Top Ten CWA Cases of Year

Fred Andes, Barnes & Thornburg, Chicago, IL[1]
Lee A. DeHihns, III, Alston & Bird LLP, Atlanta, GA
Hilary Meltzer, New York City Law Department, New York, NY

[1] Erika Powers, Barnes & Thornburg, assisted in the preparation of these materials.

***Attorney Gen. of Okla. v. Tyson Foods, Inc*., 565 F.3d 769 (10th Cir. 2009)**

Issues and Holding

The Attorney General of Oklahoma brought an action against Tyson Foods to stop fecal bacterial contamination from entering the Illinois River Watershed (IRW), which covers one million acres of land in Oklahoma and Arkansas. Tyson Foods contracts with poultry houses to grow poultry. In the IRW, there are 1,850 poultry houses which each hold 22,000-25,000 chickens at once which turn over 5-6 times a year, and according to Oklahoma, generate 345,000 tons of poultry waste per year. Oklahoma's concern is that the soil, terrain, and karst geology in the IRW will cause discharges of poultry waste bacteria into the IRW. Oklahoma filed a Section 7002 citizen suit against Tyson and sought to enjoin the land disposal pursuant to the Resource Conservation and Recovery Act (RCRA). The 10th Circuit found that Oklahoma was not likely to succeed in establishing at trial that land application of poultry waste would pose an imminent and substantial endangerment to the health of the environment as is required for a successful citizen suit by RCRA.

Relevance to Public Utilities

The disposal of biosolids is currently regulated under Section 405 of the Clean Water Act and 40 C.F.R. Part 503, along with an array of state and local regulations. This case does raise the concern that should someone believe that the federal or state programs are inadequate they could file a RCRA citizen's suit. The evidentiary situation that Oklahoma was facing in obtaining a preliminary injunction was a daunting because the IRW had so many other sources of bacteria that it was hard to focus in on solely the bacterial in the poultry waste. The 10th Circuit found that no imminent and substantial endangerment existed because: there was no evidence of specific harm from the bacteria; the land application of poultry litter is a well established farming practice; and there were no cases of illnesses or fish kills or other problems from bacteria in the IRW.

Next Steps

The 10th Circuit decision was made on May 13, 2009 and Oklahoma and the other parties have continued to litigate in District Court throughout the summer and into the fall. Oklahoma's claims in the case have been broadened to include response cost from natural resource damages under CERCLA, injunctive relief under RCRA, damages and injunctive relief under Oklahoma law of Nuisance, common law of nuisance and trespass, and violation of various state and agricultural statutes and regulations. Another appeal to the 10th Circuit was filed on September 17, 2009, by the Cherokee Nation, when their Motion to Intervene in the case was denied by the District Court. The bench trial began on September 24, 2009 and is expected to run for 30-40 days. There have been almost 2700 docket entries in Pacer for this case.

***Black Warrior Riverkeeper, Inc. v. Cherokee Mining*, LLC, 548 F.3d 986 (11th Cir. 2008)**

Issues and Holding
Black Warrior Riverkeeper (BWR), which watches over the Black Warrior River in Alabama, sued Cherokee Mining under a Clean Water Act citizen suit for the company's failure to comply with its NPDES permits. Cherokee Mining filed a Motion to Dismiss for lack jurisdiction in the District Court, claiming that an administrative enforcement action, brought by Alabama prior to the citizen suit's being filed precluded the citizen suit. Cherokee Mining agreed to a Consent Order with the Alabama Department of Environmental Management (ADEM) in which it agreed to resolve the violations and pay a fine of $15,000. BWR argued that it gave notice of the citizen suit prior to the commencement of the state enforcement action, and pursuant to Section 33 U.S.C. 1319(g)(6)(B) that the suit would not be precluded by the commencement of the state enforcement action, and the 11th Circuit agreed.

Relevance to Public Utilities
This decision by the 11th Circuit raises an issue that comes up quite often for violations of permits: where citizens groups are interested in the outcome, potential defendants to citizen suits frequently will seek state enforcement actions to resolve the violations. The concern here is that the 11th Circuit held that CWA allows a citizen suit to be brought within 120 days of a Notice of Intent to Sue being filed, if that notice predated the commencement of the state enforcement action.

Next Steps
The 11th Circuit decision came down on November 13, 2008, which remanded it back to the District Court for the Northern District of Alabama. On June 5, 2009, the Court issued a Memorandum Opinion dismissing BWR's case against Cherokee Mining, holding that the enforcement action by ADEM had completely resolved the matter and that there was no further reason to allow the citizen suit to proceed when it was essentially moot. The opinion made a point about the situation the judge found himself in.

