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The City of Portland filed a petition for review in the D.C. Circuit and the City of New York filed a motion to intervene regarding a 2006 rule promulgated by the Environmental Protection Agency ("EPA"). The rule required stringent measures to be taken to protect drinking water from contamination by the Cryptosporidium parasite. Cryptosporidium is a parasite that originates in human and animal feces, which can cause mild flu-like symptoms when ingested and can be deadly in children, the elderly, and others with weak immune systems. In Milwaukee in 1993, a Cryptosporidium outbreak caused thousands of people to become sick and killed approximately fifty people.

While the majority of cities protect against Cryptosporidium by filtering and covering water supplies and sources, New York and Portland simply took measures to protect their water sources from contact with domestic animals and humans. However, wild animals could still contaminate the water. The water reservoirs were located in urban areas and uncovered. The cities claimed they protected the water by preventing runoff and fencing the reservoirs. But, the EPA stated that the reservoirs were still at risk for Cryptosporidium contamination from bird droppings, small animals getting through the fences, and intentional human contamination. Additionally, neither city filtered their water. The EPA rule required changes in these water treatment systems.

In their petitions, the cities argued that the EPA had not performed a required cost-benefit analysis, had not provided an opportunity for notice and comment, and had not used the best available science. Secondly, the cities claimed that the rule was arbitrary and capricious because it did not respond to public comments, it lacked support, and it had incorrectly estimated cryptosporidium's infectivity. The court found these arguments meritless and irrelevant.

The Safe Drinking Water Act required the EPA to issue rules to protect against Cryptosporidium contamination in drinking water. The EPA's 1998 rule required a zero contaminate level goal for Cryptosporidium, imposed treatment techniques, required covers on all water reservoirs built after the rule, and required any system that filtered their water to filter out Cryptosporidium. A 2003 proposed rule allowed cities such as Portland and New York to develop a risk mitigation plan in
lieu of covering or treating their drinking water. However, the final rule promulgated in 2006 required covering and treatment of water, without the option for risk mitigation plans.

In its opinion, the court found that the cost-benefit analysis was not necessary since the rule required the most stringent feasible treatment technique and the treatment techniques at issue were not infeasible. Next, the court held that the rule was not arbitrary and capricious, since because the EPA had cited on multiple relevant studies to support the rule and had provided replies to cities’ potential objections. Additionally, the court noted that any comment brought by either city would not have affected the final rule. Lastly, in response to the argument that the EPA had relied on bad science, the court held that any reliance on inadequate science by the EPA was a harmless.

The court found that since the Act required the most stringent feasible treatment technique all of the mistakes alleged by the two cities were harmless. In addition, the court held that the EPA had used adequate science and evidence to support its rule, had given clear notice, and had provided opportunity for comments and responses thereto. Therefore, the court then denied the petition for review.

TANA SANCHEZ
The State of New York (State) filed a suit against Panex Industries, Inc. (Panex) to recover unreimbursed environmental response costs in the amount of $4.5 million incurred in the cleanup of a landfill used by one of Panex's operating divisions. Panex had dissolved in 1985 under Delaware General Corporation Law, which provides for a three-year limitation period for dissolved corporations to wind up affairs and for unknown claimants to assert claims against the corporation. Shortly after the three-year limitation period under Delaware law had expired, the State filed federal claims under CERCLA, which provides a six-year limitation period for recovering environmental response costs, against Panex, and the Panex trust. After the Panex trust had been depleted, the State was granted leave to join Panex's shareholder-distributees.

The district court dismissed the State's claims against the shareholder-distributees, and summary judgment was later granted to the State with regard to the suits against Panex and the Panex trust, with the district court holding that CERCLA preempted Delaware's three-year limitation period that barred suits against Panex. Because neither Panex nor the Panex trust had any assets to pay the judgment, the State appealed the district court's order dismissing its claims against the shareholder-distributees. The shareholder-distributees cross-appealed the judgments against both Panex and the Panex trust.

