further Information, and Definitions

A. Index of Nationwide Permits, Conditions, Further Information, and Definitions

Nationwide Permits

3. Maintenance
7. Outfall Structures and Maintenance
12. Utility Line Activities
14. Linear Transportation Crossings
27. Stream and Wetland Restoration Activities
39. Residential, Commercial, and Institutional Developments
40. Agricultural Activities
41. Reshaping Existing Drainage Ditches
42. Recreational Facilities

43. Stormwater Management Facilities
44. Mining Activities

Nationwide Permit General Conditions

1. Navigation
2. Proper Maintenance
3. Soil Erosion and Sediment Controls
4. Aquatic Life Movements
5. Equipment
6. Regional and Case-by-Case Conditions
7. Wild and Scenic Rivers
8. Tribal Rights
9. Water Quality
10. Coastal Zone Management
11. Endangered Species
12. Historic Properties
13. Notification
14. Compliance Certification
15. Use of Multiple Nationwide Permits.
16. Water Supply Intakes
17. Shellfish Beds
18. Suitable Material
19. Mitigation
20. Spawning Areas
21. Management of Water Flows
22. Adverse Effects from Impoundments
23. Waterfowl Breeding Areas
24. Removal of Temporary Fills
25. Designated Critical Resource Waters
26. Fills Within 100-year Floodplains

Further Information

Definitions

Best Management Practices
Compensatory mitigation
Creation
Enhancement
Ephemeral stream
Farm tract
Flood Fringe
Floodway
Independent utility
Intermittent stream
Loss of waters of the United States
Non-tidal wetland
Open water
Perennial stream
Permanent above-grade fill
Preservation
Restoration
Rifle and pool complex
Single and complete project
Stormwater management
Stormwater management facilities
Stream bed
Stream channelization
Tidal wetland
Vegetated buffer
Vegetated shallows
Waterbody

B. Nationwide Permits and Conditions

3. **Maintenance.** Activities related to:
 - (i) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure, or fill, or of any currently serviceable structure or fill authorized

by 33 CFR 330.3, provided the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, or current construction codes or safety standards which are necessary to make repair, rehabilitation, or replacement, are permitted, provided the adverse environmental effects resulting from such repair, rehabilitation, or replacement are minimal. Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. This nationwide permit authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire, or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the District Engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(ii) Discharges of dredged or fill material, including excavation, into all waters of the United States to remove accumulated sediments and debris in the vicinity of, and within, existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.) and the placement of new or additional rip rap to protect the structure, provided the permittee notifies the District Engineer in accordance with General Condition 13. The removal of sediment is limited to the minimum necessary to restore the waterway in the immediate vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend further than 200 feet in any direction from the structure. The placement of rip rap must be the minimum necessary to protect the structure or to ensure the safety of the structure. All excavated materials must be deposited and retained in an upland area unless otherwise specifically approved by the District Engineer under separate authorization. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the District Engineer.

(iii) Discharges of dredged or fill material, including excavation, into all waters of the United States for activities associated with the restoration of

upland areas damaged by a storm, flood, or other discrete event, including the construction, placement, or installation of upland protection structures and minor dredging to remove obstructions in waters of the United States. (Uplands lost as a result of a storm, flood, or other discrete event can be replaced without a Section 404 permit provided the uplands are restored to their original pre-event location. This NWP is for the activities in waters of the United States associated with the replacement of the uplands.) The permittee must notify the District Engineer, in accordance with General Condition 13, within 12 months of the date of the damage and the work must commence, or be under contract to commence, within two years of the date of the damage. The permittee should provide evidence, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. The restoration of the damaged areas cannot exceed the contours, or ordinary high water mark, that existed prior to the damage. The District Engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this permit. Minor dredging to remove obstructions from the adjacent waterbody is limited to 50 cubic yards below the plane of the ordinary high water mark, and is limited to the amount necessary to restore the pre-existing bottom contours of the waterbody. The dredging may not be done primarily to obtain fill for any restoration activities. The discharge of dredged or fill material and all related work needed to restore the upland must be part of a single and complete project. This permit cannot be used in conjunction with NWP 18 or NWP 19 to restore damaged upland areas. This permit does not authorize the replacement of lands lost through gradual erosion processes.

Maintenance dredging for the primary purpose of navigation and beach restoration are not authorized by this permit. This permit does not authorize new stream channelization or stream relocation projects. Any work authorized by this permit must not cause more than minimal degradation of water quality, more than minimal changes to the flow characteristics of the stream, or increase flooding (See General Conditions 9 and 21). (Sections 10 and 404)

Note: This NWP authorizes the minimal impact repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Section 404(f) exemption for maintenance.

7. Outfall Structures and

Maintenance. Activities related to: (i) construction of outfall structures and associated intake structures where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted, or is otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System program (Section 402 of the Clean Water Act), and (ii) maintenance excavation, including dredging, to remove accumulated sediments blocking or restricting outfall and intake structures, accumulated sediments from small impoundments associated with outfall and intake structures, and accumulated sediments from canals associated with outfall and intake structures, provided the activity meets all of the following criteria:

- a. The permittee notifies the District Engineer in accordance with General Condition 13;
- b. The amount of excavated or dredged material must be the minimum necessary to restore the outfalls, intakes, small impoundments, and canals to original design capacities and design configurations (*i.e.*, depth and width);
- c. The excavated or dredged material is deposited and retained at an upland site, unless otherwise approved by the District Engineer under separate authorization; and
- d. Proper soil erosion and sediment control measures are used to minimize reentry of sediments into waters of the United States.

The construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure. For maintenance excavation and dredging to remove accumulated sediments, the notification must include information regarding the original design capacities and configurations of the facility and the presence of special aquatic sites (*e.g.*, vegetated shallows) in the vicinity of the proposed work. (Sections 10 and 404)

12. Utility Line Activities. Activities required for the construction, maintenance, and repair of utility lines and associated facilities in waters of the United States as follows:

(i) **Utility lines:** The construction, maintenance, or repair of utility lines, including outfall and intake structures and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, provided there is no change in preconstruction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for

the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication (see Note 1, below). Material resulting from trench excavation may be temporarily sidecast (up to three months) into waters of the United States, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The District Engineer may extend the period of temporary side casting not to exceed a total of 180 days, where appropriate. In wetlands, the top 6" to 12" of the trench should normally be backfilled with topsoil from the trench. Furthermore, the trench cannot be constructed in such a manner as to drain waters of the United States (*e.g.*, backfilling with extensive gravel layers, creating a french drain effect). For example, utility line trenches can be backfilled with clay blocks to ensure that the trench does not drain the waters of the United States through which the utility line is installed. Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

(ii) **Utility line substations:** The construction, maintenance, or expansion of a substation facility associated with a power line or utility line in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, provided the activity does not result in the loss of greater than 1/2 acre of non-tidal waters of the United States.

(iii) **Foundations for overhead utility line towers, poles, and anchors:** The construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

(iv) **Access roads:** The construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than 1/2 acre of non-tidal waters of the United States. Access roads shall be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes the adverse effects on waters of the United States and as near as possible to preconstruction contours and elevations (*e.g.*, at grade corduroy roads or geotextile/gravel roads). Access roads

constructed above preconstruction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

The term "utility line" does not include activities which drain a water of the United States, such as drainage tile or french drains; however, it does apply to pipes conveying drainage from another area. For the purposes of this NWP, the loss of waters of the United States includes the filled area plus waters of the United States that are adversely affected by flooding, excavation, or drainage as a result of the project. Activities authorized by paragraphs (i) through (iv) may not exceed a total of 1/2 acre loss of waters of the United States temporarily affected by filling, flooding, excavation, or drainage, where the project area is restored to preconstruction contours and elevations, are not included in the calculation of permanent loss of waters of the United States. This includes temporary construction mats (*e.g.*, timber, steel, geotextile) used during construction and removed upon completion of the work. Where certain functions and values of waters of the United States are permanently adversely affected, such as the conversion of a forested wetland to a herbaceous wetland in the permanently maintained utility line right-of-way, mitigation will be required to reduce the adverse effects of the project to the minimal level.

Mechanized landclearing necessary for the construction, maintenance, or repair of utility lines and the construction, maintenance, and expansion of utility line substations, foundations for overhead utility lines, and access roads is authorized, provided the cleared area is kept to the minimum necessary and preconstruction contours are maintained as near as possible. The area of waters of the United States that is filled, excavated, or flooded must be limited to the minimum necessary to construct the utility line, substations, foundations, and access roads. Excess material must be removed to upland areas immediately upon completion of construction. This NWP may authorize utility lines in or affecting navigable waters of the United States, even if there is no associated discharge of dredged or fill material (See 33 CFR Part 322).

Notification: The permittee must notify the District Engineer in accordance with General Condition 13, if any of the following criteria are met:

- (a) Mechanized land clearing in a forested wetland for the utility line right-of-way;

(b) A Section 10 permit is required;

(c) The utility line in waters of the United States, excluding overhead lines, exceeds 500 feet;

(d) The utility line is placed within a jurisdictional area (*i.e.*, a water of the United States), and it runs parallel to a stream bed that is within that jurisdictional area;

(e) Discharges associated with the construction of utility line substations that result in the loss of greater than 1/2 acre of waters of the United States;

(f) Permanent access roads constructed above grade in waters of the United States for a distance of more than 500 feet; or

(g) Permanent access roads constructed in waters of the United States with impervious materials. (Sections 10 and 404)

Note 1: Overhead utility lines constructed over Section 10 waters and utility lines that are routed in or under Section 10 waters without a discharge of dredged or fill material require a Section 10 permit; except for pipes or pipelines used to transport gaseous, liquid, liquefiable, or slurry substances over navigable waters of the United States, which are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to Section 9 of the Rivers and Harbors Act of 1899. However, any discharge of dredged or fill material associated with such pipelines will require a Corps permit under Section 404.

Note 2: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work and the area restored to preconstruction contours, elevations, and wetland conditions. Temporary access roads for construction may be authorized by NWP 33.

Note 3: Where the proposed utility line is constructed or installed in navigable waters of the United States (*i.e.*, Section 10 waters), copies of the PCN and NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration, National Ocean Service, for charting the utility line to protect navigation.

14. Linear Transportation Crossings.

Activities required for the construction, expansion, modification, or improvement of linear transportation crossings (*e.g.*, highways, railways, trails, and airport runways and taxiways) in waters of the United States, including wetlands, provided the activity meets the following criteria:

- a. This NWP is subject to the following acreage and linear limits:

(1) **For public linear transportation projects in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than 1/2 acre of waters of the United States;**

(2) **For public linear transportation projects in tidal waters or non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than 1/2 acre of waters of the United States and the length of fill for the crossing in waters of the United States does not exceed 200 linear feet; or**

(3) **For private linear transportation projects in all waters of the United States, provided the discharge does not cause the loss of greater than 1/4 acre of waters of the United States and the length of fill for the crossing in waters of the United States does not exceed 200 linear feet;**

b. The permittee must notify the District Engineer in accordance with General Condition 13 if any of the following criteria are met:

(1) The discharge causes the loss of greater than 1/2 acre of waters of the United States; or

(2) There is a discharge in a special aquatic site, including wetlands;

c. The notification must include a compensatory mitigation proposal to offset permanent losses of waters of the United States to ensure that those losses result only in minimal adverse effects to the aquatic environment and a statement describing how temporary losses of waters of the United States will be minimized to the maximum extent practicable;

d. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of the affected special aquatic sites;

e. The width of the fill is limited to the minimum necessary for the crossing;

f. This permit does not authorize stream channelization, and the authorized activities must not cause more than minimal changes to the hydraulic flow characteristics of the stream, increase flooding, or cause more than minimal degradation of water quality of any stream (see General Conditions 9 and 21);

g. This permit cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangers; and

h. The crossing is a single and complete project for crossing a water of the United States. Where a road segment (*i.e.*, the shortest segment of a road with independent utility that is part of a larger project) has multiple crossings of streams (several single and complete projects) the Corps will consider whether it should use its discretionary authority to require an individual permit. (Sections 10 and 404)

Note: Some discharges for the construction of farm roads, forest roads, or temporary roads for moving mining equipment may be eligible for an exemption from the need for a Section 404 permit (see 33 CFR 323.4).

22. Stream and Wetland Restoration

Activities. Activities in waters of the United States associated with the restoration of former waters, the enhancement of degraded tidal and non-tidal wetlands and riparian areas, the creation of tidal and non-tidal wetlands and riparian areas, and the restoration and enhancement of non-tidal streams and non-tidal open water areas as follows:

(a) The activity is conducted on:
 (1) Non-Federal public lands and private lands, in accordance with the terms and conditions of a binding wetland enhancement, restoration, or creation agreement between the landowner and the U.S. Fish and Wildlife Service (FWS) or the Natural Resources Conservation Service (NRCS) or voluntary wetland restoration, enhancement, and creation actions documented by the NRCS pursuant to NRCS regulations; or
 (2) Any Federal land; or
 (3) Reclaimed surface coal mined lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining or the applicable state agency (the future reversion does not apply to streams or wetlands created, restored, or enhanced as mitigation for the mining impacts, nor naturally due to hydrologic or topographic features, nor for a mitigation bank); or

(b) **Notification:** For activities on any private or public land that are not described by paragraphs (a)(1), (a)(2), or (a)(3) above, the permittee must notify the District Engineer in accordance with General Condition 13; and
 (c) Only native plant species should be planted at the site, if permittee is vegetating the project site.

Activities authorized by this NWP include, but are not limited to: the removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms; the installation of current deflectors; the enhancement, restoration, or creation of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to restore or create stream meanders; the backfilling of artificial channels and drainage ditches; the removal of existing drainage structures; the construction of small nesting islands; the construction of open water areas; activities needed to reestablish vegetation, including

plowing or discing for seed bed preparation; mechanized landclearing to remove undesirable vegetation; and other related activities.

This NWP does not authorize the conversion of a stream to another aquatic use, such as the creation of an impoundment for waterfowl habitat. This NWP does not authorize stream channelization. This NWP does not authorize the conversion of natural wetlands to another aquatic use, such as creation of waterfowl impoundments where a forested wetland previously existed. However, this NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands, on the project site provided there are net gains in aquatic resource functions and values. For example, this NWP may authorize the creation of an open water impoundment in a non-tidal emergent wetland, provided the non-tidal emergent wetland is replaced by creating that wetland type on the project site. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

Reversion. For enhancement, restoration, and creation projects conducted under paragraphs (a)(2) and (a)(4), this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit would be required for any reversion. For restoration, enhancement, and creation projects conducted under paragraphs (a)(1) and (a)(3), this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (i.e., prior to the restoration, enhancement, or creation activities) within five years after expiration of a limited term wetland restoration or creation agreement or permit, even if the discharge occurs after this NWP expires. This NWP also authorizes the reversion of wetlands that were restored, enhanced, or created on prior-converted cropland that has not been abandoned, in accordance with a binding agreement between the landowner and NRCS or FWS (even though the restoration, enhancement, or creation activity did not require a Section 404 permit). The five-year reversion limit does not apply to agreements without time limits reached under paragraph (a)(1). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal

agency or appropriate State agency executing the agreement or permit. Prior to any reversion activity, the permittee or the appropriate Federal or State agency must notify the District Engineer and include the documentation of the prior condition. Once an area has reverted back to its prior physical condition, it will be subject to whatever the Corps regulatory requirements will be at that future date. (Sections 10 and 404)

Note: Compensatory mitigation is not required for activities authorized by this NWP, provided the authorized work results in a net increase in aquatic resource functions and values in the project area. This NWP can be used to authorize compensatory mitigation projects, including mitigation banks, provided the permittee notifies the District Engineer in accordance with General Condition 13, and the project includes compensatory mitigation for impacts to waters of the United States caused by the authorized work. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition. NWP 27 can be used to authorize impacts at a mitigation bank, but only in circumstances where it has been approved under the Intersagency Federal Mitigation Banks Guidelines.

39. Residential, Commercial, and Institutional Developments. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of residential, commercial, and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, stormwater management facilities, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development). The construction of new ski areas or oil and gas wells is not authorized by this NWP. Residential developments include multiple and single unit developments. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The activities listed above are authorized, provided the activities meet all of the following criteria:

a. The discharge does not cause the loss of greater than 1/2 acre of non-tidal waters of the United States, excluding

non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear feet of stream bed;

c. The permittee must notify the District Engineer in accordance with General Condition 13, if any of the following criteria are met:

(1) The discharge causes the loss of greater than 1/2 acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters; or

(2) The discharge causes the loss of any open waters, including perennial or intermittent streams, below the ordinary high water mark (see Note, below).

d. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of affected special aquatic sites;

e. The discharge is part of a single and complete project;

f. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification, when required, must include a written statement explaining how avoidance and minimization of losses of waters of the United States were achieved on the project site. Compensatory mitigation will normally be required to offset the losses of waters of the United States. (See General Condition 19.) The notification must also include a compensatory mitigation proposal for offsetting unavoidable losses of waters of the United States. If an applicant asserts that the adverse effects of the project are minimal without mitigation, then the applicant may submit justification explaining why compensatory mitigation should not be required for the District Engineer's consideration;

g. When this NWP is used in conjunction with any other NWP, any combined total permanent loss of waters of the United States exceeding 1/2 acre requires that the permittee notify the District Engineer in accordance with General Condition 13;

h. Any work authorized by this NWP must not cause more than minimal degradation of water quality or more than minimal changes to the flow characteristics of any stream (see General Conditions 9 and 21);

i. For discharges causing the loss of 1/2 acre or less of waters of the United States, the permittee must submit a report, within 30 days of completion of the work, to the District Engineer that contains the following information: (1) The name, address, and telephone number of the permittee; (2) The location of the work; (3) A description of the work; (4) The type and acreage of

the loss of waters of the United States (e.g., 1/2 acre of emergent wetlands); and (5) The type and acreage of any compensatory mitigation used to offset the loss of waters of the United States (e.g., 1/2 acre of emergent wetlands created on-site);

j. If there are any open waters or streams within the project area, the permittee will establish and maintain, to the maximum extent practicable, wetland or upland vegetated buffers next to those open waters or streams consistent with General Condition 19. Deed restrictions, conservation easements, protective covenants, or other means of land conservation and preservation are required to protect and maintain the vegetated buffers established on the project site; and

k. Stream channelization or stream relocation downstream of the point on the stream where the annual average flow is 1 cubic foot per second is not authorized by this NWP.

Only residential, commercial, and institutional activities with structures on the foundation(s) or building pad(s), as well as the attendant features, are authorized by this NWP. The compensatory mitigation proposal required in paragraph (f) of this NWP may be either conceptual or detailed. The wetland or upland vegetated buffer required in paragraph (j) of this NWP will normally be 25 to 50 feet wide on each side of the stream, but the District Engineer may require wider vegetated buffers to address documented water quality concerns. The required wetland or upland vegetated buffer is part of the overall compensatory mitigation requirement for this NWP. If the project site was previously used for agricultural purposes and the farm owner/operator used NWP 40 to authorize activities in waters of the United States to increase production or construct farm buildings, NWP 39 cannot be used by the developer to authorize additional activities in waters of the United States on the project site in excess of the acreage limit for NWP 39 (i.e., the combined acreage loss authorized under NWPs 39 and 40 cannot exceed 1/2 acre).

Subdivisions: For any real estate subdivision created or subdivided after October 5, 1984, a notification pursuant to paragraph (c) of this NWP is required for any discharge which would cause the aggregate total loss of waters of the United States for the entire subdivision to exceed 1/2 acre. Any discharge in any real estate subdivision which would cause the aggregate total loss of waters of the United States in the subdivision to exceed 1/2 acre is not authorized by this NWP, unless the District Engineer exempts a particular subdivision or

parcel by making a written determination that the individual and cumulative adverse environmental effects would be minimal and the property owner had, after October 5, 1984, but prior to July 21, 1999, committed substantial resources in reliance on NWP 26 with regard to a subdivision, in circumstances where it would be inequitable to frustrate the property owner's investment-backed expectations. Once the exemption is established for a subdivision, subsequent lot development by individual property owners may proceed using NWP 39. For the purposes of NWP 39, the term "real estate subdivision" shall be interpreted to include circumstances where a landowner or developer divides a tract of land into smaller parcels for the purpose of selling, conveying, transferring, leasing, or developing said parcels. This would include the entire area of a residential, commercial, or other real estate subdivision, including all parcels and parts thereof. (Sections 10 and 404)

Note: Areas where there is no wetland vegetation are determined by the presence or absence of an ordinary high water mark or bed and bank. Areas that are waters of the United States based on this criteria would require a PCN even though water is infrequently present in the stream channel (except for ephemeral waters).

40. Agricultural Activities. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the purpose of improving agricultural production and the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized landclearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities, provided the permittee complies with the following terms and conditions:

a. For discharges into non-tidal waters of the United States to improve agricultural production, the following criteria must be met if the permittee is a USDA program participant:

(1) The permittee must obtain a categorical minimal effects exemption, minimal effect exemption, or mitigation exemption from NRCS in accordance with the provisions of the Food Security Act of 1985, as amended (16 U.S.C. 3801 et seq.);

(2) The discharge into non-tidal wetlands does not result in the loss of greater than 1/2 acre of non-tidal wetlands on a farm tract;

(3) The permittee must have an NRCS-certified wetland delineation;

(4) The permittee must implement an NRCS-approved compensatory mitigation plan that fully offsets wetland losses, if required; and

(5) The permittee must submit a report, within 30 days of completion of the authorized work, to the District Engineer that contains the following information: (a) The name, address, and telephone number of the permittee; (b) The location of the work; (c) A description of the work; (d) The type and acreage (or square feet) of the loss of wetlands (e.g., 1/2 acre of emergent wetlands); and (e) The type, acreage (or square feet), and location of compensatory mitigation (e.g., 1/2 acre of emergent wetlands on the farm tract); or

b. For discharges into non-tidal wetlands to improve agricultural production, the following criteria must be met if the permittee is not a USDA program participant (or a USDA program participant for which the proposed work does not qualify for authorization under paragraph (a) of this NWP):

(1) The discharge into non-tidal wetlands does not result in the loss of greater than 1/2 acre of non-tidal wetlands on a farm tract;

(2) The permittee must notify the District Engineer in accordance with General Condition 13, if the discharge results in the loss of greater than 1/2 acre of non-tidal wetlands;

(3) The notification must include a delineation of affected wetlands; and

(4) The notification must include a compensatory mitigation proposal to offset losses of waters of the United States; or

c. For the construction of building pads for farm buildings, the discharge does not cause the loss of greater than 1/2 acre of non-tidal wetlands that were in agricultural production prior to December 23, 1985, (i.e., farmed wetlands) and the permittee must notify the District Engineer in accordance with General Condition 13; or

d. Any activity in other waters of the United States is limited to the relocation of existing serviceable drainage ditches constructed in non-tidal streams. This NWP does not authorize the relocation of greater than 300 linear feet of existing serviceable drainage ditches constructed in non-tidal streams; and

e. Activities located in 100-year floodplains identified by FEMA's Flood Insurance Rate Maps or FEMA-approved local floodplain maps must comply with General Condition 26.

The term "farm tract" refers to a parcel of land identified by the Farm Service Agency. The Corps will identify

other waters of the United States on the farm tract. NRCS will determine if a proposed agricultural activity meets the terms and conditions of paragraph (a) of this NWP, except as provided below. For those activities that require notification, the District Engineer will determine if a proposed agricultural activity is authorized by paragraphs (b), (c), and/or (d) of this NWP. USDA program participants requesting authorization for discharges of dredged or fill material into waters of the United States authorized by paragraphs (c) or (d) of this NWP, in addition to paragraph (a), must notify the District Engineer in accordance with General Condition 13 and the District Engineer will determine if the entire single and complete project is authorized by this NWP. Discharges of dredged or fill material into waters of the United States associated with completing required compensatory mitigation are authorized by this NWP. However, total impacts, including other authorized impacts under this NWP, may not exceed the 1/2 acre limit of this NWP. This NWP does not affect, or otherwise regulate, discharges associated with agricultural activities when the discharge qualifies for an exemption under Section 404(f) of the Clean Water Act, even though a categorical minimal effects exemption, minimal effect exemption, or mitigation exemption from NRCS pursuant to the Food Security Act of 1985, as amended, may be required. Activities authorized by paragraphs (a) through (d) may not exceed a total of 1/2 acre on a single farm tract. Activities authorized by paragraphs (c) and (d) are not included in the 1/2 acre limit for the farm tract. If the site was used for agricultural purposes and the farm owner/operator used either paragraphs (a), (b), or (c) of this NWP to authorize activities in waters of the United States to increase agricultural production or construct farm buildings, and the current landowner wants to use NWP 39 to authorize residential, commercial, or industrial development activities in waters of the United States on the site, the combined acreage loss authorized by NWPs 39 and 40 cannot exceed 1/2 acre. (Section 404)

41. Reshaping Existing Drainage Ditches. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of currently serviceable drainage ditches constructed in these waters. The reshaping of the ditch cannot increase drainage capacity beyond the original design capacity or expand the area

drained by the ditch as originally designed (i.e., the capacity of the ditch must be the same as originally designed and it cannot drain additional wetlands or other waters of the United States). Compensatory mitigation is not required because the work is designed to improve water quality (e.g., by regrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, increase uptake of nutrients and other substances by vegetation, etc.). The permittee must notify the District Engineer in accordance with General Condition 13, if greater than 500 linear feet of drainage ditch will be reshaped. Material resulting from excavation may not be permanently sidecast into waters but may be temporarily sidecast (up to three months) into waters of the United States, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The District Engineer may extend the period of temporary sidecasting not to exceed a total of 180 days, where appropriate. This NWP does not apply to reshaping drainage ditches constructed in uplands, since these areas are not waters of the United States, and thus no permit from the Corps is required, or to the maintenance of existing drainage ditches to their original dimensions and configuration, which does not require a Section 404 permit (see 33 CFR 323.4(a)(3)). This NWP does not authorize the relocation of drainage ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage ditch must be approximately the same as the location of the centerline of the original drainage ditch. This NWP does not authorize stream channelization or stream relocation projects. (Section 404)

42. Recreational Facilities. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of recreational facilities, provided the activity meets all of the following criteria:

a. The discharge does not cause the loss of greater than 1/2 acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear feet of stream bed;

c. For discharges causing the loss of greater than 1/2 acre of non-tidal waters of the United States, the permittee notifies the District Engineer in accordance with General Condition 13;

d. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of affected special aquatic sites;

e. The discharge is part of a single and complete project; and

f. Compensatory mitigation will normally be required to offset the losses of waters of the United States. The notification must also include a compensatory mitigation proposal which provides for 1:1 replacement to offset authorized losses of waters of the United States.

For the purposes of this NWP, the term "recreational facility" is defined as a recreational activity that is integrated into the natural landscape and does not substantially change preconstruction grades or deviate from natural landscape contours. For the purpose of this permit, the primary function of recreational facilities does not include the use of motor vehicles, buildings, or impervious surfaces. Examples of recreational facilities that may be authorized by this NWP include: hiking trails, bike paths, horse paths, nature centers, and campgrounds (excluding trailer parks). The construction or expansion of golf courses and the expansion of ski areas may be authorized by this NWP, provided the golf course or ski area does not substantially deviate from natural landscape contours and is designed to minimize adverse effects to waters of the United States and riparian areas through the use of such practices as integrated pest management, adequate stormwater management facilities, vegetated buffers, reduced fertilizer use, etc. The facility must have an adequate water quality management plan in accordance with General Condition 9, such as a stormwater management facility, to ensure that the recreational facility results in no substantial adverse effects to water quality. This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables, that are directly related to the recreational activity. This NWP does not authorize other buildings, such as hotels, restaurants, etc. The construction or expansion of playing fields (e.g., baseball, soccer, or football fields), basketball and tennis courts, racetracks, stadiums, arenas, and the construction of new ski areas are not authorized by this NWP. (Section 404)

43. Stormwater Management Facilities. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction and maintenance of stormwater management facilities, including activities for the excavation of

stormwater ponds/facilities, detention basins, and retention basins; the installation and maintenance of water control structures, outfall structures and emergency spillways; and the maintenance dredging of existing stormwater management ponds/facilities and detention and retention basins, provided the activity meets all of the following criteria:

a. The discharges for the construction of new stormwater management facilities does not cause the loss of greater than 1/2 acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters;

b. The discharge does not cause the loss of greater than 300 linear feet of stream bed;

c. The discharge of dredged or fill material for the construction of new stormwater management facilities in perennial streams is not authorized;

d. For discharges or excavation for the construction of new stormwater management facilities or for the maintenance of existing stormwater management facilities causing the loss of greater than 1/2 acre of non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, the permittee notifies the District Engineer in accordance with General Condition 13. In addition, the notification must include:

(1) A maintenance plan. The maintenance plan should be in accordance with State and local requirements, if any such requirements exist;

(2) For discharges in special aquatic sites, including wetlands and submerged aquatic vegetation, the notification must include a delineation of affected areas; and

(3) A compensatory mitigation proposal that offsets the loss of waters of the United States. Maintenance in constructed areas will not require mitigation provided such maintenance is accomplished in designated maintenance areas and not within compensatory mitigation areas (i.e., district engineers may designate non-maintenance areas, normally at the downstream end of the stormwater management facility, in existing stormwater management facilities). (No mitigation will be required for activities which are exempt from Section 404 permit requirements);

e. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification must include a written statement to the District Engineer detailing compliance with this condition (i.e., why the discharge must

occur in waters of the United States and why additional minimization cannot be achieved);

f. The stormwater management facility must comply with General Condition 21 and be designed using best management practices (BMPs) and watershed protection techniques. Examples may include forbays (deeper areas at the upstream end of the stormwater management facility that would be maintained through excavation), vegetated buffers, and siting considerations to minimize adverse effects to aquatic resources. Another example of a BMP would be bioengineering methods incorporated into the facility design to benefit water quality and minimize adverse effects to aquatic resources from storm flows, especially downstream of the facility, that provide, to the maximum extent practicable, for long term aquatic resource protection and enhancement;

g. Maintenance excavation will be in accordance with an approved maintenance plan and will not exceed the original contours of the facility as approved and constructed; and

h. The discharge is part of a single and complete project. (Section 404)

44. Mining Activities. Discharges of dredged or fill material into: (i) Isolated waters, streams where the annual average flow is 1 cubic foot per second or less, and non-tidal wetlands adjacent to headwater streams, for aggregate mining (i.e., sand, gravel, and crushed and broken stone) and associated support activities; (ii) lower perennial streams, excluding wetlands adjacent to lower perennial streams, for aggregate mining activities (support activities in lower perennial streams or adjacent wetlands are not authorized by this NWP); and/or (iii) isolated waters and non-tidal wetlands adjacent to headwater streams, for hard rock/mineral mining activities (i.e., extraction of metalliferous ores from subsurface locations) and associated support activities, provided the discharge meets the following criteria:

a. The mined area within waters of the United States, plus the acreage loss of waters of the United States resulting from support activities, cannot exceed 1/2 acre;

b. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification must include a written statement detailing compliance with this condition (i.e., why the discharge must occur in waters of the United States and why additional minimization cannot be achieved);

c. In addition to General Conditions 17 and 20, activities authorized by this permit must not substantially alter the sediment characteristics of areas of concentrated shellfish beds or fish spawning areas. Normally, the mandated water quality management plan should address these impacts;

d. The permittee must implement necessary measures to prevent increases in stream gradient and water velocities and to prevent adverse effects (e.g., head cutting, bank erosion) to upstream and downstream channel conditions;

e. Activities authorized by this permit must not result in adverse effects on the course, capacity, or condition of navigable waters of the United States;

f. The permittee must utilize measures to minimize downstream turbidity;

g. Wetland impacts must be compensated through mitigation approved by the Corps;

h. Beneficiation and mineral processing for hard rock/mineral mining activities may not occur within 200 feet of the ordinary high water mark of any open waterbody. Although the Corps does not regulate discharges from these activities, a Clean Water Act Section 402 permit may be required;

i. All activities authorized by this NWP must comply with General Conditions 9 and 21. Further, the District Engineer may require modifications to the required water quality management plan to ensure that the authorized work results in minimal adverse effects to water quality;

j. Except for aggregate mining activities in lower perennial streams, no aggregate mining can occur within stream beds where the average annual flow is greater than 1 cubic foot per second or in waters of the United States within 100 feet of the ordinary high water mark of headwater stream segments where the average annual flow of the stream is greater than 1 cubic foot per second (aggregate mining can occur in areas immediately adjacent to the ordinary high water mark of a stream where the average annual flow is 1 cubic foot per second or less);

k. *Single and complete project:* The discharge must be for a single and complete project, including support activities. Discharges of dredged or fill material into waters of the United States for multiple mining activities on several designated parcels of a single and completed mining operation can be authorized by this NWP provided the 1/2 acre limit is not exceeded; and

l. *Notification:* The permittee must notify the District Engineer in accordance with General Condition 13. The notification must include: (1) A description of waters of the United

States adversely affected by the project; (2) A written statement to the District Engineer detailing compliance with paragraph (b), above (i.e., why the discharge must occur in waters of the United States and why additional minimization cannot be achieved); (3) A description of measures taken to ensure that the proposed work complies with paragraphs (c) through (f), above; and (4) A reclamation plan (for aggregate mining in isolated waters and non-tidal wetlands adjacent to headwaters and hard rock/mineral mining only).

This NWP does not authorize hard rock/mineral mining, including placer mining, in streams. No hard rock/mineral mining can occur in waters of the United States within 100 feet of the ordinary high water mark of headwater streams. The terms "headwaters" and "isolated waters" are defined at 33 CFR 330.2(d) and (e), respectively. For the purposes of this NWP, the term "lower perennial stream" is defined as follows: "A stream in which the gradient is low and water velocity is slow, there is no tidal influence, some water flows throughout the year, and the substrate consists mainly of sand and mud." (Sections 10 and 404)

C. Nationwide Permit General Conditions

The following general conditions must be followed in order for any authorization by an NWP to be valid:

1. Navigation. No activity may cause more than a minimal adverse effect on navigation.

2. Proper Maintenance. Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.

3. Soil Erosion and Sediment Controls. Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date.

4. Aquatic Life Movements. No activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area, unless the activity's primary purpose is to impound water. Culverts placed in streams must be installed to maintain low flow conditions.

5. Equipment. Heavy equipment working in wetlands must be placed on mats, or other measures must be taken to minimize soil disturbance.

6. Regional and Case-By-Case Conditions. The activity must comply with any regional conditions which may have been added by the division engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the State or tribe in its Section 401 water quality certification and Coastal Zone Management Act consistency determination.

7. Wild and Scenic Rivers. No activity may occur in a component of the National Wild and Scenic River System; or in a river officially designated by Congress as a "study river" for possible inclusion in the system, while the river is in an official study status; unless the appropriate Federal agency, with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation, or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency in the area (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).

