

Case No. 02-1863

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GREENFIELD MILLS, INC., et al.,

Plaintiff-Appellants,

v.

JOHN GOSS, as Director of the Indiana
Department of Natural Resources, et al.,

Defendant-Appellee

On Appeal from the United States District Court
for the Northern District of Indiana
Fort Wayne Division

The Honorable William C. Lee
Chief Judge

District Court No. 1:00CV0219

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

(formerly known as Certificate of Interest)

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

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(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

MCCROSKEY, FELDMAN, COCHRANE & BROCK, P.C. and
LEWIS & ASSOCIATES

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any: and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)

I hereby certify that Appellants' Brief complies with the type-volume limitations of F.R.A.P. 32(a)(7), and that this Brief contains 13,786 words excluding the Corporate Disclosure, Table of Contents, Table of Citations, Appendix and Certificates of Counsel, but the word count does include all footnotes. Counsel is relying upon the word count prepared by Word Perfect 8.0 in making this certification.

Neal Lewis

CIRCUIT RULE 31(e)(1) CERTIFICATION

I hereby certify that one copy of this Brief containing nothing more than the text with the label of the disc including the case name and docket number has been filed with this Brief, or downloaded to the 7th Circuit via internet pursuant to its published instructions, together with a copy of the disc served on each party separately represented by counsel.

Neal Lewis

PROOF OF SERVICE AND FILING

I hereby certify that a copy of this Brief and Appendix was served upon the following Counsel for Defendants at the following addresses, by first class U.S. Mail, postage prepaid this ____ day of _____, 2002. I further certify that this document was filed by mailing in accordance with F.R.A.P. 25(a)(2)(B) on the same date as above by over night U.S. Mail, prepaid addressed to the Clerk of the 7th Circuit.

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CIRCUIT RULE STATEMENT

I certify that all of the materials required by F.R.A.P. 30(a) and (b), in accordance with Circuit Rule 30, and the 7th Circuit Practitioner's Handbook, are included in the Short Appendix and the FRAP (30)(a) and Circuit Rule 30(b) Appendix, and that no digital version is available.

Neal Lewis

I. JURISDICTIONAL STATEMENT

The district court has subject matter jurisdiction under 28 U.S.C. 1331, because the action arises under the Federal Clean Water Act, 33 USC 1365, Federal Civil Rights Act, 42 USC 1983 and Fifth and Fourteenth Amendments to the Constitution. This Court has appellate jurisdiction pursuant to 28 USC 1291. Plaintiffs appeal as of right the district court's March 11, 2002 Order granting summary judgement to Defendants. Final judgement was entered on March 12, 2002, which fully disposes of all claims. Plaintiffs filed their Notice of Appeal on April 5, 2002.

II. STATEMENT OF ISSUES FOR REVIEW

1. Did the district court err in finding Defendants' discharge of a pollutant and dredge or fill material was an exempt maintenance activity, not subject to the recapture provision, and thus not a violation of the Clean Water Act ("CWA")?

2. Did the district court err in dismissing Plaintiffs' Fifth Amendment partial takings claim under 42 USC 1983 by ruling Plaintiffs had a state law remedy for inverse condemnation, even though Indiana does not allow actions for partial takings?

3. Did the district court err in finding no denial of procedural due process under 42 USC 1983 and Fourteenth Amendment, even though Defendants had no good cause for failing to provide pre-deprivation process prior to taking Plaintiffs' property?

III. STATEMENT OF THE CASE

This case was filed in the Northern District of Indiana on 5/15/00. The suit alleged Defendants hydraulically dredged the bottom of an Indiana Department of Natural Resources ("IDNR") reservoir and discharged 100,000 cubic yards of those dredged materials into Fawn River below. The suit sought various remedies for the destruction of five miles of a previously

pristine waterway and small downstream lake.

Defendants are all officials of IDNR, sued in both individual and official capacity, except for John Goss, named only as director of IDNR (replacing former director, Larry Macklin).

Plaintiffs are owners in the destroyed section of Fawn River, except for Jeff Dunfee, who alleged standing as a recreational user of the stream.

Relief was sought under the Clean Water Act (“CWA”) citizen suit provision, 33 USC 1365 and the federal Civil Rights Act, 42 USC 1983. The complaint requests equitable relief from Defendants in their official capacity to end the continuing violation of the CWA, together with fees and costs. Damages and penalties are sought as to the individual capacity Defendants.

Defendants filed a motion to dismiss all counts for lack of jurisdiction on 7/10/00, which was denied on 1/26/01, except as to the governor of Indiana.

On 6/8/01 Defendants filed for summary judgment, and on 6/11/01 Plaintiffs filed a counter motion on the CWA claim. At the vigorous request of the district court, Plaintiffs voluntarily dismissed some Section 1983 counts, but retained the Fourteenth Amendment procedural due process and Fifth Amendment takings claims.

Subsequently, Judge William C. Lee denied Plaintiffs’ motion for summary judgement and granted summary judgment in favor of Defendants, entering it as a final judgment on 3/12/02.¹

IV. STATEMENT OF FACTS

1. Introduction.

On 5/18/98 the Defendants hydraulically dredged the bottom of an IDNR reservoir and

¹Published as, *Greenfield Mills, Inc. v. O’Bannon*, 189 F.Supp.2d 893 (N.D.Ind. 2002).

discharged 100,000 cubic yards of material through the IDNR dam into Fawn River below.² Prior to the 1998 dredging, local IDNR officials had complained that this reservoir was completely filled with sediment, and some local officials, including Defendants Clary and Ledet, had engaged in other attempts to remove sediment from the reservoir.

Before 1998, Fawn River had been recognized as one of the best clean, gravel bottomed streams preserved in Indiana, home to rare and threatened species and highly prized as a native smallmouth bass fishery—a place where family and friends routinely gathered to swim and recreate. This stream is now largely destroyed—Defendants literally filled Fawn River with mud. This discharge of vast amounts of offensive material ruined five miles of aquatic habitat, wrecking most of the stream’s recreational, aesthetic and environmental uses once enjoyed by the landowners and public. The discharge additionally filled a small downstream lake, converting it to a marsh.³

The dredged materials remain where deposited. The natural flows of Fawn River are incapable of reversing this pollution. Defendants claim their destruction resulted from attempts to repair an intermittently used plumbing valve for the IDNR hatchery.