The State first argued that Delaware General Corporation Law § 278 did not bar its claim against the shareholder-distributees because the common law trust fund doctrine, which gives creditors an equitable right to follow corporate assets after dissolution, survives the enactment of § 278. The Court of Appeals for the Second Circuit dismissed this argument, holding that § 278 did indeed formalize the continued existence of the dissolved corporation's assets, and had supplanted the equitable trust theory not only in Delaware, but in most jurisdictions. Since the Court found the shareholder-distributees were not liable under § 278, the Court also dismissed the State's next argument that the shareholder-distributees were liable under another section of Delaware law, because the other section necessarily required that the shareholder-distributees be liable under § 278.
The State next argued that CERCLA did indeed preempt any time limitation imposed by Delaware law on the State’s claims, and that the State should be able to sue the shareholder-distributees due to CERCLA’s preemption of Delaware law. The Court held that since there was no actual conflict between state and federal law, the district court erred in holding that CERCLA preempted the Delaware dissolution statute. The Court noted that complying with both statutes was not a physical impossibility since the State could have been in compliance with both statutes by filing suit within three years of the dissolution. Furthermore, the Court stated that Congress did not explicitly intend to preempt state law and that Congress’s scheme of federal regulation was not comprehensive enough to justify a reasonable inference that there was no room for the state to act. Additionally, the court noted that the conflict between the two statutes was not a sharp one, that corporate law is generally in the realm of the state, and that absent clear congressional intent, federal preemption of state law is not favored.

The State’s last argument was that the trust fund doctrine applies in any timely-filed CERCLA action as a matter of federal common law. The Court noted that courts are not to create specific rules only applying to CERCLA that displace state corporate law just because a case involves CERCLA. The Court also found that Congress intended the unaddressed issues to be subject to state law. Therefore, the Court concluded that the district court did not err in finding that Delaware law governed the shareholder-distributee’s susceptibility to CERCLA claims. The court also reversed the district court’s judgments against Panex and the Panex trust.

CERCLA will not preempt state law unless there is a sharp conflict between state law and CERCLA. Absent clear, congressional intent, preemption of state law is disfavored, especially in the area of corporate law, and other areas that are traditionally governed by the states. Since there was not a sharp conflict between CERCLA and Delaware law, and because Congress expressed no intent in CERCLA, either explicitly or implicitly, to preempt state law, the Second Circuit found that the State was barred by the Delaware dissolution statute from bringing its CERCLA claim.

ANDREW REED
In 1998, the United States Army Corps of Engineers (Corps) determined a portion of the Missouri River, located near river mile 142, alongside Jefferson City, needed to implement a flood damage reduction measure in order to protect against future flood damages. The area is currently protected by the Capitol View Levee; however, the levee has been breached and suffered severe damages since the flood of 1993 resulting in losses of up to $18 million for the City of Jefferson City. The Corps’ solution to protect against future flood damage consisted of building a levee 4.7 miles long and 23 feet high.

The Corps requested formal comments from several State and Federal agencies on the “significant resources that might be impacted by implementation of the preferred plan.” The U.S. Fish and Wildlife Service (USFWS), the Natural Resources Conservation Service (NRCS), the U.S. Environmental Protection Agency (EPA), and the Missouri Department of Natural Resources (MDNR) responded to the request, sharing many of the same concerns with cumulative effects on the Missouri River as a whole and increased development in the floodplains.

The NRCS found that the proposed levee would increase upstream flooding and encourage development in the floodplain. The USFWS looked to the cumulative effects of the levee on the Missouri River as a whole and determined that “more and larger levees are increasing the frequency and size of flood events.” Similarly, the EPA found concern with the cumulative impacts of levee construction on lower Missouri River and stressed that the Corps needed to consider the effects on the physical, chemical, and biological integrity of the Missouri River. The EPA projected that construction of the levee would encourage development in the floodplain and the Corps “has not gone far enough in analyzing secondary effects.” The MDNR found the levee would cause additional flooding downstream, stream widening and shallowing, and increased development in the floodplain.

