Clean Air Act
Litigation Developments
1998

Citizen Suits

***Steel Co. v. Citizens For A Better Environment*,** 118 S.Ct. 1003 (1998).

In a landmark decision, the U.S. Supreme Court ruled that a party lacks standing under Article III of the Constitution to bring a citizen suit to recover civil penalties unless the party can also show that it is entitled to injunctive relief to remedy a concrete injury to itself. Although the case involved a company's failure to file certain reports under the Emergency Planning and Community Right-To-Know Act (EPCRA), the Court's broad ruling will have a substantial impact on the ability of groups to bring citizen suits under the Clean Air Act as well as all other environmental statutes with citizen suit provisions. Because the ruling was based on fundamental constitutional principles, not the statutory language of EPCRA, its scope is not limited to EPCRA citizen suits. In short, the decision establishes that a party may not bring a citizen suit for civil penalties under the environmental statutes unless it can allege and ultimately prove that it is entitled to injunctive relief based on the existence of "a continuing violation or the imminence of a future violation."

Writing for the majority, Justice Scalia first concluded that the Court must address the constitutional standing issue before determining whether the language of EPCRA authorized a court to consider an action based on wholly past violations. Having determined that the Court must address the issue of standing before proceeding further, Justice Scalia ruled that the citizens group lacked standing under Article III because it had not satisfied the "redressability" requirement for establishing standing. The Court did not actually determine whether the injuries alleged by the group would have constituted sufficiently concrete injuries because it concluded that they would not be redressable in any event. Justice Scalia's opinion analyzed the items of relief sought by the group and rejected each as a basis for redressing the group's claimed injuries:

- *Declaratory relief* – Although the plaintiff had sought a declaration from the district court that the company had violated EPCRA by not filing the reports, the majority opinion stated that this would not help the plaintiff. The opinion stated that, since there was no controversy regarding whether the reports had been filed or whether violations had occurred, such declaratory relief would have no impact.

- *Recovery of civil penalties* – The majority opinion concluded that an order awarding civil penalties would not redress any injury to the plaintiff because the penalties would be paid to the Treasury. To the extent the plaintiff claimed that it had an interest in the penalties being paid in accordance with the statute, the opinion held that this merely constituted an "undifferentiated public interest" in carrying out the laws – an interest which the Court previously had held is not a cognizable injury for Article III purposes.

- *Recovery of investigation costs* – Although the group had contended that it had been injured because it had expended funds to investigate the company's EPCRA compliance problems, the Court ruled that the

expenditures were not an injury to be redressed in a citizen suit. The Court explained that such investigation costs could be recovered only if authorized by the citizen suit provision. In relevant part, that provision authorizes recovery of litigation costs but is silent as to pre-litigation investigation costs. However, even if the investigation costs were considered to be litigation costs, the group would lack standing because the Court has previously ruled that the expenditure of litigation costs is not sufficient, by itself, to give a party Article III standing to continue pursuing a federal court action.

- *Request for injunctive and other relief* – The Court rejected the group's contentions that its requests for an order directing the company to allow inspections by the group and to provide copies of reports to the group were adequate to establish standing. The Court ruled that the allegations of the complaint were insufficient to show that this requested relief would redress any injury suffered by the group.

Although the Court acknowledged that a request for injunctive relief could satisfy the redressability test, it concluded that injunctive relief could only be proper where the plaintiff has alleged the existence of "a continuing violation or the imminence of a future violation." The Court stated that, otherwise, the plaintiff's interest is merely a "generalized interest in deterrence, which is insufficient for purposes of Article III." In short, the Court made clear that allegations based on past violations that are not continuing or are not likely to recur are insufficient to establish Article III standing to bring a citizen suit under the environmental statutes. Thus, in order to establish its standing to bring suit, a plaintiff seeking civil penalties under a citizen suit provision must allege and demonstrate entitlement to injunctive relief based on an ongoing compliance problem.