A. Tribal Rights. No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

9. Water Quality. (a) In certain States and tribal lands an individual 401 water quality certification must be obtained or waived (See 33 CFR 330.4(c)).

(b) For NWPs 12, 14, 17, 18, 32, 39, 40, 42, 43, and 44, where the State or tribal 401 certification (either generically or individually) does not require or approve a water quality management plan, the permittee must include design criteria and techniques that will ensure that the authorized work does not result in more than minimal degradation of water quality. An important component of a water quality management plan includes stormwater management that minimizes degradation of the downstream aquatic system, including water quality. Refer to General Condition 21 for stormwater management requirements. Another important component of a water quality management plan is the establishment and maintenance of vegetated buffers next to open waters, including streams. Refer to General Condition 19 for vegetated buffer requirements for the NWPs.

10. Coastal Zone Management. In certain states, an individual state coastal zone management consistency concurrence must be obtained or waived (see Section 330.4(d)).

11. Endangered Species. (a) No activity is authorized under any NWP

which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which will destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the District Engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or is located in the designated critical habitat and shall not begin work on the activity until notified by the District Engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. For activities that may affect Federally-listed endangered or threatened species or designated critical habitat, the notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. As a result of formal or informal consultation with the FWS or NMFS, the District Engineer may add species-specific regional endangered species conditions to the NWPs.

(b) Authorization of an activity by a nationwide permit does not authorize the "take" of a threatened or endangered species as defined under the Federal Endangered Species Act. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, both lethal and non-lethal "takes" of protected species are in violation of the Endangered Species Act. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. Fish and Wildlife Service and National Marine Fisheries Service or their world wide web pages at <http://www.fws.gov/r9endapp/endapp.html> and http://www.nmfs.gov/prot_res/esahome.html, respectively.

12. Historic Properties. No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the DE has complied with the provisions of 33 CFR part 325, Appendix C. The prospective permittee must notify the District Engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not

begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places (see 33 CFR 330.4(g)). For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the notification must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

13. Notification. (a) Timing: Where required by the terms of the NWP, the prospective permittee must notify the District Engineer with a preconstruction notification (PCN) as early as possible. The District Engineer must determine if the PCN is complete within 30 days of the date of receipt and can request the additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the District Engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the District Engineer. The prospective permittee shall not begin the activity:

(1) Until notified in writing by the District Engineer that the activity may proceed under the NWP with any special conditions imposed by the District or Division Engineer; or
(2) If notified in writing by the District or Division Engineer that an individual permit is required; or
(3) Unless 45 days have passed from the District Engineer's receipt of the complete notification and the prospective permittee has not received written notice from the District or Division Engineer. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) Contents of Notification: The notification must be in writing and include the following information:
(1) Name, address, and telephone numbers of the prospective permittee;
(2) Location of the proposed project;
(3) Brief description of the proposed project; the project's purpose; and direct and indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s), or individual permit(s) used or intended to

begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places (see 33 CFR 330.4(g)). For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the notification must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

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tidal wetlands adjacent to headwaters and any hard rock/mineral mining activities).

(17) For activities that may adversely affect Federally-listed endangered or threatened species, the PCN must include the name(s) of those endangered or threatened species that may be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work.

(18) For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

(19) For NWP's 12, 14, 29, 39, 40, 42, 43, and 44, where the proposed work involves discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills within 100-year floodplains (as identified on FEMA's Flood Insurance Rate Maps or FEMA-approved local floodplain maps), the notification must include documentation demonstrating that the proposed work complies with the appropriate FEMA or FEMA-approved local floodplain construction requirements.

(c) Form of Notification: The standard individual permit application form (Form ENG 4345) may be used as the notification but must clearly indicate that it is a PCN and must include all of the information required in (b) (1)-(19) of General Condition 13. A letter containing the requisite information may also be used.

(d) District Engineer's Decision: In reviewing the PCN for the proposed activity, the District Engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. The prospective permittee may, optionally, submit a proposed mitigation plan with the PCN to expedite the process and the District Engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, the District Engineer will notify the permittee and include any conditions the District Engineer deems necessary.

Any compensatory mitigation proposal must be approved by the District Engineer prior to commencing work. If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the District Engineer will expeditiously review the proposed compensatory mitigation plan. The District Engineer must review the plan within 45 days of receiving a complete PCN and determine whether the conceptual or specific proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant stating that the project can proceed under the terms and conditions of the nationwide Permit.

If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then he will notify the applicant either: (1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (2) that the project is authorized under the NWP subject to the applicant's submission of a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions. Where the District Engineer determines that mitigation is required in order to ensure no more than minimal adverse effects on the aquatic environment, the activity will be authorized within the 45-day PCN period, including the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level. When conceptual mitigation is included, or a mitigation plan is required under item (2) above, no work in waters of the United States will occur until the District Engineer has approved a specific mitigation plan.

(e) Agency Coordination: The District Engineer will consider any comments from Federal and State agencies concerning the proposed activity's compliance with the terms and conditions of the NWP's and the need for

mitigation to reduce the project's adverse effects on the aquatic environment to a minimal level.

For activities requiring notification to the District Engineer that result in the loss of greater than 1/4 acre of waters of the United States, the District Engineer will, upon receipt of a notification, provide immediately (e.g., via facsimile transmission, overnight mail, or other expeditious manner), a copy to the appropriate offices of the Fish and Wildlife Service, State natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO), and, if appropriate, the National Marine Fisheries Service. With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the District Engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 15 calendar days before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency, except as provided below. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered. As required by Section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act, the District Engineer will provide a response to National Marine Fisheries Service within 30 days of receipt of any Essential Fish Habitat conservation recommendations. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification.

(f) Wetlands Delineations: Wetland delineations must be prepared in accordance with the current method required by the Corps. For NWP 29 see paragraph (b)(9)(iii) for parcels less than 1/4 acre in size. The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 45-day period will not start until the wetland delineation has been completed and submitted to the Corps, where appropriate.

14. **Compliance Certification.** Every permittee who has received a Nationwide permit verification from the Corps will submit a signed certification regarding the completed work and any required mitigation. The certification will be forwarded by the Corps with the authorization letter. The certification will include: (a) A statement that the authorized work was done in

accordance with the Corps authorization, including any general or specific conditions; (b) A statement that any required mitigation was completed in accordance with the permit conditions; and (c) The signature of the permittee certifying the completion of the work and mitigation.

15. **Use of Multiple Nationwide Permits.** The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWP's does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/4 acre.

16. **Water Supply Intakes.** No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may occur in the proximity of a public water supply intake except where the activity is for repair of the public water supply intake structures or adjacent bank stabilization.

17. **Shellfish Beds.** No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4.

18. **Suitable Material.** No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may consist of unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.) and material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).

19. **Mitigation.** The project must be designed and constructed to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable at the project site (i.e., on site). Mitigation will be required when necessary to ensure that the adverse effects to the aquatic environment are minimal. The District Engineer will consider the factors discussed below when determining the acceptability of appropriate and practicable mitigation necessary to offset adverse effects on the aquatic environment that are more than minimal.

(a) Compensatory mitigation at a minimum 1:1 ratio will be required for

all wetland impacts requiring a PCN. Consistent with National policy, the District Engineer will establish a preference for restoration of wetlands to meet the minimum compensatory mitigation ratio, with preservation used only in exceptional circumstances.

(b) To be practicable, the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of the overall project purposes. Examples of mitigation that may be appropriate and practicable include, but are not limited to: reducing the size of the project; establishing and maintaining wetland or upland vegetated buffers to protect open waters such as streams; and replacing losses of aquatic resource functions and values by creating, restoring, enhancing, or preserving similar functions and values, preferably in the same watershed;

(c) The District Engineer will require restoration, creation, enhancement, or preservation of other aquatic resources in order to offset the authorized impacts to the extent necessary to ensure that the adverse effects on the aquatic environment are minimal. An important element of any compensatory mitigation plan for projects in or near streams or other open waters is the establishment and maintenance, to the maximum extent practicable, of vegetated buffers next to open waters on the project site. The vegetated buffer should consist of native species. The District Engineer will determine the appropriate width of the vegetated buffer and in which cases it will be required. Normally, the vegetated buffer will be 25 to 50 feet wide on each side of the stream, but the District Engineer may require wider vegetated buffers to address documented water quality concerns. If there are open waters on the project site and the District Engineer requires compensatory mitigation for wetland impacts to ensure that the net adverse effects on the aquatic environment are minimal, any vegetated buffer will comprise no more than 1/4 of the remaining compensatory mitigation acreage after the permanently filled wetlands have been replaced on a one-to-one acreage basis. In addition, compensatory mitigation must address adverse effects on wetland functions and values and cannot be used to offset the acreage of wetland losses that would occur in order to meet the acreage limits of some of the NWP's (e.g., for NWP 39, 1/4 acre of wetlands cannot be created to change a 1/2 acre loss of wetlands to a 1/4 acre loss; however, 1/2 acre of created wetlands can be used to reduce the impacts of a 1/2 acre loss of wetlands).

If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed. (d) To the extent appropriate, permittees should consider mitigation banking and other appropriate forms of compensatory mitigation. If the District Engineer determines that compensatory mitigation is necessary to offset losses of waters of the United States and ensure that the net adverse effects of the authorized work on the aquatic environment are minimal, consolidated mitigation approaches, such as mitigation banks, will be the preferred method of providing compensatory mitigation, unless the District Engineer determines that activity-specific compensatory mitigation is more appropriate, based on which is best for the aquatic environment. These types of mitigation are preferred because they involve larger blocks of protected aquatic environment, are more likely to meet the mitigation goals, and are more easily checked for compliance. If a mitigation bank or other consolidated mitigation approach is not available in the watershed, the District Engineer will consider other appropriate forms of compensatory mitigation to offset the losses of waters of the United States to ensure that the net adverse effects of the authorized work on the aquatic environment are minimal.

20. **Spawning Areas.** Activities, including structures and work in navigable waters of the United States or discharges of dredged or fill material, in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., excavate, fill, or smother downstream by substantial turbidity) of an important spawning area are not authorized.

21. **Management of Water Flows.** To the maximum extent practicable, the activity must be designed to maintain preconstruction downstream flow conditions (e.g., location, capacity, and flow rates). Furthermore, the activity must not permanently restrict or impede the passage of normal or expected high flows (unless the primary purpose of the fill is to impound waters) and the structure or discharge of dredged or fill material must withstand expected high flows. The activity must, to the maximum extent practicable, provide for retaining excess flows from the site, provide for maintaining surface flow rates from the site similar to preconstruction conditions, and must not increase water flows from the project site, relocate water, or redirect water flow beyond preconstruction conditions. In addition, the activity

must, to the maximum extent practicable, reduce adverse effects such as flooding or erosion downstream and upstream of the project site, unless the activity is part of a larger system designed to manage water flows.

22. Adverse Effects From Impoundments. If the activity, including structures and work in navigable waters of the United States or discharge of dredged or fill material, creates an impoundment of water, adverse effects on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized to the maximum extent practicable.

23. Waterfowl Breeding Areas. Activities, including structures and work in navigable waters of the United States or discharges of dredged or fill material, into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

24. Removal of Temporary Fills. Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.

25. Designated Critical Resource Waters. Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally listed threatened and endangered species, coral reefs, State natural heritage sites, and outstanding national resource waters or other waters officially designated by a State as having particular environmental or ecological significance and identified by the District Engineer after notice and opportunity for public comment. The District Engineer may also designate additional critical resource waters after notice and opportunity for comment.

(a) Except as noted below, discharges of dredged or fill material into waters of the United States are not authorized by NWP's 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters. Discharges of dredged or fill materials into waters of the United States may be authorized by the above NWP's in National Wild and Scenic Rivers if the activity complies with General Condition 7. Further, such discharges may be authorized in designated critical habitat for Federally listed threatened or endangered species if the activity complies with General Condition 11 and the U.S. Fish and Wildlife Service or the National Marine Fisheries Service has concurred in a determination of compliance with this condition.

(b) For NWP's 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with General Condition 13, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The District Engineer may authorize activities under these NWP's only after he determines that the impacts to the critical resource waters will be no more than minimal.

26. Fills Within 100-Year Floodplains. For purposes of this general condition, 100-year floodplains will be identified through the Federal Emergency Management Agency's (FEMA) Flood Insurance Rate Maps or FEMA-approved local floodplain maps.

(a) **Discharges Below Headwaters.** Discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills within the 100-year floodplain at or below the point on a stream where the average annual flow is five cubic feet per second (i.e., below headwaters) are not authorized by NWP's 29, 39, 40, 42, 43, and 44. For NWP's 12 and 14, the prospective permittee must notify the District Engineer in accordance with General Condition 13 and the notification must include documentation that any permanent, above-grade fills in waters of the United States within the 100-year floodplain below headwaters comply with FEMA or FEMA-approved local floodplain construction requirements.

(b) **Discharges In Headwaters (i.e., above the point on a stream where the average annual flow is five cubic feet per second).**

(1) **Flood Fringe.** Discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills within the flood fringe of the 100-year floodplain of headwaters are not authorized by NWP's 12, 14, 29, 39, 40, 42, 43, and 44, unless the prospective permittee notifies the District Engineer in accordance with General Condition 13. The notification must include documentation that such discharges comply with FEMA or FEMA-approved local floodplain construction requirements.

(2) **Floodway.** Discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills within the floodway of the 100-year floodplain of headwaters are not authorized by NWP's 29, 39, 40, 42, 43, and 44. For NWP's 12 and 14, the permittee must notify the District Engineer in accordance with General Condition 13 and the notification must include documentation that any permanent, above grade fills proposed

in the floodway comply with FEMA or FEMA-approved local floodplain construction requirements.

D. Further Information

1. District engineers have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWP's do not obviate the need to obtain other Federal, State, or local permits, approvals, or authorizations required by law.

3. NWP's do not grant any property rights or exclusive privileges.

4. NWP's do not authorize any injury to the property or rights of others.

5. NWP's do not authorize interference with any existing or proposed Federal project.

E. Definitions

Best management practices: Best Management Practices (BMPs) are policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural. A BMP policy may affect the limits on a development.

Compensatory mitigation: For purposes of Section 10/404, compensatory mitigation is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Creation: The establishment of a wetland or other aquatic resource where one did not formerly exist.

Enhancement: Activities conducted in existing wetlands or other aquatic resources which increase one or more aquatic functions.

Ephemeral stream: An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Farm tract: A unit of contiguous land under one ownership which is operated as a farm or part of a farm.

Flood Fringe: That portion of the 100-year floodplain outside of the floodway (often referred to as "floodway fringe.")

Floodway: The area regulated by Federal, state, or local requirements to provide for the discharge of the base flood so the cumulative increase in water surface elevation is no more than

a designated amount (not to exceed one foot as set by the National Flood Insurance Program) within the 100-year floodplain.

Independent utility: A test to determine what constitutes a single and complete project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases are not built can be considered as separate single and complete projects with independent utility.

Intermittent stream: An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

Loss of waters of the United States: Waters of the United States that include the filled area and other waters that are permanently adversely affected by flooding, excavation, or drainage as a result of the regulated activity. Permanent adverse effects include permanent above-grade, at-grade, or below-grade fills that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is the threshold measurement of the impact to existing waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and values.

The loss of stream bed includes the linear feet of stream bed that is filled or excavated. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to preconstruction contours and elevations after construction, are not included in the measurement of loss of waters of the United States.

Non-tidal wetland: A non-tidal wetland is a wetland (i.e., a water of the United States) that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., the spring high tide line).

Open water: An area that, during a year with normal patterns of precipitation, has standing or flowing water for sufficient duration to establish

an ordinary high water mark. Aquatic vegetation within the area of standing or flowing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. The term "open water" includes rivers, streams, lakes, and ponds. For the purposes of the NWP's, this term does not include ephemeral waters.

Perennial stream: A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

Permanent above-grade fill: A discharge of dredged or fill material into waters of the United States, including wetlands, that results in a substantial increase in ground elevation and permanently converts part or all of the waterbody to dry land. Structural fills authorized by NWP's 3, 25, 36, etc. are not included.

Preservation: The protection of ecologically important wetlands or other aquatic resources in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands as necessary to ensure protection and/or enhancement of the overall aquatic ecosystem.

Restoration: Re-establishment of wetland and/or other aquatic resource characteristics and function(s) at a site where they have ceased to exist, or exist in a substantially degraded state.

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Steep gradient sections of streams are sometimes characterized by riffle and pool complexes. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. Pools are characterized by a slower stream velocity, a streaming flow, a smooth surface, and a finer substrate.

Single and complete project: The term "single and complete project" is defined at 33 CFR 330.2(l) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers (see definition of independent utility). For linear projects, the "single and complete project" (i.e., a single and complete crossing) will apply to each crossing of a separate water of the United States (i.e., a single waterbody) at that location. An exception is for linear projects crossing

a single waterbody several times at separate and distant locations: each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly-shaped wetland or lake, etc., are not separate waterbodies.

Stormwater management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and BMPs, which retain water for a period of time to control runoff and/or improve the quality (i.e., by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream channelization: The manipulation of a stream channel to increase the rate of water flow through the stream channel. Manipulation may include deepening, widening, straightening, armoring, or other activities that change the stream cross-section or other aspects of stream channel geometry to increase the rate of water flow through the stream channel. A channelized stream remains a water of the United States, despite the modifications to increase the rate of water flow.

Tidal wetland: A tidal wetland is a wetland (i.e., a water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(b) and 33 CFR 328.3(f), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line (i.e., spring high tide line) and are inundated by tidal waters two times per lunar month, during spring high tides.

Vegetated buffer: A vegetated upland or wetland area next to rivers, streams, lakes, or other open waters which separates the open water from developed areas, including agricultural land. Vegetated buffers provide a variety of aquatic habitat functions and values (e.g., aquatic habitat for fish and other aquatic organisms, moderation of water temperature changes, and detritus for aquatic food webs) and help improve or maintain local water quality. A vegetated buffer can be established by maintaining an existing vegetated area or planting native trees, shrubs, and herbaceous plants on land next to open

waters. Mowed lawns are not considered vegetated buffers because they provide little or no aquatic habitat functions and values. The establishment and maintenance of vegetated buffers is a method of compensatory mitigation that can be used in conjunction with the restoration, creation, enhancement, or preservation of aquatic habitats to ensure that activities authorized by NFPs result in minimal adverse effects to the aquatic environment. (See General Condition 19.)

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas

that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: A waterbody is any area that in a normal year has water flowing or standing above ground to the extent that evidence of an ordinary high water mark is established. Wetlands contiguous to the waterbody are considered part of the waterbody.

[FR Doc. 00-3194 Filed 3-8-00; 8:45 am]
BILLING CODE 3710-02-P



Public Notice

Public Notice No. NWP-98-002

Date: Oct 7, 1998

Closing Date: Nov 6, 1998

**US Army Corps
of Engineers
Louisville District**

Please address all comments and inquiries to:
U.S. Army Corps of Engineers, Louisville District
ATTN: James Townsend, CEORL-OP-F
P.O. Box 59
Louisville, Kentucky 40201-0059
Phone: (502) 582-6461

REQUEST FOR COMMENTS ON PROPOSED REGIONAL CONDITIONS FOR NATIONWIDE PERMITS PROPOSED ON JULY 1, 1998

On July 1, 1998, the Corps published its proposal to issue 6 new Nationwide Permits (NWP) and modify 6 existing NWP in Part II of the *Federal Register* (63 FR 36040 - 36078). The Louisville District issued a public notice in July, 1998, to solicit comments on the proposed new and modified NWP, as well as proposed Corps regional conditions, for a 30 day comment period. In that public notice, the Louisville District requested comments and suggestions for additional Corps regional conditions for the proposed new and modified NWP to ensure that those NWP authorize only those activities with minimal adverse effects on the aquatic environment, individually or cumulatively. The Louisville District also held a public meeting on August 20, 1998, to discuss the Corps regional conditioning process for the proposed new and modified NWP and receive suggestions for additional Corps regional conditions.

The purpose of NWP regional conditions is to ensure that the NWP authorize only those activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively. NWP are developed at Corps Headquarters to authorize most activities that would result in minimal adverse environmental effects on the aquatic environment. However, the Corps determines whether the minimal effects test is met from a watershed perspective, and whether regional conditions are necessary to account for differences in aquatic resource functions and values across the country.

There are two types of regional conditions: 401/CZM regional conditions and Corps regional conditions. The 401/CZM regional conditions are developed by the State under Section 401 of the CWA and the Section 307 of the Coastal Zone Management Act and become regional conditions to NWP. The 401/CZM regional conditions are added to the NWP and announced by a District public notice. The public does not have the opportunity to comment on 401/CZM regional conditions through the Corps public notice process, but rather through the State process. Corps regional conditions are proposed by the District Engineer for a 30-day comment period and are reviewed and approved by the Division Engineer. For more details on the regional conditioning process, please refer to the July 1, 1998, *Federal Register* notice (63 FR 36048 - 36049).

In this public notice, the Louisville District is requesting comments on potential Corps regional conditions that have been suggested by the public and listed in Enclosures 1 and 2. The Louisville District is requesting comments as to which of these Corps regional conditions are necessary to ensure that the proposed NWP will authorize only those activities that have minimal adverse effects on the aquatic environment, individually or cumulatively. The Division Engineer makes the final determination as to which Corps regional conditions are necessary to ensure that the NWP will authorize only those activities that result in minimal adverse environmental effects on the aquatic environment. Additional Corps regional conditions that are not necessary to ensure that the NWP authorize only activities with minimal adverse effects will be considered by the Division Engineer, but any Corps regional conditions adopted must: 1) provide value added for the aquatic environment, 2) not be excessively burdensome on the regulated public, and 3) be able to be implemented by the

**REQUESTS FOR COMMENTS ON PROPOSED REGIONAL CONDITIONS
FOR NATIONWIDE PERMITS PROPOSED ON JULY 1, 1998
- PUBLIC NOTICE -
DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, LOUISVILLE DISTRICT**

EXHIBIT B

Corps with resources available to the Corps.

When Corps regional conditions are approved by the Division Engineer, those regional conditions will become effective when the new and modified NWP's become effective. Unless otherwise noted, all proposed regional conditions listed in Enclosures 1 and 2 are applicable for activities in Indiana and Kentucky, respectively. Comments on the proposed Corps regional conditions, as well as any other suggested Corps regional conditions, should be submitted in writing to: Mr. James M. Townsend at CELRL-OP-F, P.O. Box 59, Louisville, Kentucky 40201-0059. Comments are due by November 6, 1998. Similar public notices proposing regional conditions in other regions or States are being published concurrently by other Corps district offices.

The States are reviewing the NWP's to determine the need for 401/CZM regional conditions. The Louisville District is working with the States to ensure that the Corps and 401/CZM regional conditions will ensure that the NWP's authorize only those activities that have minimal adverse effects on the aquatic environment, individually or cumulatively. Districts and States can coordinate workload to maximize the effective use of their respective resources and avoid unnecessary duplication of workload.

Provisional determinations, including environmental documents, have been prepared indicating that these NWP's comply with the requirements for issuance under general permit authority. The Corps will prepare final environmental decision documents when the NWP's are issued or modified. These documents will be available when the final NWP's are issued, at the Louisville District office or on the Internet at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>. Furthermore, these NWP decision documents will be supplemented by Division Engineers to address their decision concerning regional conditions for the NWP's. These supplemental documents will be available at the Louisville District office when the final NWP's become effective.

The July 1, 1998, *Federal Register* notice for the proposed new and modified NWP's is available on the Internet at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>. As an alternate, World Wide Web users can access the *Federal Register* through the Government Printing Office (GPO) at http://www.access.gpo.gov/su_docs/aces/aaces002.html.

PROPOSED REGIONAL CONDITIONS FOR NATIONWIDE PERMITS IN INDIANA

Note: (1) Information on Pre-Construction Notification in addition to below can be found at NWP General Condition No. 13 (Federal Register, 63 FR 36075-36076).

(2) Mitigation includes activities that avoid, minimize, and compensate for impacts.

Nationwide A: Residential, Commercial and Institutional Activities.

(1) Section 10 waters and wetlands contiguous to Section 10 waters shall be excluded.

(2) Pre-Construction Notification (PCN) is required to the Corps for all stream impacts. Impacts refer to filling/excavation below Ordinary High Water (OHW). The impact on ephemeral, intermittent, and perennial streams is limited to no more than 500 linear feet of stream.

(3) All PCN's must include a mitigation plan to offset losses to "waters of the United States".

(4) The following waters of the United States in Indiana are excluded:

a. Morse Reservoir and associated wetlands

b. Geist Reservoir and associated wetlands

c. Bogs

d. Calcareous fens

e. Vernal pools

f. Natural lakes and adjacent wetlands

g. Wetland portion of dune and swale systems

h. Wet prairies (meadows)

i. A list of other high value waters is currently being developed by Indiana Department of Environmental Management, Indiana Department of Natural Resources, the U. S. Environmental Protection Agency, and the U. S. Fish and Wildlife Service for consideration by the Corps of Engineers.

(5) In Lake, Porter, LaPorte and St. Joseph Counties, the size of the discharge shall not exceed 1/2 acre, and shall be cumulative over time.

Nationwide B: Master Planned Development Activities.

(1) Section 10 waters and wetlands contiguous to Section 10 waters shall be excluded.

(2) The impact on ephemeral, intermittent, and perennial streams is limited to no more than 1000 linear feet of stream.

(3) Condition 4 of NWP "A" applies to this NWP.

Nationwide C: Stormwater Management Facilities.

(1) The impact on ephemeral, and intermittent streams is limited to no more than 500 linear feet of stream, and 1 acre of total impacts to "waters of the U.S."

(2) Condition 4 of NWP "A" applies to this NWP.

(3) In Lake, Porter, LaPorte and St. Joseph Counties, the size of the discharge shall not exceed 1/2 acre, and shall be cumulative over time.

Nationwide D: Passive Recreational Facilities.

(1) The construction of new golf courses or new ski areas is not authorized by this NWP.

(2) All PCN's must include a mitigation plan to offset losses to "waters of the United States."

(3) A PCN is required to the Corps for facilities impacting those "waters of the United States" listed in Condition 4 of NWP "A."

(4) In Lake, Porter, LaPorte and St. Joseph Counties, the size of the discharge shall not exceed 1/2 acre, and shall be cumulative over time.

Nationwide E: Mining Activities.

(1) This NWP is limited to 1 acre for all "waters of the United States." The impact on ephemeral, intermittent, and perennial streams is limited to no more than 500 linear feet of stream.

(2) Condition 4 of NWP "A" applies to this NWP.

(3) The Corps will conduct agency coordination on all PCN's in accordance with General Condition 13(e).

(4) All PCN's must include a mitigation plan to offset losses to "waters of the United States."

Nationwide F: Reshaping Existing Drainage Ditches.

A PCN is required for projects which affect greater than 500 linear feet or which are located in waterways with a drainage area greater than 5 square miles in the Kankakee River, Lake Michigan, St. Joseph River (mouth on Lake Michigan) and Maumee River watersheds.

Nationwide Permit No. 3: Maintenance.

** none proposed **

Nationwide Permit No. 7: Outfall Structures and Maintenance.

** none proposed **

Nationwide Permit No. 12: Utility Activities.

(1) The construction of new electric or pumping substations, and permanent access roads is not authorized.

(2) A PCN is required to the Corps for activities impacting those "waters of the United States" listed in Condition 4 of NWP "A."

Nationwide Permit No. 14: Linear Transportation Crossings.

(1) This NWP for public projects is limited to the loss of one (1) acre.

(2) A PCN is required to the Corps for crossings impacting those "waters of the United States" listed in Condition 4 of NWP "A."

Nationwide Permit No. 27: Stream and Wetland Restoration Activities.

(1) A PCN is required to the Corps for activities impacting those "waters of the United States" listed in Condition 4 of NWP "A" and all Section 10 waters.

Nationwide Permit No. 40: Agricultural Activities.

(1) Perennial streams are excluded.

(2) A PCN is required to the Corps for activities impacting those "waters of the United States" listed in Condition 4 of NWP "A."

(3) Impacts shall not exceed (1) acre, and the impacts are cumulative over time.

(4) A mitigation plan is required for impacts over 1/4 acre.

PROPOSED REGIONAL CONDITIONS FOR NATIONWIDE PERMITS IN KENTUCKY

Note: (1) Outstanding Resource Waters (ORW's) are streams designated by the Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet. A list is enclosed.

(2) Information on Pre-Construction Notification in addition to below can be found at NWP General Condition No. 13 (Federal Register, 63 FR 36075-36076).

(3) Mitigation includes activities that avoid, minimize, and compensate for impacts.

Nationwide A: Residential, Commercial and Institutional Activities.

(1) Section 10 waters and wetlands contiguous to Section 10 waters shall be excluded.

(2) Pre-Construction Notification (PCN) is required to the Corps for all stream impacts. Impacts refer to filling/excavation below Ordinary High Water (OHW). The impact on ephemeral, intermittent, and perennial streams is limited to no more than 500 linear feet of stream.

(3) All PCN's must include a mitigation plan to offset losses to "waters of the United States".

(4) Discharges causing the loss of greater than one tenth (0.1) acre in the Pond Creek watershed of Jefferson County, Kentucky, will require a PCN to the Corps.

Nationwide B: Master Planned Development Activities.

(1) Section 10 waters and wetlands contiguous to Section 10 waters shall be excluded.

(2) The impact on ephemeral, intermittent, and perennial streams is limited to no more than 1000 linear feet of stream.

Nationwide C: Stormwater Management Facilities.

(1) The impact on ephemeral, and intermittent streams is limited to no more than 500 linear feet of stream, and 1 acre of total impacts to "waters of the U.S."

(2) Discharges for greater than one tenth (0.1) acre in the Pond Creek Watershed in Jefferson County, Kentucky will require a PCN to the Corps.

(3) All work in ORW's will require a PCN to the Corps.

Nationwide D: Passive Recreational Facilities.

- (1) The construction of new golf courses or new ski areas is not authorized by this NWP.
- (2) All PCN's must include a mitigation plan to offset losses to "waters of the United States."
- (3) All work in ORW's will require a PCN to the Corps.

Nationwide E: Mining Activities.

- (1) This NWP is limited to 1 acre for all "waters of the United States." The impact on ephemeral, intermittent, and perennial streams is limited to no more than 500 linear feet of stream.
- (2) This NWP is not applicable for sand and gravel mining or dredging activities.
- (3) The Corps will conduct agency coordination on all PCN's in accordance with General Condition 13(e).
- (4) All PCN's must include a mitigation plan to offset losses to "waters of the United States."

Nationwide F: Reshaping Existing Drainage Ditches.

**** none proposed****

Nationwide Permit No. 3: Maintenance.

- (1) All work in ORW's will require a PCN to the Corps.

Nationwide Permit No. 7: Outfall Structures and Maintenance.

- (1) All work in ORW's will require a PCN to the Corps.

Nationwide Permit No. 12: Utility Activities.

- (1) The construction of new electric or pumping substations, and permanent access roads is not authorized.
- (2) All work in ORW's will require a PCN to the Corps.

Nationwide Permit No. 14: Linear Transportation Crossings.

- (1) This NWP for public projects is limited to the loss of one (1) acre.
- (2) All work in ORW's will require a PCN to the Corps.

Nationwide Permit No. 27: Stream and Wetland Restoration Activities.

- (1) PCNs will be coordinated with the Kentucky Department of Fish & Wildlife Resources in accordance with General Condition 13 for activities on public or private land with no agreement.

(2) All work in ORW's and in all Section 10 waters will require a PCN to the Corps.

Nationwide Permit No. 40: Agricultural Activities.

- (1) Perennial streams are excluded.
- (2) All work in ORW's will require a PCN to the Corps.
- (3) Impacts shall not exceed (1) acre, and the impacts are cumulative over time.
- (4) A mitigation plan is required for impacts over 1/4 acre.

STANDING TO SUE
IN ENVIRONMENTAL CITIZEN SUITS

Michael P. Healy
Professor, University of Kentucky College of Law
Lexington, Kentucky

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STANDING TO SUE IN ENVIRONMENTAL CITIZEN SUITS

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STANDING IN ENVIRONMENTAL CITIZEN SUITS:
Laidlaw's Clarification of the Injury-In-Fact Redressability Requirements

To Be Published in June 2000 Environmental Law Reporter
at 30 ELR 10455

Standing in Environmental Citizen Suits: Laidlaw's Clarification
of the Injury-in-Fact and Redressability Requirements

by Michael P. Healy

In its first week of business during the new millennium, the U.S. Supreme Court decided *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,¹ and provided important clarifications about the law of standing in environmental citizen suits.² Specifically, the Court rejected the narrow view of environmental injury-in-fact advocated by Justice Scalia and instead adhered to the broader view of injury-in-fact established in a nonenvironmental context by the Court's decision in *Federal Elections Commission v. Akins*.³ As importantly, the Court also addressed the redressability requirement of Article III standing in *Laidlaw*. Here too, the Court did not apply the narrow view of redressability that Justice Scalia had defined for the Court in *Steel Co. v. Citizens for a Better Environment*,⁴ and instead found that the deterrence afforded by civil penalties was sufficient redress for environmental injury-in-fact.

This Article will analyze the Court's quite generous view of citizen suit standing in *Laidlaw*. After presenting the legal background to the *Laidlaw* decision in the first part of this Article, I will turn to an analysis of the Court's holdings in *Laidlaw*. To be sure, the Court's decision was adumbrated in important ways by the Court's broader conception of standing articulated in *Akins*. Nevertheless, the decision will be welcomed by environmentalists who had been concerned, viewing the apparent "slash and burn" assault on environmental standing⁵ in *Steel Co.* and *Defenders of Wildlife v. Lujan*,⁶ that the Court was ready to foreclose citizen suits when the defendant was unable to demonstrate that the statutory violations giving rise to the suit would recur causing measurable harm.⁷

Professor of Law, University of Kentucky College of Law. I wish to thank my colleague, John Rogers, for discussing the subject of this Article with me and for providing very helpful comments on a previous draft. Any errors are my own.

