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Daniel C. Mizell

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## EPA's Failure to Administer the NPDES Permit System Leads to a Judicial Mugging

*Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*<sup>1</sup>

by Daniel C. Mizell

### I. INTRODUCTION

Since its passage in 1972, the Clean Water Act has been used as an effective tool in cleaning our nation's waterways. Permits issued under the Clean Water Act's National Pollution Discharge Elimination System have been recognized as the "most successful pollution abatement effort in the country...if not the world."<sup>2</sup> One must wonder how much more powerful the pollution abatement effort could become if the 1972 legislation were fully implemented. It is a shocking revelation to find that the Environmental Protection Agency is still struggling to implement the necessary permits. The confusion and complication that arises from this administrative failure is demonstrated by *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*

The Fifth Circuit's analysis in *Cedar Point Oil* is significant for several reasons. First, the court ultimately finds that the definition of pollutant under the

Clean Water Act is expansive enough to include produced water.<sup>3</sup> Second, the court finds that an environmental organization can allege that its members were injured in fact based on the discharge of a pollutant into common waters.<sup>4</sup> Lastly and most importantly, the court holds that discharging without an NPDES permit is a violation of the Clean Water Act and subject to a citizen suit even if a pending permit application has not been acted upon by the Environmental Protection Agency.<sup>5</sup>

### II. FACTS AND HOLDING

From August, 1971 to July, 1989, Chevron Corporation created "produced water" which originated from oil and gas drilling activities in Cedar Point Field.<sup>6</sup> Cedar Point Field is located in Galveston Bay, Chambers County, Texas.<sup>7</sup> Chevron Corporation discharged its produced water from an on-shore separating facility directly into Galveston Bay.<sup>8</sup> The Texas Railroad Commission issued a

Commission Permit<sup>9</sup> to Chevron Corporation which allowed discharge of produced water in this manner.<sup>10</sup> This Texas Railroad Commission permit limited only the oil and grease content of Chevron's produced water.<sup>11</sup>

On July 1, 1989, John McGowan, the principal shareholder of Cedar Point Oil Company, purchased Cedar Point Field from Chevron Corporation.<sup>12</sup> After the purchase, the Texas Railroad Commission transferred Chevron's Commission Permit to John McGowan.<sup>13</sup> The Commission Permit allowed McGowan to discharge produced water, limiting only the oil and grease content of the discharge.<sup>14</sup> The Texas Railroad Commission informed John McGowan that a National Pollutant Discharge Elimination System (NPDES) permit from EPA may be required to discharge produced water into Galveston Bay.<sup>15</sup>

On January 1, 1991 Cedar Point acquired Cedar Point Field from John McGowan at no cost.<sup>16</sup> Later in 1991, Cedar Point drilled its first well<sup>17</sup> in Cedar Point Field.<sup>18</sup> Cedar Point began producing oil and gas from this newly drilled well on September 10, 1991.<sup>19</sup>

Cedar Point, like Chevron Corporation had done for the past fifteen

<sup>1</sup>73 F.3d 546 (5th Cir. 1996), cert. denied, 117 S. Ct. 57 (1996).

<sup>2</sup>Oliver A. Houck, *Clean Water Act and Related Programs*, CA 37 ALI-ABA 295 (1996).

<sup>3</sup>*Cedar Point Oil*, 73 F.3d at 562-69.

<sup>4</sup>*Id.* at 555-59.

<sup>5</sup>*Id.* at 558-63.

<sup>6</sup>The Environmental Protection Agency (EPA) has defined produced water as: "water and particulate matter associated with oil and gas producing formations. Produced water includes small volumes of source water and treatment chemicals that return to the surface with the produced formation fluids and pass through the produced water treating systems currently used by many oil and gas operators." *Id.* at 550 n.1 (citing 57 Fed. Reg. 60,926,60,951 (1992)).

<sup>7</sup>*Id.* at 550.

<sup>8</sup>*Id.*

<sup>9</sup>To avoid confusion between permits issued by the Environmental Protection Agency and the Texas Railroad Commission, the Texas Railroad Commission permits for the discharge of produced water are called Commission Permits in this note. For a more complete discussion of the different types of permits issued by the Environmental Protection Agency relating to produced water, see *infra* notes 75-97 and accompanying text.

<sup>10</sup>*Cedar Point Oil*, 73 F.3d at 551-552.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.* at 551.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 552.

<sup>15</sup>*Id.* Chevron Corporation's records reflected that Chevron Corporation never acquired a NPDES Permit of any kind to discharge produced water into Galveston Bay. *Id.* at 552.

<sup>16</sup>*Id.* at 550 n.4.

<sup>17</sup>*Id.* The new well was named "State Well 1876." *Id.* at 550.

<sup>18</sup>*Id.* at 550.

<sup>19</sup>*Id.*

years, began discharging produced water into Galveston Bay.<sup>20</sup> Cedar Point prepared its produced water for discharge into Galveston Bay in the following manner:

(1) the oil, gas, and water mixture...was piped to a platform in Galveston Bay for the first phase of separation; (2) after the initial separation, the remaining mixture was then piped to shore where more oil was separated in a series of tanks; (3) the produced water then was transferred to settling pits so that some constituents could settle out of the water; and (4) the remaining produced water was drained out of the pits and discharged through a pipe over the bulkhead into Galveston Bay.<sup>21</sup>

Cedar Point discharged produced water in this manner from September 1991 through May 1994, stopping only for a brief period between April and August, 1992.<sup>22</sup> From September 1991 through May 1994 Cedar Point discharged between 21,000 and 50,400 gallons of produced water into

Galveston Bay every day.<sup>23</sup>

In 1991, David Russell, Cedar Point's Vice President, commenced negotiations with the Texas Railroad Commission to transfer John McGowan's Commission Permit to Cedar Point.<sup>24</sup> In September, 1992 John McGowan's Commission Permit was transferred to Cedar Point.<sup>25</sup> Because the Texas Railroad Commission advised Cedar Point that EPA was considering prohibiting produced water discharges, Cedar Point applied to EPA for an NPDES Permit on October 15, 1992.<sup>26</sup>

Although EPA acknowledged on November 5, 1992 that Cedar Point's application for an NPDES Individual Permit was administratively complete, EPA failed to issue a permit or further act in any way on Cedar Point's application.<sup>27</sup> Prompted by EPA's inaction, Cedar Point filed a request to EPA under the Freedom of Information Act.<sup>28</sup> The request asked EPA if it had ever issued a permit for the discharge of produced water in Texas.<sup>29</sup>

On December 16, 1992, the Sierra Club,<sup>30</sup> Lone Star Chapter (Sierra Club), informed Cedar Point that discharging produced water without an NPDES permit violated the Clean Water Act.<sup>31</sup> Sierra Club also informed<sup>32</sup> Cedar

Point of its plans to seek a court order enjoining Cedar Point's produced water discharges and for monetary damages.<sup>33</sup>

On February 4, 1993 EPA responded to the Freedom of Information Act request submitted by Cedar Point regarding whether any NPDES permit had been issued in Texas.<sup>34</sup> EPA said it had issued two general permits, neither of which applied to Cedar Point because Cedar Point is in the "Coastal Subcategory."<sup>35</sup> Therefore, none of Cedar Point's produced water discharges were authorized by an NPDES permit.<sup>36</sup>

On April 23, 1993, Sierra Club filed a complaint in the United States District Court for the Southern District of Texas. The complaint prayed for:

(1) a judgment declaring that Cedar Point's unpermitted discharges of produced water into Galveston Bay violated the [Clean Water Act]; (2) a permanent injunction prohibiting future unpermitted discharges [of produced water]; and (3) penalties for past unpermitted discharges [of produced water].<sup>37</sup>

On August 18, 1993 Cedar Point

<sup>20</sup>*Id.* at 551.

<sup>21</sup>*Id.*

<sup>22</sup>*Id.* It is unknown why Cedar Point briefly stopped discharging produced water.

<sup>23</sup>*Id.* Cedar Point's produced water contained barium, benzene, zinc, chlorides, sulfate, bicarbonate, ammonia, naphthalene, phenolic, radium, oil and grease. *Id.* at 551.

<sup>24</sup>*Id.* at 552.

<sup>25</sup>*Id.*

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup>5 U.S.C. § 552 (1994).

<sup>29</sup>*Cedar Point Oil*, 73 F.3d at 552.