Friends of the Earth v. Laidlaw Environmental Services, 149 F.3d 303 (4th Cir. 1998).

In one of the first cases to address the Supreme Court's decision on standing in *Steel Co. v. Citizens For A Better Environment*, 118 S.Ct. 1003 (1998), the U.S. Court of Appeals for the Fourth Circuit held that a citizen suit under the Clean Water Act became moot once the plaintiffs were no longer entitled to injunctive relief. The court of appeals concluded that, under the holding of *Steel Co.*, the plaintiffs' claims for the imposition of civil penalties against the company involved were, by themselves, insufficient to constitute a live controversy.

The Fourth Circuit's decision is significant because it extends the holding of the *Steel Co*. decision in two important ways. First, by applying *Steel Co*. to a Clean Water Act citizen suit, the Fourth Circuit's decision confirms that the *Steel Co*. holding broadly applies to the citizen suit provisions of all environmental statutes and is not limited to citizen suits addressing the reporting requirements of EPCRA. Second, by ruling that the case before it had become moot, the Fourth Circuit made clear that a citizen suit plaintiff must demonstrate that it meets Article III requirements at every stage of the litigation. In other words, even if a plaintiff has standing when it files its complaint, the citizen suit will subsequently become moot if the defendant takes actions which result in the plaintiff no longer being entitled to injunctive relief.

In this case, the plaintiffs brought a citizen suit action in federal district court based on allegations that the company had violated its Clean Water Act permit. The plaintiffs sought both injunctive relief and the imposition of civil penalties against the company. Following a trial, the district court ordered the company to pay civil penalties. However, the district court denied the request for injunctive relief because it concluded that the violations had not caused any environmental harm and that, at the time of the court's final order, the company had been in compliance with its permit for several years. The plaintiffs did not appeal the district court's denial of injunctive relief. After the company appealed the district court's award of civil penalties and attorneys fees, the

Fourth Circuit concluded that, because the plaintiffs were no longer entitled to injunctive relief, the rationale of the *Steel Co*. decision dictated that the case be dismissed as moot.

As a result of its mootness determination, the Fourth Circuit overturned a civil penalty assessment of more than $400,000. The court also disallowed plaintiffs' requests for attorneys fees of more than $2,000,000.

***Texans United for a Safe Economy Education Fund v. Crown Central Petroleum Corp*.,** Civil No. H-97-2427, 1998 U.S. Dist. LEXIS 16146 (S.D. Tex., Aug. 3, 1998).

A federal district court ruled that plaintiffs are precluded from pursuing a Clean Air Act citizen suit against a company where the state regulatory agency is diligently prosecuting an administrative enforcement action concerning the same alleged violations. The effect of the decision is to narrow significantly the circumstances under which plaintiffs may bring citizen suits where a state agency is addressing alleged violations.

The district court's decision is based on section 304(b)(1)(B) of the Act, which provides that plaintiffs may not pursue a citizen suit if the state agency "has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order . . . ." Although the state agency – the Texas Natural Resource Conservation Commission (TNRCC) – had not filed a separate action in federal or state court, it had already ordered the company to take corrective action and was preparing to impose civil penalties and additional injunctive relief through administrative means. Relying on the Third Circuit's decision in *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 217 (3rd Cir.), *cert. denied*, 441 U.S. 961 (1979), the district court concluded that the agency itself could qualify as a "court" for purposes of the citizen suit provision if the following conditions were satisfied: (1) the agency is empowered to grant relief which is substantially equivalent to that which could be granted by a court; (2) the agency's procedures provide for effective participation by citizens; and (3) the agency is diligently prosecuting the matter.

After examining the TNRCC's enforcement authority and its actions in this matter, the district court concluded that the TNRCC satisfied the requirements set forth above. Accordingly, the district court ruled that the citizen suit was precluded under the statute and entered a judgment for the defendant company.

