

of the state other than the site in question. Specifically, the court found that 485 riparian miles were available in the state for a facility of the kind proposed and that a smaller plant could be built on the proposed site. Thus, the court concluded, the North Carolina Program does not effect a total ban on the waste treatment facilities.

JIM SIEMENS

*D. The Clean Water Act*

*Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 933 F.2d 124 (2d Cir. 1991)

Atlantic States Legal Foundation (ASLF) appealed the lower court's dismissal of their citizen's suit brought against Eastman Kodak Company (the Company), under section 505 of the Federal Water Pollution Control Act (FWPCA), because the Company entered into an agreement with the State of New York to pay civil and criminal fines in exchange for release from further liability for the same cause of action.

The Second Circuit upheld the district court's ruling on the grounds that although ASLF could not pursue their cause of action merely to challenge the settlement terms reached by the Company and the State, ASLF was entitled to attorney's fees as a prevailing party.

The court held that a state enforcement proceeding, which caused violations to cease, would eliminate the basis for the citizen's suit. The suit must supplement, not simply supplant, state enforcement of the FWPCA. Therefore, the court concluded, there must be a "realistic prospect" that the violations would recur notwithstanding the settlement.

Attorney's fees were awarded because the court found that the existence of the citizen's suit was a motive for the settlement agreement, and that the citizen suit plaintiff was therefore a prevailing party.

RUTH WALKER

*Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055 (5th Cir. 1991)

Plaintiffs filed suit against a cattle feedlot for civil penalties

and injunctive relief for violations of the Clean Water Act. Due to heavy rains during a three month period, the defendant discharged wastewater from one of its holding ponds into a tributary. After the discharge and before the trial, the defendant improved its wastewater disposal system. The district court held that the defendant was excepted from the National Pollutant Discharge Elimination System (NPDES) permit requirements and dismissed the suit for a lack of standing. The plaintiffs appealed arguing that the district court erred in holding that the defendant was excepted from the NPDES permit requirements and erred in holding that plaintiffs did not have standing to bring suit.

On de novo review, the Fifth Circuit Court of Appeals reversed the district court's dismissal. The circuit court first held that the applicable effluent limitation guideline set forth in 40 C.F.R. § 412.13(b) is one of the basic criteria for issuing a permit and does not provide an exception to the NPDES permit requirements. Thus, because the defendant did not have a NPDES permit, its action amounted to a continuous violation of the Clean Water Act.

The court also held that the plaintiffs had standing to bring suit because standing is determined as of the date of the filing of the complaint. The defendant's compliance with the Clean Water Act subsequent to the filing of the complaint was irrelevant in determining standing.

The court further held that the defendant's postdischarge improvements to its wastewater disposal system did not moot the plaintiffs' action because the defendant could not meet the burden of showing that it was absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. Furthermore, the court found that the plaintiffs met their burden of proving a continuous or intermittent violation of the Clean Water Act by the defendant under the two-prong test established in *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation, Inc.*, 890 F.2d 690 (4th Cir. 1989). Since the defendant never obtained a permit, the plaintiffs met the first prong of the test by showing that this was a continuous violation. The plaintiffs also met the second prong of the test by proving a continuing likelihood of intermittent or sporadic discharges.

TOMMY MASON