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David Sive Award for Best Brief Overall: Eighteenth Annual Pace National Environmental Law Moot Court Competition

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DAVID SIVE AWARD FOR BEST BRIEF OVERALL*

Civ. App. No. 05-195

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

BEARCLAW RIVER KEEPER, INC.

and

TOWN OF NOBLESVILLE, NEW UNION,
Appellants,

v.

MAJOR ELECTRONICS, INC.,
Appellee.

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

BRIEF FOR THE APPELLANT BEARCLAW RIVER KEEPER, INC.

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* This brief has been reprinted in its original form.

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JURISDICTIONAL STATEMENT

This case arises under the Clean Water Act, 33 U.S.C. § 1251 *et. seq.* (2005) and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et. seq* (2005). Both acts are federal statutes. Federal courts have jurisdiction over all cases arising from federal statutes. 28 U.S.C. § 1331 (2005). Petitioner filed a timely appeal from a final judgment entered by a federal district court. Accordingly, this Court has jurisdiction. 28 U.S.C. § 1291 (2005).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the PCB-impregnated soil at Major Electronics manufacturing facility is a "point source" under CWA § 504(14), 33 U.S.C. § 1362(14).
2. Whether the allegations of BRK that Major Electronics discharge of PCBs into the Bearclaw River violates water quality standards established by the state of New Union under CWA § 303, 33 U.S.C. § 1313, are actionable under the CWA.
3. Whether the CWA preempts the federal common law of nuisance for non-point source pollution.
4. Whether the CWA preempts state common law of nuisance for non-point source pollution originating in another state.

5. Whether BRK may maintain a public nuisance claim on behalf of its members under the "special injury" rule.
6. Whether BRK has claims for reimbursement and summary judgment against Major Electronics under CERCLA § 113(f), 42 U.S.C. § 9613(f), in the absence of pending or previous action under CERCLA §§ 106 or 107, 42 U.S.C. §§ 9606 or 9607 and whether BRK's claim under § 107, 42 U.S.C. § 9607, can be denied as inconsistent with the National Contingency Plan without an explanation of how it differs from the plan.

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the District of Progress granting Major Electronics, Inc.'s ("Major Electronics" or "Major") motions for summary judgment. Bearclaw River Keeper, Inc. ("BRK") brought suit against Major Electronics pursuant to § 505, 33 U.S.C. § 1365, the citizen suit provision of the Clean Water Act ("CWA" or the "Act"), complaining that Major Electronics violated § 301(a) of the Act which forbids the addition of a pollutant to navigable water without a permit. 33 U.S.C. § 1311(a). BRK further alleges that Major Electronics is violating federal and state common law of nuisance. The Town of Noblesville ("Noblesville"), located in the State of New Union, was granted leave to intervene as a Plaintiff-Appellant in a number of BRK's CWA and nuisance claims. Noblesville also brought a claim against Major Electronics, seeking reimbursement of response costs and summary judgment under § 113(f) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9613(f). BRK amended its complaint to make a similar CERCLA claim.

The district court granted summary judgment in favor of Major Electronics on four grounds. First, the district court agreed with Major that CWA § 301(a) was not violated. This decision was based on the court's holding that the polychlorinated biphenyl ("PCB") impregnated soil at Major's manufacturing facility is not a "point source" under CWA § 502(14), 33 U.S.C. § 1362(14). R. at 6. BRK challenges the district court's ruling that the soil beneath Major's facility is not a point source and that CWA § 301 was not violated.

Second, the district court agreed with Major that violations of water quality standards are not actionable under the citizen suit provision as a violation of "an effluent standard or limitation" under CWA § 505, 33 U.S.C. § 1365(a)(1). R. at 7. Noblesville

joins BRK in arguing that water quality standard violations are actionable under the CWA.

Third, the district court granted Major's motion for summary judgment on the grounds that BRK could not maintain common law nuisance claims because the CWA preempts the federal common law of nuisance for non-point source pollution and the state common law of nuisance for non-point source pollution originating in another state. Even if the federal and state common law of nuisance were not preempted by the CWA, the court held that BRK lacks standing to bring a nuisance action on behalf of its members because they have not suffered a "special injury" separating their harm from the injury imposed on the general public. R. at 8. Noblesville joins BRK in arguing that the CWA does not preempt the federal or state common law of nuisance for non-point source pollution but does not join BRK in arguing that BRK can maintain a public nuisance claim under the "special injury" rule.

Fourth, the district court agreed with Major Electronics that BRK does not have any CERCLA claims. The court held that there can be no cause of action for contribution in the absence of a pending or previous action under CERCLA §§ 106 or 107. The Court further reasoned that Noblesville, like Major, is a "liable party" under § 107 and as such, has no claim under that same section. Finally, the court held that BRK's claim for recovery is inconsistent with the National Contingency Plan ("NCP"). R. at 9. Both BRK and Noblesville argue the district court erred in holding they have no CERCLA claims.

STATEMENT OF THE FACTS

BRK is a non-profit corporation organized under the laws of the State of New Union and its members include residents of the Town of Noblesville, State of New Union. R. at 3. Noblesville is located on the banks of Bearclaw River (the "River") one mile downstream from New Union's border with the State of Progress. R. at 4. Eighty percent of the Noblesville's population is a racial minority group, Proto-Litigian, and on average, the population is just above the poverty level with Noblesville being the poorest town in the state. *Id.*

The town's population relies on the Bearclaw River to provide recreational activities such as swimming and fishing at the public beach. *Id.* The state has classified a fifty-mile stretch of the Bearclaw River from the state line downstream past Noblesville as "Class B" waters which are suitable for fishing and contact recrea-

tion use. R. at 4-5. However, the New Union Department of Environmental Conservation ("NUDEC") has warned the residents that using the public beach and swimming in the River may expose them to unsafe levels of PCBs. R. at 5. The state's water quality criterion states that PCBs shall not exceed X concentration in "Class B" waters. *Id.* After a wet-weather event, concentrations of PCBs in the river adjacent to the public beach exceed X concentration. *Id.* In addition, NUDEC and the Food and Drug Administration ("FDA") have advised Noblesville residents against eating fish from the river since fish taken at locations on or near the public beach contain levels of PCBs that exceed safety levels established by the FDA. *Id.* NUDEC surveys initially indicated that these warnings did not result in a diminution of local consumption of fish from the river and residents continued to eat on average twelve pounds of fish from the river every year. *Id.*

In the spring of 2005 however, Noblesville spent $50,000 to construct an eight-foot high chain link fence to prevent access to the public beach and to increase policing of the area to prevent swimming and fishing. *Id.* BRK also spent $500 on signs posted on the fence warning residents of the dangers of PCBs in the river and on the public beach. After these actions, local swimming from the beach decreased by thirty percent and fishing decreased by twenty-five percent although residents continue to swim and fish in other portions of the Bearclaw River. *Id.*

The only known sources of PCBs in the section of the Bearclaw River around Noblesville are the Noblesville public beach and an electrical equipment manufacturing facility located two miles upstream in Fort Union, State of Progress. *Id.* This facility is owned by Major Electronics, a corporation organized under the laws of the State of Progress. R. at 3. Major has manufactured electrical equipment at this facility for decades and until 1980, used PCBs as heat-resistant conduction material in its equipment. R. at 4.

