

NOTES

Sierra Club v. Lujan: SOVEREIGN IMMUNITY AND THE CLEAN WATER ACT

The United States Department of the Interior (DOI) and its Bureau of Reclamation (the Bureau) own and operate the Leadville Tunnel in Lake County, Colorado. In 1975, the United States Environmental Protection Agency (EPA) issued DOI and the Bureau a permit for the Leadville Tunnel under the National Pollution Discharge Elimination System (NPDES). The permit set effluent limitations on the drainage from the tunnel and required the Bureau to submit to EPA a schedule for compliance. On January 13, 1989, the Sierra Club and the Colorado Environmental Coalition filed a citizen's suit in federal district court alleging that DOI and the Bureau had violated the 1975 permit. The plaintiffs requested a mandatory injunction, civil penalties, and declaratory relief. Averring that the Clean Water Act does not waive sovereign immunity for the assessment of civil penalties, DOI and the Bureau moved to dismiss the claim for civil penalties, for lack of subject matter jurisdiction. In response, the plaintiffs moved for partial summary judgment on that issue. Finding that the Clean Water Act waives sovereign immunity and authorizes civil penalties, the district court granted the plaintiffs' motion for summary judgment and denied the defendants' motion to dismiss. The defendants brought an interlocutory appeal. The Tenth Circuit Court of Appeals affirmed the ruling of the district court and held that the Clean Water Act contains an express waiver of sovereign immunity which authorizes the assessment of civil penalties against federal agencies. *Sierra Club v. Lujan*, 931 F.2d 1421 (10th Cir. 1991), *petition for cert. filed*, (July 29, 1991)(No. 91-169).

Responding to the continued degradation of the nation's waters, Congress passed legislation, commonly called the Clean Water Act (CWA or the Act),¹ "to restore and maintain the chemical, physical, and biological integrity of the nation's

1. 33 U.S.C. §§ 1251-1387 (1988).

waters."² The CWA prohibits the discharge of a pollutant by any person unless authorized by specific sections of the Act.³ The Act provides for enforcement by EPA,⁴ the states,⁵ and citizens.⁶

The CWA mandates that, in addition to private parties, the federal government shall also be subject to pollution control.⁷ Specifically, section 1323(a) states, "Each department . . . shall be subject to and comply with, all . . . requirements . . . and process and sanctions respecting the control and abatement of water pollution"⁸ Federal liability for both process and sanctions and civil penalties is further clarified in section 1323(a).⁹ The remainder of that section provides,

[T]he United States shall be liable only for those civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court.¹⁰

Moreover, Congress explicitly authorized citizen suits against the United States to enforce the provisions of the Act.¹¹

The doctrine of sovereign immunity has its roots in the Supremacy Clause of the Constitution.¹² The United States, as sovereign, may not be sued without Congress' consent.¹³ Furthermore, the waiver of such immunity must be clear and express, not implied from vague language.¹⁴ In *Franchise Tax Board v. United States Postal Service*¹⁵ the Supreme Court held that the controlling factor in determining whether a waiver is clear and express is the "underlying congressional policy."¹⁶ Finally, if a clear waiver exists, it should not be "thwarted by an unduly restrictive interpretation."¹⁷

In *McClellan Ecological Seepage Situation v. Weinberger*,¹⁸

2. *Id.* § 1251(a).

3. *Id.* § 1311(a).

4. *Id.* § 1319(b), (g).

5. *Id.* § 1319(a).

6. *Id.* § 1365.

7. *Id.* § 1323(a).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* § 1365.

12. U.S. CONST. art. VI, cl. 2.

13. *Block v. North Dakota*, 461 U.S. 273, 287 (1983).

14. *Id.*

15. 467 U.S. 512 (1984).

16. *Id.* at 521.

17. *Canadian Aviator v. United States*, 324 U.S. 215, 222 (1945).