In April 2001, the Corps issued its final report along with an Environmental Assessment (EA) and a Finding of No Significant Impact (FONSI). The EA stated the Corps found no short-term or long-term environmental effects and land available for development was limited to
the project area and restricted by nearby airport regulations. Further, the FONSI stated the levee would not have an effect on the quality of the environment and an Environmental Impact Statement was therefore not required.

Plaintiff Sierra Club brought this action in 2003 alleging the Corps’ EA is defective because the Corps failed to consider the cumulative impact of its actions on flood heights and failed to evaluate the secondary effects of development in floodplain areas. Sierra Club alleges that if the Corps had conducted a cumulative review of the levee’s effects, they would have been required to complete an Environmental Impact Statement in lieu of an EA and failure to do so was a violation of the Administrative Procedure Act (APA).

The four State and Federal agencies asked to review the plan noted concern with the cumulative impact of the proposed levee. Further, the Corps’ own regulations require an evaluation of cumulative impacts before a permit may be issued. Accordingly, the Court found that the EA completed by the Corps failed to consider the cumulative impact of the proposed levee combined with other flood control structures that border the Missouri River. Additionally, the Court held the Corps’ finding that the proposed levee would not affect future flood risks was arbitrary and capricious and in violation of the APA. However, the Court did find that the Corps adequately evaluated the secondary impacts on floodplain development near the proposed levee and their decision was neither arbitrary nor capricious.

CLAIRE MCCLINTIC
Environmental groups sought for a review to reverse a permit issued by the Illinois Environmental Protection Agency to Prairie State Generating Company for building a 1,500-megawatt coal-fired electrical generating plant. The proposed plant was a “mine-mouth” plant sitting at the location of a coal seam containing enough high-sulfur coal to supply the plant’s fuel needs for thirty years. The coal could be transported from the mine to the plant by an half of a mile long conveyor belt. Environmental groups claimed that the permit was issued in violation of 42 U.S.C. § 7475(a)(4) for failure to require the “best available control technology” (“BACT”) to minimize sulfur dioxide emitted by Prairie State’s power plant. They also claimed that the ozone level that would be produced in the area would exceed the limits imposed by the Clean Air Act’s national ambient air quality standards (“NAAQS”), 42 U.S.C. § 7475(a)(3).

To satisfy BACT requirement, environmental groups argued that Prairie State must bring low-sulfur coal from mines afar, which would result in changes in the design of the plant, especially the design of the facilities for receiving coal. The EPA maintained that redesigning of the proposed plant by the permit applicant was not required under the BACT unless ineffectual control measures were adopted intentionally. To clarify this issue, the EPA distinguished between “control technology” as a means of minimizing emissions from a pollution source and “redesign of proposed facility” as changing the fundamental scope of the proposed facility. This distinction created a line-drawing problem, i.e., “where control technology ends and a redesign of the ‘proposed facility’ begins.” Because the line was not obvious and required expert judgment, the court deferred to the EPA’s decision as long as it would be within reason.

To determine whether, in this case, changing high-sulfur coal to low-sulfur coal constituted control technology, the court gave two extreme examples. If Prairie State’s plant was not a mine mouth plant, the change would have been the adoption of “control technology” had the change of fuel source from high-sulfur coal to low-sulfur coal only involved with a change in the design of proposed plant no more than what would have
been necessary to change in the design whenever there had been a change in the fuel source. However, when the change of fuel source from coal to nuclear fuel, it involved the redesign of the proposed plant because the proposed plant must be redesigned from a coal-burning plant to a nuclear plant. The court denied the review requested by environmental groups because it considered this case a border-line case requiring expert judgment. With respect to BACT, the court in its opinion pointed out that the environmental groups could have relied on another provision which directed the EPA to consider alternative control technologies suggested by interested persons. In addition, the court made a point that the long brief filed by environmental groups failed to provide expert opinion to support a decision requiring expert judgment.

