WILLIAMS MULLEN

CLEAN WATER ACT ENFORCEMENT DEFENSES AND CONSIDERATIONS

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by

William A. Anderson, II
Williams Mullen
(202) 327-5060

CLEAN WATER ACT ENFORCEMENT DEFENSES AND CONSIDERATIONS

WILLIAM A. ANDERSON, II
SEAN M. SULLIVAN
WILLIAMS MULLEN

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I. Topics

A. Enforceability of State Law-Based Requirements Contained in NPDES Permits via Citizens' Suits

B. The Boundary Between the CWA and RCRA

C. Exclusions from the Definition of "Discharge" Under CWA Section 311 and the Definition of Federally Permitted Releases Under CERCLA Section 101(10)

D. Challenges to Regulatory Requirements Based on New Circumstances and Information

E. Counting Violations

F. Impossibility

G. Unfunded Mandates Reform Act

H. Information Quality Act

I. Reach of Citizens' Suits: *American Canoe Ass'n, Inc. v. District of Columbia Water & Sewer Authority*

II. Enforceability of State Law-Based Requirements Contained in NPDES Permits via Citizens' Suits

A. Three Federal Courts of Appeals have addressed whether and how citizens' suits can be used to enforce state law-based NPDES permit requirements.

- Two Circuits allow citizens' suits to enforce state-based requirements, while one Circuit does not.

B. Second Circuit – *Atlantic States Legal Foundation v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1994).

i. Facts – Case was a citizens' suit to halt discharges of pollutants that were not listed in a state-issued NPDES permit.

ii. Holding – Both states and EPA can enforce state law-based standards contained in an NPDES permit issued by a state.

- Citizens, however, may only enforce requirements that are based on the federal CWA.

iii. This was the first U.S. Court of Appeals decision addressing this issue.

C. Ninth Circuit – *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995).

i. Facts – Case involved a citizens' suit regarding combined sewer overflows, alleging that the overflows violated state–issued NPDES permit.

ii. Holding – State law-based requirements are enforceable in a CWA citizens' suit. The Court concluded that citizens' suits under the CWA are allowed regarding "all permit conditions".

iii. The Court relied on the legislative history of CWA and the broad language of statute which allows citizens' suits for violations of "an effluent standard or limitation under the [CWA]".

D. Eleventh Circuit – *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993 (11th Cir. 2004).

i. Facts – The case involved a citizens' suit regarding the discharge of stormwater from a scrap metal business without a permit, as well as the violation of applicable permit requirements after the business obtained a permit.

ii. Holding – The Court found that the plain meaning of the statute confirms that citizens' suits regarding state law-based permit requirements are permissible.

iii. The decision notes that no other Court has followed the approach adopted by the Second Circuit.

iv. The Court suggests that the Supreme Court's decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, is evidence that its approach is correct.

1. *Gwaltney*, 484 U.S. 49 (1987).

2. Facts – The Supreme Court held that a citizens' suit is not available for wholly past violations, but is available if the defendant's violations are ongoing, or if the plaintiff can show a reasonable likelihood that the violations will recur.
3. Relevance to Eleventh Circuit's Analysis
    a. The decision involved a citizens' suit to enforce permit requirements that were contained in an NPDES permit issued by the state of Virginia.
    b. The Court did not question whether the permit was enforceable via citizens' suit.

v. Several other district Court decisions from the Eleventh Circuit have taken this approach as well.

III. Boundary Between the CWA and RCRA

A. Exclusion of Domestic Sewage from the Definition of Solid Waste

i. 40 C.F.R. § 261.4(a)(1) (emphasis added) – "domestic sewage; and … any mixture of domestic sewage and other wastes that passes through a sewer system to a *publicly* owned treatment works for treatment."

ii. Domestic sewage, or mixtures of domestic sewage and other wastes are excluded from the definition of solid waste and not regulated under RCRA.

iii. Mixtures of domestic sewage and other wastes flowing to a Privately Owned Treatment Works are not excluded from the definition of solid waste, and hence they are regulated under RCRA.

B. Exclusion from RCRA of Discharges Subject to the NPDES Program

i. 42 U.S.C. § 6903(27) – The term "solid waste" … does not include … industrial discharges which are point sources subject to permits under section 402 of the CWA.

ii. Extent of the exclusion – EPA stated in a guidance letter to the EPA Regions that: "a facility that should, but does not, have the proper NPDES permit is in violation of the CWA, not RCRA." Undated Letter from Michael H. Shapiro, Director, Office of Solid Waste to Waste Management Division Directors, Regions I–X.

iii. Discharges in violation of an NPDES permit or permitting requirements are not regulated by RCRA.

