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June v. Town of Westfield, 370 F.3d 255 (2d Cir. 2004)

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COURT REPORTS

FEDERAL COURTS

UNITED STATES CIRCUIT COURTS

SECOND CIRCUIT

June v. Town of Westfield, 370 F.3d 255 (2d Cir. 2004) (holding the maintenance exemption to the Clean Water Act applied to an embankment supporting a road for transit by motor vehicles, and road repairs of this nature, once completed, did not constitute a discharge for the purposes of an ongoing violation of the Clean Water Act and the Resource Conservation and Recovery Act).

Due to mass erosion, a portion of Mt. Baldy Road in the Town of Westfield, New York ("Town") was in danger of collapse. In 1997 and 1998, to shore up the embankment and alleviate this problem, the Town deposited dirt, gravel, sand, rocks, and cement in the area. This process resulted in an expansion of the embankment, as well as the partial filling of a gully containing water located directly below the embankment. Michael June brought a private citizen suit alleging the Town violated the Clean Water Act ("CWA") by: (1) discharging solid waste consisting of fill material into waters of the United States without a permit, and (2) discharging storm waters associated with industrial activity from a "point source" into navigable waters without a permit. The first charge related to the partial filling of the gully. The second charge related to the possible storm water runoff that could consist of the materials deposited by the Town to fix the embankment. June also alleged the Town violated the Resource Conservation and Recovery Act ("RCRA") by engaging in the open dumping of solid waste. He argued the dirt, gravel, sand, rocks, and cement deposited by the Town constituted solid waste for purposes of the RCRA. The United States District Court for the Western District of New York granted summary judgment for the Town on all issues, concluding that the actions of the Town fell within the section 1344(f) maintenance exemption of the CWA, and that June failed to show an ongoing violation of either the CWA or the RCRA. June appealed to the United States Court of Appeals for the Second Circuit.

June argued on appeal that the maintenance exemption to the CWA did not apply, because no pre-existing structure upon which the Town could perform maintenance existed, and the Town's actions, absent a pre-existing structure, constituted ongoing violations of both the CWA and the RCRA. The maintenance exemption allows for the

completion of maintenance of transportation structures without first obtaining a permit. Precedent demonstrated the narrow construction of this exemption with the apparent purpose of allowing routine government maintenance of transportation, public water-supply, and similar facilities without the cost, use of time, and consequent danger to people and facilities that may occur if a permit was required. The court concluded the Town's actions fell within the maintenance exemption, construing an embankment that supported a road for transit by motor vehicles as a "transportation structure." The court further noted that "maintenance," under this exemption, did not include any modification that changed the character, scope, or size of the original fill design. However, the court did not rule on this issue since June did not raise it or discuss the federal regulation supporting it either in the district court or on appeal. The court, thus, affirmed the district court's grant of summary judgment on June's CWA claims because June only challenged whether the Town qualified for the maintenance exemption, and the court found that it did.

Finally, in regards to the RCRA claim that the Town engaged in the dumping of solid waste, the court also granted summary judgment in favor of the Town. The court relied on *S. Rd. Assocs. v. Chesapeake Bay Found., Inc.* to conclude the RCRA prohibited the act of introducing substances that caused "exceedances," but did not prohibit the actual pollution of the toxic substance in the environment. The court also determined a "historical act" did not support a claim under the RCRA. The court held June's allegations were "historical acts," as he failed to show the Town was continuing to introduce substances that made the exceedances worse at the time June filed his lawsuit.

Accordingly, the court affirmed the district court's grant of summary judgment for the Town on all issues.

Michael O'Loughlin

SIXTH CIRCUIT

Ailor v. City of Maynardville, 368 F.3d 587 (6th Cir. 2004) (holding that a citizen suit under the Resource Conservation and Recovery Act, and the Clean Water Act is moot if previous enforcement actions remedied the alleged injuries).

The City of Maynardville ("City") owned and operated a sewage treatment plant on Bull Run Creek in Tennessee. Betty Lynch ("Lynch") and Harry Ailor ("Ailor") both owned land along the creek downstream from the plant. Between January 1991 and December 1992, the plant repeatedly violated its National Pollution Discharge Elimination System ("NPDES") permit due to overflows and discharges of raw sewage and other pollutants into Bull Run Creek, inducing the Tennessee Department of Environment and Conservation ("TDEC") to issue an Order and Assessment in November 1993 against the City.