No. 05-4437

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, et al.,

Plaintiffs,

THE SIERRA CLUB; MARILYN WALL,

Plaintiffs-Appellees,

v.

HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS;
CITY OF CINCINNATI,

Defendants-Appellants.

On Appeal From The United States District Court
For The Southern District Of Ohio

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES IN SUPPORT OF DEFENDANTS-APPELLANTS

David W. Burchmore
William V. Shaklee
SQUIRE, SANDERS & DEMPSEY L.L.P.
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500

Alexandra Dapolito Dunn
General Counsel
NATIONAL ASSOCIATION OF
CLEAN WATER AGENCIES
1816 Jefferson Place, NW
Washington, DC 20036
(202) 533-1803

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INTERESTS OF THE *AMICUS CURIAE*

As detailed in the accompanying motion, NACWA represents the interests of several hundred small, medium and large wastewater treatment agencies throughout the United States. These public entities are entrusted with the crucial service of collecting, treating and reclaiming wastewater while simultaneously protecting the environment. NACWA has 15 member agencies in Ohio, and a total of 30 member agencies in the states comprising the Sixth Circuit.

A central function of NACWA is the representation of its members' collective legislative, regulatory and environmental interests. As a result, for decades NACWA has actively participated in litigation that raises important CWA implementation and policy issues. The case before the Court involves sewer overflows, an issue which NACWA's members take very seriously. NACWA's members seek to provide the highest level of treatment to the wastewater that enters our collection and treatment systems; maximize the protection of public health and the environment; and to eliminate sewer overflows wherever possible. The primary legal question in this case is whether an environmental activist group is entitled to recover its attorney fees after intervening in an enforcement action initiated by the United States, when the Intervenor was neither a named party nor signatory to the Consent Decree that resolved this action.

NACWA's members have a substantial interest in the resolution of this issue. As public wastewater treatment agencies, NACWA's members hold National Pollutant Discharge Elimination System (NPDES) permits and are governed by the many other rules and regulations of the CWA. These public entities often resolve CWA enforcement matters by entering into agreements with their state and federal regulators. NACWA is concerned that the District Court's order awarding nearly $1,000,000 in attorney fees to a party intervening in a government enforcement proceeding will significantly impair the ability of other wastewater treatment operators to conduct meaningful and fruitful settlement negotiations. This order greatly enlarges the scope of the fee-shifting provisions in the CWA and significantly alters the balance intended by Congress when it incorporated the citizen suit provision into the Act's overall enforcement scheme.

STATEMENT OF THE CASE

Amicus adopts the statement of the case contained in Petitioner's brief.

SUMMARY OF THE ARGUMENT

The District Court's decision awarding nearly $1,000,000 in attorney fees to the Intervenor in this case is not supported by the plain language of the CWA's citizen-suit provision, the case law interpreting similar provisions in other environmental statutes, and the limited role that Congress envisioned for such parties. CWA § 505, 33 U.S.C. § 1365, limits the award of attorney fees to cases

"brought pursuant to" that section. The government's action in this case was brought pursuant to CWA §§ 309 and 504, 33 U.S.C. §§ 1319 and 1364. While citizens are granted the right in CWA § 505(b)(1)(B) to intervene "in such action," there is no concomitant right to receive an award of attorney fees. 33 U.S.C. § 1365(b)(1)(B).

Even if such a right did exist, neither of the legal theories advanced by the District Court can support its fee award in this case. The District Court's reliance on the "catalyst theory" runs directly contrary to the 1987 Clean Water Act ("CWA") amendments, and the Supreme Court's subsequent decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001). In applying *Buckhannon* to a myriad of statutory fee-shifting provisions, the Sixth Circuit and its sister circuits have flatly rejected the viability of the catalyst theory for fee-shifting provisions containing the "prevailing party" limitation. Furthermore, in light of the limited, supplemental role of CWA citizen suits envisioned by Congress, the CWA should not be construed to allow a fee recovery under this theory.