A map of the area is included as the last page in the Short Appendix bound herewith (*also, at App. 2*).

2. IDNR officials’ pre-1998 problems with its “filled-in” reservoir.

Located in northeast Indiana at the IDNR Fish Hatchery, the 40 acre reservoir is hourglass shaped, with the much larger, upstream lobe connected to the downstream lobe by a channel.

²Supporting fact citations immediately follow this short introduction.

³The magnitude of the discharge can be quickly understood by viewing the extreme alteration of Greenfield Mills Lake apparent in the “before and after” pictures (five miles downstream from initial point of discharge at the IDNR dam). (App. 128a).

(*Id.*). The main dam structure is located at the downstream end of the smaller lobe. (*Id.*).

Reservoir water is pumped through plumbing by IDNR for use in the fish hatchery. (App. 101-102). In 1993, the local hatchery manager had complained by letter of serious problems with this reservoir.

Currently the pond [IDNR reservoir] is silted in to the point it is no longer navigable even in a canoe. Dissolved oxygen . . . [has] become critical Removal of the silt and decaying vegetation [from the reservoir] may help rectify this condition.

(App. 80, comments added). However, IDNR officials believed approvals for conventional dredging would be difficult as shown in other official correspondence.

He [John Laturner, IDNR Division of Water] also informs me that the Fawn River is a highly protected environmental river and it may be difficult to make any kind of repairs or dredging in the area.

(App. 79, comment added). The Director of Water wrote in 1993:

[A]pprovals to dredge the mill pond [reservoir] would be difficult to obtain since the area is environmentally sensitive.

(App. 81, comment added). In 1994-95, IDNR officials made their first unconventional attempt to remove reservoir sediment.

I have noticed a continual build up of silt in the Mill Pond [reservoir] Removal of the silt and decaying vegetation may help I will be submitting a work plan this summer to control vegetation using approved chemicals.

(App. 80, 1993 IDNR hatchery letter, comment added).

Problem: The mill pond just east of the Fawn River Hatchery is choked Over the past 50 years silt has totally filled in the river channel [in the reservoir]. . . .

Procedures: A granular aquatic herbicide will be applied . . . to large clumps of spatterdock, arrowhead and pond lilies.

(App. 83, 1993 IDNR work plan, comment added). After these chemical killings, IDNR reported success at removing sediment.

Major Findings (Issues Problems) Secondary benefits were also realized. Silt deposition in the mill pond [reservoir] was reduced and the river channel was navigable, by canoe, for the first time in over a decade.

(App. 85, 1995, IDNR report, comment added). Defendants Clary and Ledet both admitted participation in the prior chemical killings. (App. 96, 110). Defendant Clary admitted that one of the purposes of the prior spraying operation was to “create boating lanes.” (App. 96). Chemical destruction of vegetation is also known as an engineering technique employed in advance of traditional dredging. (App. 55).

Despite IDNR’s efforts, the condition of the reservoir remains a problem. Defendants Meyer and Clary continue to request a dredging of the reservoir. (App. 87, 1999 IDNR fax).

3. The dredging operation of May 18, 1998.

On May 18, 1998 Defendants rapidly drained their reservoir resulting in a hydraulic dredging. (App. 53, 97, 106, 109, 111, 122, 133; Op. 18). This activity was directed by Defendants Clary and Meyer, respectively the manager and assistant manager of the IDNR hatchery, and pre-approved by Defendant Armstrong, head of the hatchery division. (App. 91-92,100). Defendant Ledet, an IDNR fisheries biologist, also participated in the operation. (App. 123-24).

Hydraulic dredging is an engineering technique where stored waters are rapidly released to create powerful excavating currents. (App. 56). This inexpensive method of dredging, known by a variety of names, including, “sluicing,” remains a common mining practice. (App. 56).

On the morning of May 18, Defendants began opening an 8 foot high dam control structure. (App. 12, 90). Throughout the day, the resulting rapid release of stored waters excavated materials from the IDNR reservoir, discharging them through the open spillway into Fawn River below. (App. 11-15, 53-56, 97, 106, 109, 111,119, 122, 133). In the process, Defendants completely emptied their reservoir until it was drained land. (App. 109, 133). Defendants admitted in their briefs that the event of May 18, 1998 was a “hydraulic dredging,” and the district court so found. (Op. 18).

In this one-day operation, IDNR deepened their reservoir by removing as much as 33,000 cubic yards from the bottom. (App. 14, 53). After being cut loose, these once compact materials were churned by the powerful man-induced flows into an expanded slurry of about 100,000 cubic yards. (App. 53-54, 69). This slurry of dredged materials flowed through the IDNR spillway into Fawn River, filling the stream and small down river lake.⁴ (App. 13-14, 41-42, 52-54, 69-71). This volume of mud is equivalent to 6,250 dump trucks carrying 16 cubic yards each.

Defendants admitted there was substantial removal of material from the reservoir as a result of the May 18, 1998 event.⁵

Q. At what point did it start to become discolored?

A. Well, it was a muddy color immediately upon raising the bottom gate.

⁴The district court stated “Plaintiffs claim [the sediment was] excavated and replaced into the same body of water.” (Op. at 28, comment added). This was wrong. Plaintiffs proved that Fawn River is a biologically and geologically distinct body of water from that of the IDNR reservoir. (App. 44).

⁵The district court regularly inferred Defendants presented evidence that the discharge was *de minimus*. (Op. pp. 6, 7, 9, 36, and notes 6, 23). The Defendants’ several admissions quoted hereafter contradict the inference.

[text omitted]

A. My recollection is that it was muddy throughout the entire draining operation, muddy colored.

(App. 106, Meyer).

Q. All right, then based upon your observations—you've acknowledged that silt and sediment was cut from the DNR facilities and discharged through the dam, correct?

A. Yes.

(App. 97, Clary).

Q. And this photograph shown as number 32 in Exhibit 56, that's essentially what the—or that is what the lower millpond looked like on May 18 after it had been drawn to a channel?