With respect to the ozone level, in 2003, the EPA replaced the old one-hour standard with what it claimed to be more protective and more stringent eight-hour standard. However, the EPA used the one-hour formula to generate an eight-hour estimate to conclude that Prairie State's plant would not increase the ozone level in the area because it had not adopted a formula for the eight-hour standard. The environmental groups argued that the EPA violated the § 7475(a)(3) because the one-hour standard had been superseded by the eight-hour standard. The court made an arithmetic analysis and concluded that if an emission level satisfied the one-hour standard, it was likely to satisfy the eight-hour standard. The court held that the EPA was permitted to use the formula adopted for the older standard to make an estimate demonstrating that the plant would be unlikely to violate the new standard. The court denied the review request and again pointed out that the environmental groups made criticism without suggestion of an alternative.

HANNAH M. TIEN
Pollack v. United States DOD, 2007 U.S. App. LEXIS 24352 (7th Cir. 2007)

In Pollack v. United States DOD, a concerned citizen and attorney, Steven Pollack, sued the Department of Defense, the Army, and the Navy for improperly transferring ownership of property, therefore violating the Comprehensive Environmental, Response, Compensation, and Liability Act (CERCLA). This Act enables the President to clean up sites that are contaminated with hazardous waste by delegating his powers to others.

The issue stems from a conflict between the Army and the EPA over the construction of a landfill cap to prevent seeping waste. In 1993, part of the base at Fort Sheridan was transferred from the Army to the Navy for twenty four million dollars. The Army had vowed to “retain responsibility and liability for environmental restoration” of the property as a part of an agreement. Eventually, the waste from the landfill spilled out into the air and water, leading the Army to develop an interim plan until they could decide on an effective remedy. The Army launched this interim plan shortly thereafter, comprised of installing new drainage and collection systems, a “burn facility for gases,” and a new topsoil cap and liner for the landfill.

The EPA claims that the Army failed to meet the specifications required to construct a landfill cap by using big rocks instead of small ones, therefore allowing rainwater to enter the cap liner and affect its ability to hold waste. Consequently, the EPA refused to sign off on the project, causing the Army to cut off its funding for EPA cooperation. Years later, the Navy decided to least part of its property abutting the landfill to a private developer, which would build housing for Navy families. Eventually, the Army initiated a final remedial plan in 2006 for the landfill that is currently under review by the Illinois EPA for a final determination.

Plaintiff Steven Pollack sued, objecting to both the transfer from the Army to the Navy in 1993, and from the Navy to the private developer in 2006. Pollack claims that because the United States EPA did not sign off on the Army’s final remedial plan before the transfers, it violated CERCLA. After the district court dismissed the suit, plaintiff appealed to this court.
The court addresses the merits of Pollack’s claim and concluded that because the transfer from the Army to the Navy in 1993 happened before the landfill issue was discovered, it would have been impossible for the EPA to approve a cleanup plan that was yet to be in existence. The second transfer did not include transferring the landfill, therefore is not subject the CERCLA violation. In addition, the defendants argue that although the transferred land abutted the landfill, the landfill was not on the National Priorities List (NPL) of most dangerous hazardous waste sites, thus they were free to work only with the Illinois EPA and didn’t need approval from the federal equivalent.

Furthermore, the court states that under CERCLA, no Federal Court shall have jurisdiction to review challenges to CERCLA cleanup efforts, however, may review challenges brought by citizen suits only if the citizens bring suit after the cleanup is done before suing.

Pollack attempts to validate his argument by arguing that his claim is not subject to this CERCLA section by pointing to technicalities, which the court readily rejects by pointing to prevalent case law. Finally, Pollack asserts that barring this type of suit unfairly prevents citizens from challenging transfers of federally owned property, as CERCLA’s broad citizen suit provision would otherwise allow them. However, granting Pollack’s petition would create a loophole allowing citizens to indirectly attack federal cleanups by going after any transfer of property preceding it. As a result, the Supreme Court affirms the district courts decision to dismiss Pollack’s claim for lack of jurisdiction.