> If there is a lesson to be learned from this case, it is that a citizen who admittedly has a right to file a citizen suit seeking to remedy a perceived water violation, although knowing, as a matter of law, that ADEM has concurrent jurisdiction over the issue, is taking the risk that he will be headed off at the pass by a subsequent appropriate ADEM enforcement action. If this hard lesson needs to be erased from judicial blackboards, the erasure must be done by another. This case having been rendered moot by the Consent Order entered into between ADEM and Cherokee Mining, Cherokee Mining's Motion to Dismiss for Lack of Subject Matter Jurisdiction will be granted.

The District Court relied heavily on the decision by the 5th Circuit in the case of *Environmental Conservation Organization v. City of Dallas*.

***City of Los Angeles v. Kern County Water Agency*, No. 07-56564, WL 2871514 (9th Cir. Sept. 9, 2009)**

Issues and Holding

This case involved a local ordinance ban on the land application of biosolids that was challenged by a number of NACWA member agencies in Southern California. On September 9, the U.S. Court of Appeals for the Ninth Circuit determined that the plaintiffs did not have sufficient legal standing to challenge the ban based on the dormant Commerce Clause of the U.S. Constitution.

The Ninth Circuit's opinion focused specifically on the issue of whether the plaintiffs had standing to bring a federal claim under the dormant Commerce Clause. The dormant Commence Clause is an inferred legal doctrine from the Commerce Clause of the U.S. Constitution and has been used by courts to strike down legislation that improperly burdens or discriminates against interstate commerce. The plaintiffs in the case argued that the Kern County biosolids land application ban would have an impact on both in-state and out-of-state business, thus negatively impacting interstate commerce in an impermissible manner. The Ninth Circuit, however, disagreed, finding that the plaintiffs in the case were not in the "zone of interest" of the dormant Commerce Clause because the biosolids at issue did not cross state lines and none of the plaintiffs were from outside of California. The court's decision further focused on the narrow fact that the Kern ban on its face does not seek to regulate interstate commerce. Although the court ruled that the plaintiffs could not pursue their claim based on the federal Constitution, the Ninth Circuit did not address or undercut the merits of the lower court's Commerce Clause ruling that the Kern County ban discriminates against out-of-county biosolids. The appeals court also did not address the lower court's determination that the Kern County ban violates California's Integrated Waste Management Act (IWMA). As a result, the injunction issued against the ban by the lower court will remain in place. The Ninth Circuit has remanded the case to the trial court for additional deliberation regarding the IWMA claim.

Background

The case began in 2006 when voters in Kern County, California approved a ban, which would have prevented out-of-county utilities from land applying biosolids at agricultural sites within the county. This ban would have significantly impacted a number of major urban municipalities in Southern California that have safely land applied their biosolids to farms in Kern County for many years, including NACWA member agencies the City of Los Angeles, the Orange County Sanitation District, and Sanitation District No. 2 of Los Angeles County. These agencies, along with a number of other plaintiffs, filed suit in the U.S. District Court for the Central District of California requesting an injunction against the ban, arguing that the ban ran afoul of both the dormant Commerce Clause inferred from the U.S. Constitution, which prohibits legislation that unfairly discriminates against interstate commerce, and the California Integrated Waste Management Act, which sets certain goals for the recycling of waste material. The District Court ruled in the plaintiffs' favor on both claims and granted the injunction. Kern County then appealed the decision to the Ninth Circuit.

During briefing before the appeals court, NACWA filed amicus curiae brief with the court and argued the Association's long-standing position that individual municipalities should be able to choose the method of biosolids management that works best for their communities, including the option of land application. Additionally, it discussed the critical role land application plays for

many clean water utilities across the country to meet their environmental mandates and outlined the difficulties these utilities would face if land application bans became widespread. The brief also highlighted the safety and agricultural benefits of recycling biosolids through land application when done in compliance with state and federal regulations and stressed the primacy of state and federal regulatory efforts over misguided local attempts to enact land application bans.

Relevance to Public Utilities

NACWA and the plaintiffs were disappointed with the court's decision regarding the federal Commerce Clause claim and believe it was wrongly decided. Among other things, the court's reasoning failed to take into account existing federal case law that defines interstate commerce to include business carried on in-state that has some minimal impact or relation to interstate commerce. The court also ignored evidence produced by the plaintiffs that the Kern ban would likely result in out-of-state shipments of biosolids from California to Arizona, thus creating an impact on interstate commerce.

