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Jennifer Pruett

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FEDERAL WATER POLLUTION CONTROL ACT'S NOTICE REQUIREMENT LIBERALLY CONSTRUED

ENVIRONMENTAL LAW—FEDERAL WATER POLLUTION CONTROL ACT: Notice was held sufficient, although not in compliance with the Federal Water Pollution Control Act, where the district court had stayed its proceedings until notice had been given and 11 months had elapsed between the filing of suit and a hearing on the merits. *Pymatuning Water Shed Citizens for a Hygienic Environment v. Eaton*, 644 F.2d 995 (3d Cir. 1981).

The Pymatuning Water Shed Citizens for a Hygienic Environment (Pymatuning), a non-profit corporation for those living in or having some ecological or recreational interest in the Pymatuning Water Shed area, filed a citizens' suit in federal district court pursuant to the Federal Water Pollution Control Act (FWPCA)¹ on May 17, 1979. The complaint in *Pymatuning Water Shed Citizens for a Hygienic Environment v. Eaton*² alleged that members of the Board of the North and South Shenango Joint Municipal Authority (the Authority) and various contractors and construction corporations were releasing untreated sewage into the Shenango River and its tributaries. The defendants moved for dismissal on June 5, 1979, on the ground that Pymatuning had failed to give them notice as required by § 505 of the FWPCA.³ The district court denied the defendants' motion, but stayed its proceedings until Pymatuning gave the required notice. The court subsequently dismissed all defendants except the Authority for lack of personal and subject matter jurisdiction.⁴

Pymatuning was tried on the merits on May 21, 1980. The court found that the Authority had violated state discharge limits⁵ and

1. 33 U.S.C. §§ 1251-1376 (1976) (Supp. II 1978). §§ 1365(a) and (g) allow private citizens to bring suit for alleged violations of the FWPCA. Pymatuning alleged violations of §§ 1311, 1311(b)(1), 1342, 1342(b) and 1365(f)(6) (1976) of the FWPCA.

2. 644 F.2d 995 (3d Cir. 1981).

3. 33 U.S.C. § 1365(b) (1976) provides that no citizen action may be commenced until 60 days after the plaintiff has given notice of the alleged violation to the appropriate administrator, to the state in which the violation occurs, and to any alleged violator of a standard, limitation or order.

4. *Pymatuning Water Shed Citizens for a Hygienic Environment v. Eaton*, 506 F. Supp. 902, 903 (1980).

5. The Authority had violated conditions 5, 8 and 16 of the Pennsylvania Department of Environmental Resources (DER) permit, and condition 16 of the Standard Conditions Relating to Erosion Control of the DER permit issued to them by the state. 506 F. Supp. at

ordered the Authority to prepare a timetable containing plans to reduce its discharge to legal limits.⁶ The Authority appealed the district court's decision to the Third Circuit and argued there that the trial court had no jurisdiction because of Pymatuning's improper notice. The Authority contended that the only remedy for the improper notice was a dismissal and refiling after proper notice.⁷

The court of appeals held that failure to comply strictly with the FWPCA's notice requirement did not deprive the district court of jurisdiction. The court relied heavily on its decision in *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*,⁸ where it followed a pragmatic approach to the FWPCA's notice requirements. In *Susquehanna*, a citizen group filed suit two days after having given notice to the defendants of alleged FWPCA violations. The Nuclear Regulatory Commission (NRC), a defendant in the action, conceded that the defendants had ample time to respond to the plaintiff's FWPCA claim.⁹ The court determined that a dismissal and refiling would waste judicial resources. The court further found that strict adherence to the notice requirement would serve no purpose under the circumstances in *Susquehanna* and would result in "excessive formalism."¹⁰

The Third Circuit considered the facts in *Pymatuning* to be indistinguishable from those in *Susquehanna*. The court noted that 11 months had elapsed between the time Pymatuning filed its complaint and the trial date. The stay in the trial court's proceedings had allowed the defendants "the time contemplated by the statute for taking appropriate action"¹¹ and sufficient time to prepare their defense. The court found that, as in *Susquehanna*, dismissal at that stage in the proceedings would waste judicial resources and would frustrate citizen enforcement of the FWPCA. The court noted that almost two years had passed since the filing of the complaint, and "in the meantime, the alleged flow of sewage continued unabated."¹² Apparently, the court was unwilling to delay any longer the clean-up of the Shen-

904. 33 U.S.C. § 1365(f)(6) (1976) permits citizens to sue under the FWPCA for violations of state-issued permits.

6. 506 F. Supp. at 909.

7. 644 F.2d at 996.

8. 619 F.2d 231 (3d Cir. 1980), *cert. denied sub nom.* General Public Utilities Corp. v. Susquehanna Valley Alliance, _____ U.S. _____, 101 S. Ct. 893 (1981).

9. NRC also contended that notice requirements in citizen suits are designed to give agencies the opportunity to resolve alleged violations without resort to possibly unnecessary court proceedings.

10. 619 F.2d 231 (3rd Cir. 1980), *cert. denied sub nom.* General Public Utilities Corp. v. Susquehanna Valley Alliance, _____ U.S. _____, 101 S. Ct. 893 (1981).

11. 644 F.2d at 996.

12. *Id.*

ango River. The Third Circuit therefore affirmed the lower court's jurisdiction to hear the case.

The Third Circuit ignored an important difference between *Susquehanna* and *Pymatuning*. In *Susquehanna*, a major defendant conceded that the notice had been sufficient and argued against dismissal. All defendants in *Pymatuning* strongly resisted the trial court's assertion of jurisdiction and contended that the case should have been dismissed and refiled. The decision in *Pymatuning* is therefore a stronger statement of the pragmatic approach to the FWPCA's notice requirement.

This case illustrates the tension between judicial discretion and legislative direction. Although the legislature provided an absolute notice requirement in the FWPCA, the court has broadly interpreted and applied it. In the exercise of the court's discretion, however, it has closely followed the legislative intent behind the notice requirement. All defendants had time to investigate the alleged violations and correct them, or to prepare a defense. The Third Circuit's approach should be followed by other courts, as it satisfies both legislative intent and also conserves judicial resources.

JENNIFER PRUETT