

*Environment—Citizen Suits***Water Act Citizen Suit Against Coal Mine
'Not Correctly Decided,' Law Professor Says**

A Clean Water Act citizen suit against an Alabama coal mine operator should have been reinstated by the U.S. Court of Appeals for the Eleventh Circuit, an environmental law professor told BNA Nov. 22, citing “unusually clear” language in the statute (*Black Warrior Riverkeeper, Inc. v. Black Warrior Minerals, Inc.*, 2013 BL 315036, 11th Cir., No. 12-15409, 11/13/13).

The Eleventh Circuit, in an opinion by Judge William H. Pryor Jr., found the act’s citizen suit provision allows citizens to sue permit holders for violations of the permit if the permit covers the alleged discharges, and that an exception to the notice period doesn’t apply to enforcement of new source performance standards incorporated into a permit. The plaintiffs alleged new source performance standards violations, but not permit violations.

Congress provided an exception to the citizen suit waiting period “because new sources and toxic pollutants are held to more requirements under the Act generally,” Professor Linda A. Malone, William and Mary Law School, Williamsburg, Va., said in an e-mail. “In those two situations, proceeding ‘immediately’ against violators is a higher priority than deferral to EPA or state enforcement.”

Counsel for the defendants said the court correctly found that the citizen group is not entitled to any special exception.

“The significance of the decision is simply that Clean Water Act plaintiffs will have to continue to follow the statutory notice requirements,” Stephen Gidiere of Balch & Bingham LLP, Birmingham, Ala., told BNA in a Nov. 22 e-mail. “Every other group follows the rules,” and this group will have to follow them too, he said.

Whether a citizen may evade the waiting period and sue a permit holder for violations of the new source performance standards when they are incorporated in the permit was an issue of first impression before the Eleventh Circuit.

Suit Filed 11 Days After Notice. In 2008, the Alabama Department of Environmental Management (ADEM) issued Black Warrior Minerals Inc. a permit for its Fleetwood coal mine to discharge into Hurricane Creek un-

der the National Pollutant Discharge Elimination System. The permit incorporates performance standards promulgated by the Environmental Protection Agency for “new source coal mines.”

On Sept. 2, 2011, several citizens—Black Warrior Riverkeeper Inc., Friends of Hurricane Creek, John Wathen and Nelson Brooke—served Black Warrior Minerals and government authorities with notice of alleged violations of both the new source performance standards and the mine’s NPDES permit.

Eleven days after providing notice, the citizens sued Black Warrior Minerals under the citizen suit provision of the Clean Water Act. The suit alleged violations of the new source performance standards, but didn’t allege that Black Warrior Minerals violated its permit—allegations that, under the statute, would have required the citizens to wait 60 days before filing suit.

The district court found that the liability of a permit holder must be determined in light of the conditions of its permit. The plaintiffs’ suit for violations of the new source performance standards was inappropriate, the court said.

Thus, it granted summary judgment in the citizen suit in favor of Black Warrior Minerals because the environmental groups sued before the 60-day waiting period expired.

‘Novel Complaint.’ Riverkeeper argued that the plain language of the citizen suit provision allows them to sue a permit holder for violations of the new source performance standards, for violations of permit conditions or for both kinds of violations.

Black Warrior Minerals argued that the permit defines a discharger’s obligations under the act, and a citizen must sue a permit holder for violations of the permit’s conditions.

The appeals court agreed with Black Warrior Minerals, finding when the act is considered as a whole, the citizen suit provision requires an allegation that the permit holder violated its permit if the permit covers the alleged discharges.

“This citizen suit against a permit holder, if allowed, would disrupt the statutory scheme for the enforcement of permits,” the court said. Allowing a private party plaintiff to avoid the waiting period “would both undermine the overarching permitting scheme and nullify the statutory preference for governmental enforcement.”

“The novel complaint filed in this case is a thinly veiled attempt to beat the State of Alabama to the courthouse,” the court said.

The court relied on *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200 (1976), for the proposition that citizen suits against permit holders must allege violations of the discharger’s permit.

William and Mary’s Malone was critical of the court’s reliance on the Supreme Court case, saying the “decision and its language, whether a holding or dicta, was addressing an entirely different and unrelated issue under the Act as to whether a federal discharger had to obtain a state permit.”

Not All Programs Created Equal. Eva Dillard, staff attorney for Black Warrior Riverkeeper, Birmingham, Ala., told BNA in a Nov. 21 e-mail that the group tried the creative approach of suing under the new source performance standards because ADEM “is a ‘bare bones’ agency by deliberate legislative design.”

“In many if not the majority of states, it will be more advantageous for litigants to proceed under a permit, because most states go well beyond the baseline new source performance standards that were incorporated by the permit in our case,” she said. “States have the option of adopting stricter standards and many do; unfortunately, all state programs are not created equal.”

“ADEM was formed to be a ‘management’ agency to expedite the permitting of industry and keep EPA out of the state. In Alabama it is to a defendant’s advantage to solicit weak enforcement by ADEM—and that is what typically occurs to block more stringent citizen enforcement.”

Dillard said the plaintiffs read the exception to allow direct enforcement of the new source performance standards if the state is not doing its job. “And here, that is precisely the case,” she said.

“Two years after we filed this action, ADEM has yet to impose any meaningful consequences and the coal

mine in the underlying case has continued to experience NSPS violations.”

Exceptions Included for a Reason. “Unlike the original Clean Air Act, the 1970 Clean Water Act required from its inception that sources have permits for any point source discharges into navigable waters,” Malone said.

“Therefore there is no question that the exceptions to the waiting period were provided with full knowledge that point source dischargers would, in most circumstances other than blatant non-compliance with the requirement of having a permit, be operating under a permit incorporating the new source requirements.”

She acknowledged that waiting 60 days to file a citizen suit might seem insignificant, but said that might not be true on a practical level.

“Any environmental group committed to bringing suit will necessarily seek vigorous compliance. EPA, or a state agency, may have a variety of pressures and considerations in a given case even if either does file suit. Permit holders might choose to negotiate with EPA or a state agency during the waiting period rather than face a citizens’ suit as well,” she said.

Judges R. Lanier Anderson III and Jane A. Restani, sitting by designation from the U.S. Court of International Trade, also served on the panel.

Eva L. Dillard, Black Warrior Riverkeeper Inc., Birmingham, Ala., and David A. Ludder, Tallahassee, Fla., represented the environmental groups.

Ronald Bruce Barze Jr., Thomas Lee Casey III, Philip Stephen Gidiere III and Jason Brent Tompkins, Balch & Bingham LLP, Birmingham represented Black Warrior Minerals.

BY PERRY COOPER

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