Water Law Review

Volume 5 | Issue 2 Article 35

1-1-2002

Sierra Club v. Whitman, 268 F.3d 898, (9th Cir. 2001)

Daniel C. Wennogle

Sierra Club v. Whitman, 268 F.3d 898, (9th Cir. 2001)

Chemetco further argued that its sentence violated the rule announced by the Supreme Court in *Apprendi.* In that case, the Supreme Court held any fact that increased the penalty for a crime *beyond the prescribed statutory maximum* had to be proven beyond a reasonable doubt. Chemetco claimed the CWA had a statutory maximum penalty: $50,000 per day of violation. The court held that even if Chemetco's argument was taken as true, it would not mandate a reversal because an *Apprendi* violation only occurred when the imposed sentence *exceeded* the prescribed statutory maximum. Chemetco had urged the district court to find seventy-one days of violation, which would yield a fine range of $342,500 to $3,425,000. The court's fine of $3,327,500 was less than what Chemetco contended was appropriate. The court of appeals concluded, therefore, even if the CWA had a statutory maximum penalty, the district court's fine did not exceed the limit ($3,425,000) in the present case. Accordingly, the court of appeals affirmed Chemetco's sentence.

Gloria M. Soto

NINTH CIRCUIT

Sierra Club v. Whitman, 268 F.3d 898, (9th Cir. 2001) (holding Environmental Protection Agency's refusal to take action against alleged violations of the Clean Water Act was discretionary and not subject to judicial review).

The Sierra Club and an individual citizen (collectively "Sierra Club") sued the Administrator of the Environmental Protection Agency ("EPA"), Christine Todd Whitman ("Whitman"), and others for failing to take action against the operators of a wastewater treatment plant allegedly polluting the Santa Cruz River in violation of the Clean Water Act ("CWA"). The CWA authorizes any citizen to sue the Administrator of the EPA for failure to perform any act or duty deemed "not discretionary" under the act.

The treatment plant ("Plant"), located in Southern Arizona, served a relatively small population of Americans and Mexicans, and had a National Pollution Discharge Elimination System ("NPDES") permit that expired in 1996. The Plant continued to operate and discharge pollutants thereafter while a new NPDES permit was on appeal. According to the lower court's findings from January 1995 to 2000, the facility violated its permit limitations 128 times.

The Sierra Club based its suit on the theory that the CWA required Whitman to find a violation and file suit against the Plant. It focused on language in the CWA that provides, whenever "the Administrator finds that any person is in violation" of permit conditions, the Administrator "shall issue an order requiring such person to comply. . . or . . . shall bring a civil action." The court pointed out the language

did not compel Whitman to find a violation, and Congress likely used the word *shall* as instructive rather than compulsory language.

The court criticized the Sierra Club's argument on three fronts. First, the court upheld the presumption that an agency's refusal to investigate or enforce statutory violations lies within that agency's discretion. Next, it reasoned the agency's limited resources, and the high number of potential investigations it could face, forced the Administrator to balance priorities and act only on serious violations. Finally, the court determined Whitman's decision not to take enforcement measure was of the type "typically committed to the agency's absolute discretion." Therefore, the court held "[when] used in a statute that prospectively affects government action" such as the CWA, the word *shall* sometimes carried only the connotations of the word "may," and did not mandate action.

In further justification of its ruling, the court noted the CWA's provision allowing citizens to file their own suits against polluters suggested no congressional intention to mandate government action for every alleged violation. The court also scrutinized the legislative history of the CWA for any indicia of a congressional intent to mandate EPA action via the act, but found no compelling evidence to suggest this. Accordingly, the court deemed the Sierra Club's claim outside the scope of judicial review and dismissed for lack of jurisdiction.

Daniel C. Wennogle

Natural Res. Def. Council v. United States EPA, 279 F.3d 1180 (9th Cir. 2002) (holding that the Environmental Protection Agency erred by not providing the public with notice of or the opportunity to comment on changes included in final permits to release bark and woody debris into marine waters when those changes were not a logical outgrowth of the draft permits).

The Natural Resources Defense Council ("NRDC") brought this action against the Environmental Protection Agency ("EPA") for failing to provide the public with notice of and the opportunity to comment on changes the EPA approved in two final National Pollutant Discharge Elimination System permits. The permits authorized Alaskan logging transfer facilities ("LTFs") to discharge bark and woody debris into marine waters. NRDC asserted that interested parties could not have reasonably anticipated the changes EPA approved in the final permits. The EPA claimed references within the draft permits were sufficient to put interested parties on notice of the changes.

The Alaskan timber industry transports most of its logs to markets through marine waters. During transportation, friction between logs, water, and the bottom of the water body causes the discharge of bark and woody debris. The debris, which can accumulate in significant