***Dubois v. U.S. Dept. of Agriculture*,** 20 F. Supp. 2d 263 (D.N.H. 1998).

A federal district court ruled that a citizen suit plaintiff's claim for civil penalties became moot after injunctive relief had been granted and there was no injury to be redressed by the civil penalties. Although the citizen suit arose under the Clean Water Act, the reasoning of the court would apply with equal force to citizen suits under the Clean Air Act. The case involved claims for both injunctive relief and civil penalties based on allegations that a ski resort had violated the Clean Water Act in diverting water for snow-making operations. In a prior decision in the same case, the district court had granted the defendants' motion for summary judgment and had dismissed all the claims raised by plaintiffs. However, on appeal, the First Circuit Court of Appeals reversed that decision, directed the district court to grant the plaintiffs' request for an injunction, and remanded the case to the district court.

After the district court judge entered the order granting injunctive relief, the judge ruled that, because of the injunction, the claim for civil penalties had become moot. The district court reasoned that a citizen suit plaintiff must show throughout the course of the litigation that it has suffered, or is threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision. The district court ruled that,

because the injunction had been granted, plaintiffs could no longer establish that they had a personal stake in the payment of civil penalties to the U.S. Treasury.

Natural Resources Defense Council v. Southwest Marine Inc., 28 F. Supp. 2d 584 (S.D. Cal. 1998).

A federal district court issued a decision which sought to limit the scope of the Supreme Court's decision in *Steel Co. v. Citizens For A Better Environment*, 118 S.Ct. 1003 (1998), and to distinguish that decision. In this case, the citizen suit plaintiffs sought to obtain both injunctive relief and civil penalties under the Clean Water Act for violations that the court characterized as "ongoing." In denying a motion to dismiss for lack of standing, the court stated that the *Steel Co.* decision was distinguishable because, unlike the instant case, it involved only "wholly past" violations. Also, the court characterized much of the Supreme Court's discussion in *Steel Co.* as "dicta," i.e., it was not a basis for the Supreme Court's holding. According to the district court, once standing has been established, a court need not analyze each type of claim presented to determine whether that claim continues to present a live controversy.

The district court's opinion raised a number of unanswered questions. For example, the district court did not explain why it believed that the Supreme Court's extensive discussion concerning standing to raise various claims was merely "dicta" when the Supreme Court's opinion separately and deliberately analyzed each type of claim to determine whether the citizen suit plaintiffs had standing to raise the claim and based its conclusion on the outcome of that analysis.

Evidence; Burden of Proof

Clean Air Implementation Project v. EPA, 150 F.3d 1200 (D.C. Cir. 1998)

On August 14, 1998, the U.S. Court of Appeals for the D.C. Circuit issued a decision dismissing industry petitioners' challenges to EPA's "Credible Evidence" (CE) rule. The three-judge panel did not address the merits of industry's challenges but instead ruled that the issues raised in the case were not yet ripe for review. The Court's decision on ripeness grounds was surprising in that the issue of ripeness had not been briefed by the parties and the Court had not requested supplemental briefing on the issue.

Under the challenged rule, EPA authorized the use of any "credible evidence" to prove violations of numeric emissions limits under the Act. Nothing in the rule defines or limits the possible kinds of evidence included within the phrase "credible evidence."

Industry petitioners' principal argument was that EPA could not lawfully promulgate such a rule without undertaking rulemaking proceedings to determine the effect of the rule on the stringency and reasonableness of individual standards. The industry petitioners maintained that, as a result of the rule, the reference test method specified in a particular standard would no longer be the exclusive means of determining whether a violation of a numeric limit in the standard has occurred. They further argued that, consideration of "credible evidence" from continuous emissions monitors would mean that unavoidable deviations from a limit that had never been deemed violations would suddenly become violations. Thus, the effect of the rule in numerous cases would be to increase the stringency of the standards involved without following rulemaking procedures to consider whether sources could reasonably comply with the more stringent numeric limits with the technology on which the standards were based.

