

INTERPRETING THE CLEAN WATER ACT'S CITIZEN SUIT PROVISION:  
SUCCESSOR LANDOWNER LIABILITY FOR INACTIVE MINE DISCHARGES IN  
*SIERRA CLUB v. EL PASO GOLD MINES, INC.*

I. INTRODUCTION

The surface water resources of the United States are vast, comprising 3.5 million miles of rivers and streams.<sup>1</sup> These abundant resources have contributed significantly toward building and maintaining a healthy society and economy, as surface waters provide drinking water for approximately one-half of the nation's population.<sup>2</sup> Commercially, more than nine trillion gallons of water are used annually to manufacture goods and process food.<sup>3</sup> The industrialization and urbanization of the nineteenth century, however, produced adverse effects in the form of untreated or inadequately treated municipal waste discharges, precipitating a crisis in the quality of our nation's waters.<sup>4</sup> The historical absence of environmental regulation during the early period of American industrialization left a legacy of contaminated properties.<sup>5</sup>

As of 2005, both active and inactive mines were still considered significant contributors to the water pollution problems in the United States.<sup>6</sup> Specifically, drainage from inactive or abandoned mining areas represented a substantial portion of acid mine drainage, especially in the Appalachian region.<sup>7</sup> In western watersheds, home to more than 550,000 abandoned mines, the Environmental Protection Agency (EPA) estimates that mine waste

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<sup>1</sup> See William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 552 (2004) (discussing abundance of United States water resources).

<sup>2</sup> See Office of Water, U.S. Environmental Protection Agency, *Liquid Assets: A Summertime Perspective on the Importance of Clean Water to the Nation's Economy*, EPA No. 800R96002, at 10 (May 1996) (explaining allocation and use of America's water resources).

<sup>3</sup> See *id.* (noting volume of water used for commercial purposes).

<sup>4</sup> See William L. Andreen, *The Evolution of Water Pollution Control in the United States—State, Local, and Federal Efforts, 1789-1972: Part I*, 22 STAN. ENVTL. L.J. 145, 162-68 (2003) (discussing epidemics and development of municipal water treatment systems in context of eighteenth and nineteenth century American industrialization and urbanization).

<sup>5</sup> See Mina S. Park, Comment, *Predecessor Landowner Liability: Disclosing Latent Defects*, 13 UCLA J. ENVTL. L. & POL'Y 299, 299 (1994/1995) (explaining lack of environmental regulation as one of several reasons for contaminated properties). Industrial waste effluents, which continued to grow in magnitude as U.S. manufacturing strengthened, exceeded municipal sewage by a ratio of seven to six by the end of World War II. See Andreen, *supra* note 1, at 554. By the end of the 1960s, eighty percent of the pollution discharged into U.S. waterways was industrial in origin. See *id.*

<sup>6</sup> See River Network, *Understanding the Clean Water Act—Poor Mining Practices and Abandoned Mines*, <http://www.cleanwateract.org/pages/b4.cfm> (last visited Sept. 28, 2005) (explaining effect of mines on water pollution problem).

<sup>7</sup> See Michael D. Bryan, Note, *Toward Strict Liability for Abandoned Mine Drainage*, 71 KY. L.J. 193, 193 (1983) (noting effects of acid mine drainage in eastern United States). As an example, the single biggest water pollution problem in Pennsylvania is polluted water draining from abandoned coal mining operations. See Walter Rossman et al., *Abandoned Mines—Pennsylvania's Single Biggest Water Pollution Problem* (Jan. 21, 1997), [http://www.dep.state.pa.us/dep/DEPUTATE/MINRES/BAMR/MINING\\_012397.htm](http://www.dep.state.pa.us/dep/DEPUTATE/MINRES/BAMR/MINING_012397.htm) (detailing Pennsylvania's efforts to fight acid mine drainage through multi-year funding plan and long-term reclamation management plan). Over half of the waterways that do not meet water quality standards—more than 2,400 miles—fail to do so because of mine drainage. See *id.*

has contaminated at least forty percent of streams.<sup>8</sup> Such abandoned mine waste, defined categorically as “acid mine drainage,” occurs either as rainwater runoff from surface mining sites or as seepage from underground mines.<sup>9</sup> Regardless of the source, abandoned mine pollution has damaged municipal water supplies and private wells, killed or diminished aquatic life in nearby streams, and damaged industrial equipment.<sup>10</sup> Though courts historically have interpreted federal laws to hold landowners and operators of active mines liable for drainage from mining activities, legal scholars and judges continue to disagree whether such laws also apply to successor landowners of inactive or abandoned mines.<sup>11</sup>

In *Sierra Club v. El Paso Gold Mines, Inc. (El Paso)*,<sup>12</sup> the Tenth Circuit Court of Appeals became the highest federal court to address liability for abandoned mine pollution of waterways, specifically in the context of successor landowner liability.<sup>13</sup> *El Paso* highlights the difficulties that federal courts face in assessing violations of the Clean Water Act of 1977 (CWA),<sup>14</sup> especially with regard to judicial attempts to reconcile divergent interpretations of the United States Supreme Court’s 1987 ruling in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc. (Gwaltney)*.<sup>15</sup> *Gwaltney* attempted to define the circumstances constituting a violation within the boundaries of a valid CWA citizen suit.<sup>16</sup> Veering from the line of reasoning followed by three other federal courts of

<sup>8</sup> See EARTHWORKS, *Cleaning Up Abandoned Mines*, <http://www.earthworksaction.org/aml.cfm> (last visited Sept. 29, 2005) (explaining effect of pollution from abandoned mines in western states).

<sup>9</sup> See Bryan, *supra* note 7, at 194 (discussing sources of mine pollution). Acid mine drainage is the general term for sulfuric acid, formed by the oxidation of pyrite (a sulfide of iron) when coal from a mine is exposed to water and oxygen. See *id.* Upon the occurrence of this chemical reaction, iron hydroxides, additional contributors to the water pollution problem, are created. See *id.* Once the acid mine drainage composed of sulfuric acid and iron hydroxides—as well as possible amounts of aluminum, copper, zinc, magnesium and manganese—reaches a water source, the relatively insoluble iron precipitates and forms the compound referred to as “yellow buoy.” See *id.*

<sup>10</sup> See *id.* at 195 (describing magnitude of harms resulting from acid mine drainage).

<sup>11</sup> See *id.* at 196-203 (detailing historical evolution of common law and statutory law in context of liability for acid mine drainage). Historically, courts used the federal common law tort theory of nuisance as a remedy for mine drainage, especially in cases involving interstate pollution. See *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 239 (1907) (holding Georgia had right to prevent copper companies from discharging noxious gases under public nuisance theory); *Missouri v. Illinois*, 200 U.S. 496, 526 (1906) (holding state of Illinois not liable under public nuisance theory for discharges of sewage into river). In 1977, Congress enacted the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Title 30 United States Code 1201-1328, to control the surface mining of coal and the surface effects of underground coal mining to “assure that surface mining operations are so conducted as to protect the environment.” See 30 U.S.C. § 1202(d) (2000). Under the SMCRA, the person conducting active mining activities is required to control drainage from mining activities, and thus, the SMCRA would not apply to a mere purchaser of an abandoned coal mine site. See Bryan, *supra* note 7, at 203. Yet, the Clean Water Act, which prohibits the discharge of any pollutant into navigable waters without a permit, has been interpreted broadly to include all drainage from mining activities as a discharge to be regulated, regardless of the present landowner’s activities on the land. See *id.* at 205.

<sup>12</sup> 421 F.3d 1133 (10th Cir. 2005).

<sup>13</sup> See *id.* at 1143-44 (presenting court’s analysis of whether mere ownership of point source triggers liability).

<sup>14</sup> 33 U.S.C. §§ 1251-1376 (2000) [hereinafter CWA].

<sup>15</sup> 484 U.S. 49 (1987), *rev’d on other grounds*, 890 F.2d 690 (4th Cir. 1989).

<sup>16</sup> See *El Paso*, 421 F.3d at 1139-40 (detailing judicial divergence of opinion in interpreting violation of CWA since *Gwaltney*).

appeal, the Tenth Circuit implicitly supported the view that a continuing migration of pollutants from a single past discharge is a violation as defined by the CWA.<sup>17</sup> Though the Tenth Circuit followed the Supreme Court's guidance and interpreted the CWA to confer subject matter jurisdiction over the complaint in *El Paso*, the court held that triable issues of fact existed regarding the plaintiffs' good-faith allegation of CWA violations based on the amount of credible evidence cited by both parties.<sup>18</sup>

This Note examines the Tenth Circuit's statutory interpretation of two components of the CWA's citizen suit provision: the "alleged to be in violation of" and "discharge of a pollutant" components.<sup>19</sup> Section II of this Note provides a brief summary of the facts in *El Paso*.<sup>20</sup> Section III explains the historical evolution of federal water quality laws, discusses relevant case law surrounding the jurisdictional authority underlying the CWA citizen suit provision for pollution violations, and clarifies the guidelines courts must follow when interpreting statutory language and ruling on motions for summary judgment.<sup>21</sup> Section IV discusses the *El Paso* court's analysis of relevant statutory language and case law.<sup>22</sup> Section V analyzes the propriety of the Tenth Circuit's determination.<sup>23</sup> Finally, Section VI of this Note evaluates the impact of the *El Paso* decision on future determinations of judicial jurisdiction under the CWA's citizen suit provision.<sup>24</sup>

## II. FACTS

In *El Paso*, the Sierra Club and the Mineral Policy Center (collectively Sierra Club), plaintiff environmental groups, alleged that the El Paso Mine, an inactive gold mine, discharged pollutants into Colorado's Cripple Creek.<sup>25</sup> The mine, located on one-hundred acres of El Paso Gold Mines, Inc. (El Paso) property between Cripple Creek and Victor, Colorado, was never in operation during El Paso's ownership of the property.<sup>26</sup> An abandoned vertical elevator shaft (the El Paso Shaft) connected the mine to the six-mile-long Roosevelt Tunnel, a mine drainage tunnel constructed in 1910 to drain groundwater from mines in the Cripple Creek Mining District.<sup>27</sup> The Roosevelt Tunnel Portal, the

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<sup>17</sup> See *id.* at 1140-41 (distinguishing instant case from those involving migration of pollutants from prior discharges based on fact that man-made point source is present).

