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Ninth Circuit Protects Ability of Citizens to Sue Under Clean Water Act

In San Francisco BayKeeper, Inc. v. Tosco Corp.,1 the Ninth Circuit followed Supreme Court precedent in determining sufficiency of notice and the standard for proving mootness in a Clean Water Act (CWA or Act) citizen suit.2 The court held that the plaintiff's notice letter was sufficient because it provided enough information to permit the defendants to identify the dates of the alleged violations.3 The court also held that the suit was not mooted by the fact that the defendant no longer operated the polluting facility.4

In January 2000, San Francisco BayKeeper, Inc. (BayKeeper), a nonprofit corporation “dedicated to the preservation, protection, and defense of the environment, wildlife, and natural resources of the San Francisco Bay” sued Tosco Corporation and Diablo Services Corporation (collectively Tosco) for violations of the CWA.5 BayKeeper sued under the citizen-suit provision of the CWA, which requires plaintiffs to write a letter sixty days before suing, notifying the defendant of the alleged violations and of the plaintiff's intent to sue.6 Tosco owned and operated a petroleum coke storage and loading facility (the Diablo facility) near a navigable waterway, the New York Slough, which flows into the San Francisco Bay.7 The Diablo facility stored petroleum coke, a byproduct of the petroleum refining process, and then loaded the substance onto ships that traveled into the Bay.8 Tosco did not have a permit to discharge coke under the CWA, which prohibits discharge of pollutants into navigable waterways except in compliance with a National Pollution Discharge Elimination System (NPDES) permit.9

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1. 309 F.3d 1153 (9th Cir. 2002).
3. BayKeeper, 309 F.3d at 1157-59.
4. Id. at 1155.
5. Id. at 1155-56.
7. BayKeeper, 309 F.3d at 1155.
8. Id. at 1155-56. Petroleum coke is a byproduct of the petroleum refining process, and is primarily burned as a fuel. Non-energy uses include the creation of carbon and graphite electrodes, as well as cement. See Roskill Information Services, Petroleum Coke, at http://www.roskill.co.uk/petcoke.html (last visited Sept. 10, 2003).
9. BayKeeper, 309 F.3d at 1156; see also 33 U.S.C. §§ 1311, 1342.
BayKeeper alleged that Tosco had allowed illegal discharges of petroleum coke to enter the slough in two ways. First, BayKeeper alleged that Tosco’s method of storing petroleum coke in large uncovered piles resulted in wind and rain carrying the substance into the New York Slough. Second, BayKeeper alleged that Tosco’s procedures for loading coke onto ships were careless and caused coke to enter the waterway. BayKeeper sought injunctive and declaratory relief, civil penalties, and attorney’s fees. Upon challenge by Tosco, however, the district court found that BayKeeper’s notice was not adequately specific in describing the dates of violations. The court limited BayKeeper’s claim to violations for which, in its view, Baykeeper had provided adequate notice.

In August 2000, Tosco sold the Diablo facility and then moved for summary judgment on the theory that the sale rendered the case moot. The district court granted Tosco’s motion, reasoning that “where Tosco no longer owns or operates the facility, it is absolutely clear that the alleged violations cannot reasonably be expected to recur.” BayKeeper appealed both the district court’s limitation of its claims and the mootness dismissal.

The Ninth Circuit evaluated the sufficiency of BayKeeper’s notice de novo. The court noted the Supreme Court interpretation in Hallstrom v. Tillamook County that the notice requirements must be “strictly construed” for citizen suits under the Clean Water Act. However, the court determined that the notice requirements of the regulation do not require that plaintiffs “list every specific aspect or detail of every alleged violation,” but instead require that the notice is sufficient to permit the accused party “to identify the alleged violations and bring itself into compliance.” Based on this interpretation, the court identified the specific issue to be whether BayKeeper’s notice letter provided
“sufficient information to permit the recipient to identify...the date or dates” of the alleged violations.23

The court divided its decision on this issue into three parts—(1) relating to an allegation of an ongoing violation of Tosco's obligation to implement best available technology to prevent storm water pollution, (2) relating to violations from coke spilled into the slough during ship loading, and (3) relating to the wind blowing the coke from the piles into the slough.24 As to part one, the court held that the allegations relating to the ongoing failure to implement best available technology did not require specific dates.25