The District Court's alternative holding that intervenors were a "prevailing party" under the Act incorrectly allowed the intervenors to obtain a fee award for a claim that they could not have raised on their own behalf. Citizen suits are limited to the claims expressly defined in CWA § 505 and do not encompass cases brought

pursuant to other sections of the Act, such as the emergency powers provision in CWA § 504. Only the government can bring cases pursuant to that provision. Because the claims involving "Water in Basement" ("WIB") events were brought only pursuant to that section, and could not have been raised under the citizen suit provision itself, attorney fees cannot be awarded on the theory that the Intervenors were a "prevailing or substantially prevailing party" on those claims.

ARGUMENT

The District Court's Order granting nearly $1,000,000 in attorneys fees to the Intervenors in this case creates a radical and unwarranted expansion of the CWA's citizen suit provision. Under the District Court's analysis, any citizen would be allowed to intervene in an enforcement action already commenced by state and federal authorities, and be granted its attorneys fees for partially prevailing on a claim that it could not have brought on its own behalf. As an initial matter, the *amicus* agrees with the Appellant's argument that the CWA's citizen-suit provision does not provide for the granting of attorneys fees to intevenors under any circumstances. *See* Appellant's Opening Brief at 19, and cases cited therein. Even if such awards were allowed, however, they could not be premised upon either of the two theories advanced by the District Court in this case – that the Intervenors herein served as a "catalyst" for the settlement ultimately reached

by the parties, or that the Intervenors were a "prevailing or substantially prevailing party" on the WIB issue.

I. APPLICATION OF THE CATALYST THEORY TO CWA CITIZEN SUITS IS BOTH UNPRECEDENTED AND UNWARRANTED IN LIGHT OF THE ROLE ASSIGNED TO THOSE SUITS IN THE ACT'S OVERALL ENFORCEMENT SCHEME

The District Court's ruling that the "catalyst theory" applies to the Clean Water Act's citizen-suit provision, and that the Sierra Club is entitled to recover its attorney fees under that theory, is contrary to the overwhelming weight of authority in this and other Circuits. Furthermore, it is particularly inappropriate in light of the limited role that Congress envisioned for citizen suits under the Act.

A. The Catalyst Theory Cannot Be Followed in Light of the 1987 Amendments to the CWA and the Supreme Court's Decision in *Buckhannon*

Congress amended the CWA in 1987 to add the "prevailing or substantially prevailing" party language to §1365(d). This was done, in part, to codify the Supreme Court's reversal of a decision by the D.C. Circuit in *Sierra Club v. Gorsuch*, 672 F.2d 33 (D.C. Cir. 1983) that allowed a completely unsuccessful party to obtain attorney and expert witness fees for its citizen suit.[1] During the development of the 1987 Amendments, the Senate Committee that introduced the "prevailing party" requirement explicitly stated that, although the amendment

[1] The Supreme Court reversed the D.C. Circuit in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983) (party had to prevail on at least part of its substantive claims to receive attorney fees).

would allow a partially prevailing party to recover fees with respect to issues on which it prevailed, it would *not* authorize an award of costs to "a party who intervenes in a case and, although technically on the prevailing side, fails to make a substantial contribution to the successful outcome of the case." S. Rep. No. 98-233, 98th Cong. 1st Sess. 24-25 (September 21, 1983), *reprinted in* 3 *A Legislative History of the Water Quality Act of 1987*, 2100-2101 (November 1988).

In *Ruckelshaus*, the Supreme Court had considered whether, under the similar Clean Air Act citizen-suit provision, it was appropriate to award attorney fees to a claimant that was entirely unsuccessful on the merits.[2] The Court found that the term "appropriate" in this provision modified, but did not completely reject, the traditional rule that a party must prevail before it may recover fees. *Id*. at 686. The Court was not persuaded with Sierra Club's argument that the term "appropriate" should be read to "encompass situations beyond those mentioned in the legislative history" to "totally unsuccessful actions." *Id*. at 687. Citing to decisions by the Fifth and Third Circuits, the Court found that a prevailing party was one that succeeded on a central issue or "essentially" succeeded in obtaining

[2] The relevant provision of the Clean Air Act states that "[t]e Court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate." CAA § 304, 42 U.S.C. §7604(d).

relief on its claims. *Id*. at 688 (citing *Coen v. Harrison County School Bd.*, 638 F.2d 24, 26 (5th Cir. 1981) and *Bagby v. Beal*, 606 F.2d 411 (3rd Cir. 1979)).