Next Steps

This decision will have no immediate impact on NACWA members, including those that recycle their biosolids through land application. As stated above, the existing injunction against the ban will stay in place pending further review by the federal District Court in California, so the three NACWA members that are parties to the litigation may continue to recycle their biosolids via land application in Kern County. Additionally, the decision does not mean that county or local government restrictions on biosolids management can no longer be challenged in federal courts in the Ninth Circuit or elsewhere in the country. Instead, the case suggests that any future challenges in federal courts to local biosolids ordinances should pay particular attention to the potential impacts on interstate commerce in order to trigger federal Commerce Clause protections.

***Coeur Alaska v. Southeast Alaska Conservation Council*, 129 S.Ct. 2458 (2009)**

Brief description of issue and holding:
EPA new source performance standards under CWA 306 prohibit froth-flotation gold mines from discharging process wastewater, including solid wastes.[2] Coeur Alaska reopened a gold mine using froth flotation and applied for and obtained a CWA 404 permit from the Army Corps of Engineers to discharge slurry (including solid mine tailings) as fill material into a lake, raising the bed of the lake by up to 50 feet. Plaintiffs objected to the Corps permit as violating the CWA 306 prohibition on the discharge of solids, and argued that Coeur Alaska should have obtained an NPDES permit instead. The District Court granted summary judgment to the Corps and Coeur Alaska. The Ninth Circuit reversed, finding that the Corps permit would violate EPA's new source performance standard.

The Supreme Court reversed the Ninth Circuit in favor of the Coeur Alaska. The Court determined that both the CWA and agency regulations were silent on the issue of whether EPA's new source performance standards applied to discharges authorized under Corps permits. However, an internal agency memo offered a reasonable interpretation—that EPA standards developed under CWA 306 do not apply to discharges authorized under Corps permits. Because both agencies define "fill material" as including slurry, and because permits for the discharge of fill material fall under the sole jurisdiction of the Corps, the CWA 306 prohibition does not apply to the slurry discharge.

Relevance to public utilities:
Very little direct relevance to public utilities. Primarily of interest because the Court relied on an internal agency memo as statutory interpretation in light of ambiguity in the statute and regulations.

Next steps:
None.

[2] 40 CFR 440.104.

***Connecticut v. Am. Elec. Power Co.*, Nos. 05-5104-cv, 05-5119-cv, 2009 U.S. App. LEXIS 20873 (2d Cir. Sept. 21, 2009)**

Brief description of issue and holding:
In 2004, eight states, the City of New York, and three land trusts sued the largest U.S. power companies, alleging that their emissions of greenhouse gases and contribution to global climate change constituted a nuisance and seeking relief under federal common law. In 2005, the district court dismissed the matter, holding that plaintiffs had raised a political question, not appropriate for judicial review.[3]

More than three years after the appeal was briefed and argued, and two years after the Court requested supplemental submissions concerning the applicability of *Massachusetts v. EPA*,[4] the Second Circuit reversed. The Court first held that the relief plaintiffs seek under the federal common law of nuisance does not require a court to make inappropriate policy determinations. The Court also found that all plaintiffs have standing, and that on their face, the complaints stated a cause of action under the federal common law of nuisance.

The most interesting part of the 140 page decision is the discussion of whether plaintiffs' common law nuisance claim had been displaced by federal legislation. The Court focused primarily on the analyses in *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972) ("Milwaukee I") and *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) ("Milwaukee II"). In *Milwaukee I*, the Supreme Court concluded that the water pollution laws in effect at that time had not displaced Illinois' claim that inadequately treated sewage discharged to Lake Michigan from four cities in Wisconsin constituted a nuisance, but anticipated the possibility that subsequent legislation might in time do so. In *Milwaukee II*, several years after Congress adopted the comprehensive CWA amendments of 1972, the Supreme Court concluded that the new federal legislation had "occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency," in which "[e]very point source discharge is prohibited unless covered by a permit."

In applying this analysis to the nuisance claims concerning greenhouse gas emissions, the Second Circuit found that unlike the CWA, the Clean Air Act does not establish a comprehensive regulatory program, but rather, as the Supreme Court found in *Massachusetts v. EPA*, gives EPA discretion to determine whether to regulate greenhouse gas emissions. As EPA has not adopted such regulations, the Court found that the CAA does not displace plaintiffs' common law nuisance claims. The decision ends with another reflection on the analogy with the *Milwaukee* cases:

> the concluding words of *Milwaukee I* have an eerie resonance almost forty years later. To paraphrase: 'It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance' by greenhouse gases.