Over the last several decades, spills and equipment leaks of PCBs at Major's facility have impregnated the soil beneath the facility with PCBs at depths that reach the watertable. R. at 4, 6. Like Noblesville, this facility is located directly on the banks of the Bearclaw River. R. at 4. Furthermore, the water table beneath the facility is located upgradient from the Bearclaw River. *Id.* Because of the facility's proximity to the river and water table, when it rains, precipitation soaks into the soil and through the vadose

zone[1] which carries concentrations of PCBs attached to the soil particles into the Bearclaw River. The river then flows past Noblesville and its public beach two miles downstream from Major's facility. *Id.* The State of Progress has classified the Bearclaw River from upstream of Major's facility to the state border with the State of New Union as "Class C" waters suitable for industrial and non-contact recreational use. *Id.* The State of Progress does not have PCB water quality standards for "Class C" waters. *Id.*

Major Electronics has a National Pollution Discharge Elimination System (NPDES) permit issued to it by the Administrator of the Environmental Protection Agency ("EPA") under CWA § 402, 33 U.S.C. § 1342, which allows it to discharge treated effluent from its manufacturing process lines into the Bearclaw River. *Id.* In Major's initial NPDES permit application and in subsequent renewal applications, it reported occasional low-level concentrations of PCBs in its wastewater discharge but the issuing authority did not include a PCB effluent limitation in Major's permit. *Id.* However, Major has reported that its wastewater discharge is occasionally contaminated by incidental concentrations of PCBs from unknown sources. *Id.*

SUMMARY OF THE ARGUMENT

It has been widely held by courts of appeal that the definition of point source should be interpreted broadly to include conveyances other than pipes and ditches. Because the PCB contamination of the Bearclaw River comes from an identifiable point of discharge that can be attributed to Major Electronics, the district court erred in holding that the PCB impregnated soil beneath the Major facility does not constitute a point source.

Major Electronic's discharge of PCBs from its manufacturing facility is the cause of violation of New Union's water quality standards. This violation is actionable under the CWA because BRK is authorized to bring suit under 33 U.S.C. § 1365 for violations of water quality standards and violations of the water quality standards are themselves a violation of the CWA.

If this Court determines that the soil beneath the Major Electronics' facility is not a point source, it must be considered a nonpoint source for the purpose of the CWA. The court below did not fully appreciate the significance of this distinction in its interpre-

1. Water or solutions in the earth's crust above the permanent groundwater level. Merriam-Webster Collegiate Dictionary (11th ed. 2003).

tation of *City of Milwaukee v. Illinois,* 451 U.S. 304 (1981) and *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981), two cases in which the Supreme Court held that the federal common law of nuisance was preempted with respect to point-sources falling under the CWA's comprehensive regulatory scheme. Because the Court's decision was narrowly limited to point sources and non-point sources fall outside of the CWA's regulatory scheme, BRK may maintain an action in nuisance against Major Electronics under the federal common law.

The district court also erred in holding that the CWA preempts the operation of New Union's common law of nuisance as it applies to a non-point source of water pollution originating in the State of Progress. This error is based on its misinterpretation of *International Paper Corporation v. Ouellette,* 479 U.S. 481 (1987) where the Court narrowly held that Vermont's common law of nuisance was preempted as it applied to a New York point source. The CWA does not expressly or impliedly preempt the application of one state's common law to an out-of-state non-point source polluter, and New Union's common law as applied to these sources is not in conflict with the Act. Therefore, BRK may maintain an action in nuisance against Major Electronics under New Union common law.

The district court also erred in applying the "special injury" rule to grant summary judgment on BRK's public nuisance claim. The "special injury" rule was put in place several centuries ago with valid justifications. Those justifications no longer exist and so the rule should no longer bar meritorious claims. Even if the "special injury" is applied to the facts here, BRK can show that they have suffered an injury "different in kind." They have suffered injuries to both their livelihood and physical injuries. Neither of which is suffered by the public generally.

Finally, the district court erred in granting summary judgment on BRK's CERCLA claim for failure to be consistent with the NCP. Summary judgment is only proper when a party fails to make a sufficient showing on an essential element. Consistency with the NCP is not an essential element as several circuits have held and the purpose of CERCLA requires. Since it is not an essential element, it is improper to grant summary judgment on that basis. Even if consistency with the NCP is found to be an essential element, there are circumstances when summary judgment is not proper for inconsistency with the NCP. A limited re-

cord, as is present here, is one of those special circumstances. The remedial nature of CERCLA impels that it be interpreted liberally and this claim should therefore not be dismissed over a small procedural hurdle that would contravene the goals for which CERCLA was enacted.

STANDARD OF REVIEW

The district court granted Major Electronic Inc.'s motions for summary judgment. The appropriate standard of review for a grant of summary judgment is *de novo*. *DeBoer v. Pennington,* 206 F.3d 857, 863 (9th Cir. 2000). Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Viewing the evidence in the light most favorable to Bearclaw River Keeper, Inc., this Court must determine whether there are any genuine issues of material fact and whether the district court correctly applied the substantive law. *See Berry v. Valence Tech., Inc.,* 175 F.3d 699, 703 (9th Cir. 1999).

ARGUMENT

I. THE PCB-IMPREGNATED SOIL AT MAJOR'S FACILITY IS A "POINT SOURCE" UNDER 33 U.S.C. § 1362(14) AND MAJOR IS THEREFORE IN VIOLATION OF 33 U.S.C. § 1311 FOR THE DISCHARGE OF A POLLUTANT WITHOUT A PERMIT.

The objective of the CWA is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C § 1251(a). To achieve this goal, CWA § 301 prohibits the "the discharge of any pollutant by any person" except as authorized by specific sections of the Act. § 1311. The pertinent section here is CWA § 402, the NPDES permit program which makes it unlawful to discharge a pollutant without obtaining a permit or complying with its terms. § 1342; *Trs. for Alaska v. EPA*, 749 F.2d 549, 553 (9th Cir. 1984). Under § 402, the Administrator of the EPA, or a state agency acting under an EPA approved permit program, issues NPDES permits authorizing effluent discharges in compliance with conditions stated in the permit. *Id.* Major Electronics has a valid EPA issued NPDES permit allowing it to discharge treated effluent from its manufacturing process lines into the Bearclaw River. R. at 5. However, this permit does not ad-

dress the discharge of PCBs from the soil beneath the facility to the Bearclaw River.

When a person is alleged to be in violation of an effluent standard or limitation, CWA § 505(a)(1) authorizes citizens to bring suit. § 1365(a)(1). To establish a violation of CWA § 301, a plaintiff must show the defendant (1) discharged (2) a pollutant (3) to navigable waters (4) from (5) a point source. §§ 1311(a), 1362(12) (defining discharge of a pollutant as the "addition of any pollutant to navigable waters from any point source."); *Nat'l Wildlife Fed'n v. Gorsuch,* 693 F.2d 156, 165 (D.C.Cir.1982).