A. Yes.

Q. So all these mud bars were exposed in here, correct?

A. Yes.

Q. And this channel had been cut by the power of the water coming through the dam, correct?

A. That would be fair, yes.

(App. 111, Ledet).

Q. On May 18 of '98 when you first saw the Millpond drained to a channel before Gene Lewis got there, how would you characterize the color of the water that was discharging through the dam?

A. It was very dark. It had picked up a lot of—or whatever a lot is—it had picked up, you know, bottom muck, sediment material.

Q. Okay, and there wasn't any question in your mind that that's what was causing the discoloration, was the transport of sediment or silt?

A. Correct.

(App. 109, Ledet). Assistant IDNR biologist Koza testified:

Q. [W]hat about the situation caused you to get up and go ask Neil [Defendant Ledet] if he had seen that?

[text omitted]

A. [text omitted] I looked out and I saw the water, it was—it was, you know, black. It was—had—apparently had a high silt load in it from eroding a channel in the bottom.

(App. 113). Not only was the nature of the discharge plainly obvious to Defendants throughout the operation, but they also knew in advance that sediment would be cut from the reservoir.

A. I would say that we were aware there'd be some sediment loss opening up that structure. Does that answer your question?

Q. Okay, so—well, it's a little different, but what you're saying is, even before May 18, '98 you were aware there would be some sediment loss when you did it?

A. Yes.

(App. 105, Meyer). And the potential harm was apparent to Defendant Ledet, and his assistant, both IDNR biologists.⁶ For example:

Q. Were you concerned about that when you first saw it?

A. Yes.

Q. And was your concern about possible impacts downstream?

A. Yes.

(App. 109, Ledet).

A. Well, you hate to see a lot of—of heavy, you know, dark colored

⁶Defendants claimed in briefings to be unaware their activities could cause harm.

sediment laden, whatever you call it, water going down the stream . . . My—you know, my first thought was for the—the—fish population

(App. 114, biologist Koza). Even the IDNR summer intern testified that the potential danger to aquatic life in the river was apparent. (App. 121).

When Plaintiff Gene Lewis saw the damage occurring downstream, he went to the IDNR hatchery. (App. 151). When Plaintiff arrived, IDNR officials were just standing on the dam watching the semi-solid flow of dredged materials move through the spillway. (App. 133). The magnitude of the discharge and extreme damage being done was immediately obvious. (App. 151). Plaintiff requested that Defendants close the dam. (App. 151). Defendants did not; rather, they continued discharging sediment to Plaintiffs' property through the afternoon. (App. 151-52).

The IDNR reservoir had been well prepared for hydraulic dredging by the prior 1994-95 killing of aquatic vegetation. In commercial dredging, advance chemical destruction of vegetation is a common practice. Plaintiffs' un-rebutted experts' affidavits proved that much of the materials discharged on May 18, 1998 would not have been excavated by sluicing except for the prior destruction of vegetation.⁷

The killing of aquatic vegetation in advance years in anticipation of a dredging operation is an accepted engineering practice to allow for more inexpensive or easier removal of materials during a traditional dredging operation. In fact, the manner in which the DNR killed the aquatic vegetation, and then allowed an intervening period of time for the vegetation's deep, long established root systems to decompose, may have been exactly the method and timeline best employed in order to minimize costs to the DNR while maximizing the amount of materials that could be removed during a hydraulic dredging/sluicing bulk excavation process such as that

⁷The district court stated "Plaintiffs failed to explain . . . let alone present any proof that the two events are related" (Op. p. 22).

undertaken by the DNR on May 18, 1998

[text omitted]

[A] Substantial portion, potentially the majority, of the dredged materials discharged on May 18, 1998 was likely discharged as direct result of or incidental to the reported spreading of aquatic herbicide and subsequent chemical kill of the reservoir's vegetation by the DNR in preceding years.

(App. 55-56, *see also*, App. 70).

4. Defendants admitted they had no intention to maintain the IDNR dam on May 18, 1998, and admitted the discharge was not necessary to perform any maintenance to hatchery plumbing.

Defendants never intended any maintenance to the dam.⁸ Defendants Meyer and Clary both testified their intended purpose on 5/18/98 was only to repair a valve used to pipe water into a building.

Q. Whose idea was it to lower the millpond on May 18 ...?

A. Well, I think it arose as a joint discussion how to repair the [hatchery] plumbing to the intake structure.

(App. 91, comment added)

Our intentions were only to expose the [hatchery] piping. We had no idea it was going to be required to lower it [the reservoir] to that level.

(App. 93, comment added). Defendants did not intend any maintenance to the dam control structure, nor intend to inspect the bottom of the dam gates.

Q. So again, neither you nor Tom Meyer—in the morning of May 18, neither of you expected to fully drain the millpond, is that

⁸The district court repeatedly stated there were no facts disputing Defendants' claimed intent to perform maintenance to the dam. (Op. pp. 18-19, 22, and note 13). Again, the following admissions from Defendants are relevant to the issue.

correct?

A. Yes.

Q. So you could not have had any intention to fully inspect the dam gates down to the bottom because you didn't intend to fully drain it, right?

A. Yes.

(App. 89, Clary). Defendant Meyer admitted any claim of repair to the dam was dubious—only an “afterthought.”

Well, the—the only actual repair we effected that day, if you can call it a repair, was attaching the clevis and/or clevises and attaching a chain to the north bottom gate. That was kind of an afterthought while—while we were going through that process, because we had such a hard time hooking on, that would alleviate the problem at some future point.

(App. 107(b)). Under cross examination, Meyer unequivocally admitted that Defendants never intended any maintenance to the dam.

Q. And you didn't actually plan to repair anything on the flow gates [of the dam] on May 18th of 98, did you?

A. That is Correct.

(App. 99, comment added).