[3] *Conn. v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 271-72 (S.D.N.Y. 2005).
[4] *Massachusetts v. EPA*, 549 U.S. 497, 531 (2007).

Relevance to public utilities:
Unless and until federal legislation displaces federal common law nuisance claims based on greenhouse gas emissions, water and wastewater management utilities may have viable nuisance claims against large emitters of greenhouse gases based on climate change impacts in a number of different contexts, such as damage to infrastructure from sea level rise, water quality impairment due to more frequent, more severe storms, and/or increased stormwater management costs.

Picking up on the Court's analysis of the two *Milwaukee* cases, the decision also suggests the possibility that courts would entertain nuisance claims based on discharges of even trace amounts of pharmaceuticals and personal care products from POTWs, to the extent such discharges are not considered to be regulated under the CWA.

Next steps:
The defendants apparently intend to move for reconsideration *en banc*, and presumably will seek certiorari. The Fifth Circuit reached a similar result in *Comer v. Murphy Oil United States*, No. 07-60756, 2009 U.S. App. LEXIS 22774 (5th Cir. Oct. 16, 2009), while the U.S. District Court for the Northern District of California recently dismissed a similar case, following the logic of the lower court decisions reversed by the Second and Fifth Circuits. *Native Village of Kivalina* v. Exxon Mobil Corp., No. C08-1139 (N.D. Cal. Sept. 30, 2009). There will surely be more litigation about this issue.

In the meanwhile, Congress may adopt legislation that would displace common law nuisance claims based on greenhouse gas emissions.

***Entergy Corp. v. Riverkeeper*, 129 S.Ct 1498 (2009)**

Brief description of issue and holding:
EPA had adopted Phase I cooling water intake structure rules under CWA 316(b) requiring new facilities to achieve reductions in impingement and entrainment equal to that attainable by closed-cycle recirculating cooling water systems. EPA in Phase II rulemaking declined to apply the same requirement to existing facilities in part because it would have cost $3.5 billion per year, and comparable (though not identical) reductions could be achieved at a cost of only $389 million per year. In addition, EPA adopted site-specific variance provisions providing relief from the Phase II requirements where a particular facility's costs "would be significantly greater than the benefits of complying with the applicable performance standards." Plaintiffs argued that the 316(b) standard of "best technology available for minimizing adverse environmental impact" precluded the cost-benefit analysis EPA used in adopting the variance provision and appeared to use in declining to require closed-cycle reductions for existing facilities. Plaintiffs took the position that the 316(b) language required EPA to determine which technology achieved the smallest adverse environmental impact, and then consider costs only to the extent of determining whether the facilities could feasibly afford to implement that technology, with no comparison to the benefits achieved. The Second Circuit agreed, and remanded the rule to EPA.

The Supreme Court reversed the Second Circuit. It held that the fact that the CWA does not specifically state that EPA may compare costs and benefits in determining the "best technology available for minimizing adverse environmental impact" did not unambiguously preclude the practice. Indeed, the Court found that the lack of specificity in the CWA was meant to provide EPA with greater discretion rather than less, and that EPA's interpretation of the statute to allow cost-benefit considerations was reasonable.

Relevance to public utilities:
Very little direct relevance at this point. The Court's interpretation applies only to the unique language of CWA 316(b) and is not likely to affect portions of the statute applicable to public utilities. The opinion may reflect the level of deference the Court is willing to grant to the agencies. The makeup of the Court, however, is different now with the addition of Justice Sotomayor, who participated in the Second Circuit panel that decided in favor of the plaintiffs.

Next steps:
Despite the favorable ruling from the Court, EPA has decided to revisit the Phase II cooling water intake structure rule. They are expected to have a draft rule out mid-2010, with a new final rule expected in 2012.

***Environmental Conservation Organization v. City of Dallas*, 529 F.3d 519; 307 F. App'x 781, (5th Cir. 2008)**

Issues and Holding

The Environmental and Conservation Organization (ECO) sued the City of Dallas for stormwater pollution of the Trinity River in the District Court for the Northern District of Texas. In 2004, EPA issued an administrative complaint against the City of Dallas and began negotiating a settlement, which resulted in a consent decree being filed with the Court in May of 2006. ECO commented on the inadequacy of the penalty and remedial measures in the Consent Decree, but did not oppose it, and it was subsequently entered in August 2006. After the Court entered the EPA consent decree, the City was instructed by the Court to file a motion for summary judgment. Relying on *res judicata*, the Court dismissed the lawsuit, and the appeal to the 5th Circuit ensued.