Here, the parties stipulate that PCBs are pollutants, the Bearclaw River is navigable, and that Major Electronics adds PCBs to the Bearclaw River. R. at 5. Thus, the only issue is whether the soil is a point source. Major Electronics argues that since § 301's prohibition against discharge of pollutants applies only to point sources, they cannot found to be in violation of the Act since the PCB impregnated soil beneath its facility is not a point source. However, the soil beneath the facility is a point source for two primary reasons: (1) the definition of point source is broadly interpreted and the plain language of the Act expands the definition of point source beyond pipes and ditches and (2) the soil is an identifiable point of discharge that can be ascribed to a single polluter.

A. The definition of "point source" is broadly interpreted and 33 U.S.C. § 1362(14) expands the definition of "point source" beyond "pipes" and "ditches."

The CWA defines a "point source" as "any discernible, confined, and discrete conveyance, including *but not limited to* any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." § 1362(14) (emphasis added); *see also* 40 C.F.R. § 122.2 (EPA regulation defining "point source" in same manner as § 1362(14)). United States courts of appeal have widely held that this definition of a point source is to be broadly interpreted. *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004); *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 955 (9th Cir. 2002); *Concerned Areas Residents for the Env't v. Southview Farms*, 34 F.3d 114, 118 (2d Cir. 1994); *United States v. Earth Scis., Inc.*, 599 F.2d 368, 373 (10th Cir. 1979). The Act does not define "conveyance" but it's

common definition is "the action of conveying" or "a means of transport." Merriam-Webster Collegiate Dictionary (11th ed. 2003). Further, "convey" means "to bear from one place to another." *Id.*

In *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F.Supp. 983, 988 (E.D. Wash. 1994) the defendant mining company argued its man-made mining tailing ponds were not point sources but merely "areas of low topography into which mine tailing from mineral processing activities have been deposited and through which water may percolate" and that a "point source is usually a ditch or a pipe." This is similar to Major Electronics argument that their soil is not a point source since PCBs from its manufacturing activities have just percolated through the soil downhill into the River. R. at 4. However, the court in *Hecla Mining* found the tailing ponds were a point source. 870 F.Supp. at 988. The court reasoned that "it would be irrational to conclude that the bigger the source of pollution, the less likely it is to be a 'source' under the CWA." *Id.* Further, "discharges from a pond or refuse pile can easily be traced to their source. Thus, even though runoff may be caused by rainfall or snow melt percolating through a pond or refuse pile, the discharge is from a point source because the pond or pile acts to collect and channel contaminated water." *Id.* The same is true here. The soil has collected PCBs spilled or leaked during Major's manufacturing activities and is therefore a point source.

Similarly, the Eleventh Circuit in *Scrap Metal Processors*, 386 F.3d at 1009, held that "piles of debris. . .collected water, which then flowed into the stream. [The piles], are therefore, point sources within the meaning of the CWA." As in *Hecla Mining*, 870 F.Supp at 988, a point source is something that can "collect" pollutants. The PCBs at Major's facility have built up in the soil to measurable levels and the soil has thus acted to collect pollutants which makes it a point source.

The district court below relied on the rationale that soil is not a man-made conveyance and that being man-made is a distinguishing element of a point-source. In addition, 40 C.F.R. § 122.2 defines "discharge of a pollutant" as including "additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man. . .." However, the reasoning of the Fifth Circuit in *Sierra Club v. Abston Construction Co., Inc.*, 620 F.2d 41 (5th Cir. 1980), is more persuasive. In *Abston*, a mining company engaged in strip mining placed discarded materials

in highly erodible piles which were then carried away by rain water through naturally created ditches. *Id.* at 43. The court found that storm water contaminated with sediment and mining spoil discharged from sediment basins, spoil piles, and through erosion-created gullies into a nearby stream can be regulated as point source discharges. *Id.*

Although it is true that the spoil piles in *Abston* were man-made and configured to produce channels down which pollutants would flow, and that Major Electronics did not construct the soil beneath its facility or construct a construct a device to channel the flow of the PCBs into the River, this distinction is insignificant. The court stated in dicta that "[n]othing in the Act relieves [the defendant] from liability simply because the operators did not actually construct these conveyances, so long as they are reasonably likely to be the means by which pollutants are ultimately deposited into a navigable body of water." *Id.* at 45. This statement describes Major Electronics' actions. Although Major did not construct the soil, it is not just the likely means but the actual means by which pollutants are being deposited into the Bearclaw River. Whether man-made or not, the soil still collects the PCBs and because of the downhill gradient from the facility to the river and rainwater, the PCB impregnated soil moves towards and is deposited in the River.

B. The PCB-impregnated soil beneath Major Electronics facility is a point source for purposes of proving a violation § 33 U.S.C. § 1311(a) as it is an identifiable point of discharge that can be ascribed to a single polluter.

Major Electronics argues that the PCB laden soil is not a point source which implies it is a "non-point source" of pollution not regulated under § 301 or § 402 and not defined in the CWA. The court in *United States v. Earth Sciences., Inc.*, 599 F.2d at 373, stated that Congress has classified non-point source pollution as runoff caused "primarily by rainfall around activities that employ or create pollutants" and that such runoff could not be traced to an identifiable point of discharge. *See also Trs. for Alaska*, 749 F.2d at 558 (same classification of non-point source pollution). The court further stated that it "contravenes the intent of [the CWA] to exempt from regulation any activity that emits pollution from an identifiable point." *Earth Sciences,* 599 F.3d at 373. Examples of non-point sources are "oil and gas runoffs caused by

rainfall on the highways [which] are virtually impossible to isolate to one polluter." *Id.* at 371. The court went on to hold that a reserve sump used in mining operations was a point source even though it was not a "conduit" as mentioned in § 1362(14) but was a pit or well in which liquids collect. *Id.* at 374. The court also pointed out that the "touchstone of the regulatory scheme is that those needing to use the water for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated. The concept of a point source was designed to further this scheme by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States." *Id.* at 373.

Similarly here, the soil can more accurately be classified as a point source rather than a non-point source since the PCBs in the Bearclaw River can be traced to an "identifiable point of discharge" and it is not impossible to isolate the polluter. As the district court below found, it is not disputed that the soil beneath Major's facility is contaminated with PCBs, R. at 5, and it is thus identifiable as the source of the PCBs in the Bearclaw River and contaminating Noblesville's beach. Major Electronics is also the only source of PCBs in the Noblesville region it is therefore possible to isolate them as the polluter. *Id.*

In *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168, 1173 (D. Mont. 1995), the court held mine pits were discernable, confided and discrete conveyances of acid drainage constituting a point source which required a NPDES permit. The court cited a statement in an EPA Region VIII letter that "any seeps coming from identifiable sources of pollution. . .would need to be regulated by discharge permits" to support finding the mine pits were point sources. *Id.* The soil at Major's facility is a point source as it is the identifiable source of PCB pollution in the Bearclaw River. Following *Trustees for Alaska*, 749 F.2d at 558, the court in *Beartooth Alliance* further explained that "the non-point source designation is limited to uncollected runoff water which is difficult to ascribe to a single polluter." *Id.* There is no such difficulty here. Major admits it is adding PCBs to the Bearclaw River and it is the only source of PCB contamination in the Noblesville region, R. at 5; thus, it is easy to ascribe the pollution to a single polluter and to remove it from a non-point source classification.