<sup>18</sup> See *id.* at 1150 (holding magistrate erred in granting summary judgment for plaintiffs).

<sup>19</sup> See Randall S. Abate, *Rethinking Citizen Suits for Past Violations of Federal Environmental Laws: Recommendations for the Next Decade of Applying the Gwaltney Standard*, 16 TEMP. ENVTL. L. & TECH. J. 1, 5 (1997) (explaining that "alleged to be in violation" and "ongoing violation" are, historically, terms of judicial interpretative disagreement).

<sup>20</sup> For a discussion of the facts in *El Paso*, see *infra* notes 25-43 and accompanying text.

<sup>21</sup> For a discussion of the CWA and relevant statutory and judicial background of section 402 (33 U.S.C. § 1342), see *infra* notes 44-126 and accompanying text.

<sup>22</sup> For a discussion of the court's reasoning in *El Paso*, see *infra* notes 127-59 and accompanying text.

<sup>23</sup> For a critique of the *El Paso* decision, see *infra* notes 160-84 and accompanying text.

<sup>24</sup> For a discussion of the impact of the *El Paso* decision on federal jurisdiction, see *infra* notes 185-96 and accompanying text.

<sup>25</sup> See *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1135-36 (10th Cir. 2005) (discussing plaintiffs' argument in favor of liability for pollution).

<sup>26</sup> See *id.* at 1136 (explaining El Paso's past, present and future use of land on which El Paso Mine was located).

<sup>27</sup> See *id.* (describing physical connection of El Paso Mine to navigable waters).

physical termination of the mining district's tunnel system, discharged water into Cripple Creek, which ultimately emptied into the Arkansas River.<sup>28</sup>

In 2001, the plaintiffs filed a citizen suit under the CWA in the United States District Court for the District of Colorado.<sup>29</sup> The lawsuit alleged that El Paso violated CWA section 402 by discharging pollutants into Cripple Creek without a valid federal permit.<sup>30</sup> Water samples taken from the El Paso Shaft and the Roosevelt Tunnel showed varying, but similar, amounts of mineral pollutants.<sup>31</sup> El Paso claimed a lack of evidence linking water from the shaft to water discharged at the portal.<sup>32</sup>

The district court referred the case to a magistrate who held that the court possessed subject matter jurisdiction under CWA section 505(a)(1).<sup>33</sup> Despite the lack of direct contribution to the alleged pollution through active mining operations, the magistrate ruled that liability under the CWA is based on the ownership or operation of a point source, not on the activity which results in the point source discharge.<sup>34</sup> The magistrate further found that the experts relied upon by each party agreed that some of the water flowing into the Roosevelt Tunnel from the El Paso Shaft reached the tunnel portal and ultimately flowed into Cripple Creek.<sup>35</sup> Having found the necessary hydrological link, the magistrate granted summary judgment for the plaintiffs.<sup>36</sup>

El Paso appealed the ruling to the Tenth Circuit Court of Appeals, citing three separate grounds on which it believed the magistrate's ruling was improper.<sup>37</sup> First, El Paso argued

<sup>28</sup> *See id.* (explaining geographical hydrology connecting water discharges from Roosevelt Tunnel Portal and water flowing into Arkansas River).

<sup>29</sup> *See id.* (noting plaintiffs' exercise of CWA's citizen suit provision to hold El Paso liable for pollution violations).

<sup>30</sup> *See El Paso*, 421 F.3d at 1136 (noting plaintiffs' allegations that El Paso discharged zinc and manganese into Cripple Creek).

<sup>31</sup> *See id.* at 1137 n.2 (noting specific levels of zinc and manganese in El Paso Shaft and Roosevelt Tunnel Portal in October 1994, November 1995 and October 2000). While the levels of zinc and manganese in water samples collected between October 1994 and November 2000 at the Roosevelt Tunnel varied over time, the levels of zinc and manganese from those samples were similar to such levels observed at the El Paso Shaft. *See id.*

<sup>32</sup> *See id.* at 1137 (noting El Paso's claim that hydrological connection was not established).

<sup>33</sup> *See id.* at 1136-37 (explaining magistrate's rationale for upholding jurisdiction under CWA).

<sup>34</sup> *See id.* at 1137 (detailing magistrate's favoring of plaintiffs' interpretation of CWA statutory language). A point source is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." *See* 33 U.S.C § 1362(12), (14).

<sup>35</sup> *See El Paso*, 421 F.3d at 1137 (explaining necessary hydrological link established by expert agreement).

<sup>36</sup> *See id.* (noting grant of summary judgment properly based on evidence presented).

<sup>37</sup> *See id.* at 1138-39 (noting El Paso's appeal on grounds of lack of jurisdiction and lack of sufficient evidence). Concurrent with the federal appeal to the Tenth Circuit, the Colorado Water Quality Control Division (CWQCD) filed an administrative action against El Paso based on the same allegations set forth by the Sierra Club. *See id.* at 1137. The CWQCD's case was referred to an administrative law judge (ALJ) who found jurisdiction under the Colorado Water Quality Control Act to hold El Paso liable for pollutants leeching from its inactive mine. *See id.* at 1138. Though the ALJ ultimately held that El Paso had discharged pollutants into state waters, El Paso and the State of Colorado agreed to stay further administrative proceedings until the federal court appeal was decided. *See id.* *See also* COLO. REV. STAT. § 25-8-103(19) (2005) (defining "state waters"); *see id.* §

the magistrate erred in granting Sierra Club's summary judgment motion because the El Paso Mine was merely a conduit for the migration of residual effluence from a past discharge.<sup>38</sup> Second, El Paso proposed that a party could not be liable for a discharge of pollutants absent some form of affirmative conduct that resulted in the pollution.<sup>39</sup> Finally, El Paso asserted that, aside from the issue of jurisdiction, the magistrate failed to view the facts in the light most favorable to the non-moving party; thus, the plaintiffs had failed to proffer the facts necessary to meet their burden in establishing a hydrological connection between the El Paso Shaft and the Roosevelt Tunnel.<sup>40</sup>

The Tenth Circuit affirmed the district magistrate's jurisdiction to hear the case under CWA section 505(a)(1).<sup>41</sup> Additionally, the court determined the magistrate correctly held that the CWA required El Paso to apply for a federal permit.<sup>42</sup> The court, nevertheless, reversed Sierra Club's grant of summary judgment, finding that triable issues of material fact existed concerning the flow of water from the El Paso Shaft to the Roosevelt Tunnel.<sup>43</sup>

### III. BACKGROUND

#### A. State Water Control Policies and Enactment of the CWA

Prior to the 1970s, individual states were largely responsible for enacting water pollution control legislation in response to a federal government mandate to enforce water quality standards.<sup>44</sup> This mandate was set forth in the Federal Water Pollution Control Act of 1948 (FWPCA),<sup>45</sup> which provided state and local governments with federal technical assistance and research funds.<sup>46</sup> Federal involvement in the enforcement of pollution

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25-8-501 (clarifying administration and enforcement of permit requirements for point source discharges into state waters by Colorado Water Quality Control Commission).

<sup>38</sup> See *El Paso*, 421 F.3d at 1140 (stating El Paso's argument on theory that migration of residual contamination from prior discharges is not ongoing violation).

<sup>39</sup> See *id.* at 1142 (noting El Paso's argument on alternative theory that passive landowners cannot be held liable for mine discharges).

<sup>40</sup> See *id.* at 1149-50 (describing El Paso's third argument that experts disagreed regarding whether pollutants from shaft were discharged at portal).

<sup>41</sup> See *id.* at 1141 (affirming magistrate's ruling on jurisdictional issue). The Tenth Circuit initially ordered the parties to submit briefs on additional issues (the status of the CWQCD proceeding and the desirability of a stay of appeal pending state administrative action decision) to determine the appropriateness of federal appellate review. See *id.* at 1138. Though the Tenth Circuit abated the case under the rationale that the CWA "manifests a 'pro-federalism thrust'" giving states the primary role in CWA administration and enforcement, the court lifted its stay due to the length of time the defendant's appeal was pending review. See *id.*

<sup>42</sup> See *id.* at 1146 (affirming magistrate's ruling on issue of NPDES applicability to passive landowners).

<sup>43</sup> See *El Paso*, 421 F.3d at 1149-50 (reversing magistrate's ruling on summary judgment motion).

<sup>44</sup> See Stephanie L. Hersperger, Comment, *A Point Source of Pollution Under the Clean Water Act: A Human Being Should be Included*, 5 DICK. J. ENVTL. L. & POL'Y 97, 99-100 (1996) (explaining evolution of water pollution legislation).

<sup>45</sup> Federal Water Pollution Control Act of 1948, Pub. L. No. 80-845, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251-1387) [hereinafter FWPCA].

