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Cmtys. for a Better Env't v. Tosco Ref. Co., No. C 00-0248, 2001 U.S. Dist. LEXIS 1161 (N.D. Ca. Jan. 26, 2001)

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incidental and occasional. Therefore, such activities did not meet the "usual and accustomed" standard the Boldt Decision used to adjudicate fishing grounds under the provisions of the treaties. Based on these findings, the appellate court affirmed the district court's grant of summary judgment to the Tribes.

Kathryn S. Kanda

UNITED STATES DISTRICT COURTS

Cmtys. for a Better Env't v. Tosco Ref. Co., No. C 00-0248, 2001 U.S. Dist. LEXIS 1161 (N.D. Ca. Jan. 26, 2001) (holding environmental organization's suit alleging Clean Water Act violations was moot because National Pollution Discharge Elimination System permit violations could not reasonably have been expected to recur after permit limits were revised and defendant sold refinery).

Tosco Refining Co. ("Tosco") owned and operated a refinery near Martinez, California ("Avon refinery"). In 1993, Tosco obtained a National Pollution Discharge Elimination System ("NPDES") permit from the California State Water Resources Board and the Regional Water Quality Control Board ("Regional Board") in order to discharge pollutants from the Avon refinery into the navigable waters of the San Francisco Bay. The Regional Board amended the permit in 1995 and again in February 2000, setting a limit for the allowable discharge of dioxins to a monthly average of 0.14 picograms per liter ("pg/l"). On June 21, 2000, the Regional Board again amended the effluent limitations for dioxins, raising it to 0.65 pg/l. On August 31, 2000, Tosco sold the Avon refinery to Ultramar Diamond Shamrock Corp. ("Ultramar"), and transferred the refinery's NPDES permit.

Community for a Better Environment ("CBE") alleged Tosco discharged dioxins from the Avon refinery at levels that exceeded 0.14 pg/l in violation of the NPDES permit and the Clean Water Act ("CWA"). CBE also asserted Tosco violated its dioxin monitoring, sampling, and reporting requirements established by the permits. Finally, CBE contended Tosco's dioxin emissions from the Avon refinery smoke stacks violated the California Water Code, and that the violations of the California Water Code and the CWA constituted an unfair business practice in violation of the California Business and Professions Code. Tosco filed a motion for summary judgment asserting the June 21, 2000 amendment to the permit's dioxin effluent limit and Tosco's sale of the Avon refinery eliminated Article III subject matter jurisdiction and rendered CBE's suit moot. CBE filed a cross motion for summary judgment.

The court determined Tosco bore the burden to establish CBE's suit was moot by showing it was absolutely clear the allegedly wrongful behavior could not reasonably recur. Tosco asserted it was absolutely

clear, given the new permit limit and the transfer of the facility and the permit, that the court could not reasonably expect Tosco would violate its permit in the future. Relying on *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, the court determined post-complaint events might moot claims for civil penalties. The court still had to determine whether, in this case, civil penalties would deter future violations. CBE alleged civil penalties would deter Tosco from future CWA violations because the company operated other refineries managed by the same staff that assisted Tosco in efforts to comply with the Avon refinery permit. The court disagreed with CBE, and noted, that given the structure and procedural requirements of the CWA, CBE could not rely on allegations of violations at other Tosco facilities to demonstrate civil penalties would deter Tosco from future violations.

The court granted Tosco's motion for summary judgment after noting the revision of the permit's limit, the sale of the facility, and the transfer of the permit made absolutely clear that one could not reasonably expect Tosco's permit violation to recur. Thus, the court held no prospect civil penalties would deter future violations.

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United States v. Power Eng'g Co., 125 F. Supp. 2d 1050 (D. Colo. 2000) (granting United States' motion for partial summary judgment and denying defendant facility operator's motion for partial summary judgment, noting: (1) EPA "overfiling" was not inappropriate under the circumstances; (2) United States' suit was not barred by res judicata or laches; and (3) defendant, as a facility operator, was required to post financial assurances).

Beginning in 1968, Richard Lilienthal operated an electroplating business in Denver, Colorado under the name Power Engineering Co. ("PEC"). The processes employed by PEC produced thirteen waste streams containing more than 1000 kilograms of waste per month. The materials present in these streams included a number of toxic substances as identified by the Resource Conservation and Recovery Act ("RCRA"), including hexavalent chromium.

RCRA authorizes Colorado to administer hazardous waste programs and monitor production and treatment facilities to insure compliance with RCRA's effluent standards. The Colorado Department of Public Health and the Environment ("CDPHE") oversees the program. In 1986, PEC notified CDPHE that its operations were generating certain hazardous wastes but failed to indicate its discharge of hexavalent chromium. In 1992, CDPHE discovered these releases had contaminated groundwater on and outside of PEC's property. About one year later, PEC informed CDPHE that in addition to the wastes it had initially reported, PEC was emitting five additional hazardous wastes.