II. THE PCBS ENTERING THE BEARCLAW RIVER VIOLATE THE STATE OF NEW UNION'S WATER QUALITY STANDARDS AND ARE THERFORE ACTIONABLE UNDER THE CWA.

The CWA "provides for two sets of water quality measures." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). The first, effluent limitations, are "promulgated by the EPA and restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources." *Id.*; §§ 1311, 1314. These limits are technology based standards as they require the use of pollution control technology. *Natural Res. Def. Council v. EPA*, 822 F.2d 104, 110 (D.C. Cir. 1987). The second, water quality standards, are "promulgated by the States and establish the desired condition of the waterway." *Id.*; § 1313. NPDES permits must include "technology-based effluent limitations that reflect the pollution reduction available based on specific equipment or process changes, without reference to the effect on the receiving water and, where necessary, more stringent limitations representing the level of control necessary to ensure that the receiving waters attain and maintain state water quality standards." *Natural Res. Def. Council, Inc. v. EPA*, 16 F.3d 1395, 1400 (4th Cir. 1992); §§ 1342, 1311(b), 1311(c)).

Water quality standards have three elements: (1) the designated use or uses of each waterway, (2) criteria expressed in numerical concentration levels or narrative statements, and (3) an anti-degradation provision. Id.; § 1313(c)(2)(A). New Union has designated the Noblesville portion of the Bearclaw River as "Class B" waters suitable for fishing and contact recreation use. R. at 4-5. New Union set a maximum PCB concentration of X for these waters. R. at 5. In contrast, Progress has classified its portion as "Class C" waters suitable for industrial and non-contact recreational use and does not have a PCB water quality standard. R. at 4.

Major Electronics' discharge of PCBs from its manufacturing facility violates New Union's PCB water quality standards. This violation is actionable under the CWA for two reasons: (1) BRK is authorized to bring suit under § 1365 for violations of water quality standards and (2) violations of the water quality standards are themselves a violation of the CWA whether or not the soil is considered a point source.

A. Citizens are authorized to bring suit under 33 U.S.C. § 1365 for violations of water quality standards promulgated under 33 U.S.C. § 1313.

Section 505, 33 U.S.C. § 1365 of the CWA authorizes suit for violations of "an effluent standard or limitation" which includes "an effluent limitation or other limitation under [§ 301]." Major Electronics asserts that the Act's citizens suit provision does not authorize suit here since, according to Major, their facility has no effluent standard or limitation for PCBs, which means there can be no violation. However, the Supreme Court and the Ninth Circuit have emphasized that violations of water quality standards are enforceable in a citizens suit.

In *Northwest Environmental Advocates v. City of Portland*, 56 F.2d 979, 987 (9th Cir. 1995), the court held that violations of water quality standards are enforceable in a citizens suit brought under § 1365. This case is distinguishable from the present case in that the effluent discharges causing the water quality standards to be violated were covered by a NPDES permit. *Id.* at 983. However, the discharges held to be within the permit did not have effluent limitations, *id.* at 985, which makes it similar to Major's discharge of PCBs which has no PCB discharge limitation. This case is also distinguishable from the one at bar since in *Northwest Environmental Advocates*, the NPDES permit specifically made violating water quality standards a condition of the permit. *Id.* Although Major does have a NPDES permit to discharge wastewater from its processing lines, the permit does not have a PCB effluent limitation and it does not cover PCBs discharged from the soil beneath its facility. R. at 4.

Read more broadly though, the court's reasoning supports allowing suit here. In response to the polluter's argument that "§ 505 allows citizens to enforce only those water quality standards that are translated into effluent limitations" the court stated that "nowhere does Congress evidence an intent to preclude the enforcement of water quality standards that have not been translated into effluent discharge limitations." *Nw. Envtl. Advocates*, 56 F.2d at 986; *see also* S.Rep. No. 414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3671 ("If the wastes discharged by polluters reduce water quality below the standards, action may be begun against the polluters."). Simply because Major Electronics is not operating under a PCB effluent limitation does not mean the enforcement of Progress' water quality standards should be precluded. *See also Wash. Wilderness Coalition v. Hecla Mining*

Co., 870 F.Supp. 983, 968 (E.D. Wash. 1994) (stating the court in *Northwest Environmental Advocates* "did not suggest that a permit must be in place before a citizens suit may be brought; rather, it distinguished between suits to enforce discharge limitations that would be the subject of a permit and those to enforce general water quality standards.").

B. Violations of New Union's water quality standards promulgated under 33 U.S.C. § 1313 are themselves violations of the CWA.

Major does not deny that New Union's water quality standards for PCBs are violated after wet weather events or that the violations are largely, if not entirely, caused by PCBs entering the River from the soil beneath their facility. R. at 6. But Major does argue that a violation of New Union's water quality standards is not an enforceable violation of the Act. Major's analysis rests on the assertion that to have an enforceable violation, there must be an addition of pollutants from a point source to a navigable water without, or in violation of, an NPDES permit under § 301, 33 U.S.C. § 1311. Since, according to Major, the soil is not a point source, there can be no violation. However, a violation of § 301 can still occur whether or not the soil is characterized as a point source since violating the water quality standards is itself of violation of the Act.

Section 1365(a) allows a citizen to commence suit against any person alleged to be in violation of an effluent standard or limitation. "Effluent standard or limitation" is defined as "an unlawful act under subsection (a) of [§] 1311. . .[or] an effluent limitation or other limitation under [§§] 1311 or 1312." § 1365(f). As discussed above, § 1311 is applicable to point sources. However, § 1311(b)(1)(C) lists additional enforceable standards including state water quality standards: in order to achieve the objectives of the Act there shall be achieved "any more stringent limitation including those necessary to meet water quality standards. . .or required to implement any applicable water quality standard established" under the Act.

The citizens in *Oregon Natural Resources Defense Council v. U.S. Forest Service*, 834 F.2d 842, 850 (9th Cir. 1987) used these statutory provisions to argue they were entitled to sue to enforce state water quality standards. The court disagreed and held that "only permit limitations derived from water quality standards, not the water quality standards themselves, are enforceable by citi-

zens suits." However the court's rationale relies in part on the distinction between point and non-point sources: "we do not believe that the Act allows for the enforcement of state water quality standards, as affected by nonpoint sources, under the citizen suit provision." *Id.* at 849. The present case is distinguishable since, as argued above, the soil may correctly be classified as a point source. In addition, the Supreme Court has twice held that violations of water quality standards are actionable under the CWA.

In *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 707 (1994), the Court reasoned "[s]tates are responsible for enforcing water quality standards." In addition, the Court in *Arkansas v. Oklahoma*, 503 U.S. 91, 101-102 (1992) stated that "the primary means for enforcing [water quality standards] is the NDPES" program. Although these cases did not involve citizens suits, the Court's statements are still an acknowledgement that citizen suits can be used to enforce permit conditions based on both effluent limitations and state-established standards. Although Major is not operating under a permit with PCB limitations, Major can not avoid liability for violating water quality standards simply because it is not operating under a permit.