<sup>46</sup> See Claudia Copeland, Environment and Natural Resources Policy Division, *Clean Water Act: A Summary of the Law*, U.S. Congressional Research Service Report RL30030, at 2 (Jan. 24, 2002), available at <http://usinfo.state.gov/usa/infousa/laws/majorlaw/cwa.pdf> (detailing early development of comprehensive federal involvement in state and local water pollution control).

control, however, was limited to matters involving interstate waters, provided that government consent had been given by the state in which the pollution originated.<sup>47</sup> Throughout the 1950s and 1960s, Congress enacted a series of amendments to the FWPCA that accomplished the following objectives: (1) extending federal assistance to state and local enforcement programs; (2) expanding federal jurisdiction and responsibility over pollution enforcement to include navigable interstate and intrastate waters; and (3) establishing initial water quality standards that would determine actual pollution levels and control requirements.<sup>48</sup>

Growing public awareness and heightened concern for controlling water pollution and its dangerous effects, public desire for a more prominent federal role in water pollution control programs, and mounting frustration over the slow pace of pollution cleanup efforts under then-existing local regulations, state regulations and the FWPCA (and its related amendments) ultimately led to the enactment of the Federal Water Pollution Control Act Amendments of 1972.<sup>49</sup> The 1972 amendments created an extensive statute which spelled out optimistic and ambitious programs for national water quality improvement.<sup>50</sup> After congressional fine-tuning by means of further amendments in 1977, the 1972 legislation became known comprehensively, and more popularly, as the Clean Water Act.<sup>51</sup> The CWA officially affirmed Congress' intention "to restore and maintain the chemical, physical, and biological integrity of the [n]ation's waters."<sup>52</sup>

At the center of the federal system for water pollution control is the National Pollutant Discharge Elimination System (NPDES),<sup>53</sup> a permit program under which discharges must meet specified "effluent limitations' based on nationally uniform, technologically-based performance standards for categories of processes."<sup>54</sup> By establishing a national monitoring system and the NPDES permit program, Congress sought to reduce and control pollution

<sup>47</sup> See *id.* (noting limits of federal authority in controlling specific instances of pollution).

<sup>48</sup> See *id.* (explaining how amendments in 1950s and 1960s gradually shaped federal authority over pollution control programs).

<sup>49</sup> Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387).

<sup>50</sup> See Copeland, *supra* note 46, at 2 (stressing that 1972 amendments made fundamental revisions to FWPCA).

<sup>51</sup> See U.S. Environmental Protection Agency, Clean Water Act, <http://www.epa.gov/region5/water/cwa.htm> (last visited Sept. 15, 2005) [hereinafter EPA] (explaining motive behind CWA enactment).

<sup>52</sup> See 33 U.S.C. § 1251(a) (stating congressional declaration of goals and policy under CWA). Subsequent enactments in 1981 (streamlining the municipal construction grant process and improving treatment plant capabilities) and 1987 (replacing the construction grant program with a new funding strategy based on EPA-state partnerships) modified original CWA provisions. See EPA, *supra* note 51 (explaining intent behind CWA enactment and briefly describing CWA's statutory structure).

<sup>53</sup> 33 U.S.C. § 1342. CWA section 402 allows the EPA Administrator to issue permits authorizing the discharge of pollutants in accordance with specified conditions. See *id.* § 1342(a)(1)-(5).

<sup>54</sup> See Lawrence J. MacDonnell, *Water Quality Policy and The Park City Principles*, 31 LAND & WATER L. REV. 329, 330-31 (1996) (noting stringent limitations for issuance of NPDES permits). The term "effluent limitation" has several meanings within the context of a CWA citizen suit. See 33 U.S.C. § 1365(f). Generally, however, the term refers to alternative control strategies and discharge limits established for specific point sources that are expected to "contribute to the attainment or maintenance" of water quality resulting from pollutant discharges that endanger the protection public water supplies or the growth of a balanced population of shellfish, fish and wildlife. See *id.* § 1312(a).

discharges through a centralized, federally-mandated permit scheme.<sup>55</sup> Congressional mechanisms for accomplishing these objectives include the regulation of all point source discharges, authorization of grants for the construction of publicly-owned sewage treatment facilities, and collaboration with individual states to manage nonpoint source pollution.<sup>56</sup>

To ensure compliance with NPDES requirements, Congress granted citizens the authority to enforce NPDES permit provisions under CWA section 505.<sup>57</sup> Courts have consistently disagreed, however, over the nature and scope of judicial enforcement authority under this “citizen suit provision.”<sup>58</sup> Though the citizen suit provision parallels the language of several other federal environmental statutes, a judicial split exists regarding the interpretation of the statute’s “alleged to be in violation” component.<sup>59</sup> In 1987, the United States Supreme Court attempted to clarify whether the CWA confers subject matter jurisdiction for citizen suits seeking recovery for wholly past violations of the Act.<sup>60</sup> Yet, even after Supreme Court review, the circumstances under which a CWA violation is “continuous or intermittent” remained unclear.<sup>61</sup>

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<sup>55</sup> See *id.* (explaining overall CWA objective); see also 33 U.S.C. § 1281 (stating congressional declaration of purpose for grants under CWA).

<sup>56</sup> See MacDonnell, *supra* note 54, at 330 (noting three basic mechanisms to accomplish congressional objectives under CWA); see also 33 U.S.C. § 1288 (explaining plans for waste treatment management). Though the primary focus of the CWA is on the regulation of point source pollution, the CWA also mentions the policy objective of developing and implementing controls for nonpoint source pollution. See *id.* § 1251(a)(7). Historically, the definitions attributed to the term “nonpoint source pollution,” among many others, have included “pollution from diffuse sources,” “polluted runoff from rain or snow,” and “poison runoff.” See River Network, Understanding the Clean Water Act—Point Source Discharge Permits/NPDES, <http://www.cleanwateract.org/pages/c3.cfm> (last visited Oct. 25, 2005). The most accurate and complete definition, however, is deemed to be “any source of pollution that is not a point source. See *id.* For a definition of point source under the CWA, see *infra* note 34.

<sup>57</sup> See Abate, *supra* note 19, at 3 (noting congressional purpose behind citizen suit provision); 33 U.S.C. § 1365 (listing conditions authorizing CWA citizen suits).

<sup>58</sup> See *id.* at 4 (explaining additional procedural requirements for CWA citizen suits).

<sup>59</sup> See *id.* (citing similarities to citizen suit provisions instituted by other federal environmental statutes). See also 42 U.S.C. § 6972 (2000) (noting provision for citizen suits under Resource Conservation and Recovery Act); *id.* § 9659 (2000) (noting provision for citizen suits under Comprehensive Environmental Response, Compensation, and Liability Act). Under section 505(a)(1) of the CWA, any citizen may institute a civil action on his own behalf in the following circumstances: (1) against any person (including the United States and any other governmental agency) who is alleged to be in violation of (a) an effluent standard or limitation under the CWA or (b) an order issued by the NPDES Administrator or a State with respect to an effluent standard or limitation; and (2) against the NPDES Administrator where there is an alleged failure of the Administrator to perform a nondiscretionary act or duty under the CWA. See 33 U.S.C. § 1365(a).

<sup>60</sup> See Abate, *supra* note 19, at 6 (noting basis for Supreme Court’s grant of certiorari in *Gwaltney*). See generally *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) (interpreting “to be in violation”). According to the Supreme Court, which followed the Eastern District of Virginia Court’s analysis, “[t]he words ‘to be in violation’ may reasonably be read as comprehending unlawful conduct that occurred solely prior to the filing of the lawsuit as well as unlawful conduct that continues into the present.” See *id.* at 55. “Wholly past violations,” therefore, are alleged violations for discharges that are not continuing at the time a lawsuit is filed. See *id.*

<sup>61</sup> See *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1139 (10th Cir. 2005) (noting issues raised by *Gwaltney* remained unresolved). Although it is now clear that citizen suits cannot be premised on violations that occurred entirely in the past, the “continuous or intermittent” issue

The CWA, the culmination of a twenty-four year legislative process, was the first comprehensive legislation to make water quality protection a national objective achieved through a universally-designed, federally-supervised program.<sup>62</sup> Though the CWA created a planning process to address diffused, nonpoint sources of water pollution, the CWA's primary focus with respect to NPDES is the regulation of point sources.<sup>63</sup> Traditionally, courts broadly interpreted the definition of a point source to achieve CWA objectives, resulting in judicial decisions declaring that sources such as abandoned mines are point sources under the purview of the CWA.<sup>64</sup>

## B. CWA Citizen Suit Provision and *Gwaltney*

CWA section 505(a)(1) grants citizens the right to bring civil actions against any individual "alleged to be in violation of" effluent standards or limitations.<sup>65</sup> Considerable debate has emerged regarding the circumstances under which a person is "in violation of" effluent standards, particularly with respect to whether the person must be actively engaged in a polluting activity or whether violations can be supported by past practices that have ceased by the time of suit.<sup>66</sup> The United States Supreme Court attempted to clarify this confusion in *Gwaltney*, where the Court held that Congress did not intend to permit citizen suits based on "wholly past violations."<sup>67</sup> To establish jurisdiction, citizens must make a good-faith allegation of continuous or intermittent violations.<sup>68</sup> The Court, however, neglected to further define when a CWA violation is considered "continuous or intermittent," causing problems for lower courts deciding cases where the conduct giving rise to the alleged violation ceased but the effects continued.<sup>69</sup>

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establishes whether a discharge is alleged to violate the CWA because of its past violation-causing conduct or its present violation-causing effects. See notes 63-64 and accompanying text.

<sup>62</sup> See MacDonnell, *supra* note 54, at 329 (noting historical importance of comprehensive legislation under Federal Water Pollution Control Act Amendments of 1972).

<sup>63</sup> See 33 U.S.C. § 1288 (explaining federal planning process to identify nonpoint sources of pollution); see also *id.* § 1362(12), (14) (defining "discharge of a pollutant" and "point source"). For a definition of "point source," see *supra* note 34.