<sup>30</sup>The Sierra Club is a nationwide organization of environmentally concerned citizens.

<sup>31</sup>*Id.* at 553.

<sup>32</sup>*Id.* at 553 n.15 (citing 33 U.S.C. § 1365(b)(1)(1994)). Sierra Club sent a letter to Cedar Point to comply with the Clean Water Act's citizen suit provision. "The CWA requires that a person bringing an action under the citizen suit provision send an 'intent to sue' letter to the EPA, the alleged violator, and the state in which the alleged violation occurs at least 60 days prior to the commencement of the action." *Id.* at 553.

<sup>33</sup>*Id.* at 553. Cedar Point promptly responded by filing a petition in the United States District Court for the Southern District of Mississippi requesting an order which: (1) required EPA to respond to Cedar Point's then-unanswered Freedom of Information Act request; (2) required EPA to rule upon Cedar Point's application for an NPDES Permit; and (3) enjoined Sierra Club from filing a citizen suit against Cedar Point. The district court dismissed all claims against Sierra Club on July 12, 1993. *Id.* at 553.

<sup>34</sup>*Id.* at 552.

<sup>35</sup>*Id.* See *infra*, notes 75 to 97 and accompanying text for a discussion of permit types and Environmental Protection Agency categories.

<sup>36</sup>*Cedar Point Oil*, 73 F.3d at 553.

<sup>37</sup>*Id.* At this time, the District Court also entered an order for accelerated discovery. This order required disclosure of the expert testimony that each party would offer at trial. *Id.* at 553.

filed its answer and a counterclaim against Sierra Club.<sup>38</sup> The counterclaim sought compensatory damages for the emotional distress of Cedar Point's officers and \$10,000,000 in punitive damages based on the notion that Sierra Club's citizen suits against Cedar Point and other oil and gas operators was an abuse of process.<sup>39</sup> The District Court granted Sierra Club's motion to dismiss Cedar Point's counterclaim finding that Sierra Club's citizen suit was not frivolous and therefore could not constitute the basis for an abuse of process action.<sup>40</sup>

After hearing motions for summary judgment by both Sierra Club and Cedar Point, the District Court entered an order finding that, as a matter of law, Cedar Point had discharged pollutants without an NPDES permit in violation of the Clean Water Act.<sup>41</sup> The District Court also found that the affidavits submitted by Sierra Club established standing for the Lone Star Chapter to sue on behalf of its members, and therefore were sufficient to defeat Cedar Point's motion for summary judgment.<sup>42</sup>

The only issues tried before the District Court were the penalties to be

assessed against Cedar Point for its past violations and Sierra Club's request for injunctive relief.<sup>43</sup> On May 24, 1994 the District Court ordered Cedar Point to pay a civil penalty of \$186,070.<sup>44</sup> This represented the money Cedar Point saved by not constructing a system that would eliminate all contaminants before discharge of the produced water.<sup>45</sup> The District Court also enjoined Cedar Point from discharging any more produced water into Galveston Bay until it received an NPDES Permit of some kind.<sup>46</sup>

Cedar Point appealed to the United States Court of Appeals, Fifth Circuit. Cedar Point alleged: (1) Sierra Club lacked standing to sue; (2) Sierra Club failed to state a claim under the Clean Water Act; (3) Cedar Point did not violate the Clean Water Act by discharging produced water into Galveston Bay; (4) the District Court erred in calculating the amount of the penalty imposed and attorneys' fees awarded; and (5) the District Court erred in dismissing Cedar Point's counterclaim for abuse of process.<sup>47</sup>

On January 9, 1995, EPA promulgated an NPDES General Permit which addressed the discharge of

produced water by individuals or entities in the "Coastal Subcategory."<sup>48</sup> The NPDES General Permit imposed an absolute prohibition on the discharge of produced water.<sup>49</sup> This NPDES General Permit became effective on February 8, 1995. EPA also issued an administrative compliance order allowing<sup>50</sup> the gradual phase out of produced water discharge until January 1, 1997.<sup>51</sup>

On January 30, 1995 Cedar Point filed a motion to amend the District Court's final order.<sup>52</sup> Cedar Point requested permission to discharge produced water on February 8, 1995 and thereafter so that it could take advantage of the two year phase out period.<sup>53</sup> The District Court granted this motion and amended its May 27, 1994 order.<sup>54</sup> Sierra Club appealed the amendment of order to the United States Court of Appeals, Fifth Circuit.<sup>55</sup>

On January 11, 1996 the United States Court of Appeals, Fifth Circuit, filed its opinion affirming the actions of the District Court. The Fifth Circuit held that (1) Sierra Club had standing to sue based on the individual standing of its members; (2) Sierra Club stated a claim

<sup>38</sup>*Id.* at 553.

<sup>39</sup>*Id.*

<sup>40</sup>*Id.*

<sup>41</sup>*Id.* at 554.

<sup>42</sup>*Id.* Also in the pretrial stage, the District Court struck Cedar Point's designation of experts that it would offer at trial because Cedar Point failed to comply with the District Court's discovery order. The reports submitted by Cedar Point were substantively inadequate and substantial prejudice would result to Sierra Club if the experts were called at trial. *Id.* at 554.

<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>*Id.* The last portion of the District Court's order awarded Sierra Club \$82,956.86 in attorney's fees because they were the prevailing party in the litigation. *Id.* at 554.

<sup>47</sup>*Id.* at 555. Cedar Point also appealed the District Court's striking of Cedar Point's designation of experts. *Id.* at 555.

<sup>48</sup>*Id.* at 554. See *infra*, notes 75 to 97 and accompanying text for a discussion of permit types and Environmental Protection Agency categories.

<sup>49</sup>*Cedar Point Oil*, 73 F.3d at 554.

<sup>50</sup>*Id.* The administrative compliance order only applied to operators who would be discharging produced water on the effective date of the NPDES general permit. For example, if an operator was not discharging produced water on February 8, 1995 then they could not take advantage of the two year phase out period. *Cedar Point Oil*, 73 F.3d at 554.

<sup>51</sup>*Id.* at 554-55.

<sup>52</sup>*Id.* at 555.

<sup>53</sup>*Id.*

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

under the citizen suit provision of the Clean Water Act; (3) Cedar Point violated § 1311(a) of the Clean Water Act; (4) the District Court properly assessed the economic penalties and attorneys' fees; (5) the District Court properly dismissed Cedar Point's counterclaim because Cedar Point failed to state a claim for abuse of process against Sierra Club; and (6) the District Court did not abuse its discretion when it modified its injunction and allowed Cedar Point to discharge produced water under EPA's administrative compliance order.<sup>56</sup>

### III. LEGAL BACKGROUND

#### A. Statutory Structure and Judicial Interpretation

The predecessor to the modern day Clean Water Act was enacted in 1948.<sup>57</sup> The 1948 Federal Water Pollution Control Act only allowed a court to grant relief from pollution if the court found that abatement was both practicable and economically feasible.<sup>58</sup>

Congress passed a complete revision and recodification of the 1948

Federal Water Pollution Control Act in 1972.<sup>59</sup> The 1972 revision is what we now know as the Clean Water Act.<sup>60</sup> It provided for water quality standards and periodic modification of those standards.<sup>61</sup> Most importantly, the 1972 amendments established the NPDES permit program to regulate the discharge of pollutants into our nation's waterways.<sup>62</sup>

An NPDES permit is required whenever a pollutant is discharged.<sup>63</sup> While the statutory definition of pollutant is helpful, it does not address every type of substance that could be released into our nation's waterways. Therefore, courts have had to interpret what substances fall into the category of "pollutants." Generally courts have interpreted the term very broadly.<sup>64</sup>

For instance, in *National Wildlife Federation v. Gorsuch*,<sup>65</sup> one of the main issues on appeal before the Court of Appeals was what constituted a pollutant under the Clean Water Act.<sup>66</sup> In *Gorsuch*, several public utilities operated electric producing dams. Those

dams made the water that flowed from the dams low in dissolved oxygen, high in dissolved minerals and nutrients, too low of a temperature, or supersaturated with oxygen.<sup>67</sup> In that litigation, the National Wildlife Federation and the State of Missouri argued that these changes in water quality constituted a pollutant under the Clean Water Act, and EPA failed to regulate these discharges.<sup>68</sup> EPA argued that dams only induced insignificant water quality changes, and therefore were not a widespread or serious problem.<sup>69</sup> The Court of Appeals held that EPA's definition of pollutant was reasonable and not inconsistent with Congressional intent. Therefore, due to the great deference accorded to EPA, EPA's decision was upheld.<sup>70</sup>

The Clean Water Act statutorily defines "discharge of a pollutant" as "(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

<sup>56</sup>The Court of Appeals also held that the District Court did not abuse its discretion in striking Cedar Point's experts and excluding the expert's testimony because Cedar Point violated the discovery order. *Id.* at 550.