Courts have traditionally held that fee-shifting provisions with similar language have substantially the same effect. *Dague v. City of Burlington*, 935 F.2d 1343, 1357 (2d Cir. 1991) (principles governing fee awards under Attorney's Civil Rights Fee Awards Act are applicable as it contains substantially similar language to RCRA and CWA). Subsequent to the 1987 amendments adding the "prevailing or substantially prevailing" language to the CWA fee-shifting provision, the Supreme Court decided *Buckhannon Board & Care Home v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001). In that case, the Court rejected the application of the widely-utilized "catalyst theory" to a statutory fee-shifting provision containing the "prevailing party" requirement, determining that there was no basis for "an award where there is no judicially sanctioned change in the legal relationship of the parties." *Id*. at 605; see also, *Dague*, 935 F.2d at 1357 (citing to *Texas State Teachers' Assn. v. Garland Independent School Dist.*, 489 U.S. 782 (1989) for the proposition that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.").

In evaluating the rationale supplied by *Buckhannon*, the Sixth Circuit and its sister circuits have determined that the catalyst theory is no longer viable for a

wide-range of statutes. See, *Chambers v. Ohio Dep't of Human Servs.*, 273 F.3d 690, 693 n.1 (6th Cir. 2001) (catalyst theory of recovery not available under statutes that allow fees to prevailing parties); *Union of Needletrades, Industrial & Textile Employees v. United States*, 336 F.3d 200 (2d Cir. 2003) (rejecting the catalyst theory under the Freedom of Information Act); *New York State Fed'r of Taxi Drivers v. Westchester County Taxi & Limousine Comm.*, 272 F.3d 154 (2d Cir. 2001) (applying *Buckhannon* to a case arising under the Civil Rights Attorney's Fees Awards Act); *John T. v. Del. County Intermediate Unit*, 318 F.3d 545 (3d Cir. 2003) (applying *Buckhannon* to the Individuals with Disabilities Act); *Richardson v. Miller*, 279 F.3d 1 (1st Cir. 2002); *Crabill v. TransUnion, L.L.C.*, 259 F.3d 662 (7th Cir. 2001) (rejection of catalyst theory applied to Fair Credit Reporting Act); *Perez-Arellano v. Smith*, 279 F.3d 791 (9th Cir. 2002) (reasoning of *Buckhannon* applicable to Equal Access to Justice Act). Even in instances where the fee-shifting provisions contain slightly different language, courts have determined the *Buckhannon* rationale governed the non-viability of the catalyst theory. *Oil, Chem. & Atomic Workers Int'l Union v. Dep't of Energy*, 288 F.3d 452 (D.C. Cir. 2002) (there is nothing to suggest that Congress sought to draw any fine distinction between "prevailing" and "substantially prevailing" parties).

The language of the CWA contains virtually the same language with respect to "prevailing or substantially prevailing parties" as the statutes addressed

in the cases cited above. To allow a fee award under the catalyst theory for a CWA case would run counter to those principles announced in *Buckhannon* and the related cases decided in this and other circuits across the country.

B. Application of the Catalyst Theory to the CWA Would Contradict the Specific, Limited Role Envisioned by Congress for Citizen Suits under the Act.

The District court's reliance upon the "catalyst theory" to award attorney fees to intervenors in an enforcement action initiated by government authorities is particularly inappropriate in light of the carefully limited role envisioned by Congress for citizen suits under the CWA.