In *Hecla Mining*, 870 F.Supp. at 986, the court held that citizen suits can be based on allegations that the polluter is discharging without a NPDES permit. The mining company argued the citizens bringing suit had not shown violation of an "effluent limitation" since they challenged the companies failure to get a limitation setting permit in the first place. *Id.* The court reasoned that 1365(f) defines "effluent limitation" to include "an unlawful act under subsection (a) of section 1311; 1311(a) in turn makes it unlawful to discharge any pollutant except in compliance with the NPDES permit required in section 1342. Thus, a citizen suit to enforce an 'effluent limitation' can be based on allegations that the defendant is discharging without an NPDES permit." *Id.* at 986. Similarly here, BRK's suit should be allowed based on the allegation that not only is Major discharging without an NPDES permit, but those discharges are also causing New Union's water quality standards to be violated.

III. BRK MAY MAINTAIN A CAUSE OF ACTION IN NUISANCE AGAINST MAJOR ELECTRONICS UNDER FEDERAL COMMON LAW.

The district court improperly held that the CWA entirely preempts the federal common law of nuisance in the area of water pollution. This error is based on the court's misinterpretation of the two Supreme Court cases that considered whether the CWA preempts the federal common law of nuisance in relation to point sources of water pollution. The district court's broad interpretation of *City of Milwaukee v. Illinois* 451 U.S. 304 (1981) and *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981) ignores the fact that both cases address the preemption of the federal common law of nuisance with respect to point sources, specifically foregoing consideration of whether a private party may commence an action in nuisance against a non-point source polluter under the federal common law.

At issue in this case is whether BRK may bring an action in nuisance under the federal common law against Major Electronics. The CWA does not explicitly preempt the federal common law and no court has ever held that the Act implicitly preempts the federal common law of nuisance with respect to non-point sources. Because the federal common law has never been explicitly or implicitly preempted, an injured party may maintain an action nuisance under the federal common law against an injury-causing non-point source polluter.

A. A finding that the soil beneath the Major Electronic facility does not constitute a point source under 33 U.S.C. § 1362(14) places the facility outside the regulatory scope of the CWA.

The regulatory scheme established by the CWA turns upon the distinction between point sources and non-point sources. The CWA "establish[ed] an all-encompassing program of water pollution regulation" through which "[every] point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress. . . ." *Milwaukee*, 451 U.S. at 318. All sources falling outside or specifically excluded from the "point source" definition are considered non-point sources for the purposes of the Act. Although not explicitly defined in the Act itself, it is generally accepted that non-point source pollution is "nothing more [than] a [water] pollu-

tion problem not involving a discharge from a point source." *Gorsuch,* 693 F.2d at 166, n. 28. Therefore, if this Court determines that the soil beneath the Major Electronic facility does not constitute a point source, it must find that it is a non-point source of pollution.

Characterizing the Major Electronic facility as a non-point source of pollution has far-reaching implications for the CWA's role in regulating the ongoing PCB contamination of the Bearclaw River. Because they fall outside the NPDES permitting program established by the CWA, the EPA lacks the authority to regulate effluents discharged from non-point sources. *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005). Furthermore, although the Act requires states to designate water quality standards and to identify those waterways that do not meet these standards, "nothing in the CWA demands that a state adopt a regulatory scheme for non-point sources." *Id.* (quoting *Am. Wildlands v. Browner,* 260 F.3d 1192, 1194 (10th Cir. 2001)). A ruling by this Court that the soil beneath the Major Electronics facility does not constitute a point source precludes regulation of this source of contamination through the CWA's permitting scheme and eliminates the ability of a private party to bring an enforcement action under the Act's citizen suit provision. Thus, an injured party's only possible recourse for an injury caused by a non-point source polluter lies in the common law.

B. The holding of *City of Milwaukee v. Illinois* preempts the federal common law of nuisance in relation to point sources only, leaving the cause of action available for parties injured by non-point source polluters.

Despite the district court's representations to the contrary, the Supreme Court in *Milwaukee* did not hold that the CWA completely preempted the federal common law of nuisance. Instead, the Court narrowly limited its reading of the CWA to preempt the federal common law of nuisance with respect to point sources only. At issue in *Milwaukee* was whether parties could use federal common law to impose more strict effluent limitations on point source polluters than those required in their NPDES permit. 451 U.S. at 305. The Court determined that "[federal] courts lack authority to impose more stringent effluent limitations under federal common law than those imposed by the agency charged by Congress with administering" the comprehensive regulatory scheme created by the CWA. *Milwaukee*, 451 U.S. at 320. This decision was based on

the fact that "the problem of effluent limitations has been thoroughly addressed through the administrative scheme established by Congress." *Id.* The Court was concerned that applying federal common law of nuisance to sources covered by a NPDES permit could supplant or render ineffective the CWA's comprehensive regulatory scheme. *Id.* at 317.

The Supreme Court did not consider the preemptive effect of the Act on the federal common law of nuisance in regards to non-point sources of water pollution because these sources fall outside of the regulatory scheme established by Congress. The district court's interpretation of the *Milwaukee* decision is overbroad and ignores the rationale behind the Supreme Court's narrow holding. Because no comprehensive permitting program exists for non-point sources and Congress has chosen not to provide for their regulation under the Act, this Court need not be concerned with rendering ineffective any provision of the CWA. Therefore, the only permissible reading of the *Milwaukee* decision requires this Court recognize the continued availability of an action in nuisance against non-point source polluters under the federal common law.

C. The Supreme Court in *Middlesex County Sewerage Authority v. National Sea Clammers Association* merely reaffirmed the *City of Milwaukee v. Illinois* decision that the federal common law of nuisance is preempted in relation to point sources, leaving the cause of action available for parties injured by non-point source polluters.

The district court also misinterpreted *Sea Clammers*, 453 U.S. 1, a Supreme Court case decided the same year as *Milwaukee,* 451 U.S. 304. The district court erred by holding the *Sea Clammers* decision completely preempted the federal common law of nuisance in the water pollution context. The issue before the Court in *Sea Clammers* was whether all federal common-law nuisance actions concerning ocean pollution were pre-empted by the regulatory scheme established in the CWA and the Marine Protection, Research, and Sanctuaries Act (MPRSA). 453 U.S. at 11. Focusing narrowly on the issues before it, the Court held that "the federal common law of nuisance has been fully pre-empted in the area of ocean pollution." *Id.* Similar to its rationale in *Milwaukee,* the Court's decision was based on the comprehensive nature of the regulatory scheme established by the CWA.

Because the Court only considered ocean pollution, it determined "it need not discuss the question whether the federal common law of nuisance could ever be the basis of a suit for damages by a private party." *Id.* at n.17. The circumstances of this case present a compelling reason for this Court to hold that the federal common law of nuisance can be the basis of a suit by a private party because without the availability of the federal common law a private party would be left without a remedy under federal law for an injury inflicted by a non-point source polluter. Therefore, this Court should reject the district court's broad reading of *Milwaukee* and *Sea Clammers* and hold that the federal common law of nuisance is not preempted by the CWA in relation to non-point sources of water pollution.