Celina M. Lopez
In 2000 Westinghouse Electric Company purchased the Hematite Nuclear Facility and immediately began decommissioning the facility. During the forty years previous the Hematite site was operated as a nuclear fuel processing plant and was contaminated with radiological and chemical wastes. During decontamination Westinghouse worked with the United States Nuclear Regulatory Commission (NRC) and the Missouri Department of Natural Resources (MDNR).

In 2005 the State of Missouri filed suit against Westinghouse making several demands. First, Missouri requested injunctive relief requiring Westinghouse to perform a Remedial Investigation/Feasibility Study (RI/FS) to determine the nature and extent of the site contamination and create a plan for decontamination. Second, Missouri requested that Westinghouse implement the plan decided under the RI/FS and reimburse MDNR for all past or future response costs at the Hematite site. As a result of litigation Missouri and Westinghouse entered into a Consent Decree. The decree was drafted according to Section 107 of CERCLA and included a plan for decontamination of the Hematite site. The decree was submitted for court approval.

Westinghouse then brought a second action against the United States and several corporate defendants with possible liability for expenses related to cleaning up the Hematite site. Note that the NRC, the federal agency responsible for regulating the civilian use of nuclear materials, took exception to Missouri's attempt to regulate radiological waste. The defendants in this action intervened in the suit resulting from Missouri's action against Westinghouse.

The intervenors based their argument on the assumption that states are without federal authority to regulate radiological materials and that any state authority that might exist is pre-empted by the Atomic Energy Act (AEA). Westinghouse and the State countered providing three arguments. First, the proponents of the Consent Decree cite authority under CERCLA granting State's the power to enter into a Consent Decree. Proponents argued that Supremacy Clause analysis does not apply because Missouri brought the claim under CERCLA. The Court rejected this argument finding that Missouri required a federal basis for the regulatory action.
Since no cooperative agreement was entered between Missouri and the federal government, Missouri's authority to enter the regulatory action must come from State authority. Therefore, Missouri's action was subject to pre-emption from federal regulatory agencies and laws.

Second, the proponents argued that the AEA does not pre-empt State action when the facility has been decommissioned. In response to this argument the Court looked to precedent and the NRC's interpretation of the AEA and found no basis for this argument. The Court determined that the AEA pre-empts state regulation of nuclear safety issues at operation or non-operation facilities. The Court pointed out that Missouri retained authority over the non-radiological contaminants at the Hematite site. If the Consent Decree was constructed narrowly to apply strictly to the non-radiological components, the Decree would have been valid if it did not run afoul of federal law. Since no distinction was made Missouri was regulating an area controlled by federal in violation of the Supremacy Clause.

Finally, the last argument presented was that the Consent Decree contained limiting language therefore pre-emption was avoided. The Court found that the limiting language did not affect the pre-emption of the Consent Decree because, even though the language avoided a conflict with federal law, it did not change the fact that Missouri was asserting the right to act in an area regulated by the AEA.

In sum, the Court denied the State of Missouri's motion to enter the Consent Decree because it ran afoul of the Supremacy Clause by attempting to assert authority in an area of regulation delegated to federal agencies.

LEE STOCKHORST
Our Children's Earth Foundation v. United States Environmental Protection Agency, 2007 WL 3132412 (9th Circuit)

In 1972 Congress passed the Clean Water Act (CWA) in order to pursue the goal of cleaning up the nation's waterways. The CWA was intended to have an impact on the biological welfare of water-based ecosystems and also to effect pollution levels in America's waterways. To effect pollution levels, the CWA included a permitting system for pollutants which carefully monitored the amount of pollutants allowed to be released. These permits would control pollution through technology based effluent limitations on pollutant discharge.