1. 120 S. Ct. 693, 30 ELR 20246 (2000).
2. Several members of the Fourth Circuit would disagree with the statement that *Laidlaw* merely clarified standing law. See *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 164, 30 ELR 20369, 20375 (4th Cir. 2000) (en banc) (Niemeyer, J., concurring) ("the decision in *Laidlaw* represents a sea change in constitutional standing principles"); *id.* at 165, 30 ELR at 20375 (Luttig, J., concurring) (a "significant change in environmental standing doctrine [is] worked by" *Laidlaw*); *id.* (Hamilton, J., concurring) (*Laidlaw* "has unnecessarily opened the standing floodgates").
3. 524 U.S. 11 (1998).
4. 523 U.S. 83, 28 ELR 20434 (1998).
5. *Defenders of Wildlife v. Lujan*, 504 U.S. 555, 606, 22 ELR 20913, 20927 (1992) (Blackmun, J., dissenting) ("I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing.").
6. *Id.*
7. See, e.g., John D. Echeverria & Jon T. Zeidler, *Barely Standing*, ENVTL. F., July/Aug. 1999, at 20, 21 ("Beneath the cumulative weight of a series of recent Supreme Court decisions, citizen stand-

Factual and Legal Background

The Court's Conception of Environmental Citizen Suits

Before turning to a summary of standing law prior to *Laidlaw*, the standing issue needs to be framed by an appreciation of the environmental citizen suit context in which it arises. In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*,⁸ the Court considered the scope of the citizen suit provision of the Clean Water Act (CWA).⁹ The Court concluded that Congress intended the provision to be forward looking; that is, a citizen suit claim cannot be based on a violation that has completely ceased at the time that the complaint is filed. In *Gwaltney*, both lower courts had held that a citizen suit could be brought under the CWA based on violations that were wholly past.¹⁰ The Court rejected this interpretation, holding that the Act requires a claimant to make a good-faith allegation that the defendant is in violation of the Act at the time that the claim is filed.¹¹

The Court decided, based on "the language and structure" of the citizen suit provision, that the Act foreclosed claims based on wholly past violations.¹² The Court concluded, moreover, that allowing claims to be based on wholly past violations would be inconsistent with the "supplementary role" that Congress intended citizen suits would play in the enforcement of the Act, and "would change the nature of the citizens' role from interstitial to potentially intrusive."¹³

The *Gwaltney* Court also addressed the relation between mootness and standing in response to the defendant's contention that the Act had to be construed to require "ongoing noncompliance" during the action to prevent evasion of the

ing is rapidly eroding."). *But see id.* at 22 ("The Court's decision to review this ruling [by the court of appeals in *Laidlaw*] may be a signal of the justices' willingness to halt, or even possibly reverse, the loss of ground.").

8. 484 U.S. 49, 18 ELR 20142 (1987).
9. 33 U.S.C. §1365(a), ELR STAT. FWPCA §505(a).
10. See 484 U.S. at 55, 56, 18 ELR at 20143.
11. See *id.* at 64-65, 18 ELR at 20146. The Court was insistent that the good-faith allegation of a present violation was what the Act required: "The statute does not require that a defendant 'be in violation' of the Act at the commencement of suit; rather, the statute requires that a defendant be 'alleged to be in violation.'" *Id.* at 64, 18 ELR at 20146. Justice Scalia, concurring along with Justices Stevens and O'Connor, rejected this interpretation, concluding instead that:
[T]he issue to be resolved by the Court of Appeals on remand of this suit is not whether the allegation of a continuing violation on the day suit was brought was made in good faith after reasonable inquiry, but whether the petitioner was in fact "in violation" on the date suit was brought.
Id. at 69, 18 ELR at 20147.
12. *Id.* at 59, 18 ELR at 20145.
13. *Id.* at 60-61, 18 ELR at 20145.

"case or controversy" requirement of Article III,¹⁴ an issue also considered in *Laidlaw*.¹⁵ The Court rejected this concern, stating that a live controversy is only mooted by the defendant's compliance upon defendant's showing "that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."¹⁶

In sum, the CWA requires that a defendant be in violation at the time the complaint is filed. Once that requirement is met, the defendant must meet a very high standard to demonstrate that, because the violations will not recur, the controversy is no longer live.

The Court's Conception of Article III Standing

Having established the forward-looking nature of the environmental citizen suit, we turn to a summary of how the Court viewed Article III standing in environmental cases prior to *Laidlaw*. It is now well established that a "triad of injury in fact, causation, and redressability comprises the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence."¹⁷ This summary will consider two of these requirements, injury-in-fact and redressability, be-

cause the Court has focused on them in its more recent standing cases, particularly its environmental cases.

The Injury-in-Fact Requirement

To define the injury-in-fact requirement in the context of environmental citizen suits, two different issues have been the focus of Court analysis. First, the Court has focused on the type of environmental impact that may constitute an injury for purposes of the Article III injury-in-fact requirement. Second, the Court has addressed the class of claimants that may properly claim an injury-in-fact. Informing the Court's approach to both of these issues has been a long-standing concern that a litigant should not be able to establish an injury-in-fact based on a generalized grievance. The following summary of the state of the law relating to both injury-in-fact issues, as well as the Court's concerns about generalized grievances, provides background for an understanding of the significance of *Laidlaw*.

□ The Broad Range of Cognizable Environmental Injuries. In its important early environmental standing case, *Sierra Club v. Morton*,¹⁸ the Court viewed broadly the range of impacts to the environment that would give rise to an injury-in-fact for purposes of Article III:

The injury alleged by the Sierra Club will be incurred entirely by reason of the change in the uses to which Mineral King will be put, and the attendant change in the aesthetics and ecology of the area. Thus, in referring to the road to be built through Sequoia National Park, the complaint alleged that the development "would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." We do not question that this type of harm may amount to an "injury in fact" sufficient to lay the basis for standing under § 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.¹⁹

Later in the opinion, the Court reiterated both components of its broad view of cognizable injuries: they "may reflect aesthetic, conservational, and recreational as well as economic values," and they may be "widely shared."²⁰

The Court's broad recognition of the status of environmental injuries as cognizable under Article III was consistently reiterated in cases decided after *Sierra Club*.²¹ Indeed, the Court's broad acceptance of environmental injury as injury-in-fact can be seen in the Court's recent acceptance, in its "slash and burn" standing decision in *Defenders of Wildlife*,²² of the proposition that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeni-

14. *Id.* at 66, 18 ELR at 20147.

15. *Laidlaw's* analysis of mootness is discussed *infra*.

16. 484 U.S. at 66-67, 18 ELR at 20147 (citations, internal quotations and footnote omitted).

Gwaltney's interpretation of the scope of the citizen suit provision did not turn on the Court's view of the scope of Article III standing. Justice Scalia, who concurred in *Gwaltney* in an opinion joined by Justices Stevens and O'Connor, addressed standing, however. Justice Scalia argued that, to ensure that the plaintiff had Article III standing, the Court should require a plaintiff to demonstrate that the defendant was "in violation" at the time the citizen suit was filed, rather than require only a good-faith allegation of a present violation. See 484 U.S. at 70-71, 18 ELR at 20147 (Scalia, J., concurring). In later citizen suit standing cases, Justices disagreeing with the approach of the Court majority have made arguments analogous to the argument presented in Justice Scalia's *Gwaltney* concurrence. Indeed, Justices Scalia and Stevens, on opposite sides of the constitutional issue in later cases, have argued that the Court should interpret citizen suit provisions narrowly to avoid having to address the constitutional question of Article III standing. Compare *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 132-33, 28 ELR 20434, 20444 (1998) (Stevens, J., concurring) (Even if Congress did not intend to confer jurisdiction over citizen suits for wholly past violations, the Court's "settled policy of adopting acceptable constructions of statutory provisions in order to avoid the unnecessary adjudication of constitutional questions—here, the unresolved standing question—strongly supports a construction of the statute that does not authorize suits for wholly past violations.") with *Federal Elections Comm'n v. Akins*, 524 U.S. 11, 32 (1998) (Scalia, J., dissenting) ("a narrower reading of 'party aggrieved' [in the text of the Federal Election Campaign Act citizen-suit provision] is supported by the doctrine of constitutional doubt, which counsels us to interpret statutes, if possible, in such fashion as to avoid grave constitutional questions.") (citation omitted). Cf. *Defenders of Wildlife v. Lujan*, 504 U.S. 555, 585, 22 ELR 20913, 20922 (1992) (Stevens, J., concurring) ("Although I believe that respondents have standing, I nevertheless concur in the judgment of reversal because I am persuaded that the Government is correct in its submission that §7(a)(2) does not apply to activities in foreign countries.").

The debate between Justices Scalia and Stevens in these cases has the effect of transforming the old saw, when you don't have the facts argue the law, into "when you can't win the constitutional debate argue statutory construction." Justice Scalia interestingly brands this approach by Justice Stevens in *Steel Co.* as "ultra vires," 523 U.S. at 102, 28 ELR at 20437, based on his view that the Court is duty bound to decide whether there is standing before it has the judicial power to interpret the scope of the statute's citizen suit provision. See *id.* at 101-02, 28 ELR at 20437.

17. *Steel Co.*, 523 U.S. at 103-04, 28 ELR at 20438 (footnote and citation omitted).

18. 405 U.S. 727, 2 ELR 20192 (1972).

19. *Id.* at 734, 2 ELR at 20194.

20. *Id.* at 738, 2 ELR at 20195 (internal quotations and citation omitted).

21. See, e.g., *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 886, 20 ELR 20962, (1990) (expressing "no doubt" that among interests statutes protected were "recreational use and aesthetic enjoyment"); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 3 ELR 20536 (1973).

22. See *Defenders of Wildlife v. Lujan*, 504 U.S. 555, 22 ELR 20913 (1992).

ably a cognizable interest for purpose of standing."²³ In sum, the Court has consistently viewed a broad range of environmental impacts as constituting injury-in-fact for purposes of Article III.

The Court interestingly had no occasion in these cases to identify the existence of any clear limits on the types of environmental injuries that are cognizable under Article III. This is because, as will soon be discussed,²⁴ all but one of these cases resulted in decisions that the plaintiffs lacked standing, not because the injuries they sought to protect were inadequate, but because the plaintiffs adduced insufficient proof that they had an actual interest in the environmental amenity or resource being affected. The one exception, *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*,²⁵ also did not result in the Court's articulation of limits, because the standing issue was resolved on the pleadings and the plaintiff had alleged that cognizable interests would be affected by the claimed illegality.

Moreover, the Court was not concerned in these cases about relating the injury claimed by the plaintiffs to the statutory schemes that gave rise to the claims of illegality.²⁶ The Court may have seen no need for such an analysis both because the types of harms being claimed by the plaintiffs appeared to be traditional sorts of injuries even in the absence of statutory protection, and because the Court viewed it as plain that the statutes at issue were protecting these sorts of interests.²⁷ In the Court's recent decision in *Akins*,²⁸ however, the Court gave specific attention to the relationship between a congressionally defined injury and the Article III requirement of injury-in-fact. Plaintiffs in that case brought a citizen suit, alleging that the Federal Election Commission (FEC) violated the Federal Election Campaign Act of 1971 (FECA) when it declined to fund that a political action committee, the American Israel Political Affairs Committee (AIPAC), had violated FECA and refused to order that group to comply with FECA's public reporting requirements.²⁹

The Court held that the plaintiffs had demonstrated a cognizable Article III injury, given the purpose of the statutory scheme enacted by Congress:

The "injury in fact" that respondents have suffered consists of their inability to obtain information—lists of AIPAC donors . . . and campaign-related contributions and expenditures—that, on respondents' view of the law, the statute requires that AIPAC make public. There is no reason to doubt their claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election. Respondents' injury consequently seems concrete and particular. Indeed, this Court has previously held that a plaintiff suffers an "injury in fact" when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.³⁰

Notwithstanding the fact that the injury in *Akins* was effectively defined by the nature of the statute's requirements of reporting and disclosure, the Court held that Congress had not exceeded its constitutional power as limited by Article III, because the statutorily defined injury met Article III's particularity requirement: "The informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts."³¹

In short, the Court has accepted in environmental cases that a broad range of environmental impacts constitute cognizable injuries under Article III. Outside of the environmental context, the Court has indicated a willingness to take the lead from Congress in accepting as cognizable under Article III injuries that are defined by statute.³²

□ Proper Parties for Asserting a Claim of Injury. Notwithstanding the Court's acceptance of environmental injuries as injuries-in-fact under Article III, some of the Court's most prominent modern standing cases have held that plaintiffs claiming environmental injuries resulting from statutory violations failed to meet the injury-in-fact requirement. Indeed, what the Court gave in *Sierra Club*, when it catalogued the broad range of environmental injuries cognizable under Article III, it largely withdrew by circumscribing the parties who could assert those interests.³³ The Court specifically distinguished between the requirement of a cognizable injury and the requirement of actual injury, stating that "broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning

23. *Id.* at 562-63, 22 ELR at 20916 (citation omitted). The Court has held, moreover, that when established, environmental injuries are commonly irreparable. See *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 17 ELR 20574 (1987). The Court did not reach the issue of environmental injury-in-fact in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 105, 28 ELR 20434, 20439 (1998).

24. See the discussion *infra*.

25. 412 U.S. 669, 689, 3 ELR 20536, 20540 (1973): ("[W]e deal here simply with the pleadings in which the [plaintiffs] alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected.") (footnote omitted).

26. See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 260 (1988) ("the Court did not engage in serious statutory analysis in" either *Sierra Club* or *SCRAP*).

27. The Court's lack of concern in these environmental cases may be contrasted with its statutory analysis in *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968). There, the Court stated that injuries resulting from competition would not generally "confer standing on the injured business to question the legality of any aspect of its competitor's operations." *Id.* at 6 (citations omitted). The Court concluded that prudential standing was present "when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest." *Id.* In that circumstance, "the injured competitor has standing to require compliance with that provision." *Id.* (citation omitted).

28. 524 U.S. 11 (1998) (Breyer, J.).

29. See *id.* at 14-16.

30. *Id.* at 21 (citation omitted).

31. *Id.* at 24-25.

32. Cf. Fletcher, *supra* note 26, at 253 ("when the Court has decided actual cases involving statutory rights, it has never required any showing of injury beyond that set out in the statute itself."). Because the Court in *Akins* held that the injury asserted was cognizable under Article III because it was concrete, it did not go as far as to accept Judge Fletcher's opinion that "[w]hen Congress passes a statute conferring a legal right on a plaintiff to enforce a statutorily created duty, the Court should not require that the plaintiff show 'injury in fact' over and above the violation of the statutorily conferred right." *Id.*

33. See 405 U.S. at 734-35, 2 ELR at 20194 ("the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.").

the requirement that the party seeking review must himself have suffered an injury."³⁴ The Sierra Club's complaint failed with regard to this latter requirement:

The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort. The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.³⁵

The Court believed that this "requirement that a party seeking review must allege facts showing that he is himself adversely affected . . . does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome."³⁶

In two more recent decisions, the Court relied upon this personal effect requirement to hold that environmental claimants had failed to establish an injury-in-fact. In *Lujan v. National Wildlife Federation*,³⁷ the Court held that the plaintiff had failed to establish an injury-in-fact, where its proof of injury was affidavits of members who stated that they used and enjoyed federal lands "in the vicinity of" lands to be affected by the challenged government action.³⁸

Similarly, the Court concluded that the plaintiff failed to demonstrate an injury-in-fact in *Lujan v. Defenders of Wildlife*.³⁹ Although the Court accepted that the underlying injuries would, if proved, constitute Article III injuries,⁴⁰ it concluded that

To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents' members would thereby be "directly" affected apart from their "special interest" in th[e] subject.⁴¹

The Court concluded that this direct effects test had not been met in the circumstances of the case, because the affidavits supporting the plaintiff's claim for standing stated only that the affiants had plans to return "some day" to the foreign nations where the animals of interest to those members lived

and any injury was accordingly not imminent⁴²: "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."⁴³ The Court stated that the purpose of a requirement of imminence "is to insure that the alleged injury is not too speculative for Article III purposes. . . ." ⁴⁴ The claimed injury was, in the Court's view, too speculative because "the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control."⁴⁵ In his concurring opinion, Justice Kennedy clarified why he had concluded that the plaintiffs' claimed injuries were too speculative in this case:

While it may seem trivial to require that Mss. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return, this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis, nor do the affiants claim to have visited the sites since the projects commenced.⁴⁶

The *Defenders of Wildlife* Court also addressed the plaintiffs' claim that they suffered injury-in-fact because they were interested in the study and protection of an ecosystem that is part of an interconnected global ecosystem, so that harms to species in a foreign locale by the challenged government action also harm the rest of the ecosystem in which plaintiffs claim an interest. The Court rejected this claim of an injury, because the plaintiffs had failed to meet the perceptible effect requirement: "To say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured-in-fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question."⁴⁷ Given how remote the plaintiffs were from the place where the animal species of concern to them were arguably being harmed, the plaintiffs could show no such perceptible effect:

It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible—though it goes to the outermost limit of plausibility—to think that

42. The Court focused its concern about the showing of a direct injury on whether the affiants would personally experience the reduced numbers of animals, rather than whether that reduction would actually occur:

We shall assume for the sake of argument that these affidavits contain facts showing that certain agency-funded projects threaten listed species—though that is questionable. They plainly contain no facts, however, showing how damage to the species will produce "imminent" injury to [the affiants].

Id.

43. *Id.* at 564, 22 ELR at 20916 (citation omitted).

44. *Id.* at 564 n.2, 22 ELR at 20916 n.2.

45. *Id.*

46. *Id.* at 579, 22 ELR at 20920 (citations omitted). Justice Stevens rejected this concern, concluding that the affiants' interests and previous visits to view the species at issue were sufficient to establish imminence. *See id.* at 584 n.2, 22 ELR at 20921 n.2 (Stevens, J., concurring) ("[R]espondents would not be injured by the challenged projects if they had not visited the sites or studied the threatened species and habitat. But, . . . respondents did visit the sites; moreover, they have expressed an intent to do so again.")

47. *Id.* at 566, 22 ELR at 20917.

34. *Id.* at 738, 2 ELR at 20195.

35. *Id.* at 735, 2 ELR at 20194 (footnote omitted).

36. *Id.* at 740, 2 ELR at 20195-96.

37. 497 U.S. 871, 20 ELR 20962 (1990).

38. *See id.* at 886, 20 ELR at 20964. *See also id.* at 889, 20 ELR at 20966 (the standing requirement is not met "by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action.")

39. 504 U.S. 555, 22 ELR 20913 (1992).

40. *See Federal Elections Comm'n v. Akins*, 524 U.S. 11 (1998).

41. 504 U.S. at 563, 22 ELR at 20916 (citation and internal quotations omitted).

a person who observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist. It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.⁴⁸

In sum, although the Court has concluded that a broad range of environmental impacts may give rise to an Article III injury-in-fact, the Court has sought to ensure that the particular plaintiff claiming an injury from such an impact will be imminently affected in a perceptible way.

□ **Generalized Grievances.** The purpose of the Court's requirement that plaintiffs demonstrate that they will suffer an actual injury-in-fact is to foreclose the judiciary from being used by claimants "to do no more than vindicate their own value preferences."⁴⁹ This bar against the judicial resolution of generalized grievances⁵⁰ was applied in the first great environmental standing case, *Sierra Club*,⁵¹ to reject the Sierra Club's effort to establish standing doctrine that would permit that organization to bring a public action.⁵²

More recently, the bar against the litigation of generalized grievances has been debated by the Court when it has resolved standing issues in environmental and nonenvironmental contexts. The opposing sides of the debate about the scope of the generalized grievances bar have a sharp fundamental disagreement about the types of injuries that give rise to injury-in-fact. Although the views of Justice Scalia, who wrote for the majority in *Defenders of Wildlife* and advocates a broad scope to the generalized grievance bar, appeared to be prevailing in the early 1990s, the views of Justice Breyer, who wrote for the majority in *Akins* and views the bar more narrowly, have more recently driven the Court's approach to this issue.

In *Defenders of Wildlife*, the Court's consideration of the generalized grievance bar arose in the context of the lower court's view that "the injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, noninstrumental 'right' to have the Executive observe the procedures required by law."⁵³ Writing for the Court, Justice Scalia rejected this view, finding that a plaintiff could bring suit based on the government's failure to conform to procedures mandated by statute only when the failure to comply with the required procedures resulted in direct and tangible injury.⁵⁴ The Court grounded

48. *Id.* at 566-67, 22 ELR at 20917 (citation and footnote omitted).

49. *Sierra Club v. Morton*, 405 U.S. 727, 740, 2 ELR 20192, 20196 (1972).

50. The Court often contrasts the noncognizable generalized grievance with particularized injury. See *Defenders of Wildlife*, 504 U.S. at 560 n.1, 22 ELR at 20915 n. 1 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.")

51. 405 U.S. at 727, 2 ELR at 20192.

52. *Id.* at 736, 2 ELR at 20194.

53. 504 U.S. at 573, 22 ELR at 20918.

54. *Id.* at 573-74, 22 ELR at 20919.

We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no

this requirement in separation-of-powers limits on the judiciary that translate into limits on Congress' power to define cognizable injury:

The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies' observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3.⁵⁵

Justice Scalia's broad view of the generalized grievance bar shaped his reading for the Court majority of the Court's previous decision in *United States v. Richardson*⁵⁶ and what he viewed as the broad precedential value of that case. In *Richardson*, the Court decided that the plaintiff failed to demonstrate standing in a suit claiming that the government's failure to disclose expenditures of the Central Intelligence Agency violated the statement and account clause of the U.S. Constitution.⁵⁷ In *Defenders of Wildlife*, Justice Scalia read *Richardson* as establishing that standing was lacking because "such a suit rested upon an impermissible 'generalized grievance,' and was inconsistent with 'the framework of Article III' because 'the impact on [plaintiff] is plainly undifferentiated and common to all members of the public.'"⁵⁸

Only six years later, however, Justice Scalia found himself in the minority when the Court again addressed the generalized grievance bar to standing. In *Akins*,⁵⁹ Justice Breyer, writing for the majority, acknowledged that "[t]he FEC's strongest argument is its contention that this lawsuit involves only a 'generalized grievance.'"⁶⁰ The Court then held that the generalized grievance bar did not apply to injuries that, while widely shared, are "sufficiently concrete and specific."⁶¹ Justice Breyer, on behalf of the *Akins* majority,

more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

The Court noted that its standing decisions have adhered to a requirement that a plaintiff show personal injury: "The dissent is unable to cite a single case in which we actually found standing solely on the basis of a 'procedural right' unconnected to the plaintiff's own concrete harm." *Id.* at 573 n.8, 22 ELR at 20918-19 n.8.

55. 504 U.S. at 567-77, 22 ELR at 20918.

56. 418 U.S. 166 (1974).

57. Art. I, §9, cl. 7 ("a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time").

58. 504 U.S. at 579, 22 ELR at 20919 (quoting *Richardson*, 418 U.S. at 176-77).

59. 524 U.S. 11 (1998).

60. *Id.* at 23.

61. The Court stated that:

[W]here a harm is concrete, though widely shared, the Court has found injury in fact. Thus the fact that a political forum may be more readily available where an injury is widely shared (while counseling against, say, interpreting a statute as conferring standing) does not, by itself, automatically dis-

rejected the applicability of *Richardson*, which had been cited by neither party.⁶² The Court concluded that Congress had established through FECA a concrete right to particular information viewed by the claimants as important to their exercise of the right to vote. It stated that in *Akins*, unlike *Richardson*, "there is a statute which . . . does seek to protect individuals such as respondents from the kind of harm they say they have suffered, i.e., failing to receive particular information about campaign-related activities."⁶³ This left Justice Scalia able only to chide the Court for abandoning *Richardson*⁶⁴ and to decry the Court's acceptance of a role for the judiciary defined by Congress that conflicts descriptively and normatively with the governmental structure.⁶⁵

In sum, the Court's approach to injury-in-fact in environmental cases has accepted a broad range of impacts as constitutionally sufficient, while it has sought to ensure that the claimant is a directly affected party. The Court has recently been engaged in a spirited and closely divided debate about whether a claimant who has brought a citizen suit is asserting a generalized grievance that is not a cognizable injury-in-fact.

qualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an injury in fact. This conclusion seems particularly obvious where (to use a hypothetical example) large numbers of individuals suffer the same common-law injury (say, a widespread mass tort), or where large numbers of voters suffer interference with voting rights conferred by law. We conclude that similarly, the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.

Id. at 24-25 (citations and internal quotations omitted); *see also id.* at 23 ("The kind of judicial language to which the FEC points, however, invariably appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature—for example, harm to the 'common concern for obedience to law.'" (citation omitted)).

62. *See id.* at 21.

63. *Id.* at 22 (citation omitted).

64. In his dissent, Justice Scalia argued that, "[f]airly read, and applying a fair understanding of its important purposes, *Richardson* is indistinguishable from the present case." 524 U.S. at 34 (Scalia, J., dissenting). I should note that it is nice to see, if only in this limited context, Justice Scalia taking a purposivist approach to interpretation, after rejecting such an approach to the interpretation of statutes. *See, e.g.,* *Chisom v. Roemer*, 501 U.S. 380, 417 (1991) (Scalia, J. dissenting) (criticizing the Court's purposivist interpretation of the Voting Rights Act).

65. *See id.* at 36-37 (Scalia, J., dissenting):

If today's decision is correct, it is within the power of Congress to authorize any interested person to manage (through the courts) the Executive's enforcement of any law that includes a requirement for the filing and public availability of a piece of paper. This is not the system we have had, and is not the system we should desire.

See also id. at 36 (Scalia, J., dissenting):

When the Executive can be directed by the courts, at the instance of any voter, to remedy a deprivation which affects the entire electorate in precisely the same way—and particularly when that deprivation (here, the unavailability of information) is one inseverable part of a larger enforcement scheme—there has occurred a shift of political responsibility to a branch designed not to protect the public at large but to protect individual rights.

The Redressability Requirement

Redressability is the other standing requirement that the Court has considered recently in the context of environmental citizen suits. In *Steel Co.*,⁶⁶ the plaintiff's citizen suit claimed that the defendant had violated the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA)⁶⁷ by failing to prepare required reports on its inventory of hazardous substances and release of toxic substances.⁶⁸ After receiving the required notice of the plaintiff's planned citizen suit, the defendant issued the required reports prior to the filing of the complaint.⁶⁹ The Court assumed that the plaintiff had demonstrated injury-in-fact,⁷⁰ but held that the plaintiff lacked standing because none of the forms of relief it had sought would redress the injury caused by the defendant's filing of its unlawfully late reports.⁷¹

The form of relief that the Court analyzed most closely regarding redressability was the plaintiff's request for civil penalties imposed for statutory violations.⁷² Justice Scalia's opinion for the majority relied upon, this time in the

66. 523 U.S. at 83, 28 ELR at 20434.

67. 42 U.S.C. §§11001-11050, ELR STAT. EPCRA §§301-330.

68. 523 U.S. at 87-88, 28 ELR at 20434.

69. *Id.* at 88, 28 ELR at 20434.

70. *Id.* at 105, 28 ELR at 20438.

71. The court concluded that:

The complaint asks for (1) a declaratory judgment that petitioner violated EPCRA; (2) authorization to inspect periodically petitioner's facility and records (with costs borne by petitioner); (3) an order requiring petitioner to provide respondent copies of all compliance reports submitted to the EPA; (4) an order requiring petitioner to pay civil penalties of \$25,000 per day for each violation of §§11022 and 11023; (5) an award of all respondent's "costs, in connection with the investigation and prosecution of this matter, including reasonable attorney and expert witness fees, as authorized by Section 326(f) of [EPCRA]"; and (6) any such further relief as the court deems appropriate. None of the specific items of relief sought, and none that we can envision as "appropriate" under the general request, would serve to reimburse respondent for losses caused by the late reporting, or to eliminate any effects of that late reporting upon respondent.

Id. at 105-06, 28 ELR at 20438 (citation and footnotes omitted).

72. The brevity of the Court's analysis of the lack of redress associated with the other forms of relief sought by the plaintiff is an indication of the Court's view of the insufficiency of the claim. The Court found that the declaratory relief sought by the plaintiff would be "worthless" because there was "no controversy over whether petitioner failed to file reports, or over whether such a failure constitutes a violation. . . ." *Id.* at 107, 28 ELR at 20438. The Court viewed the second and third items of relief sought by the plaintiff to be "injunctive in nature." *Id.* at 108, 28 ELR at 20439. The Court concluded that, "[i]f respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm. But there is no such allegation here—and on the facts of the case, there seems no basis for it." *Id.* The Court rejected in this context the Solicitor General's argument that future illegal activity should be presumed when illegal activity only ceases in response to litigation. *See id.* at 109, 28 ELR at 20439. The final specified form of requested relief was the recovery of the costs of litigation. The Court rejected that form of relief as redress, because "a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit." *Id.* at 107, 28 ELR at 20438. The plaintiff also sought other unspecified, "appropriate" relief, but the Court concluded that no relief "that we can envision as 'appropriate' under the general request, would serve to reimburse respondent for losses caused by the late reporting, or to eliminate any effects of that late reporting upon respondent." *Id.* at 106, 28 ELR at 20438.

redressability context, the principle that the Constitution does not permit adjudication based on a generalized grievance. Because the civil penalties available under the statute would be paid to the federal government, rather than to the plaintiff, the Court stated that, "[i]n requesting them, . . . respondent seeks not remediation of its own injury—reimbursement for the costs it incurred as a result of the late filing—but vindication of the rule of law—the 'undifferentiated public interest' in faithful execution of EPCRA."⁷³

Although the Court then referred to Justice Stevens' contention that the civil penalties provided by the statute are adequate redress because of their deterrent effect, the Court's analysis actually rejected only his claim that such penalties are adequate redress because of the "psychic satisfaction" they yield:

Justice Stevens thinks it is enough that respondent will be gratified by seeing petitioner punished for its infractions and that the punishment will deter the risk of future harm. If that were so, our holdings in *Linda R.S. v. Richard D.*, and *Simon v. Eastern Ky. Welfare Rights Organization*, are inexplicable. Obviously, such a principle would make the redressability requirement vanish. By the mere bringing of his suit, every plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts [sic], or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury. Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.⁷⁴

As this passage explains, Justice Scalia's redressability analysis for the majority was dependent on the fact that the civil penalties available under EPCRA were inadequate redress for past violations because they had to be paid to the federal government, rather than to the plaintiff. Justice Scalia therefore acknowledged that the lack of redressability would be cured if Congress had provided that part of the penalties, even perhaps a peppercorn, be paid to the plaintiff for the statutory violations proved in the case.⁷⁵ This concession, which likely reflects the historical acceptance of *qui tam* actions, has the effect of recognizing broad congressional authority to define constitutionally adequate redress. Given this acceptance of congressional power by the *Steel Co.* majority, Justice Scalia's

73. *Id.* at 107, 28 ELR at 20438 (citations omitted).

74. *Id.* at 106-07, 28 ELR at 20438 (citations omitted).

75. *See id.* at 107, 28 ELR at 20438 ("[T]he civil penalties authorized by the statute . . . might be viewed as a sort of compensation or redress to respondent if they were payable to respondent."). Justice Stevens chided the majority for this view:

Yet it is unclear why the separation of powers question should turn on whether the plaintiff receives monetary compensation. In either instance, a private citizen is enforcing the law. If separation of powers does not preclude standing when Congress creates a legal right that authorizes compensation to the plaintiff, it is unclear why separation of powers should dictate a contrary result when Congress has created a legal right but has directed that payment be made to the federal Treasury.

Id. at 127, 28 ELR at 20443 (Stevens, J., concurring).

concerns about the impact of broadened citizen suit standing appear to be nothing more than policy arguments relevant to Congress' decisions about proper redress, rather than necessary limitations on citizen litigation mandated by our constitutional structure.⁷⁶

In sum, the Court's analysis of the redressability requirement in the context of environmental citizen suits appeared to limit standing because succeeding in having statutory civil penalties imposed on a violator of environmental laws was found to be inadequate redress for the plaintiff's claimed environmental injury.

Laidlaw and Its Impact on Standing in Environmental Citizen Suits

Against this unsettled legal background, the Court has now decided *Laidlaw*.⁷⁷ *Laidlaw* operated a point source that had received a national pollution discharge elimination system (NPDES) permit to discharge pollutants into waters of the United States as required by the CWA.⁷⁸ *Laidlaw* thereafter "repeatedly" violated the emissions limitations established by the permit over an eight-year period.⁷⁹ Several of these violations occurred after the plaintiff had filed the complaint.⁸⁰ *Laidlaw* moved for summary judgment in district court, contending that the plaintiff did not demonstrate a cognizable Article III injury-in-fact.⁸¹ Friends of the Earth responded by submitting affidavits and depositions of its members describing their use of and interest in the waterway receiving *Laidlaw's* unlawfully high pollutant discharges.⁸² "After examining this evidence, the District Court denied *Laidlaw's* summary judgment motion, finding—albeit 'by the very slimmest of margins'—that FOE had standing to bring the suit."⁸³

76. *Cf. id.* at 127, 28 ELR at 20443 ("[I]n this case (assuming for present purposes that respondent correctly reads the statute) not only has Congress authorized standing, but the Executive Branch has also endorsed its interpretation of Article III. It is this Court's decision, not anything that Congress or the Executive has done, that encroaches on the domain of other branches of the Federal Government.") (citation and footnote omitted).

77. 120 S. Ct. at 693, 30 ELR at 20246.

78. *See* 33 U.S.C. §§1311(a), 1342(a), ELR STAT. FWPCA §§301(a), 402(a).

79. *See Laidlaw*, 120 S. Ct. at 701-02, 30 ELR at 20247:

Once it received its permit, *Laidlaw* began to discharge various pollutants into the waterway; repeatedly, *Laidlaw's* discharges exceeded the limits set by the permit. In particular, despite experimenting with several technological fixes, *Laidlaw* consistently failed to meet the permit's stringent 1.3 ppb (parts per billion) daily average limit on mercury discharges. The District Court later found that *Laidlaw* had violated the mercury limits on 489 occasions between 1987 and 1995.

(Citation omitted.)

80. *See id.* at 702, 30 ELR at 20247:

The record indicates that after FOE initiated the suit, but before the District Court rendered judgment, *Laidlaw* violated the mercury discharge limitation in its permit 13 times. The District Court also found that *Laidlaw* had committed 13 monitoring and 10 reporting violations during this period. The last recorded mercury discharge violation occurred in January 1995, long after the complaint was filed but about two years before judgment was rendered.

(Citations omitted.)

81. *Id.*

82. *Id.*

83. *Id.* (citation omitted).

In January 1997, the district court entered judgment against Laidlaw, finding that the defendant had repeatedly violated its permit limitations, and ordered Laidlaw to pay a civil penalty of \$405,800.⁸⁴ In setting the penalty at that level, the district court accounted for the statutory factors, including the "total deterrent effect"⁸⁵ and its finding that "there has been 'no demonstrated proof of harm to the environment' from Laidlaw's mercury discharge violations."⁸⁶ In resolving Laidlaw's subsequent appeal, the Fourth Circuit Court of Appeals relied on the Supreme Court decision in *Steel Co.* and "reasoned that the case had become moot because 'the only remedy currently available to [FOE]—civil penalties payable to the government—would not redress any injury [FOE has] suffered.' The court therefore vacated the District Court's order and remanded with instructions to dismiss the action."⁸⁷

Given the defendant's contentions regarding standing and the decision of the court of appeals, *Laidlaw* presented the Court with the opportunity to address both the injury-in-fact and redressability requirements of Article III standing.

