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Nat'l Wildlife Fed'n v. Browner, 237 F.3d 670 (D.C. Cir. 2001)

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Burke argued the mitigating factors surrounding his offense made debarment unnecessary, as he did not represent a business risk, and these mitigating factors made his five-year debarment period excessive. Burke maintained his offense was a single act and not a pattern of offenses, making him less of a business risk in future relationships. The court explained that the scope of its review was to decide whether the EPA acted reasonably given the facts in the record, and that the EPA had discretion in making its decision. The court held, given the nature and circumstances of Burke's offense, that EPA's decision to debar him for five years was not an abuse of discretion.

Patrick Nackley

Nat'l Wildlife Fed'n v. Browner, 237 F.3d 670 (D.C. Cir. 2001)
(holding section 509(b)(1) of the Clean Water Act determines venue, not jurisdiction).

In April 1998, the Environmental Protection Agency ("EPA") promulgated regulations, known as the "Cluster Rules," pertaining to the paper mill and pulp industry. The Cluster Rules include both effluent limitation guidelines under the Clean Water Act ("CWA") and emission standards under the Clean Air Act ("CAA"). Several environmental groups, including the National Wildlife Federation (collectively, "NWF"), filed a petition for review of the CWA portion of the Cluster Rules in the Ninth Circuit. Various paper producers (collectively, "Industry petitioners") filed a petition for review of the same portion of the Cluster Rules in the Fourth and Eleventh Circuits. Both the Fourth and Eleventh Circuits transferred the Industry petitioners to the Ninth Circuit, where the court consolidated their petition for review with NWF's claims. Industry petitioners then motioned to dismiss NWF's petition for lack of subject matter jurisdiction. Without ruling, the Ninth Circuit transferred the case to the United States Court of Appeals for the District of Columbia Circuit.

CWA section 509(b)(1) provided the basis for the Industry petitioner's lack of subject matter jurisdiction argument. This section states that review of an administrator's action in promulgating any effluent standard may be had in the "Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action." Industry petitioners argued the phrase "resides or transacts" was jurisdictional and only one of the NWF petitioners resided or transacted business in the Ninth Circuit. Industry petitioners asserted that because NWF's one valid petitioner lost standing, or its claim became moot, nine months after NWF's petition was filed, NWF's remaining petition should be dismissed. NWF countered that the "resides or transacts" language referred to venue, and argued venue was properly established.

In analyzing Industry petitioners' and NWF's arguments, the court

first looked to previous interpretations of similar language. In *Texas Municipal Power Agency v. EPA*, the court noted it had previously interpreted CAA's analogous provision as determining venue. In *Texas Municipal*, the court held the mandatory language of the analogous provision as to where a petitioner may "file" supported the conclusion that the provision pertained to venue. The court noted the best reading of "resides or transacts" language was as providing a choice among circuits, and not the power of a specific circuit court to hear a claim. Relying on this assertion and legislative history, the court inferred the congressional purpose of the provision was to divide the cases among the circuits.

The court next considered CWA section 509(b)(1) in light of its decision in *Texas Municipal*. The court agreed that the language at issue provided a choice among circuits and not the power of a particular circuit to hear a claim. The court acknowledged that section 509(b)(1) contained no exclusive language in contrast to the language at issue in *Texas Municipal*. In *Texas Municipal*, the relevant CAA section stated a petition for review may be filed *only* in the specified circuit. Here, such classifications were absent. Instead, section 509(b)(1) expressly permitted "review of any enumerated claim in whichever circuit an interested person resides or transacts business." Therefore, the court concluded section 509(b)(1) determines venue, not jurisdiction

The court then considered the different remedies for improper venue versus improper jurisdiction. A claim brought in the inappropriate jurisdiction is dismissed; a claim brought in the inappropriate venue is transferred to the proper court. The court reasoned that section 509(b)(1) evidences a broad grant of appellate authority because every interested person challenging an enumerated action has a court in which to obtain review. Interpreting section 509(b)(1) to pertain to venue comported better with this broad grant of authority, as a simple transfer of the case to the proper court preserves a petitioner's ability to obtain review. Accordingly, the court held section 509(b)(1) must pertain to venue.

The court specifically addressed Industry petitioners' arguments within the context of its previous statements. Industry petitioners argued the court's rationale in *Texas Municipal* should not apply because, in that case, CAA's provision limited the petitioner's ability to challenge an agency's action in a particular court. Contrarily, Industry petitioners asserted CWA limited a court's ability to review such a petition. The court described this argument as "exceptionally unconvincing." The court concluded section 509(b)(1) clearly directed petitioners where to file, and neither explicitly addressed courts nor used the term jurisdiction.

Industry petitioners next argued different courts have found other provisions included in section 509(b)(1) pertained to jurisdiction. The court determined this argument was contrary to its *Texas Municipal* holding. In *Texas Municipal*, the court found the fact that the CAA judicial review provision included jurisdictional restrictions

was "not determinative" of whether or not the section pertained to venue.

The court noted the CWA's legislative history was unclear and not unequivocal as to whether section 509(b)(1) pertained to jurisdiction or venue. However, Industry petitioners did not raise this argument. The court concluded that even if they had, it would not have found such an argument persuasive.

The court held section 509(b)(1) determines venue, not jurisdiction. Because venue objections could be waived and Industry petitioners conceded proper venue was no longer an issue, the court denied Industry petitioners' motion to dismiss.

Sarah E. McCutcheon

Slinger Drainage, Inc. v. EPA, 237 F.3d 681 (D.C. Cir. 2001) (holding the provision of the Clean Water Act that establishes the computation of time for filing a notice of appeal determines whether the notice is timely and not the federal rules of procedure).

Slinger Drainage ("Slinger") installed drainage tiles over a fifty-acre area that resulted in the discharge of pollutants into a wetland. The Environmental Protection Agency ("EPA") subsequently filed an administrative complaint against Slinger alleging a violation of section 301(a) of the Clean Water Act ("CWA") for failure to obtain a permit before discharging pollutant into a wetland. The Administrative Law Judge found Slinger liable and imposed a civil penalty of $90,000. The Appeals Board upheld the fine, and Slinger brought this action to the United States Court of Appeals for the District of Columbia.

The court ruled it had no jurisdiction to hear the case on its merits because Slinger failed to timely file the notice of appeal. Under the CWA, Slinger had thirty days to file its notice of appeal beginning on the date the Appeals Board issued its order. Slinger filed its notice a day late under the CWA provision. Slinger argued the Federal Rules of Appellate Procedure Rule 26(a) ("Rule 26(a)") governed how courts should compute the thirty-day period, and not the CWA. Under Rule 26(a), the day the court issued its order is not calculated in the time period, and Slinger's appeal would have been filed on time.

The court held Rule 26(a) did not apply when Congress has specified a particular method of counting in the statute itself and there is no indication of a contrary congressional intention. The court dismissed Slinger's appeal because the CWA clearly established the computation of time.

Spencer L. Sears

United States v. A.J.S., Inc., No. CIV.A.00-0263-C, 2000 U.S. Dist. LEXIS 17388 (E.D. La. Nov. 29, 2000) (denying summary judgment motion concerning a mortgage foreclosure due to the existence of