IV. BRK MAY MAINTAIN A CAUSE OF ACTION IN NUISANCE AGAINST MAJOR ELECTRONICS UNDER NEW UNION COMMON LAW.

The district court improperly held that BRK may not maintain an action in nuisance against Major Electronics under New Union common law. This erroneous decision was based on the Court's misinterpretation of the Supreme Court's decision in *International Paper,* 479 U.S. 481, where it again considered the preemptive scope of the CWA. In *International Paper*, the Court specifically considered whether the CWA preempts Vermont common law to the extent that such law may impose civil liability on a New York point-source. The Court held that Vermont common law was preempted and could not form the basis of a suit against an out-of-state point source. However, the Court did not consider whether one state's common law could be used to impose liability on an out-of-state non-point source polluter. This Court must consider whether or not BRK may use New Union's common law of nuisance to impose liability on Major Electronics, a corporation whose facility is located upstream in the State of Progress and is responsible for the PCB contamination of the Bearclaw River. Because the district court misread *International Paper* to apply to all sources of water pollution and the CWA does not preempt or conflict with New Union common law in relation to non-point sources, its granting of summary judgment to Major Electronics must be reversed.

A. The district court erred in holding that the Court in *International Paper* did not distinguish between the CWA's preemptive effect on point source versus non-point source pollution.

The district court erred by distinguishing between the CWA's preemptive effect on point source versus non-point source pollution. In *International Paper*, the Supreme Court clearly held "that when a court considers a state-law claim concerning interstate water pollution that is subject to the CWA, the court must apply the law of the State in which the point source is located." 479 U.S. at 487. Here, there is not a point source of water pollution. Instead, the soil beneath the Major Electronics facility is a non-point source of pollution and thus falls outside the narrowly limited scope of the Court's holding.

Furthermore, the Court in *International Paper* went to great lengths to describe the comprehensive nature of the scheme under which point sources are regulated. This scheme was the key factor in the Court's determination that a state court must apply the law of the State in which the point source is located. The Court recognized that "if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serious interference with the achievement" of the purposes of the CWA. *International Paper*, 479 U.S. at 493. The Court was concerned that subjecting permit holding dischargers to common-law suits could render the permitting scheme of the Act meaningless. *Id.* at 497. This concern has no application in the context of non-point sources because they fall outside the regulatory scope of the Act. Therefore, the district court erred in holding that *International Paper* did not distinguish between point sources and non-point sources. Accordingly, BRK may use New Union's common law of nuisance to impose liability on Major Electronics.

B. The CWA does not preempt the operation of New Union's common law of nuisance as it applies to a non-point source of water pollution originating in the State of Progress.

It is universally accepted that the Supremacy Clause, U.S. Const. art. VI, cl. 2, invalidates state laws that "interfere with, or are contrary to," federal law. *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (quoting *Gibbons v.*

Ogden, 9 Wheat. 1, 211 (1824)). The Court in *International Paper* recognized three ways that state law can be preempted by a federal statute. 479 U.S. at 491. Adopting the analytical framework of the *International Paper* decision, this Court must hold that the CWA does not preclude the common law of one state being used to impose liability on an out-of-state non-point source polluter. Accordingly, this Court should rule in BRK's favor and allow it to commence an action in nuisance against Major Electronics under New Union's common law.

i. The CWA does not explicitly preempt the operation of New Union's common law of nuisance as it applies to a non-point source of water pollution originating in the State of Progress.

Under the Supremacy Clause, a federal statute may explicitly provide for the preemption of state law so long as Congress acted within constitutional limits. *Hillsborough,* 471 U.S. at 713. Although Congress acted constitutionally under its commerce power in adopting the CWA, it did not expressly preempt state law. *United States v. Ashland Oil & Transp. Co.,* 504 F.2d 1317, 1329 (6th Cir. 1974); U.S. Const. art. 1, § 8, cl. 3. Therefore, any preemption of state law under the Act occurs impliedly or to the extent that the state law is in conflict with the CWA.

ii. The CWA does not impliedly preempt the operation of New Union's common law of nuisance as it applies to a non-point source of water pollution originating in the State of Progress.

In the absence of a provision explicitly providing for preemption, such preemption may be inferred when "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation." *Hillsborough,* 471 U.S. at 713 (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)). Considering whether there was 'room' for supplementary state regulation, the Court in *International Paper* concluded "if affected States were allowed to impose separate discharge standards on a single point source, the inevitable result would be a serous interference with the achievement of the "full purposes and objectives of Congress." 479 U.S. 494. The primary objective of the Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters through the application of a comprehensive regulatory

scheme to point sources of pollution. 33 U.S.C. § 1251, 1342. Because no such scheme exists for non-point sources, there is ample 'room' for state regulation. To allow BRK to use New Union's common law of nuisance to impose liability on Major Electronics would not interfere with the NPDES program and would actually help achieve the goal of reducing water pollution. Therefore, the Act does not impliedly preempt the operation of New Union's common law of nuisance as it applies to a non-point source of water pollution originating in the State of Progress.

iii. New Union's common law of nuisance as applied to a State of Progress non-point source polluter does not conflict with the CWA.

Even where Congress has not completely displaced state regulation in a specific area, state law may be preempted to the extent that it conflicts with federal law. *Hillsborough,* 471 U.S. at 713. Such a conflict will be found when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Id.* (quoting *Hines v. Davidowitz,* 312 U.S. 52 (1941)). When considering whether the application of Vermont law to a New York point source conflicted with the objectives of the CWA, the Court in *International Paper* held that a state law is "pre-empted if it interferes with the methods by which the federal statute was designed to reach [its] goal." 479 U.S. 494. It also recognized that applying the one state's common law to an out-of-state point source polluter would "circumvent the NPDES permit system" and impose common law liabilities "even though the source had complete with its state and federal permit obligations." *Id.* at 494-95. Applying New Union law to Major Electronics is a dramatically different situation than that considered in *International Paper* because it is not subject to the NPDES permitting system. Because non-point sources fall outside this permitting system and have no federal or state effluent limitations to meet, there is no conflict between New Union common law and the methods by which the CWA was designed to reduce water pollution. Accordingly, this Court must hold that the district court erred in holding of *International Paper* preempts the application of New Union's common law of nuisance to a non-point source located in the neighboring State of Progress.

V. THE DISTRICT COURT ERRED IN APPLYING THE "SPECIAL INJURY" RULE TO BAR BRK'S PUBLIC NUISANCE CLAIM

Public nuisance is defined as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B (2005). Historically, there are three elements to a successful public nuisance claim brought by a private party: (1) The existence of a public nuisance, (2) the Defendant must have created, contributed to or maintained the nuisance, and (3) the public nuisance must have caused the private party to suffer a "special injury". It is this last element that is unjustifiably preventing BRK from their day in court. The rationale for the "special injury" requirement no longer justifies its use when private parties seek an injunction, and should not be utilized here. However, if this court applies the "special injury" requirement, BRK can show that they have suffered an injury "different in kind" and their claim for public nuisance should be heard on the merits.