It is axiomatic that a court must interpret the plain language of the statute and give the plain meaning Congress intended when the statute was drafted. *Zimmerman v. Oregon Dep't of Justice*, 170 F.3d 1169, 1173 (9th Cir. 1999) ("When interpreting a statute, we look first to the words that Congress used."); *United Technologies Corp. v. Browning-Ferris Industries, Inc.*, 33 F.3d 96, 99 (1st Cir. 1994) ("our first recourse must be to the statute's text and structure.") (citations omitted). In this instance, the plain language of the citizen-suit provision in CWA § 505(d), 33 U.S.C. §1365(d), makes clear that attorney fees are only available in actions "brought pursuant to this section." This language confines attorney fees to prevailing or substantially prevailing parties that are proceeding

under § 505.[3] When those parties bring an action under § 505(a) to enforce effluent standards or orders of the EPA, they are allowed to recoup their attorney and expert witness fees if they prevail or substantially prevail on those claims. The key component of the attorney fee recovery is that the plaintiff brought the action in which it prevailed or substantially prevailed under the guise of a citizen suit.[4]

This interpretation of the plain language of CWA § 505 is reinforced by the legislative history surrounding the enactment of this provision in the 1972 amendments to the CWA. During the Committee hearings, there was some question as to the possibility of certain lawyers using the citizen suit provision to harass NPDES permit holders. In response, the Committee noted as follows:

> Concern was expressed that some lawyers would use section 505 *to bring frivolous and harassing actions*. The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest. The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging the abuse of this provision, while at the same time encouraging the quality of the actions that *will be brought*.

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[3] See, *Citizens Coordinating Committee on Friendship Heights, Inc. v. Washington Metropolitan Area Transit Authority*, 765 F.2d 1169 (D.C. Cir. 1985) ("The only time an award would appropriate is to the extent the costs were incurred in furtherance of the section 505 claim.").

[4] The claims brought by the United States in the Joint Amended Complaint were brought pursuant to CWA §§ 309(d) and 504(a), 33 U.S.C. §§ 1319(d) and 1364(a). Consequently, the action in which Sierra Club intervened was not brought "pursuant to" CWA § 505, 33 U.S.C. §1365.

S. Rep No. 92-414, at 81 (1971), *reprinted in* 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972* (January 1973) at 820-21 (emphasis added). The Committee's focus on the parties "bringing" the action and the impact that would have on the award of fees is a clear indication that one must file and maintain a citizen suit in order to be eligible for such fees. This result is logical, as the expense of filing and prosecuting a citizen suit involve a much higher initial burden of costs and greater risk to the plaintiff than mere intervention in a pre-existing action.[5]

Ultimately, the public service performed by the plaintiffs who bring citizen suits is subordinate to the role state and federal agencies play in the enforcement process. Congress intentionally vested the states with primary enforcement authority under the CWA, which explicitly states that: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution. . . ." CWA § 101(b), 33 U.S.C. § 1251(b). The relationship between this primary enforcement authority and the alternate role to be played by citizen suits is established in 33 U.S.C. § 1365 which

[5] The Senate Committee also emphasized that citizens should be recognized for the public service they perform in "*bringing* legitimate actions under this section." S. rep. 92-414, 92d cong. 1st Sess. 81 (1971), *reprinted in* 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972* at 1499 (January 1973) (emphasis added). The reward for this public service is that "the court may award litigation expenses borne by the plaintiffs in *prosecuting* such actions." *Id*.

bans citizen suits: (1) prior to the provision of 60-days notice; and (2) where the federal or state government is "diligently prosecuting" an enforcement action.[6]

As recognized by the Supreme Court, Congress crafted these restrictions to ensure that citizen suits would play a secondary role in CWA enforcement. *See Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 60 (1987) ("The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suits is meant to supplement rather than supplant governmental action."). This basic relationship is borne out in the legislative history. Again the Supreme Court has acknowledged:

> The legislative history of the Act reinforces this view of the role of the citizen suit. The Senate Report noted that "[t]he Committee intends the great volume of enforcement actions [to] be brought by the States," and that citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility."

Gwaltney at 60 (quoting S. Rep. No. 92-414, p. 64 (1971)). The same Senate Report quoted in *Gwaltney* notes that the restrictions on citizen suits were actually crafted "to further encourage and provide for agency enforcement . . . ." *Id*. at 79. Similarly, the U.S. EPA testified to Congress that these restrictions on the filing of citizen suits were needed to "discourage unnecessary or abusive use of the citizen suit devices." *Fed. Water Pollution Control Act Amend. Of 1972: Hearing on S. 75*

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[6] See, *NRDC v. Train*, 510 F.2d 692, 700 (D.C. Cir. 1974) (Congress restricted citizen suits to prevent disruption of the Act's implementation and the overburdening of the courts which might occur if unlimited public actions were allowed to take place).

et seq. Before the S. Subcomm. on Air and Water Pollution, 92nd Cong. 69 (1971) (Letter from William Ruckelshaus, Administrator, U.S. EPA).