Defendants did not bother consulting with their own engineering department in advance of the May 18 event.⁹ (App. 94-95). If IDNR engineering had been consulted, the discharge could

⁹The lower court states Defendants “consulted with others” in advance of dam repairs, and provides other discussion on dam repair activity. (Op. at 22). The district court was misled by a subtle red herring. It is true Defendants planned, at some unspecified point in the future, to perform dam maintenance—but such was not the intent of the activities on May 18, 1998. “Q. [B]e careful here . . . my point is . . . there are two things going on, there were some future things you planned to do, right? A. Correct.” (App. 99, Meyers)

easily have been avoided.

Q. [text omitted] If the local dam operators had come to you before May 18th of 1998 as one of the DNR engineers . . . would you have recommended that they do a rapid drawdown of the reservoir?

[text omitted]

A. We would probably have said take it down at a rate that would be safe and judicious from the standpoint of stirring up sediment. Because if you pull it out quickly, it will take sediment with it.

(App. 116, IDNR engineer Wayland). IDNR engineering offered two simple alternatives for performing the claimed work—neither of which would involve any discharge.

[T]he two basic ways of approaching it would be to cofferdam so you don't drop the water at all, and the other one would be to drop it slowly, using the judicious raising of stop logs, draining it down slowly. And by doing it slowly, you would not have any downstream repercussions with property owners, and you would have less likelihood of the bank sloughing.

(App. 117, Wayland). But, perhaps the single most striking admission was that the exact same plumbing work claimed as the excuse for the May 18 rapid draining, was later conducted by these Defendants without any lowering of the reservoir.

Q. [B]ut my specific question is, on May 18, of '98 did you actually go make any repairs to this valve?

A. No.

Q. Have you yet?

A. Yes.

Q. When was that?

A. [text omitted] I can estimate it for you at a couple weeks after May 18th.

[text omitted]

Q. [text omitted] [I]n order to make those repairs did you draw down, or drain, or lower the hatchery millpond to make those repairs?

A. No.

(App. 103-04, Meyer).

5. Undisputed impairment and changes to wetlands resulting from the deposit of 100,000 cubic yards of dredged materials.

Prior to its destruction, Fawn River was one of the finest streams left preserved in Indiana. It was a clear, clean, gravel bottomed creek, supporting a wide variety of ecological and recreational uses. (App. 3-4). It was once a uniquely beautiful place, as can be seen in the photograph of children and their parents playing in the river prior to the events of May 18, 1998. (App. 147). Contrasting photographs show the unappealing mud deposits and dirty conditions that now persist. (App. 140-44, 148 (147 and 148 are of the same location, before and after)). Plaintiffs' families and friends no longer swim in the Fawn River. (App. 136-37).

The dredged material discharged through the IDNR spillway was a slurried mix, having sediment concentrations of 40% to 80% of volume.¹⁰ (App. 69). This flowing mud was deposited throughout a several mile stretch of Fawn River and small downstream lake. (App. 3, 11-14, 41-42, 54, 69, 127-29, 136) The particle composition is 84% sand by weight. (App. 72).

IDNR deposited 100,000 cubic yards of dredged sediments into the riparian properties of

¹⁰Plaintiffs retained an inter-disciplinary team of environmental scientists and engineers. Four are professors at Indiana University; two have received numerous appointments by the governor of Indiana and IDNR. (App. 36-39, 46-47). Professor Willard, who had firsthand knowledge of this stretch of the Fawn before the event of 5/18/98, has recently served in CWA litigation as an expert for USDOJ. *Id.* Engineer John Gasper has performed numerous public lands reclamation projects. (App. 59-62).

the Plaintiffs, with the immediate effect of suffocating the aquatic life in Fawn River.¹¹ (App. 35, 41,134). Long term, the materials have elevated the bottom of Fawn River, are impairing its flows and circulation and have reduced the pre-event reach of the waters. (App. 42, 54). “Certain areas that were once flowing are currently stagnant and other areas of quiet waters have been significantly filled with mud.” (App. 54). Vast deposits of mud pudding have filled portions of the stream channel, buried the gravel bottom and destroyed much of the previously available aquatic habitat. (App. 23-25, 41, 136-37, 140-144). The stream has been rendered unfit for most recreation. (App. 1, 137).

A large volume of dredged materials also ended up in Greenfield Mills Lake, approximately 5 miles down river from IDNR. (App. 42, 128a). This once open water lake has been converted to a marsh by the discharge. (*Id.*).

In addition to un-rebutted expert testimony, Plaintiffs filed affidavits by people with a lifetime of experience on Fawn River, who know intimately what the stream was like before the changes caused by the dredged materials. (App. 127, 129, 132). The affidavits include photographs of the river, both before and after it was destroyed. (App. 128a, 140-44, 147-48). The landowners’ observations match those of the Indiana University scientists.

The pollution will not self-correct. The natural currents are incapable of removing the dredged materials within present lifetimes. (App. 1, 30-31, 42). Removal can only be accomplished through careful environmental engineering. (App. 31-35). Professor Willard of

¹¹The district court implies that Defendants presented credible evidence that the discharge was *de minimus*. (Op. pp. 6, 7, 9, and note 6). Defendants’ admissions are directly contradictory. Nor did they file any affidavits, lay or expert, refuting the testimony of the Indiana University scientists.

Indiana University, summarizes the damages to the stream and small lake as follows:

The ecological changes I have described here (and in our report) to both the Fawn River and the lake at Greenfield Mills Indiana are extreme modifications of their pre-event characteristics and ecosystems. Ecologically they are catastrophic, in that the sudden deposition of large amounts of mud throughout the system altered the system processes so that it is an entirely different system. In this case that alteration has changed the Fawn River from a clear gravelly, well oxygenated stream, a rare type in Indiana, to a mud clogged low oxygen stream (of which we have many). Greenfield Mills Pond was changed from an open pond to a marsh. The mud has impaired the flow or circulation of the affected waters and reduced their reach. Neither transformation is likely to be naturally reversed.

(App. 42).

Defendants never responded to Plaintiffs' evidence as to the quantity of materials excavated, discharged, or the resulting damage to Fawn River.¹² The magnitude of the May 18, 1998 event was an undisputed fact in the proceedings below.¹³

V. SUMMARY OF ARGUMENT

Defendants hydraulically dredged a reservoir and discharged 100,000 cubic yards of slurried material through the IDNR dam into Fawn River below. The mechanism employed is a common mining practice ("sluicing"), whereby stored waters in a reservoir are rapidly released to create powerful currents to excavate materials from one body of water and transport them to another.