The 5th Circuit found that ECO's interest in the litigation was the public's interest, and once EPA had a consent decree in place, addressing all the same violations of the citizen suit, the public interest was vindicated, and with nothing left to accomplish, ECO thus no longer had a stake in the litigation. The 5th Circuit affirmed the District Court dismissal on different grounds, saying that the District Court's dismissal for *res judicata* was incorrect and the case should have been dismissed as moot. That decision was made in May 2008. In December 2008, the 5th Circuit took up a separate issue, which was ECO's request for attorneys' fees, which had been denied by the District Court. The District Court had held that ECO didn't join the EPA suit, they didn't obtain any judicially enforceable rights, and they did not prevail wholly or substantially, and their fees were denied. The 5th Circuit took a long look at the so called "Catalyst Theory" in terms of whether the federal action was caused by the ECO action, and concluded that they were not even sure that the Catalyst Theory had relevance under the Clean Water Act. The Court said that even if it did, it wouldn't apply here, for exactly the same reasons they had use in affirming the dismissal of the underlying lawsuit in their May 2008 opinion.

Relevance to Public Utilities and Next Steps

Much like the *Black Warrior* case, the decision by the City to resolve its EPA complaint in the form of a consent decree, even in the face of a pending citizens suit, turned out okay for the City because they were able to resolve the differences with EPA and avoid not only the citizen suit, but also avoid having to pay the citizens' attorneys' fees, whether or not they were catalysts to the citizen suit.

This case is over. There are no next steps. The lesson learned here is much like the lesson learned in the *Black Warrior* case - settle your disputes with EPA or the State and you can perhaps avoid a citizen suit.

***Fairbanks North Star Borough v. U.S. Army Corps of Engineers*, 542 F.3d 1235 (9th Cir. 2008)**

Brief description of issue and holding:
Fairbanks requested a wetlands delineation determination from the Army Corps of Engineers prior to undertaking a project to develop a tract of land in Alaska for its residents' recreational use. Fairbanks contended that the tract could not be a wetland due to the presence of permafrost at 20 inches, and because the soil temperature never exceeded zero degrees Celsius, so could not support the vegetation necessary for a wetland. Although the Corps' delineation manual indicates that soil must achieve a temperature above 5 degrees Celsius in order to be considered a wetland, it used a special definition established for Alaska (the Alaska Rule) that considered 28 degree air temperature rather than the normal soil temperature. Fairbanks filed an administrative appeal with the Corps, which was denied, and then appealed to the federal district court, which dismissed the case for lack of jurisdiction. Fairbanks appealed to the Ninth Circuit.

The Ninth Circuit upheld the district court, determining that a Corps wetlands delineation did not constitute final agency action, so was not ripe for judicial review. Although the action was final upon resolution of the administrative appeal, the Court held that the wetlands delineation did not determine any rights or obligations from which legal consequences would flow. The Court considered the issue of whether jurisdictional wetlands exist on a particular piece of property to be a factual and legal determination completely unaffected by the Corps opinion contained in the wetlands delineation. Further, any legal consequences would flow only from later agency action—either to issue or deny a CWA 404 permit, or to bring an enforcement action if the plaintiff proceeded without a permit. No such consequences flowed from the wetlands delineation itself.

Relevance to public utilities:
Very little direct relevance to public utilities, unless they seek to challenge a Corps jurisdictional determination.

Next steps:
None.

***Friends of the Everglades, Inc. v. S. Fla. Water Mgmt. Dist*., 570 F.3d 1210 (11th Cir. 2009)**

Brief description of issue and holding:
In the context of a Clean Water Act citizen suit concerning pumping stormwater into the Everglades, the 11th Circuit upheld EPA's 2008 Water Transfers Rule (WTR)[5] as a reasonable interpretation of the statute. The WTR provides that transfers of water do not require NPDES permits, so long as the transfers themselves do not subject the transferred water to intervening commercial, industrial, or municipal use.

Relevance to public utilities:
Numerous public utilities – particularly those involved in water supply and stormwater management – have been concerned about decisions in the 2nd Circuit,[6] and a prior 11th Circuit decision,[7] holding that water management agencies needed NPDES permits to transfer untreated water from one water body to another "meaningfully distinct" body of water. NACWA has participated as an *amicus curiae* in *Friends of the Everglades* as well as in the related litigation.

Next steps:
Plaintiffs have sought rehearing *en banc*. That motion was fully submitted on October 13, 2009. Presumably, at least one party will petition for a writ of certiorari once that motion is decided. In addition, in its brief opposing the motion for rehearing *en banc*, EPA indicated that it is intending to "reconsider" the WTR itself. Of course, in the meanwhile, the Rule remains in effect.