Once the state or federal government has assumed the primary oversight and enforcement role by filing its suit, the private citizen is relegated to the role of intervenor. CWA § 505(b)(1)(B), 33 U.S.C. §1365(b)(1)(B). The role of the intervenor under the CWA "was not intended to enable citizens to commandeer the federal enforcement machinery." *DuBois v. Thomas*, 820 F.2d 943 (8th Cir. 1987); *Pennsylvania Envtl. Defense Found. v. Borough of North E.*, 1997 U.S. Dist. LEXIS 23865, 19-20 (D. Pa. 1997) (balance struck by §1365 is to welcome citizen participation in the vindication of environmental interests, but their role is limited to goading agencies into enforcement) (citations omitted). In the present case, the Sierra Club was allowed to intervene and offer their opinions, and most notably, their vociferous objections to the Consent Decree.[7] They were "given their appropriate day in court," which is the supplemental role intended for intervenors under the language and context of § 505(b)(1)(B). *United States v. Ketchikan Pulp Co.*, 430 F. Supp. 83, 85 (D. Alaska 1977). Intervening in actions already initiated by governmental authorities does not, and should not, provide an opportunity for the recovery of attorney fees by the intervening party.

[7] As the Appellant notes, all of Sierra Club's objections and recommendations concerning the terms of the Consent Decree were rejected by the Court. (App. Proof Brief at 4).

II. THE SIERRA CLUB IS NOT ENTITLED TO ATTORNEY FEES AS A "PREVAILING PARTY" ON THE WIB ISSUE BECAUSE THAT ISSUE WAS NOT RAISED UNDER THE CWA'S CITIZEN SUIT PROVISION

As an alternative basis for awarding attorney fees, the District Court found that, even if the catalyst theory was not applicable to the CWA – as the *amicus* argues above – the Sierra Club was entitled to attorney fees as a "prevailing or substantially prevailing party" in connection with the WIB issue that was addressed in the final Consent Decree lodged with the court on December 3, 2003. Order at 14 and 32, JA ____ and ____. This portion of the court's ruling cannot stand, however, because the government's WIB claim did not allege a violation of any "effluent standard or other limitation" covered by the CWA's citizen-suit provision. The Sierra Club therefore had no legal right to bring such a claim on its own behalf, and it similarly lacked the right to intervene and obtain attorney fees for that claim in the government's enforcement action.

As noted above, the limitation on the award of attorneys fees to "prevailing or substantially prevailing" parties was added to the CWA's citizen-suit provision in 1987. When it was first introduced in the Senate version of the 1987 amendments, the Senate Committee explained that:

> The Committee does not believe that it is reasonable or appropriate to compel either the government or a private party to pay the costs of an opposing party to a lawsuit when the opposing party has not prevailed on the issues. Accordingly, these amendments would limit the

> awarding of costs under the Clean Water Act to prevailing or substantially prevailing parties.
>
> These amendments are not intended to preclude the awarding of costs to a partially prevailing party *with respect to the issues on which that party has prevailed*, if such an award is deemed appropriate by the court. Nor does the Committee intend to authorize an award of costs to a party who intervenes in a case and, although technically on the prevailing side, fails to make a substantial contribution to the successful outcome of the case.

S. Rep. No. 98-233, 98th Cong. 1st Sess. 24-25 (September 21, 1983), *reprinted in* 3 *A Legislative History of the Water Quality Act of 1987*, 2100-2101 (November 1988).

In stating that a partially prevailing party may be awarded costs "with respect to the issues on which that party has prevailed," the Committee recognized the common understanding of the courts that, "to be a 'prevailing party,' one must succeed on the 'central issue' . . . or 'essentially [succeed] in obtaining the relief he seeks in his claims on the merits.'" *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 688 (1983) (citations omitted). A partially prevailing plaintiff will not be awarded fees for its work on claims that are unrelated to the claims on which it succeeded. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). Similarly, a plaintiff cannot be awarded fees for "prevailing" claims that it did not raise in its complaint, and which it lacked standing to raise or was otherwise barred from raising to begin with.