In holding that the challenges were not ripe, the panel concluded that the petitioners had not satisfied either element of the two-part ripeness test established by the federal courts, which considers the fitness of the issues for decision and the hardship to the challenging parties if review is withheld. The panel stated that too many "imponderables" existed for it to render a decision. According to the panel, "[g]iven the universe of all possible evidence that might be considered 'credible,' it is impossible for us to decide now what impact the rule will have." The panel further concluded that "[p]etitioners cannot point to any great hardship they would suffer by our deferring judicial review." As a result, the panel stated that industry parties must wait and raise any challenges to the CE rule in individual enforcement proceedings.

On September 28, industry parties filed two separate petitions for rehearing with the Court and requested that rehearing be conducted before the entire court. On November 20, 1998, the D.C. Circuit issued two brief orders denying the petitions and requests without providing any explanation of the grounds for its denials.

In re: Commercial Cartage Company**,** CAA Appeal No. 97-9 (EAB, July 30, 1998).

In a decision that may have implications for implementation of EPA's "Credible Evidence" (CE) rule, the Agency's Environmental Appeals Board (EAB) ruled that the Agency could not enforce a requirement in its gasoline volatility regulations against a company because the Agency had failed to obtain test results required by the regulations to demonstrate noncompliance. In so ruling, the EAB upheld the key conclusions of an administrative law judge who had dismissed the Agency's administrative complaint.

Although the CE rule was not directly involved in this case, the Board's holding implicitly rejects the rationale underlying the rule. The Board ruled that, because the regulation specifies a testing method for determining violations, EPA could not rely on documentary evidence to establish a violation of the regulations. Thus, the Board's decision clearly supports the position that, where a testing procedure or other compliance method is specified in a regulation, that procedure or method should be the sole means of determining whether a violation has occurred.

This case involved EPA's enforcement of its gasoline volatility regulations against a trucking company that delivered gasoline to retail outlets. OECA's contention that the volatility regulations had been violated was based on two elements of proof: (1) tests conducted by EPA on gasoline contained in tanks at a retail outlet served by the company showed that the volatility exceeded permissible limits and (2) various documents (bills of lading, delivery tickets, and test logs) indicated that the trucking company had delivered gasoline to the outlet during the relevant time period. However, EPA had not tested gasoline in the company's tank trucks.

The Board rejected OECA's position that documentary evidence linking the company to the high volatility gasoline was sufficient to establish a violation of the provisions applicable to carriers of gasoline. The Board ruled that the plain language of the pertinent regulation was determinative of what constituted compliance or noncompliance with that regulation. It emphasized that the regulation provides that a carrier is liable for a violation of the volatility restrictions only "where a violation of the applicable standard . . . is detected at a carrier's facility." Because EPA had never tested the volatility of the gasoline in those tank trucks, the Board ruled that EPA's documentary evidence was not sufficient to establish a violation.

"Fair Notice" Requirement

United States v. Chrysler Corp.**,**158 F.3d 1350 (D.C. Cir. 1998).

In a decision confirming the principle that a regulated party must receive "fair notice" of its regulatory obligations, the D.C. Circuit ruled that an automobile manufacturer could not be compelled to recall vehicles where it had not been provided sufficient notice regarding the test method for determining whether a violation had occurred. Although the decision involved a recall under the National Traffic and Motor Vehicle Safety Act, the basic reasoning of the decision would apply in environmental cases as well.

The case involved an order of the National Highway and Traffic Safety Administration (NHTSA) directing Chrysler to recall 91,000 vehicles because they allegedly did not comply with a

safety standard governing safety belt assembly anchorages. In contending that Chrysler had not complied with the standard, NHTSA relied upon test results reached by its contractor. The contractor had placed pelvic body blocks (objects representing the human pelvis) away from rear seat backs when conducting its tests – unlike Chrysler, which had placed the blocks against the seat backs.