¹²Defendant Clary even admitted he was unable to rebut the damage. "Q. So, during that entire 18 years you've never traveled that length of the river by canoe or foot or otherwise? A. No. Q. So you're in no position to give me any opinions about how it has or hasn't changed because of the May 18 event, is that fair? A. That's fair." (App. 176-77).

¹³The district court remarked on the "sharp contrast" in the evidence, citing "Clary and Meyer, who testified that after the draw-down the clarity of the water was 'unremarkable.'" (Op. p. 9). Defendants comments were irrelevant, either referencing water in the reservoir after the gates were closed, or at bridges miles from the discharge.

The effect of a discharge of this magnitude upon the small stream was catastrophic. What was arguably the best preserved section of one of the finest natural river systems left in Indiana was destroyed. A valuable natural resource, sustaining multiple ecological and recreational uses, was transformed into an aesthetically displeasing mud-filled waterway supporting very few pre-event uses; and a small lake was filled in, converted to marsh.

IDNR Defendants admitted that their actions produced a hydraulic dredging, and the district court correctly ruled that the activity was a discharge of dredged or fill material within jurisdiction of 33 USC 1344 of the Clean Water Act.

However, the lower court erroneously held that inspection of hatchery plumbing exempted the discharge as dam maintenance under 33 USC 1344(f)(1)(B). The district court may have confused maintenance of plumbing with the nearby dam. Hatchery plumbing does not form a part of the dam, and plumbing is not listed as a structure for which a maintenance exemption may lie. The district court also ignored Defendants' admissions that the discharge was unnecessary, even for the claimed repair of hatchery plumbing. Thus, the lower court incorrectly found an intent to perform repairs to the IDNR dam and erred in applying the dam maintenance exemptions to the CWA. Simply put, no maintenance to a dam was shown.

But assuming, for argument, that the record supported an intent to work on the dam, nowhere does the district court explain why destruction of this magnitude can be excused under the CWA. This Circuit and others have all plainly ruled that Congress never intended to exempt activities causing significant harm. To avoid this issue, the lower court had to accept Defendants' unsupported claims of a *de minimus* discharge and wholly reject Plaintiffs' comprehensive expert and lay evidence on the destruction of Fawn River. Plaintiffs' evidence of

the magnitude of events went unchallenged. It was error to exempt any maintenance where substantial alteration of waters was shown.

The lower court also stated that Plaintiffs never supported a claim of pretext—i.e., that Defendants were only pretending to perform maintenance. The district court was incorrect. Plaintiffs supplied a highly developed fact pattern beginning with IDNR’s well documented history of wanting to dredge their filled-in reservoir, prior attempts to remove sediment, and other events culminating on May 18, 1998 with Plaintiffs arriving on the scene to find Defendants simply watching the dredging of the reservoir and semi-solid discharge to Fawn River below. Defendants knew the discharge was harmful; yet, they were all just standing around on the dam watching. The damaging effect of this discharge was plainly obvious. Plaintiff asked the Defendants to close the dam, but they refused—continuing to discharge sediments into Fawn River for several more hours. A genuine issue of pretext was fully supported and argued to the court below.

The district court also refused to apply 33 CFR 323.4(a)(2), and thereby erroneously held that a discharge beyond the IDNR facility—filling five miles of private property—qualified for the maintenance exception. 33 CFR 323.4(a)(2) is a dredge and fill regulation that limits discharges to the scope of the facility under repair. However, the district court found that this regulation, stating “maintenance does not include any modification that changes the character, scope, or size of the original fill design,” was a limitation on the amount of water in the reservoir—not a restriction on the locations where dredged or fill material may be discharged without a permit. The lower court was wrong. The regulation allows filling a hole in a dam, while prohibiting a discharge into never-before-filled wetlands or other people’s property.

And while the district court wrongly interprets the regulation, it compounds the error by finding that there was no change in the “character, scope or size” of the reservoir. This was an unusual statement, given that the reservoir was completely drained—a rather dramatic, albeit short term, alteration. The lower court’s statement is even more perplexing given the uncontradicted evidence that the reservoir was permanently deepened by excavating as much as 33,000 cubic yards of material from its bottom.

But even were the maintenance exemption applicable in the first instance, the district court further erred in rejecting application of the recapture provision. Section 1344(f)(2) recaptures even an exempt discharge, if it is incidental to any change in use to a water body or causes any impairment or reduction of the flow or in the reach of a waterway.

The district court here found the discharge was not incidental to any changes of use, pointedly ignoring the intentional draining of the IDNR reservoir—an activity specifically listed as a “change of use” under 33 CFR 323.4(c).

The district court also refused to consider the 1994-95 intentional destruction of wetland vegetation in the IDNR reservoir, and intentional creation of boating lanes where they did not previously exist, as a “change of use.” The district court stated it did not understand the connection between the prior chemical kills and the discharge of dredged materials in 1998. The direct correlation between the two events was well documented, cited and argued by Plaintiffs to the lower court. Prior chemical destruction of wetland vegetation is a common dredging practice which makes the bottom materials more easily excavated. In this case, but for the prior destruction of reservoir vegetation, much of the materials discharged on May 18, 1998 would have remained anchored and not susceptible to removal by hydraulic excavation. The chemical

stripping was itself a subjectively intended change in use to which the 1998 discharge was directly incidental.

The district court also ruled that filling a once pristine stream and a small lake with vast quantities of mud did not demonstrate any “change of use” to a water body. To reach that conclusion, the district court cited Defendants’ claimed lack of intent, thus ignoring the strict liability standard under the Clean Water Act. The lower court failed to recognize that purpose, good or bad, is irrelevant—only the result of a defendant’s conduct is at issue under the recapture provision. The lower court also discounted facts showing that Defendants knew their actions would damage Fawn River. It was error to hold that the destruction of a river and lake were not “changes of use” under the recapture provision, regardless of Defendants’ claimed purpose.