<sup>57</sup>Pub. L. No. 80-845, 62 Stat. 1155 (1948). For a more complete history of the Clean Water Act, see C. Peter Goplerud, III, *Water Pollution Law: Milestones From the Past and Anticipation of the Future*, 10 NAT. RESOURCES & ENV'T 7 (1995).

<sup>58</sup>*Id.*

<sup>59</sup>Pub. L. No. 92-500, 86 Stat. 816 (1972).

<sup>60</sup>Congress enacted corrections to the Act in 1977, and amendments to the Act in 1987. However, the core provisions of the Clean Water Act were established in the 1972 recodification.

<sup>61</sup>33 U.S.C. § 1313 (1994).

<sup>62</sup>33 U.S.C. § 1342 (1994).

<sup>63</sup>"Pollutant" is defined to include industrial, municipal, or agricultural wastes; chemical wastes; biological materials; garbage; sewage; sewage sludge; solid wastes; heat; dredge spoil; incinerator residue; rock; sand; cellar dirt; wrecked or discarded equipment; radioactive materials; filter backwash; and munitions. A pollutant is not: (A) sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces... or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas; or water derived in association with oil or gas production and disposed of in a well, if... approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources. 33 U.S.C. § 1362(6) (1994); 40 C.F.R. § 122.2 (1996).

<sup>64</sup>For example, the United States Supreme Court has held that unexploded bombs which were dropped into the ocean during military target practice could be a pollutant under the Clean Water Act. *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). For more judicial interpretations, see: *Hudson River Fishermen's Ass'n v. City of New York*, 751 F.Supp. 1088 (S.D.N.Y. 1990), *aff'd*, 940 F.2d 649 (2d Cir. 1991); *National Wildlife Federation v. Consumers Power Co.*, 657 F.Supp. 989 (W.D. Mich. 1987), *rev'd on other grounds*, 862 F.2d 580 (6th Cir. 1988).

<sup>65</sup>*National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982).

<sup>66</sup>*Id.*

<sup>67</sup>*Id.* at 161-66.

<sup>68</sup>*Id.*

<sup>69</sup>*Id.* at 162.

<sup>70</sup>*Id.* at 183.

craft.”<sup>71</sup> The definition of the term “point source”, which is central to the definition of discharge of a pollutant, has generated more controversy and litigation than any of the terms affecting the scope and applicability of the NPDES permit system.<sup>72</sup> The Clean Water Act defines point source as any:

discernable, confined, and discrete conveyance, including but not limited to any pipe, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.<sup>73</sup>

Like the term pollutant, point source has also been interpreted broadly by courts.<sup>74</sup>

## B. The NPDES Permit System

While it is true that the Clean Water Act prohibits the discharge of pollutants from point sources into navigable waters, the NPDES permit system was established to allow for exceptions and limitations. The unauthorized discharge of pollutants is a violation of the Clean Water Act unless

the individual or entity discharging the pollutant has submitted a complete application<sup>75</sup> for an NPDES permit at least 180 days prior to commencing the discharge.<sup>76</sup> Although EPA has the primary authority to issue and enforce NPDES permits,<sup>77</sup> both EPA and the states have a role in the administration of the NPDES permit system. Authorization to discharge pollutants may be obtained either at the state level or the federal level, depending on what type of system the particular state has adopted.<sup>78</sup> States that have EPA approved NPDES permit programs are called “delegated” states and states without EPA approved NPDES permit programs are called “non-delegated” states.<sup>79</sup>

To issue its own NPDES permits and therefore become a “delegated” state, a state must satisfy five requirements. First a state must submit to EPA a description of the state’s proposed NPDES program.<sup>80</sup> Second, a state must submit to EPA a declaration from the state attorney general stating that the laws of the state have adequate authority to carry out the proposed NPDES permit program.<sup>81</sup> Third, the state must enter into a “Memorandum of

Agreement” with the applicable EPA Regional Office which sets forth the relative responsibilities of the state agency and the EPA Regional Office.<sup>82</sup> Fourth, the state must adopt a compliance evaluation program which includes the procedures for inspection and surveillance of facilities.<sup>83</sup> Lastly, the state must adopt a lengthy set of enforcement regulations.<sup>84</sup> The sum of this procedure is attestation by the state that any permits issued under the delegated program comply with the Clean Water Act.

Nondelegated states are less common than delegated states.<sup>85</sup> In nondelegated states, NPDES permits are issued by EPA regional offices if the state “certifies” the permit or waives its right to do so.<sup>86</sup> Certification by the nondelegated state is an attestation that the permit contains conditions sufficient to assure compliance with any applicable state water standards, and the Clean Water Act.<sup>87</sup>

The appropriate state or federal authority can issue either general or individual NPDES permits. A general permit covers discharges by similar facilities that are located in different places.<sup>88</sup> The delegated state agency or

<sup>71</sup>33 U.S.C. § 1362(12) (1994).

<sup>72</sup>Karen M. Wardzinski, et al., *National Pollutant Discharge Elimination System Permit Application and Issuance Procedures*, in THE CLEAN WATER ACT HANDBOOK, 10 (Parthenia B. Evans ed., 1994).

<sup>73</sup>33 U.S.C. § 1362(14) (1994).

<sup>74</sup>See generally Dague v. City of Burlington, 935 F.2d 1343 (2d Cir. 1991); Fishel v. Westinghouse Electric Corp., 640 F.Supp. 442 (M.D. Pa. 1986); Carr v. Alta Verde Indust., Inc., 931 F.2d 1055 (5th Cir. 1991); Sierra Club v. Abston Constr. Co., 620 F.2d 41 (5th Cir. 1980); United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979); United States v. Weisman, 489 F.Supp. 1331 (M.D. Fla. 1980).

<sup>75</sup>Karen M. Wardzinski, et al., *supra* note 72, at 66-69.

<sup>76</sup>33 U.S.C. § 1311(a) (1994); 40 C.F.R. § 122.21(c) (1996).

<sup>77</sup>33 U.S.C. § 1342 (1994).

<sup>78</sup>Oklahoma v. United States Envtl. Prot. Agency, 908 F.2d 595, 597-98 (10th Cir. 1990).

<sup>79</sup>United States v. Avatar Holdings, Inc., No. 93-281-CIV-FTM-21, 1996 WL 479533 (M.D. Fla. Aug. 20, 1996).

<sup>80</sup>33 U.S.C. § 1342(b) (1994); 40 C.F.R. § 123.22 (1996).

<sup>81</sup>33 U.S.C. § 1342(b) (1994); 40 C.F.R. § 123.25 (1996); Adequate authority means that the state has adopted provisions at least as stringent as the federal NPDES regulations.

<sup>82</sup>40 C.F.R. § 123.24 (1996). See also *Champion International Corp. v. United States Envtl. Prot. Agency*, 850 F.2d 182, 184 (4th Cir. 1988).

<sup>83</sup>40 C.F.R. § 123.26 (1996).

<sup>84</sup>40 C.F.R. § 123.27 (1996) sets out the remedies and enforcement mechanism that the state must adopt. For comparability issues between enforcement mechanisms at the federal and state levels, see *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376, 382 (8th Cir. 1994).

<sup>85</sup>Richard S. Davis & Shelley V. Lucas, *Water Pollution*, in 3 ENVIRONMENTAL LAW PRACTICE GUIDE, § 18.03(1)(a) (Michael B. Gerrard ed., 1991): “As of the date of this writing in late 1991, 40 states had approved NPDES programs.”

<sup>86</sup>33 U.S.C. § 1341 (1994); 40 C.F.R. § 124.53 (1996).

<sup>87</sup>33 U.S.C. §§ 1341, 1311, 1316, 1317 (1994); If the nondelegated state does not certify the NPDES permit within 60 days, certification is waived pursuant to 33 U.S.C. § 1341(s)(1) (1994) (as interpreted in 40 C.F.R. § 124.53(c)(3) (1996)).

