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## Mississippi River Revival, Inc. v. Cities of Minneapolis and St. Paul, MN, 145 F. Supp. 2d 1062 (D. Minn. 2001)

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contract. Third, Krilich was bound by the stipulated facts used in forming the decree, specifically the stipulation that the wetlands then at issue were “waters of the United States.” Finally, the court held that the motion was not timely. Each of these four failures was adequate on its own for the court to deny Krilich’s motion to vacate the decree.

Krilich next argued for modification of the decree pursuant to Federal Rule of Civil Procedure 60(b)(5). This rule provides that a judgment may be modified or vacated if “a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.” The court held that this provision was not applicable here. The provision was limited only to judgments that were the basis of issue or claim preclusion, and not to cases relied upon as precedent. Furthermore, the law had not been so changed by *Solid Waste* that equity demanded the opening of the decree; Krilich’s motion was therefore denied.

*Erika Delaney-Lew*

**Mississippi River Revival, Inc. v. Cities of Minneapolis and St. Paul, MN, 145 F. Supp. 2d 1062 (D. Minn. 2001)** (holding a violation of the Clean Water Act would compel no further action and do nothing to redress injuries given the improbability of future violations, and a statutory bar against recovering retroactive penalties in citizen suits).

In an effort to improve the natural environment of the Mississippi River, a group of environmental organizations (“Organizations”), sued the cities of St. Paul and Minneapolis (“Cities”). The Organizations alleged the Cities’ discharge of storm water without a permit violated the Clean Water Act (“CWA”). The Cities owned storm drains, which dated back to the nineteenth century and could not be shut off. The drains prevented surface water from building up by directing rain and melted snow through a series of channels into the Mississippi River. Along the way, the water picked up pollutants such as lawn fertilizer, petroleum byproducts, animal waste, and garbage, which in turn impaired aesthetic and recreational interests on the Mississippi.

In order to comply with the CWA, the Cities needed a National Pollution Discharge Elimination System (“NPDES”) permit for their discharges. The Cities submitted timely applications to the Minnesota Pollution Control Agency (“MPCA”) for their NPDES permits in November 1992. Despite federal regulations requiring action on such application within one year, the MPCA did not take action for several years. While the applications languished, the Organizations filed suit against the Cities for discharging without a permit. The Organizations sought both declaratory and injunctive relief along with the assessment of civil penalties and an award of attorney’s fees. However, before judgment on that case, the MPCA issued the Cities NPDES permits and, thus, rendered the Organizations’ claim for injunctive relief

moot.

Nevertheless, the Organizations sought civil penalties against the Cities for past violations of the CWA. The Minnesota District Court then faced the question of whether citizens could rightfully file suit for such retroactive civil penalties as well as whether assessing penalties retroactively could possibly redress the Organizations' injuries or prevent further violations of the CWA.

The court first considered whether civil penalties could redress the Organizations' injuries or deter future violations. A request for civil penalties becomes moot if the court can no longer grant relief that will redress the injury claimed. Because the CWA makes all civil penalties assessed pursuant to citizen suits payable to the United States Treasury, assessing penalties would not result in awards to the Organizations. Therefore, the court held, such penalties did nothing to redress their injuries. Furthermore, the assessment of civil penalties is warranted only when they "encourage defendants to discontinue current violations and deter them from committing future ones." Here, the court held since the Cities had permits, they did not continue to violate the CWA.

Next, the court considered the power to sue for retroactive penalties. It held such power fell outside the purview of citizen suits and, thus, belonged only to the government. Citizen suits, at most, allowed for civil penalties only if commenced during ongoing violations. Here, the eventual issuance of the NPDES permits stopped the violations, thus barring the Organizations' right to sue for civil penalties.

Lacking any proof that penalties would redress injuries or deter violation, and lacking the power to bring a citizen suit for retroactive penalties in the first place, the Organizations' claims failed and the court accordingly dismissed the suit.

*Dan Wennogle*

**United States v. Buday, 138 F. Supp. 2d 1282 (D. Mont. 2001)** (holding *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* did not overrule the Clean Water Act protections of tributaries of navigable waters, and such protections were constitutional).

On August 11, 1996, Mr. Buday dug ponds and created burns near Fred Burr Creek in Granite County, Montana. Fred Burr Creek flooded in the spring of 1997, destroying the burns, and draining the ponds. This sent dirt and debris into the surrounding wetlands and downstream into Flint Creek. Mr. Buday was indicted, and pled guilty to violating the Clean Water Act ("CWA") by releasing pollutants into navigable waters, including wetlands.

Subsequently, the Supreme Court limited the definition of