The current case was brought against the EPA with charges that it failed its mandatory duties when it did abandoned a technology based review of pollutant discharge levels in favor of hazard based review, it neglected to identify new pollution sources, and did not timely publish plans for future reviews. A technology based review focuses on current technology, and achieving the maximum decrease in pollution at the current level of technology, where the hazard based review focuses on identification of pollutants and reduce those hazards. The district court granted summary judgment in favor of the EPA saying all the claims covered only discretionary acts, and thus plaintiffs could not force the EPA to do any of them.

Upon appeal the circuit court looks to the statutory framework of the CWA to determine the issue of technology review. The court rejects the EPA's argument that technology based review can be completely abandoned at their discretion. Looking at the statutory framework, as well as the legislative intent behind the act, the court finds that technology based review is mandatory for the agency and not discretionary. The court notes that this does not mean that the review must change the guidelines, only that the review of the system must be done at least in part with a technology based review. As it is not clear on the record whether the EPA did take in to account a technology based review, that portion of the case is remanded for further proceedings.

Turning to the next two issues, the court simply finds the publication duty to be mandatory, but not in the manner that OCE wishes. OCE claims that the duty coincides with a calendar year, while the EPA claims it can meet the mandatory duties prescribed by statute without
publication on that time schedule. The court agrees with the EPA (giving
great deference to their interpretation of the statutes) and says that the
CWA requires biennial publication, but not on any given time schedule.
The court also says that identification of new pollution sources is a
mandatory act, but that the number of new sources to identify, as well as
whether to issue guidelines for those new sources is discretionary. The
court again turns to statutory language in showing that the mandatory duty
is limited to only some identification, and without clear language to the
contrary deference is again given to the agency interpretation for actions
beyond the clear language of the statute.

Benjamin Hodges
Plaintiff Reichhold, Inc. ("Reichhold") brought an action against Defendant United States Metal Refining Co. ("USMR") seeking legal and declaratory relief under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") as amended by the Superfund Amendments and Reauthorization Act ("SARA") and the New Jersey Spill Compensation and Control Act ("the Spill Act"). The District Court dismissed for lack of ripeness a portion of Reichhold's claim for declaratory relief based on Reichhold's claim of contribution liability. Reichhold then moved the Court to reconsider or clarify the Order following the dismissal ("the August Order"). The District Court subsequently decided that the August Order was unclear and vacated the August Order. The Court issued a superceding Order dismissing for lack of ripeness only Reichhold's claim for declaratory relief pursuant to its contribution liability claim under §113(f). The Court held that Reichhold was entitled to seek a declaratory judgment to establish liability under §107(a).

Reichhold purchased land located in Carteret, New Jersey from USMR in 1960 and 1962. USMR owned the land and operated a large secondary copper smelter and refinery for approximately 80 years. While USMR owned the property, USMR may have contaminated portions of the land with slag and other metal contaminates. It was believed this led to widespread lead and other metal contamination of the site. It is also believed that Reichhold contributed to the site contamination by filling and grading the majority of the property. During the mid-1980s Reichhold began discussions with the New Jersey Department of Environmental Protection about the possible site contamination. Reichhold then confronted USMR regarding a possible claim of liability against USMR.

Reichhold asserts that Defendants are responsible for widespread site contamination of lead and other metals. Reichhold also contends that the contamination caused by the Defendants will lead to future costs associated with the site cleanup. USMR moved to dismiss Reichhold's declaratory judgment claim. Reichhold asserted that the subsequent dismissal illustrated by the August Order focused on Reichhold's ability to obtain a declaration of USMR's liability for contribution.
The Court stated that §107(a) and §113(f) both allow for plaintiffs to seek declaratory judgments, however the ripeness threshold is different for each provision. Section §113(f) does not specifically contain declaratory relief language. Therefore, plaintiffs must meet the requirements of the Declaratory Judgment Act, which requires an existence of an actual case or controversy. The Court held that Reichhold could not establish an actual case or controversy. CERCLA, however, does provide expressly for declaratory relief as long as the plaintiff establishes principle liability under §107(a). CERCLA allows parties that have incurred costs for cleaning up a contaminated site to recover its costs from parties responsible for the contamination.

