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## United States v. Krilich, 152 F. Supp. 2d 983 (N.D. I., 2001)

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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

contract. Third, Krilich was bound by the stipulated facts used in forming the decree, specifically the stipulation that the wetlands then at issue were “waters of the United States.” Finally, the court held that the motion was not timely. Each of these four failures was adequate on its own for the court to deny Krilich’s motion to vacate the decree.

Krilich next argued for modification of the decree pursuant to Federal Rule of Civil Procedure 60(b)(5). This rule provides that a judgment may be modified or vacated if “a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.” The court held that this provision was not applicable here. The provision was limited only to judgments that were the basis of issue or claim preclusion, and not to cases relied upon as precedent. Furthermore, the law had not been so changed by *Solid Waste* that equity demanded the opening of the decree; Krilich’s motion was therefore denied.

*Erika Delaney-Lew*

**Mississippi River Revival, Inc. v. Cities of Minneapolis and St. Paul, MN, 145 F. Supp. 2d 1062 (D. Minn. 2001)** (holding a violation of the Clean Water Act would compel no further action and do nothing to redress injuries given the improbability of future violations, and a statutory bar against recovering retroactive penalties in citizen suits).

In an effort to improve the natural environment of the Mississippi River, a group of environmental organizations (“Organizations”), sued the cities of St. Paul and Minneapolis (“Cities”). The Organizations alleged the Cities’ discharge of storm water without a permit violated the Clean Water Act (“CWA”). The Cities owned storm drains, which dated back to the nineteenth century and could not be shut off. The drains prevented surface water from building up by directing rain and melted snow through a series of channels into the Mississippi River. Along the way, the water picked up pollutants such as lawn fertilizer, petroleum byproducts, animal waste, and garbage, which in turn impaired aesthetic and recreational interests on the Mississippi.

In order to comply with the CWA, the Cities needed a National Pollution Discharge Elimination System (“NPDES”) permit for their discharges. The Cities submitted timely applications to the Minnesota Pollution Control Agency (“MPCA”) for their NPDES permits in November 1992. Despite federal regulations requiring action on such application within one year, the MPCA did not take action for several years. While the applications languished, the Organizations filed suit against the Cities for discharging without a permit. The Organizations sought both declaratory and injunctive relief along with the assessment of civil penalties and an award of attorney’s fees. However, before judgment on that case, the MPCA issued the Cities NPDES permits and, thus, rendered the Organizations’ claim for injunctive relief