18. 655 F. Supp. 601 (E.D. Cal. 1986).

the Eastern District of California addressed the issue of sovereign immunity from the assessment of civil penalties under the CWA. In that case, plaintiffs brought suit against the Secretary of Defense alleging violations of the Resource Conservation and Recovery Act (RCRA)¹⁹ and the CWA, and sought various types of recovery including civil penalties. In examining CWA sections 1323 and 1365, the court was unable to find a clear waiver of sovereign immunity.²⁰ The court found section 1323 to be "a compilation of ambiguity,"²¹ stating, "it is not possible to find a clear meaning to CWA section 1323."²² Similarly, the court found the legislative history of the CWA inconclusive, and held that there was no waiver of sovereign immunity for civil penalties under section 1323 of the CWA.²³ Finally, the court looked at section 1365, the citizen suit provision of the CWA.²⁴ The court noted that the definition of "person" in the citizen suit provision includes the United States.²⁵ However, the court also pointed out that the United States was not included in the definition of "person" within the general definition section of the Act.²⁶ Because the civil penalties section²⁷ is subject to the general definitions, the court refused to find a clear waiver of sovereign immunity in section 1365.²⁸

Other courts considering the same issue, however, have reached the opposite conclusion. In *Ohio v. United States Department of Energy*,²⁹ the Sixth Circuit found a clear, concise and unambiguous waiver of sovereign immunity from civil penalties. The court reasoned that, "[s]ubsection C specifically states that sovereign immunity is waived for *any* sanction. Any reader would interpret this statement to subject the Department of Energy to civil penalties."³⁰ The court further noted that the legislative history of the CWA supports a reading which would allow civil penalties arising under federal law.³¹

19. 42 U.S.C. § 6961 (1988).

20. 655 F. Supp. at 604-05.

21. *Id.* at 604.

22. *Id.*

23. *Id.* at 604-05.

24. *Id.* at 605.

25. *Id.*

26. *Id.*

27. 33 U.S.C. § 1319(d).

28. *McClellan*, 655 F. Supp. at 605.

29. 904 F.2d 1058 (6th Cir. 1990).

30. *Id.* at 1060 (emphasis in original).

31. *Id.* at 1061.

Similarly, in *Metropolitan Sanitary District of Greater Chicago v. United States Department of Navy*,³² the Northern District of Illinois found a waiver of sovereign immunity for civil penalties. In that case, Metropolitan Sanitary District brought suit against the Department of Navy for failure to comply with a sewer discharge permit. The court held that "1323(a) communicates a clear congressional intent to provide a sweeping waiver of sovereign immunity that renders federal facilities . . . liable . . . for civil penalties."³³ In addition, the court determined that the legislative history supported allowing civil penalties.³⁴

Finally, in *State of California v. United States Department of Navy*,³⁵ the Ninth Circuit, while not specifically reaching the issue of civil penalties in citizen suits, supported a reading of the statute which provided that sovereign immunity for civil penalties had been waived.³⁶ In that case the court dismissed California's claim for civil penalties for alleged violations of state water pollution laws but conceded that the CWA allows EPA to seek civil penalties.³⁷

In the noted case, the issue before the Tenth Circuit Court of Appeals was whether the CWA provided a waiver of sovereign immunity, which expressly authorizes the courts to assess civil penalties in citizen suits against federal agencies for violations of the Act.³⁸ Although the defendants conceded that section 1323(a) subjected the federal government to the provisions of the CWA, they contended that the waiver of sovereign immunity regarding the "requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution" does not authorize civil penalties against the federal government because such penalties are not "requirements" or "sanctions" under the Act.³⁹ Thus, the court focused on whether "the term 'sanctions' in 'process and sanctions' set forth in section 1323(a) encompass[ed] 'civil penalties.'"⁴⁰ The court found the definition of "sanction" to be "[t]hat part of a law which is designed to secure enforcement by imposing a pen-

32. 722 F. Supp. 1565 (N.D. Ill. 1989).

33. *Id.* at 1570.

34. *Id.* at 1570-71.

35. 845 F.2d 222 (9th Cir. 1988).

36. *Id.* at 224.