In the meanwhile, several direct challenges to the WTR have been stayed. The petitions filed under Section 509 of the Clean Water Act in a number of appellate courts have been consolidated in the 11th Circuit, which will hear them once there is a final decision in *Friends of the Everglades*. The complaints filed under the APA, which have been consolidated in the Southern District of Florida and Southern District of New York, will not be heard until after the 11th Circuit hears the consolidated petitions. This litigation will thus focus not only the merits of the WTR itself, but also on the scope of the judicial review provisions in the Clean Water Act.

[5] 40 CFR § 122.3(i).
[6] *Catskill Mountains Ch. of Trout Unlimited v. City of New York*, 273 F.3d 481 (2d Cir. 2001), *aff'd following trial*, 451 F.3d 77 (2d Cir. 2006).
[7] *Miccosukee v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002), *vacated and remanded by S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

Friends of Pinto Creek v EPA, 504 F.3d 1007 (9th Cir. 2007)

Brief description of issue and holding:
Pinto Creek is included on the Arizona 303(d) List as impaired for dissolved copper, and EPA completed a TMDL to address the impairment. Carlota Copper sought and was issued an NPDES permit to discharge mining-related wastewater, stormwater, and groundwater containing dissolved copper. In order to offset the mine's copper discharge, Carlota was required to remediate the Gibson Mine, an upstream source of copper loading to Pinto Creek. EAB denied review, and the plaintiffs appealed to the Ninth Circuit.

The Ninth Circuit vacated and remanded the permit to EPA, finding that the permit was issued in violation of 40 CFR 122.4(i), which sets forth the conditions under which a new source can obtain a permit to discharge to an impaired water. The permittee is required, before the close of the public comment period, to demonstrate both that there are sufficient remaining pollutant load allocations to allow for the new discharge, and that existing dischargers into the segment are subject to compliance schedules designed to bring the segment into compliance with water quality standards. The Court held that the conditions of 122.4(i) were not satisfied. First, the TMDL only provided "a method by which allocations could be established," rather than "any plan that will effectuate these load allocations so as to bring Pinto Creek" into compliance. Second, the remaining point source dischargers to Pinto Creek were not subject to compliance schedules that would result in compliance with water quality standards. The Court indicated that the offsets to account for the copper discharged by Carlota were insufficient to reduce copper loadings enough to meet water quality standards, so could not be relied on in issuing the permit.

With regard to putting sources under compliance schedules, the Court stated:

> If point sources, other than the permitted point source, are necessary to be scheduled in order to achieve the water quality standard, then the EPA must locate any such point sources and establish compliance schedules to meet water quality standards before issuing a permit. If there are not adequate point sources to do so, then a permit cannot be issued unless the state or Carlota agrees to establish a schedule to limit pollution from a nonpoint source or sources sufficient to achieve water quality standards.

Relevance to public utilities:
This opinion could have very broad implications for any public utility intending to build a new facility that would discharge to an impaired water. Although technically the holding is directly applicable only to facilities within the jurisdiction of the Ninth Circuit, if followed elsewhere the opinion could potentially halt all new sources on impaired waters unless all other sources are under compliance schedules consistent with the opinion.

Next steps:
The Supreme Court denied cert, and it is not clear whether EPA will take any action to comply with the opinion and reissue the permit. EPA has stated that it intends to begin a rulemaking process to revise 40 CFR 122.4(i) in order to address the implications of the opinion. The scope of that rulemaking may be even broader, applying to both new and increased discharges to

impaired waters. Public utility participation in that rulemaking process will be critical to ensuring that facilities can adapt to changing community needs.

***In re Montpelier WWTF Discharge Permit*, Case No. 22-2-08 Vtec (Vt Env. Ct. Jul. 2, 2009)**

Brief description of issue and holding:
The Conservation Law Foundation challenged a 2008 NPDES permit issued to the City of Montpelier, which included water quality-based effluent limitations (WQBELs) for phosphorus identical to the wasteload allocation (WLA) assigned to the facility in the 2002 Lake Champlain phosphorus TMDL. CLF did not challenge the 2002 TMDL at the state level, but did file a federal challenge to EPA approval of the TMDL just a few weeks before the expiration of the federal six-year statute of limitations in 2008. The state environmental court vacated the permit and remanded to the agency to determine whether the limits were consistent with not only the requirements, but also the assumptions, underlying the 2002 TMDL.