1. *Jones v. E.R. Snell Contractor, Inc.*, 333 F. Supp. 2d 1344, 1350 (N.D. Ga. 2004) – Case was a citizens' suit under the CWA and RCRA in which the Court found that construction site stormwater runoff is not a solid waste for purposes of the open dumping prohibition because such runoff is regulated under the CWA.

2. *Fishel v. Westinghouse Electric Corp.*, 617 F. Supp. 1531, 1538 (M.D. Pa. 1985) – Case involved a citizens' suit under CERCLA, the CWA, and RCRA regarding contamination from a

manufacturing facility's operations. The Court held that hazardous substances that were discharged to a storm drain were not solid waste for purposes of the open dumping prohibition because a storm drain is regulated under the CWA.

C. Application of Treatment Sludge to the Land

i. Section 405 of the CWA authorizes EPA to regulate land application of treatment sludge through NPDES permits.

ii. Publicly Owned Treatment Works – The regulations in 40 C.F.R. Pt. 503 govern land application of sludges from these facilities.

iii. Privately Owned Treatment Works – The RCRA open dumping criteria are incorporated by reference into NPDES Permits to set restrictions on where land application of sludge is allowed. *See* 46 Fed. Reg. 47048, 47051 (Sept. 23, 1981).

iv. Violation of applicable requirements is a violation of the CWA, not RCRA.

1. 40 C.F.R. § 261.4(a)(2) comment – States that sludges generated by treatment of industrial wastewater are not excluded from definition of solid waste. EPA added this comment when it issued the 1980 RCRA rules.

2. In 1987, Congress amended Section 405 of the CWA to require that EPA impose sludge application requirements through an NPDES permit.

- Furthermore, *CWA* Section 405 authorizes EPA to issue a permit for land application of treatment sludge even when a facility has no discharge to a navigable water.

3. Thus, the sludge is likely solid waste until it is applied to the land, at which point the CWA supplies the applicable requirements.

IV. Exclusions from the Definition of "Discharge" Under CWA Section 311 and Federally Permitted Releases Under CERCLA Section 101(10)

A. The definition of "discharge" in CWA Section 311(a)(2) excludes certain discharges from the reporting and liability provisions of the remainder of Section 311.

B. Similarly, releases that meet the definition of "federally permitted release" are excluded from CERCLA Section 103's and EPCRA Section 304's release reporting requirements and are not subject to the liability provisions of CERCA Section 107.

C. With respect to NPDES permitted discharges, three types of "releases" to a navigable water are excluded from the definition of "discharge" and are also considered "federally permitted releases":

i. Discharges in compliance with an NPDES Permit;

ii. Discharges "resulting from circumstances identified and reviewed and made a part of the public record with respect to" an NPDES Permit "and subject to a condition of such permit"; and

iii. "Continuous or anticipated intermittent discharges from a point source identified in a [NPDES] permit or permit application … caused by events occurring within the scope of relevant operating or treatment systems."

iv. 33 U.S.C. § 1321(a)(2); 42 U.S.C. § 9601(10).

D. Disclosure of all potential pollutant discharges during the NPDES application process may help to avoid reporting and liability obligations in addition to broadening the effect of NPDES Permit Shield.

V. Challenges to Regulatory or Permit Requirements Based on New Circumstances and Information

A. CWA Section 509(b) requires that a party seek judicial review of any enumerated approval, determination, promulgation, issuance, or denial under the CWA within 120 days.

i. Thereafter, the action may not be challenged in enforcement proceedings.

ii. Exception – A challenge is allowed after 120 days if the grounds for the challenge arose *solely* after the 120–day period expired.

iii. 33 U.S.C. § 1369(b).

B. There are no recent cases on challenges to existing regulatory requirements based on the existence of changed circumstances.

C. Two Older Cases of Note

i. *Tanner's Council of America v. Train*, 540 F.2d 1188 (4th Cir. 1976).

1. Facts – A trade association brought suit seeking review of effluent limits and performance standards for Leather Tanning and Finishing Point Sources.
2. The Court noted that EPA's belief about the predicted development of new technologies to meet new source performance standards may prove incorrect and that those standards might have to be set aside if EPA cannot demonstrate timely availability of technology.
3. Statement in dicta – "We think that further review of these … regulations is obtainable" under the changed circumstances provision to address the presence or absence of technology to meet the new standards.

ii. *Chevron U.S.A., Inc. v. EPA*, 908 F.2d 468 (9th Cir. 1990).