<sup>88</sup>Timothy F. Malloy, *Once More Unto the Breach*, 7 VILL. ENVTL. L. J. 1, 47 (1996).

EPA itself usually initiates the creation of an NPDES general permit.<sup>89</sup> General permits may be appropriate for any category of sources within a defined geographic area that: involve similar operations; discharge the same types of wastes; require the same effluent limitation, operating conditions, or standards for sewage sludge use or disposal; require the same or similar monitoring; and are more appropriately controlled under a general permit rather than an individual permit.<sup>90</sup> The use of general permits was first suggested to EPA over twenty years ago<sup>91</sup> and has become the principal administrative mechanism by which large numbers of similarly situated producers are regulated.<sup>92</sup>

In contrast to general permits, NPDES individual permits are issued to one producer. The application for an individual permit is usually initiated by the producer of the potential pollutant.<sup>93</sup> Individual permits are issued on a case by case basis.<sup>94</sup> A delegated state or

EPA may require any discharger which is covered by a general permit to obtain an individual permit.<sup>95</sup> This decision is predicated upon whether the circumstances of the discharge have changed enough to require the termination of the general permit.<sup>96</sup>

When the appropriate state or federal agency issues an NPDES permit of either type, it contains effluent limitations. An effluent limitation, as defined in the Clean Water Act, is any restriction on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from a point source into navigable waters.<sup>97</sup>

### C. Citizen Suits and the Requirement of Standing

The Clean Water Act, like many federal environmental statutes, may be enforced through citizen suits. Two types of citizen suits are contemplated by the Clean Water Act. First, a citizen is authorized to bring a civil suit against

any person, entity, or governmental instrumentality who is alleged to be in violation of an effluent limitation or an order issued by EPA.<sup>98</sup> Second, a citizen is authorized to bring a civil suit against EPA itself if EPA has failed to perform an act that is not discretionary.<sup>99</sup> Any citizen suit must be brought in the United States District Court where the discharge source is located.<sup>100</sup>

The holding in *National Resource Defense Council, Inc. v. Costle*<sup>101</sup> makes it impossible to challenge NPDES permit decisions made by EPA via a citizen suit because *Costle* held that the decision to issue an NPDES permit is discretionary.<sup>102</sup> Therefore, nearly all challenges to NPDES permit violations come via citizen suits against persons or entities.

The requirement of standing has been an obstacle to successful citizen suits against persons or entities.<sup>103</sup> At times, the standing requirement is accentuated because an environmental group seeks to bring suit

<sup>89</sup>40 C.F.R. § 123.25 (1996). See also, Anthony P. Tokarz & Betsy Ennis Dulin, *Wetlands Regulations Affecting Coal Mining and Oil and Gas Operations*, 10 J. NAT. RESOURCES & ENVTL. L. 261, 266 (1995).

<sup>90</sup>Karen M. Wardzinski, et al., *National Pollutant Discharge Elimination System Permit Application and Issuance Procedures*, in THE CLEAN WATER ACT HANDBOOK, 27 (Parthenia B. Evans ed., 1994).

<sup>91</sup>The United States District Court for the District of Columbia first suggested the general permit scheme to EPA in *Natural Resources Defense Council v. Train*, 396 F.Supp 1393 (D.D.C. 1975).

<sup>92</sup>40 C.F.R. § 122.28 (1996); Robert L. Glicksman, *Pollution on the Federal Lands II: Water Pollution Law*, 12 UCLA J. ENVTL. L. & POL'Y 61, 69 (1993).

<sup>93</sup>Karen M. Wardzinski, et al., *National Pollutant Discharge Elimination System Permit Application and Issuance Procedures*, in THE CLEAN WATER ACT HANDBOOK, 12 (Parthenia B. Evans ed., 1994).

<sup>94</sup>*Id.*

<sup>95</sup>40 C.F.R. § 122.28(b)(3)(1996).

<sup>96</sup>*Id.*

<sup>97</sup>33 U.S.C. § 1362(11) (1994); *Dague v. City of Burlington*, 935 F.2d 1343, 1345 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 557 (1992); *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 165 n.22 (D.D.C. 1982); *United States v. Plaza Health Lab.*, 3 F.3d 643, 646 (2d Cir. 1993); David E. Filippi, *Unleashing the Rule of Lenity: Environmental Enforcers Beware!*, 26 ENVTL. L. 923, 929 (1996); Debra L. Donahue, *The Untapped Power of Clean Water Act Section 401*, ECOLOGY L. Q. 201, 232 (1996).

<sup>98</sup>33 U.S.C. § 1365(a) (1994).

<sup>99</sup>*Id.* See generally: *Natural Resources Defense Council, Inc., v. United States Env'tl. Prot. Agency*, 16 F.3d 1395 (4th Cir. 1993); *Sierra Club v. United States Env'tl. Prot. Agency*, 995 F.2d 1478 (9th Cir. 1993); *Save Our Community v. United States Env'tl. Prot. Agency*, 971 F.2d 1155 (5th Cir. 1992); *Chicago Ass'n of Commerce & Industry v. United States Env'tl. Prot. Agency*, 873 F.2d 1025 (7th Cir. 1989); *Chemical Mfrs. Ass'n v. United States Env'tl. Prot. Agency*, 870 F.2d 177 (5th Cir. 1989).

<sup>100</sup>33 U.S.C. § 1365(a) and (c)(1)(1994).

<sup>101</sup>*National Resource Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977).

<sup>102</sup>*Id.* at 1375.

<sup>103</sup>Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 STAN. L. REV. 1247 (1996); Lino A. Graglia, et al., *The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandates*, 28 ARIZ. ST. L. J., 17, 100 (1996); Kelly Murphy, *Cutting Through the Forest of the Standing Doctrine: Challenging Resource Management Plans in the Eighth and Ninth Circuits*, 18 U. ARK. LITTLE ROCK L. J. 223, 239-43 (1996).

on behalf of its members.<sup>104</sup> Standing is a constitutional requirement flowing from the "case or controversy" clause of the United States Constitution.<sup>105</sup> In addition to the constitutional precepts, there are prudential limitations that may cause a court to deny standing.<sup>106</sup> However, the Clean Water Act aids the organization seeking standing on the part of its members by conferring standing to the limits of the constitution.<sup>107</sup> Congress granted an express right of action to persons otherwise barred by prudential standing rules.<sup>108</sup>

In *Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*,<sup>109</sup> the Third Circuit said that organizational standing is appropriate where:

(1) the organization's members would have standing to sue on their own, (2) the interests the organization seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires individual participation by it

members.<sup>110</sup>

To qualify for individual standing, the only constitutional prerequisites are that a) the party who invokes the court's authority show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant; b) that the injury fairly can be traced to the challenged action; and c) the injury can be redressed by a favorable decision.<sup>111</sup> Redressability is least likely to be litigated in the environmental organizational standing context because an injunction or monetary damages can usually redress the plaintiff's injury.<sup>112</sup> However, the requirement of an injury that is fairly traceable to the alleged conduct is often more difficult to satisfy.<sup>113</sup>

In *Lujan v. National Wildlife Federation*,<sup>114</sup> the National Wildlife Federation filed suit challenging the land withdrawal review program of the United States Bureau of Land Management.<sup>115</sup> National Wildlife Federation's organizational standing was predicated

upon affidavits of its members.<sup>116</sup> The Supreme Court held that National Wildlife Federation did not have standing because it was insufficient that "one of [National Wildlife Federation's] members uses unspecified portions of an immense tract of territory."<sup>117</sup> In sum, the plaintiff's could not establish that the affiants' injury was fairly traceable to the defendant's conduct.

The Third Circuit had to determine if the affiants' injury was fairly traceable to the discharge of industrial chemicals in *Powell Duffryn*.<sup>118</sup> The Third Circuit announced: the plaintiff must show that a defendant had (1) discharged some pollutant in concentrations greater than allowed by its permit (2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that (3) the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.<sup>119</sup>

*Lujan* and *Powell Duffryn* demonstrate how malleable the fairly traceable test can be. At one end of the spectrum lies the *Lujan* standard which

<sup>104</sup>Miles A. Yanick, *Loss of Protection as Injury In Fact: An Approach to Establishing Standing to Challenge Environmental Planning Decisions*, 29 U. MICH. J. L. REF. 857-58 (1996).