Yet that is precisely what happened in this case. Although the Sierra Club refers several times in its complaint to sanitary sewers that overflow "on to private

and public property (e.g. streets, yards, basements, etc.)," the only cause of action alleged in its complaint is for violations of CWA §§ 301 and 402, 33 U.S.C. §§ 1311 and 1342. Sierra Club Complaint at ¶ 71. Those sections of the Act contain a prohibition against any "discharge" without a permit, and the requirements for obtaining a such permit. Section 301(a) states that, except in compliance with a permit issued under § 402, the "discharge" of any pollutant by any person shall be unlawful. Section 402 states that, notwithstanding the prohibition in § 301, the Administrator of EPA may issue a permit for the "discharge" of any pollutant upon condition that such discharge will meet all applicable requirements of the Act.

"Discharge" is a term of art in the CWA. Section 502(16), 33 U.S.C. § 1362(16), states that "the term 'discharge' when used without qualification includes the discharge of a pollutant and a discharge of pollutants." Pursuant to § 502(12), 33 U.S.C. § 1362(12):

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

Finally, the term "navigable waters" is defined in § 502(7), 33 U.S.C. § 1362(7), to mean "the waters of the United States, including the territorial seas."

The broadly-worded allegations in the Sierra Club's complaint seek to obscure the fundamental distinction between sanitary sewer overflows that are

discharged into waters of the United States, which are violations of the Act, and sanitary sewer overflows "on to private and public property (e.g. streets, yards, basements, etc.)," which – though clearly undesirable – are simply not regulated by the Act. In fact, the CWA does not even mention "sanitary sewer overflows," much less prohibit them; it prohibits only unpermitted "discharges" to "waters of the United States."[8]

In its complaint, the Sierra Club appears to claim that WIB is a form of regulated discharge because it may have been "eventually removed and drained" into a navigable water of the United States. Sierra Club Complaint at ¶ 49, JA ____. However, CWA §§ 301 and 402 regulate only the actual discharge of pollutants from a point source, not the potential to discharge. *See Waterkeeper Alliance, Inc. v. United States EPA*, 399 F.3d 486, 504 (2d Cir. 2005) (if there is no discharge, there is no violation of the CWA). "The Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges – not potential

[8] The District Court failed to recognize this fundamental distinction. In its Order, the court refers to the Sierra Club's argument that WIB is a sewer overflow that backs up into a basement, and notes that the Consent Decree entered by the court "defines SSOs to include WIBs." Order at 20, JA ____. In doing so, the court overlooks the distinction made in the Consent Decree's definition section between a "Sanitary Sewer Overflow" ("SSO"), which includes WIB, and a "Sanitary Sewer Discharge" ("SSD"), which includes *only* a discharge to waters of the United States through a point source not specified in a permit. Consent Decree § V.B, page 15, JA ____. Only SSDs are violations of CWA § 301 and subject to stipulated penalties under the decree. Consent Decree § XVII.E.1, page 58, JA ____.

discharges, and certainly not point sources themselves." *Id*. at 505 (citing *NRDC v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988) ("EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants.") (emphasis in original).

Recognizing the fact that sanitary sewer overflows to dry land are not a violation of CWA § 301, the United States addressed the issue of WIB by including a separate claim in its complaint alleging that such overflows presented an "imminent and substantial endangerment" to public health, for which the Administrator is authorized to bring suit under the "Emergency Powers" provision in CWA § 504(a), 33 U.S.C. § 1364(a). Joint Amended Complaint at 25-26, ¶¶ 84-87 (Fifth Claim for Relief), JA ____. This claim encompassed all sewage "released onto property and into homes." *Id*. Only sanitary sewer overflows that constituted actual "discharges" to waters of the United States were addressed in the government's claim for violations of CWA § 301. Joint Amended Complaint at 24-25, ¶¶ 79-83 (Fourth Claim for Relief), JA ____.