37. *Id.*

38. *Sierra Club v. Lujan*, 931 F.2d 1421, 1422 (10th Cir. 1991).

39. *Id.* at 1425.

40. *Id.*

alty for its violation."⁴¹ Moreover, the court pointed out that, "[t]he Supreme Court recently has held that civil penalties authorized by the CWA may be sanctions."⁴² Accordingly, the court concluded that "sanctions authorized by section 1323(a) are also penalties."⁴³

Examining the jurisprudence in the area, the court observed that both the majority and dissenting opinions of the Sixth Circuit in *Ohio*⁴⁴ agreed that sovereign immunity for civil penalties had been waived.⁴⁵ The court noted that, except for the decision of the Eastern District of California in *McClellan*,⁴⁶ the position was well supported.

The Tenth Circuit refused to accept an overly restrictive reading of section 1323.⁴⁷ Finding an express authorization for courts to assess civil penalties under section 1323, the court declined the opportunity to "import [total] immunity back into a statute designed to limit [governmental immunity]." ⁴⁸ Instead, the court determined that "section 1323(a) expressly authorizes the courts to assess civil penalties against federal agencies for violations of the CWA"⁴⁹ and stated "[n]ot only does the term 'sanctions' encompass civil penalties, but this section also does not limit the use of such penalties merely to ensure compliance with judicial process."⁵⁰

Regarding the waiver of sovereign immunity under the citizen suit provision, the court rejected appellant's assertion that the government was excluded from the assessment of civil penalties based on the general definition of "person" in the Act.⁵¹ The court observed that "this general definition of 'person' conflicts with the specific definition of 'person' in the citizen suits provision . . . [which allows] private citizens to file complaints 'against any person (including (i) the United States).' "⁵² The

41. *Id.* at 1426 (quoting BLACK'S LAW DICTIONARY 1203 (5th ed. 1979)).

42. *Id.* (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 53 (1987) and *United States v. Ward*, 448 U.S. 242, 249 (1980)).

43. *Id.*

44. *Ohio v. United States Dep't of Energy*, 904 F.2d 1058 (6th Cir. 1990).

45. *Id.*

46. *McClellan Ecological Seepage Situation v. Weinberger*, 655 F. Supp. 601 (E.D. Cal. 1986).

47. *Lujan*, 931 F.2d at 1426-27.

48. *Id.* at 1426 (quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955)).

49. *Id.* at 1426-27.

50. *Id.* at 1427.

51. 33 U.S.C. § 1362(5).

52. *Lujan*, 931 F.2d at 1427 (quoting 33 U.S.C. § 1365(a)).

court found the specific definition "trumped" the general, as evidence of Congress' intent to consent to civil penalties.⁵³ Finally, although the court reasoned that, because there was an express waiver, resort to legislative history on the issue was unnecessary,⁵⁴ the court nonetheless noted that the legislative history of the CWA supported a waiver.⁵⁵

The Tenth Circuit sensibly interprets sections 1323(a) and 1365 of the CWA to contain a waiver of sovereign immunity which authorizes the assessment of civil penalties against federal agencies for violations of the CWA. In addition, by recognizing a waiver in the CWA citizen suit provision, the *Lujan* court opens the door for civil penalties in citizen suits under other environmental statutes.

The *Lujan* court's decision is a reasonable interpretation of the statute for four reasons. First, as the Tenth Circuit points out, the Supreme Court in *Gwaltney of Smithfield Ltd. v. Chesapeake*, held that civil penalties authorized by the CWA may be considered sanctions.⁵⁶ Thus, because section 1323(a) specifically subjects the United States to "process and sanctions," the United States must be liable for civil penalties. Second, "[i]t is axiomatic that all parts of an Act, 'if at all possible, are to be given effect.'"⁵⁷ If the Tenth Circuit had not found a waiver of sovereign immunity, parts of section 1323(a) would be rendered meaningless. For example, section 1323(a) states, "the United States shall be liable only for those civil penalties arising under federal law or imposed by a state or local court to enforce an order or the process of such court."⁵⁸ While the exact meaning of this sentence remains unclear as to state sanctions, it could not more clearly provide liability for civil penalties arising under federal law. Any interpretation which prevents imposition of civil penalties would therefore necessarily deprive a part of the CWA of meaning. Third, the *Lujan* court conforms to the standard rule of statutory construction by adopting the specific definition of the term "person" from the citizen suit provision in lieu

53. *Id.*

54. *Id.* at 1427.