<sup>105</sup>U.S. CONST. art. III, § 2, cl. 1.

<sup>106</sup>"Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that 'the plaintiff generally must assert his own legal rights and interest, and cannot rest his claim to relief on the legal rights or interests of third parties.' *Warth v. Seldin*, 422 U.S. 490, 499 (1975). In addition, even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches. *Id.* at 499-50. Finally, the Court has required that the plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.' *Ass'n of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153 (1969)." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473-74 (1982).

<sup>107</sup>*Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 70 (3rd Cir. 1990).

<sup>108</sup>*Id.* at 70 n. 3 (citing *Warth v. Seldin*, 442 U.S. 490, 501 (1975)); David Sive, *Environmental Standing*, 10 NAT. RESOURCES & ENV'T 49, 52 (1995).

<sup>109</sup>*Powell Duffryn*, 913 F.2d at 64.

<sup>110</sup>*Id.* at 70 (citing *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

<sup>111</sup>*Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

<sup>112</sup>Jeffery W. Ring & Andrew F. Behrend, *Using Plaintiff Motivation to Limit Standing: An Inappropriate Attempt to Short-Circuit Environmental Citizen Suits*, 8 J. ENVTL. L. & LITIG. 345, 350 (1993).

<sup>113</sup>Robert Wiygul, *Gwaltney Eight Years Later: Proving Jurisdiction and Article III Standing in Clean Water Act Citizen Suits*, 8 TUL. ENVTL. L. J. 435, 448 (1995); Matthew M. Werner, Comment, *Mootness and Citizen Suit Civil Penalty Claims Under the Clean Water Act: A Post-Lujan Reassessment*, 25 ENVTL. L. 801, 805 (1995); *Hunt v. Washington Apple Advertising Comm.*, 432 U.S. 333, 343 (1977); *O'Hair v. White*, 675 F.2d 680, 691 (5th Cir. 1982); *Save Our Community v. United States Env'tl. Prot. Agency*, 971 F.2d 1155, 1160 (5th Cir. 1992).

<sup>114</sup>*Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990).

<sup>115</sup>*Id.*

<sup>116</sup>*Id.* at 881-86.

<sup>117</sup>*Id.* at 888.

<sup>118</sup>*Powell Duffryn*, 913 F.2d at 68.

<sup>119</sup>*Id.* at 72.



requires a concrete connection or some formal nexus.<sup>120</sup> At the other end of the spectrum lies the *Powell Duffryn* standard which, as applied, only requires a "mere pertinence between litigation subject and organizational purpose."<sup>121</sup>

#### D. EPA'S History of Administrative Failure

An administrative default can be another obstacle to parties attempting a citizen suit. The Clean Water Act envisions that effluent limitations will be formulated by EPA to address every type of pollution that could be introduced into our navigable waters.<sup>122</sup> Persons or entities emitting pollutants in excess of the limitations can be held in violation of the Clean Water Act and subject to its penalties if they have not obtained an NPDES permit.<sup>123</sup> When the effluent limitations and NPDES permits envisioned by the Clean Water Act have not been issued, however, and will not be issued in the foreseeable future, courts have had to decide whether citizen suits can proceed where EPA has not promulgated an effluent limitation or issued an NPDES permit that covers the discharge.<sup>124</sup>

In *United States v. GAF Corp.*,<sup>125</sup> the United States brought an action to enjoin GAF Corporation's drilling of subsurface reinjection wells.<sup>126</sup> GAF Corporation had applied for an NPDES permit, but EPA had not acted upon the application.<sup>127</sup> The court decided that the disposal of chemical wastes into underground waters does not constitute a discharge of a pollutant into navigable waters.<sup>128</sup> The court then entered into a discussion of EPA's administrative inaction.<sup>129</sup> The court said that it would be an "intolerable result" if GAF Corporation was unable to discharge any wastes at all simply because EPA failed to establish the required effluent limitations.<sup>130</sup> In sum, GAF said that a discharger can only violate an effluent limitation if the EPA has established an effluent limitation.<sup>131</sup>

Like *GAF*, *United States v. Frezzo Bros., Inc.*,<sup>132</sup> dealt with a situation where EPA never established required effluent limitations. In *Frezzo Bros.*, the United States brought an action against mushroom producers for discharging storm water run-off that was laden with hay and horse manure.<sup>133</sup> Frezzo Brothers Incorporated did not

believe its discharge constituted a pollutant, and therefore never applied for an NPDES permit.<sup>134</sup> The court held that the "promulgation of effluent limitation standards is not a prerequisite to the maintenance of a criminal proceeding based on a violation of section 1311(a) of the Act."<sup>135</sup> The court stated that this case was "particularly compelling for broad enforcement" because Frezzo Brothers Incorporated never applied for an NPDES permit.<sup>136</sup>

Although decided under the Clean Air Act, *General Motors Corp. v. United States*<sup>137</sup> also dealt with the situation where EPA failed to perform their required administrative functions. General Motors Corporation (GMC) operated an automobile painting facility in Massachusetts.<sup>138</sup> Under the Clean Air Act, Massachusetts filed a state implementation plan which required GMC to comply with applicable ozone discharge limitations by 1985.<sup>139</sup> In 1985, GMC sought an extension of the deadline until 1987.<sup>140</sup> EPA failed to act upon this request for extension until September 4, 1988.<sup>141</sup> However, on August 17, 1987, EPA filed an enforcement action against GMC alleging that GMC failed to comply

<sup>120</sup>Health Research Group v. Kennedy, 82 F.R.D. 21, 24 (D.D.C. 1979); Sierra Club v. Aluminum Corp. of America, 585 F.Supp. 842, 845 (N.D.N.Y. 1984).

<sup>121</sup>Humane Society v. Hodel, 840 F.2d 45, 58 (D.C. Cir. 1988).

<sup>122</sup>33 U.S.C. § 1314 (1994).

<sup>123</sup>33 U.S.C. § 1365 (1994).

<sup>124</sup>See Carr v. Alta Verde Indust., Inc., 931 F.2d 1055, 1060 n.3 (5th Cir. 1991); Concerned Area Residents for Env't v. Southview Farm, 34 F.3d 114, 117 (2nd Cir. 1994); Menzel v. County Utils. Corp., 712 F.2d 91, 94 (4th Cir. 1983); Washington Wilderness Coalition v. Hecla Min. Co., 870 F.Supp. 983, 986 (E.D. Wash. 1994).

<sup>125</sup>United States v. GAF Corp., 389 F.Supp. 1379 (S.D. Tex. 1975).

<sup>126</sup>*Id.* at 1380.

<sup>127</sup>*Id.* at 1386.

<sup>128</sup>*Id.* at 1383. For more discussion on this portion of the *GAF* decision, see Philip M. Quatrochi, *Groundwater Jurisdiction Under the Clean Water Act: The Tributary Groundwater Dilemma*, 23 B.C. ENVTL. AFF. L. REV. 603 (1996).

<sup>129</sup>*Id.* at 1386.

<sup>130</sup>*Id.*

<sup>131</sup>*Id.*

<sup>132</sup>United States v. Frezzo Bros. Inc., 602 F.2d 1123 (3rd Cir. 1979).

<sup>133</sup>*Id.* at 1125.

<sup>134</sup>*Id.* at 1128. For a discussion of the collateral issues raised in *Frezzo Bros.*, see Kristen E. Mollnow, Note, *Concerned Area Residents for the Environment v. Southview Farm: Just What is a Concentrated Animal Feeding Operation Under the Clean Water Act?*, 60 ALB. L. REV. 239 (1996).

<sup>135</sup>*Id.* For a more complete discussion of environmental crime, see Steve Curran, et al., *Environmental Crimes*, 32 AM. CRIM. L. REV. 245 (1995).

<sup>136</sup>*Id.*

<sup>137</sup>General Motors Corp. v. United States, 496 U.S. 530 (1990).

<sup>138</sup>*Id.* at 534.

<sup>139</sup>*Id.*

<sup>140</sup>*Id.* at 535.