<sup>64</sup> See Hersperger, *supra* note 44, at 102 (listing sources of water pollution labeled by courts as potential point sources); *Commonwealth v. EPA*, 618 F.2d 991, 993 (3d Cir. 1980) (noting issue timing and scope of regulation). In this case, the Administrator, under the authority of CWA section 306, enacted a regulation adding coal mining as a new source category. See *id.* The petitioners did not call upon the Third Circuit to decide whether abandoned mines could be classified as point sources. See *id.* Rather, the issue was the timing and scope of the regulation. See *id.*

<sup>65</sup> See 33 U.S.C. § 1365(a)(1) (noting authorization for citizen suits). Under section 301(a), "the discharge of any pollutant by any person shall be unlawful" unless otherwise stated. See *id.* § 1311(a).

<sup>66</sup> See *El Paso*, 421 F.3d at 1139 (explaining Supreme Court's attempt in *Gwaltney* to resolve confusion over when person "is in violation of" CWA).

<sup>67</sup> See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56-60 (1987) (explaining harm sought to be addressed by citizen suit must lie in present or future, not in past). The *Gwaltney* court held that the most natural reading of section 505(a)(1) required "citizen-plaintiffs [to] allege a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." See *id.* at 57.

<sup>68</sup> See *id.* at 64 (noting jurisdictional requirement of good-faith allegation).

<sup>69</sup> See *El Paso*, 421 F.3d at 1139 (explaining difficulty of assessing liability in cases where conduct giving rise to violation has ceased, but effects continue).

More recently, courts have attempted to apply the principles of *Gwaltney* to citizen suits arising under the Resource Conservation and Recovery Act (RCRA),<sup>70</sup> the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>71</sup> and the Emergency Planning and Community Right-to-Know Act (EPCRA).<sup>72</sup> The inability of courts to reach a consistent terminological understanding of “past violations,” however, has caused courts to expand, contract and distort the *Gwaltney* standard, both within and outside the CWA context.<sup>73</sup>

### 1. *Expansive Interpretation of Gwaltney and the CWA*

Courts that interpret the CWA and *Gwaltney* holding expansively have held that the continuing migration of pollutants from a past discharge is sufficient to establish jurisdiction.<sup>74</sup> Two United States District Courts—the District of Minnesota and the District of Oregon—have agreed with such an interpretation of *Gwaltney*.<sup>75</sup>

#### a. *Werlein v. United States*<sup>76</sup>

In *Werlein v. United States* (*Werlein*), the District Court for the District of Minnesota, Third Division, addressed whether toxic waste that is introduced into a waterway over a period of time constitutes “ongoing pollution” that is prohibited by the CWA.<sup>77</sup> The controversy centered on plaintiffs’ allegations that the Twin Cities Army Ammunition Plant (TCAAP) and Trio Solvents site, not in operation at the time of the alleged pollution, dumped contaminants containing trichloroethylene (TCE) into the soil that eventually produced chemical discharges which migrated into a waterway over time.<sup>78</sup> Plaintiffs alleged that as a result of rainwater infiltration of the contaminated soil, the contaminants discharged into Long Lake and Rush Lake.<sup>79</sup> Accordingly, the class action plaintiffs—citizens who resided near the two sites and relied on water supplies allegedly polluted by

<sup>70</sup> 42 U.S.C. §§ 6901-92 (2000) [hereinafter RCRA].

<sup>71</sup> 42 U.S.C. §§ 9601-75 (2000) [hereinafter CERCLA].

<sup>72</sup> 42 U.S.C. §§ 11001-50 (2000) [hereinafter EPCRA].

<sup>73</sup> See *Abate*, *supra* note 19, at 2 (noting judicial application of *Gwaltney* to different forms of federal legislation). For a discussion of how courts have diverged in applying the *Gwaltney* holding, see *infra* notes 74-106 and accompanying text.

<sup>74</sup> See *El Paso*, 421 F.3d at 1139 (noting cases that follow expansive reading of *Gwaltney*).

<sup>75</sup> See *Werlein v. United States*, 746 F. Supp. 887 (D. Minn. 1990), *vacated*, 793 F. Supp. 898 (D. Minn. 1992) (dismissing citizen suit because defendant’s alleged pollution activities had ceased by time of suit with no likelihood that infractions would continue); *Umatilla Waterquality Protective Ass’n v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1322 (D. Or. 1997) (holding pollutants from past discharges which are released gradually over time by contaminated soil is ongoing pollution). The *Werlein* decision was vacated only on mootness grounds after all class claims in the litigation were settled out-of-court. See *Werlein*, 793 F. Supp. at 898.

<sup>76</sup> 746 F. Supp. 887 (D. Minn. 1990).

<sup>77</sup> See *id.* at 896 (noting lack of post-*Gwaltney* case law on issue of what constitutes ongoing violation).

<sup>78</sup> See *id.* (discussing substantive arguments in plaintiffs’ complaints).

<sup>79</sup> See *id.* (explaining hydrological connection between source of pollution and waterway into which it emptied).

the sites—sought both injunctive relief and monetary damages.<sup>80</sup> In response, the past owners and operators of the Trio Solvents site argued that any violations at the site must be deemed “wholly past violations” by virtue of the fact that they had neither owned nor operated their business at the site since 1976, fourteen years prior to the filed complaint.<sup>81</sup>

With respect to the alleged CWA violations, the court held that where contaminants are dumped into the soil many years ago, their gradual migration into water can constitute an ongoing violation.<sup>82</sup> Because the Trio Solvents site contained toxic substances that had not yet entered nearby waterways but were being introduced over time, the court held it would be consistent with the CWA’s focus on preventing water pollution to classify such discharges as “ongoing pollution” sufficient to establish subject matter jurisdiction under the CWA.<sup>83</sup>

*b. Umatilla Waterquality Protective Ass’n v. Smith Frozen Foods, Inc.*<sup>84</sup>

In *Umatilla Waterquality Protective Ass’n v. Smith Frozen Foods, Inc. (Umatilla)*, the District Court for the District of Oregon addressed whether the ongoing migration of pollutants to waterways via hydrologically connected groundwater constitutes an ongoing discharge under the CWA.<sup>85</sup> The case arose when the Umatilla Waterquality Protective Association (UWQPA), a nonprofit corporation dedicated to protecting water quality in Oregon, alleged that wastewater pipelines from the defendant’s vegetable processing facility periodically failed, thus discharging pollutants into Pine Creek.<sup>86</sup> The UWQPA also alleged that sodium and chloride pollutants from the defendant’s unlined brine pond leached into the groundwater and were discharged into Pine Creek, thus constituting an unpermitted continuing discharge.<sup>87</sup>

While the court held that an unlined brine pond constitutes a confined and discrete conveyance within the CWA’s definition of a “point source,” the court left open for Ninth Circuit review the question of whether discharges of pollutants through hydrologically-

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<sup>80</sup> *See id.* at 890 (citing alternative statutory and common law claims of plaintiffs). Plaintiffs’ claims for injunctive relief and contaminant cleanup were brought under federal environmental statutes (CERCLA, RCRA and CWA) and state environmental statutes (the Minnesota Environmental Response and Liability Act, or MERLA, and the Minnesota Environmental Rights Act, or MERA) while claims for monetary damages and medical monitoring were brought under common law claims. *See id.* at 890-91.

<sup>81</sup> *See Werlein*, 746 F. Supp. at 896 (explaining defendant’s argument that lack of current ownership or operation precludes liability).

<sup>82</sup> *See id.* at 897 (holding that classifying steady introduction of toxic waste into waterway over time as “ongoing pollution” is consistent with CWA goals). The court found only two possible types of contamination: (1) cases where a polluter dumps toxic substances directly into a waterway such that “the damage is done” and the violation is “wholly past” under *Gwaltney*; and (2) cases where toxic waste has not yet reached a waterway but is being introduced into the waterway over time such that it constitutes “ongoing pollution.” *See id.*

<sup>83</sup> *See id.* (stating CWA’s “any addition of any pollutant” language clearly applies to discharges from Trio Solvents facility).

<sup>84</sup> 962 F. Supp. 1312 (D. Or. 1997).

<sup>85</sup> *See id.* at 1314 (presenting main issue of case).

<sup>86</sup> *See id.* at 1313-14 (explaining plaintiff’s first allegation of CWA violation).

<sup>87</sup> *See id.* (discussing plaintiff’s second claim of CWA violation).

connected groundwater are subject to the NPDES permit requirement.<sup>88</sup> The court, however, held that if the Ninth Circuit found that discharges via hydrologically-connected groundwater do constitute discharges subject to NPDES regulation, then the ongoing residual migration of pollutants from an old brine pond through groundwater to surface water, without an NPDES permit, would constitute an ongoing violation of the CWA.<sup>89</sup> The focus is on whether the pollutants continue to reach navigable waters from a point source, not whether the discharger continues to add pollutants to the point source itself.<sup>90</sup>

## 2. *Narrow Interpretation of Gwaltney and the CWA*

Courts that interpret the CWA and *Gwaltney* narrowly have held that the migration of residual contamination from prior discharges does not constitute an ongoing violation.<sup>91</sup> The Fifth, First and Second Circuits have followed such a rationale.<sup>92</sup>

### a. *Hamker v. Diamond Shamrock Chemical Co.*<sup>93</sup>

In *Hamker v. Diamond Shamrock Chemical Co. (Hamker)*, the Fifth Circuit dismissed a landowner's complaint because, although lingering effects remained from crude petroleum that had leaked from the company's pipeline into a creek on the landowner's property, the discharge had ceased by the time of the lawsuit.<sup>94</sup> The court held that continuing residual effects resulting from a prior discharge are not equivalent to a continuing discharge.<sup>95</sup> The court dismissed the complaint, ruling that the CWA's statutory scheme denies a private right of action where a complaint does not allege an ongoing violation of an effluent standard, limitation or order.<sup>96</sup>

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<sup>88</sup> See *id.* at 1321 (explaining reliance on Ninth Circuit rulings on related CWA issues). The United States District Court for the Southern District of New York had previously held that "chlorine residuals," when discharged into navigable waters, are regarded as pollutants under the CWA. See *Hudson River Fishermen's Ass'n v. City of New York*, 751 F. Supp. 1088, 1101 (S.D.N.Y. 1990).

