Inland Empire Waterkeeper v. Corona Clay Co.—CWA citizen suit can continue based solely upon ongoing monitoring and reporting violations of NPDES permit

Corona Clay Co. operates a clay-processing plant near Temescal Creek, a tributary of the Santa Ana River in south coastal California. The State Water Resources Board issued the company a National Pollutant Discharge Elimination System Permit under the Clean Water Act requiring it to maintain a Storm Water Pollution Prevention Plan. Corona was required under the SWPPP to implement not only certain technologies to control discharges of toxic and conventional pollutants but also monitoring, analysis and reporting protocols with respect to the facility's storm water discharges. Two environmental groups (together, Coastkeeper) filed a citizen suit under the CWA in 2018 consisting of seven claims for relief that alleged pollutant discharges into the Creek and other permit violations including failure to monitor and report such discharges.

The district court granted partial summary judgment to Coastkeeper on claims one and five, which alleged that Corona had not developed (1) adequate pollutant technologies and (2) and an adequate SWPPP. The court additionally held that Coastkeeper possessed Article III associational standing to maintain the suit. *Inland Empire Waterkeeper v. Corona Clay Co.*, No. SA CV 18-0333-DOC (DFMx), 2019 WL 4233584 (C.D. Cal. June 10, 2019). Coastkeeper thereafter voluntarily dismissed claims three and four, leaving for trial claims two, six and seven that alleged discharge, monitoring and reporting violations. At trial, the jury was directed, inter alia, to answer two questions, the first of which "asked whether Corona had *discharged* pollutants into the waters of the United States and whether the *discharge* occurred after the complaint was filed or 'at any time, with a reasonable likelihood that such violations will recur in intermittent or sporadic violations?'" [Emphasis added.] Only if it answered this question "Yes" was the jury to proceed to the second that "asked [it] to determine whether run-off of storm water adversely affected the beneficial uses of Temescal Creek, and, if so, to determine the number of violations." Because the jury answered the first question "No," the court entered judgment in Corona's favor on the three (and only remaining) claims. The court then granted prospective relief to Coastkeeper with respect to claims one and five and imposed a $3.7 million fine on Corona. Both parties appealed.

A divided Ninth Circuit panel vacated the judgment and remanded for further proceedings. The remaining panel member dissented, principally on standing grounds, and would have issued a significantly different remand order. *Inland Empire Waterkeeper v. Corona Clay Co.*, Nos. 20-55420 & 20-55678, 2021 WL 4258829 (9th Cir. Sept. 20, 2021).

Given its jurisdictional nature, the majority began by addressing Coastkeeper's Article III standing. It separated this inquiry into two types: "claims of discharge violations, which allege Corona harms Coastkeeper's members by releasing storm water with pollutant levels that violate its permit; and claims of 'procedural' violations, involving Corona's failure to adhere to other permit requirements, the obligation to monitor and report." As to the discharge claims, the majority found "the requisite injury in fact and causation through its members' declarations averring to frequent use of the Temescal Creek for recreational or academic purposes, a noticeable decrease in water quality conditions because of Corona's discharges, and a resulting decline in their enjoyment of the waterway." As to the procedural claims, it cited circuit precedent for the rule that "when a statute provides a right to information, the deprivation of which 'result[s] in an informational harm,' violation of the statute gives rise to a cognizable 'informational' injury." The

CWA's monitoring and reporting requirements, the panel stated, "serve the public's substantive interest in clean water and the environment[,]" and the statute "elevated that interest by providing a cause of action to affected citizens." It reasoned further that the requisite injury in fact would arise when the "permit violations deprive[d] the public both of information about past discharges and likely future ones"—information that "would reduce the risk of injury to a plaintiff who wishes to know whether the water is polluted before using the Creek for recreation." Coastkeeper declarations satisfied this burden by establishing "a specific interest, whether academic, journalistic, or recreational, in the information that was harmed because of the alleged reporting and monitoring violations."

