

## CHAPTER ELEVEN: ENFORCEMENT (Updated September 2013)

### Add a new Note 4 above section 2 on page 873:

4. In a decision that should make it more difficult for defendants to secure dismissals on mootness grounds in citizen enforcement cases, the Supreme Court made clear that such a case is not (necessarily) moot simply because the defendant's violations have ended and are unlikely to recur. Rather, the Court held, the case does not become moot until it is clear that there is no relief the court could award that would redress the "actual injury" alleged by the citizen plaintiff. In *See Decker v. Northwest Environmental Defense Center*, \_\_\_ S.Ct. \_\_\_, 2013 WL 1131708 (2013) (discussed in the updates to Chapter 8), a citizen group had filed a Clean Water Act citizen enforcement suit against a number of logging companies, alleging that they were discharging contaminated stormwater to surface waters in Oregon without an NPDES permit. The defendants argued that, under EPA's longstanding interpretation of its stormwater regulations, runoff from logging operations does not require a permit. On appeal, the Ninth Circuit Court of Appeals held that such discharges *do* require a permit, and the defendants then appealed to the Supreme Court. EPA then modified its stormwater rules to make clear that stormwater runoff from logging is not covered, and the defendants (and the United States, as *amicus curiae*) argued that the case was now moot, because it was clear that their activities no longer violated the CWA. All eight members of the Supreme Court deciding the case (Justice Breyer did not participate in the decision) disagreed:

A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. Here, despite the recent amendment, a live controversy continues to exist regarding whether petitioners may be held liable for unlawful discharges under the earlier version of the Industrial Stormwater Rule. ...

The parties...have litigated the suit extensively based on the earlier version of the Industrial Stormwater Rule; and that version governed petitioners' past discharges, which might be the basis for the imposition of penalties even if, in the future, those types of discharges will not require a permit.

If the Court of Appeals is correct that petitioners were obligated to secure NPDES permits before discharging channeled stormwater runoff, the District Court might order some remedy for their past violations. The Act contemplates civil penalties of up to \$25,000 per day, as well as attorney's fees for prevailing parties. NEDC [the plaintiff], in addition, requests injunctive relief for both past and ongoing violations, in part in the form of an order that petitioners incur certain environmental-remediation costs to alleviate harms attributable to their past discharges. Under these circumstances, the cases remain live and justiciable, for the possibility of some remedy for a proven past violation is real and not remote.

2013 WL 1131708 at \*8-\*9 (citations and internal quotes omitted). Similarly, if a defendant violates an environmental regulation or permit provision, but comes into sustained compliance

sometime after a citizen plaintiff files an enforcement suit, the court's ability to award relief that would redress the citizen plaintiff's injuries (such as remediation of the environmental harm caused by the defendant's violations) should be sufficient to keep the controversy "live" for Article III purposes. In other words, the issues of whether the defendant's past conduct violated applicable law, and of what judicial relief is appropriate if such violations are proven, would remain before the court for resolution. Such an approach is consistent with the First Circuit's *Atlantic Salmon* decision, discussed earlier in this chapter.