In conclusion to the CWA Section 1344 issues, while not Plaintiffs’ burden, they supplied evidence demonstrating Defendants’ lack of entitlement to an exemption in the first instance, and second, established violation of the recapture provision. Plaintiffs showed every element of liability—often using Defendants’ own admissions. Despite the unequivocal evidence, the district court held that Defendants needed no CWA permit to discharge 100,000 cubic yards of dredged materials, destroying miles of private waterways.

As to the CWA 1342 discharge of pollutants without an NPDES permit, the district court held Defendants’ actions were unintended and, therefore, not regulated. This, too, was error. CWA liability is strict.

Additionally, the district court made erroneous holdings under the Fifth and Fourteenth Amendments to the United States Constitution.

Under the Fifth Amendment taking without just compensation, 42 USC 1983 claim, the

district court ruled that Plaintiffs failed to exhaust Indiana's inverse condemnation procedures. This was error, because Indiana does not recognize an inverse condemnation remedy for partial takings. Indiana will not allow inverse condemnation unless all uses have been destroyed. In this case, total destruction of Plaintiffs' lands could not be shown. The river is only a small portion of Plaintiffs' property and still can be used for limited activities such as canoeing or irrigation. Even Defendants admitted Plaintiffs had no remedy under Indiana's inverse condemnation law.

Finally, under the Fourteenth Amendment procedural due process, Section 1983 claim, the district court erroneously held that the facts demonstrated only negligent conduct. The lower court disregarded the evidence of reckless indifference in support of the Fourteenth Amendment claim. For example, Defendants simply stood by, obviously continuing to discharge dredged material onto the Plaintiffs' property—even after Defendants were informed of the destruction their actions were causing downstream. And Defendants were independently aware, both before and during the dredging, that their actions would cause damage. In spite of this knowledge, Defendants chose to engage in and continue activities known to be harmful to private property. Such conduct is not merely negligent.

Under the Fourteenth Amendment, the lower court also erroneously held that Plaintiffs had no claim, because Plaintiffs failed to exhaust state law post-deprivation remedies. However, the issue of post-deprivation remedies is irrelevant unless the state actors can demonstrate their actions were random, unauthorized, or that an emergency or other reasonable justification existed as to why pre-deprivation process could not be given. The facts here demonstrate that Defendants' actions were expressly approved in advance by the chain of IDNR command, and that no exigence was shown. Under those circumstances, it was error for the district court to

dismiss Plaintiffs' procedural due process claim for lack of exhaustion of state law post-deprivation remedies.

ARGUMENT

A. Standard of Review on all Issues

This standard of review is applicable to all the issues on appeal. The Court of Appeals reviews summary judgment de novo, drawing its own conclusions of law and fact from the record. *E.g., Feldman v. American Memorial Life Ins. Co.*, 196 F.3d 783, 789 (7th Cir. 1999). Summary judgment is proper if there is no genuine issue as to any material fact. The burden is on the moving party to show the absence of evidence to support the nonmoving party's case. *Doe v. R.R. Donnelly, and Sons Co.*, 42 F.3d 439, 443 (7th Cir. 1994). If the moving party carries its burden, the opposing party must demonstrate by affidavits, depositions, discovery, and admissions on file that there is a genuine issue of material fact for trial. *Celotex v. Catrett*, 477 U.S. 317, 324-25 (1986). All reasonable inferences from facts in the record must be drawn in the nonmoving party's favor. *Id.* at 255.

B. Clean Water Act—Defendants Discharged 100,000 Cubic Yards of Dredged Material Without a Permit in Violation of Sections 1342 and 1344 of the CWA

Fawn River falls within the jurisdiction of the Clean Water Act (“CWA”).¹⁴ The CWA sections at issue are 33 USC 1342 (discharge of pollutants) and 33 USC 1344 (discharge of dredged or fill material).

¹⁴“Navigable waters” under CWA are “waters of the United States.” 33 USC 1362(7). “[W]aters of the United States” include interstate waters (33 CFR 328.3 (a)(2)) and tributaries of all waters ever used for interstate commerce, 33 CFR 328.3 (a)(1) and (5). Fawn River is an interstate river (Indiana and Michigan) and tributary of Lake Michigan via the St. Joseph River Basin. (App. 132).

Section 1342 prohibits discharges of pollutants without a permit. The pollutants at issue here are “dredged spoil” and “sand.” 33 U.S.C. 1362(6).

Section 1344 regulates discharge of "dredged or fill material." A permit is always required unless the discharge is part of an activity listed as conditionally exempt. Moreover, even a conditionally exempt activity requires a permit if substantial alteration to the waterway results, under 1344(f)(2) a/k/a the “recapture provision.”

1. Burden of Proof on the Clean Water Act.

Once a discharge is shown, it becomes defendant’s burden to prove both the maintenance exemption and even if exempt, that the activity still avoids the recapture provision. *U.S. v Brace*, 41 F.3d 117, 124 (3rd Cir. 1995). In this case, Defendants failed to support their defense under either provision. By contrast to Defendants’ lack of evidence, Plaintiffs comprehensively demonstrated each element as to Defendants’ liability under the CWA. Based on Defendants’ failure to meet their burden, judgement should have been granted for Plaintiffs under Section 1344. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

2. The maintenance exemption and recapture provisions at issue.

Section 1344 prohibits the discharge of dredged or fill material without a permit, but allows an exemption for certain activities. 33 USC 1344. The District Court correctly found Defendants’ hydraulic dredging was subject to the jurisdiction of Section 1344 consistent with this Circuit’s decision in *Froebel. Froebel v. Meyer*, 217 F.3d 928 (7th Cir., 2000), *affirming* 13 F.Supp.2d 843, 869 (E.D.Wis., 1998).¹⁵

¹⁵As was noted in the *Froebel* district court opinion: “Powerful, scouring currents of water are sometimes expressly used to excavate and dredge waterbeds.” *Id.*

The contested issues involve the "dam maintenance" exemption in 1344(f)(1)(B).

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material--

[text omitted]

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures;

[text omitted]

is not prohibited

33 USC 1344(f)(1)(B). Also, at issue is the following dredge and fill regulation:

Maintenance . . . of . . . dikes, dams . . . bridge abutments or approaches Maintenance does not include any modification that changes the character, scope or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time

33 CFR 323.4(a)(2).

Finally, even if a discharge qualifies as maintenance, a permit is still required if the "recapture provision" is violated. 33 USC 1344(f)(2).