On the merits, the majority held "that district court erred in interpreting *Gwaltney* [*of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987)], as requiring an ongoing *discharge* violation as a prerequisite to a CWA citizen suit asserting ongoing monitoring and reporting violations." It reasoned that "[t]he plaintiffs in *Gwaltney* ... only alleged discharge violations" and that the opinion did "not address whether a CWA citizen suit alleging reporting or monitoring violations must be premised on ongoing or reasonably likely discharge violations." The panel also cited other Ninth Circuit decisions as inconsistent with "the district court's conclusion that a CWA suit alleging monitoring and reporting violations can only lie if there are also current forbidden discharges." *See Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141 (9th Cir. 2000); *Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995). In short, "*Gwaltney* permits a citizen suit based ongoing or imminent procedural violations."

The majority next addressed a second flaw in the trial instructions that arose by virtue of a decision issued after the district court judgment, *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020). There, the Supreme Court held that "[a]n emission of polluted water is ... a 'discharge' for CWA purposes only 'when a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means.'" As the panel explained, the parties "reasonably tailored their cases to our Court's then-extant law"—which supplied a less stringent "discharge" standard—and this "change in law affected not only the jury instructions, but also the partial summary judgment, which were premised on the admitted discharge" in Corona's request-for-admission response "that its storm water discharge flows 'indirectly into Temescal Wash.'" It added on this point that Fed. R. Civ. P. 36 makes an "admitted fact is no longer subject to dispute" and subject to mandatory judicial notice under Fed. R. Evid. 201. The majority vacated the judgment and remanded for further proceedings consistent with its opinion.

The dissent was extensive and commenced by taking aim at the district court's summary judgment determination that Coastkeeper had established standing. As to "discharge" standing, "Plaintiffs' claim of standing could be resolved in their favor as a matter of law only if, *inter alia*, they presented sufficient evidence to show that there was no genuine issue of material fact as to whether Corona's alleged polluted discharges reached the creek or threatened to do so." But Coastkeeper "inarguably failed to carry that burden; indeed, the majority does not contend otherwise." The dissent also criticized the majority's "information-deprivation theory of standing." It deemed that alternative standing theory fictive because it was grounded in "'a *genuine threat of undetected past or future polluted discharge*'" and accordingly dependent on "establish[ing] a fairly traceable

injury-in-fact that could be redressed by the forward-looking remedies in a citizen suit under the CWA only if there were ongoing or threatened future discharges."

The dissent then addressed "what follows from that [premature standing] conclusion":

> At a minimum, it means that the judgment in Plaintiffs' favor as to the first and fifth causes of action—which were partially decided in Plaintiffs' favor at summary judgment—should be reversed. But that leaves the question of whether those claims should now be tried on remand, as well as the issue of what effect, if any, the district court's error has on the jury's verdict in Corona's favor on the sixth and seventh causes of action.

The dissent's answer to this question as to claims one and five was to "remand for the district court address whether the verdict is dispositive of the sole theory of Article III standing that Plaintiffs presented at summary judgment" because it found that "the parties' briefing on this point is insufficient to resolve that narrowly focused issue." That said, the dissent left no doubt concerning how it would resolve the issue:

> Because Plaintiffs' only Article III standing theory has always been a discharge-based theory, the fact that the jury verdict was for other (and possibly erroneous) reasons serendipitously focused on actual or threatened discharges provides no basis for declining to give that verdict preclusive effect vis-à-vis Plaintiffs' discharge-based Article III standing theory. Put another way, the fact that the jury's finding was tailored to discharges as opposed to reporting and monitoring violations—even if erroneous for other purposes—provides no basis for declining to give it binding effect on the issue of Plaintiffs' discharged-based theory of standing.

As for the other claims, "the jury here was given the opportunity to hold Corona liable under the looser standards that we had previously applied, and it concluded that those standards had not been met." There was, in other words, "no basis for setting aside an adverse verdict that was based on more permissive standards." Under the dissent's analysis, therefore, Corona would be entitled to a judgment in its favor on all claims if the district court deemed the jury verdict conclusive on the remanded standing issue or, if the court reached the contrary conclusion, for a trial on claims one and five.

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/09/20/20-55420.pdf