Injury-in-Fact in Environmental Cases

As decided by the Court, *Laidlaw* had much to say about the constitutional sufficiency of an injury premised on adverse environmental impacts. *Laidlaw* differed from the earlier environmental standing cases, in which the Court found no injury-in-fact, because members of the plaintiff organization had identified a desire to use the local resource being impacted by the allegedly unlawful activity. For example, the Court referred to statements of one such member in affidavits and a deposition that he resided near Laidlaw's facility and the affected waterway and that he refrained from using the waterway for recreation "because of his concerns about Laidlaw's discharges."⁸⁸ In the Court's view, the evidence of direct injury to the plaintiff in *Laidlaw* took the case wholly out of the improper party category that the

Court had framed in *National Wildlife Federation and Defenders of Wildlife*.⁸⁹

The critical injury-in-fact issue resolved in *Laidlaw* instead concerned the nature of the environmental injuries that are cognizable under Article III. On this issue, as we discussed earlier, the Court had consistently stated that degradation of the environment claimed as injurious to a plaintiff constituted a cognizable Article III injury-in-fact.⁹⁰ Indeed, Justice Ginsburg, writing for the *Laidlaw* majority, relied on the watershed decision in *Sierra Club* to support the conclusion that there was an injury-in-fact: "We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity."⁹¹

The problem for the *Laidlaw* majority, though, was identifying how such values of the receiving waterway were "lessened" given the district court's finding that Laidlaw's illegal discharges had neither actually harmed nor increased the risk of harm to the environment.⁹² This finding is somewhat surprising, but no doubt attributable to the limited evidence presented by Friends of the Earth in response to the motion for summary judgment on standing. The plaintiff was apparently unable to demonstrate that the permit violations had caused violations of the applicable water quality standards.⁹³ More surprising, though, was the plaintiff's apparent failure to claim injury based on the nature of the toxic effects of the pollutant (mercury) or the increased risk of

89. See *id.* at 705-06, 30 ELR at 20249, where the Court stated that:

[T]he affidavits and testimony presented by FOE in this case assert that Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests. These submissions present dispositively more than the mere "general averments" and "conclusory allegations" found inadequate in *National Wildlife Federation*. Nor can the affiants' conditional statements—that they would use the nearby North Tyger River for recreation if Laidlaw were not discharging pollutants into it—be equated with the speculative "'some day' intentions" to visit endangered species halfway around the world that we held insufficient to show injury in fact in *Defenders of Wildlife*.

(Citations omitted.) In this regard, the members of Friends of the Earth were like the plaintiffs in *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221 (1986), and *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). Even Justice Scalia had not raised any concerns about standing in those cases because of the plaintiffs' obvious interest in the affected resource. See *Defenders of Wildlife v. Lujan*, 504 U.S. 555, 573 n.8, 22 ELR 20913, 20918-19 n.8 (1992). That the *Laidlaw* Court distinguished *Defenders of Wildlife* on this ground makes the earlier decision more "plausible." See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 203 (1992) ("if the outcome in [*Defenders of Wildlife*] turns on the fact that plaintiffs made an inadequate showing that they would indeed return to the relevant sites, the Court's decision is hardly implausible.")

90. See discussion *supra*.

91. *Id.* at 705, 30 ELR at 20249 (quoting *Sierra Club*, 405 U.S. at 735, 2 ELR at 20194).

92. See *supra* note 86 and accompanying text.

93. See 33 U.S.C. §1313, ELR STAT. FWPCA §303. Cf. *Friends of the Earth v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 157, 30 ELR 20369, 20372 (4th Cir. 2000) (en banc) (in finding injury-in-fact, the court relies on the fact that permit limitations violated by the defendant were set at a level needed to ensure water quality standard compliance).

84. *Id.* at 703, 30 ELR at 20247 (citing *Friends of the Earth v. Laidlaw Env'tl. Svcs. (TOC), Inc.*, 956 F. Supp. 588, 27 ELR 20976 (D.S.C. 1997)).

85. *Id.*

86. *Id.* at 704, 30 ELR at 20247 (quoting 956 F. Supp. at 602, 27 ELR at 20982). The Court also quoted the district court's statement in the context of determining the civil penalty that "[t]he NPDES permit violations at issue in this citizen suit did not result in any health risk or environmental harm." *Id.* at 704, 30 ELR at 20248.

87. *Id.* at 703, 30 ELR at 20248 (citation omitted).

88. *Id.* at 704, 30 ELR at 20248:

[T]he District Court found that FOE had demonstrated sufficient injury to establish standing. For example, FOE member Kenneth Lee Curtis averred in affidavits that he lived a half-mile from Laidlaw's facility; that he occasionally drove over the North Tyger River, and that it looked and smelled polluted; and that he would like to fish, camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the facility, as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by Laidlaw's discharges. Curtis reaffirmed these statements in extensive deposition testimony. For example, he testified that he would like to fish in the river at a specific spot he used as a boy, but that he would not do so now because of his concerns about Laidlaw's discharges.

(Citations omitted.)

their occurrence given the unlawfully increased amounts of the pollutant in the waterway.⁹⁴

The Court found an injury-in-fact in *Laidlaw* by employing the analytic method it had utilized in *Akins* and by relying on its own long-standing conception of environmental injury. As we will see, both parts of the Court's analysis were necessary to its conclusion that Friends of the Earth had identified a cognizable injury-in-fact. First, the Court proceeded as it had in *Akins* to follow the lead of Congress in identifying a cognizable injury-in-fact⁹⁵ and held that

The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry . . . is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit.⁹⁶

The nature of the Court's analysis—both matter-of-fact and brief—shows the effect that *Akins* has had in relating statutory violation to injury-in-fact: injury-in-fact was present because the effect that Congress sought to prevent by its statutory requirement—increased pollutant levels in a waterway resulting from the defendant's permit violations—was felt to be injurious to those who wished to use the affected local resource.

Akins, of course, did not hold that an Article III injury-in-fact was present simply because the plaintiffs claimed that they were harmed by the statutory violation. The Court required that the injury be sufficiently concrete to be cognizable under Article III. This leads to the second part of the *Laidlaw* Court's analysis in support of its finding of Article III injury-in-fact. Here, the Court relied on the conception of environmental injury to which it has consistently adhered and which resulted in the decision that the injury at issue in *Laidlaw* was concrete. At bottom, *Laidlaw* demonstrates very nicely that the Court's conception of environmental injury reflects a property-rule, rather than liability-rule, paradigm.⁹⁷ As Judge Calabresi and Mr. Melamed

94. The district court found that "[t]he NPDES permit violations at issue in this citizen suit did not result in any health risk . . ." 120 S. Ct. at 704, 30 ELR at 20247 (quoting 956 F. Supp. at 602, 27 ELR at 20982). For an example of a case in which the plaintiffs presented such evidence of increased risks of harm due to increased pollutant levels, see *Gaston Copper*, 204 F.3d at 157, 30 ELR at 20372.

The *Laidlaw* Court's conclusion of an injury-in-fact would have been less noteworthy if the plaintiffs had adduced evidence about the increased risk created by increased levels of mercury in the receiving waters and the Court had found an injury based on that heightened risk. See Sunstein, *supra* note 89, at 203-04 (arguing that injury-in-fact may be identified based on conduct creating environmental risks); see also *Gaston Copper*, 204 F.3d at 160, 30 ELR at 20373 ("Threats or increased risk . . . constitutes cognizable harm. Threatened environmental injury is by nature probabilistic."). For a discussion of "the 'multiple warhead' nature of the Clean Water Act's approaches to [limiting] toxic pollution," see Oliver A. Houck, *The Regulation of Toxic Pollutants Under the Clean Water Act*, 21 ELR 10528, 10528 (Sept. 1991).

95. See *supra* note 64 and accompanying text.

96. *Laidlaw*, 120 S. Ct. at 704, 30 ELR at 20248.

97. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). For a discussion of an environmental context in which legislatures have differed in their adherence to a property-rule approach rather than liability-rule approach in defining a regulatory regime, see Michael P. Healy, *England's Contaminated Land Act of 1995: Perspectives on America's Approach to Hazardous Substance Cleanups and Evolving Principles of International Law*, 13 J. NAT. RESOURCES & ENVTL. L. 289, 298-99 & n.48

describe these two types of rules in their famous article, when an entitlement is protected by a property rule, its value is determined by the person who holds the entitlement; that person will not sell the entitlement unless she receives what she believes the entitlement is worth.⁹⁸ The authors contrast this regime with a regime that protects an entitlement by a liability rule; under such a regime, the value of the entitlement is "objectively determined" rather than determined by the owner's subjective valuation.⁹⁹

Laidlaw is exceptionally instructive in this regard, because the case implicated the issue of injury both at the constitutional threshold of standing and at the later stage of the assignment of liability. On the threshold standing issue, the Court focused on the articulated belief of the members of the plaintiff organization themselves that the local environment that they planned to use and enjoy recreationally was being harmed as a result of the defendant discharging unlawfully high amounts of pollutants into the resource. For the Court, the important fact is the objective illegal increase in the level of pollutants in the waterway: The members' feeling of aggravement in response to that illegally high pollution level is then accepted as "reasonable" by the Court.¹⁰⁰ Although the Court claimed that it was demanding objectivity,¹⁰¹ its analysis reflects an unstated vision of environmental injury that accepts the subjectivity of an individual's response to prohibited environmental impacts. This is the Court's own understanding of injury; it does not arise out of the Court's understanding of the interests that Congress intended to protect.¹⁰²

(1997-1998) (arguing that England's statutory scheme for cleaning up hazardous substances reflects a liability rule, while the American federal statutory scheme reflects a property rule).

98. See Calabresi & Melamed, *supra* note 97, at 1092; see also *id.* at 1106-08.

99. *Id.* at 1092. See also *id.* at 1106-08 (describing eminent domain as a valuation method that relies on a liability rule).

100. See *Laidlaw*, 120 S. Ct. at 706, 30 ELR at 20249, where the Court stated that:

[I]t is undisputed that *Laidlaw's* unlawful conduct—discharging pollutants in excess of permit limits—was occurring at the time the complaint was filed. Under *Lyons*, then, the only "subjective" issue here is "[t]he reasonableness of [the] fear" that led the affiants to respond to that concededly ongoing conduct by refraining from use of the North Tyger River and surrounding areas. Unlike the dissent, we see nothing "improbable" about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely reasonable, the District Court found it was true in this case, and that is enough for injury in fact.

(Citation omitted.)

101. See *id.*

102. The Court's own property-rule paradigm for understanding environmental injury may be contrasted with an argument about environmental injury that Judge Fletcher presented in his well-known article on standing. See Fletcher, *supra* note 26. There, Judge Fletcher argued that the Court properly demanded little proof of the actual threatened injury in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 3 ELR 20536 (1973), because the statutory scheme that plaintiffs relied upon for protection was the National Environmental Policy Act (NEPA). 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209. See Fletcher, *supra* note 26, at 259-60. Judge Fletcher argued that Congress had enacted that statute to compel agencies to develop information about the expected environmental impacts of their actions and the Court should accordingly limit the required showing of injury-in-fact given that statutory purpose, because the agency is supposed to develop that very evidence of injury during its environmental review. *Id.* Judge Fletcher recognized that the Court did not engage in this analysis. *Id.* at 259.

Justice Scalia's criticism in *Laidlaw* that the plaintiffs' grievance is widely shared and thus generalized because the plaintiffs failed to adduce evidence of objective harm to the environment¹⁰³—proof, for example, that the excess mercury discharged by Laidlaw resulted in the hospitalization of children or caused dead or injured fish—was beside the point for the majority: The majority believed that environmental injury for Article III purposes follows from property-rule subjectivity, rather than Justice Scalia's liability-rule objectivity. For the Supreme Court and the district court in *Laidlaw*, that concern about objective indicia of harm, of which there was none, was defined by Congress to be a factor in calculating the amount of the penalty (i.e., the liability)¹⁰⁴; it was not determinative of the standing question.¹⁰⁵ The Court's analysis of injury-in-fact in *Laidlaw* is consistent with the approach that Justice Scalia (ironically) had presented for the Court in *Defenders of Wildlife*.¹⁰⁶ There, in response to Justice Blackmun's complaint that the Court's narrow limit on the parties that could demonstrate injury-in-fact would necessitate a very specific description of actual injury in a loss of consortium case before standing could be found,¹⁰⁷ Justice Scalia had distinguished the requisite proof of injury for standing, which looks to the existence vel non of injury, from the proof of injury for liability, which depends on the precise extent of injury and is considered in the damages aspect of the case.¹⁰⁸ Because Friends of the Earth proved in *Laidlaw* that its members were personally affected by the increased

pollution levels because of their intended use of the impacted resource, the Court concluded that injury-in-fact was present under the CWA—proof of its precise extent was relevant only to the penalty.

This approach of the *Laidlaw* majority in accepting the injury to plaintiffs as cognizable under Article III because it is subjectively concrete thus conforms to previous environmental standing decisions of the Court. For the Court, just as a claimant is injured-in-fact when a forest she uses will have fewer trees because of the action being challenged as unlawful, a claimant is injured when a waterway she uses has higher pollution levels because of NPDES permit violations. In the former context, the Court has never required the plaintiff to show either the specific trees that would be removed by the government action or that removal of those specific trees would objectively impair the area's aesthetics by, for example, offending a reasonable observer of nature or reducing the market value of the property. In the permit violation context, of course, a claimant meeting the proper party requirements of *National Wildlife Federation and Defenders of Wildlife* is by definition able to demonstrate that the resource of interest has illegally high pollutant levels; the *Laidlaw* Court's decision conformed to its earlier holdings that proof of further harm was not necessary to show injury-in-fact.¹⁰⁹

In short, the Court's injury-in-fact analysis in *Laidlaw* is important for two reasons. First, the Court again decided to follow Congress' lead by accepting as an injury-in-fact under Article III an effect that is more clearly injurious because it is a legal violation. As in *Akins*, the Court did not hold that Congress had power to define injuries that are cognizable under Article III.¹¹⁰ On the other hand, *Laidlaw* also did not undermine the CWA regulatory scheme by holding that, notwithstanding the broadly protective purposes of the CWA,¹¹¹ a citizen suit claimant is able to bring an action

103. See *id.* at 714, 30 ELR at 20252 (Scalia, J., dissenting):

At the very least, in the present case, one would expect to see evidence supporting the affidavits' bald assertions regarding decreasing recreational usage and declining home values, as well as evidence for the improbable proposition that Laidlaw's violations, even though harmless to the environment, are somehow responsible for these effects.

(Citation omitted.)

104. See *Laidlaw*, 120 S. Ct. at 701, 30 ELR at 20247 ("In deterring the amount of any civil penalty, the district court must take into account 'the seriousness of the violation or violations. . .'" (quoting 33 U.S.C. §1365(d)); *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 956 F. Supp. 588, 602-03, 27 ELR 20976, 20982 (D.S.C. 1997) (evaluating the extent of "demonstrated adverse affect [sic] on the environment" in determining the amount of the civil penalty), *rev'd on other grounds*, 149 F.3d 303, 28 ELR 21444 (4th Cir. 1998), *rev'd on other grounds*, 120 S. Ct. 693, 30 ELR 20246 (2000).

105. Congress' decision to employ a liability rule for determining the penalty for violations is consistent with the view of Calabresi and Melamed that such a rule "facilitates a combination of efficiency and distributive results which would be difficult to achieve under a property rule." Calabresi & Melamed, *supra* note 97, at 1110.

106. See *Defenders of Wildlife*, 504 U.S. at 564 n.2, 22 ELR at 20916 n.2.

107. See *id.* at 593, 22 ELR at 20924 (Blackmun, J., concurring) (under the Court's approach to injury-in-fact, "a Federal Tort Claims Act plaintiff alleging loss of consortium should make sure to furnish this Court with a 'description of concrete plans' for her nightly schedule of attempted activities.").

108. See *id.* at 564 n.2, 22 ELR at 20916 n.2:

Our insistence upon these established requirements of standing does not mean that we would, as the dissent contends, "demand . . . detailed descriptions" of damages, such as a "nightly schedule of attempted activities" from plaintiffs alleging loss of consortium. That case and the others posited by the dissent all involve actual harm; the existence of standing is clear, though the precise extent of harm remains to be determined at trial. Where there is no actual harm, however, its imminence (though not its precise extent) must be established.

(Citation omitted.)

109. The degree to which the *Laidlaw* result is bounded in this respect depends on the environmental medium affected by the unlawful pollution. Other waterways may be less bounded than the waterway at issue in *Laidlaw*. For example, the court's decision that the plaintiff demonstrated injury-in-fact in *Friends of the Earth v. Gaston Copper Recycling Corp.* was based on its view that excessive pollutant levels resulting from the defendant's permit violations affected a "discharge zone" extending 16.5 miles from a lake into which the defendant's effluent flowed. See 204 F.3d 149, 158, 30 ELR 20369, 20373 (4th Cir. 2000). Because the plaintiff's property was well within that area, the court concluded that the plaintiff suffered injury-in-fact. See *id.* When air is the affected medium, the effects are far less bounded. See *infra* note 126.

110. The *Laidlaw* Court thus did not make the argument that the court seemed to make in *Gaston Copper*. There, when the Fourth Circuit explained its conclusion that the plaintiff demonstrated injury-in-fact, the court suggested a willingness to find an Article III injury-in-fact simply on the basis of a statutory violation. See 204 F.3d at 163, 30 ELR at 20375:

To deny standing to Shealy here would further thwart congressional intent by recreating the old system of water quality standards whose failure led to the enactment of the Clean Water Act in the first place. An important reason for Congress' shift to end-of-pipe standards was to eliminate the need to address complex questions of environmental abatement and scientific tracability in enforcement proceedings.

(Citation omitted.)

111. One purpose of the CWA is to move toward the zero discharge of pollutants into waters of the United States. See 33 U.S.C. §1251(a)(1), ELR STAT. FWPCA §101(a)(1) ("It is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.").

only upon proof that the permit violations are causing water quality standard violations, or some other objective harm.

Second, because the Court decided to accept the statutory injury in *Laidlaw* as cognizable under Article III and because the district court made the fact-finding that the statutory violation caused no measurable environmental degradation, the Court had to identify more clearly the limits of Article III injury in this environmental context. The Court accepted as sufficiently concrete an injury that arises because of a subjective response to illegally high pollution levels. The Court's acceptance improves our understanding of the contours of Article III injury-in-fact, because the case demonstrates that aggrievement as a result of a statutory violation is sufficient when it lessens environmental value to users of the affected resource, even if it is lessened only as a subjective matter.¹¹²

This conception of injury-in-fact is arguably both narrower and broader than the injury determined to be cognizable in *Akins*. It is narrower because in *Laidlaw* the aggrieved plaintiff had to be a proper party by showing that the subjective injury resulting from illegally high levels of pollution actually affected a particular resource used by the plaintiff. Only those using this resource would have standing to assert the subjective injury. In contrast, the class of those who might claim an injury due to nondisclosure of information under *Akins* does not seem similarly constrained: any person can claim an interest in information the disclosure of which is required by the statute and *Akins* accordingly appears broader than *Laidlaw*.¹¹³ *Laidlaw*, though, is arguably broader than *Akins* along a different axis. *Laidlaw* does not require any proof of objective, that is measurable, environmental degradation. *Laidlaw* would thus appear to permit any person with a proper interest in a resource affected by pollution levels that are illegally high as a result of defendant's statutory violations to show injury-in-fact as long as the person feels injured by that higher level of pollution. This aspect of *Laidlaw* may be seen as broader than *Akins*, because the injury-in-fact in *Akins* was grounded on a deprivation of actual information claimed to be important to voting. Thus, *Akins* defines a largely unbounded class of persons who would be able to claim injury, while *Laidlaw* defines actual injury in a way that appears unbounded once a proper party demonstrates a statutory violation.

Redressability in Citizen Suit Cases

Unlike the injury-in-fact context, where the recent *Akins* precedent was available to help the plaintiff's claim for standing, recent precedent in the redressability context was

112. In some cases, proof of a statutory violation may necessitate proof of actual harm to the environment. For example, a plaintiff may bring a citizen suit based on a claim that the defendant's discharge of pollutants has caused a violation of state water quality standards, when compliance with water quality standards is a condition of the defendant's NPDES permit. For a discussion of the statutory permissibility of such citizen suits, see Michael P. Healy, *Still Dirty After Twenty-Five Years: Water Quality Standard Enforcement and the Availability of Citizen Suits*, 24 *ECOLOGICAL Q.* 393 (1997). In that circumstance, proof of the statutory violation would be sufficient for Article III injury without any need to rely on subjective perceptions.

113. The degree to which the *Laidlaw* result is bounded in this respect depends on the environmental medium affected by the unlawful pollution. The air medium is, for example, far less bounded than a river. See *infra* note 126.

far less favorable. The Court in *Steel Co.* had only recently relied on a lack of redressability to hold that there was no standing when the plaintiff was complaining about past violations of an environmental reporting statute.¹¹⁴ In particular, the Court had concluded that payment of civil penalties to the federal fisc would not redress the plaintiff's injury by giving them psychic satisfaction.¹¹⁵

Perhaps because the plaintiff in *Steel Co.* had not claimed that there was a likelihood of future statutory violations given the company's prior failures to submit the required reports, the *Steel Co.* Court never specifically rejected the argument that civil penalties were sufficient redress due to the deterrence of future violations.¹¹⁶ The factual context of the claim in *Laidlaw* differed significantly from *Steel Co.* in this regard. Because of the convergence of the Court's statutory decision in *Gwaltney* that a CWA citizen suit is forward looking with the mootness doctrine, which provides that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur,"¹¹⁷ the *Laidlaw* plaintiffs had a live claim based on the violations at the time the claim was filed unless the defendant met its "formidable burden" of showing that permit violations would not recur in the future. It was in this context of the reasonable threat that future injuries would result from permit violations that the *Laidlaw* Court considered whether civil penalties offered sufficient redress for the plaintiffs.¹¹⁸

In this context, the Court thought it straightforward that penalties provide reasonable deterrence against future violations and accordingly redress injuries that result from violations:

It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal

114. *Steel Co.* is discussed *supra* at notes 65-75 and accompanying text.

115. See *supra* note 74 and accompanying text.

116. Justice Scalia disagreed with this reading of *Steel Co.*, and he contended, when dissenting in *Laidlaw*, that *Steel Co.* had decided the redress question. See 504 U.S. at 715, 30 ELR at 20253 ("Only last Term, we held that such penalties do not redress any injury a citizen plaintiff has suffered from past violations.")

117. 120 S. Ct. at 709, 30 ELR at 20250 (citation omitted). The Court explained in this regard that "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Id.* This greater willingness to permit resolution of a pending case than to accept a case at the outset reflects in part the value of judicial efficiency:

Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal.

Id. at 710, 30 ELR at 20250.

118. This contextual difference was the ground on which the *Laidlaw* Court distinguished *Steel Co.* See *Laidlaw*, 120 S. Ct. at 708, 30 ELR at 20249-50:

In short, *Steel Co.* held that private plaintiffs, unlike the Federal Government, may not sue to assess penalties for wholly past violations, but our decision in that case did not reach the issue of standing to seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future if undeterred.

(Footnote omitted.)

conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. To the extent that they encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.¹¹⁹

In addition to relying on the inherent plausibility of the deterrent effect of penalties, the Court supported its conclusion of deterrent effect by reference to previous decisions of the Court.¹²⁰ Perhaps more importantly in the context of its conclusion that Article III standing was present, the Court twice relied on Congress' own determination that the civil penalties available under the CWA would deter future violations.¹²¹ The *Laidlaw* decision thereby built upon the Court's approach in *Akins* and the analysis of injury-in-fact in *Laidlaw* itself, which followed Congress' lead in identifying an injury cognizable under Article III, by relying on a congressional determination of deterrence to find constitutionally adequate redress.¹²² The *Laidlaw* Court thus effectively held that, by both providing that civil penalties are available in the forward-looking CWA citizen suit and finding that civil penalties deter future violations, Congress has provided at least the peppercorn of redress that the Court found lacking in *Steel Co.*¹²³ Finally, the Court supported its

intuitive view that penalties would provide redress by relying on the fact that the district court had factored the deterrent effect of the penalty on *Laidlaw* when it fixed the proper amount of *Laidlaw's* civil penalty.¹²⁴

For the Court, therefore, this was the "ordinary case" in which penalties would be reasonably expected to yield deterrence of future violations that would give rise to injury-in-fact to the plaintiff.¹²⁵

Conclusion

All told when read in the light of recent standing cases, *Laidlaw* is very much a clarification of how that law applies in the context of likely future violations of statutory standards intended to protect against pollution of the environment. The case does not establish new doctrine, but rather extends the *Akins* rationale to define a cognizable injury-in-fact to the context of environmental injury. The case also confirms the Court's property-rule paradigm for identifying environmental injury, so that measurable degradation in environmental or health quality is not necessary to demonstrate injury-in-fact. *Laidlaw's* effect therefore is to focus claimants in environmental citizen suits on demonstrating that they are proper parties by showing a real interest in the resource or environmental amenity being affected by the

119. *Id.* at 706-07, 30 ELR at 20249.

120. *See id.* at 706, 30 ELR at 20249 ("We have recognized on numerous occasions that 'all civil penalties have some deterrent effect.'") (citations omitted).

121. *See id.* at 707, 30 ELR at 20249:

Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance by limiting the defendant's economic incentive to delay its attainment of permit limits; they also deter future violations. This congressional determination warrants judicial attention and respect.

[I]t is reasonable for Congress to conclude that an actual award of civil penalties does in fact bring with it a significant quantum of deterrence over and above what is achieved by the mere prospect of such penalties. A would-be polluter may or may not be dissuaded by the existence of a remedy on the books, but a defendant once hit in its pocketbook will surely think twice before polluting again.

Id. (footnote omitted).

122. For Justice Scalia in dissent, this extension of the *Akins* rationale meant that the Court's improper allowance of injury-in-fact based on a generalized grievance in *Akins* was now extended to an unconstitutional recognition of generalized redress. *Id.* at 716, 30 ELR at 20253 (Scalia, J., dissenting):

Just as a "generalized grievance" that affects the entire citizenry cannot satisfy the injury-in-fact requirement even though it aggrieves the plaintiff along with everyone else, so also a generalized remedy that deters all future unlawful activity against all persons cannot satisfy the remediation requirement, even though it deters (among other things) repetition of this particular unlawful activity against these particular plaintiffs.

(Citation omitted.)

123. *See supra* note 75 and accompanying text. Justice Scalia was adamant in his view that Congress has no authority under the constitutional structure to make a civil penalty serve the purpose of the peppercorn:

In seeking to overturn that tradition by giving an individual plaintiff the power to invoke a public remedy, Congress has done precisely what we have said it cannot do: convert an

"undifferentiated public interest" into an "individual right" vindicable in the courts. The sort of scattershot redress approved today makes nonsense of our statement in *Schlesinger v. Reservists Comm. to Stop the War* that the requirement of injury in fact "insures the framing of relief no broader than required by the precise facts." A claim of particularized future injury has today been made the vehicle for pursuing generalized penalties for past violations, and a threshold showing of injury in fact has become a lever that will move the world.

120 S. Ct. at 716-17, 30 ELR at 20253 (citations omitted); *see also id.* at 717, 30 ELR at 20253 ("[I]t is my view that a plaintiff's desire to benefit from the deterrent effect of a public penalty for past conduct can never suffice to establish a case or controversy of the sort known to our law.")

124. *Id.* at 707, 30 ELR at 20249:

Here, the civil penalties sought by FOE carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress FOE's injuries by abating current violations and preventing future ones—as the District Court reasonably found when it assessed a penalty of \$405,800.

(Citation omitted.)

125. *See id.*

We recognize that there may be a point at which the deterrent effect of a claim for civil penalties becomes so insubstantial or so remote that it cannot support citizen standing. The fact that this vanishing point is not easy to ascertain does not detract from the deterrent power of such penalties in the ordinary case.

Justice Scalia ridiculed the idea that the case could be viewed as an ordinary one for purposes of the value of deterrence for the plaintiff. *Id.* at 718, 30 ELR at 20254 (Scalia, J., dissenting):

[I]f this case is, as the Court suggests, within the central core of "deterrence" standing, it is impossible to imagine what the "outer limits" could possibly be. The Court's expressed reluctance to define those "outer limits" serves only to disguise the fact that it has promulgated a revolutionary new doctrine of standing that will permit the entire body of public civil penalties to be handed over to enforcement by private interests.

statutory violation.¹²⁶ Finally as to the Article III redressability requirement, *Laidlaw* wholly marginalizes

126. The limits of the Court's willingness to find injury-in-fact in such suits may be more likely to be identified in citizen suits under the Clean Air Act, 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618, where the affected resource is far less cabined than a waterway and the permit violations have arguable effects in areas that are far distant from where the source is located. Regarding the uncabined nature of air quality impacts, see P. WILLIAMSON & P.S. LISS, *Understanding the Earth System, in POLICY MAKING IN AN ERA OF GLOBAL ENVIRONMENTAL CHANGE* 23 (R.E. Munn, J.W.M. la Riviere & N. van Lookeren Campagne eds., 1996):

In every breath we take there are around 10^{19} atoms of oxygen; it is therefore a statistical near-certainty that at least one of these oxygen atoms has been previously breathed by Confucius—and another by Albert Einstein, or anyone else who lived more than a few decades ago (to allow for worldwide mixing within the atmosphere).

Cf. Battle over Older Coal Plants Widens as States File Their Own Clean Air Act Suits, 1999 UTL ENV'T REP. (McGraw-Hill), Dec. 3, 1999, at 1 (describing actions brought by northeastern states claiming violations by midwestern power plants of new source permit re-

Steel Co. by concluding that the civil penalties that Congress provides in citizen suits offer sufficient redress by deterring future violations (that must be threatened in any event to avoid mootness).¹²⁷

quirements based on ozone impacts in the northeastern states). The *SCRAP* Court suggested that there may be pragmatic limits on standing when an action with an allegedly unlawful environmental impact has an exceptionally widespread impact, at least when the impact is "less direct and perceptible." See *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 3 ELR 20536 (1973). *Cf. Arkansas v. Oklahoma*, 503 U.S. 91, 112 (1992) (upholding EPA interpretation of CWA regulations requiring a showing that a source's discharge caused a "detectable change in water quality" 39 miles downstream before more stringent water quality-based limitations would be required).

127. The *Laidlaw* Court thereby limited the effect of *Steel Co.* to the narrow circumstances of a citizen suit based on a wholly past violation. As a statutory matter, the Court had, of course, previously foreclosed such actions under the CWA. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 64-65, 18 ELR 20142, 20145 (1987).

**FRIENDS OF THE EARTH,
INCORPORATED, et
al., Petitioners,**

v.

**LIDLAW ENVIRONMENTAL
SERVICES (TOC), INC.**

No. 98-822.

Argued Oct. 12, 1999.

Decided Jan. 12, 2000.

Environmental groups brought action pursuant to citizen suit provision of Clean Water Act (CWA) against holder of National Pollutant Discharge Elimination System (NPDES) permit, alleging, inter alia, violation of mercury discharge limits, and seeking declaratory and injunctive relief, civil penalties, costs, and attorney fees. The United States District Court for the District of South Carolina, Joseph F. Anderson, Jr., J., 956 F.Supp. 588, found numerous permit violations, imposed penalty of \$405,800, and denied request for declaratory and injunctive relief. Appeal was taken. The Court of Appeals for the

Fourth Circuit, 149 F.3d 303, vacated and remanded with instructions to dismiss. Certiorari was granted. The Supreme Court, Justice Ginsburg, held that: (1) groups had standing to bring citizen suit seeking both injunctive relief and civil penalties; (2) action was not rendered moot by permit holder's compliance with permit limits or its shut down of facility, absent showing that violations could not reasonably be expected to recur; and (3) Supreme Court would not address groups' request for attorneys' fees.

Judgment of Court of Appeals reversed and remanded.

Justice Stevens filed concurring opinion.

Justice Kennedy filed concurring opinion.

Justice Scalia filed dissenting opinion in which Justice Thomas joined.

1. Health and Environment ⇨25.15(4.1)

Purpose of notice to the alleged violator, under Clean Water Act's citizen suit provision, is to give violator an opportunity to bring itself into complete compliance with the Act and thus render unnecessary a citizen suit. Federal Water Pollution Control Act, § 505(a), (b)(1)(A), (g), as amended, 33 U.S.C.A. §§ 1365(a), (b)(1)(A), (g).

2. Health and Environment ⇨25.15(4.1)

Citizens lack statutory standing under Clean Water Act's citizen suit provision to sue for violations that have ceased by the time the complaint is filed. Federal Water Pollution Control Act, § 505(a), as amended, 33 U.S.C.A. § 1365(a).

3. Federal Civil Procedure ⇨103.2, 103.3

To satisfy Article III's standing requirements, a plaintiff must show: (1) it has suffered an injury in fact that is concrete and particularized and is actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3)

it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. U.S.C.A. Const. Art. 3, § 2, cl. 1.

4. Associations ⇨20(1)

An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. U.S.C.A. Const. Art. 3, § 2, cl. 1.

5. Health and Environment ⇨25.15(4.1)

Environmental groups alleged sufficient injury in fact to establish standing to seek injunctive relief in action against holder of National Pollutant Discharge Elimination System (NPDES) permit for alleged violation of mercury discharge limits, pursuant to citizen suit provision of Clean Water Act (CWA), even if there was no resulting injury to the environment, as group members alleged that, although they would like to use affected river for recreational purposes, they would not do so due to permit holder's alleged discharges. U.S.C.A. Const. Art. 3, § 2, cl. 1.; Federal Water Pollution Control Act, § 505(a, g), as amended, 33 U.S.C.A. § 1365(a, g).

6. Health and Environment ⇨25.15(3.3)

Environmental plaintiffs adequately allege injury in fact, for standing purposes, when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity. U.S.C.A. Const. Art. 3, § 2, cl. 1.

7. Health and Environment ⇨25.15(4.5)

Environmental groups had standing to seek civil penalties in action against holder of National Pollutant Discharge Elimination System (NPDES) permit for allegedly ongoing violation of mercury discharge limits, pursuant to citizen suit provision of Clean Water Act (CWA), even

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though such penalties are paid to government, not private plaintiffs, since penalties would encourage permit holder to discontinue current violations and deter it from committing future ones. U.S.C.A. Const. Art. 3, § 2, cl. 1.; Federal Water Pollution Control Act, § 505(a, g), as amended, 33 U.S.C.A. § 1365(a, g).

8. Federal Civil Procedure ⇐103.2

A plaintiff must demonstrate standing separately for each form of relief sought.

9. Federal Courts ⇐13.25

Neither National Pollutant Discharge Elimination System (NPDES) permit holder's substantial compliance with its permit nor its subsequent shutdown of hazardous waste incinerator facility from which it discharged pollutants rendered moot environmental groups' citizen suit, under Clean Water Act, seeking civil penalty for violation of permit's mercury discharge limits, absent clear showing that violations could not reasonably be expected to recur, notwithstanding groups' failure to appeal district court's denial of injunctive relief. Federal Water Pollution Control Act, § 505(a, g), as amended, 33 U.S.C.A. § 1365(a, g).