The District Court held that a plaintiff need only prove liability for costs already incurred in order to be entitled to a declaratory judgment under §107(a). The Court also stated that the entry of a declaratory judgment was mandatory even if the possible future costs are somewhat speculative. The Court granted Reichold’s motion to clarify. The Court ultimately held that Reichhold was entitled to seek a declaratory judgment because Reichhold was seeking to establish liability pursuant to §107(a) for environmental cleanup costs already incurred.

Michael Page
In \textit{Friends of Pinto Creek v. EPA}, the claim involved the approval of a National Pollution Discharge Elimination System (NPDES) permit issued by the Environmental Protection Agency (EPA) to Carlota Copper Company ("Carlota") which would allow the company to discharge copper from their mining operations into Arizona’s Pinto Creek, a waterway that is above the water quality standards for copper. Carlota planned to build a copper mine and processing facility near the Pinto Creek. The company also planned to construct diversion channels through which they would reroute the creek around the mine and block the groundwater from flowing into the mine.

The National Environmental Policy Act (NEPA) requires that the U.S. Forest Service determine whether a pending project would have a significant impact on the environment and to prepare an Environmental Impact Statement to their findings. The Army Corps of Engineers must also issue an Environmental Assessment which analyzes the construction of the diversion channels. The EPA issued the permit to Carlota and, after a petition for review was filed by Friends of Pinto Creek, Grand Canyon Chapter of the Sierra Club, and Maricopa Audubon Society and Citizens for the Preservation of Powers Gulch and Pinto Creek ("Organizations"), the Environmental Appeals Board (Appeals Board) denied review. The petition for review was based on two arguments: 1) the permit to discharge a pollutant into Pinto Creek is in violation of the Clean Water Act (CWA) and applicable regulations; and 2) the EPA failed to include and regulate all discharges which is a violation of the CWA and applicable regulations.

The Organizations argued that because Carlota was a "new discharger" of copper into Pinto Creek, which is waterway that is already "impaired" due to copper pollutants and already exceeds its water quality standards, the permit should not have been issued. The CWA requires that, in order to obtain a permit, a new discharger must show that there is room for more of the pollutant in the already contaminated waterway and that the existing dischargers are subject to compliance schedules to conform to water quality standards. Here, the court found that Carlota had no plans nor did the company have a compliance schedule. The company also failed to show that if Carlota were allowed to discharge pollutants into Pinto Creek that the water quality standard would be met. Therefore, the
court held that the EPA cannot issue a permit until those conditions are met.

Last, the Organizations claimed that the EPA did not consider the additional copper pollutants from the two diversion channels Carlota planned to build in order to divert the surface and ground water around the mine. They also argued that the Appeals Board refusal to consider those two sources because the issue was not raised in the first comment period was made in error. During the first of two comment periods for Carlota’s permit, the Societies raised the issue that these sources would in fact contribute pollutants to both the Pinto Creek and the Powers Gulch stream. The court agreed and found that the claims concerning the diversion channels had been timely raised and should have been considered by the Appeals Board. Therefore, the court held that the NPDES Permit was issued to Carlota Copper Mine based on “errors of law under the Clean Water Act … and the NEPA” and vacated and remanded the permit to the EPA for further proceedings.

BREANNE ARDILLA
Consolidated Companies Inc v. Union Pacific Railroad Co, 499 F.3d 382 (5th Cir. 2007).