As to the discharges from loading spills, the court found that BayKeeper sufficiently met its notice obligation with its allegation that coke spilled into the waterway on each day of ship loading (including days for which specific dates were not provided).26 The court reasoned that the notice regulation did not require identification of the exact dates that the violations occurred and that Tosco was in a better position to identify the exact dates.27 The court held that because BayKeeper's letter was specific enough to notify Tosco of the nature of the alleged violations and their likely dates, BayKeeper was entitled to pursue claims for violations on dates within the overall period specified in the letter.28 As to the discharges from wind blowing coke into the water, the court found that although BayKeeper did not specify dates relating to wind violations, the allegation was “sufficiently specific to notify [Tosco] about what it was doing wrong.” BayKeeper was entitled to pursue the claims at trial.29

The Ninth Circuit also used a de novo standard of review to evaluate the mootness issue.30 Tosco argued that its sale of the Diablo facility rendered BayKeeper's suit moot.31 Relying on the Supreme Court's decision in Friends of the Earth v. Laidlaw Environmental Services, Inc.,32 the court clarified that in order to establish mootness a defendant must

23. Id. at 1158 (quoting 40 C.F.R. § 135.3(a)).
24. Id. at 1158-59.
25. Id. at 1158 (citing Southwest Marine, 236 F.3d at 996, which found that the requirement can still be satisfied, even where there is no specific date identified where the plaintiffs' allegation was broadly based, alleging defendant's “failure to prepare and implement plans that were required by its permit”as opposed to alleging that “a particular discharge from a particular pipe on a particular day had violated the CWA,” The court further noted that because the deficiencies in the plans were ongoing, no specific date of violation could be alleged.).
26. Id. Baykeeper was able to allege that there were spills each time that a ship was loading. Even when Baykeeper was unable to provide a specific date, the allegations contained enough information satisfy the court Id.
27. Id.
28. Id. at 1159.
29. Id. (quoting Southwest Marine, 236 F.3d at 996 (quoting Atlantic States Legal Found. Inc. v. Stroh Die Casting Co., 116 F.3d 814, 819 (7th Cir. 1997))).
30. Id. (citing Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1193 (9th Cir. 2000)).
31. Id.
32. 528 U.S. 167 (2000).
satisfy a "heavy burden of persuasion" and show that no effective relief can be ordered by the court. In *Laidlaw*, the Supreme Court emphasized the deterrent function of civil penalties for future violations under the Act. *Laidlaw* established that in a suit seeking civil penalties, events following the commencement of the suit will render the suit moot only when it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."

Applying this rationale to the case at bar, the Ninth Circuit reasoned that because the Diablo facility was still operating, violations could recur at the facility. Imposing civil penalties on Tosco would have a deterrent effect on the facility's new owner. Since violations could still occur, BayKeeper's claim for civil penalties against Tosco was not moot.

The court grounded this holding in its larger policy implications. If the court found that BayKeeper's claim was moot, it would allow Tosco and any subsequent owner to continue polluting while simultaneously avoiding monetary sanctions by selling the facility. This escape valve would undermine the enforcement mechanism provided for in the Act of allowing citizens to use civil penalties to police and deter illegal conduct.

The Ninth Circuit's decision in this case follows the Supreme Court's successive movement to protect citizens' rights to bring suit under the Clean Water Act. The court's decision protects citizens' ability to bring suit by recognizing that the citizen may not be in the best position to identify the specifics of alleged violations. It upholds fairness by requiring a notice standard which is attainable on the part of the citizen but also gives fair notice to the party alleged to be in violation. By rejecting the mootness argument, the court reinforced the deterrent effect of civil penalties. Thus, this case represents a victory for citizen enforcement of the environmental protections established in the Clean Water Act.

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33. *BayKeeper*, 309 F.3d at 1159 (quoting United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203 (1968)).
34. *Id*; see also *City of Erie v. Pap's A. M.*, 529 U.S. 277, 287 (2000); *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1123-24 (9th Cir. 1997).
36. *Id.* at 189 (quoting Concentrated Phosphate, 393 U.S. at 203).
37. *BayKeeper*, 309 F.3d at 1160.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*