1. Facts – Chevron sought review of an NPDES permit for an offshore oil facility that contained an oil and grease discharge limit that the facility could not meet.
2. The Court held that discovery of a previously unknown pollutant in a facility's waste stream is a changed circumstance sufficient to allow judicial review more than 120 days after issuance of a permit.
3. Commencement of the limitations period – The discovery of the changed circumstances starts the clock for the limitations period.

4. Time period in which action based on changed circumstances is allowed

    a. The Court held that the right to bring a challenge under the changed circumstances provision does not continue ad infinitum, and some limitations period must apply.

    b. The Court considered both the California general limitations period of three years, and the 120-day limitations period of the CWA.

    c. Holding – The Court found that it did not need to decide which period applies because both the California period and the 120-day CWA period had already expired.

VI. Counting Violations

A. NPDES permits typically contain both maximum daily limits and monthly (or weekly) average limits.

B. A question arises as to how to count the number of violations that occur when a facility violates an average limit, or when it violates both a daily limit and an average limit on the same day.

C. Two Decisions Addressing this Issue

    i. *International Union of United Automobile, Aerospace, and Agricultural Implement Workers of America v. Amerace Corp.*, 740 F. Supp. 1072 (D.N.J. 1990).

1. Facts – The case involved a citizens' suit seeking penalties for violations of the electroplating categorical pretreatment standards under the CWA.
2. Holding – The Court found that violation of a monthly average limitation constitutes 30 violations, not one.
3. Court did not rule as to whether contemporaneous exceedances of daily limits constitute separate violations.

ii. *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338 (E.D. Va. 1997), *aff'd in relevant part*, 191 F.3d 516 (4th Cir. 1999).

1. Facts – Case was an enforcement action by EPA for violations of daily and monthly average limits, as well as reporting and recordkeeping violations.
2. Holding – The Court found that violation of a monthly average limit constitutes a separate violation for each day of the month.
3. Holding – The Court also ruled that violations of daily limits during the same time are separate, actionable violations as well.
    - The decision notes that daily limits have a different environmental purpose than average limits, *i.e.*, controlling acute exposure versus the ability of waterbody to tolerate an average pollutant load over a longer period.

4. Holding – The Court ruled that each day for which the Facility does not have three years' worth of discharge monitoring records was a separate violation.
    - For example, if a facility only has records for the previous 2½ years, it will have 180 separate violations of this requirement, – until it has three years' worth of records available.

VII. Impossibility

A. Impossibility of compliance with the CWA is a defense to an enforcement action only in extremely limited circumstances.

B. The defense arises from a line of cases beginning with *Hughey v. JMS Development Corp.*, 78 F.3d 1523 (11th Cir. 1996).

i. Facts – Case was a citizens' suit regarding stormwater discharges to a navigable water from a construction site at a time when EPA had not yet issued an NPDES general permit for such discharges.

ii. Court Relies on Four Factors – to determine that compliance was impossible under the circumstances, and that the developer had a defense to the violations:

1. Compliance was factually impossible;
    - The Court found that the developer made every good faith attempt to stop the discharge of stormwater from

its construction site into the waterbody, but that it was physically impossible to stop the stormwater from reaching a navigable water entirely.

2. No NPDES permit covering the discharges existed;
3. The developer was in good faith compliance with all local requirements regarding stormwater discharges; and
4. The discharges were minimal.

C. Cases Declining to Apply *Hughey* Defense

i. *Association to Protect Hammersley, Eld, and Totten Inlets v. Taylor Resources, Inc.*, 299 F.3d 1007 (9th Cir. 2002).

1. Facts – Case was a citizens' suit against a shellfish producer alleging the discharge of pollutants without an NPDES permit.
2. Court found, in dicta, that the *Hughey* impossibility defense was not available because the defendant could alleviate the violations by halting operations. Therefore, preventing the discharge was factually possible.

ii. *Driscoll v. Adams*, 181 F.3d 1285 (11th Cir. 1999).

1. Facts – Case was a citizens' suit in which the defendant was alleged to have performed timber harvesting operations without coverage under an NPDES stormwater permit. Coverage under the general permit for industrial discharges was not available yet due to litigation regarding the permit at the time of the discharge.