10. Federal Courts ⇐12.1

A defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice under the mootness doctrine; if it did, the courts would be compelled to leave the defendant free to return to his old ways.

11. Federal Courts ⇐12.1

A case might become moot based on a defendant's voluntary conduct if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur, but the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.

12. Federal Civil Procedure ⇐103.2

In a lawsuit brought to force compliance, it is the plaintiff's burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the threatened injury is certainly impending.

13. Federal Civil Procedure ⇐103.2

Federal Courts ⇐12.1

There are circumstances in which the prospect that a defendant will engage in or resume harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.

14. Federal Courts ⇐13

When a mentally disabled patient files a lawsuit challenging her confinement in a segregated institution, her postcomplaint transfer to a community-based program will not moot the action, despite the fact that she would have lacked initial standing had she filed the complaint after the transfer.

15. Federal Civil Procedure ⇐103.2

If a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum.

16. Federal Courts ⇐12.1

District courts cannot retain jurisdiction over cases in which one or both of the parties plainly lacks a continuing interest, as when the parties have settled or a plaintiff pursuing a nonsurviving claim has died, notwithstanding the sunk costs to the judicial system.

17. Health and Environment ⇐25.15(12)

Under Clean Water Act's citizen suit provision, the district court has discretion to determine which form of relief is best suited, in the particular case, to abate current violations and deter future ones. Federal Water Pollution Control Act, § 505(a), as amended, 33 U.S.C.A. § 1365(a).

18. Injunction ⇐1

A federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.

19. Health and Environment ⇐25.7(24)

Denial of injunctive relief in action brought under Clean Water Act's citizen suit provision does not necessarily mean that the district court has concluded there is no prospect of future violations for civil penalties to deter. Federal Water Pollution Control Act, § 505(a, g), as amended, 33 U.S.C.A. § 1365(a, g).

20. Federal Civil Procedure ⇐2582

Federal courts should aim to ensure the framing of relief no broader than required by the precise facts.

21. Health and Environment ⇐25.15(2.1)

A district court in a Clean Water Act citizen suit properly may conclude that an injunction would be an excessively intrusive remedy, because it could entail continuing superintendence of the permit holder's activities by a federal court, which is a process burdensome to court and permit holder alike. Federal Water Pollution Control Act, § 505(a), as amended, 33 U.S.C.A. § 1365(a).

22. Federal Courts ⇐460.1

Supreme Court would not address plaintiff's entitlement to attorneys' fees under catalyst theory, on appeal from dismissal for mootness of citizen suit under Clean Water Act, but would have district court address request for fees in the first instance, where district court had stayed time for petition for attorneys' fees until time for appeal had expired or, if either party appealed, until appeal was resolved. Federal Water Pollution Control Act, § 505(d), as amended, 33 U.S.C.A. § 1365(d).

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of

Syllabus *

Defendant-respondent Laidlaw Environmental Services (TOC), Inc., bought a facility in Roebuck, South Carolina, that included a wastewater treatment plant. Shortly thereafter, the South Carolina Department of Health and Environmental Control (DHEC), acting under the Clean Water Act (Act), 33 U.S.C. § 1342(a)(1), granted Laidlaw a National Pollutant Discharge Elimination System (NPDES) permit. The permit authorized Laidlaw to discharge treated water into the North Tyger River, but limited, among other things, the discharge of pollutants into the waterway. Laidlaw began to discharge various pollutants into the waterway; these discharges, particularly of mercury, an extremely toxic pollutant, repeatedly exceeded the limits set by the permit.

On April 10, 1992, plaintiff-petitioners Friends of the Earth and Citizens Local Environmental Action Network, Inc. (referred to collectively here, along with later joined plaintiff-petitioner Sierra Club, as "FOE"), notified Laidlaw of their intention to file a citizen suit against it under the Act, 33 U.S.C. § 1365(a), after the expiration of the requisite 60-day notice period. DHEC acceded to Laidlaw's request to file a lawsuit against the company. On the last day before FOE's 60-day notice period expired, DHEC and Laidlaw reached a settlement requiring Laidlaw to pay \$100,000 in civil penalties and to make "every effort" to comply with its permit obligations.

On June 12, 1992, FOE filed this citizen suit against Laidlaw, alleging noncompliance with the NPDES permit and seeking declaratory and injunctive relief and an award of civil penalties. Laidlaw moved for summary judgment on the ground that FOE lacked Article III standing to bring the lawsuit. After examining affidavits and deposition testimony from members of the plaintiff organizations, the District

the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Court denied the motion, finding that the plaintiffs had standing. The District Court also denied Laidlaw's motion to dismiss on the ground that the citizen suit was barred under § 1365(b)(1)(B) by DHEC's prior action against the company. After FOE initiated this suit, but before the District Court rendered judgment on January 22, 1997, Laidlaw violated the mercury discharge limitation in its permit 13 times and committed 13 monitoring and 10 reporting violations. In issuing its judgment, the District Court found that Laidlaw had gained a total economic benefit of \$1,092,581 as a result of its extended period of noncompliance with the permit's mercury discharge limit; nevertheless, the court concluded that a civil penalty of \$405,800 was appropriate. In particular, the District Court found that the judgment's "total deterrent effect" would be adequate to forestall future violations, given that Laidlaw would have to reimburse the plaintiffs for a significant amount of legal fees and had itself incurred significant legal expenses. The court declined to order injunctive relief because Laidlaw, after the lawsuit began, had achieved substantial compliance with the terms of its permit.

FOE appealed as to the amount of the District Court's civil penalty judgment, but did not appeal the denial of declaratory or injunctive relief. The Fourth Circuit vacated the District Court's order and remanded with instructions to dismiss the action. Assuming, *arguendo*, that FOE initially had standing, the appellate court held that the case had become moot once Laidlaw complied with the terms of its permit and the plaintiffs failed to appeal the denial of equitable relief. Citing *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210, the court reasoned that the only remedy currently available to FOE, civil penalties payable to the Government, would not redress any injury FOE had suffered. The court added that FOE's failure to obtain relief on the merits precluded re-

covery of attorneys' fees or costs because such an award is available only to a "prevailing or substantially prevailing party" under § 1365(d). According to Laidlaw, the entire Roebuck facility has since been permanently closed, dismantled, and put up for sale, and all discharges from the facility have permanently ceased.

Held: The Fourth Circuit erred in concluding that a citizen suitor's claim for civil penalties must be dismissed as moot when the defendant, after commencement of the litigation, has come into compliance with its NPDES permit. Pp. 703-712.

(a) The Constitution's case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins both standing and mootness doctrine, but the two inquiries differ in crucial respects. Because the Fourth Circuit was persuaded that the case had become moot, it simply assumed that FOE had initial standing. See *Arizonaans for Official English v. Arizona*, 520 U.S. 43, 66-67, 117 S.Ct. 1055, 137 L.Ed.2d 170. But because this Court concludes that the Court of Appeals erred as to mootness, this Court has an obligation to assure itself that FOE had Article III standing at the outset of the litigation. Pp. 703-704.

(b) FOE had Article III standing to bring this action. This Court has held that to satisfy Article III's standing requirements, a plaintiff must show "injury in fact," causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351. An association has standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383. The relevant showing for Article III standing is not injury to the environment but injury to the plaintiff. To

insist on the former rather than the latter is to raise the standing hurdle higher than the necessary showing for success on the merits in a citizen's NPDES permit enforcement suit. Here, injury in fact was adequately documented by the affidavits and testimony of FOE members asserting that Laidlaw's pollutant discharges, and the affiants' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 735, 92 S.Ct. 1361, 31 L.Ed.2d 636. These submissions present dispositively more than the mere "general averments" and "conclusory allegations" found inadequate in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695, or the "some day" intentions" to visit endangered species halfway around the world held insufficient in *Defenders of Wildlife*, 504 U.S., at 564, 112 S.Ct. 2130. Pp. 704-706.

(c) Laidlaw argues that FOE lacked standing to seek civil penalties payable to the Government, because such penalties offer no redress to citizen plaintiffs. For a plaintiff who is injured or threatened with injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. Insofar as they encourage defendants to discontinue current violations and deter future ones, they afford redress to citizen plaintiffs injured or threatened with injury as a result of ongoing unlawful conduct. The Court need not explore the outer limits of the principle that civil penalties provide sufficient deterrence to support redressability, because the civil penalties sought here carried a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress FOE's injuries—as the District Court reasonably found when it assessed a penalty of \$405,800. *Steel Co.* is not to the contrary. That case held that private plaintiffs may

not sue to assess penalties for wholly past violations, 523 U.S., at 106-107, 118 S.Ct. 1003, but did not address standing to seek penalties for violations ongoing at the time of the complaint that could continue into the future if undeterred, see *id.*, at 108, 118 S.Ct. 1003. Pp. 706-708.

(d) FOE's civil penalties claim did not automatically become moot once the company came into substantial compliance with its permit. A defendant's voluntary cessation of a challenged practice ordinarily does not deprive a federal court of its power to determine the legality of the practice. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152. If it did, courts would be compelled to leave the defendant free to return to its old ways. Thus, the standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344. The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness. *Ibid.* The Court of Appeals incorrectly conflated this Court's case law on initial standing, see, e.g., *Steel Co.*, with its case law on mootness, see, e.g., *City of Mesquite*. Such confusion is understandable, given this Court's repeated description of mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." E.g., *Arizonaans*, 520 U.S., at 68, n. 22, 117 S.Ct. 1055. Careful reflection, however, reveals that this description of mootness is not comprehensive. For example, a defendant claiming that its voluntary compliance moots a case bears a formidable burden. By contrast, it is the plaintiff's burden, in a

lawsuit brought to force compliance, to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue and that the threatened injury is certainly impending. *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135. The plain lesson is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness. Further, if mootness were simply "standing set in a time frame," the exception to mootness for acts that are "capable of repetition, yet evading review" could not exist. See, e.g., *Olmstead v. L.C.*, 527 U.S. —, —, n. 6, 119 S.Ct. 2176, 2184, n. 6, 144 L.Ed.2d 540. Standing admits of no similar exception; if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum. See, e.g., *Steel Co.*, 523 U.S., at 109, 118 S.Ct. 1003. Standing doctrine ensures, among other things, that the resources of the federal courts are devoted to disputes in which the parties have a concrete stake. Yet by the time mootness is an issue, abandonment of the case may prove more wasteful than frugal. Courts have no license to retain jurisdiction over cases in which one or both of the parties plainly lacks a continuing interest, see, e.g., *Arizonans*, 520 U.S., at 67, 117 S.Ct. 1055, but the foregoing examples highlight an important difference between the two doctrines, see generally *Honig v. Doe*, 484 U.S. 305, 329-332, 108 S.Ct. 592, 98 L.Ed.2d 686 (REHNQUIST, C. J., concurring).

Laidlaw's argument that FOE doomed its own civil penalty claim to mootness by failing to appeal the denial of injunctive relief misconceives the statutory scheme. Under § 1365(a), the district court has discretion to determine which form of relief is best suited to abate current violations and deter future ones. See *Weinberger v.*

Romero-Barcelo, 456 U.S. 305, 313, 102 S.Ct. 1798, 72 L.Ed.2d 91. Denial of injunctive relief does not necessarily mean that the district court has concluded there is no prospect of future violations to deter. Indeed, it meant no such thing in this case; the District Court denied injunctive relief, but expressly based its award of civil penalties on the need for deterrence. A district court properly may conclude that an injunction would be too intrusive, because it could entail continuing and burdensome superintendence of the permit holder's activities by a federal court. See *City of Mesquite*, 455 U.S., at 289, 102 S.Ct. 1070. Both Laidlaw's permit compliance and the facility closure might moot this case, but only if one or the other event made it absolutely clear that violations could not reasonably be expected to recur. *Concentrated Phosphate Export Assn.*, 393 U.S., at 203, 89 S.Ct. 361. These are disputed factual matters that have not been aired in the lower courts; they remain open for consideration on remand. Pp. 708-711.

(e) This Court does not resolve FOE's argument that it is entitled to attorneys' fees on the theory that a plaintiff can be a "prevailing party" under § 1365(d) if it was the "catalyst" that triggered a favorable outcome. Although the Circuits have divided as to the continuing validity of the catalyst theory following *Farrar v. Hobby*, 506 U.S. 103, 118 S.Ct. 566, 121 L.Ed.2d 494, it would be premature for this Court to address the question here. The District Court stayed the time for a petition for attorneys' fees until the time for appeal had expired or until any appeal was resolved. Thus, when the Fourth Circuit addressed the availability of counsel fees, no order was before it either denying or awarding fees. It is for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees. Pp. 711-712.

149 F.3d 303, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR,

KENNEDY, SOUTER, and BREYER, JJ., joined. STEVENS, J., and KENNEDY, J., filed concurring opinions. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined.

Bruce J. Terris, Washington, DC, for petitioners.

Jeffrey P. Minear, Washington, DC, for United States as amicus curiae, by special leave of the Court.

Donald A. Cockrill, Greenville, SC, for respondent.

For U.S. Supreme Court briefs, see:

1999 WL 311764 (Pet.Brief)

1999 WL 513835 (Resp.Brief)

1999 WL 623917 (Reply.Brief)

Justice GINSBURG delivered the opinion of the Court.

This case presents an important question concerning the operation of the citizen-suit provisions of the Clean Water Act. Congress authorized the federal district courts to entertain Clean Water Act suits initiated by "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. §§ 1365(a), (g). To impel future compliance with the Act, a district court may prescribe injunctive relief in such a suit; additionally or alternatively, the court may impose civil penalties payable to the United States Treasury. § 1365(a). In the Clean Water Act citizen suit now before us, the District Court determined that injunctive relief was inappropriate because the defendant, after the institution of the litigation, achieved substantial compliance with the terms of its discharge permit. 956 F.Supp. 588, 611 (D.S.C.1997). The court did, however, assess a civil penalty of \$405,800. *Id.*, at 610. The "total deterrent effect" of the penalty would be adequate to forestall future violations, the court reasoned, taking into account that the defendant "will be required to reimburse plaintiffs for a significant amount of legal fees and has, it-

self, incurred significant legal expenses." *Id.*, at 610-611.

The Court of Appeals vacated the District Court's order. 149 F.3d 303 (C.A.4 1998). The case became moot, the appellate court declared, once the defendant fully complied with the terms of its permit and the plaintiff failed to appeal the denial of equitable relief. "[C]ivil penalties payable to the government," the Court of Appeals stated, "would not redress any injury Plaintiffs have suffered." *Id.*, at 307. Nor were attorneys' fees in order, the Court of Appeals noted, because absent relief on the merits, plaintiffs could not qualify as prevailing parties. *Id.*, at 307, n. 5.

We reverse the judgment of the Court of Appeals. The appellate court erred in concluding that a citizen suitor's claim for civil penalties must be dismissed as moot when the defendant, albeit after commencement of the litigation, has come into compliance. In directing dismissal of the suit on grounds of mootness, the Court of Appeals incorrectly conflated our case law on initial standing to bring suit, see, e.g., *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), with our case law on post-commencement mootness, see, e.g., *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982). A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case. The Court of Appeals also misperceived the remedial potential of civil penalties. Such penalties may serve, as an alternative to an injunction, to deter future violations and thereby redress the injuries that prompted a citizen suitor to commence litigation.

I

A

In 1972, Congress enacted the Clean Water Act (Act), also known as the Federal Water Pollution Control Act, 86 Stat.

816, as amended, 33 U.S.C. § 1251 *et seq.* Section 402 of the Act, 33 U.S.C. § 1342, provides for the issuance, by the Administrator of the Environmental Protection Agency (EPA) or by authorized States, of National Pollutant Discharge Elimination System (NPDES) permits. NPDES permits impose limitations on the discharge of pollutants, and establish related monitoring and reporting requirements, in order to improve the cleanliness and safety of the Nation's waters. Noncompliance with a permit constitutes a violation of the Act. § 1342(h).

[1, 2] Under § 505(a) of the Act, a suit to enforce any limitation in an NPDES permit may be brought by any "citizen," defined as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. §§ 1365(a), (g). Sixty days before initiating a citizen suit; however, the would-be plaintiff must give notice of the alleged violation to the EPA, the State in which the alleged violation occurred, and the alleged violator. § 1365(b)(1)(A). "[T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus . . . render unnecessary a citizen suit." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). Accordingly, we have held that citizens lack statutory standing under § 505(a) to sue for violations that have ceased by the time the complaint is filed. *Id.*, at 56-63, 108 S.Ct. 376. The Act also bars a citizen from suing if the EPA or the State has already commenced, and is "diligently prosecuting," an enforcement action. 33 U.S.C. § 1365(b)(1)(B).

The Act authorizes district courts in citizen-suit proceedings to enter injunctions and to assess civil penalties, which are payable to the United States Treasury. § 1365(a). In determining the amount of any civil penalty, the district court must take into account "the seriousness of the violation or violations, the economic benefit

(if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." § 1319(d). In addition, the court "may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." § 1365(d).

B

In 1986, defendant-respondent Laidlaw Environmental Services (TOC), Inc., bought a hazardous waste incinerator facility in Roebuck, South Carolina, that included a wastewater treatment plant. (The company has since changed its name to Safety-Kleen (Roebuck), Inc., but for simplicity we will refer to it as "Laidlaw" throughout.) Shortly after Laidlaw acquired the facility, the South Carolina Department of Health and Environmental Control (DHEC), acting under 33 U.S.C. § 1342(a)(1), granted Laidlaw an NPDES permit authorizing the company to discharge treated water into the North Tyger River. The permit, which became effective on January 1, 1987, placed limits on Laidlaw's discharge of several pollutants into the river, including—of particular relevance to this case—mercury, an extremely toxic pollutant. The permit also regulated the flow, temperature, toxicity, and pH of the effluent from the facility, and imposed monitoring and reporting obligations.

Once it received its permit, Laidlaw began to discharge various pollutants into the waterway; repeatedly, Laidlaw's discharges exceeded the limits set by the permit. In particular, despite experimenting with several technological fixes, Laidlaw consistently failed to meet the permit's stringent 1.3 ppb (parts per billion) daily average limit on mercury discharges. The District Court later found that Laidlaw

had violated the mercury limits on 489 occasions between 1987 and 1995. 956 F.Supp., at 613-621.

On April 10, 1992, plaintiff-petitioners Friends of the Earth (FOE) and Citizens Local Environmental Action Network, Inc. (CLEAN) (referred to collectively in this opinion, together with later joined plaintiff-petitioner Sierra Club, as "FOE") took the preliminary step necessary to the institution of litigation. They sent a letter to Laidlaw notifying the company of their intention to file a citizen suit against it under § 505(a) of the Act after the expiration of the requisite 60-day notice period, *i.e.*, on or after June 10, 1992. Laidlaw's lawyer then contacted DHEC to ask whether DHEC would consider filing a lawsuit against Laidlaw. The District Court later found that Laidlaw's reason for requesting that DHEC file a lawsuit against it was to bar FOE's proposed citizen suit through the operation of 33 U.S.C. § 1365(b)(1)(B). 890 F.Supp. 470, 478 (D.S.C.1995). DHEC agreed to file a lawsuit against Laidlaw; the company's lawyer then drafted the complaint for DHEC and paid the filing fee. On June 9, 1992, the last day before FOE's 60-day notice period expired, DHEC and Laidlaw reached a settlement requiring Laidlaw to pay \$100,000 in civil penalties and to make "every effort" to comply with its permit obligations. 890 F.Supp., at 479-481.

On June 12, 1992, FOE filed this citizen suit against Laidlaw under § 505(a) of the Act, alleging noncompliance with the NPDES permit and seeking declaratory and injunctive relief and an award of civil penalties. Laidlaw moved for summary judgment on the ground that FOE had failed to present evidence demonstrating injury in fact, and therefore lacked Article III standing to bring the lawsuit. Record,

1. The District Court noted that "Laidlaw drafted the state-court complaint and settlement agreement, filed the lawsuit against itself, and paid the filing fee." 890 F.Supp., at 489. Further, "the settlement agreement between DHEC and Laidlaw was entered into with unusual haste, without giving the Plain-

Doc. No. 43. In opposition to this motion, FOE submitted affidavits and deposition testimony from members of the plaintiff organizations. Record, Doc. No. 71 (Exhs. 41-51). The record before the District Court also included affidavits from the organizations' members submitted by FOE in support of an earlier motion for preliminary injunctive relief. Record, Doc. No. 21 (Exhs. 5-10). After examining this evidence, the District Court denied Laidlaw's summary judgment motion, finding—albeit "by the very slimmest of margins"—that FOE had standing to bring the suit. App. in No. 97-1246(C.A.4), pp. 207-208 (Tr. of Hearing 39-40 (June 30, 1993)).

Laidlaw also moved to dismiss the action on the ground that the citizen suit was barred under 33 U.S.C. § 1365(b)(1)(B) by DHEC's prior action against the company. The United States, appearing as *amicus curiae*, joined FOE in opposing the motion. After an extensive analysis of the Laidlaw-DHEC settlement and the circumstances under which it was reached, the District Court held that DHEC's action against Laidlaw had not been "diligently prosecuted"; consequently, the court allowed FOE's citizen suit to proceed. 890 F.Supp., at 499.¹ The record indicates that after FOE initiated the suit, but before the District Court rendered judgment, Laidlaw violated the mercury discharge limitation in its permit 13 times. 956 F.Supp., at 621. The District Court also found that Laidlaw had committed 13 monitoring and 10 reporting violations during this period. *Id.*, at 601. The last recorded mercury discharge violation occurred in January 1995, long after the complaint was filed but about two years before judgment was rendered. *Id.*, at 621.

tiffs the opportunity to intervene." *Ibid.* The court found "most persuasive" the fact that "in imposing the civil penalty of \$100,000 against Laidlaw, DHEC failed to recover, or even to calculate, the economic benefit that Laidlaw received by not complying with its permit." *Id.*, at 491.

On January 22, 1997, the District Court issued its judgment. 956 F.Supp. 588 (D.S.C.1997). It found that Laidlaw had gained a total economic benefit of \$1,092,581 as a result of its extended period of noncompliance with the mercury discharge limit in its permit. *Id.*, at 603. The court concluded, however, that a civil penalty of \$405,800 was adequate in light of the guiding factors listed in 33 U.S.C. § 1319(d). 956 F.Supp., at 610. In particular, the District Court stated that the lesser penalty was appropriate taking into account the judgment's "total deterrent effect." In reaching this determination, the court "considered that Laidlaw will be required to reimburse plaintiffs for a significant amount of legal fees." *Id.*, at 610-611. The court declined to grant FOE's request for injunctive relief, stating that an injunction was inappropriate because "Laidlaw has been in substantial compliance with all parameters in its NPDES permit since at least August 1992." *Id.*, at 611.

FOE appealed the District Court's civil penalty judgment, arguing that the penalty was inadequate, but did not appeal the denial of declaratory or injunctive relief. Laidlaw cross-appealed, arguing, among other things, that FOE lacked standing to bring the suit and that DHEC's action qualified as a diligent prosecution precluding FOE's litigation. The United States continued to participate as *amicus curiae* in support of FOE.

On July 16, 1998, the Court of Appeals for the Fourth Circuit issued its judgment. 149 F.3d 303. The Court of Appeals assumed without deciding that FOE initially had standing to bring the action, *id.*, at 306, n. 3, but went on to hold that the case had become moot. The appellate court stated, first, that the elements of Article III standing—injury, causation, and redressability—must persist at every stage of review, or else the action becomes moot. *Id.*, at 306. Citing our decision in *Steel Co.*, the Court of Appeals reasoned that the case had become moot because "the only remedy currently available to

[FOE]—civil penalties payable to the government—would not redress any injury [FOE has] suffered." *Id.*, at 306-307. The court therefore vacated the District Court's order and remanded with instructions to dismiss the action. In a footnote, the Court of Appeals added that FOE's "failure to obtain relief on the merits of [its] claims precludes any recovery of attorneys' fees or other litigation costs because such an award is available only to a 'prevailing or substantially prevailing party.'" *Id.*, at 307, n. 5 (quoting 33 U.S.C. § 1365(d)).

According to Laidlaw, after the Court of Appeals issued its decision but before this Court granted certiorari, the entire incinerator facility in Roebuck was permanently closed, dismantled, and put up for sale, and all discharges from the facility permanently ceased. Respondent's Suggestion of Mootness 3.

We granted certiorari, 525 U.S. 1176, 119 S.Ct. 1111, 143 L.Ed.2d 107 (1999), to resolve the inconsistency between the Fourth Circuit's decision in this case and the decisions of several other Courts of Appeals, which have held that a defendant's compliance with its permit after the commencement of litigation does not moot claims for civil penalties under the Act. See, e.g., *Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (C.A.7), cert. denied, 522 U.S. 981, 118 S.Ct. 442, 139 L.Ed.2d 379 (1997); *Natural Resources Defense Council, Inc. v. Texaco Rfg. and Mktg., Inc.*, 2 F.3d 493, 503-504 (C.A.3 1993); *Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp.*, 993 F.2d 1017, 1020-1021 (C.A.2 1993); *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1135-1136 (C.A.11 1990).

II

A

The Constitution's case-or-controversy limitation on federal judicial authority, Art.

III, § 2, underpins both our standing and our mootness jurisprudence, but the two inquiries differ in respects critical to the proper resolution of this case, so we address them separately. Because the Court of Appeals was persuaded that the case had become moot and so held, it simply assumed without deciding that FOE had initial standing. See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66-67, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (court may assume without deciding that standing exists in order to analyze mootness). But because we hold that the Court of Appeals erred in declaring the case moot, we have an obligation to assure ourselves that FOE had Article III standing at the outset of the litigation. We therefore address the question of standing before turning to mootness.

[3, 4] In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), we held that, to satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

[5] Laidlaw contends first that FOE lacked standing from the outset even to seek injunctive relief, because the plaintiff organizations failed to show that any of their members had sustained or faced the threat of any "injury in fact" from Laid-

law's activities. In support of this contention Laidlaw points to the District Court's finding, made in the course of setting the penalty amount, that there had been "no demonstrated proof of harm to the environment" from Laidlaw's mercury discharge violations. 956 F.Supp., at 602; see also *ibid.* ("[T]he NPDES permit violations at issue in this citizen suit did not result in any health risk or environmental harm.").

The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry (as the dissent in essence does, *post*, at 713-714) is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit. Focusing properly on injury to the plaintiff, the District Court found that FOE had demonstrated sufficient injury to establish standing. App. in No. 97-1246(CA4), pp. 207-208 (Tr. of Hearing 39-40 (June 30, 1993)). For example, FOE member Kenneth Lee Curtis averred in affidavits that he lived a half-mile from Laidlaw's facility; that he occasionally drove over the North Tyger River, and that it looked and smelled polluted; and that he would like to fish, camp, swim, and picnic in and near the river between 3 and 15 miles downstream from the facility, as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by Laidlaw's discharges. Record, Doc. No. 71 (Exhs. 41, 42). Curtis reaffirmed these statements in extensive deposition testimony. For example, he testified that he would like to fish in the river at a specific spot he used as a boy, but that he would not do so now because of his concerns about Laidlaw's discharges. *Ibid.* (Exh. 43, at 52-53; Exh. 44, at 33).

Other members presented evidence to similar effect. CLEAN member Angela Patterson attested that she lived two miles from the facility; that before Laidlaw op-

erated the facility, she picnicked, walked, birdwatched, and waded in and along the North Tyger River because of the natural beauty of the area; that she no longer engaged in these activities in or near the river because she was concerned about harmful effects from discharged pollutants; and that she and her husband would like to purchase a home near the river but did not intend to do so, in part because of Laidlaw's discharges. Record, Doc. No. 21 (Exh. 10). CLEAN member Judy Pruitt averred that she lived one-quarter mile from Laidlaw's facility and would like to fish, hike, and picnic along the North Tyger River, but has refrained from those activities because of the discharges. *Ibid.* (Exh. 7). FOE member Linda Moore attested that she lived 20 miles from Roebuck, and would use the North Tyger River south of Roebuck and the land surrounding it for recreational purposes were she not concerned that the water contained harmful pollutants. Record, Doc. No. 71 (Exhs. 45, 46). In her deposition, Moore testified at length that she would hike, picnic, camp, swim, boat, and drive near or in the river were it not for her concerns about illegal discharges. *Ibid.* (Exh. 48, at 29, 36-37, 62-63, 72). CLEAN member Gail Lee attested that her home, which is near Laidlaw's facility, had a lower value than similar homes located further from the facility, and that she believed the pollutant discharges accounted for some of the discrepancy. Record, Doc. No. 21 (Exh. 9). Sierra Club member Norman Sharp averred that he had canoed approximately 40 miles downstream of the Laidlaw facility and would like to canoe in the North Tyger River closer to Laidlaw's discharge point, but did not do so because he was concerned that the water contained harmful pollutants. *Ibid.* (Exh. 8).

[6] These sworn statements, as the District Court determined, adequately documented injury in fact. We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use

the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity. *Sierra Club v. Morton*, 405 U.S. 727, 735, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). See also *Defenders of Wildlife*, 504 U.S., at 562-563, 112 S.Ct. 2130 ("Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing.").

Our decision in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), is not to the contrary. In that case an environmental organization assailed the Bureau of Land Management's "land withdrawal review program," a program covering millions of acres, alleging that the program illegally opened up public lands to mining activities. The defendants moved for summary judgment, challenging the plaintiff organization's standing to initiate the action under the Administrative Procedure Act, 5 U.S.C. § 702. We held that the plaintiff could not survive the summary judgment motion merely by offering "averments which state only that one of [the organization's] members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action." 497 U.S., at 889, 110 S.Ct. 3177.

In contrast, the affidavits and testimony presented by FOE in this case assert that Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests. These submissions present dispositively more than the mere "general averments" and "conclusory allegations" found inadequate in *National Wildlife Federation*. *Id.*, at 888, 110 S.Ct. 3177. Nor can the affiants' conditional statements—that they would use the nearby North Tyger River for recreation if Laidlaw were not discharging pollutants into it—be equated with the speculative

"some day" intentions" to visit endangered species halfway around the world that we held insufficient to show injury in fact in *Defenders of Wildlife*. 504 U.S., at 564, 112 S.Ct. 2130.

Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), relied on by the dissent, *post*, at 714, does not weigh against standing in this case. In *Lyons*, we held that a plaintiff lacked standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a realistic threat from the policy. 461 U.S., at 107, n. 7, 103 S.Ct. 1660. In the footnote from *Lyons* cited by the dissent, we noted that "[t]he reasonableness of Lyons' fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct," and that his "subjective apprehensions" that such a recurrence would even *take place* were not enough to support standing. *Id.*, at 108, n. 8, 103 S.Ct. 1660. Here, in contrast, it is undisputed that Laidlaw's unlawful conduct—discharging pollutants in excess of permit limits—was occurring at the time the complaint was filed. Under *Lyons*, then, the only "subjective" issue here is "[t]he reasonableness of [the] fear" that led the affiants to respond to that concededly ongoing conduct by refraining from use of the North Tyger River and surrounding areas. Unlike the dissent, *post*, at 714, we see nothing "improbable" about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely reasonable, the District Court found it was true in this case, and that is enough for injury in fact.

[7] Laidlaw argues next that even if FOE had standing to seek injunctive relief, it lacked standing to seek civil penalties. Here the asserted defect is not injury but redressability. Civil penalties offer no redress to private plaintiffs, Laidlaw argues,

because they are paid to the government, and therefore a citizen plaintiff can never have standing to seek them.

[8] Laidlaw is right to insist that a plaintiff must demonstrate standing separately for each form of relief sought. See, e.g., *Lyons*, 461 U.S., at 109, 103 S.Ct. 1660 (notwithstanding the fact that plaintiff had standing to pursue damages, he lacked standing to pursue injunctive relief); see also *Lewis v. Casey*, 518 U.S. 343, 358, n. 6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) ("[S]tanding is not dispensed in gross."). But it is wrong to maintain that citizen plaintiffs facing ongoing violations never have standing to seek civil penalties.

We have recognized on numerous occasions that "all civil penalties have some deterrent effect." *Hudson v. United States*, 522 U.S. 93, 102, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997); see also, e.g., *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 778, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994). More specifically, Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance by limiting the defendant's economic incentive to delay its attainment of permit limits; they also deter future violations. This congressional determination warrants judicial attention and respect. "The legislative history of the Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties. . . . [The district court may] seek to deter future violations by basing the penalty on its economic impact." *Tull v. United States*, 481 U.S. 412, 422-423, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987).

It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. To the extent that they encour-

age defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.

The dissent argues that it is the *availability* rather than the *imposition* of civil penalties that deters any particular polluter from continuing to pollute. *Post*, at 718-719. This argument misses the mark in two ways. First, it overlooks the interdependence of the availability and the imposition; a threat has no deterrent value unless it is credible that it will be carried out. Second, it is reasonable for Congress to conclude that an actual award of civil penalties does in fact bring with it a significant quantum of deterrence over and above what is achieved by the mere prospect of such penalties. A would-be polluter may or may not be dissuaded by the existence of a remedy on the books, but a defendant once hit in its pocketbook will surely think twice before polluting again.²

We recognize that there may be a point at which the deterrent effect of a claim for civil penalties becomes so insubstantial or so remote that it cannot support citizen standing. The fact that this vanishing point is not easy to ascertain does not detract from the deterrent power of such penalties in the ordinary case. Justice Frankfurter's observations for the Court, made in a different context nearly 60 years ago, hold true here as well:

"How to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems. Whether pro-

2. The dissent suggests that there was little deterrent work for civil penalties to do in this case because the lawsuit brought against Laidlaw by DHEC had already pushed the level of deterrence to "near the top of the graph." *Post*, at 718. This suggestion ignores the District Court's specific finding that the penalty agreed to by Laidlaw and DHEC was far too low to remove Laidlaw's economic benefit from noncompliance, and thus was inadequate to deter future violations. 890

scribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice. Judgment on the deterrent effect of the various weapons in the armory of the law can lay little claim to scientific basis." *Tigner v. Texas*, 310 U.S. 141, 148, 60 S.Ct. 879, 84 L.Ed. 1124 (1940).³

In this case we need not explore the outer limits of the principle that civil penalties provide sufficient deterrence to support redressability. Here, the civil penalties sought by FOE carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress FOE's injuries by abating current violations and preventing future ones—as the District Court reasonably found when it assessed a penalty of \$405,-800. 956 F.Supp., at 610-611.