Relying on its decision in *General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995), the D.C. Circuit held that, as a matter of due process, a party must receive “fair notice” of regulatory requirements before it can be found liable for violating those requirements. Based on the record, the Court ruled that Chrysler had not received sufficient notice that the tests were to be conducted with the blocks away from the seat backs. The decision expressly rejected the government’s contention that the “fair notice” doctrine applies only where the government is seeking civil penalties or some other punitive measure against the regulated party. The Court concluded that the recall order itself must be overturned for lack of “fair notice.” Thus, the Court made clear that the doctrine applies to actions seeking injunctive relief as well as actions seeking monetary penalties. The decision would also likely apply in situations where a standard prescribes a reference test method but EPA attempts to rely on “credible evidence” of a violation under a different approach concerning which the source did not receive “fair notice.”

Justiciability

***See Steel Co. v. Citizens For A Better Environment*,** 118 S.Ct. 1003 (1998) (Citizen Suits).

***See Friends of the Earth v. Laidlaw Environmental Services*,** 149 F.3d 303 (4th Cir. 1998) (Citizen Suits).

***See Dubois v. U.S. Dept. of Agriculture*,** 20 F. Supp. 2d. 263 (D.N.H. 1998) (Citizen Suits).

***See Natural Resources Defense Council v. Southwest Marine Inc.*,** 28 F. Supp. 2d. 584 (S.D. Cal. 1998) (Citizen Suits).

Nonattainment Designations

Southwestern Pennsylvania Growth Alliance v. Browner,144 F.3d 984 (6th Cir. 1998).

The U.S. Court of Appeals for the Sixth Circuit rejected arguments that an ozone redesignation determination was unlawful because EPA had not properly taken into account the effects on downwind areas from the interstate transport of ozone and its precursors. The Court ruled that EPA had properly redesignated the Cleveland-Akron-Lorain area in northeastern Ohio from an nonattainment area for ozone to an attainment area. The decision recognizes that past EPA determinations regarding the adequacy of a state implementation plan (SIP) should not be ignored simply because new programs addressing the interstate impacts of ozone pollution are being implemented.

The case involved a challenge to EPA's decision in May 1996 to redesignate the Cleveland-Akron-Lorain area as an ozone attainment area based on Ohio's demonstration that the ozone standard had been achieved during the three-year period from 1992 to 1994. The petitioner – a coalition of local governments and manufacturers in Pittsburgh and southwestern Pennsylvania – sought review of the decision in the Sixth Circuit. The petitioner contended that ozone nonattainment problems in southwestern Pennsylvania were caused by emissions of ozone precursors in Ohio and West Virginia and that the decision should be overturned because Ohio's SIP did not adequately address the interstate transport of pollutants. Petitioner's argument was based largely on the fact that the SIP had been approved prior to passage of the 1990 amendments, which allegedly had made more stringent the statutory provisions addressing interstate transport. Petitioner also relied on the report of the Ozone Transport Assessment Group and EPA's November 1997 SIP call proposal.

According to the court, the principal issue was whether EPA erred in approving the redesignation request because the relevant provisions of the Ohio SIP, which had been approved in 1980, did not expressly prohibit sources within the state from "contribut[ing] significantly to nonattainment" in other states in accordance with section 110(a)(2)(D) of the Act, as amended in 1990. EPA maintained that its policy was not to revisit prior SIP approvals when considering redesignation requests and that, in any event, the Agency had previously interpreted the language of the Ohio SIP, which prohibits sources from "prevent[ing]" nonattainment in other states, as being consistent with the amended statutory language. The court concluded that EPA's approach to interstate transport issues was reasonable in this case and that the redesignation decision should not be vacated.

PSD Requirements

In re: Maui Electric Company, PSD Appeal No. 98-2 (EAB, Sept. 10, 1998).