The CWA does not allow citizen suits to enforce CWA § 504, and it does not afford a statutory right to intervene in actions brought by the government pursuant to that section. CWA § 505(a), 33 U.S.C. § 1365(a), allows any citizen to commence a civil action:

> (1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation . . . .

The district courts are granted jurisdiction to enforce "such an effluent standard or limitation, or such an order." *Id*. Pursuant to CWA § 505(b), 33 U.S.C. § 1365(b), if the government has commenced and is diligently prosecuting an action "to require compliance with the standard, limitation or order," any citizen may intervene as a matter of right "in any such action." The term "effluent standard or limitation under this chapter" is defined in CWA § 505(f), 33 U.S.C. § 1365(f), to include specific sections of the Act, which do not include the Emergency Powers provision in CWA § 504.

In *United States v. Hooker Chemicals & Plastics Corp.* 749 F.2d 968, 978 (2d Cir. 1984), the Second Circuit found that a citizen's right to intervene in a CWA enforcement action "is limited to government initiated actions that could have been brought by the individual but for the government action." The court therefore upheld the denial of a motion to intervene in a case brought by the government under the emergency powers provisions of the Safe Drinking Water Act, RCRA and the CWA. The Court specifically ruled that citizen suits were confined to the regulatory and enforcement scheme in the CWA and that the emergency powers provisions were directed to a "different problem." *Id*. at 979.

Pursuant to CWA § 505(d), 33 U.S.C. § 1365(d), litigation costs, including reasonable attorney and expert witness fees, may be awarded to any prevailing or substantially prevailing party "in any action brought pursuant to this section."

Because the government's claims relating to WIB were not brought "pursuant to this section," and the CWA does not allow citizens to bring such claims on their own behalf, the Sierra Club is not entitled to attorney fees for any contribution it may have made to the WIB issue. In *Citizens Coordinating Committee*, 765 F.2d at 1173, the D.C. Circuit ruled that an intervenor in a government enforcement action was not allowed to recover for pollution in its basement because that condition was not a "violation of an effluent standard or limitation" under the CWA's citizen-suit provision, and in fact was not actionable under the Act at all. The intervenor in *Citizens Coordinating Committee* was not allowed to recover its attorney fees because the basement pollution "came before and was not caused by pollution into a waterway." *Id.* at 1174 n.3.[9]

In the present case, the *only* issue on which the Sierra Club claims to have prevailed, and on which the District court premised its fee award in this case, was

[9] In *American Canoe Ass'n, Inc. v. D.C. Water & Sewer Authority*, 306 F. Supp. 2d 30 (D.D.C. 2004), plaintiffs were allowed to maintain a citizen suit based on a release of hydrodgen sulfide into city sewers because, even though that release was not a "discharge," the complaint alleged that it violated a specific provision in the city's NPDES permit (which is included in the definition of an "effluent standard or limitation" under CWA § 505(f)). The court distinguished the *Citizens Coordinating Committee* decision as "inapposite" for that reason. *Id.* at 38. *See also, Conn. Fund for the Env't v. Raymark Indus., Inc.*, 631 F. Supp. 1283, 1285 (D. Conn. 1986) (complaint alleged violation of specific effluent limitations in an NPDES permit). There is no such permit or allegation involved in this case, so the D.C. Circuit's decision in *Citizens Coordinating Committee* is the controlling precedent for the facts presented herein.

the WIB issue. Order at 28-29, JA ____. Because that issue was not raised by the government pursuant to the Act's citizen-suit provision, and because the Sierra Club had no legal right to raise that issue on its own behalf or to intervene in the government's WIB claim, the District Court's award of nearly $1,000,000 in attorney fees to the Sierra Club for "prevailing" on that issue must be reversed.

CONCLUSION

For each of the foregoing reasons, as well as those advanced by the Appellants in their brief, the court should reverse the decision below.