<sup>89</sup> See *Umatilla*, 962 F. Supp. at 1321 (discussing facts of case); see also *Werlein*, 746 F. Supp. at 897 (holding pollutants from past discharges which are released gradually over time by contaminated soil is ongoing pollution).

<sup>90</sup> See *Umatilla*, 962 F. Supp. at 1322 (applying rationale from Ninth Circuit rulings).

<sup>91</sup> See *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1139-40 (10th Cir. 2005) (noting cases that follow narrow reading of *Gwaltney*).

<sup>92</sup> See *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986) (dismissing citizen suit because defendant's alleged pollution activities had ceased by time of suit with no likelihood that infractions would continue); *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1312-13 (2d Cir. 1993) (dismissing citizen suit because accumulated lead shot in state waters could not be considered ongoing violation); *Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 397 (5th Cir. 1985) (dismissing complaint against company's leaking oil pipeline because incident involved "only single past discharge with continuing effects, not a continuing discharge").

<sup>93</sup> 756 F.2d 392 (5th Cir. 1985).

<sup>94</sup> See *id.* at 394 (discussing facts of case).

<sup>95</sup> See *id.* at 397 (finding complainant's allegations insufficient for purposes of CWA jurisdiction).

<sup>96</sup> See *id.* at 394-95 (explaining substantive requirements of private right of action under CWA citizen suit provision).

*b. Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*<sup>97</sup>

In *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp. (Pawtuxet)*, a case which involved the dumping of wastewater into offshore waters, the First Circuit dismissed the plaintiffs' lawsuit because the alleged polluter had ceased operations by the time of the lawsuit.<sup>98</sup> The plaintiff landowners alleged that Ciba-Geigy's discharges of process wastewater caused economic property loss by preventing the dredging of the silted Pawtuxet River.<sup>99</sup> The court, however, found that when reviewing CWA citizen suit complaints, a court must consider the isolated or recurrent nature of the infraction and the sincerity of the defendant's assurances against future violations.<sup>100</sup> Given that Ciba-Geigy no longer operated under its NPDES permit due to a disposal agreement with a local municipal treatment facility, the court found no reasonable likelihood that the alleged infractions would continue, and the action was dismissed.<sup>101</sup>

*c. Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*<sup>102</sup>

In *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co. (Remington Arms)*, the Second Circuit supported the First Circuit's view, holding that the CWA's present violation requirement would be undermined if a violation included the decomposition of pollutants.<sup>103</sup> The case arose when deposits of clay targets and lead shot from a local skeet shooting club accumulated in the Long Island Sound over a seventy-year period.<sup>104</sup> Remington Arms successfully demonstrated that it did not operate the gun club at the time of the lawsuit and that it made a "final irrevocable decision' never to reopen the [g]un [c]lub . . . at any time in the future."<sup>105</sup> Although the court conceded that Remington Arms discharged pollutants without a permit, the court found Remington Arms' argument persuasive and dismissed the suit.<sup>106</sup>

C. Liability for "Discharges" Under NPDES

CWA section 301(a) states that "the discharge of any pollutant by any person shall be unlawful" unless authorized by a NPDES permit in section 402 or by Secretary of the Army approval under section 404.<sup>107</sup> Whereas section 404 applies to permits for dredged or fill

<sup>97</sup> 807 F.2d 1089 (1st Cir. 1986).

<sup>98</sup> *See id.* at 1094 (noting basis for dismissal of plaintiffs' complaint).

<sup>99</sup> *See id.* at 1090-91 (discussing facts of case). The plaintiffs in *Pawtuxet* filed suit for civil penalties under the CWA as well as for damages due to violations of Rhode Island common law. *See id.*

<sup>100</sup> *See id.* at 1094 (citing court's concurrence with result in *Hamker v. Diamond Shamrock Chemical Co.*).

<sup>101</sup> *See id.* (explaining basis for court's dismissal of suit).

<sup>102</sup> 989 F.2d 1305 (2d Cir. 1993).

<sup>103</sup> *See id.* at 1313 (explaining nature of present violation requirement under CWA).

<sup>104</sup> *See id.* at 1308 (discussing facts of case).

<sup>105</sup> *See id.* at 1312 (describing evidence cited by defendant).

<sup>106</sup> *See id.* at 1312-13 (explaining propriety of summary judgment grant for defendant).

<sup>107</sup> *See* 33 U.S.C. § 1311(a) (listing effluent limitations under various CWA provisions); *id.* § 1342 (listing effluent limitations for pollutants generally); *id.* § 1344 (listing effluent limitations for dredged or fill material).

material, section 402 involves “pollutants” generally.<sup>108</sup> To establish a violation of either section 402 or 404 under section 301(a), a plaintiff must satisfy a five-part test: (1) the defendant discharged a certain material; (2) the material in question is defined as a pollutant; (3) the pollutant was discharged into navigable waters; (4) the origin of the pollutant is defined under the CWA as a point source; and (5) the discharge was produced without a permit.<sup>109</sup>

The most controversial terms in the five-part test are “discharged” and “from a point source.”<sup>110</sup> The CWA defines “discharge” as the “addition of any pollutant to navigable waters from any point source.”<sup>111</sup> Though courts ruling on cases arising under violations of section 404 have found that the term “discharge” requires intentional action by an individual or company, those cases arising under section 402 have not.<sup>112</sup> Such a divergence in interpretation is evident in *Froebel v. Meyer (Froebel)*.<sup>113</sup> In *Froebel*, the Seventh Circuit held that no administrative regulation or case law interpreted section 404 to require a permit in the absence of active conduct.<sup>114</sup> As for “point source,” the CWA defines the term as “any discernible, confined and discrete conveyance” from which pollutants may be discharged.<sup>115</sup> Courts appear unanimous in holding that inactive mines are considered point sources under the CWA.<sup>116</sup>

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<sup>108</sup> See *id.* §§ 1342, 1344 (listing effluent limitations for pollutants generally and dredged or fill material); *Froebel v. Meyer*, 217 F.3d 928 (7th Cir. 2000) (denying plaintiff’s claim against defendant county for failure to remove built-up silt and sediment behind dam because active conduct resulting in discharge of dredged or fill material was lacking). EPA regulations define “dredged material” as material that is excavated or dredged from U.S. waters and “fill material” as material placed in U.S. waters where the material has the effect of “(i) [r]eplacing any portion of a water of the United States with dry land; or (ii) [c]hanging the bottom elevation of any portion of a water of the United States.” See 40 C.F.R. pt. 232.2 (2006); see also 33 C.F.R. pt. 323.2(d)(1) (2006).

<sup>109</sup> See *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982) (noting five-element requirement for dams to require NPDES permits).

<sup>110</sup> See *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1142-44 (10th Cir. 2005) (explaining dispute as to meaning of “discharge of a pollutant”); *id.* at 1145-46 (explaining dispute as to meaning of “point source”).

<sup>111</sup> See 33 U.S.C. § 1362(12) (defining “discharge of a pollutant” under CWA).

<sup>112</sup> See *Froebel*, 217 F.3d at 939 (explaining that section 404, its underlying regulations, and cases applying its terms require active conduct resulting in discharge of dredged or fill material). *But see* *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (explaining that Congress established regulatory provisions of CWA without regard to intentionality); *Sierra Club v. Abston Construction Co.*, 620 F.2d 41, 45 (5th Cir. 1980) (holding nothing in CWA relieves miners from liability on basis that operators did not actually construct conveyances in question).

<sup>113</sup> 217 F.3d 928 (7th Cir. 2000).

<sup>114</sup> See *id.* at 938-39 (explaining active conduct requirement that necessitates section 404 permit). In *Froebel*, a landowner filed a citizen suit alleging violations under sections 402 and 404 for sediment discharges caused by the removal of the 150 year-old Funk Dam. See *id.* at 930-32. *Froebel* filed the citizen suit against Waukesha County under section 404. See *id.* at 931, 939. The county merely owned the land on which the dam was located and took no part in the activities to dismantle the dam. See *id.*

<sup>115</sup> See 33 U.S.C. § 1362(14) (defining “point source” under CWA).

<sup>116</sup> See, e.g., *Comm. to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993) (holding spillway and valve from abandoned mine are point sources); *Am. Mining Cong. v. EPA*, 965 F.2d 759, 764-66 (9th Cir. 1992) (noting legislative history provides no indication that Congress intended to exempt contaminated discharges from inactive mines); *Beartooth Alliance v. Crown Butte Mines*, 904 F. Supp. 1168, 1172-74 (D. Mont. 1995) (noting EPA makes clear that mines are point sources as defined under CWA).

#### D. The *Chevron* Standard and Rules of Statutory Construction

Generally in all statutory construction cases, courts begin their analysis with the language of the statute.<sup>117</sup> If such statutory language is unambiguous, the court's inquiry ends; however, if the language of the statute can be reasonably understood as having two or more meanings, the court must look further.<sup>118</sup> In such cases, the court must consider the statutory provision at issue in the context of the statute as a whole, not in isolation.<sup>119</sup>

More specifically, an analysis of the legislative intent behind any congressional statute enforced by an executive branch agency requires a court to follow rules of statutory interpretation outlined in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (*Chevron*).<sup>120</sup> *Chevron* requires that when a statute is silent or ambiguous with respect to a specific issue, a court may not substitute its own interpretation of the statute for that of the executive branch agency charged with its administration.<sup>121</sup> Rather, a court must defer to the agency's reasonable interpretation of the statute, provided the agency's reading is based on a permissible construction of the statute.<sup>122</sup> Congress imparts such administrative deference to executive agencies by explicitly delegating to them the necessary authority to clarify specific statutory provisions through the issuance of interpretive agency regulations.<sup>123</sup>

#### E. Rules of Summary Judgment

Federal Rule of Civil Procedure 56 states that a party shall be granted a motion for summary judgment if the evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."<sup>124</sup> At the summary judgment stage, courts provide non-moving parties the opportunity to prove a factual controversy exists.<sup>125</sup> When sufficient evidence exists to support a legitimate disagreement as to whether one party must prevail as a matter of law, a court must deny a summary judgment motion and submit the matter to the factfinder.<sup>126</sup>

<sup>117</sup> See *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (explaining process of statutory interpretation).