Laidlaw contends that the reasoning of our decision in *Steel Co.* directs the conclusion that citizen plaintiffs have no standing to seek civil penalties under the Act. We disagree. *Steel Co.* established that citizen suitors lack standing to seek civil penalties for violations that have abated by the time of suit. 523 U.S., at 106-107, 118 S.Ct. 1003. We specifically noted in that case that there was no allegation in the complaint of any continuing or imminent violation, and that no basis for such an allegation appeared to exist. *Id.*, at 108, 118 S.Ct. 1003; see also *Gwaltney*, 484 U.S., at 59, 108 S.Ct. 376 ("the harm sought to be addressed by the citizen suit lies in the

F.Supp. 470, 491-494, 497-498 (D.S.C.1995). And it begins to look especially farfetched when one recalls that Laidlaw itself prompted the DHEC lawsuit, paid the filing fee, and drafted the complaint. See *supra*, at 702, n. 1.

3. In *Tigner* the Court rejected an equal protection challenge to a statutory provision exempting agricultural producers from the reach of the Texas antitrust laws.

present or the future, not in the past"). In short, *Steel Co.* held that private plaintiffs, unlike the Federal Government, may not sue to assess penalties for wholly past violations, but our decision in that case did not reach the issue of standing to seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future if undeterred.⁴

B

Satisfied that FOE had standing under Article III to bring this action, we turn to the question of mootness.

[9-11] The only conceivable basis for a finding of mootness in this case is Laidlaw's voluntary conduct—either its achievement by August 1992 of substantial compliance with its NPDES permit or its more recent shutdown of the Roebuck facility. It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite*, 455 U.S., at 289, 102 S.Ct. 1070. "[I]f it did, the courts would be compelled to leave [t]he defen-

4. In insisting that the redressability requirement is not met, the dissent relies heavily on *Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973). That reliance is sorely misplaced. In *Linda R. S.*, the mother of an out-of-wedlock child filed suit to force a district attorney to bring a criminal prosecution against the absentee father for failure to pay child support. *Id.*, at 616, 93 S.Ct. 1146. In finding that the mother lacked standing to seek this extraordinary remedy, the Court drew attention to "the special status of criminal prosecutions in our system," *id.*, at 619, 93 S.Ct. 1146, and carefully limited its holding to the "unique context of a challenge to [the non-enforcement of] a criminal statute," *id.*, at 617, 93 S.Ct. 1146. Furthermore, as to redressability, the relief sought in *Linda R. S.*—a prosecution which, if successful, would automatically land the delinquent father in jail for a fixed term, *id.*, at 618, 93 S.Ct. 1146, with predictably negative effects on his earning power—would scarcely remedy the plaintiff's lack of child support payments. In this regard, the Court contrasted "the civil contempt model whereby the defendant 'keeps the keys to the jail in his own

dant . . . free to return to his old ways.'" *Id.*, at 289, n. 10, 102 S.Ct. 1070 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1308 (1953)). In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968). The "heavy burden of persuad[ing]" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness. *Ibid.*

The Court of Appeals justified its mootness disposition by reference to *Steel Co.*, which held that citizen plaintiffs lack standing to seek civil penalties for wholly past violations. In relying on *Steel Co.*, the Court of Appeals confused mootness with standing. The confusion is understandable, given this Court's repeated statements that the doctrine of mootness

'pocket' and may be released whenever he complies with his legal obligations." *Ibid.* The dissent's contention, *post* at 716, that "precisely the same situation exists here" as in *Linda R. S.* is, to say the least, extravagant.

Putting aside its mistaken reliance on *Linda R. S.*, the dissent's broader charge that citizen suits for civil penalties under the Act carry "grave implications for democratic governance," *post*, at 715-716, seems to us overdrawn. Certainly the federal Executive Branch does not share the dissent's view that such suits dissipate its authority to enforce the law. In fact, the Department of Justice has endorsed this citizen suit from the outset, submitting *amicus* briefs in support of FOE in the District Court, the Court of Appeals, and this Court. See *supra*, at 702, 703. As we have already noted, *supra*, at 701, the Federal Government retains the power to foreclose a citizen suit by undertaking its own action. 33 U.S.C. § 1365(b)(1)(B). And if the Executive Branch opposes a particular citizen suit, the statute allows the Administrator of the EPA to "intervene as a matter of right" and bring the Government's views to the attention of the court. § 1365(c)(2).

can be described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonaans for Official English*, 520 U.S., at 68, n. 22, 117 S.Ct. 1055 (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980), in turn quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973)) (internal quotation marks omitted).

[12, 13] Careful reflection on the long-recognized exceptions to mootness, however, reveals that the description of mootness as "standing set in a time frame" is not comprehensive. As just noted, a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur. *Concentrated Phosphate Export Assn.*, 393 U.S., at 203, 89 S.Ct. 361. By contrast, in a lawsuit brought to force compliance, it is the plaintiff's burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the "threatened injury [is] certainly impending." *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (citations and internal quotation marks omitted). Thus, in *Lyons*, as already noted, we held that a plaintiff lacked initial standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a realistic threat arising from the policy. 461 U.S., at 105-110, 103 S.Ct. 1660. Elsewhere in the opinion, however, we noted that a city-wide moratorium on police chokeholds—an action that surely diminished the already slim likelihood that any particular individual would be choked by police—would not have mooted an otherwise valid claim for injunctive relief, because the moratorium

by its terms was not permanent. *Id.*, at 101, 103 S.Ct. 1660. The plain lesson of these cases is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.

[14, 15] Furthermore, if mootness were simply "standing set in a time frame," the exception to mootness that arises when the defendant's allegedly unlawful activity is "capable of repetition, yet evading review" could not exist. When, for example, a mentally disabled patient files a lawsuit challenging her confinement in a segregated institution, her postcomplaint transfer to a community-based program will not moot the action. *Olmstead v. L. C.*, 527 U.S. —, —, n. 6, 119 S.Ct. 2176, 2184, n. 6, 144 L.Ed.2d 540 (1999), n. 6), despite the fact that she would have lacked initial standing had she filed the complaint after the transfer. Standing admits of no similar exception; if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum. See *Steel Co.*, 523 U.S., at 109, 118 S.Ct. 1003 ("the mootness exception for disputes capable of repetition yet evading review . . . will not revive a dispute which became moot before the action commenced") (quoting *Renne v. Geary*, 501 U.S. 312, 320, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991)).

We acknowledged the distinction between mootness and standing most recently in *Steel Co.*:

"The United States . . . argues that the injunctive relief does constitute remediation because 'there is a presumption of [future] injury when the defendant has voluntarily ceased its illegal activity in response to litigation,' even if that occurs before a complaint is filed. . . . This makes a sword out of a shield. The 'presumption' the Government refers to has been applied to re-

fute the assertion of mootness by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity. . . . It is an immense and unacceptable stretch to call the presumption into service as a substitute for the allegation of present or threatened injury upon which initial standing must be based." 523 U.S., at 109, 118 S.Ct. 1003.

[16] Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal. This argument from sunk costs⁵ does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lacks a continuing interest, as when the parties have settled or a plaintiff pursuing a nonsurviving claim has died. See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (*per curiam*) (non-class-action challenge to constitutionality of law school admissions process mooted when plaintiff, admitted pursuant to preliminary injunction, neared graduation and defendant law school conceded that, as a matter of ordinary school policy, plaintiff would be allowed to finish his final term); *Arizonaans*, 520 U.S., at 67, 117 S.Ct. 1055 (non-class-action challenge to state constitutional amendment declaring English the official language of the State became moot when plaintiff, a state employee who sought to use her bilingual skills, left state employment). But the argument surely highlights an important difference between the two doctrines. See generally *Honig v. Doe*, 484 U.S. 305, 329-332, 108 S.Ct. 592,

98 L.Ed.2d 686 (1988) (REHNQUIST, C. J., concurring).

[17-21] In its brief, Laidlaw appears to argue that, regardless of the effect of Laidlaw's compliance, FOE doomed its own civil penalty claim to mootness by failing to appeal the District Court's denial of injunctive relief. Brief for Respondent 14-17. This argument misconceives the statutory scheme. Under § 1365(a), the district court has discretion to determine which form of relief is best suited, in the particular case, to abate current violations and deter future ones. "[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982). Denial of injunctive relief does not necessarily mean that the district court has concluded there is no prospect of future violations for civil penalties to deter. Indeed, it meant no such thing in this case. The District Court denied injunctive relief, but expressly based its award of civil penalties on the need for deterrence. See 956 F.Supp., at 610-611. As the dissent notes, *post*, at 717-718, federal courts should aim to ensure "the framing of relief no broader than required by the precise facts." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974). In accordance with this aim, a district court in a Clean Water Act citizen suit properly may conclude that an injunction would be an excessively intrusive remedy, because it could entail continuing superintendence of the permit holder's activities by a federal court—a process burdensome to court and permit holder alike. See *City of Mesquite*, 455 U.S., at 289, 102 S.Ct. 1070 (although the defendant's voluntary cessation of the challenged practice does not moot the case,

5. Of course we mean sunk costs to the judicial system, not to the litigants. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) (cited by the dissent, *post*, at 721) dealt with the latter,

noting that courts should use caution to avoid carrying forward a moot case solely to vindicate a plaintiff's interest in recovering attorneys' fees.

"[s]uch abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice").

Laidlaw also asserts, in a supplemental suggestion of mootness, that the closure of its Roebuck facility, which took place after the Court of Appeals issued its decision, mooted the case. The facility closure, like Laidlaw's earlier achievement of substantial compliance with its permit requirements, might moot the case, but—we once more reiterate—only if one or the other of these events made it absolutely clear that Laidlaw's permit violations could not reasonably be expected to recur. *Concentrated Phosphate Export Assn.*, 393 U.S., at 203, 89 S.Ct. 361. The effect of both Laidlaw's compliance and the facility closure on the prospect of future violations is a disputed factual matter. FOE points out, for example—and Laidlaw does not appear to contest—that Laidlaw retains its NPDES permit. These issues have not been aired in the lower courts; they remain open for consideration on remand.⁶

C

[22] FOE argues that it is entitled to attorneys' fees on the theory that a plaintiff can be a "prevailing party" for purposes of 33 U.S.C. § 1365(d) if it was the "catalyst" that triggered a favorable outcome. In the decision under review, the Court of Appeals noted that its Circuit precedent construed our decision in *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), to require rejection of that theory. 149 F.3d, at 307, n. 5 (citing *S-1 & S-2 v. State Bd. of Ed. of N. C.*, 21 F.3d 49, 51 (C.A.4 1994) (en banc)). Cf. *Foreman v. Dallas County*, 193 F.3d 314, 320 (C.A.5 1999) (stating, in dicta, that

6. We note that it is far from clear that vacatur of the District Court's judgment would be the appropriate response to a finding of mootness on appeal brought about by the voluntary conduct of the party that lost in the District Court. See *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 115

"[a]fter *Farrar* ... the continuing validity of the catalyst theory is in serious doubt").

Farrar acknowledged that a civil rights plaintiff awarded nominal damages may be a "prevailing party" under 42 U.S.C. § 1988. 506 U.S., at 112, 113 S.Ct. 566. The case involved no catalytic effect. Recognizing that the issue was not presented for this Court's decision in *Farrar*, several Courts of Appeals have expressly concluded that *Farrar* did not repudiate the catalyst theory. See *Marbley v. Bane*, 57 F.3d 224, 234 (C.A.2 1995); *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 546-550 (C.A.3 1994); *Zinn v. Shalala*, 35 F.3d 273, 276 (C.A.7 1994); *Little Rock School Dist. v. Pulaski County Special Sch. Dist., # 1*, 17 F.3d 260, 263, n. 2 (C.A.8 1994); *Kilgour v. Pasadena*, 53 F.3d 1007, 1010 (C.A.9 1995); *Beard v. Teska*, 31 F.3d 942, 951-952 (C.A.10 1994); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (C.A.11 1999). Other Courts of Appeals have likewise continued to apply the catalyst theory notwithstanding *Farrar*. *Paris v. United States Dept. of Housing and Urban Development*, 988 F.2d 236, 238 (C.A.1 1993); *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255, 257 (C.A.6 1993).

It would be premature, however, for us to address the continuing validity of the catalyst theory in the context of this case. The District Court, in an order separate from the one in which it imposed civil penalties against Laidlaw, stayed the time for a petition for attorneys' fees until the time for appeal had expired or, if either party appealed, until the appeal was resolved. See 149 F.3d, at 305 (describing order staying time for attorneys' fees petition). In the opinion accompanying its order on penalties, the District Court stat-

S.Ct. 386, 130 L.Ed.2d 233 (1994) (mootness attributable to a voluntary act of a nonprevailing party ordinarily does not justify vacatur of a judgment under review); see also *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 64 S.Ct. 826, 88 L.Ed. 1001 (1944).

ed only that "this court has considered that Laidlaw will be required to reimburse plaintiffs for a significant amount of legal fees," and referred to "potential fee awards." 956 F.Supp., at 610-611. Thus, when the Court of Appeals addressed the availability of counsel fees in this case, no order was before it either denying or awarding fees. It is for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees.

For the reasons stated, the judgment of the United States Court of Appeals for the Fourth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, concurring.

Although the Court has identified a sufficient reason for rejecting the Court of Appeals' mootness determination, it is important also to note that the case would not be moot even if it were absolutely clear that respondent had gone out of business and posed no threat of future permit violations. The District Court entered a valid judgment requiring respondent to pay a civil penalty of \$405,800 to the United States. No post-judgment conduct of respondent could retroactively invalidate that judgment. A record of voluntary post-judgment compliance that would justify a decision that injunctive relief is unnecessary, or even a decision that any claim for injunctive relief is now moot, would not warrant vacation of the valid money judgment.

* *Comfort Lake Assn. v. Dresel Contracting, Inc.*, 138 F.3d 351, 356 (C.A.8 1998); *Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (C.A.7), cert. denied, 522 U.S. 981, 118 S.Ct. 442, 139 L.Ed.2d 379 (1997); *Natural Resources Defense Council v. Texaco Refining and Mktg., Inc.*, 2 F.3d 493, 502-503 (C.A.3 1993); *Atlantic States Legal Foundation, Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1020-1021 (C.A.2 1993); *Atlantic States Legal Founda-*

Furthermore, petitioners' claim for civil penalties would not be moot even if it were absolutely clear that respondent's violations could not reasonably be expected to recur because respondent achieved substantial compliance with its permit requirements after petitioners filed their complaint but before the District Court entered judgment. As the Courts of Appeals (other than the court below) have uniformly concluded, a polluter's voluntary post-complaint cessation of an alleged violation will not moot a citizen-suit claim for civil penalties even if it is sufficient to moot a related claim for injunctive or declaratory relief.* This conclusion is consistent with the structure of the Clean Water Act, which attaches liability for civil penalties at the time a permit violation occurs. 33 U.S.C. § 1319(d) ("Any person who violates [certain provisions of the Act or certain permit conditions and limitations] shall be subject to a civil penalty ..."). It is also consistent with the character of civil penalties, which, for purposes of mootness analysis, should be equated with punitive damages rather than with injunctive or declaratory relief. See *Tull v. United States*, 481 U.S. 412, 422-423, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987). No one contends that a defendant's post-complaint conduct could moot a claim for punitive damages; civil penalties should be treated the same way.

The cases cited by the Court in its discussion of the mootness issue all involved requests for injunctive or declaratory relief. In only one, *Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), did the plaintiff seek damages, and

tion, Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1134-1137 (C.A.11 1990); *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 696-697 (C.A.4 1989). Cf. *Powell v. McCormack*, 395 U.S. 486, 496, n. 8, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969) ("Where several forms of relief are requested and one of these requests subsequently becomes moot, the Court has still considered the remaining requests").

I

in that case the opinion makes it clear that the inability to obtain injunctive relief would have no impact on the damages claim. *Id.*, at 105, n. 6, 109, 103 S.Ct. 1660. There is no precedent, either in our jurisprudence, or in any other of which I am aware, that provides any support for the suggestion that post-complaint factual developments that might moot a claim for injunctive or declaratory relief could either moot a claim for monetary relief or retroactively invalidate a valid money judgment.

Justice KENNEDY, concurring.

Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States. The questions presented in the petition for certiorari did not identify these issues with particularity; and neither the Court of Appeals in deciding the case nor the parties in their briefing before this Court devoted specific attention to the subject. In my view these matters are best reserved for a later case. With this observation, I join the opinion of the Court.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

The Court begins its analysis by finding injury in fact on the basis of vague affidavits that are undermined by the District Court's express finding that Laidlaw's discharges caused no demonstrable harm to the environment. It then proceeds to marry private wrong with public remedy in a union that violates traditional principles of federal standing—thereby permitting law enforcement to be placed in the hands of private individuals. Finally, the Court suggests that to avoid mootness one needs even less of a stake in the outcome than the Court's watered-down requirements for initial standing. I dissent from all of this.

Plaintiffs, as the parties invoking federal jurisdiction, have the burden of proof and persuasion as to the existence of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (hereinafter *Lujan*); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). The plaintiffs in this case fell far short of carrying their burden of demonstrating injury in fact. The Court cites affiants' testimony asserting that their enjoyment of the North Tyger River has been diminished due to "concern" that the water was polluted, and that they "believed" that Laidlaw's mercury exceedances had reduced the value of their homes. *Ante*, at 704-705. These averments alone cannot carry the plaintiffs' burden of demonstrating that they have suffered a "concrete and particularized" injury. *Lujan*, 504 U.S., at 560, 112 S.Ct. 2130. General allegations of injury may suffice at the pleading stage, but at summary judgment plaintiffs must set forth "specific facts" to support their claims. *Id.*, at 561, 112 S.Ct. 2130. And where, as here, the case has proceeded to judgment, those specific facts must be "supported adequately by the evidence adduced at trial," *ibid.* (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115, n. 31, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979)). In this case, the affidavits themselves are woefully short on "specific facts," and the vague allegations of injury they do make are undermined by the evidence adduced at trial.

Typically, an environmental plaintiff claiming injury due to discharges in violation of the Clean Water Act argues that the discharges harm the environment, and that the harm to the environment injures him. This route to injury is barred in the present case, however, since the District Court concluded after considering all the evidence that there had been "no demonstrated proof of harm to the environment,"

956 F.Supp. 588, 602 (D.S.C.1997), that the "permit violations at issue in this citizen suit did not result in any health risk or environmental harm," *ibid.*, that "[a]ll available data ... fail to show that Laidlaw's actual discharges have resulted in harm to the North Tyger River," *id.*, at 602-603, and that "the overall quality of the river exceeds levels necessary to support ... recreation in and on the water," *id.*, at 600.

The Court finds these conclusions unproblematic for standing, because "[t]he relevant showing for purposes of Article III standing ... is not injury to the environment but injury to the plaintiff." *Ante*, at 704-705. This statement is correct, as far as it goes. We have certainly held that a demonstration of harm to the environment is not enough to satisfy the injury-in-fact requirement unless the plaintiff can demonstrate how he personally was harmed. *E.g.*, *Lujan, supra*, at 563, 112 S.Ct. 2130. In the normal course, however, a lack of demonstrable harm to the environment will translate, as it plainly does here, into a lack of demonstrable harm to citizen plaintiffs. While it is perhaps possible that a plaintiff could be harmed even though the environment was not, such a plaintiff would have the burden of articulating and demonstrating the nature of that injury. Ongoing "concerns" about the environment are not enough, for "[i]t is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions," *Los Angeles v. Lyons*, 461 U.S. 95, 107, n. 8, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). At the very least, in the present case, one would expect to see evidence supporting the affidavits' bald assertions regarding decreasing recreational usage and declining home values, as well as evidence for the improbable proposition that Laidlaw's violations, even though harmless to the environment, are somehow responsible for these effects. *Cf. Gladstone, supra*, at 115, 99 S.Ct. 1601 (noting that standing could be established by "convinc-

ing evidence" that a decline in real estate values was attributable to the defendant's conduct). Plaintiffs here have made no attempt at such a showing, but rely entirely upon unsupported and unexplained affidavit allegations of "concern."

Indeed, every one of the affiants deposed by Laidlaw cast into doubt the (in any event inadequate) proposition that subjective "concerns" actually affected their conduct. Linda Moore, for example, said in her affidavit that she would use the affected waterways for recreation if it were not for her concern about pollution. Record, Doc. No. 71 (Exhs. 45, 46). Yet she testified in her deposition that she had been to the river only twice, once in 1980 (when she visited someone who lived by the river) and once after this suit was filed. Record, Doc. No. 62 (Moore Deposition 23-24). Similarly, Kenneth Lee Curtis, who claimed he was injured by being deprived of recreational activity at the river, admitted that he had not been to the river since he was "a kid," (Curtis Deposition, pt. 2, p. 38), and when asked whether the reason he stopped visiting the river was because of pollution, answered "no," *id.*, at 39. As to Curtis's claim that the river "looke[d] and smell[ed] polluted," this condition, if present, was surely not caused by Laidlaw's discharges, which according to the District Court "did not result in any health risk or environmental harm." 956 F.Supp., at 602. The other affiants cited by the Court were not deposed, but their affidavits state either that they would use the river if it were not polluted or harmful (as the court subsequently found it is not), Record, Doc. No. 21 (Exhs. 7, 8, and 9), or said that the river looks polluted (which is also incompatible with the court's findings), *ibid.* (Exh. 10). These affiants have established nothing but "subjective apprehensions."

The Court is correct that the District Court explicitly found standing—albeit "by the very slimmest of margins," and as "an awfully close call." App. in No. 97-1246 (C.A.4), p. 207-208 (Tr. of Hearing 39-40 (June 30, 1993)). That cautious finding,

however, was made in 1993, long before the court's 1997 conclusion that Laidlaw's discharges did not harm the environment. As we have previously recognized, an initial conclusion that plaintiffs have standing is subject to reexamination, particularly if later evidence proves inconsistent with that conclusion. *Gladstone*, 441 U.S., at 115, and n. 31, 99 S.Ct. 1601; *Wyoming v. Oklahoma*, 502 U.S. 437, 446, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992). Laidlaw challenged the existence of injury in fact on appeal to the Fourth Circuit, but that court did not reach the question. Thus no lower court has reviewed the injury-in-fact issue in light of the extensive studies that led the District Court to conclude that the environment was not harmed by Laidlaw's discharges.

Inexplicably, the Court is untroubled by this, but proceeds to find injury in fact in the most casual fashion, as though it is merely confirming a careful analysis made below. Although we have previously refused to find standing based on the "conclusory allegations of an affidavit" *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), the Court is content to do just that today. By accepting plaintiffs' vague, contradictory, and unsubstantiated allegations of "concern" about the environment as adequate to prove injury in fact, and accepting them even in the face of a finding that the environment was not demonstrably harmed, the Court makes the injury-in-fact requirement a sham. If there are permit violations, and a member of a plaintiff environmental organization lives near the offending plant, it would be difficult not to satisfy today's lenient standard.

II

The Court's treatment of the redressability requirement—which would have been unnecessary if it resolved the injury-in-fact question correctly—is equally cavalier. As discussed above, petitioners allege ongoing injury consisting of diminishment of the affected waterways

and decreased property values. They allege that these injuries are caused by Laidlaw's continuing permit violations. But the remedy petitioners seek is neither recompense for their injuries nor an injunction against future violations. Instead, the remedy is a statutorily specified "penalty" for past violations, payable entirely to the United States Treasury. Only last Term, we held that such penalties do not redress any injury a citizen plaintiff has suffered from past violations. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 106–107, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). The Court nonetheless finds the redressability requirement satisfied here, distinguishing *Steel Co.* on the ground that in this case the petitioners allege ongoing violations; payment of the penalties, it says, will remedy petitioners' injury by deterring future violations by Laidlaw. *Ante*, at 706–707. It holds that a penalty payable to the public "remedies" a threatened private harm, and suffices to sustain a private suit.

That holding has no precedent in our jurisprudence, and takes this Court beyond the "cases and controversies" that Article III of the Constitution has entrusted to its resolution. Even if it were appropriate, moreover, to allow Article III's remediation requirement to be satisfied by the indirect private consequences of a public penalty, those consequences are entirely too speculative in the present case. The new standing law that the Court makes—like all expansions of standing beyond the traditional constitutional limits—has grave implications for democratic governance. I shall discuss these three points in turn.

A

In *Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973), the plaintiff, mother of an illegitimate child, sought, on behalf of herself, her child, and all others similarly situated, an injunction against discriminatory application of Art. 602 of the Texas Penal Code.

Although that provision made it a misdemeanor for "any parent" to refuse to support his or her minor children under 18 years of age, it was enforced only against married parents. That refusal, the plaintiff contended, deprived her and her child of the equal protection of the law by denying them the deterrent effect of the statute upon the father's failure to fulfill his support obligation. The Court held that there was no Article III standing. There was no "direct" relationship," it said, "between the alleged injury and the claim sought to be adjudicated," since "[t]he prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative." *Id.*, at 618, 93 S.Ct. 1146. "[Our cases] demonstrate that, in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.*, at 619, 93 S.Ct. 1146.

Although the Court in *Linda R.S.* recited the "logical nexus" analysis of *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), which has since fallen into desuetude, "it is clear that standing was denied ... because of the unlikelihood that the relief requested would redress appellant's claimed injury." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79, n. 24, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978). There was no "logical nexus" between nonenforcement of the statute and Linda R. S.'s failure to receive support payments because "[t]he prospect that prosecution will ... result in payment of support" was "speculative," *Linda R. S.*, *supra*, at 618, 93 S.Ct. 1146—that is to say, it was uncertain whether the relief would prevent the injury.¹ Of course precisely the same situation exists here. The principle that "in American jurisprudence ... a private citi-

zen lacks a judicially cognizable interest in the prosecution or nonprosecution of another" applies no less to prosecution for civil penalties payable to the State than to prosecution for criminal penalties owing to the State.

The Court's opinion reads as though the only purpose and effect of the redressability requirement is to assure that the plaintiff receive *some* of the benefit of the relief that a court orders. That is not so. If it were, a federal tort plaintiff fearing repetition of the injury could ask for tort damages to be paid, not only to himself but to other victims as well, on the theory that those damages would have at least some deterrent effect beneficial to him. Such a suit is preposterous because the "remediation" that is the traditional business of Anglo-American courts is relief specifically tailored to the plaintiff's injury, and not *any* sort of relief that has some incidental benefit to the plaintiff. Just as a "generalized grievance" that affects the entire citizenry cannot satisfy the injury-in-fact requirement even though it aggrieves the plaintiff along with everyone else, see *Lujan*, 504 U.S., at 573–574, 112 S.Ct. 2130, so also a generalized remedy that deters all future unlawful activity against all persons cannot satisfy the remediation requirement, even though it deters (among other things) repetition of this particular unlawful activity against these particular plaintiffs.

Thus, relief against prospective harm is traditionally afforded by way of an injunction, the scope of which is limited by the scope of the threatened injury. *Lewis v. Casey*, 518 U.S. 343, 357–360, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996); *Lyons*, 461 U.S., at 105–107, and n. 7, 103 S.Ct. 1660. In seeking to overturn that tradition by

upon payment. The Court then continued: "The prospect that prosecution will, at least in the future,"—i.e., upon completion of the imprisonment—"result in payment of support can, at best, be termed only speculative." *Linda R. S.*, 410 U.S., at 618, 93 S.Ct. 1146.

1. The decision in *Linda R.S.* did not turn, as today's opinion imaginatively suggests, on the father's short-term inability to pay support if imprisoned. *Ante*, at 704, n. 4. The Court's only comment upon the imprisonment was that, unlike imprisonment for civil contempt, it would not condition the father's release

giving an individual plaintiff the power to invoke a public remedy, Congress has done precisely what we have said it cannot do: convert an “undifferentiated public interest” into an “individual right” vindicable in the courts. *Lujan, supra*, at 577, 112 S.Ct. 2130; *Steel Co.*, 523 U.S., at 106, 118 S.Ct. 1003. The sort of scattershot redress approved today makes nonsense of our statement in *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222, 94 S.Ct. 2925 (1974), that the requirement of injury in fact “insures the framing of relief no broader than required by the precise facts.” A claim of particularized future injury has today been made the vehicle for pursuing generalized penalties for past violations, and a threshold showing of injury in fact has become a lever that will move the world.

B

As I have just discussed, it is my view that a plaintiff’s desire to benefit from the deterrent effect of a public penalty for past conduct can never suffice to establish a case or controversy of the sort known to our law. Such deterrent effect is, so to speak, “speculative as a matter of law.” Even if that were not so, however, the deterrent effect in the present case would surely be speculative as a matter of fact.

The Court recognizes, of course, that to satisfy Article III, it must be “likely,” as opposed to “merely speculative,” that a favorable decision will redress plaintiffs’ injury, *Lujan, supra*, at 561, 112 S.Ct. 2130. See *ante*, at 704. Further, the Court recognizes that not all deterrent effects of all civil penalties will meet this standard—though it declines to “explore the outer limits” of adequate deterrence, *ante*, at 707–708. It concludes, however, that in the present case “the civil penalties sought by FOE carried with them a deterrent effect” that satisfied the “likely [rather than] speculative” standard. *Ibid.* There is little in the Court’s opinion to explain why it believes this is so.

The Court cites the District Court’s conclusion that the penalties imposed, along with anticipated fee awards, provided “adequate deterrence.” *Ante*, at 702, 707–708; 956 F.Supp., at 611. There is absolutely no reason to believe, however, that this meant “deterrence adequate to prevent an injury to these plaintiffs that would otherwise occur.” The statute does not even mention deterrence in general (much less deterrence of future harm to the particular plaintiff) as one of the elements that the court should consider in fixing the amount of the penalty. (That element can come in, if at all, under the last, residual category of “such other matters as justice may require.” 33 U.S.C. § 1319(d).) The statute does require the court to consider “the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, [and] the economic impact of the penalty on the violator. . . .” *Ibid.*; see 956 F.Supp., at 601. The District Court meticulously discussed, in subsections (a) through (e) of the portion of its opinion entitled “Civil Penalty,” each one of those specified factors, and then—under subsection (f) entitled “Other Matters As Justice May Require,” it discussed “1. Laidlaw’s Failure to Avail Itself of the Reopener Clause,” “2. Recent Compliance History,” and “3. The Ever-Changing Mercury Limit.” There is no mention whatever—in this portion of the opinion or anywhere else—of the degree of deterrence necessary to prevent future harm to these particular plaintiffs. Indeed, neither the District Court’s final opinion (which contains the “adequate deterrence” statement) nor its earlier opinion dealing with the preliminary question whether South Carolina’s previous lawsuit against Laidlaw constituted “diligent prosecution” that would bar citizen suit, see 33 U.S.C. § 1365(b)(1)(B), displayed any awareness that deterrence of future injury to the plaintiffs was necessary to support standing.

The District Court’s earlier opinion did, however, quote with approval the passage from a District Court case which began: “Civil penalties seek to deter pollution by discouraging future violations. To serve this function, the amount of the civil penalty must be high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business.” App. 122, quoting *PIRG v. Powell Duffryn Terminals, Inc.*, 720 F.Supp. 1158, 1166 (D.N.J. 1989). When the District Court concluded the “Civil Penalty” section of its opinion with the statement that “[t]aken together, this court believes the above penalty, potential fee awards, and Laidlaw’s own direct and indirect litigation expenses provide adequate deterrence under the circumstances of this case,” 956 F.Supp., at 611, it was obviously harking back to this general statement of what the statutorily prescribed factors (and the “as justice may require” factors, which in this case did not include particularized or even generalized deterrence) were designed to achieve. It meant no more than that the court believed the civil penalty it had prescribed met the statutory standards.

The Court points out that we have previously said “all civil penalties have some deterrent effect,” *ante*, at 706 (quoting *Hudson v. United States*, 522 U.S. 93, 102, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997)). That is unquestionably true: As a general matter, polluters as a class are deterred from violating discharge limits by the availability of civil penalties. However, none of the cases the Court cites focused on the deterrent effect of a single imposition of penalties on a particular lawbreaker. Even less did they focus on the question whether that particularized deterrent effect (if any) was enough to redress the injury of a citizen plaintiff in the sense required by Article III. They all involved penalties pursued by the government, not by citizens. See *Hudson, supra*, at 96, 118 S.Ct. 488; *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 773,

114 S.Ct. 1937, 128 L.Ed.2d 767 (1994); *Tull v. United States*, 481 U.S. 412, 414, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987).

If the Court had undertaken the necessary inquiry into whether significant deterrence of the plaintiffs’ feared injury was “likely,” it would have had to reason something like this: Strictly speaking, no polluter is deterred by a penalty for past pollution; he is deterred by the fear of a penalty for future pollution. That fear will be virtually nonexistent if the prospective polluter knows that all emissions violators are given a free pass; it will be substantial under an emissions program such as the federal scheme here, which is regularly and notoriously enforced; it will be even higher when a prospective polluter subject to such a regularly enforced program has, as here, been the object of public charges of pollution and a suit for injunction; and it will surely be near the top of the graph when, as here, the prospective polluter has already been subjected to state penalties for the past pollution. The deterrence on which the plaintiffs must rely for standing in the present case is the marginal increase in Laidlaw’s fear of future penalties that will be achieved by adding federal penalties for Laidlaw’s past conduct.

I cannot say for certain that this marginal increase is zero; but I can say for certain that it is entirely speculative whether it will make the difference between these plaintiffs’ suffering injury in the future and these plaintiffs’ going unharmed. In fact, the assertion that it will “likely” do so is entirely farfetched. The speculativeness of that result is much greater than the speculativeness we found excessive in *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 43, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976), where we held that denying § 501(c)(3) charitable-deduction tax status to hospitals that refused to treat indigents was not sufficiently likely to assure future treatment of the indigent plaintiffs to support standing. And it is much greater than the specula-

tiveness we found excessive in *Linda R.S. v. Richard D.*, discussed *supra*, at 702-703, where we said that "the prospect that prosecution [for nonsupport] will . . . result in payment of support can, at best, be termed only speculative," 410 U.S., at 618, 93 S.Ct. 1146.

In sum, if this case is, as the Court suggests, within the central core of "deterrence" standing, it is impossible to imagine what the "outer limits" could possibly be. The Court's expressed reluctance to define those "outer limits" serves only to disguise the fact that it has promulgated a revolutionary new doctrine of standing that will permit the entire body of public civil penalties to be handed over to enforcement by private interests.

C

Article II of the Constitution commits it to the President to "take Care that the Laws be faithfully executed," Art. II, § 3, and provides specific methods by which all persons exercising significant executive power are to be appointed, Art. II, § 2. As Justice KENNEDY'S concurrence correctly observes, the question of the conformity of this legislation with Article II has not been argued—and I, like the Court, do not address it. But Article III, no less than Article II, has consequences for the structure of our government, see *Schlesinger*, 418 U.S., at 222, 94 S.Ct. 2925, and it is worth noting the changes in that structure which today's decision allows.