Respectfully submitted,

David W. Burchmore
William V. Shaklee
SQUIRE, SANDERS & DEMPSEY L.L.P,
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114-1304

Alexandra D. Dunn
General Counsel
NATIONAL ASSOCIATION
OF CLEAN WATER AGENCIES
1816 Jefferson Place, NW
Washington, DC 20036

Attorneys for the Amicus Curiae

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

The undersigned, one of the attorneys for the *Amicus*, hereby certifies pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure that the foregoing brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B). The brief is set in 14-point Times New Roman type and, according to the word processing system used to prepare the brief, contains 4,712 words, not including the matter expressly excluded by Rule 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25, I certify that I am an employee of SQUIRE, SANDERS & DEMPSEY L.L.P. and that on this ____ day of February, 2006 I sent a true copy of the foregoing Brief of *Amicus Curiae* the National Association of Clean Water Agencies in Support of Defendant-Appellants via Federal Express next-day delivery to the following:

Peter P. Murphy
Andrew S. Tulumello
Michael K. Murphy
Amir C. Tayrani
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306

Dennis D. Altman
Amy M. Hartford
Amy J. Leonard
D. DAVID ALTMAN, CO.
15 E. Eighth Street
Suite 200W
Cincinnati, Ohio 45202

Albert J. Slap
LAW OFFICE OF ALBERT J. SLAP
36 Glengarry Drive
Aspen, Colorado 81611

By_____

STATUTORY ADDENDUM

(b) The Board shall advise, consult with, and make recommendations to the Administrator on matters of policy relating to the activities and functions of the Administrator under this Act.

(c) Such clerical and technical assistance as may be necessary to discharge the duties of the Board shall be provided from the personnel of the Environmental Protection Agency.

(33 U.S.C. 1363)

EMERGENCY POWERS

SEC. 504. (a) Notwithstanding any other provision of this Act, the Administrator upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to the livelihood of such persons, such as inability to market shellfish, may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary.

[Subsection (b) repealed by §304(a) of P.L. 96–510, Dec. 11, 1980, 94 Stat. 2809]

(33 U.S.C. 1364)

CITIZEN SUITS

SEC. 505. (a) Except as provided in subsection (b) of this section and section 309(g)(6), any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 309(d) of this Act.

(b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such ac-

tion in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 306 and 307(a) of this Act. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c)(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) PROTECTION OF INTERESTS OF UNITED STATES.—Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) The court, in issuing any final order in any action brought pursuant to this section, 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. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) For purposes of this section, the term "effluent standard or limitation under this Act" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act; (2) an effluent limitation or other limitation under section 301 or 302 of this Act; (3) standard or performance under section 306 of this Act; (4) prohibition, effluent standard or pretreatment standards under section 307 of this Act; (5) certification under section 401 of this Act; (6) a permit or condition thereof issued under section 402 of this Act, which is in effect under this Act (including a requirement applicable by reason of section 313 of this Act); or (7) a regulation under section 405(d) of this Act,.[1]

(g) For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) A Governor of a State may commence a civil action under subsection (a), without regard to the limitations of subsection (b) of

[1] So in law. See P.L. 100–4, sec. 406(d)(2), 101 Stat. 73.

this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this Act the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

(33 U.S.C. 1365)

APPEARANCE

SEC. 506. The Administrator shall request the Attorney General to appear and represent the United States in any civil or criminal action instituted under this Act to which the Administrator is a party. Unless the Attorney General notifies the Administrator within a reasonable time, that he will appear in a civil action, attorneys who are officers or employees of the Environmental Protection Agency shall appear and represent the United States in such action.

(33 U.S.C. 1366)

EMPLOYEE PROTECTION

SEC. 507. (a) No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative or employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

(b) Any employee or a representative of employees who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or alleged discrimination. A copy of the application shall be sent to such person who shall be the respondent. Upon receipt of such application, the Secretary of Labor shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to such review to enable the parties to present information relating to such alleged violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of title 5 of the United States Code. Upon receiving the report of such investigation, the Secretary of Labor shall make findings of fact. If he finds that such violation did occur, he shall issue a decision, incorporating an order therein and his findings, requiring the party committing such violation to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee or representative of employees to his former position with compensation. If he finds that there was no such violation, he shall issue an order denying the application. Such order issued by the Secretary of Labor under this subparagraph shall be subject to ju-