<sup>118</sup> See *id.* (explaining process of statutory interpretation when language is capable of more than one interpretation); *United States v. Quarrell*, 310 F.3d 664, 669 (10th Cir. 2002) (defining "ambiguous" as being capable of interpretation with two or more meanings).

<sup>119</sup> See *United States v. Nichols*, 184 F.3d 1169, 1171 (10th Cir. 1999) (noting that when court interprets statutory language, it must examine language "in context, not in isolation").

<sup>120</sup> 467 U.S. 837 (1984).

<sup>121</sup> See *id.* at 843 (explaining supremacy of administrative agency interpretation over judicial interpretation).

<sup>122</sup> See *id.* (explaining that only issue for Court's consideration is permissibility of agency's statutory interpretation).

<sup>123</sup> See *id.* (noting Court's deference to its prior holding in *Morton v. Ruiz*, 415 U.S. 199 (1974)). The *Ruiz* Court explained, "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." See *Ruiz*, 415 U.S. at 231.

<sup>124</sup> See FED. R. CIV. P. 56(c) (stating that where there is "no genuine issue as to any material fact" based on evidence presented, "the moving party is entitled to a judgment as a matter of law").

<sup>125</sup> See *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1150 (10th Cir. 2005) (explaining standards for summary judgment).

<sup>126</sup> See *id.* (describing circumstances under which court must deny summary judgment motion).

## IV. NARRATIVE ANALYSIS

In *El Paso*, the Tenth Circuit affirmed the plaintiffs' first argument that their claim met the necessary requirements for subject matter jurisdiction under the CWA citizen suit provision.<sup>127</sup> After passing this first hurdle, the court proceeded to agree with the plaintiffs that El Paso's activities satisfied the definition of "discharge of any pollutant" under CWA section 301(a).<sup>128</sup> Despite finding that the plaintiffs satisfied their jurisdictional and statutory burdens, however, the court rejected Sierra Club's third argument that the evidence admitted established the hydrological connection between the El Paso Mine Shaft and the Roosevelt Tunnel Portal necessary to demonstrate the link between the discharged pollutants and their addition to navigable waters.<sup>129</sup> In reviewing the summary judgment grant de novo, the court reversed the district magistrate's ruling, holding that Sierra Club had not sufficiently satisfied the heightened evidentiary burden necessary for summary judgment.<sup>130</sup>

## A. Tenth Circuit's Examination of the Magistrate's Findings of Subject Matter Jurisdiction

The Tenth Circuit first addressed the issue of subject matter jurisdiction.<sup>131</sup> The court upheld the magistrate's ruling that Sierra Club had made the "good-faith allegation of continuous or intermittent violation" required under CWA section 505.<sup>132</sup>

The court's primary focus was whether a defendant must be engaged in a polluting practice at the time legal proceedings are initiated or whether jurisdiction exists for past pollution practices which have stopped by the time the plaintiff files suit.<sup>133</sup> Relying on the Supreme Court's ruling in *Gwaltney*, the Tenth Circuit found the language and structure of the citizen suit provision was "primarily forward-looking" or preventative.<sup>134</sup> Thus, plaintiffs need only make good-faith allegations of continuous or intermittent violations with the "likelihood that a past polluter will continue to pollute in the future."<sup>135</sup> The

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<sup>127</sup> See *id.* at 1141 (stating plaintiffs' position regarding satisfaction of requirements for jurisdiction under citizen suit provision).

<sup>128</sup> See *id.* at 1136-37 (explaining plaintiffs' argument that El Paso activities are covered by CWA's definition of discharge); 33 U.S.C. § 1362(12) (defining "discharge of a pollutant" under CWA).

<sup>129</sup> See *El Paso*, 421 F.3d at 1146 (stating plaintiffs' position that factual uncertainties created by experts were not material to issue of CWA liability).

<sup>130</sup> See *id.* at 1149 (noting testimonial evidence and water sampling data underscore complex geology and hydrology of Roosevelt Tunnel and cast doubt on Sierra Club's claim that pollutants discharged at portal originate at El Paso Shaft).

<sup>131</sup> See *id.* at 1139 (explaining court's analysis of subject matter jurisdiction under citizen suit provision).

<sup>132</sup> See *id.* at 1141 (affirming magistrate's ruling that El Paso failed to proffer sufficient evidence to rebut plaintiffs' good-faith allegation).

<sup>133</sup> See *id.* at 1139 (noting Tenth Circuit's reliance on *Gwaltney*).

<sup>134</sup> See *El Paso*, 421 F.3d at 1139 (citing Supreme Court's interpretation of citizen suit provision requirements); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987) (explaining effect of language and structure in remainder of citizen suit provision in CWA section 505).

<sup>135</sup> See *Gwaltney*, 484 U.S. at 57-66 (stating most natural reading of "to be in violation" requirement).

burden then shifts to the defendant to show that any violations have ceased and are not likely to recur.<sup>136</sup>

The Tenth Circuit found the facts of the instant case more analogous to past cases involving the ongoing *discharge* of pollutants from a *current* point source rather than the ongoing *migration* of pollutants from a *past* point source.<sup>137</sup> El Paso, in fact, did not deny the district magistrate's determination that its mine shaft was a point source as defined by the CWA.<sup>138</sup> Therefore, because Sierra Club properly alleged that the contemporaneous discharge originated from a point source (the El Paso Shaft) which flowed through other conveyances to navigable waters, CWA jurisdiction was established.<sup>139</sup> Moreover, the court determined that all cases on which El Paso relied involved discharging activity from a point source which had ceased at the time of suit, whereas the discharge from the El Paso Mine Shaft was still occurring at the time of suit.<sup>140</sup>

The hydrology of the El Paso Shaft and Roosevelt Tunnel connection further supported the Tenth Circuit's position.<sup>141</sup> Given that the tunnel was originally constructed for the purpose of draining groundwater from the rock, the shaft and tunnel were operating as intended with the unintentional and unfortunate byproduct being polluted water.<sup>142</sup> In addition, because the mine shaft was a man-made point source that delivered polluted water to the tunnel, El Paso carried the burden of proffering rebuttal evidence as to the discharge of pollutants.<sup>143</sup> In the absence of such evidence, the court followed the ruling in *Gwaltney* and affirmed subject matter jurisdiction.<sup>144</sup>

#### B. Tenth Circuit's Examination of the Magistrate's Findings of NPDES Violations

The Tenth Circuit next considered El Paso's principal challenge to the district magistrate's ruling that the focus of CWA section 301 is the ownership of a point source rather than the discharge-causing conduct emanating from that source.<sup>145</sup> The court analyzed CWA section 301 according to its component elements: (1) discharge; (2) of a pollutant; and (3) from a point source.<sup>146</sup>

<sup>136</sup> See *El Paso*, 421 F.3d at 1139 (detailing each party's burden of proof and persuasion under requirement of initial good-faith allegation).

<sup>137</sup> See *id.* at 1140 (noting similarities of *El Paso* facts to cases involving past identifiable discharge such as spills, accident leakages and dumping of waste rock).

<sup>138</sup> See *id.* (mentioning El Paso's failure to challenge determination that its mine shaft was point source); 33 U.S.C. § 1362(14) (defining "point source" as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged").

<sup>139</sup> See *El Paso*, 421 F.3d at 1140 (explaining that mine shaft itself as point source is not reasonably contestable).

<sup>140</sup> See *id.* (noting critical differences between discharges in cases cited by El Paso and nature of El Paso Mine Shaft discharge).

<sup>141</sup> See *id.* at 1141 (describing purpose of shaft and tunnel to allow pollutants to continually flow through rock and mine workings).

<sup>142</sup> See *id.* (explaining that purpose of El Paso Shaft-Roosevelt Tunnel connection was to drain groundwater from rock).

<sup>143</sup> See *id.* (noting El Paso's burden of rebuttal).

<sup>144</sup> See *El Paso*, 421 F.3d at 1141 (explaining that good-faith allegation of NPDES violation stands in absence of evidence to contrary).

<sup>145</sup> See *id.* at 1143 (explaining that focus of CWA is not on who engages in discharging, but rather on fact of discharge).

<sup>146</sup> See *id.* at 1142 (setting forth five-part test for establishing violation of CWA section 301).