By permitting citizens to pursue civil penalties payable to the Federal Treasury,

2. The Court points out that the government is allowed to intervene in a citizen suit, see *ante*, at 707-709, n. 4; 33 U.S.C. § 1365(c)(2), but this power to "bring the Government's views to the attention of the court," *ante*, at 708-709, n. 4, is meager substitute for the power to decide whether prosecution will occur. Indeed, according to the Chief Executive of the United States the ability to intervene does no more than place him on a par with John Q. Public, who can intervene—whether the government likes it or not—when the United States files suit. § 1365(b)(1)(B).

the Act does not provide a mechanism for individual relief in any traditional sense, but turns over to private citizens the function of enforcing the law. A Clean Water Act plaintiff pursuing civil penalties acts as a self-appointed mini-EPA. Where, as is often the case, the plaintiff is a national association, it has significant discretion in choosing enforcement targets. Once the association is aware of a reported violation, it need not look long for an injured member, at least under the theory of injury the Court applies today. See *supra*, at 700-702. And once the target is chosen, the suit goes forward without meaningful public control.² The availability of civil penalties vastly disproportionate to the individual injury gives citizen plaintiffs massive bargaining power—which is often used to achieve settlements requiring the defendant to support environmental projects of the plaintiffs' choosing. See Greve, *The Private Enforcement of Environmental Law*, 65 *Tulane L.Rev.* 339, 355-359 (1990). Thus is a public fine diverted to a private interest.

To be sure, the EPA may foreclose the citizen suit by itself bringing suit. 33 U.S.C. § 1365(b)(1)(B). This allows public authorities to avoid private enforcement only by accepting private direction as to when enforcement should be undertaken—which is no less constitutionally bizarre. Elected officials are entirely deprived of their discretion to decide that a given violation should not be the object of suit at all, or that the enforcement decision should be postponed.³ See § 1365(b)(1)(A) (providing that citizen plaintiff need only wait

3. The Court observes that "the federal Executive Branch does not share the dissent's view that such suits dissipate its authority to enforce the law," since it has "endorsed this citizen suit from the outset." *Ante*, at 707, n. 4. Of course, in doubtful cases a long and uninterrupted history of presidential acquiescence and approval can shed light upon the constitutional understanding. What we have here—acquiescence and approval by a single Administration—does not deserve passing mention.

60 days after giving notice of the violation to the government before proceeding with action). This is the predictable and inevitable consequence of the Court's allowing the use of public remedies for private wrongs.

III

Finally, I offer a few comments regarding the Court's discussion of whether FOE's claims became moot by reason of Laidlaw's substantial compliance with the permit limits. I do not disagree with the conclusion that the Court reaches. Assuming that the plaintiffs had standing to pursue civil penalties in the first instance (which they did not), their claim might well not have been mooted by Laidlaw's volun-

4. In addition to the compliance and plant-closure issues, there also remains open on remand the question whether the current suit was foreclosed because the earlier suit by the State was "diligently prosecuted." See 33 U.S.C. § 1365(b)(1)(B). Nothing in the Court's opinion disposes of the issue. The opinion notes the District Court's finding that Laidlaw itself played a significant role in facilitating the State's action. *Ante*, at 702, n. 1, 707, n. 2. But there is no incompatibility whatever between a defendant's facilitation of suit and the State's diligent prosecution—as prosecutions of felons who confess their crimes and turn themselves in regularly demonstrate. Laidlaw was entirely within its rights to prefer state suit to this private enforcement action; and if it had such a preference it would have been prudent—given that a State must act within 60 days of receiving notice of a citizen suit, see § 1365(b)(1)(A), and given the number of cases State agencies handle—for Laidlaw to make sure its case did not fall through the cracks. South Carolina's interest in the action was not a feigned last minute contrivance. It had worked with Laidlaw in resolving the problem for many years, and had previously undertaken an administrative enforcement action resulting in a consent order. 890 F.Supp. 470, 476 (D.S.C. 1995). South Carolina has filed an *amicus* brief arguing that allowing citizen suits to proceed despite ongoing state enforcement efforts "will provide citizens and federal judges the opportunity to relitigate and second-guess the enforcement and permitting actions of South Carolina and other States." Brief for South Carolina as *Amicus Curiae* 6.

5. Unlike Justice STEVENS' concurrence, the opinion for the Court appears to recognize

tary compliance with the permit, and leaving this fact-intensive question open for consideration on remand, as the Court does, *ante*, at 711, seems sensible.⁴ In reaching this disposition, however, the Court engages in a troubling discussion of the purported distinctions between the doctrines of standing and mootness. I am frankly puzzled as to why this discussion appears at all. Laidlaw's claimed compliance is squarely within the bounds of our "voluntary cessation" doctrine, which is the basis for the remand. *Ante*, at 711.⁵ There is no reason to engage in an interesting academic excursus upon the differences between mootness and standing in order to invoke this obviously applicable rule.⁶

that a claim for civil penalties is moot when it is clear that no future injury to the plaintiff at the hands of the defendant can occur. The concurrence suggests that civil penalties, like traditional damages remedies, cannot be mooted by absence of threatened injury. The analogy is inapt. Traditional money damages are payable to compensate for the harm of past conduct, which subsists whether future harm is threatened or not; civil penalties are privately assessable (according to the Court) to deter threatened future harm to the plaintiff. Where there is no threat to the plaintiff, he has no claim to deterrence. The proposition that impossibility of future violation does not moot the case holds true, of course, for civil-penalty suits by the government, which do not rest upon the theory that some particular future harm is being prevented.

6. The Court attempts to frame its exposition as a corrective to the Fourth Circuit, which it claims "confused mootness with standing." *Ante*, at 709. The Fourth Circuit's conclusion of nonjusticiability rested upon the belief (entirely correct, in my view) that the only remedy being pursued on appeal, civil penalties, would not redress FOE's claimed injury. 149 F.3d 303, 306 (1998). While this might be characterized as a conclusion that FOE had no standing to pursue civil penalties from the outset, it can also be characterized, as it was by the Fourth Circuit, as a conclusion that, when FOE declined to appeal denial of the declaratory judgment and injunction, and appealed only the inadequacy of the civil penalties (which it had no standing to pursue) the case as a whole became moot. Given the Court's erroneous conclusion that civil penal-

Because the discussion is not essential—indeed, not even relevant—to the Court's decision, it is of limited significance. Nonetheless, I am troubled by the Court's too-hasty retreat from our characterization of mootness as “the doctrine of standing set in a time frame.” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68, n. 22, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997). We have repeatedly recognized that what is required for litigation to continue is essentially identical to what is required for litigation to begin: There must be a justiciable case or controversy as required by Article III. “Simply stated, a case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Powell v. McCormack*, 395 U.S. 436, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). A Court may not proceed to hear an action if, subsequent to its initiation, the dispute loses “its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract propositions of law.” *Hall v. Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969) (*per curiam*). See also *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975); *Steffel v. Thompson*, 415 U.S. 452, 459, n. 10, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). Because the requirement of a continuing case or controversy derives from the Constitution, *Liner v. Jafco, Inc.*, 375 U.S. 301, 306, n. 3, 84 S.Ct. 391, 11 L.Ed.2d 347 (1964), it may not be ignored when inconvenient, *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116, 40 S.Ct. 448, 64 L.Ed. 808 (1920) (moot question cannot be decided, “[h]owever convenient it might be”), or, as the Court suggests, to save “sunk costs,” compare *ante*, at 707, with *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) (“[R]easonable caution is needed to be sure that mooted litigation is not pressed forward . . . solely in order to obtain reimbursement of sunk costs”).

ties can redress private injury, it of course rejects both formulations—but neither of them necessitates the Court's academic dis-

It is true that mootness has some added wrinkles that standing lacks. One is the “voluntary cessation” doctrine to which the Court refers. But it is inaccurate to regard this as a reduction of the basic requirement for standing that obtained at the beginning of the suit. A genuine controversy must exist at both stages. And just as the initial suit could be brought (by way of suit for declaratory judgment) before the defendant actually violated the plaintiff's alleged rights, so also the initial suit can be continued even though the defendant has stopped violating the plaintiff's alleged rights. The “voluntary cessation” doctrine is nothing more than an evidentiary presumption that the controversy reflected by the violation of alleged rights continues to exist. *Steel Co.*, 523 U.S., at 109, 118 S.Ct. 1003. Similarly, the fact that we do not find cases moot when the challenged conduct is “capable of repetition, yet evading review” does not demonstrate that the requirements for mootness and for standing differ. “Where the conduct has ceased for the time being but there is a demonstrated probability that it will recur, a real-life controversy between parties with a personal stake in the outcome continues to exist.” *Honig v. Doe*, 484 U.S. 305, 341, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) (SCALIA, J., dissenting) (emphasis omitted).

Part of the confusion in the Court's discussion is engendered by the fact that it compares standing, on the one hand, with mootness based on voluntary cessation, on the other hand. *Ante*, at 709. The required showing that it is “absolutely clear” that the conduct “could not reasonably be expected to recur” is not the threshold showing required for mootness, but the heightened showing required in a particular category of cases where we have sensibly concluded that there is reason to be skeptical that cessation of violation means

course comparing the mootness and standing doctrines.

cessation of live controversy. For claims of mootness based on changes in circumstances other than voluntary cessation, the showing we have required is less taxing, and the inquiry is indeed properly characterized as one of “standing set in a time frame.” See *Arizonans, supra*, at 67, 68, n. 22, 117 S.Ct. 1055 (case mooted where plaintiff's change in jobs deprived case of “still vital claim for prospective relief”); *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (case mooted by petitioner's completion of his sentence, since “throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision”) (internal quotation marks omitted); *Lewis, supra*, at 478–480, 116 S.Ct. 2174 (case against state mooted by change in federal law that eliminated parties' “personal stake” in the outcome).

In sum, while the Court may be correct that the parallel between standing and mootness is imperfect due to realistic evidentiary presumptions that are by their nature applicable only in the mootness context, this does not change the underlying principle that “[t]he requisite personal interest that must exist at the commencement of the litigation . . . must continue throughout its existence. . . .” *Arizonans, supra*, at 68, n. 22, 117 S.Ct. 1055 (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980)).

By uncritically accepting vague claims of injury, the Court has turned the Article III requirement of injury in fact into a “mere pleading requirement.” *Lujan*, 504 U.S., at 561, 112 S.Ct. 2130; and by approving the novel theory that public penalties can redress anticipated private wrongs, it has come close to “mak[ing] the redressability requirement vanish.” *Steel Co., supra*, at 107, 118 S.Ct. 1003. The undesirable and unconstitutional consequence of today's decision is to place the

immense power of suing to enforce the public laws in private hands. I respectfully dissent.

FRIENDS OF THE EARTH, INCORPORATED; Citizens Local Environmental Action Network, Incorporated,
Plaintiffs-Appellants,

v.

GASTON COPPER RECYCLING CORPORATION, Defendant-Appellee.

United States of America,
Amicus Curiae.

No. 98-1938.

United States Court of Appeals,
Fourth Circuit.

Argued Oct. 25, 1999.

Decided Feb. 23, 2000.

Nonprofit environmental organizations brought citizens suit against operator of smelting facility under Clean Water Act, alleging violations of operator's National Pollutant Discharge Elimination System (NPDES) permit and seeking declaratory and injunctive relief. Following bench trial, the United States District Court for the District of South Carolina, Matthew J. Perry, Jr., Senior District Judge, 9 F.Supp.2d 589, dismissed suit for lack of subject matter jurisdiction, and plaintiffs appealed. The Court of Appeals, 179 F.3d 107, affirmed. On rehearing en banc, the Court of Appeals, Wilkinson, Chief Judge, held that: (1) owner of lake four miles downstream from facility suffered injury in fact as result of facility's violations of NPDES permit; (2) owner's injuries as result of pollution of lake were fairly traceable to facility's violations of NPDES permit; and (3) owner's injuries were redressable by citizen suit under Clean Water Act.

Reversed and remanded.

Niemeyer, Circuit Judge, wrote opinion concurring in judgment.

Luttig, Circuit Judge, wrote opinion concurring in judgment, in which Niemeyer, Circuit Judge, joined.

Hamilton, Senior Circuit Judge, wrote opinion concurring in judgment.

1. Associations ⇨20(1)

Association may have standing to sue in federal court either based on injury to organization in its own right or as representative of its members who have been harmed. U.S.C.A. Const. Art. 3, § 2, cl. 1.

2. Associations ⇨20(1)

Organization has representational standing when (1) at least one of its members would have standing to sue in his own right; (2) organization seeks to protect interests germane to organization's purpose; and (3) neither claim asserted nor relief sought requires participation of individual members in lawsuit. U.S.C.A. Const. Art. 3, § 2, cl. 1.

3. Federal Civil Procedure ⇨103.2

Plaintiff must suffer invasion of legally protected interest that is concrete and particularized before he can bring action. U.S.C.A. Const. Art. 3, § 2, cl. 1.

4. Health and Environment ⇨25.15(4.1)

Owner of lake four miles downstream from smelting facility suffered injury in fact for standing purposes as result of facility's violations of its National Pollutant Discharge Elimination System (NPDES) permit, despite lack of evidence of chemical content, increase in salinity or negative change in ecosystem of waterway; owner and his family used lake for swimming and fishing, facility had violated permit more than 500 times, chemicals released were harmful to health and environment, and chemicals released by facility had been found in lake. Federal Water Pollution Control Act Amendments of 1972, § 505, 33 U.S.C.A. § 1365.

5. Health and Environment ⇨25.15(4.1)

Violation of discharge restrictions established by state pursuant to National Pollutant Discharge Elimination System (NPDES) permit program in order to pro-

FRIENDS OF THE EARTH, INCORPORATED
v.
GASTON COPPER RECYCLING CORPORATION

United States Court of Appeals for the Fourth Circuit February 2000
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tect designated uses of receiving waterways necessarily means that these uses may be harmed, for purposes of determining injury in fact in standing inquiry as result of violation. Federal Water Pollution Control Act Amendments of 1972, § 301(a), 33 U.S.C.A. § 1311(a).

6. Health and Environment ⇨25.15(4.1)

Lake owner's injuries as result of pollution of lake were fairly traceable to smelting facility's violations of its National Pollutant Discharge Elimination System (NPDES) permit, for purposes of determining owner's standing to bring action under Clean Water Act; evidence indicated past presence of metals in lake of the type discharged by facility, facility was discharging pollutants at levels that caused environmental degradation, and discharge travelled downstream beyond lake. Federal Water Pollution Control Act Amendments of 1972, § 505, 33 U.S.C.A. § 1365.

7. Health and Environment ⇨25.15(4.1)

Where plaintiff bringing action under Clean Water Act has pointed to polluting source as seed of his injury, and owner of polluting source has supplied no alternative culprit, fairly traceable requirement for standing can be said to be fairly met. Federal Water Pollution Control Act Amendments of 1972, § 505, 33 U.S.C.A. § 1365.

8. Health and Environment ⇨25.15(4.1)

Injuries of lake owner arising from smelting facility's repeated violations of National Pollutant Discharge Elimination System (NPDES) permit were redressable for standing purposes by citizen suit under Clean Water Act seeking injunctive relief for continuing and threatened future violations of permit; facility had over 350 discharge violations and 650 monitoring and reporting violations in last year for which record contained evidence. Federal Water Pollution Control Act Amendments of 1972, § 505, 33 U.S.C.A. § 1365.

ARGUED: Bruce J. Terris, Terris, Pravlik & Millian, L.L.P., Washington, D.C., for Appellants. Rufus Justin Smith, United States Department of Justice, Washington, D.C., for Amicus Curiae. Harold Weinberg Jacobs, Nexsen, Pruet, Jacobs & Pollard, L.L.P., Columbia, South Carolina, for Appellee. ON BRIEF: Kathleen L. Millian, Terris, Pravlik & Millian, L.L.P., Washington, D.C.; Robert Guild, Columbia, South Carolina, for Appellants. Lois J. Schiffer, Assistant Attorney General, Greer S. Goldman, David Shilton, United States Department of Justice, Washington, D.C., for Amicus Curiae.

Before: WILKINSON, Chief Judge, and WIDENER, MURNAGHAN, WILKINS, NIEMEYER, LUTTIG, WILLIAMS, MICHAEL, MOTZ, TRAXLER, and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Reversed and remanded by published opinion: Chief Judge WILKINSON wrote the opinion, in which Judges WIDENER, MURNAGHAN, WILKINS, WILLIAMS, MICHAEL, MOTZ, TRAXLER, and KING joined. Judge NIEMEYER wrote an opinion concurring in the judgment. Judge LUTTIG wrote an opinion concurring in the judgment, in which Judge NIEMEYER joined. Senior Judge HAMILTON wrote an opinion concurring in the judgment.

OPINION

WILKINSON, Chief Judge:

Friends of the Earth (FOE) and Citizens Local Environmental Action Network (CLEAN) brought a citizen suit against Gaston Copper Recycling Corporation under the Clean Water Act. 33 U.S.C. §§ 1251-1387 (1994 & Supp. III 1997). Plaintiffs allege that Gaston Copper has been illegally discharging a variety of pollutants into a South Carolina waterway. Wilson Shealy, a CLEAN member who owns a lake only four miles downstream from Gaston Copper's facility, testified that the illegal discharges caused him and

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his family to reduce their use of his lake. CLEAN also submitted various federal, state, and private studies as evidence that the pollutants released by Gaston Copper adversely affected or threatened Shealy's lake. The district court dismissed the case, holding that plaintiffs lacked standing because they had not demonstrated sufficient injury in fact. Dismissing the action, however, encroaches on congressional authority by erecting barriers to standing so high as to frustrate citizen enforcement of the Clean Water Act. We hold that Shealy, and hence CLEAN, have standing to sue. We thus reverse the judgment and remand for a determination of whether Gaston Copper has discharged pollutants in excess of its permit limits.

I.

A.

Congress enacted the Federal Water Pollution Control Act Amendments of 1972, better known as the Clean Water Act, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). This legislation constituted "a major change in the enforcement mechanism of the Federal water pollution control program." *American Petroleum Inst. v. Train*, 526 F.2d 1343, 1344 (10th Cir.1975) (internal quotation marks omitted). Prior to 1972, the focus of federal efforts to abate water pollution was measurement of the quality of receiving waters. *See, e.g., Water Quality Act of 1965*, Pub.L. No. 89-234, 79 Stat. 903. But the great difficulty in establishing reliable, precise limitations on pollution based solely on water quality targets led to substantial enforcement problems. *See EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 202-03, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976). In fact, the use of water quality standards as a control mechanism was found to be "inadequate in every vital respect." S. Rep. No. 92-414, at 7 (1971), *reprinted in 1972 U.S.C.C.A.N.* 3668, 3674.

The Clean Water Act therefore shifted the focus of federal enforcement efforts from water quality standards to direct limitations on the discharge of pollutants—i.e., "effluent limitations." *See* 33 U.S.C. § 1311; *Natural Resources Defense Council, Inc. v. EPA*, 915 F.2d 1314, 1316 (9th Cir.1990). Whereas the previous scheme required proof of actual injury to a body of water to establish a violation, Congress now instituted a regime of strict liability for illegal pollution discharges. *See, e.g., United States v. Winchester Mun. Utils.*, 944 F.2d 301, 304 (6th Cir.1991). Government regulators were therefore freed from the "need [to] search for a precise link between pollution and water quality" in enforcing pollution controls. S. Rep. No. 92-414, at 8, *reprinted in 1972 U.S.C.C.A.N.* at 3675. Rather, they could simply determine whether a company was emptying more pollutants into the water than the Act allowed in order to detect a violation of the statute.

The centerpiece of the Clean Water Act is section 301(a). This section provides: "Except as in compliance with this section and [other sections of the Act], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). And in section 402 of the Act, Congress established the National Pollutant Discharge Elimination System (NPDES), which authorizes the issuance of permits for the discharge of limited amounts of effluent. *Id.* § 1342. The availability of such permits simply recognizes "that pollution continues because of technological limits, not because of any inherent rights to use the nation's waterways for the purpose of disposing of wastes." *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1375 (D.C.Cir.1977) (internal quotation marks omitted). Permit holders must comply not only with limitations on the amount of pollutants they may discharge, but also with a variety of monitoring, testing, and reporting requirements. *See, e.g., 33 U.S.C. § 1318.*

Both the Environmental Protection Agency (EPA) and individual states (with EPA approval) may issue NPDES permits. See *id.* § 1342(a), (b). Accordingly, the State of South Carolina has established an NPDES permit program administered by the Department of Health and Environmental Control (DHEC). See S.C.Code Ann. §§ 48-1-10 et seq. (Law. Coop. 1976 & West Supp.1998).

Critical to the enforcement of the Clean Water Act is the citizen suit provision found in section 505. 33 U.S.C. § 1365. Section 505(a) states that "any citizen may commence a civil action on his own behalf against any person . . . who is alleged to be in violation of an effluent standard or limitation under this chapter." *Id.* § 1365(a). An "effluent standard or limitation" is defined to include any term or condition of an approved permit. See *id.* § 1365(f). Citizens are thus authorized to bring suit against any NPDES permit holder who has allegedly violated its permit. A successful suit may result in the award of injunctive relief and the imposition of civil penalties payable to the United States Treasury. See *id.* § 1365(a).

Section 505(g) sets forth the statutory standing requirement for the citizen suit provision of the Clean Water Act. *Id.* § 1365(g). Specifically, it defines "citizen" as "a person or persons having an interest which is or may be adversely affected." *Id.* Congress has indicated that this provision confers standing to enforce the Clean Water Act to the full extent allowed by the Constitution. See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981) (citing S. Conf. Rep. No. 92-1236, at 146 (1972), reprinted in 1972 U.S.C.C.A.N. 3776, 3823, which notes that the term "citizen" in the Clean Water Act reflects the Supreme Court's decision in *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)).

B.

Defendant Gaston Copper owns and operates a non-ferrous metals smelting facili-

ty in Lexington County, South Carolina. At this plant, Gaston Copper treats contaminated storm water and releases it into Lake Watson, an impoundment on Gaston Copper's property. Lake Watson's overflow is then discharged into the environment by way of Boggy Branch, a tributary of Bull Swamp Creek. Bull Swamp Creek in turn flows into the North Fork of the Edisto River, which lies 16.5 miles downstream from the discharge point.

When Gaston Copper purchased the operation in 1990, the facility was covered by an NPDES permit issued by DHEC to the plant's previous owner. DHEC reissued the permit to Gaston Copper with an effective date of March 1, 1991. This permit allowed Gaston Copper to discharge wastewater containing limited quantities of pollutants, including cadmium, copper, iron, lead, mercury, nickel, PCBs, and zinc, from Lake Watson into Boggy Branch. The permit imposed pH limits as well. The terms and conditions of the permit included the monitoring and reporting of effluent discharges. Gaston Copper was also required to abide by a schedule of compliance for meeting its effluent limitations.

Plaintiffs FOE and CLEAN are two non-profit environmental organizations dedicated to protecting and improving the quality of natural resources. One of FOE's stated objectives is "to combat and eliminate water pollution." CLEAN exists "to clean up South Carolina's environment" and to "educat[e] South Carolinians about environmental issues affecting them as citizens and ways to address those issues."

Wilson Shealy is a member of CLEAN who lives with his family four miles downstream from Gaston Copper's facility. Shealy has resided on this property since 1964. His land contains a 67-acre lake that was created by damming Bull Swamp Creek. Shealy and his family fish, swim, and boat in the lake. Specifically, Shealy

claims that he fishes in the lake approximately every other week and swims in it about twice per year. He occasionally eats the fish that he catches in the lake. Further, Shealy's grandchildren, who live with him in the summer, swim and fish in the lake nearly every summer day.

Shealy claims that the pollution or threat of pollution from Gaston Copper's upstream facility has adversely affected his and his family's use and enjoyment of the lake. He limits the amount of time that his family swims in the lake because of his concern that the water is polluted. He also limits the quantity of fish that they eat out of fear that Gaston Copper's chemicals have lodged in the fish. Shealy states that if it were not for this concern about pollution, he would fish in his lake more often, eat the fish he catches more often, and allow his family to swim in the lake more often. He also alleges that the actual or threatened pollution diminishes the value of his property. Shealy has heard people refer to his lake as "the polluted pond."

Guy Jones is a member of both FOE and CLEAN. He is the owner and president of a canoe company that runs trips on the Edisto River. Jones claims that his concern that Gaston Copper is polluting the Edisto River affects his enjoyment of canoeing and swimming. He also claims that his concern about the water quality undermines his confidence in his company's ability to market its trips to the general public.

William McCullough, Jr., is a member of FOE who scuba dives in the Edisto River. He claims that he is concerned that the waters into which he dives may be contaminated. McCullough is particularly troubled by the possible presence of heavy metals. He states that he would be less likely to dive into water that he knows to contain pollutants.

On September 14, 1992, FOE and CLEAN filed a citizen suit in the United States District Court for the District of South Carolina pursuant to section 505 of

the Clean Water Act. They alleged that Gaston Copper had repeatedly violated the terms and conditions of its NPDES permit at its Gaston facility. Specifically, plaintiffs claimed that Gaston Copper had exceeded its permit's discharge limitations on numerous occasions, failed to observe its permit's monitoring and reporting requirements, and failed to meet its schedule of compliance. Plaintiffs sought declaratory and injunctive relief to prevent further permit violations, as well as the imposition of civil penalties and costs.

Nearly six years after suit was filed and after a six-day bench trial, the district court declined to rule on the merits of the case. The court instead dismissed plaintiffs' complaint for lack of standing, holding that none of plaintiffs' members had shown injury in fact. See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 9 F.Supp.2d 589 (D.S.C.1998). A divided panel of this court affirmed the district court's judgment. See *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107 (4th Cir.1999). We granted rehearing en banc and now reverse.

II.

A.

Article III of the Constitution restricts the federal courts to the adjudication of "cases" and "controversies." The threshold requirement of standing is "perhaps the most important" condition of justiciability. *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). The standing inquiry ensures that a plaintiff has a sufficient personal stake in a dispute to render judicial resolution appropriate. See *id.* at 750-51, 104 S.Ct. 3315. The standing requirement also "tends to assure that the legal questions presented to the court will be resolved, not in the rarefied atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the conse-

quences of judicial action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982).

To meet the constitutional minimum for standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751, 104 S.Ct. 3315. This formula includes three elements: (1) injury in fact; (2) traceability; and (3) redressability. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The injury in fact prong requires that a plaintiff suffer an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent. See *id.* at 560, 112 S.Ct. 2130. The traceability prong means it must be likely that the injury was caused by the conduct complained of and not by the independent action of some third party not before the court. See *id.* Finally, the redressability prong entails that it must be likely, and not merely speculative, that a favorable decision will remedy the injury. See *id.* at 561, 112 S.Ct. 2130.

While each of the three prongs of standing should be analyzed distinctly, their proof often overlaps. Moreover, these requirements share a common purpose—namely, to ensure that the judiciary, and not another branch of government, is the appropriate forum in which to address a plaintiff's complaint. See *Allen*, 468 U.S. at 752, 104 S.Ct. 3315.

In most kinds of litigation, there is scant need for courts to pause over the standing inquiry. One can readily recognize that the victim of an automobile accident or a party to a breached contract bears the kind of claim that he may press in court. In other sorts of cases, however, the nexus between the legal claim and the individual asserting the claim may not be so self-evident. Standing inquiry in environmental cases, for example, must reflect the

context in which the suit is brought. In some instances, environmental injury can be demarcated as a traditional trespass on property or tortious injury to a person. In other cases, however, the damage is to an individual's aesthetic or recreational interests. The Supreme Court has made it clear that such interests may be vindicated in the federal courts. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, — U.S. —, 120 S.Ct. 693, 705, — L.Ed.2d — (2000) (effect on "recreational, aesthetic, and economic interests" is cognizable injury for purposes of standing); *Lujan v. Defenders of Wildlife*, 504 U.S. at 562-63, 112 S.Ct. 2130 (purely aesthetic interest is cognizable for purposes of standing); *Sierra Club v. Morton*, 405 U.S. at 734, 92 S.Ct. 1361 ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society ... deserving of legal protection through the judicial process."); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 154, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970) (interest supporting standing "may reflect aesthetic, conservation, and recreational as well as economic values" (internal quotation marks omitted)). But because these and other non-economic interests may be widely shared, the Supreme Court has cautioned that environmental plaintiffs must themselves be "among the injured." *Sierra Club v. Morton*, 405 U.S. at 735, 92 S.Ct. 1361. If it were otherwise, the Article III case or controversy requirement would be reduced to a meaningless formality.

Courts must therefore examine the allegations in such cases "to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen*, 468 U.S. at 752, 104 S.Ct. 3315. Such scrutiny is necessary to filter the truly afflicted from the abstractly distressed. Courts discharge this duty by asking such questions as: "Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is

the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?" *Id.* If the plaintiff can show that his claim to relief is free from excessive abstraction, undue attenuation, and unbridled speculation, the Constitution places no further barriers between the plaintiff and an adjudication of his rights.

B.

In addition to meeting the "irreducible" constitutional minimum, *Lujan v. Defenders of Wildlife*, 504 U.S. at 560, 112 S.Ct. 2130, an individual must also satisfy any statutory requirements for standing before bringing suit. As noted earlier, the citizen suit provision of the Clean Water Act confers standing on any "person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). The language chosen by Congress confers standing on a "broad category of potential plaintiffs" who "can claim some sort of injury," be it actual or threatened, economic or noneconomic. *National Sea Clammers*, 453 U.S. at 16-17, 101 S.Ct. 2615.

The Supreme Court recognized in *National Sea Clammers* that this grant of standing reaches the outer limits of Article III. *Id.* at 16, 101 S.Ct. 2615 ("It is clear from the Senate Conference Report that this phrase was intended by Congress to allow suits by all persons possessing standing under this Court's decision in *Sierra Club v. Morton*."). Thus, if a Clean Water Act plaintiff meets the constitutional requirements for standing, then he *ipso facto* satisfies the statutory threshold as well.

C.

[1, 2] Finally, an association may have standing to sue in federal court either based on an injury to the organization in its own right or as the representative of its members who have been harmed. See *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). An

organization has representational standing when (1) at least one of its members would have standing to sue in his own right; (2) the organization seeks to protect interests germane to the organization's purpose; and (3) neither the claim asserted nor the relief sought requires the participation of individual members in the lawsuit. See *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

FOE and CLEAN assert representational standing on behalf of their members who have been harmed or threatened by Gaston Copper's discharge. The parties in this case contest only whether the first prong of representational standing—i.e., whether any member of FOE or CLEAN has individual standing—has been satisfied.

III.

The district court held that FOE and CLEAN lacked standing under Article III because they failed to establish that any of their members suffered an injury fairly traceable to Gaston Copper's alleged permit violations. The court pointed to the supposed absence of certain types of evidence: "No evidence was presented concerning the chemical content of the waterways affected by the defendant's facility. No evidence of any increase in the salinity of the waterways, or any other negative change in the ecosystem of the waterway was presented." *Gaston Copper Recycling*, 9 F.Supp.2d at 600. The district court therefore concluded that "[n]o evidence was presented that any plaintiff member has been adversely affected by the defendant's conduct." *Id.*

We disagree. CLEAN has surpassed the threshold that Article III and the Clean Water Act set for establishing a case or controversy. Wilson Shealy is a classic example of an individual who has suffered an environmental injury in fact fairly traceable to a defendant's conduct and likely to be redressed by the relief sought. The trial court erred therefore in

creating evidentiary barriers to standing that the Constitution does not require and Congress has not embraced. In fact, the legislative branch has invited precisely the type of suit brought by CLEAN. The judicial branch is not at liberty to impede its resolution on the merits.

A.

[3] We proceed then to examine each of the three elements of the standing inquiry. The injury in fact requirement precludes those with merely generalized grievances from bringing suit to vindicate an interest common to the entire public. See *Lujan v. Defenders of Wildlife*, 504 U.S. at 575, 112 S.Ct. 2130. A plaintiff must instead suffer an invasion of a legally protected interest that is "concrete and particularized" before he can bring an action. *Id.* at 560, 112 S.Ct. 2130. He must somehow differentiate himself from the mass of people who may find the conduct of which he complains to be objectionable only in an abstract sense. In other words, the alleged injury "must affect the plaintiff in a personal and individual way." *Id.* at 560 n. 1, 112 S.Ct. 2130. Without this requirement, the federal judicial process would be transformed into "no more than a vehicle for the vindication of the value interests of concerned bystanders." *Valley Forge*, 454 U.S. at 473, 102 S.Ct. 752 (internal quotation marks omitted).

The injury in fact requirement also blocks suit by those whose allegations of injury are based on mere conjecture rather than an actual or threatened invasion of their legally protected interests. See *Lujan v. Defenders of Wildlife*, 504 U.S. at 560, 112 S.Ct. 2130. Federal jurisdiction cannot lie if the alleged injury is merely "an ingenious academic exercise in the conceivable." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 689, 688, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). But this standard is one of kind and not of degree. Indeed, the claimed injury "need not be large, an identifiable trifle will suffice."

Sierra Club v. Cedar Point Oil Co., 73 F.3d 546, 557 (5th Cir.1996) (internal quotation marks omitted); see also *Conservation Council of North Carolina v. Costanzo*, 505 F.2d 498, 501 (4th Cir.1974) ("The claimed injury need not be great or substantial; an identifiable trifle, if actual and genuine, gives rise to standing." (internal quotation marks omitted)).

[4] Shealy has plainly demonstrated injury in fact. He has produced evidence of actual or threatened injury to a waterway in which he has a legally protected interest. Shealy is a property owner whose lake lies in the path of Gaston Copper's toxic chemical discharge. He and his family swim and fish in this lake. Shealy testified that he and his family swim less in and eat less fish from the lake because of his fears of pollution from Gaston Copper's permit exceedances. Shealy further claims that the pollution or threat of pollution has diminished the value of his property. Indeed, others have referred to his lake as "the polluted pond."

In fact, Shealy has alleged precisely those types of injuries that Congress intended to prevent by enacting the Clean Water Act. One of the well-recognized aims of the Act is to ensure that the nation's waterways are "fishable and swimmable." See, e.g., *Shanty Town Assocs. Ltd. Partnership v. EPA*, 843 F.2d 782, 784 (4th Cir.1988). Congress proclaimed this goal to provide "for the protection and propagation of fish, shellfish, and wildlife and provide[] for recreation in and on the water." 33 U.S.C. § 1251(a)(2). And it is well established that the "injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Warth*, 422 U.S. at 500, 95 S.Ct. 2197 (internal quotation marks omitted). Moreover, DHEC developed Gaston Copper's permit limits pursuant to a statutory command to protect public health, fish, and wildlife and to allow recreational activities on the water. See 33 U.S.C. § 1312(a). These health and recreational interests are

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constitutionally recognized as cognizable bases for injury in fact. See, e.g., *Laidlaw*, 120 S.Ct. at 705; *Sierra Club v. Morton*, 405 U.S. at 734, 92 S.Ct. 1361.