The court first held that automatic reliance (without further agency analysis) on a TMDL WLA more than five years old in effect authorizes a polluting activity to continue for more than five years. This violates the CWA 402 prohibition on permits that last for more than five years, as well as Congress' intent to ensure that permit limits are made progressively more stringent as they move toward the CWA goal of discharge elimination. The court made its own interpretation of the federal CWA because it found that neither EPA nor the state agency had previously interpreted the act as it applied to continued reliance on TMDLs. Second, the court held that the permit violated 40 CFR 122.44(d), which requires that permits be issued consistent with the requirements *and* assumptions underlying an applicable TMDL, citing the need to give meaning to both words in the regulation.

The court indicated that in order to satisfy the CWA and regulations, if any TMDL is more than five years old, the state agency must review the assumptions underlying the TMDL to determine whether issuance of the permit is still consistent with those assumptions. In the case of the Lake Champlain TMDL, the agency must specifically examine the following assumptions before it can continue to allow Montpelier to discharge at the maximum level established by the WLA: 1) that the significant nonpoint source reductions relied upon in establishing less stringent point source allocations would be achieved; 2) that agricultural lands will continue to be protected through the cooperative efforts of federal and state programs and willing land owners; 3) that the commitment of state and federal funding for point and nonpoint source programs was being sustained; 4) that increased governmental funding noted as necessary in the TMDL was being obtained; 5) that compliance with forestry accepted management practices would continue; 6) that the state or local governments were able to contain or offset the effects of urbanization; and 7) that runoff from new development is being contained.

The court made no distinction between determining whether the permit was consistent with the original TMDL assumptions and an analysis of the continued validity of those assumptions. The court indicated that if the assumptions no longer justify allowing the facility to discharge the maximum WLA amount, "stricter permit limitations would be needed to compensate for any exceedances in any other allocated discharges" to the Lake. Although the court remanded the permit to the agency for a determination on that issue, it noted that after six years, efforts to control or reduce phosphorus discharges to the lake have not yet been successful. Current loadings to the Lake are still roughly twice the level set by the TMDL. In dicta, the court also implied that relying on point source reductions in setting WLAs for point sources that were

"practical and cost-effective" means that permit limits based on the WLAs are actually less stringent technology-based effluent limits rather than WQBELs required by the CWA.

Relevance to public utilities:
At this point, with a decision only at the state court level, the case primarily indicates the extent of possible challenges environmental groups are willing to raise against TMDLs they believe to be ineffective or inadequate. Because the initial challenge here was successful, similar arguments may be made elsewhere. If the court's logic is followed, the continued validity of TMDLs may be seriously undermined, and facilities may face more stringent limits very quickly if nonpoint source reductions are not achieved.

Next steps:
The state agency has appealed the decision to the Vermont Supreme Court. Rejecting a push from CLF to redo the TMDL, the state legislature has directed the agency to develop a new implementation plan by January 2010, and to reopen the TMDL in 2013. In the meantime, however, CLF is pursuing a federal challenge to EPA's approval of the TMDL and a state challenge to a permit issued to another city discharging to the Lake watershed.

National Cotton Council v. EPA, 553 F.3d 927 (6th Cir. 2009)

Brief description of issue and holding:
EPA issued a rule in 2006 that exempted discharges of pesticides to surface waters – whether through direct application to waters or as incidental "drift" from aerial or land application – from the NPDES program, so long as the pesticides were being applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). In adopting this rule, EPA concluded that a pesticide applied according to its federal label is not a "pollutant" under the CWA and thus does not trigger the NPDES permit requirement.

The Sixth Circuit rejected EPA's analysis of when pesticides applied in accordance with FIFRA might be considered pollutants under the CWA. Accordingly, the Court vacated the EPA rule.

The Court also held that it had jurisdiction to hear this challenge under CWA Section 509(b)(1)(F), which allows federal appellate courts to review EPA's action "in issuing or denying any [NPDES] permit," finding that this provision "authorizes the courts of appeals 'to review the regulations governing the issuance of [NPDES permits], as well as the issuance or denial of a particular permit.'"

Relevance to public utilities:
This case is of most concern to entities that apply pesticides, including public health agencies controlling mosquitoes for West Nile virus and other pest-carried diseases, as well as the agriculture and timber industries. The need to seek NPDES permits as well as to comply with FIFRA may be extremely burdensome. Apparently, however, the pesticides manufacturers intend to seek general permits authorizing the discharges to surface waters associated with use of their products in accordance with their FIFRA labels.

As with the jurisdictional determination in *NRDC v. EPA*, the Court's finding jurisdiction under CWA Section 509(b)(1) to hear challenges to rules governing NPDES permits is relevant to the future litigation concerning the Water Transfers Rule.