With regard to “discharge,” the court looked to rules of statutory construction to determine whether Congress intended to subject successor owners of a point source to section 402’s NPDES requirements.<sup>147</sup> After analyzing the CWA’s definition of “discharge” and other supporting language in the statute, the court found that, when viewed as a whole, the CWA’s liability permitting sections clearly focused “on the point of discharge, not the underlying conduct that led to the discharge.”<sup>148</sup> The court relied on the CWA’s consistent reference to the obligations of “owners and operators” of a point source, suggesting that the Act’s provisions cover successor landowners.<sup>149</sup> Furthermore, the court asserted that interpretative support from EPA regulations was more than sufficient to bolster its reading of the CWA.<sup>150</sup>

The Tenth Circuit chose to discount the arguments El Paso advanced through its cited case law, particularly with regard to El Paso’s use of the Seventh Circuit’s holding in *Froebel*.<sup>151</sup> The court found the ruling in *Froebel* unpersuasive because the Seventh Circuit based its holding on an interpretation of CWA section 404, not section 402.<sup>152</sup> Furthermore, the Tenth Circuit noted that section 404 emphasized the *activity* giving rise to a discharge, not the *ownership* of the point source which the Seventh Circuit, in the first portion of its *Froebel* opinion, had interpreted section 402 to address.<sup>153</sup> Most importantly, however, the court found *Froebel* inapplicable due to one significant factual difference between the two cases: the dam in *Froebel* was not a point source, and thus did not come under the purview

<sup>147</sup> See *id.* (stating issue was not inactive status of El Paso Mine, but whether definition of “discharge” required affirmative conduct). For a discussion of standards of statutory interpretation as enunciated in *Chevron*, see *supra* notes 120-23 and accompanying text.

<sup>148</sup> See *id.* at 1143 (analyzing theoretical foundation of liability); see also 33 U.S.C. § 1311(e) (stating that effluent limitations established pursuant to CWA section 302 shall be applied to all point sources of pollutant discharges).

<sup>149</sup> See *El Paso*, 421 F.3d at 1143-44 (noting language throughout CWA referring to “owners and operators” of point sources); see also 33 U.S.C. § 1311(g)(2) (providing “owner or operator” of point source may apply for modification of permit requirements); *id.* § 1318(a)(1)(A) (stating EPA shall require “owner or operator” of point source to establish and maintain records and perform monitoring duties).

<sup>150</sup> See *El Paso*, 421 F.3d at 1144 (explaining that while not substitute for CWA’s plain language, EPA regulations provided interpretative support); see also 40 C.F.R. pt. 122.2 (2006) (stating that “addition of any pollutant” is defined with references to discharges through conveyances “owned by a person”); Nonpoint Source Management Programs Grants Guidance, 55 Fed. Reg. 35,248 (Aug. 28, 1990) (explaining drainage from abandoned mines is point source pollution where owner can be found); 40 C.F.R. pt. 122.26(b)(4)(iii) (stating in NPDES regulation requiring permits for storm water runoff that inactive mines are mining sites “which have an identifiable owner/operator”).

<sup>151</sup> See *El Paso*, 421 F.3d at 1145 (explaining Tenth Circuit’s three-part justification for finding holding in *Froebel* unpersuasive); *Froebel v. Meyer*, 217 F.3d 928, 938 (7th Cir. 2000) (explaining Seventh Circuit’s ruling that definition of “discharge” under section 404 strongly suggests permits are required only when party allegedly needing one takes “some action, rather than doing nothing whatsoever . . .”).

<sup>152</sup> See *El Paso*, 421 F.3d at 1145 (noting linguistic difference between section 402’s focus on “discharge of a pollutant” and section 404’s “discharge of dredged or fill material”). *Froebel* did interpret the word “discharge,” but interpreted its meaning in the context of “dredged or fill material,” not “pollutants.” See *Froebel*, 217 F.3d at 938; see generally 33 U.S.C. § 1344(a) (applying CWA to permits for dredged or fill material).

<sup>153</sup> See *El Paso*, 421 F.3d at 1145 (explaining second basis for distinguishing *Froebel* facts from facts of *El Paso*).

of section 402, whereas El Paso already agreed that its shaft was a point source pursuant to the CWA.<sup>154</sup>

The Tenth Circuit deemed both CWA sections 301(a) and 402 applicable to point source owner liability for unpermitted discharges in the absence of active mining operations.<sup>155</sup> The court thereby concluded that triable issues of fact existed regarding El Paso's liability for discharges in the absence of active mining operations on its property.<sup>156</sup>

### C. Tenth Circuit's Examination of the Magistrate's Grant of Summary Judgment Based on Evidence

Although the Tenth Circuit found El Paso's arguments meritless with respect to the first two issues, the court agreed with El Paso that genuine issues of material fact precluded granting the Sierra Club's summary judgment motion.<sup>157</sup> Viewed in the proper light—the light most favorable to the non-moving party (El Paso)—the court concluded Sierra Club failed to establish beyond dispute the facts necessary to show a hydrological connection between the pollutants emanating from the shaft and those discharged at the portal.<sup>158</sup> The court reversed the magistrate's ruling and remanded the case to the district court for proceedings consistent with its opinion.<sup>159</sup>

## V. CRITICAL ANALYSIS

### A. Tenth Circuit's Examination of the Magistrate's Findings of Subject Matter Jurisdiction

In *El Paso*, the Tenth Circuit properly concluded that El Paso failed to proffer any evidence indicating that the discharge of pollutants from its shaft was not a recurring and ongoing problem.<sup>160</sup> The court, in assessing the precedent set by the Supreme Court in *Gwaltney*, correctly followed an expansive reading of the case as endorsed by district courts

<sup>154</sup> See *id.* (explaining *Froebel* applied to nonpoint source of pollution whereas source in *El Paso* was point source); see also *Froebel*, 217 F.3d at 937 (holding removed dam was not point source because term “connotes the terminal end of an artificial system for moving water, waste, or other materials”); 33 U.S.C. § 1362(14) (defining “point source” under CWA).

<sup>155</sup> See *El Paso*, 421 F.3d at 1146 (stating basis for El Paso's liability).

<sup>156</sup> See *id.* (noting final issue before court).

<sup>157</sup> See *id.* at 1149-50 (holding plaintiffs failed to establish evidence necessary to show required hydrological connection). The court's reversal of the district magistrate's ruling ultimately turned on its review of the expert testimony proffered by the parties. See *id.* at 1146-48. The Tenth Circuit, which reviewed the grant of summary judgment de novo, found that the plaintiffs failed to meet their burden of establishing a hydrological connection between the pollutants discharged from the El Paso Mine Shaft and the water discharged from the Roosevelt Tunnel Portal into navigable waters. See *id.* at 1146. The plaintiffs' experts maintained that “better than half” of the water conveyed from El Paso's property into the Roosevelt Tunnel was continuously discharged into Cripple Creek. See *id.* at 1147. El Paso's expert, however, found it likely that a large part of the water flowing from the portal was derived from water that infiltrated into the tunnel between the El Paso Mine Shaft and the portal. See *id.* at 1148. As a result, the court found that El Paso presented enough compelling evidence to withstand a motion for summary judgment. See *id.* at 1149-50.

<sup>158</sup> See *id.* (noting inappropriateness of magistrate's ruling in favor of summary judgment for plaintiffs).

<sup>159</sup> See *id.* at 1151 (stating procedural result of Tenth Circuit's holding).

<sup>160</sup> See *El Paso*, 421 F.3d at 1141 (noting El Paso's failure to proffer evidence to negate plaintiffs' good-faith allegation).

in Minnesota and Oregon.<sup>161</sup> In light of the facts in *El Paso*, the Tenth Circuit's opinion is consistent with an expansive reading of *Gwaltney* rather than the narrow interpretation argued by El Paso.<sup>162</sup> The court's judgment is supported by evidence showing discharges from the mine were ongoing and not the result of a past release with lingering effects.<sup>163</sup>

The court conclusively established, both through a clear-cut reading of the CWA's general definition provision and El Paso's own admission, that El Paso's mine shaft was a point source rather than a nonpoint source.<sup>164</sup> Thus, the source of the pollution falls under the purview of CWA section 402.<sup>165</sup> In addition, Sierra Club alleged an *ongoing* discharge rather than the diffusion of pollutants from a *past* discharge.<sup>166</sup> The only cases El Paso cited in its defense involved identifiable discharges from point sources occurring in the past.<sup>167</sup> El Paso made no mention of cases identifying discharges from point sources continuously occurring at the time of suit.<sup>168</sup> By differentiating the true essence of Sierra Club's allegation, the Tenth Circuit clarified the magnitude of El Paso's burden in defeating the plaintiffs' good-faith allegation.<sup>169</sup> Given that El Paso failed to present the necessary evidence, the court correctly upheld jurisdiction.<sup>170</sup>

<sup>161</sup> See *Umatilla Waterquality Protective Ass'n v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312, 1322 (D. Or. 1997) (holding ongoing migration of pollutants from old brine pit's residues through groundwater to surface water without NPDES permit would constitute ongoing violation of CWA); *Werlein v. United States*, 746 F. Supp. 887, 897 (D. Minn. 1990) (holding waste that has not yet reached waterway but is being introduced into waterway over time constitutes "ongoing" waterway pollution).

<sup>162</sup> See *El Paso*, 421 F.3d at 1140 (explaining El Paso's cited cases all involved identifiable discharges from point sources that occurred in past).

<sup>163</sup> See *id.* (characterizing nature of El Paso Mine discharge). Based on the hydrology of the El Paso Shaft and Roosevelt Tunnel, pollutants continually flowed through the rock and mine workings until they reached the shaft, where they were then discharged into the tunnel. See *id.* at 1141. Though the origin of the discharged pollutants was unknown, the mine was a man-made point source that delivered pollutants and continued to discharge them into the Roosevelt Tunnel, distinguishing this case from those involving the migration of pollutants from prior discharges. See *id.*

<sup>164</sup> See *id.* at 1140-41 (noting agreement among parties that El Paso Mine is point source); see also 33 U.S.C. § 1362(14) (defining "point source" under CWA). The court held that had the plaintiffs filed suit alleging that pollutants migrated from surface waters through the ground to the tunnel or seeped into the tunnel from naturally occurring mineral deposits, El Paso's argument and cited cases would have "considerable force." See *El Paso*, 421 F.3d at 1141.

<sup>165</sup> See *El Paso*, 421 F.3d at 1141-42 (explaining that CWA section 402 applies to case facts).

<sup>166</sup> See *id.* at 1140 (stating factual distinction rendering cases cited by El Paso inapplicable).