55. *Id.*

56. *Id.* at 1426 (citing *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 53 (1987)).

57. *Fed. Aviation Admin. Adm'r v. Robertson*, 422 U.S. 255, 261 (1975) (quoting *Weinberger v. Hynson, Wescott & Dunning*, 412 U.S. 609, 633 (1973)).

58. 33 U.S.C. § 1323(a).

of the general definition of the same term.⁵⁹ Because the citizen suit provision specifically subjects the United States to liability for violations of the Act,⁶⁰ a finding of no liability would be inconsistent with this specific provision. Fourth, the legislative history of the CWA evinces an intent to subject the United States to all liability created by the Act. The Sixth Circuit, in the *Ohio* decision, previously relied in part on legislative history by holding that the CWA waived sovereign immunity for civil penalties.⁶¹ That court, as well as the *Lujan* court, was persuaded by the amendment to section 1323 of the Act, enacted by Congress following *EPA v. California*.⁶² The Supreme Court, in *California ex rel. State Water Resources Control Board*, narrowly interpreted the extent of the waiver of sovereign immunity under the CWA.⁶³ Congress responded by amending the CWA⁶⁴ to provide that federal facilities are subject to "all Federal, State, interstate, and local requirements . . . and process and sanctions."⁶⁵ The amendment, the Sixth Circuit stated, "clearly subjects federal agencies to civil penalties."⁶⁶

The only decision not in accord with the *Lujan* holding, on the issue of sovereign immunity for civil penalties under the CWA, is that of the Eastern District of California in *McClellan*.⁶⁷ In that case, the court ignored the statutory incongruity of finding no waiver of sovereign immunity. Instead, the court found that grammatical problems created ambiguities, and therefore, a waiver of sovereign immunity was improper.⁶⁸ In *McClellan*, the court extensively discussed the RCRA federal facilities provision⁶⁹ and stated that the CWA, "does not waive sovereign immunity for civil penalties for the same reasons dis-

59. See, e.g., *United States v. Piescon*, 695 F.2d 1236, 1243 (10th Cir. 1982).

60. 33 U.S.C. § 1365(a)(1).

61. *Ohio v. U.S. Dep't of Energy*, 904 F.2d 1058, 1061 (6th Cir. 1990).

62. 426 U.S. 200 (1976).

63. *Id.* at 227.

64. A Senate Committee report on the CWA Amendments of 1977 stated: "The act has been amended to indicate unequivocally that all Federal facilities and activities are subject to all of the provisions of State and local pollution laws. Though this was the intent of the Congress in passing the 1972 Federal Water Pollution Control Act Amendments, the Supreme Court, encouraged by the Federal agencies, has misconstrued the original intent." S. REP. NO. 370, 95th Cong., 1st Sess. 67, reprinted in 1977 U.S.C.C.A.N. 4326, 4392.

65. 33 U.S.C. § 1323(a).

66. *Ohio v. United States Dep't of Energy*, 904 F.2d 1058, 1061 (6th Cir. 1990).

67. 655 F. Supp. 601, 603-04 (E.D. Cal. 1986).

68. *Id.* at 604-05.

69. The RCRA federal facilities provisions, 42 U.S.C. § 6961, is more narrow than the Clean Water Act provision § 1323. Nancy E. Milsten, Note, *How Well Can States*

cussed in relation to RCRA."⁷⁰ For these reasons, the conclusion reached in *Lujan* is more credible than that of the *McClellan* court.