A. The "Special Injury" requirement should not be used to bar a hearing on the merits of the public nuisance claim

> "[It] is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

The "special injury" rule is an anachronism that should no longer be blindly followed. It has its roots in a 16th century English case. The dissent in that case noted that a private party should be able to bring a public nuisance claim if he "had a greater hurt or inconvenience that any other man had." Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. Envtl. Aff. L. Rev. 89, 99 (1998) (*quoting Sowthall v. Dagger*, Y.B. 27 Hen. Fo. 27, pl. 10). This dissent has become the "special injury" requirement that has survived to this day. However, the concerns that necessitated the "special injury" rule at the time are no longer applicable and therefore the rule should be eliminated.

The "special injury" rule is generally given a "tri-partite" rationale. It will prevent multiplicity of similar actions, prevent trivial suits and "prevent interference with the discretion of public authorities." William H. Rodgers, *Environmental Law: Air and Water*, §2.2, pg. 36 (1986). These reasons are of little concern in the modern legal system and especially so in regards to parties seeking injunctions. If a private plaintiff succeeds in enjoining the nuisance, there is no need for other parties to bring suit. If the private plaintiff is not successful then res judicata principles will prevent similar suits from being brought. As to trivial lawsuits, modern courts have established methods to extinguish those lacking merit early in the process such as summary judgment and motions to dismiss. The last justification is that these suits would interfere with the sovereign public's role. This may have been true at the time the rule was created as nuisances were the King's responsibilities. Times have clearly changed. Modern courts have acknowledged the concept of the "private attorney general", *e.g.*, *Miotke v. City of Spokane*, 678 P.2d 803 (Wash. 1984), and citizen suits have been enacted into many of the environmental statutes.[2]

The ALI recognized that the special "injury rule" no longer serves a purpose in the public nuisance context when parties seek injunctions.

> In order to maintain a proceeding to enjoin or abate a public nuisance, one must: (a) have the right to recover damages, as indicated in Subsection (1) (special injury), . . . (c) have standing to sue as a representative of the general public, as a citizen in a citizen's action or as a member of a class in a class action.

Restatement (Second) of Torts § 821C (2005)

The Supreme Court of Hawaii has taken up this progressive rule and abandoned the "special injury" requirement and replaced it with an "injury in fact" test. *Akau v. Olohana Corp.*, 652 P.2d 1130, 1134 (Haw. 1982). To take account for some of the concerns that underlie the "special injury" requirement, the plaintiff must also demonstrate "that the concerns of a multiplicity of suits are satisfied by any means." *Id.* Expanding the ability of Plaintiffs to satisfy standing requirements in public nuisance cases, as Hawaii has done, would be in line with other areas of the law. The Supreme Court has broadened standing to challenge agency deci-

2. Clean Water Act, 33 U.S.C. § 1311(a); Solid Waste Disposal, 42 U.S.C. § 6972 (2005)

sions. In addressing injury in fact requirements the Court said, "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." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686 (1973). They have also allowed standing to those who are claiming aesthetic injury. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

This court should change as modern times dictate and not prevent meritorious claims from being heard if the justifications for barring them have long since vanished.

B. If the court insists on using the "special injury" requirement, BRK has suffered an injury "different in kind."

The traditional "special injury" rule requires that plaintiffs must show that their injury is "different in kind" and not just "different in degree" from that suffered by the general public. *See, Ileto v. Glock Inc.*, 349 F.3d 1191, 1211 (9th Cir. 2003) (applying California law); *Frey v. EPA*, 270 F.3d 1129, 1137 (7th Cir. 2001) (applying Indiana law). BRK can show that the pollution has caused their members, an injury which is in fact different in kind. The pollution has affected the "livelihood" and it has caused physical harm to members of BRK different in kind from other citizens of New Union.

i. BRK has suffered harm of livelihood which is a "special injury" recognized by courts

Courts have consistently held that a public nuisance that harms ones livelihood is an injury "different in kind" and meets the "special injury" test. "[I]n substantially all of those cases in which commercial fisherman using public waters have sought damages for the pollution or other tortuous invasion of those waters, they have been permitted to recover." *Burgess v. M/V Tamano*, 370 F. Supp. 247, 250 (D. Me. 1973). Harm of livelihood to farmers has also been recognized as a "special injury." *In re Starlink*, 212 F. Supp. 2d 828 (N.D. Ill. 2002).

The plaintiffs are not involved in commercial activity but the effect on the citizens of Noblesville is similar because they rely on fishing for their livelihood, which is defined as "support or subsistence". Merriam-Webster Dictionary (11th ed., 2005). Noblesville is the poorest city in New Union and the average citizen is just

above the poverty line. To supplement their meager incomes, the residents must fish in order to feed themselves and their families. To say that fishermen who rely for their income on fishing are specially injured while those who fish to eat because their income is insufficient, are not, would elevate form over substance. In either situation, the pollution is limiting their ability to "support". In this instance, the fish merely act as a proxy for income and should be treated similarly.

Alaska Native Class v. Exxon Corp., 104 F.3d 1196 (9th Cir. 1997), would appear to foreclose such a claim of special injury but can be readily distinguished. The plaintiffs, natives of Alaska, brought a claim for public nuisance resulting from the Exxon Valdez oil spill. They had already recovered economic damages for loss of fish harvest and were seeking additional recovery because their "way of life" had been damaged. This is in stark contrast to what BRK claims. Noblesville residents were fishing because they needed the fish to live. The Alaskan citizens were making a loss of culture argument. BRK argues that they have suffered, in essence, an economic loss caused by the pollution.

This economic loss is not suffered by others in the general public. Other members of the state are able to buy enough food that has not been poisoned with PCB's and are thus not affected in the same way.

ii. The physical harm caused by consumption of poisonous fish is per se "different in kind"

"Injuries to a person's health are by their nature "special and peculiar" and cannot properly be said to be common or public." *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219, 1233 (D. Mass. 1986); *see also* Restatement (Second) of Torts § 821C, comment d (2005). The fish in Bearclaw River have been found to contain levels of PCB's that exceed safe levels established by the Food and Drug Administration (FDA) and The New Union Department of Environmental Conservation (NUDEC) has stated that swimming in the Bearclaw River may expose users to unsafe levels of PCB's. The average resident of Noblesville consumes twelve pounds of fish every year. As mentioned above, the residents are forced to eat fish from the River due to the poor state of the economy in the city. In addition, if they want to swim, they must do so in the River because there is no public pool. The PCB laden fish and

chemical makeup of the River itself are thus physically harming the residents of Noblesville[3].

The injury to those who must eat the fish and swim in the River is not as extensive or obvious as that alleged by plaintiffs in *Anderson* because the physical harm has not manifested yet. However, other areas of law are expanding the reach of "injury" in regards to exposure to toxic pollutants and future injuries. The Supreme Court granted standing to an environmental group due to the future damage caused by proximity to nuclear power plants emissions.

> [T]he emission of non-natural radiation into appellees' environment would also seem a direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants.