<sup>167</sup> See *id.* (distinguishing facts of present case from cases involving mere migration, decomposition or diffusion of pollutants from past point source discharge).

<sup>168</sup> See *id.* at 1141 (noting all cases cited by El Paso failed to address recurring and ongoing sources of pollution).

<sup>169</sup> See *id.* (noting El Paso's burden to demonstrate that pollutant discharge was not continuous or intermittent).

<sup>170</sup> See *El Paso*, 421 F.3d at 1141 (explaining propriety of magistrate's rationale for asserting subject matter jurisdiction).

## B. Tenth Circuit's Examination of the Magistrate's Findings of NPDES Violations

The Tenth Circuit correctly interpreted the scope of violations under NPDES.<sup>171</sup> The court properly looked to legislative history, common usage and other CWA provisions to interpret the phrase "discharge of a pollutant" as stated under NPDES.<sup>172</sup> The court examined the CWA's definition of "discharge," appropriately finding it to mean "addition of any pollutant."<sup>173</sup> In defining "addition," the court correctly looked to the context of the CWA and administrative regulations promulgated by the EPA to provide interpretative support.<sup>174</sup> Though they are not substitutes for the plain language of the CWA's general definitions provision, these sources provided an abundance of persuasive guidance.<sup>175</sup> Furthermore, when applying these regulations in the context of a *Chevron* analysis, the court was correct to defer to the EPA's guidance.<sup>176</sup> The regulatory meanings construed by the EPA are permissible constructions of the statute and are thus entitled to controlling weight under *Chevron*.<sup>177</sup>

The Tenth Circuit's ruling regarding the requirements for a NPDES violation was also internally consistent with its prior rulings.<sup>178</sup> In previously holding that unintentional discharges of pollutants from gold leaching operations violated the CWA, the court noted the CWA's intention to broadly regulate the introduction of pollutants into waterways.<sup>179</sup> Following its own prior rulings, which found that point source owners can be liable for discharges whether or not they acted intentionally in causing the discharge, the Tenth Circuit correctly held that El Paso violated applicable NPDES regulations.<sup>180</sup>

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<sup>171</sup> For a discussion of the statutory background of NPDES (33 U.S.C. § 1362), see *supra* notes 53-56 and accompanying text.

<sup>172</sup> See *El Paso*, 421 F.3d at 1143 (explaining need to look to secondary sources due to lack of useful legislative history).

<sup>173</sup> See 33 U.S.C. § 1362(12) (defining "discharge of a pollutant" under CWA).

<sup>174</sup> See *id.* § 1311(g)(2) (listing requirements for granting modifications to effluent limitations for certain nonconventional pollutants); *id.* § 1318(a) (listing requirements of owners or operators of any point source to establish and maintain for inspection records, monitoring equipment and effluent samples); see also Nonpoint Source Management Programs Grants Guidance, 55 Fed. Reg. 35,248 (Aug. 28, 1990) (stating drainage from abandoned mines can be point source pollution where owner can be found; otherwise, it is nonpoint source pollution).

<sup>175</sup> See *El Paso*, 421 F.3d at 1144 (applying EPA regulations that provide interpretative support).

<sup>176</sup> For a discussion of the standards of statutory interpretation enunciated in *Chevron*, see *supra* notes 120-23 and accompanying text.

<sup>177</sup> See *El Paso*, 421 F.3d at 1144 (explaining EPA interpretation of CWA language).

<sup>178</sup> See *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10th Cir. 1979) (holding unintentional discharge of pollutants from gold leaching operation violated CWA).

<sup>179</sup> See *id.* (explaining CWA would be severely weakened if only intentional acts were proscribed); *El Paso*, 421 F.3d at 1145-46 (noting Tenth Circuit's finding of broad pollution regulation under CWA in *Earth Sciences*).

<sup>180</sup> See *El Paso*, 421 F.3d at 1146 (noting significance of Tenth Circuit's precedent in *Earth Sciences*).

### C. Tenth Circuit's Examination of the Magistrate's Grant of Summary Judgment Based on Evidence

Ultimately, the Tenth Circuit correctly reversed the magistrate's grant of summary judgment based on the weight of the evidence.<sup>181</sup> Under the elements necessary for summary judgment pursuant to Federal Rule of Civil Procedure 56, the court, in viewing the evidence in the light most favorable to El Paso, appropriately found that a genuine issue of material fact existed regarding the hydrological connection in question.<sup>182</sup> Though the experts agreed that the Roosevelt Tunnel discharged some of the shaft's *water* on an intermittent basis, the evidence conflicted with regard to whether the shaft's *pollutants* were discharged at the portal.<sup>183</sup> Given that the evidence was not "so one-sided that [p]laintiffs [were] entitled to prevail as a matter of law," the court properly granted El Paso the opportunity to defend itself against the plaintiffs' claims through trial.<sup>184</sup>

## VI. IMPACT

Courts applying the *Gwaltney* standard to CWA citizen suits have continuously struggled to understand its scope and applicability.<sup>185</sup> This task becomes even more challenging when courts attempt to extend the *Gwaltney* standard to govern citizen suits under the RCRA, CERCLA and EPCRA.<sup>186</sup>

Though the ultimate reversal of summary judgment rested on an interpretation of federal procedural rules, the *El Paso* decision affirmatively supports the ease with which citizen suits can be filed.<sup>187</sup> Analysis within the court's opinion further suggests that the Tenth Circuit supports the judicial minority by interpreting *Gwaltney* and the CWA expansively.<sup>188</sup> This federal support for the minority position will likely widen the split in circuit and district court opinions, for three circuit courts of appeal already side with the federal majority view (a narrow interpretation).<sup>189</sup>

In addition to providing other courts with guidance on the determination of subject matter jurisdiction, *El Paso* affirms the conclusion that the foundation of the CWA is point

<sup>181</sup> See *id.* at 1150 (holding reversal rests on application of proper standards for summary judgment).

<sup>182</sup> See *id.* at 1149-50 (noting plaintiffs' strongest expert evidence was less than convincing given water sample data); see also FED. R. CIV. P. 56(c) (explaining when there is no genuine issue of material fact, moving party is entitled to judgment as matter of law).

<sup>183</sup> See *El Paso*, 421 F.3d at 1149 (noting evidence showed dramatic declines in zinc levels as water flowed from El Paso Shaft toward Roosevelt Tunnel Portal).

<sup>184</sup> See *id.* at 1150 (stating plaintiffs were not entitled to prevail as matter of law).

<sup>185</sup> See Abate, *supra* note 19, at 27 (noting courts struggle to understand scope and applicability of *Gwaltney* standard).

<sup>186</sup> See *id.* (stating difficulty faced by courts in applying *Gwaltney* standard to acts other than CWA).

<sup>187</sup> See *El Paso*, 421 F.3d at 1141 (explaining good-faith allegation will stand in absence of sufficient evidence to rebut presumption of violation).

<sup>188</sup> See *id.* at 1139-41 (distinguishing instant case from those involving migration of pollutants from prior discharges). For a discussion of cases following an expansive interpretation of *Gwaltney*, see *supra* notes 74-90 and accompanying text.

<sup>189</sup> For a discussion of cases following a narrow interpretation of *Gwaltney*, see *supra* note 92.

source ownership, not discharge-causing conduct.<sup>190</sup> Even as prior cases established that discharges from inactive mines can violate the CWA, the Tenth Circuit expanded liability not just for owners of such mines, but for successive landowners as well.<sup>191</sup> After *El Paso*, both original and successor owners of property with active and inactive mines will be more vulnerable to the risk of liability for violating the CWA by failing to possess a valid NPDES permit.<sup>192</sup>

As a result, potentially expensive fines and cleanup costs could be imposed on landowners of abandoned mines regardless of the particular owner's involvement—or lack thereof—in the creation of potential mine discharges.<sup>193</sup> Environmental regulations such as CERCLA already hold current landowners of property burdened with toxic contaminants responsible for cleanup costs even when a prior landowner created the contamination.<sup>194</sup> Expanding the CWA's reach to successor owners of abandoned mines will likely leave such owners responsible for the costs of cleaning up a pollution source they did not create, much like their counterparts under CERCLA.<sup>195</sup> Present and future landowners, however, will immediately benefit from the Tenth Circuit's interpretation of the CWA and *El Paso's* clarification of the conditions under which a landowner is required to obtain an NPDES permit.<sup>196</sup>

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<sup>190</sup> See *El Paso*, 421 F.3d at 1144 (explaining significance of secondary evidence showing that ownership of point source will trigger liability).

<sup>191</sup> See *id.* (explaining lack of evidence to show that successor landowners not currently mining their property are exempt from liability).

<sup>192</sup> See *id.* at 1136 n.1 (citing Sierra Club's filing in 2000 of another CWA citizen suit against Cripple Creek and Victor Gold Mining, Co. for discharges from Carlton Tunnel, another drainage tunnel in Cripple Creek Mining District). For the facts of Sierra Club's citizen suit against Cripple Creek & Victor Gold Mining, see *Sierra Club, et al. v. Cripple Creek & Victor Gold Mining, Co.*, No. 00-cv-02325-MSK-MEH, 2006 U.S. Dist. LEXIS 27973 (D. Colo. Apr. 13, 2006).

<sup>193</sup> See *Park, supra* note 5, at 299 (explaining increases in toxic waste hazards led to dramatic increase in governmental regulations requiring private parties to clean up contaminants on their property).

<sup>194</sup> See *id.* at 302 (noting CERCLA's influence on liability of owners of toxic property).

<sup>195</sup> See *id.* (explaining successor landowner responsibility under CERCLA for hazardous waste site cleaning costs).

<sup>196</sup> See 33 U.S.C. § 1342 (describing permit regulations under NPDES).