

# News Release

June 2012

## Hunton & Williams Request Results in Fifth Circuit Publication of Precedent-Setting Opinion on Clean Water Act Section 404 Permits

The U.S. Court of Appeals for the Fifth Circuit issued a unanimous [decision](#) on April 25, 2012, in *Atchafalaya Basinkeeper v. Chustz* holding that the Clean Water Act (“the Act”) does not authorize citizen suits to enforce the conditions of permits to discharge dredged or fill material issued by the U.S. Army Corps of Engineers under section 404 of the Act. \_\_\_F.3d\_\_\_, 2012 WL 1880600 (5<sup>th</sup> Cir. Apr. 25, 2012). The court initially issued its decision as an unpublished opinion.

Hunton & Williams attorneys **F. William Brownell** and **Andrew J. Turner** submitted a request for publication on behalf of the Waters Advocacy Coalition and the Utility Water Act Group (who are not parties to the litigation, but who have significant interests in the proper implementation of the Clean Water Act). Based on that request, the court issued an [order](#) on May 24, 2012, granting the request for publication. On May 31, 2012, the court issued an order denying a petition for rehearing *en banc* filed by the plaintiff-appellants, Atchafalaya Basinkeeper and Louisiana Environmental Action Network. The Court of Appeals’ decision establishes binding precedent in the Fifth Circuit and strong persuasive authority in other federal circuits.

The *Atchafalaya* case involved a permit issued by the Corps under Clean Water Act section 404 to the Louisiana Department of Natural Resources Atchafalaya Basin Program in connection with a project to deepen a bayou. The permit authorized the deposit of dredged material in spoil banks along the sides of the bayou. After the permitted work began, the plaintiff-appellants filed a Clean Water Act citizen suit in the U.S. District Court for the Western District of Louisiana, alleging a violation of the permit based on the state agency’s alleged failure to maintain adequate gaps in the spoil banks to allow natural water flow and flooding. The district court dismissed the case, holding that the suit was not authorized by the Clean Water Act’s citizen suit provisions, and an appeal to the Fifth Circuit followed.

The Fifth Circuit affirmed the district court’s decision based on the language of the Clean Water Act citizen suit provision. That provision authorizes citizen suits for specific acts, including (1) discharges of pollutants that do not comply with sections 402 or 404 of the Act and (2) violations of section 402 permits. The court observed that the Act expressly authorizes suits for violations of section 402 permits (National Pollutant Discharge Elimination System permits), but does not expressly authorize suits for alleged violations of section 404 permits. The court explained that, if the Act’s authorization of citizen suits for discharges not in compliance with sections 402 or 404 allowed suits alleging noncompliance with the terms of permits issued under those sections, there would have been no need for Congress to separately and specifically authorize citizen suits for alleged violations of section 402 permits. The court upheld dismissal of the suit in light of the “rule of statutory interpretation that no provision should be construed to be entirely redundant.” The court noted that “Congress has relied on the Corps to enforce the permits it issues for more than 100 years, and there are no strong indicia of congressional intent to provide citizen suits for § 1344 permit condition violations.”

On May 8, 2012, Brownell and Turner sent a letter to the court requesting publication of the *Atchafalaya* opinion. The request for publication was based on the decision's establishment of important precedent on a matter of significance to the enforcement of the Clean Water Act that has not been previously addressed by the federal courts of appeal. On May 24, 2012, the court granted the request and ordered the opinion published.

"The *Atchafalaya* decision is of considerable importance to the wide range of public and private entities who routinely receive and rely upon Clean Water Act section 404 permits," said Turner, counsel in the Washington office. "The decision establishes binding precedent in the Fifth Circuit and strong persuasive authority in other federal circuits that the Clean Water Act does not authorize citizen suits to enforce the conditions of Section 404 permits."

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