Shealy is thus anything but a roving environmental ombudsman seeking to right environmental wrongs wherever he might find them. He is a real person who owns a real home and lake in close proximity to Gaston Copper. These facts unquestionably differentiate Shealy from the general public. The company's discharge violations affect the concrete, particularized legal rights of this specific citizen. He brings this suit to vindicate his private interests in his and his family's well-being—not some ethereal public interest. We in turn are presented with an issue "traditionally thought to be capable of resolution through the judicial process." *Allen*, 468 U.S. at 752, 104 S.Ct. 3315 (internal quotation marks omitted).

Further, CLEAN has presented ample evidence that Shealy's fears are reasonable and not based on mere conjecture. The record is replete with evidence that Gaston Copper is fouling its receiving waters. Plaintiffs submitted discharge monitoring reports spanning more than four years of Gaston Copper's operations. They allege that these reports show over 500 violations of the company's discharge limits, including unlawful releases of cadmium, copper, iron, lead, and zinc, as well as pH violations.

Plaintiffs also offered evidence in the form of EPA studies and expert testimony of the adverse health and environmental effects of these chemicals. For example, copper is particularly toxic to aquatic organisms and can prevent spawning in fish. See Joint Appendix at 183, 439. Human beings are sensitive to lead poisoning, which can result in irreversible brain damage to children and other neurological impairment. See J.A. at 185, 448. Cadmium is also toxic and may cause a variety of health problems in humans, including cancer. See J.A. at 186, 412-15. Iron is chronically toxic to aquatic organisms and

leads to rust formation, which in turn degrades the aesthetic quality of the lake. See J.A. at 186. And disruption of the acceptable pH level of a waterway may increase the toxicity of certain chemicals to fish. See J.A. at 482-83.

[5] Plaintiffs submitted further evidence that Gaston Copper's permit exceedances could and did cause environmental degradation. To begin with, many of Gaston Copper's discharge limits were established by DHEC in order to attain a particular water quality. Because these discharge restrictions are set at the level necessary to protect the designated uses of the receiving waterways, their violation necessarily means that these uses may be harmed. See, e.g., *Public Interest Group of New Jersey, Inc. v. Rice*, 774 F.Supp. 317, 328 (D.N.J.1991). This fact was confirmed by a DHEC employee called to the stand by Gaston Copper at trial:

[Q:] And it's also assumed, is it not, that if you do not meet those [water-quality-based discharge] limits, you may be interfering with the designated uses of those waterways?

[A:] That's correct.

[Q:] And therefore if a designated use is swimming and you don't meet those limits, you may very well be interfering with the safety of swimming in that waterway?

[A:] That's correct.

In addition, Gaston Copper failed forty-one whole effluent toxicity tests in the forty-nine months between March 1991 and March 1995. These tests consisted of placing small organisms in effluent samples and counting the number that sicken. And at least eight of these toxicity failures were based on samples taken on days when the company allegedly violated its effluent limits. Even the company's own studies showed elevated quantities of cadmium, copper, lead, and mercury in sediment taken from the facility's receiving waters and unnatural concentrations of metals in the tissue of fish. Gaston Cop-

per's permit violations thus bear a direct relationship to the waterway's health.

Moreover, Gaston Copper's discharge affects or can affect the waters for a significant distance downstream. The parties have stipulated that the overflow from Lake Watson pours into Boggy Branch, a tributary of Bull Swamp Creek, which empties into the Edisto River. Yet plaintiffs offer far more than the stipulated description of the downstream flow of the water. During the comment period for Gaston Copper's permit, DHEC officially responded in writing to one downstream property owner's question as follows:

[Q:] I own property where Bull Swamp goes into the Edisto River, and I'd like to know, would the runoff go that far?

[A:] Yes, the runoff will go to Boggy Branch to Bull Swamp to the Edisto River. The confluence of Bull Swamp and [the] Edisto River is 16.5 miles.

Common sense dictates that the purpose of the question was to determine just how far downstream Gaston Copper's discharge would affect property owners. And the clear implication of DHEC's response is that Gaston Copper's discharges can impact the receiving waterway for a good distance downstream—well past Shealy's property and on down to the Edisto River itself. Shealy's lake is fed by Bull Swamp Creek only four miles downstream from the polluting facility. DHEC has indicated that the runoff will reach at least as far as the Edisto, which lies 12.5 miles beyond Shealy's property. Shealy's lake and home therefore lie more than four times closer to Gaston Copper than the acknowledged outer perimeter of the discharge zone.

As if this were not enough, Shealy has also presented uncontroverted testimony that the types of chemicals released into the water by Gaston Copper had been previously found in his lake. DHEC employees visited Shealy's property in the 1980s, analyzed the water quality of his lake, and reported the presence of copper, zinc, nickel, iron, and PCBs. These are the

same chemicals that the plant released in its wastewater during the tenures of both Gaston Copper and its predecessor. Although these tests were conducted before Gaston Copper took control of the facility in 1990, Gaston Copper operated the smelting facility using a similar wastewater treatment system to that of its predecessor. The evidence of past pollution is therefore directly relevant to the question of whether Gaston Copper subsequently affected or could affect Shealy's lake. Shealy's testimony that pollution of the type discharged by this system has reached his lake in the past shows that his fears are based on more than mere speculation.

In sum, the evidence paints a stark picture: Gaston Copper has been accused of violating its discharge permit. Its discharge affects or has the potential to affect the waterway for 16.5 miles downstream. Wilson Shealy sits a mere four miles from the mouth of the discharge pipe. The state has found the kinds of chemicals discharged by Gaston Copper in Shealy's lake in the past. And federal and private studies demonstrate the harmful environmental and health impacts of the toxic chemicals released by Gaston Copper. When this evidence is viewed in light of the legal threshold for standing, it is clear that the district court erroneously dismissed plaintiffs' suit. Shealy's claim is not a "generalized grievance" that relegates him to the status of a "concerned bystander" with a mere abstract interest in the environment. *Gaston Copper Recycling*, 9 F.Supp.2d at 600. While Shealy is unquestionably "concerned," he is no mere "bystander." See *Cedar Point Oil Co.*, 73 F.3d at 556.

It is instructive to contrast Shealy's injury with the injuries alleged by the plaintiffs in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351. In that case, the Defenders of Wildlife sought to challenge a government regulation that rendered the Endangered Species Act inapplicable to American actions

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in foreign nations. See *id.* at 557-558, 112 S.Ct. 2130. Two members of the group alleged that they had traveled to foreign countries and observed the habitats of certain endangered species. See *id.* at 563, 112 S.Ct. 2130. They also professed an intent to return to those countries at some indefinite future time in the hope of seeing the animals themselves. See *id.* at 563-64, 112 S.Ct. 2130. The members feared, however, that American involvement in development projects abroad would damage the species' habitats, thereby risking extinction and causing the members harm. See *id.* at 563, 112 S.Ct. 2130.

The Supreme Court dismissed the case for lack of standing because plaintiffs' members' allegations were insufficient to establish injury in fact. See *id.* at 564-66, 112 S.Ct. 2130. The members failed to show how damage to the species would produce imminent injury to themselves. See *id.* at 564, 112 S.Ct. 2130. They could not demonstrate any injury "apart from their special interest in the subject." *Id.* at 563, 112 S.Ct. 2130 (internal quotation marks omitted). Their "some day" intentions to return to the areas they had visited were simply not enough. See *id.* at 564, 112 S.Ct. 2130. The Court also rejected a variety of theories connecting distant plaintiffs to areas of impact on endangered species as "ingenious academic exercise[s] in the conceivable." *Id.* at 566, 112 S.Ct. 2130 (internal quotation marks omitted). The most expansive of these theories would have recognized injury in fact to "anyone who observes or works with an endangered species, anywhere in the world" resulting from "a single project affecting some portion of that species with which he has no more specific connection." *Id.* at 567, 112 S.Ct. 2130.

Shealy, by contrast, need not resort to such hypothetical harms to demonstrate his injury in fact. He is not asserting a mere academic or philosophical interest in the protection of the South Carolina waterways affected by Gaston Copper's pollution. Nor does he claim that he merely

"some day" intends to enjoy the use of his lake. Rather, he is a property owner in the path of a toxic discharge whose injury is ongoing. He is thus precisely the type of plaintiff that the Supreme Court envisioned in *Lujan v. Defenders of Wildlife*—namely, one who is acting to protect a "threatened concrete interest of his" own. 504 U.S. at 573 n. 8, 112 S.Ct. 2130.

The district court, however, required that plaintiffs present further evidence concerning one or more of the following: (1) "the chemical content of the waterways affected by the defendant's facility"; (2) "any increase in the salinity of the waterways"; and (3) "other negative change in the ecosystem of the waterway." *Gaston Copper Recycling*, 9 F.Supp.2d at 600. But the Supreme Court does not require such proof. In *Laidlaw*, 120 S.Ct. at 704-05, the Court found that several citizen affidavits attesting to reduced use of a waterway out of reasonable fear and concern of pollution "adequately documented injury in fact." Each of the citizens alleged that he or she would make greater recreational use of some part of the affected waterway were it not for their concern about the harmful effects of the defendant's discharges. See *id.* The Court required no evidence of actual harm to the waterway, noting: "We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity." *Id.* at 705 (quoting *Sierra Club v. Morton*, 405 U.S. at 735, 92 S.Ct. 1361).

Nor has any circuit required additional scientific proof where there was a direct nexus between the claimant and the area of environmental impairment. In *Cedar Point Oil Co.*, for example, the Fifth Circuit held that citizens' concern about water quality in Galveston Bay sufficed as injury in fact where "[t]wo of the affiants live near Galveston Bay and all of them use the bay for recreational activities." 73 F.3d at

556. It was enough that "the affiants expressed fear that the discharge ... will impair their enjoyment of these activities because these activities are dependent upon good water quality." *Id.*

Likewise, in *Friends of the Earth v. Consolidated Rail Corp.*, the Second Circuit found that two citizen affidavits "quite adequately satisfy the standing threshold." 768 F.2d 57, 61 (2d Cir.1985). In the first affidavit, a citizen stated that "he passes the Hudson [River] regularly and find[s] the pollution in the river offensive to [his] aesthetic values." *Id.* (internal quotation marks omitted). In the second, a father "averred that his children swim in the river, his son occasionally fishes in the river and his family has and will continue to picnic along the river." *Id.* And in *United States v. Metropolitan St. Louis Sewer Dist.*, the Eighth Circuit approved the standing of a citizens' group whose members alleged that they "visit, cross, and frequently observe" the Mississippi River and "from time to time ... use these waters for recreational purposes." 883 F.2d 54, 56 (8th Cir.1989). In none of these cases—where incidentally the claims of standing were weaker than the one before us—did the court require further specific allegations or evidence of the actual level of pollution in the waterway.

Courts have also left no doubt that threatened injury to Shealy is by itself injury in fact. The Supreme Court has consistently recognized that threatened rather than actual injury can satisfy Article III standing requirements. *See, e.g., Valley Forge*, 454 U.S. at 472, 102 S.Ct. 752; *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979). "[O]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (internal quotation marks omitted).

Threats or increased risk thus constitutes cognizable harm. Threatened environmental injury is by nature probabilistic. And yet other circuits have had no trouble understanding the injurious nature of risk itself. For example, in *Village of Elk Grove Village v. Evans*, the Seventh Circuit found standing because "[t]he Village is in the path of a potential flood" and "even a small probability of injury is sufficient to create a case or controversy." 997 F.2d 328, 329 (7th Cir.1993). Similarly, the District of Columbia Circuit in *Mountain States Legal Found. v. Glickman* held that an increased risk of wildfire from certain logging practices constitutes injury in fact. 92 F.3d 1228, 1234-35 (D.C.Cir. 1996). And the Fifth Circuit in *Cedar Point Oil Co.* did not require evidence of actual harm to the waterway, noting: "That this injury is couched in terms of future impairment rather than past impairment is of no moment." 73 F.3d at 556.

In this case, Gaston Copper's alleged permit violations threaten the waters within the acknowledged range of its discharge, including the lake on Shealy's property. By producing evidence that Gaston Copper is polluting Shealy's nearby water source, CLEAN has shown an increased risk to its member's downstream uses. This threatened injury is sufficient to provide injury in fact. Shealy need not wait until his lake becomes barren and sterile or assumes an unpleasant color and smell before he can invoke the protections of the Clean Water Act. Such a novel demand would eliminate the claims of those who are directly threatened but not yet engulfed by an unlawful discharge. Article III does not bar such concrete disputes from court. *See Lujan v. Defenders of Wildlife*, 504 U.S. at 560-61, 112 S.Ct. 2130.

Gaston Copper contends that Shealy has not supplied adequate proof of environmental degradation to show injury in fact. "The relevant showing for purposes of Article III standing, however, is not injury to

the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry ... is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit." *Laidlaw*, 120 S.Ct. at 704. Shealy's reasonable fear and concern about the effects of Gaston Copper's discharge, supported by objective evidence, directly affect his recreational and economic interests. This impact constitutes injury in fact. *See id.* at 705-06. It requires no abstraction or conjecture to understand the harm that confronts Shealy. We therefore have no doubt that Shealy can be counted "among the injured" for standing purposes. *Lujan v. Defenders of Wildlife*, 504 U.S. at 563, 112 S.Ct. 2130 (internal quotation marks omitted). The district court's error lies in asking too much—namely, in constructing barriers to an injured citizen's vindication of indisputably private interests in the use of his property and in the health of his family. Article III does not command such a judicial evisceration of the Clean Water Act's protections. And separation of powers principles will not countenance it.¹

B.

CLEAN also satisfies the second prong of the standing inquiry. The "fairly traceable" requirement ensures that there is a genuine nexus between a plaintiff's injury and a defendant's alleged illegal conduct. *See Lujan v. Defenders of Wildlife*, 504 U.S. at 560, 112 S.Ct. 2130. But traceability "does not mean that plaintiffs must show to a scientific certainty that defendant's effluent ... caused the precise harm suffered by the plaintiffs." *Natural Resources Defense Council, Inc. v. Watkins*, 954 F.2d 974, 980 n. 7 (4th Cir.

1. It is clear that CLEAN member Shealy has demonstrated injury in fact. The claims to injury of FOE members Jones and McCullough, however, present closer questions. The district court has not had an opportunity to consider their claims in light of the Supreme Court's standing analysis in *Laidlaw*,

1992) (quoting *Public Interest Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72 (3d Cir.1990)). If scientific certainty were the standard, then plaintiffs would be required to supply costly, strict proof of causation to meet a threshold jurisdictional requirement—even where, as here, the asserted cause of action does not itself require such proof. Thus, the "fairly traceable" standard is "not equivalent to a requirement of tort causation." *Id.* (quoting *Powell Duffryn Terminals*, 913 F.2d at 72). Other circuits have refused to interpret it as such. *See Cedar Point Oil Co.*, 73 F.3d at 557-58; *Natural Resources Defense Council, Inc. v. Texaco Ref. & Mktg., Inc.*, 2 F.3d 493, 505 (3d Cir.1993); *Powell Duffryn Terminals*, 913 F.2d at 72-73.

Rather than pinpointing the origins of particular molecules, a plaintiff "must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged" in the specific geographic area of concern. *Watkins*, 954 F.2d at 980 (internal quotation marks omitted). In this way a plaintiff demonstrates that a particular defendant's discharge has affected or has the potential to affect his interests. *See id.* at 980-81.

[6] CLEAN has satisfied this standard. Much of the evidence already cited for Shealy's injury in fact also proves traceability to Gaston Copper. Shealy testified to the past presence of metals in his lake of the type discharged by Gaston Copper. Plaintiffs have also submitted toxicity tests that show Gaston Copper is discharging pollutants at levels that cause environmental degradation. In addition, plaintiffs submitted evidence that the company's discharge will travel 16.5 miles downstream—well beyond the four-mile point that is Shealy's lake. Shealy's testi-

120 S.Ct. at 704-06. We therefore remand Jones' and McCullough's assertions of standing to the district court for evaluation in light of *Laidlaw*. We leave to the discretion of the district court whether to reopen the record for further testimony on the question of FOE's standing.

mony, buttressed by objective evidence from DHEC, thus establishes that his injuries are fairly traceable to Gaston Copper.

[7] Moreover, there is no suggestion that any entity other than Gaston Copper is responsible for the injury in fact that Shealy has established. The "fairly traceable" requirement is in large part designed to ensure that the injury complained of is "not the result of the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. at 560, 112 S.Ct. 2130 (internal quotation marks omitted). Where a plaintiff has pointed to a polluting source as the seed of his injury, and the owner of the polluting source has supplied no alternative culprit, the "fairly traceable" requirement can be said to be fairly met. This is the case here. As we have held, Shealy has shown injury in fact. This injury must, of course, be attributable to someone or something. Shealy points to a definite polluting source—namely, Gaston Copper—and supports this contention with objective evidence. Gaston Copper points to no other polluting source in response. Its efforts to contest the traceability of Shealy's injury to its facility therefore fail.

We decline to transform the "fairly traceable" requirement into the kind of scientific inquiry that neither the Supreme Court nor Congress intended. The absence of laboratory analysis of the chemical content, salinity, or ecosystem of Shealy's lake is of no moment for one simple reason: The law does not require such evidence. While Article III sets the minimum requirements for standing, Congress is entitled to impose more exacting standing requirements for the vindication of federal statutory rights if it wishes. Here the legislature chose to go to the full extent of Article III in conferring standing on any person with "an interest which is or may be adversely affected." 33 U.S.C. § 1365(g); *National Sea Clammers*, 453 U.S. at 16, 101 S.Ct. 2615. To have standing hinge on anything more in a Clean Water Act case would necessitate the liti-

gation of complicated issues of scientific fact that are entirely collateral to the question Congress wished resolved—namely, whether a defendant has exceeded its permit limits.

In applying the "fairly traceable" requirement, some distinction, of course, must be made between plaintiffs who lie within the discharge zone of a polluter and those who are so far downstream that their injuries cannot fairly be traced to that defendant. Compare *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 361-62 (5th Cir.1996) (finding an eighteen-mile distance "too large to infer causation"), with *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 900 F.Supp. 67, 75 (E.D.Tex.1995) (finding a two-to-four-mile distance sufficient to show causation). But to turn away a citizen who sits squarely in the discharge zone of a polluting facility seems more calculated "to negate the strict liability standard of the [Clean Water] Act" than to articulate any meaningful distinction. *Powell Duffryn Terminals*, 913 F.2d at 73 n. 10. CLEAN has charged that (1) Gaston Copper exceeds its discharge permit limits for chemicals that cause the types of injuries Shealy alleges and that (2) Shealy's lake lies within the range of that discharge. No court has required additional proof of causation in such a case.

C.

[8] Finally, CLEAN has standing because a favorable decision by the district court will redress Shealy's injuries. The redressability requirement ensures that a plaintiff "personally would benefit in a tangible way from the court's intervention." *Worth*, 422 U.S. at 508, 95 S.Ct. 2197. A plaintiff seeking injunctive relief shows redressability by "alleg[ing] a continuing violation or the imminence of a future violation" of the statute at issue. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S.Ct. 1003, 1019, 140 L.Ed.2d 210 (1998); see also *Laidlaw*, 120 S.Ct. at 707-08 (noting that *Steel Co.* held that

private plaintiffs may not sue to assess penalties for wholly past violations).

Here CLEAN seeks injunctive and other relief for Gaston Copper's continuing and threatened future violations of its permit. Not only did CLEAN allege continuing violations in its complaint, but over 350 of the alleged discharge violations and over 650 of the alleged monitoring and reporting violations occurred after the complaint was filed. In fact, some of the alleged violations occurred in 1997, the last period for which the record contains evidence. CLEAN has sought relief for continuing and threatened future violations at every stage of this litigation, including this appeal. We hold therefore that CLEAN presents claims of redressable injury.²

IV.

This case illustrates at heart the importance of judicial restraint. Courts are not at liberty to write their own rules of evidence for environmental standing by crediting only direct evidence of impairment. Such elevated evidentiary hurdles are in no way mandated by Article III. Nor are they permitted by the Federal Rules of Evidence or the text of the Clean Water Act. It is in fact difficult to see how one can move from the section 505(g) standard of "an interest which is or may be adversely affected" to a standard of direct scientific proof of an observable negative impact on a waterway.

Litigants routinely rely on circumstantial evidence to prove any number of contested issues. And if a prosecutor may rely wholly on circumstantial evidence to prove that a criminal defendant is guilty beyond a reasonable doubt, there is no apparent reason—and certainly not a rea-

2. Because Shealy used a waterway adversely affected or capable of being adversely affected by Gaston Copper's conduct, Gaston Copper's monitoring and reporting violations also cause him injury in fact. CLEAN alleges that these violations continue and requests injunctive and other relief to stop them. CLEAN thus has standing to pursue its monitoring and reporting claims under a straightforward

son apparent from the Constitution, the Federal Rules, or the Clean Water Act itself—to regard this type of proof as *per se* deficient for establishing standing in a Clean Water Act case. Citizens may thus rely on circumstantial evidence such as proximity to polluting sources, predictions of discharge influence, and past pollution to prove both injury in fact and traceability. This is what Wilson Shealy did. To require more would impose on Clean Water Act suits a set of singularly difficult evidentiary standards.

To deny standing to Shealy here would further thwart congressional intent by recreating the old system of water quality standards whose failure led to the enactment of the Clean Water Act in the first place. See, e.g., *Water Quality Act of 1965*, Pub.L. No. 89-234, 79 Stat. 903. An important reason for Congress' shift to end-of-pipe standards was to eliminate the need to address complex questions of environmental abatement and scientific traceability in enforcement proceedings. To have standing now turn on direct evidence of such things as the chemical composition and salinity of receiving waters would throw federal legislative efforts to control water pollution into a time warp by judicially reinstating the previous statutory regime in the form of escalated standing requirements. Courts would become enmeshed in abstruse scientific discussions as standing questions assumed a complicated life of their own. This danger is illustrated by this very case, where the in-depth discussion of control stations, macro-invertebrate sampling, and milligrams per kilogram has taken us far afield from the straightforward Clean Water Act issue of

application of this circuit's precedent in *Siera Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1112-13 (4th Cir.1988) (defendant's failure to monitor and report effluent discharges as required by permit causes injury in fact to plaintiff's interests in protecting environmental integrity of and curtailing ongoing unlawful discharges into waterway).

whether Gaston Copper has violated its permit limitations.

"[T]he law of Article III standing is built on a single basic idea—the idea of separation of powers." *Allen*, 468 U.S. at 752, 104 S.Ct. 3315. Courts must avoid infringing this principle either by reaching beyond jurisdictional limitations to decide abstract questions or by refusing to decide concrete cases that Congress wants adjudicated. This case presents a concrete controversy in which courts are left with no other choice but to effectuate Congress' clearly expressed language and intent. To bar the courthouse door to Shealy's claims of private injury would undermine the citizen suit provision of the Clean Water Act. We therefore reverse the judgment of the district court and remand this case for a determination of whether Gaston Copper has discharged pollutants in excess of its permit limits.

REVERSED AND REMANDED

NIEMEYER, Circuit Judge, concurring in the judgment and in the concurring opinion of Judge Luttig:

For the reasons that follow, I concur in the judgment and join Judge Luttig's concurring opinion.

The concept of constitutional standing lies at the heart of the judicial power conferred on courts by Article III of the Constitution. As the articulation of that standing requirement is relaxed, the scope of Article III power expands, moving it to a position where it could be exercised to resolve contests over legislation simply because citizens disagree with its interpretation. With a continuation of this trend, courts would ultimately become a super-legislative body, arbitrating the conflicts of the views of its citizenry generally.

Before the Supreme Court's recent decision in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, — U.S. —, 120 S.Ct. 693, — L.Ed.2d — (2000), I would have affirmed the district court in this case because the plaintiffs, who expressed only

a *subjective belief* of injury, have not shown that they "personally [have] suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant and that the injury fairly can be traced to the challenged action." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982) (citations and internal quotation marks omitted). These minimal requirements of Article III assured that legal issues would not be resolved "in the rarified atmosphere of a debating society." *Id.* The Supreme Court recognized in *Valley Forge* that federal courts are not "publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding." *Id.* at 473, 102 S.Ct. 752; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (standing is "an essential and unchanging part of the case-or-controversy requirement of Article III" and the separation of powers).

As my concurrence in Judge Luttig's opinion indicates, I believe that the decision in *Laidlaw* represents a sea change in constitutional standing principles, and in view of that decision I agree that we are now required to reverse.

LUTTIG, Circuit Judge, with whom Judge Niemeyer joins, concurring in the judgment:

I concur in the judgment of the court, but not in its opinion. Through no fault of this court, the Supreme Court's recent decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, — U.S. —, 120 S.Ct. 693, — L.Ed.2d — (2000), has rendered much of the discussion in today's opinion not merely unnecessary, but affirmatively confusing. Rather than persist in the fiction (as we do in the court's opinion) that *Laidlaw* was part of the fabric of standing jurisprudence at the time of argument in this case, or worse (as we also do) that that decision

was merely an unexceptional reaffirmation of the Court's previous precedents, I would simply reverse the district court's judgment on the specific reasoning of the Supreme Court in *Laidlaw* and say little else. The unfortunate implication left by the court's failure to address the significant change in environmental standing doctrine worked by the Supreme Court's recent decision in *Laidlaw* (and by the court's comfortable, but mistaken, assumption that the Supreme Court's decisions prior to *Laidlaw* themselves dictated the conclusion we reach today), is that the district court seriously erred in its application of the standing doctrine extant at the time that it ruled—which it did not.

HAMILTON, Senior Circuit Judge,
concurring in the judgment:

The Supreme Court's decision in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, — U.S. —, 120 S.Ct. 693, — L.Ed.2d — (2000), has unnecessarily opened the standing floodgates, rendering our standing inquiry "a sham," *id.* 120 S.Ct. at 715 (Scalia, J., dissenting). However, being bound by *Laidlaw Envtl. Servs.*, I concur in the court's judgment reversing the district court's judgment and remanding the case for a determination as to whether Gaston Copper has discharged pollutants in excess of its permit limits.

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ETHICAL CONCERNS IN ENVIRONMENTAL LAW

**Glenna Jo Curry
Attorney at Law
LaGrange, Kentucky**

**James L. Dickinson
Office of Administrative Hearings
Natural Resources and Environmental Protection Cabinet
Frankfort, Kentucky**

**W. Patrick Stallard
Stites & Harbison PLLC
Louisville, Kentucky**

**Richard H. Underwood
University of Kentucky College of Law
Lexington, Kentucky**

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SECTION L



HYPOTHETICAL ONE

Including Six Scenarios

"FUN AND FACTS"

BACKGROUND: Starshine in Cosmic County, Kentucky, a largely rural county, has been chosen as the site of the Fun n' Fast Snowboard Company's newest manufacturing plant. Fun n' Fast has several factories in other states and has been cited with several environmental violations. Fun n' Fast uses a special coating on their snowboards to reduce friction. The coating process involves the use of EXS, a multi-purpose chemical that can be a risk to human health and the environment if released into soil or water. Fun n' Fast is a subsidiary of MegaSports, Inc. A large number of Cosmic County citizens have formed, and incorporated, the Citizens United to Protect Sparkling (CUPS) because the location of the future Fun n' Fast is bordered by Sparkling River. Sparkling River runs through the county, including downtown Starshine, and is a popular river for fishing and canoeing. Fun n' Fast has applied for a KPDES permit.

John Apple is a member of a small three person law firm, Apple, Bean & Curd in his hometown Starshine.

SCENARIO A. In 1997, John, while an associate in a big law firm in Louisville, represented MegaSports in the negotiations to purchase property in High Hopes, Kentucky, a town located several counties away from Starshine. John has not represented MegaSports in any other matters. Bats n' Balls, another MegaSports subsidiary, recently finished construction of a baseball manufacturing factory at the High Hope property and has been issued a KPDES permit to discharge into the Upper Fork of Sparkling River. Bats n' Balls also uses EXS in the process of binding the core of the baseballs they manufacture. Several High Hopes citizens have requested a formal hearing before the state environmental protection agency to contest the KPDES permit.

- ✓ On Monday May 9, 2000, John gets a call from the President of CUPS. CUPS wants John to be their spokesperson at next week's public hearing on Fun n' Fast's draft KPDES permit. The public hearing is conducted by the state's environmental protection agency. On the same day, Bats n' Balls' plant manager calls John's partner, Jim Bean, and asked Mr. Bean if he can represent Bats n' Balls at the administrative adjudicatory hearing scheduled for late August.

What should John and Jim do?

- ✓ Meanwhile, at the state agency's hearing office, Administrative Law Judge Brownfill is assigned to hear the case on the Bats n' Balls KPDES permit. Administrative Law Judge Brownfill is a former private practitioner and had represented MegaSports in tax matters for several years. He remembers that Bats n' Ball is a subsidiary of MegaSports.

Should ALJ Brownfill preside over the case?

SCENARIO B: John's wife is in-house counsel for a local manufacturing company, Better Widgets. In last night's dinner conversation John and his wife are talking about his upcoming meeting with representatives of CUPS. John's wife tells him that Better Widgets uses EXS in their manufacturing processes and the environmental manager at the plant says it's really safe. John has already read several studies about the potential environmental and health effects of EXS and thinks there's pretty good evidence to challenge a KPDES permitting a discharge into Sparkling River.

Can John represent CUPS?

SENARIO C: Assume the background facts. Administrative law Judge Brownfill attends John Apple's wedding in Starshine, Kentucky. John and Brownfill were law school buddies. At the reception, a local citizen activist strikes up a conversation with the ALJ about the growth of industry in Cosmic County and the threat to the environment from the new snowboard company. Brownfill comments that progress has a price and Cosmic County can probably use the tax dollars from its corporate citizens. A few months later, Brownfill is assigned to a case involving CUPS petition to contest a KPDES permit issued to Fun n' Fast Snowboard Company.

Should ALJ Brownfill preside over the case?

Brownfill decides its OK for him to preside over the case so he reviews the file. He learns that his old law school buddy, John Apple, is representing the citizens group.

Should ALJ Brownfill preside over the case?

Brownfill decides its OK for him to preside over the case. Shortly before the final pre-hearing conference, Brownfill receives a thank-you note for the silver napkin rings Brownfill had given the newlyweds. John added in his note: P.S. I look forward to the hearing and the chance to bring out the awful truth about EXS.

What should Brownfill do?

SENARIO D: Assume the background facts except now Fun n' Fast has been in operation for several years in Cosmic County. They are John's "best" client. Last year, the Fun n' Fast laboratory discovered a cheaper and safer chemical to use in the manufacturing of its snowboards. The company properly disposed of its remaining drums of EXS at a permitted facility. One day at lunch, the plant manager tells John that he and the plant maintenance supervisor recently found three remaining drum of EXS in the basement of Fast n' Fun. Not wanting to deal with the "red tape" of disposing of these few drums, the plant manager had told the maintenance supervisor to "just get rid of them." The maintenance supervisor dumped one drum into a sinkhole close to a small stream that runs by the plan and into the Sparkling River. He poured the other drums out on the ground behind the plant's warehouse, close to the property line. The plant manager told John that he didn't think one drum would cause any harm to public health or the environment. John remembers reading company documents about studies documenting fish kills from exposure to certain levels of

EXS. He has also read studies confirming the human health risks associated with eating EXS contaminated fish. The plant manager tells John he knows John won't tell anyone because of the attorney-client privilege.

What, if anything, should John do?

Meanwhile, the plant maintenance supervisor is a personal friend of John's partner Joe Curd. Joe receives a late night call from the supervisor. The supervisor tells Joe the story of the illegal dumping. The plant manager now feels badly about dumping the EXS because his young son likes to fish in the Sparkling River. He wants to "come clean" and asks Joe for some "friendly advice."

What should Joe do?

SENARIO E: Assume background facts. Joe Curd, the newest partner at Apple, Bean & Curd was, for numerous years, in-house counsel for the state's environmental protection agency. Several years ago, Bats n' Balls, a MegaSports Subsidiary, was cited for a release of EXS into the environment from its Bright Spot, Kentucky Plant. Joe negotiated an Agreed Order with Bats n' Balls. Joe left state government employment one year ago. Bats n' Balls has opened a plant in High Hope, Kentucky and has been issued a KPDES permit. The High Hope Chapter of CUPS calls Joe and ask him to represent them in a formal administrative hearing to contest the KPDES permit issued to Bats n' Balls.

What should Joe do?

Assume the background facts. The High Hope plant has been in operation several years, the above-described release was from the High Hope plant, and negotiation by Joe required Bats n' Balls to obtain all state permits required for its High Hope facility. At the time Joe negotiated the Agreed Order, the High Hope plant did not have any point sources. However, the company recently constructed a holding pond for storm water runoff from the facility. The pond has a discharge pipe. The High Hope Chapter of CUPS calls Joe and ask him to represent them in a formal administrative hearing to contest the KPDES permit issued to Bats n' Balls.

Can Joe represent the High Hope Chapter of CUPS?

SENARIO F: Assume background facts; but, Fun n' Fast has been in business for numerous years. Assume Snowboarding quickly became "passé" and Fun n' Fast is closing its doors. John's wife, in-house counsel for Better Widgets tells John her client is interested in the Fast n' Fun property. John remembers an incident a few years ago concerning the plant maintenance supervisor and drums of EXS being dumped on the Fun n' Fast. As far as John knows, no one, including any state or federal agency, is aware of the illegal dumping.

What should John do?

HYPOTHETICAL TWO

"COVERING THE DRUMS"

Mary Mutual graduated from law school in 1994 and opened her law office in Lexington, where she has concentrated in small business matters, domestic relations, bankruptcy and estate planning. Last month, a client called Mary to discuss an "environmental problem." Mary had previously represented this client in a divorce. The client had purchased a small farm close to Lexington and had discovered an area where several drums had been dumped. He didn't know what were in the drums and was afraid to call the "state" because he didn't want to get stuck with "some sort of expensive environmental problem." He asked Mary if he could just cover the drums up and just forget about it. Mary told the client she would call him back in a one week. Mary has a good friend that has handled some environmental cases and she thinks she can call her to find out what the client should do. Three weeks later, Mary still hasn't had a chance to talk to her friend about this matter. She is so embarrassed that she hasn't returned the call, she thinks she'll have her paralegal call the client and tell him something.

✓ *What should Mary do?*

HYPOTHETICAL THREE

"BLUE SKIES ENVIRONMENTAL"

Law Firm handles most of Smalltown Bank's real estate closings. Recently, Smalltown Bank loaned another one of Law Firm's clients the money to purchase property in the new industrial park. Law Firm didn't act as the closing attorney on this deal. The bank contracted with Blue Skies Environmental Consulting to conduct a Phase I study of the property. No problems were found. When client began construction of his new manufacturing plant, an old tank was discovered during some excavation work. Client has some preliminary testing conducted and there is soil contamination. Client knows a little about the state's tank clean up fund, and isn't sure the removal and clean up of this tank will be covered. Client comes to your office, a new associate in Law Firm, and wants you to sue Blue Skies Environmental. You aren't familiar with all of Law Firm's clients.

✓ *What should Law firm do?*