2. Court still declined to apply *Hughey* defense for two reasons:
    a. The defendant took no steps to control stormwater discharges from the harvest site; and
    b. The amount of stormwater discharged was not "minimal."

iii. *United States P.I.R.G. v. Atlantic Salmon of Maine, L.L.C.*, 215 F. Supp. 2d 239 (D. Me. 2002).

1. Facts – Case was a citizens' suit regarding defendant who operated an offshore salmon farm without a permit, but had submitted an NPDES permit application to EPA.
2. Holding – Court declined to apply *Hughey* defense because farm operator could cease operations at any time. Thus eliminating the unpermitted discharge was factually possible.

D. Application of *Hughey* Defense to a Municipality

i. There is one case in which a Court was willing to consider the *Hughey* defense regarding alleged violations by a municipality for its stormwater system.

ii. *Mississippi River Revival, Inc. v. EPA*, 107 F. Supp. 2d 1008 (D. Minn. 2000).

1. Facts – Case was a citizens' suit against the City of St. Paul. The City submitted an NPDES permit application for its stormwater discharges to the Mississippi River, but it never received a permit from the state.

2. Holding – The Court held that additional discovery was necessary to determine whether the *Hughey* defense was available to the City.
3. This result suggests that the *Hughey* defense might be viable for POTWs experiencing effluent violations and Sewer Overflows.
    a. Several of the decisions noted above regarding privately owned facilities refused to apply the defense because the facility could stop the violations by shutting down, and thus compliance was factually possible.
    b. The Court's willingness to consider the *Hughey* defense in this case suggests an understanding by the Court that a municipality cannot simply turn off its stormwater or wastewater system.
    c. Thus, there may be an opportunity to use this defense in enforcement actions regarding sewer overflows and effluent violations by POTWs.
4. Ultimate resolution – The State issued an NPDES permit to the City after this decision, and the lawsuit was dismissed as moot before the Court could address the applicability of *Hughey* in this case.

VIII. Unfunded Mandates Reform Act

A. The Act requires federal agencies to prepare a Regulatory Impact Statement ("RIS"), and to select the least costly, most cost-effective, or least burdensome regulatory alternative.

B. The Act provides a very limited opportunity for judicial review, and the only remedy available under the Act is to force the agency to prepare an RIS when it has failed to do so.

C. Cases

i. *Allied Local & Regional Manufacturer's Caucus v. EPA*, 215 F.3d 61, 81 n.22 (D.C. Cir. 2000) – The decision involved a challenge to an EPA rulemaking and held that judicial review based on the failure of an agency to select the most cost effective alternative is expressly precluded by the language of 2 U.S.C. § 1571(b).

ii. *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1043 (D.C. Cir. 1999), reversed on other grounds, *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001) – This case found that judicial review is not available based on the failure of EPA to prepare an RIS when setting National Ambient Air Quality Standards under the Clean Air Act.

IX. Information Quality Act

A. The Act directs the Office of Management and Budget to develop standards to ensure that the information relied upon by federal agencies is accurate.

B. Two district Courts have held that judicial review is not available to enforce compliance with this Act:

i. *In re Operation of the Missouri River System Litigation*, 363 F. Supp. 2d 1145 (D. Minn. 2004) – The Court ruled that there is no meaningful standard for judicial review in the Act.

ii. *Salt Institute v. Thompson*, 345 F. Supp. 2d 589 (E.D. Va. 2004) – The Court held that Congress intended to create administrative procedures that are not enforceable in court.

X. Reach of Citizens' Suits: *American Canoe Ass'n, Inc. v. District of Columbia Water & Sewer Authority*

A. 306 F. Supp. 2d 30 (D.D.C. 2004).

B. An interesting decision regarding the types of harms that are actionable under a CWA Citizens' Suit.

C. Facts – This was a citizens' suit in which the plaintiffs complained that a sewage treatment plant was violating its NPDES permit's Operations and Maintenance requirements by failing to install equipment to control odor emissions.

D. Two Holdings

i. Sufficient Harm to have Standing

1. The plaintiffs alleged that they used areas of the Potomac River adjacent to the plant and that they were subjected to foul odors emanating from it.

2. The Court held that this was a sufficient injury to confer standing upon plaintiffs to pursue a CWA citizens' suit, even though the harm could also be actionable under common law.

ii. Merits – The Court held that the proper operation and maintenance boilerplate in an NPDES permit could not be read to require the Authority to install air filters sufficient to alleviate the odors about which the plaintiffs complained.