EPA's Environmental Appeals Board (EAB) upheld the issuance of a PSD permit against contentions that the permit issuer should have included more demanding "best available control technology" (BACT) requirements. In so ruling, the EAB confirmed that a particular technology must be both "technically feasible" and "available" in order to constitute BACT.

The case involved a challenge to a PSD permit that would allow the Maui Electric Company (Maui) to expand an existing electric generating station. The permit specified that the use of fuel oil no. 2 was BACT for control of SO_2 emissions and that water injection was BACT for control of NOx emissions. The permit had been

issued by the State of Hawaii pursuant to authority delegated to it by EPA. Waimana Enterprises, a competitor of Maui, appealed the State's issuance of the permit and contended that BACT should be the use of naphtha fuel and selective catalytic reduction (SCR) for control of SO_2 and NOx emissions, respectively.

On appeal, the EAB rejected Waimana's contention that the SO_2 BACT determination was improper because a report prepared by the State had indicated that use of naptha fuel was technically feasible for the generating system to be installed by Maui. The Board, relying upon EPA's 1990 Draft NSR Manual, ruled that the permit issuer must consider *both* the technical feasibility *and* the availability of a given technology in determining whether it constitutes BACT. It further concluded that the State's determination that the long-term availability of naptha fuel was "questionable" was not clearly erroneous and therefore that the State's permitting decision must be upheld in this respect.

With regard to BACT for control of NOx emissions, the EAB ruled that the State had not erred in allowing Maui to obtain a permit for only the first phase of the project and not including a requirement in the permit for more stringent BACT in the second phase of the project. The Board also rejected the contention that vendor guarantees were sufficient to show that SCR was BACT for the "simple cycle" operation mode to be employed by Maui for the turbines in question. It upheld the State's conclusion that SCR would not be appropriate for Maui's project because the exhaust temperatures of simple cycle turbines, like those of Maui, are generally high and outside the operating range of SCR units.

In re: Hawaiian Electric Light Co., PSD Appeal Nos. 97-15 through 97-23 (EAB, Nov. 25, 1998).

EPA's Environmental Appeals Board (EAB) rejected arguments that a PSD permit should be overturned because, among other things, the netting analysis was allegedly invalid. The EAB also rejected contentions that BACT for control of SO_2 emissions was not sufficiently stringent and rejected, in part, attacks on the air quality and source impact analysis. The case involved nine consolidated challenges to a PSD permit issued by the Hawaii Department of Health (DOH) that would allow the Hawaiian Electric Light Company (HELCO) to expand an existing generating station.

First, the EAB concluded that DOH's determination that the project did not constitute a "major modification" for NOx emissions was not clearly erroneous. That determination was based on netting the project's NOx emission increases with certain "creditable contemporaneous" NOx emission decreases resulting from HELCO's agreement to shut down or reduce operations of certain diesel generators. In upholding the netting analysis, the EAB rejected petitioners' arguments that DOH failed to follow PSD procedures, that the project's potential effects on other NOx emission units were not evaluated, and that emission reductions resulting from the shutdown and curtailment of other units could not be considered in netting because they allegedly were not federally enforceable. In addition, the EAB rejected broad contentions that HELCO's use of the netting approach in this case constituted an "abuse" of the PSD program.

Second, the EAB ruled that DOH's conclusion that use of no. 2 fuel oil, rather than naphtha, constituted BACT for SO_2 emissions was not clearly erroneous. The EAB agreed with DOH that, although use of naphtha was "technically feasible," there are significant questions regarding its long-term availability.

Third, with regard to the Petitioners' challenge to DOH's air quality and source impact analysis, the EAB denied review in part and granted review in part. The EAB rejected claims that meteorological data were insufficient, that emissions increases from other sources had not been considered, and that the modeling program

was improper. However, the EAB remanded the permit to DOH for further proceedings because it concluded that DOH had not adequately addressed comments that data for SO_2 and particulate emissions were out-of-date and that data for ambient concentrations of CO and ozone were measured at an unrepresentative location.