The *Lujan* decision also comports with the goals of the CWA. In enacting the CWA, Congress stated that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985."⁷¹ To this end, Congress provides for three levels of enforcement in the Act: federal, state, and citizen.⁷² Under this enforcement scheme, any of the parties may sue for violations of the Act, and citizens may commence actions against the Administrator to perform nondiscretionary duties.⁷³ To provide deterrence, violators of the Act are subject to criminal and civil penalties.⁷⁴ The *Lujan* court's recognition of a waiver of sovereign immunity for civil penalties provides deterrence against potential federal violations.

Undoubtedly, Congress intended the Administrator of EPA and the states to be the primary enforcers of the Act.⁷⁵ Section 1365(b) provides that a citizen must give notice before filing suit.⁷⁶ Only if the Administrator or the state refuses to act can the citizen commence the action.⁷⁷ Section 1365 also does not provide for criminal enforcement by citizens. In light of this "second class status," it is possible to view the *Lujan* decision as overreaching the role envisioned for citizen enforcement under the CWA. One could view civil and criminal penalties against the government in the same light, and, like the *McClellan* court, construe ambiguity in the waiver.⁷⁸ However, a limited citizen role does not serve to eliminate the discharge of pollutants into the navigable waters. First, states and EPA may not always zealously enforce the Act; second, undeniably the government is a large contributor to the nation's water pollution problems. Allowing citizens to pursue civil penalties, therefore, will pro-

Enforce Their Environmental Laws When the Polluter is the United States Government?, 18 RUTGERS L.J. 123, 130 (1986).

70. *McClellan*, 655 F. Supp. at 604.

71. 33 U.S.C. § 1251(a)(1).

72. 33 U.S.C. §§ 1319, 1365.

73. *Id.*

74. 33 U.S.C. § 1319.

75. See *California v. United States Dep't of Navy*, 631 F. Supp. 584 (N.D. Cal. 1986), *aff'd*, 845 F.2d 222 (9th Cir. 1988).

76. 33 U.S.C. § 1365(b).

77. *Id.*

78. *McClellan Ecological Seepage Situation v. Weinberger*, 655 F. Supp. 601, 604 (E.D. Cal. 1986).

vide enforcement where there previously was none, and provide incentive for a large polluter, the United States government, to comply with the Act. Finally, using standard rules of statutory construction, the Tenth Circuit found a waiver of sovereign immunity in the CWA. Because citizen suit provisions are included in approximately twelve environmental laws,⁷⁹ the *Lujan* holding may advise other courts considering the issue of waiver of sovereign immunity for civil penalties.

Sovereign immunity should not be dismissed as archaic. Even today, where the government seems to be involved in every facet of life, sovereign immunity serves the important function of insulating the sovereign from unwarranted liability which would prevent it from performing its function. However, where Congress has chosen to waive sovereign immunity, the judiciary should respect that waiver.

A persistent problem with recent federal environmental regulation is that a Congress controlled by one political party may pass legislation which EPA, in an administration controlled by the other political party, may not want to enforce. Compounding the problem is the deference given to agency discretion on judicial review.⁸⁰ The citizen suit mechanism has been an effective tool in enforcing congressional legislation. The *Lujan* decision to allow civil penalties against federal agencies may prove to be an important step towards achieving the goal of the Clean Water Act — clean water.

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79. Barry Breen, *Citizen Suits for Natural Resource Damages: Closing a Gap in Federal Environmental Law*, 24 WAKE FOREST L. REV. 851, 871 (1989). The provisions are: the Clean Air Act, 42 U.S.C. § 7604 (1988); the Federal Water Pollution Control Act, 33 U.S.C. § 1365; the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. § 1415(g) (1988); the Noise Control Act, 42 U.S.C. § 4911 (1988); the Endangered Species Act, 16 U.S.C. § 1540(g) (1988); the Deepwater Port Act, 33 U.S.C. § 1515 (1988); the Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (1988); the Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1988); the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (1988); the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659 (1988); the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046(a)(1) (1988); and the Outer-Continental Shelf Lands Act, 43 U.S.C. § 1349(a) (1988).

80. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 n.6, 865-66 (1984).