<sup>141</sup>*Id.* at 535.

with applicable ozone discharge limitations.<sup>142</sup> The United States Supreme Court held that EPA was free to initiate suit whenever a person is in violation of any applicable state implementation plan, regardless of whether an extension of the deadline is proposed.<sup>143</sup>

#### E. Sanctions Under the Clean Water Act

If a court decides that a citizen has stated a claim and has proven its case against a polluter, the Clean Water Act directs the District Court to assess a civil penalty to the polluter.<sup>144</sup> Civil penalties range up to twenty-five thousand dollars (\$25,000) for each day the violation continues, but the court must consider these factors in deciding the penalty to be assessed: (1) the seriousness of the violation or violations; (2) the economic benefit that may have resulted from the violation; (3) any history of such violations; (4) any good faith efforts to comply with the applicable requirements; (5) the economic impact of the penalty on the violator; and (6) such other matters as justice may require.<sup>145</sup>

In *Atlantic States Legal Foundation v. Tyson Foods, Inc.*,<sup>146</sup> the United States Court of Appeals, Eleventh Circuit formulated a framework for applying the statutory factors.<sup>147</sup> The Eleventh Circuit concluded that a court should determine the maximum penalty

that could be assessed against a violator and reduce that maximum penalty depending on if the statutory factors are present.<sup>148</sup>

#### IV. INSTANT DECISION

##### A. Standing under the Clean Water Act

The first issue the Fifth Circuit dealt with was whether Sierra Club had standing to bring a suit on behalf of its members.<sup>149</sup> In a *de novo* review<sup>150</sup> of the district court's holding on the standing issue, the court began by setting out the *Powell Duffryn* three prong test that an organization must meet to bring a suit on behalf of its members.<sup>151</sup> The Fifth Circuit said that organizational standing is appropriate where: (1) the organization's members would have standing to sue on their own, (2) the interests the organization seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires individual participation by its members.<sup>152</sup>

Since Cedar Point did not dispute whether Sierra Club satisfied the second and third prongs of the test, the Fifth Circuit concentrated on whether the members could establish individual standing.<sup>153</sup> Sierra Club submitted affidavits from three of its members to demonstrate that there was an injury in fact, the injury was fairly traceable to Cedar Point's actions, and an injunction

would redress the injury.<sup>154</sup> Cedar Point argued that because the affidavits only expressed concern that the continued discharge of produced water would impair the affiants' use of Galveston Bay, no injury in fact was stated.<sup>155</sup> However, the Fifth Circuit said the basis of the injury in fact test was whether or not the affiants had a direct stake in the litigation.<sup>156</sup> Applying this test, the Fifth Circuit said the affiants clearly have a direct stake in the outcome of the lawsuit between Sierra Club and Cedar Point even if the injury in fact is a threatened injury.<sup>157</sup>

The Fifth Circuit then turned to Cedar Point's assertion that the threatened injury is not fairly traceable to Cedar Point's discharge of produced water.<sup>158</sup> The Fifth Circuit also used the *Powell Duffryn* test to determine if the affiants' injury was fairly traceable to Cedar Point's discharge of produced water.<sup>159</sup> The Fifth Circuit's interpretation of the fairly traceable standard did not require proof to a scientific certainty that Cedar Point's discharge harmed the affiants, it only required contribution to the pollution which impairs the affiant's use of Galveston Bay.<sup>160</sup> It was enough that one of the affiants canoed in the vicinity of Cedar Point's discharge, and Sierra Club's expert said produced water discharges generally have adverse effects on water quality and marine life.<sup>161</sup>

<sup>142</sup>*Id.*

<sup>143</sup>*Id.* at 539.

<sup>144</sup>33 U.S.C. § 1319(d)(1994).

<sup>145</sup>33 U.S.C. § 1319(d)(1994).

<sup>146</sup>*Atlantic States Legal Foundation v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990).

<sup>147</sup>*Id.* at 1142.

<sup>148</sup>*Id.*

<sup>149</sup>*Cedar Point Oil*, 73 F.3d at 555-59.

<sup>150</sup>*Id.* at 555 (citing *MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492, 497 (5th Cir. 1994)).

<sup>151</sup>*Id.* (citing *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Nat'l Treasury Employees Union v. United States Dep't of Treasury*, 25 F.3d 237, 241 (5th Cir. 1994); *Save Our Community v. United States Environ. Protection Agency*, 971 F.2d 1155, 1160 (5th Cir. 1992)).

<sup>152</sup>*Id.* (citing *Powell Duffryn*, 913 F.2d at 64).

<sup>153</sup>*Id.*

<sup>154</sup>*Id.* at 556.

<sup>155</sup>*Id.*

<sup>156</sup>*Id.* (citing *Valley Forge Christian College*, 454 U.S. at 473 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972))).

<sup>157</sup>*Id.* (citing *Valley Forge Christian College*, 454 U.S. at 472).

<sup>158</sup>*Id.* at 557.

<sup>159</sup>*Id.* (citing *Powell Duffryn*, 913 F.2d at 72).

<sup>160</sup>*Id.* at 558.

<sup>161</sup>*Id.* In footnote 24 of the decision, the Fifth Circuit expressly limited its fairly traceable analysis to these facts: "while we find the *Powell Duffryn* test useful for analyzing whether Douglas's (the affiant who canoed near Cedar Point's discharge in Galveston Bay) affidavit meets the 'fairly traceable' requirement, we recognize that it may not be an appropriate standard in other [Clean Water Act] cases."

## B. Stating a Claim Under the Clean Water Act

The next issue the Fifth Circuit dealt with was whether the Sierra Club stated a claim under the Clean Water Act.<sup>162</sup> Cedar Point argued that since EPA only issued an effluent limitation on the oil and grease content of produced water, and Cedar Point's discharges have always complied with this limitation, there is no violation of the Clean Water Act.<sup>163</sup> The Fifth Circuit found that Cedar Point's argument was without merit because an NPDES permit is required for the discharge of any pollutant.<sup>164</sup> The Fifth Circuit held that if no NPDES permit is obtained, then the discharge is in violation of the Clean Water Act and subject to citizen suits.<sup>165</sup>

To support its finding, the Fifth Circuit examined the legislative history of the Clean Water Act.<sup>166</sup> The Fifth Circuit explained that when the Clean Water Act was first enacted in 1972, it was the drafter's intent that EPA establish NPDES individual and general permits for every discharge, anywhere in the United States.<sup>167</sup> The drafters realized that this process may take time, so they provided a one year window for citizen's suits to proceed only if an effluent limitation was established by EPA.<sup>168</sup> This one year window balanced the need to allow citizen's suits to proceed if based on a violation of an

effluent limitation while at the same time giving EPA time to develop the NPDES permit system.<sup>169</sup>

The Fifth Circuit said that even though the drafters of the Clean Water Act were a bit too ambitious in giving EPA a one year window to develop the NPDES permit system, EPA has not issued all of the required NPDES permits and the Clean Water Act has never been revised to account for this fact.<sup>170</sup> The Fifth Circuit reasoned that Congress' subsequent inaction evinces an intent to hold dischargers liable despite the fact that EPA failed to act.<sup>171</sup> Therefore, the discharger of a pollutant that has not obtained an NPDES permit from EPA is in violation of the Clean Water Act, even if the violation results from EPA's failure or refusal to issue the necessary permit.<sup>172</sup>

The Fifth Circuit held that the Clean Water Act's sanctions should be applied against Cedar Point in the same manner as the United States Supreme Court applied the sanctions in *General Motors, Corp. v. United States*.<sup>173</sup> The Fifth Circuit then advanced three arguments in favor of the imposition of liability. First, the Fifth Circuit agreed with the United States Court of Appeals, Third Circuit, by rejecting the reasoning of *United States v. GAF Corp.*<sup>174</sup> The Fifth Circuit refused to follow *GAF* because *GAF* would allow dangerous pollutants to be introduced into

navigable waters solely because of administrative delay.<sup>175</sup>

Lastly, the Fifth Circuit recognized that EPA itself stated that citizens have the right to sue Coastal Subcategory dischargers of produced water.<sup>176</sup> The Fifth Circuit found it persuasive that at the time EPA recognized the citizen's ability to sue, EPA had never issued any NPDES permits and had only issued effluent limitations on the oil and grease content of the produced water.<sup>177</sup>

## C. Definition of Pollutant Under the Clean Water Act

The Fifth Circuit next turned to Cedar Point's activities and whether those activities involved the discharge of a pollutant.<sup>178</sup> Cedar Point argued that the discharge of produced water was not the discharge of a pollutant and only EPA has the power to classify produced water as a pollutant under the Clean Water Act.<sup>179</sup> For these propositions, Cedar Point relied on *National Wildlife Federation, Inc. v. Gorsuch*.<sup>180</sup>

To determine whether Cedar Point was discharging a pollutant, the Fifth Circuit first examined the statutory definition of pollutant.<sup>181</sup> The court noted that the statutory definition was confusing because it included very specific substances like "cellar dirt" and also very general terms like "industrial waste."<sup>182</sup> The Fifth Circuit said the

<sup>162</sup>*Id.* at 558-63.