SIP Provision Enforcement

United States v. Pan American Grain Manufacturing Co., 29 F. Supp. 2d 53 (D. P.R. 1998).

A federal district court dismissed claims in an EPA enforcement action after concluding that the Agency's notices of violation (NOVs) failed to provide adequate notice of the alleged violations. The decision confirms that general allegations in an NOV that a SIP provision has been violated are not sufficient to satisfy the Clean Air Act's notice requirements. Instead, an NOV must set forth specific allegations regarding the violations in question and where they occurred.

The case involved alleged violations of Puerto Rico's SIP provisions at three separate facilities of the company, including, in relevant part, allegations that the company had failed to conduct required performance tests of baghouses. EPA sent NOVs to the company alleging numerous violations of SIP provisions and subsequently filed a civil enforcement action in federal district court pursuant to section 113(b) of the Act. The company moved for summary judgment on the claims involving testing of the baghouses, arguing that the NOVs had not provided adequate notice of the violations.

The district court ruled that the NOVs had not satisfied section 113(b) of the Act, which requires that EPA provide notice of alleged violations at least 30 days before filing a civil enforcement action. The court stated that "[i]t is not enough to put the party on notice. EPA has to affirmatively allege what are its findings and violations." The court found that the NOVs in this case contained general allegations that the company had violated the testing regulation in question and that the only finding which mentioned the regulation referred to only one of the three facilities. From this, the court concluded that the company had inadequate notice that EPA believed violations of the baghouse testing requirement had occurred at all three facilities. As the court explained, "[c]ourts cannot allow the EPA to circumvent the requirements of specificity by including catch-all allegations that give Defendants no indication of the rules they are allegedly violating."

Statute of Limitations

United States v. Telluride Co., 146 F.3d 1241 (10th Cir. 1998).

The U.S. Court of Appeals for the Tenth Circuit held that the general federal statute of limitations does not apply to an EPA enforcement action seeking injunctive relief to remedy past statutory violations. That provision – 28 U.S.C. § 2462 – states that an action "for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise" will be barred unless it is commenced "within five years from the date when the claim first accrued." The appellate decision reversed a prior district court decision that had interpreted § 2462 as governing requests for injunctions as well as requests for monetary penalties. *United States v. Telluride Co.*, 884 F.Supp. 404 (D. Colo. 1995). Although the case arose under the Clean Water Act, EPA will likely attempt to rely on the general principles underlying the Tenth Circuit's decision in Clean Air Act enforcement cases as well.

This case involved an enforcement action in which EPA alleged that the Telluride Company had illegally filled certain wetlands. EPA sought civil penalties as well as an injunction requiring the company to restore the wetlands or create new wetlands to replace those that could not be restored. The federal district court ruled that § 2462 barred EPA from obtaining any monetary or injunctive relief for those wetlands that had been filled more than five years before EPA had filed its complaint. EPA appealed the district court's decision that § 2462 applied to its request for an injunction.

On appeal, the Tenth Circuit agreed with the company as an initial matter that § 2462 applies to both monetary and non-monetary penalties. The court then determined that the primary question before it was whether the injunctive relief requested by EPA constituted a "penalty" under § 2462. In this regard, the court sought to determine whether EPA was seeking compensation that was unrelated to, or in excess of, the damage allegedly caused by the company. The court concluded that the injunction requested in this case was remedial in nature because EPA sought only to restore wetlands or create replacement wetlands, not to punish the company. Therefore, the appellate court reversed the district court's ruling that § 2462 barred the injunctive relief requested by EPA. At the same time, the decision implicitly recognized that, under different circumstances, an injunction could entail such far-reaching relief that it would constitute a "penalty" for purposes of the statute of limitations.

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