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 74 (1978)

It is important that BRK does not seek damages. It is unclear exactly how much any individual will be affected by the PCB's in Bearcreek. In that case, a court might understandably choose not to find an injury, because it is uncertain what the exact level of injury is. However, since only an injunction is sought, there should be a more liberal interpretation of injury. There will be some adverse effects from repeated exposure to these PCB's, with an injunction these effects will hopefully be minimized. The physical injury that is being suffered, and will be manifested, by those that are forced to use the polluted river is not imposed on others who can swim in pools and can afford to eat non-contaminated fish.

3. The International Agency for Research on Cancer and the Environmental Protection Agency classify PCBs as a probable human carcinogen. The National Toxicology Program has concluded that PCBs are reasonably likely to cause cancer in humans. The National Institute for Occupational Safety and Health has determined that PCBs are a potential occupational carcinogen. Studies of PCBs in humans have found increased rates of melanomas, liver cancer, gall bladder cancer, biliary tract cancer, gastrointestinal tract cancer, and brain cancer, and may be linked to breast cancer. www.clearwater.org/news/pcbhealth.html

VI. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON BRK'S CLAIM BASED ON INCONSISTENCY WITH THE NCP.

CERCLA is an environmental statute enacted to effectuate two goals: "(1) the cleanup of toxic waste sites and (2) the compensation of those who have attended to the remediation of environmental hazards." *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 541 (6th Cir. 2001). Private, innocent parties can recover costs they spent to attend to hazards from responsible parties who are liable for "any other necessary costs of response. . .consistent with the national contingency plan" or "NCP" under §107 of CERCLA. 42 U.S.C. § 9607(a)(4)(B). BRK seeks to recover, consistent with §107, the costs they incurred in placing warning signs on the fences surrounding the public beach in Noblesville.

The district court erred in granting Appellee summary judgment on this claim. Summary judgment is permissible when a party fails to make a sufficient showing on an essential element of its claim. The court below, in error, included consistency with the NCP as an essential element. The consistency requirement should instead be examined after liability has been determined. A parties failure to be consistent with the NCP may lead to a reduction in the recoverable amount, but should not bar a claim completely. To prevent a claim for recovery when a party is otherwise liable would subvert the goals of CERCLA.

A. Consistency with the NCP is not an element of a claim under §107 and therefore summary judgment cannot be granted on this basis

Summary judgment is proper when a party is able to show that "there is no genuine issue as to any fact." Fed R. Civ. Pro 56(c). The defendant may argue that the plaintiff "has failed to make a sufficient showing on an essential element of the case with respect to which the plaintiff has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The district court granted summary judgment on the basis that BRK's claim was inconsistent with the NCP. However, consistency with the NCP is not an essential element of the claim and therefore is an inappropriate basis to grant summary judgment.

The circuits are split on what is required to make out a prima facie case under §107 of CERCLA. All agree that there are at least

four elements to a prima facie case of liability: "(1) the Defendant must fall within one of four categories of responsible parties, (2) the site is a "facility" defined by CERCLA, (3) there is a release or threatened release of a hazardous substance at the facility, and (4) the plaintiff has incurred response costs in connection with the release or threatened release." *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994); *see also Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238 (5th Cir. 1998); *Vill. of Milford v. K-H Holding Corp.*, 390 F.3d 926 (6th Cir. 2004). However, several circuits have included a fifth element; consistency with the NCP. *Blasland, Bouck & Lee, Inc., v. City of N. Miami*, 283 F.3d 1286, 1302 (11th Cir. 2002); *Young v. United States*, 394 F.3d 858, 862 (10th Cir. 2005). This fifth element was the basis of the district court's summary judgment order.

The proper interpretation is the one taken by the Seventh Circuit in *Kerr-McGee*. This interpretation does not do away with the consistency requirement. Instead, it shifts it to the damages stage. This is consistent with the purpose of CERCLA ("a remedial statute which should be construed liberally to effectuate its goals." *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 (3d Cir. 1992)). The statute was enacted "to promote safe and speedy cleanups of hazardous waste sites and to ensure that the parties responsible for contamination finance the cleanups." James R. Deason, *Clear as Mud: The Function of the National Contingency Plan Consistency requirement in a CERCLA Private Cost-Recovery Action*, 28 Ga. L. Rev. 555, 588-89 (1994) (citing CERCLA legislative history). Requiring private groups to survive a number of procedural hurdles merely to get to liability would contravene this purpose. Parties may be less willing to voluntary undertake cleanup if the slightest misstep on their part will prevent them from recovering costs that benefit the general public. Even if innocent parties do continue to voluntarily cleanup, the second purpose will not have been fulfilled. The burden of financing the cleanup will have not have fallen on the responsible parties.

Postponing consistency issues to the damage stage where they might possible be limited due to inconsistency with the NCP would further the goals of CERCLA while minimizing judicial costs. Courts would be able to determine immediately whether there was a responsible party at all. If not, then the case will be quickly dismissed. If there is a responsible party under §107, then the court can bog down in the consistency issue. This is in line with the purpose of the NCP consistency requirement which was

"imposed not to determine whose actions necessitated the need for a cleanup, but to ensure that the cleanup was adequate and cost-effective." Deason, *supra*, at 584 (*explaining Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989)).

B. Even if consistency with the NCP is an element of the prima facie case, there are circumstances when summary judgment is not proper

The 10th Circuit is one of the courts that have held consistency with the NCP is a prima facie element of a §107 CERCLA claim. *County Line Inv. Co. v. Tinney*, 933 F.2d 1508, 1513 (10th Cir. 1991). However, the court noted "there are some circumstances in which a CERCLA plaintiff may be entitled to a declaration of the defendant's liability even though the plaintiff has not yet established that all of the claimed response costs were incurred consistent with the NCP." *Id.* One of those circumstances is when "the factual record does not permit a determination of consistency with the NCP" when the motion for summary judgment was filed. *Id.*

The limited record available in this case is a prime example of when the court should defer their determination of consistency of the NCP to trial. BRK is able to make a showing of the four elements required under the Seventh Circuit test. The only issue that could bar BRK is consistency with the NCP. The record shows that BRK has spent money to erect signs warning Noblesville residents of the dangers of using Bearclaw River. This alone is potentially enough to satisfy the NCP requirements. It would be unjust to dismiss the claim over this small issue that is not even required in some Circuits. The factual record will have the opportunity to be fleshed out if the claim is allowed to be heard on its merits. As noted above, the remedial nature of the statute should cause this court to interpret broadly to achieve the purposes of the statute.

Summary judgment is a judicial tool whose "fundamental policy. . . is to cut off baseless suits, thereby conserving judicial resources and protecting defendants from harassment in courts." Bruce D. Wickersham, *Circumstantial Evidence and CERCLA Generator Liability: Are Courts Making Summary Judgment Easier for PRPs?*, 23 B.C. Envtl. Aff. Rev. 121, 130 (1995). This is clearly not a baseless suit. BRK is able to satisfy all of the elements required by some circuits and there is only one element in dispute according to others. The defendant is already in court on

several other issues, so this would not be a waste of judicial resources to expand the record as to resolve a contentious issue. Finally, BRK's suit is not intended to harass Major. BRK merely seeks to recover costs they expended to protect citizens from harmful pollutants that resulted from activities in which Major engaged.

CONCLUSION

For the foregoing reasons, BRK respectfully request that this Court reverse the district court's grant of summary judgment.