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## Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169 (D. Idaho 2001)

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only covers hazardous substances that are considered “waste.” Caprio failed to state that the sludge that Upjohn was releasing into the environment was “waste” or that the expulsion of the sludge was a “release into the environment.” The court also dismissed the third negligence count against Upjohn, finding that under section 52-577 of the Connecticut General Statutes (“C.G.S.”), Upjohn’s activities “did not involve the release of hazardous material from industrial waste streams or toxic waste dumps in the ambient environment that would potentially affect groundwater and drinking water.”

Caprio then filed a motion seeking relief from the dismissal of counts two and three based on newly discovered evidence supporting allegations that the hazardous material was in “waste” form. The district court granted Caprio’s motion and ordered Caprio to file an amended complaint stating that Caprio brought the action under C.G.S. section 52-577 of CCWA. The amended complaint alleged that Upjohn violated the CCWA by “releasing into the environment the sludge from an industrial waste stream or toxic waste dump in a manner that would potentially affect ground water and drinking water as well as ambient air, land surfaces and surface waters.”

Upjohn claimed that this amended complaint failed to identify a legal basis and that there was no right to a private action under C.G.S. section 52-577 of the CCWA. Caprio countered that his second cause of action alleged negligence per se based on Upjohn’s violation of the standards set forth under the Connecticut Water Pollution Control Act (“CWPCA”). CWPCA states that the “pollution of the waters of the state is inimical to the public health, safety and welfare of the inhabitants of the state” and that “no person or municipality shall cause pollution of any of the waters of the state or maintain a discharge of any treated or untreated wastes.”

The court found that Caprio, as a resident of Connecticut, was within the class of persons that the statute was intended to protect and that Caprio’s allegations established that he was a potential victim of pollution or hazardous waste discharged into the water of Connecticut. Therefore, this court dismissed Upjohn’s motion to dismiss the second cause of action.

*Colleen M. Cooley*

**Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169 (D. Idaho 2001)** (holding that “navigable waters” as defined in the Clean Water Act (“CWA”) include non-navigable waters that are tributary to navigable waters and that the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States).

The Idaho Rural Council (“IRC”) brought this action against Jacob and Henry Bosma (“Bosmas”), owners and operators of Grand View

Dairy ("Dairy"), for violating provisions of the Clean Water Act ("CWA") and the Dairy's National Pollution Discharge Elimination System ("NPDES") permit, by polluting waters of the United States. To establish a viable claim based on CWA requirements, the claimant must allege that the adverse party discharged or added a pollutant to navigable waters from a point source. The parties stipulated that the Dairy constituted a point source under the CWA.

The Bosmas moved for summary judgment based on three factors: (1) the court lacked subject matter jurisdiction; (2) the IRC was unable to establish a viable claim under the CWA because the Butler and Walker Springs were not waters of the United States as there defined; and (3) the "diligent prosecution defense," and the doctrine of "unclean hands."

The Bosmas challenged the court's subject matter jurisdiction claiming that the IRC did not have standing and the case was moot. In addition, the Bosmas argued that Butler and Walker Springs were not waters of the United States as defined by the CWA. The court held that the IRC had standing because the pollution of the water directly affected members of the IRC. The court further held the case was not moot because the voluntary cessation of a challenged practice does not deprive a federal court of its right to determine the legality of the practice and the Bosmas were free to resume the behavior in the future if the court did not rule.

The court addressed the subject matter jurisdiction issue and whether the IRC stated a claim under the CWA with the same reasoning. The court followed the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* and *International Paper Co. v. Ouellette*. In these cases, the Supreme Court held that the term "navigable waters," as referred to in the CWA, and defined therein includes "almost any body of surface water that might affect interstate commerce," as well as "at least some waters that are not navigable in the classical sense, such as non-navigable tributaries and streams." The court reasoned that Butler and Walker Springs were sufficiently connected through surface water to Clover Creek, a navigable stream, as to fall within the definition of waters of the United States.

The Bosmas also protested the IRC's inclusion of pollution resulting from the hydrological connection between Butler and Walker Springs and groundwater. The Bosmas argued that such a connection cannot lead to a violation of the CWA. After examining the legislative history and intent behind the enactment of the CWA, the court held that Congress did not intend to exclude regulation discharges into hydrologically connected groundwater which adversely affect surface water. Using this reasoning, the court held that the CWA extends federal jurisdiction over groundwater that was hydrologically connected to surface waters that are themselves waters of the United States. The court emphasized that it would not be sufficient for the IRC to only allege groundwater pollution and then to assert a general hydrological connection between all waters. The court

held that the IRC must trace the pollutants from their source to surface waters in order to state a claim under the CWA.

Finally, the court held that the affirmative defenses of diligent prosecution and the doctrine of unclean hands were inapplicable for the Bosmas.

*Sarah A. Hubbard*

**United States v. Krilich, 152 F. Supp. 2d 983 (N.D. Ill., 2001)** (holding Krilich's ultra vires arguments, as well as other decree modification arguments were insufficient to warrant a motion to vacate or modify a consensual decree).

In 1992, the parties to the case entered into a consent decree regarding violations of the Clean Water Act ("CWA"). Following this, the United States contended that Krilich violated decree provisions on part of the property subject to the decree. The government presented the violation on stipulated and asserted facts. The trial court held that Krilich violated decree mitigation plan deadlines on the Royce Property. The court issued a penalty, which was upheld in a 1997 appeal. In 1998, Krilich moved to bar enforcement of the penalty pursuant to Federal Rule of Civil Procedure 60(b). In so doing, Krilich argued the court lacked jurisdiction to enforce the mitigation plan deadlines. The court denied relief. Krilich appealed, but the court held that Krilich consented to the jurisdiction of the court by entering the 1992 decree.

Krilich brought this motion in February 2001 on two bases. First, Krilich argued that the Supreme Court opinion in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* warranted vacation of the decree. Second, Krilich asserted that, in light of the change of law represented in *Solid Waste*, the decree should have been modified pursuant to Federal Rule of Civil Procedure 60(b)(5) which provides relief from judgment or order made in mistake.

In *Solid Waste*, the United States Supreme Court held the Army Corps' "Migratory Bird Rule" unenforceable because it exceeded the authority granted to the Corps under the CWA. Krilich contended that *Solid Waste* made clear that none of the waters on the Royce property were navigable waters subject to the CWA. Krilich argued that because those waters were not under federal jurisdiction, the United States had no authority to enter into the decree.

The court denied Krilich's motion to vacate the consent decree. The argument that the decree was ultra vires, or void as beyond the United States authority failed for four reasons. First, the government agreement was not outside its authority because part of the property at issue in the decree, the Sullivan Lake area, contains wetlands subject to the CWA, even if Krilich's contentions regarding the Royce property were correct. Second, if the government had gone beyond its authority, that would not void the judgment as it would void a