Any discharge of dredged or fill material . . . incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

Section 1344(f)(2) "recaptures" the activity for regulation if it alters the use, flows, circulation or reach of a waterway. *U.S. v Heubner*, 752 F.2d 1235,1240 (7th Cir. 1985).

C. The Exemptions to Section 1344 Do Not Apply

1. The District court failed to properly consider the purpose of the Clean Water Act.

"The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 USC 1251(a). The CWA bars the discharge of any pollutant without a permit. 33 U.S.C. 1311(a). The permit process is the "cornerstone of the ... scheme for cleaning up the nation's waters." *Heubner*, 752 F.2d at 1239.

Specific to the dredge and fill provisions here at issue, this Circuit has made plain that protecting the nation's waters is of paramount concern when applying the exceptions to Section 1344.

'It is clear that the amendments that created the subsection (f) exceptions on which defendants rely were not intended to exempt all farming operations from the permit requirements, but only those whose effect upon wetlands or other waters was so minimal as to not warrant federal review and supervision.' [text omitted] Our review of the legislative history confirms the conclusions reached by the lower court.

[text omitted]

Congress intended that Section 1344(f)(1) exempt from the permit process only "narrowly defined activities ... that cause little or no adverse effects either individually or cumulatively [and which do not] convert more extensive areas of water into dry land or impede circulation or reduce the reach and size of the water body."

Huebner, 752 F.2d at 240-41 (*editing in the bottom paragraph is Court supplied*).

In this case, the district court gives no consideration to the uncontradicted evidence of destruction resulting from IDNR Defendants' activities, thus ignoring the core purpose of the CWA. Defendants' activities cannot be described as causing "little or no adverse effects."

Fawn River and Greenfield Mills Lake have been massively and destructively filled. Five miles of

the stream were ruined for most recreation, with at least half the aquatic habitat lost, and a small open water lake turned into a marsh. (*See, fact discussion, supra.*, pp. 13-15). Congress stated that the exceptions listed at 33 USC 1344(f)(1) only apply to activities having a minimal effect. Allowing the level of destruction in this case has been rejected by this Circuit. On the basis of massive destruction to the waters of the United States here, no exemption should have been found in the first place by the lower court.

2. The district court erroneously confused dam maintenance with plumbing repairs.

The district court confused Defendants' claim of dam maintenance (to take place at some unscheduled future time) with the repair to hatchery plumbing on May 18, 1998.¹⁶ Hatchery plumbing is not listed as exempt in 1344(f)(1)(B), nor similar in any way to those structures listed there as "dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures."

The district court said "plaintiffs do not seriously question the defendants' claim that they were conducting maintenance on the dam ..." and the court found that Meyer and Clary drained the reservoir to "serve as a test draw-down for the proposed flow control structure repair . . ." to the dam.¹⁷ (Op. at 18-19 and 4-5). However, Defendants unequivocally admitted they had no intentions to maintain the dam:

Q. And you didn't actually plan to repair anything on the flow gates on May 18th of 98, did you?

¹⁶*See, supra.*, note 9.

¹⁷Defendants admitted that any such claimed "test" draw down did not require a total draining, and that they never intended to inspect the bottom of the control gates. The only intended repairs alleged involved hatchery plumbing. (*See, supra, fact discussion*, pp. 10-11).

A. That is Correct.

(*See, fact section, supra.* 10-11). The district court erroneously granted a dam maintenance exemption where it was not factually warranted.

3. A genuine issue of fact existed on the claim of maintenance as mere pretext.¹⁸

Compelling circumstantial evidence was submitted on whether the claimed repair was a pretext for dredging the reservoir without a permit. "[I]t is beyond any doubt that circumstantial evidence alone may serve to prove adjudicative facts." *O'Brien v National Gypsum Co*, 944 F2d 69, 72 (2d Cir. 1991).¹⁹

The district court erroneously stated that Plaintiffs produced no evidence that maintenance was merely a pretext for an intentional dredging.²⁰ To the contrary, the evidence of pretext in the record includes: 1) IDNR's prior stated problems with a filled-in reservoir; 2) prior stated desires to dredge the reservoir; 3) the belief that permits for conventional dredging would be difficult; 4) Defendants Clary and Ledet's prior chemical destruction of vegetation in the IDNR reservoir as an attempt to remove sediment and create boating channels; 5) the known use of chemical kills as an advance procedure to dredging; 6) Defendants' admitted advance knowledge that sediments would be excavated and discharged by their actions; 7) Defendants' failure to consult with IDNR engineering in advance to avoid a sediment discharge; 8) IDNR engineering testifying that the

¹⁸This section presumes, only for the sake of argument, that hatchery plumbing work could facially qualify as an exemption under Section 1344(f)(1)(B).

¹⁹The issue of pretext need not be reached. The work claimed by Defendants, even if assumed true, violates the recapture clause. (*See, discussion infra.*, pp. 33-42).

²⁰The district court incorrectly stated several times that Plaintiffs did not challenge this issue. (Op. pp. 22, 35, and notes 13 and 23). Plaintiffs' filings contained specific citations and argument on pretext. (Docket nos. 82-84, 89-94, 97,98, 111, 128).

May 18th rapid draining was unnecessary; 9) Defendants' subsequent performance of the claimed plumbing maintenance without draining the reservoir; 10) the fact that Defendants were just standing around on the dam watching the discharge when the first Plaintiff arrived at the IDNR facility; 11) Defendants' disregard for the obvious destruction that was taking place by continuing the operation; 12) Defendants' refusal of requests to close the dam; 13) Defendants' continuing desire to dredge the reservoir. (*See, discussion and citations, supra*, pp. 3-13).

These facts, taken together, supported a reasonable inference and genuine issue on whether Defendants' claim of maintenance was a pretext to cheaply and quickly dredge the filled-in IDNR reservoir at the expense of the downstream property owners. On this alternative ground, summary judgement to Defendants was incorrect.