Union Pacific Railroad Co (Union Pacific) sought an interlocutory appeal from two legal findings by a Louisiana Federal District Court, in a suit that had been brought by Consolidated Companies (Conco). Conco purchased one tract of land (Conco tract), out of three contiguous parcels, from the Southern Pacific Company, now Union Pacific, in 1964. Prior to the purchase, the three contiguous parcels were used by the now Union Pacific as their railroad yard. In its capacity as a railroad yard, Union Pacific, used above ground tankers to store fuel, oil, and dynamite, and through its operations at the site contaminated the groundwater and soil.


Union Pacific conceded that the Conco tract was contaminated and Conco could bring suit to recover on that parcel. However, the dispute in the District Court was a limited trial to determine if the contiguous parcels of land that formerly made up the entire site could be considered a single facility under the definition of either statute. Essentially, Conco was trying to bring suit on behalf of all three parcels of land, even though they only owned one. The District Court held that it could under both RCRA and LEQA.

Union Pacific appealed to the United States Court of Appeals for the Fifth Circuit and raised two arguments as to why the District Court was in error: 1) Conco does not have standing to bring its claims under the RCRA and the LEQA because of lack of "injury in fact" as required by Article III of § 2 of the United States Constitution and 2) the District Court erred in holding that the entire former railroad yard can constitute a single "facility" for purposes of RCRA and LEQA. The court of appeals took each argument in turn and determined the District Court was correct and affirmed its judgment.
The Fifth Circuit rejected Union Pacific’s first argument that Conco had not suffered any injury in fact. From *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992) the court stated that to have standing a plaintiff must show they have been injured in fact, the injury is traceable to the action of the defendant, and that the court has the power to redress the injury by a favorable decision. Union Pacific did not object to the fact that Conco meets these requirements with respect to the tract of land it owns, but not to the other two tracts of land because there would be no injury to Conco on property it does not own. The Court disagreed, relying on *Lujan* again, that the threat of harm may constitute an injury in fact, and the potential for the contamination in the contiguous parcels of land to migrate to Conco’s property is enough of a threat of injury sufficient for standing.

Similarly, the court rejected the argument that the entire railroad site could not be considered a single facility for purposes of RCRA or LEQA. RCRA does not define facility expressly in the definition section of the statute, but does in a section addressing underground storage tanks. This definition of facility read “For purposes of this paragraph the term "facility" means, with respect to any owner or operator, all underground storage tanks used for the storage of petroleum which are owned or operated by such owner or operator and located on a single parcel of property (or on any contiguous or adjacent property).” 42 U.S.C. § 6991b(h)(6)(D). The court, applying the rule that identical words used in different parts of the same act are intended to have the same meaning, determined the definition of facility was expansive enough to allow Conco to bring suit regarding the entire former railroad site. The court also found support for this conclusion in the purpose of RCRA, which is to “...speed compliance with environmental laws.” If Union Pacific’s argument was accepted the result would be opposite to this purpose. If a narrower definition of “facility” was applied a plaintiff would have to bring an individual lawsuit for each parcel of land thus slowing compliance with environmental laws.

The Court came to the same expansive definition of “facility” under the state statute as well. Under LEQA “facility” is defined as “a pollution source or any public or private property or facility where an activity is conducted which is required to be regulated under this subtitle and which does or has the potential to...” contaminate the environment
with hazardous substances. *La. R.S. 30:2004(14).* A “pollution source” is defined as “the immediate site or location of a discharge or potential discharge, including such property surrounding property necessary to secure or quarantine the area from the general public.” *La. R.S. 30:2004(13).* Due to the fact the entire former site is contaminated and that hazardous waste on each individual tract may potentially migrate beyond its own borders, the entire three parcels qualify as a “facility.”

After soundly disposing of both of Union Pacific’s arguments in the negative, the court held that the district did not err in its decision that the entire contiguous parcels or property that made up the former railroad site can constitute a single “facility” for purposes of Conco’s claims under RCRA and LEQA, and therefore because of the sufficient injury either present or threatened to Conco, they properly had standing to bring their suit with respect to the contiguous parcels of property which they did not own.

RYAN STARNES
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