<sup>163</sup>*Id.* at 559.

<sup>164</sup>*Id.*

<sup>165</sup>*Id.*

<sup>166</sup>*Id.* at 559-61.

<sup>167</sup>*Id.* at 560.

<sup>168</sup>*Id.*

<sup>169</sup>*Id.*

<sup>170</sup>*Id.*

<sup>171</sup>*Id.* (citing *Costle*, 568 F.2d at 1375).

<sup>172</sup>*Id.* at 561.

<sup>173</sup>*Id.* (citing *General Motors Corp.*, 496 U.S. at 530).

<sup>174</sup>*Id.* at 562 (citing *Frezzo Bros.*, 602 F.2d at 1123; *GAF*, 389 F.Supp. at 1379).

<sup>175</sup>*Id.* (citing *Frezzo Bros.*, 602 F.2d at 1128).

<sup>176</sup>*Id.* (citing 57 Fed.Reg. 60, 926, 60, 944-45 (1992)).

<sup>177</sup>*Id.*

<sup>178</sup>*Id.* at 562-569.

<sup>179</sup>*Id.* at 563.

<sup>180</sup>*Gorsuch*, 693 F.2d at 156.

<sup>181</sup>*Cedar Point Oil*, 73 F.3d at 565.

<sup>182</sup>*Id.*

inclusion of these imprecise terms makes the statutory definition or the legislative history of little help in deciding what Congress wanted the term "pollutant" to include.<sup>183</sup> The Fifth Circuit then concludes, by adopting a commentator's<sup>184</sup> position on the subject, that substances not specifically included in the statute may still be called pollutants.<sup>185</sup> The court adopted a definition which includes a "generic understanding" of the term pollutant, favoring a broad and inclusive reading of the statute.<sup>186</sup>

Next the court decided, as between EPA and the courts, who has the power to expand the statutory definition of pollutant.<sup>187</sup> The Fifth Circuit summarily rejected Cedar Point's contention that the court did not have the power to expand the definition of pollutant.<sup>188</sup> The Fifth Circuit said a citizen may also bring an action against a person that is discharging an "alleged pollutant..."<sup>189</sup> It would make no sense to allow a citizen suit where the court has no power to determine if a pollutant was discharged or not.<sup>190</sup> Secondly, the Fifth Circuit said numerous Clean Water Act cases have decided whether a particular substance is a pollutant, so its holding is supported by precedent from the Supreme Court and other circuits.<sup>191</sup>

Lastly, the Fifth Circuit determined if produced water is a pollutant under the Clean Water Act.<sup>192</sup> The court used both statutory arguments and EPA guidance to determine that produced water was indeed a pollutant.<sup>193</sup> The court noted that the Clean Water Act specifically provides that water derived from oil and gas production which is reinjected into the oil well is not a pollutant.<sup>194</sup> The Fifth Circuit believed that this exception evinced Congress' intent to call otherwise disposed of produced water a pollutant.<sup>195</sup> The Fifth Circuit also said Cedar Point's produced water should be classified as a pollutant under the Clean Water Act because: 1) EPA has "recognized that citizens have the right to sue 'Coastal Subcategory' operators who are discharging produced water without a permit"; 2) EPA has explicitly referred to produced water as a pollutant; and 3) Cedar Point's produced water contained benzene, naphthalene, and zinc, which are all listed by EPA as toxic pollutants.<sup>196</sup>

The Fifth Circuit did recognize, in a footnote, that its expansion of the definition of pollutant could create difficult cases in the future.<sup>197</sup> The Fifth Circuit said that there may be a variety of reasons why an NPDES permit has not

been issued, including administrative delay and statutory ambiguity.<sup>198</sup> Therefore, the Fifth Circuit warned courts considering the question to exercise restraint and examine the circumstances carefully before stretching the definition of pollutant.<sup>199</sup>

#### D. Sanctions Under the Clean Water Act

The Fifth Circuit next<sup>200</sup> examined the penalty and attorney's fees imposed by the lower court against Cedar Point.<sup>201</sup> The Fifth Circuit reviewed the lower court's findings of fact with caution because the lower court adopted Sierra Club's proposed findings with little modification.<sup>202</sup> Although the District Court imposed a penalty based solely on the money Cedar Point saved by not disposing of the produced water properly, the Fifth Circuit affirmed because the District Court considered all the statutory factors before settling on this amount.<sup>203</sup> The Fifth Circuit affirmed the award of attorney's fees to Sierra Club because Sierra Club had standing to sue, Cedar Point was violating the Clean Water Act, and Sierra Club was the prevailing party in the action.<sup>204</sup>

#### E. The Abuse of Process Counterclaim

The Fifth Circuit then turned to

<sup>183</sup>*Id.* (citing *Gorsuch*, 693 F.2d at 173).

<sup>184</sup>2 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER §4.10 at 144 (1986).

<sup>185</sup>*Cedar Point Oil*, 73 F.3d at 566.

<sup>186</sup>*Id.*

<sup>187</sup>*Id.*

<sup>188</sup>*Id.*

<sup>189</sup>*Id.*

<sup>190</sup>*Id.*

<sup>191</sup>*Id.* at 567 (citing *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 117 (2d Cir. 1994); *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 645 (2d Cir. 1993); *United States v. Schallom*, 998 F.2d 196, 199 (4th Cir. 1992); *National Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988); *United States v. M.C.C. of Florida, Inc.*, 772 F.2d 1501, 1505-06 (11th Cir. 1985); *United States v. Hamel*, 551 F.2d 107, 110 (6th Cir. 1977); *Higbee v. Starr*, 598 F.Supp. 323, 330 (E.D.Ark. 1984)).

<sup>192</sup>*Id.* at 567-69.

<sup>193</sup>*Id.*

<sup>194</sup>*Id.* at 568 (quoting 33 U.S.C. § 1362(6)(B)).

<sup>195</sup>*Id.*

<sup>196</sup>*Id.* (citing 57 Fed.Reg. 60,926, 60,944-45 (1992); 56 Fed.Reg. 7698 (1991); 46 Fed.Reg. 20,284; 40 C.F.R. § 401.15).

<sup>197</sup>*Id.* at 569 n. 37.

<sup>198</sup>*Id.*

<sup>199</sup>*Id.*

<sup>200</sup>*Id.* at 569-73. This casenote intentionally omits the court's discussion of the discovery sanctions.

<sup>201</sup>*Id.* at 573-76.

<sup>202</sup>*Id.* at 574 (citing *Federal Deposit Insurance Corp. v. Texarkana Nat'l Bank*, 874 F.2d 264, 267 (5th Cir. 1989)).

<sup>203</sup>*Id.* at 574-76.

<sup>204</sup>*Id.* at 576 (citing 33 U.S.C. § 1365(d)).

Cedar Point's counterclaim for abuse of process.<sup>205</sup> Cedar Point argued that Sierra Club threatened to sue, or actually sued, a number of oil and gas operators in Galveston Bay solely to obtain money for Sierra Club's Legal Defense Fund.<sup>206</sup>

Applying Texas law, the Fifth Circuit held that Sierra Club's actions did not amount to an abuse of process because (1) "intent to sue" letters are statutorily mandated, and therefore cannot be considered a threat; (2) settlement of some of the suits shows that Sierra Club was not motivated to coerce monetary damages, and (3) several of the consent judgments taken by Sierra Club required the oil and gas operators to make payments to environmental groups other than Sierra Club, to be used for conservation and education.<sup>207</sup>

#### F. Modification of the Injunction

The last issue the Fifth Circuit decided was whether the District Court was correct in modifying the terms of the original injunction to allow Cedar Point to discharge produced water during the regulatory two year phase out period.<sup>208</sup> Sierra Club argued that the lower court abused its discretion by modifying the original injunction because the modified injunction gave the oil and gas producers in Galveston Bay a "carte blanche" to discharge produced water until January 1, 1997.<sup>209</sup>

The Fifth Circuit disagreed with Sierra Club's argument and affirmed the modification of the injunction.<sup>210</sup> The Fifth Circuit concluded that EPA was in a better position to monitor the produced water discharge, and ensure adherence to the administrative compliance order.<sup>211</sup> Cedar Point was ordered to take

affirmative steps to decrease its produced water discharges, and was ordered to completely stop discharging produced water by January 1, 1997.<sup>212</sup> Therefore, the Fifth Circuit held the injunction, as modified, did not deviate from the purpose of the original injunction.<sup>213</sup>

#### V. COMMENT

At its base, the question of whether barium, benzene, zinc, chlorides, sulfate, bicarbonate, ammonia, naphthalene, phenolic, radium, oil and grease should be wantonly discharged into our nation's waterways can be unequivocally answered in the negative. However, society needs fuel to power the machinery we all depend on. This need is partially satisfied by domestic oil production. In the competitive market that all consumers desire, oil and gas producers must be efficient. Therefore, regulations imposed upon oil and gas producers need to be predictable in their application.