Next steps:
On April 9, 2009, EPA move for a stay of the mandate until April 9, 2011, arguing that EPA and delegated states needed time to develop and issue appropriate NPDES general permit to authorize certain pesticide discharges to waters of the United States. This motion was granted. Accordingly, EPA and delegated states must develop general permits by April 2011, or else most pesticides applications directly to water, and all with the potential for drift into waters, will require individual NDPES permits.

***Natural Resources Defense Council v. EPA*, 542 F.3d 1235 (9th Cir. 2008)**

Brief description of issue and holding:
Plaintiffs brought a citizen suit pursuant to Section 505(a)(2) of the Clean Water Act, challenging EPA's failure to adopt effluent limitation guidelines (ELGs) and new source performance standards (NSPSs) for stormwater discharges from construction sites. NRDC alleged that this was a failure to perform a nondiscretionary duty under the Act. The 9th Circuit affirmed the district court's determination that EPA had a nondiscretionary duty to adopt ELGs and NSPSs for construction site runoff once it published a plan pursuant to Section 304(m) of the Act indicating its intention to do so.

The 9th Circuit also affirmed the lower court's holding that this litigation was appropriately brought in the district court pursuant Section 505 rather than in an appellate court under Section 509, because it involved EPA's alleged failure to perform a discretionary duty rather than, for instance, a challenge to the substance of a regulation EPA had adopted under the Act.

Relevance to public utilities:
As a result of this litigation, EPA was required to propose ELGs and NSPSs for the construction and development industry by December 1, 2008 and to promulgate the new regulations by December 1, 2009. Many stakeholders, including numerous public utilities, submitted comments on the proposed rules earlier this year. Most commenters were critical of EPA's proposed absolute numeric limit for turbidity in construction stormwater runoff which would apply to construction sites meeting certain criteria, finding that such a limit would be extremely expensive to achieve, and/or that absolute limits do not reflect many states' water quality standards for turbidity, which are based on relative concentrations rather than absolute levels.

The holding concerning jurisdiction may also prove relevant in future litigation.

Next steps:
Under the District Court's injunction, EPA is required to adopt new regulations setting forth ELGs and NSPSs for stormwater from construction sites by December 1, 2009.

Pennaco Energy Inc. v EPA, Case No. 06-CV-100-B (D. Wyo. Oct. 13, 2009)

Brief description of issue and holding:
In 2003, Montana adopted numeric criteria for electrical conductivity and sodium adsorption ratio to address increased coalbed methane gas extraction activities in the Powder River Basin to protect agricultural uses. The numeric criteria were set below average levels naturally found in the basin during irrigation season. In 2006, Montana revised its antidegradation policy relating to those criteria to be more stringent. EPA approved both water quality standards revisions. Energy companies and the state of Wyoming appealed EPA's approval to federal district court.

The court vacated EPA's approval of both revisions, and remanded the matter to the agency. The court determined that EPA has an obligation to review the entire state administrative record, particularly where there are complex issues, and had failed to include 47 documents in its review that raised scientific objections to the criteria. Second, the court held that EPA failed to fulfill its obligation under 40 CFR 131.5 to determine whether the state criteria "are based upon appropriate technical and scientific data and analyses." Although EPA indicated that it had reviewed current science in approving the criteria, the Court indicated that the agency failed to provide a rational basis for its conclusion. Specifically, "EPA failed to identify the scientific basis for approving a standard which oftentimes will be less than the naturally occurring condition." As such, EPA's conclusion was insufficient to allow the court to determine whether the approval was the product of reasoned decision-making. Similarly, the court found that EPA failed to provide a rational basis for its approval of the antidegradation policy revisions. EPA is required to "explain the evidence which is available, and must offer a rational connection between the facts found and the choice made."

Wyoming also argued that nothing in the CWA authorizes states to impose its standards on another state, if more stringent than required by the CWA itself. Federal approval therefore violates state sovereignty under the 10th Amendment to the Constitution, as well as the Dormant Commerce Clause. The court did not reach those issues.

Relevance to public utilities:
The opinion shows a general lack of deference for agency conclusions, and appears to require a more detailed review of state standards that EPA generally undertakes before approval. More relevant perhaps will be the issues that the court did not address—specifically, whether a state can impose standards and criteria more stringent than required by the CWA on neighboring state dischargers as a matter of federal law. This issue has been and is being faced by a number of public utilities located in interstate watersheds.

Next steps:
EPA must reconsider its approval of Montana's criteria and antidegradation policy revisions. If approved, it is not clear whether the plaintiffs (including the State of Wyoming) will raise further challenges to application of standards across state boundaries.