In theory, NPDES permits are predictable in application if issued. The main difficulty is that EPA has never issued all the NPDES permits that are required. Courts have had to supply regulation piecemeal because of this administrative default. The result is unpredictability and inefficiency.

Unpredictability and inefficiency stem from EPA's administrative default. Much can be said for the foresight of the drafters of the Clean Water Act. The drafters saw that the nation's waterways were becoming choked with pollution, and they envisioned a better way of regulating the discharge of pollutants. The drafters saw

that technology had advanced enough to allow regulators to establish technical guidelines for dischargers to follow. Most importantly, the drafters even acknowledged that EPA may have difficulty administering the complex NPDES permit system. Therefore, the drafters provided the ability and the motivation for EPA to implement the NPDES permit system. First, the drafters provided a one year head start for EPA to implement the necessary effluent limitations.<sup>214</sup> Secondly, the drafters gave citizens the ability to sue EPA to make EPA perform duties that were not discretionary.<sup>215</sup>

Sadly, twenty four years after the passage of the Clean Water Act, the ability and the motivation have not materialized. EPA has not formulated all the required effluent limitations, and may never accomplish this task. *National Resources Defense Council, Inc. v. Costle*<sup>216</sup> eviscerated the motivation to implement the NPDES permit program by holding that the issuance of NPDES permits is a discretionary duty.<sup>217</sup>

The courts, understandably, have been unwilling for the environment to suffer because of EPA's procrastination, and have instead imposed the cost upon the nation's economy. However, that judicial decision leaves oil and gas producers in Galveston Bay caught in a costly bind. Either the oil and gas producers shut their operations down and wait for EPA approval, or they face the twenty-five thousand dollar per day teeth of Clean Water Act sanctions.<sup>218</sup> Regardless of which way the producers turn, they are inevitably going to lose money.

Unpredictability and

<sup>205</sup>*Id.* at 576-77.

<sup>206</sup>*Id.* at 576.

<sup>207</sup>*Id.*

<sup>208</sup>*Id.* at 579.

<sup>209</sup>*Id.*

<sup>210</sup>*Id.*

<sup>211</sup>*Id.*

<sup>212</sup>*Id.*

<sup>213</sup>*Id.*

<sup>214</sup>33 U.S.C. § 1342(k)(1994).

<sup>215</sup>33 U.S.C. § 1365(a)(1994).

<sup>216</sup>*Costle*, 568 F.2d at 1369.

<sup>217</sup>*Id.* at 1375.

<sup>218</sup>*See* 33 U.S.C. § 1319(d)(1994).

inefficiency stem from the Fifth Circuit's use of false analogy. In *Cedar Point Oil*, the court applies, by analogy, the Supreme Court's analysis in *General Motors Corp. v. United States*.<sup>219</sup> The Fifth Circuit fails to recognize that in *General Motors*, a state implementation plan set limitations on General Motors Corporation's emissions of ozone. The only issue was whether EPA's failure to act upon an extension of time request prevented EPA from initiating suit. In *Cedar Point Oil*, no applicable effluent limitation had been issued. Cedar Point had no ability to comply with something that did not exist. Cedar Point's only option was to shut its operations down, which was not a viable economic alternative.

The Fifth Circuit also uses *United States v. Frezzo Bros., Inc.*,<sup>220</sup> to support the imposition of liability against Cedar Point. However, the Fifth Circuit fails to realize that in *Frezzo Bros.*, the Third Circuit was most persuaded by the fact that Frezzo Brothers Incorporated never applied for an NPDES permit. This persuasive fact was not present in *Cedar Point Oil*.

Unpredictability and inefficiency stem from the Fifth Circuit's expansion of organizational standing. Courts are generally expected to adhere to the principle of *stare decisis et non quieta movere*. This Latin phrase means that our courts should adhere to precedent and should not unsettle things which are established. The Fifth Circuit's

opinion seemingly violates this directive, resulting in an extension of standing that is contrary to Supreme Court jurisprudence.

In *Cedar Point Oil* the Fifth Circuit granted organizational standing to Sierra Club based on the affidavits of three of Sierra Club, Lone Star Chapter's members.<sup>221</sup> Out of the three affidavits submitted, only one of the affiants, Douglas, engaged in activity in the vicinity of Cedar Point's discharge.<sup>222</sup> However, Douglas did not assert, and the court did not require, that Douglas' harm resulted from Cedar Point's discharge.<sup>223</sup>

The Fifth Circuit's analysis of the "fairly traceable" requirement runs contrary to the test set out in *Lujan v. National Wildlife Federation*.<sup>224</sup> *Lujan* unequivocally required a specific geographic nexus between the actor and the injury.<sup>225</sup> In fact, the Supreme Court announced that "[i]t will not do to 'presume' the missing facts because without them, the affidavits would not establish the injury that they generally allege."<sup>226</sup> In *Cedar Point*, the Fifth Circuit does exactly what the Supreme Court warned against. The Fifth Circuit presumes that Douglas was injured because of Cedar Point's discharge, saying "it is sufficient for Sierra Club to show that Cedar Point's discharge of produced water contributes to the pollution that impairs Douglas's use of the bay."<sup>227</sup>

The standard announced in

*Cedar Point Oil* has already led to confusion in the Fifth Circuit. In *Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*,<sup>228</sup> the plaintiff, an environmental group, attempted to use organizational standing to sue an oil refinery which was discharging storm water run-off into a river.<sup>229</sup> The plaintiff's affiants did not use the river but they did use a lake located downstream.<sup>230</sup> The Fifth Circuit held that the affiants' injuries were not fairly traceable to the storm water discharge.<sup>231</sup> Even though the Fifth Circuit applied the same *Powell Duffryn* factors, the court said that just because water runs downstream the injury was not fairly traceable to discharges upstream.<sup>232</sup> This version of the Fifth Circuit's "fairly traceable" standard sounds remarkably close to the standard set forth in *Lujan*.<sup>233</sup>

## VI. CONCLUSION

As we progress into the next century, it appears that EPA will never issue all the effluent limitations and NPDES permits required by the Clean Water Act. Consequently, environmental groups will continue to use the court system to effectuate what EPA has not, or possibly cannot. Down this road of piecemeal, judicially imposed legislation is an increased economic burden upon oil and gas producers.

<sup>219</sup>*General Motors*, 496 U.S. at 530.

<sup>220</sup>*Frezzo Bros.*, 602 F.2d at 1123.

<sup>221</sup>*Cedar Point Oil*, 73 F.3d at 556-58.

<sup>222</sup>*Id.* at 557.

<sup>223</sup>*Id.* at 558.

<sup>224</sup>*Lujan*, 497 U.S. at 888-89.

<sup>225</sup>*Id.*

<sup>226</sup>*Id.* at 889.

<sup>227</sup>*Cedar Point Oil*, 73 F.3d at 558.

<sup>228</sup>*Friends of the Earth, Inc. v. Crown Central Petroleum Corp.*, 95 F.3d 358 (5th Cir. 1996). [Editor's Note: see "Case Summaries," page 127, this issue.]

<sup>229</sup>*Id.* at 358-59.

<sup>230</sup>*Id.*

<sup>231</sup>*Id.* at 360.

<sup>232</sup>*Id.*

<sup>233</sup>*Lujan*, 497 U.S. at 888-89.