4. The regulations prohibit use of the maintenance exemption to justify discharging dredged or fill material into someone else's wetland property.

The applicable regulation on maintenance strictly limits an exempt discharge as follows:

Maintenance . . . of . . . dikes, dams . . . bridge abutments or approaches Maintenance does not include any modification that changes the character, scope or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time

33 CFR 323.4(a)(2). Plaintiffs argued that this regulation was meant to strictly confine an exempt maintenance discharge to the scope of the dam—a limitation based on the *status quo* of “fill” as the dam was constructed. The district court rejected this interpretation, instead finding that “original fill design” meant the size of the IDNR reservoir, thus agreeing with Defendants that the regulation is a limitation on the scope of impounded waters. (Op. pp. 19-20). The lower court equates “fill” to mean water in the reservoir. This directly contradicts the regulatory definition of fill as “replacing an aquatic area with dry land” or “changing the bottom elevation of a

waterbody.” 33 CFR 323.2 (e).

Limiting an exempt maintenance discharge to the “original fill design” is not a limitation on the amount of water in a reservoir. Reservoirs are not even mentioned in the relevant sections. Rather, it is dams, dikes, bridges, *etc.* that are the subject of the regulation. The term “original fill design” can only be understood with reference to those structures. Dams, dikes, bridges, *etc.* are by their very nature constructed of “fill” in a wetland. “Fill” as used in “original fill design” must be understood to delineate the boundaries of the dredged or fill material originally placed to construct the dam. Therefore 33 CFR 323.4(a)(2) limits a maintenance discharge of dredged or fill materials to the same space originally occupied by the “fill” of the structure. The regulation is properly understood as a prohibition on filling new wetland areas under the guise of maintenance.

Nor did the lower court consider the anomalies that result when its interpretation of “original fill design” is applied to the other listed structures such as “riprap, breakwaters, causeways . . . bridge abutments, approaches, and transportation structures.” For example, the “original fill design” of a bridge abutment cannot be the size of its reservoir waters—a bridge abutment has no reservoir. 33 USC 1344(f)(1)(B) & 33 CFR 323.4(a)(2).

The lower court comments that Plaintiffs’ interpretation would make it “questionable whether any activity or repair on a dam could ever qualify [for an exemption]” (Op. at 19). The lower court never explains why this is true, nor gives examples to merit this fear.²¹ More important, the court never explains the worthiness of relieving dam owners of any limitation on the placement of dredged or fill material. There is no value in granting unlimited authority to fill

²¹The facts of this case do not validate this fear. Defendants admitted that the discharge was unnecessary to their work. (*See, fact discussion, supra.* pp. 12-13).

other people's property for claimed plumbing maintenance. The district court gives dam owners *carte blanche* to needlessly destroy preserved wetlands. Such a result contradicts Congressional intent, contradicts established precedent, and contradicts moral reason. The district court is wrong.

Maintenance . . . of . . . dikes, dams . . . bridge abutments or approaches . . . Maintenance does not include any modification that changes the character, scope or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time

33 CFR 323.4(a)(2). Under the regulation at issue, owners of dikes, dams, bridges, *etc.* may not discharge dredged or fill material for maintenance that is a "modification that changes the character, scope or size of the original fill design." So, for example, if a hole washes in a dam, the owner may replace that material, but he may not fill an additional twenty feet of wetlands on the back side of the dam. In this case, Defendants filled an additional five miles on the back side of their dam.

The Defendants' 1998 discharge resulted in a modification of wetlands which changed the character, scope or size of the area originally filled by the dam. "Fill" includes material "changing the bottom elevation of a waterbody." 33 CFR 323.2. Environmental engineer John Gasper testified:

The deposits of dredged material . . . I have caused to be surveyed and measured, have elevated the bottom of Fawn River . . . and are reducing the pre-event reach of the waters. [text omitted] [C]ertain areas that were once flowing are currently stagnant and other areas of quiet waters have been significantly filled with mud.

(App. 54). Professor Willard confirms "Fawn River in this stretch has been filled-in with sedimentation in many areas changing its bottom elevation" and as to Greenfield Mills lake,

“[w]hat was once a mostly open water shallow lake environment is now an emergent wetland environment, dominated by marshy conditions as result of the massive deposits of sedimentation from the events of May 18, 1998. (App. 42).

The scope of fill in Fawn River before the events of May 18, 1998 was limited to the “fill” of the IDNR dam across the stream. As the result of May 18, the “fill” in Fawn River was newly extended miles beyond the scope, size or character of the original dam structure. Defendants’ discharge grossly violates the limitation stated in 33 CFR 323.4(a)(2).

Owners of dikes, dams, bridges, *etc.* simply may not fill that which was not filled before—and they certainly may not fill someone else’s property.²² The regulatory limitation of 33 CFR 323.4(a)(2) is precisely aligned with the Congressional intent that exemptions cause little or no harm, and it is precisely aligned with this Circuit’s holding in *Huebner*, that the exemptions do not excuse an activity that substantially alters a wetland.

In conclusion, under 33 CFR 323.4(a)(2) it is correct that dredged and fill materials can be discharged to “fill” a breach in a dam without a permit, while clear those materials may not be discharged beyond the scope of the facility into previously undisturbed wetlands. Limiting a discharge to the boundary of the facility allows reasonable maintenance to proceed, while

²²This Circuit has rejected granting exemptions where a defendant destroys the property of another under old Nationwide Permit Program.

What the district court did not explain is how Krich could use a nationwide permit to justify filling someone else's land. "Nationwide permits do not authorize any injury to the property or rights of others." 33 C.F.R. § 330.5(c)(4). The court's decision is accordingly untenable

York Center Park District v. Krich, 40 F.3d 205, 208 (7th Cir.1994). While the regulatory language at issue in *York Center* is much plainer, the general concept should apply to this case.

protecting the nations' wetlands from the capricious conduct at issue in this case.

Even without the regulatory language under discussion, Plaintiffs believe it should be found that the 1344(f)(1) exemptions do not provide a defendant with immunity to fill wetlands owned by someone else. It is unconscionable to condone destruction of large tracts of private wetland properties on a claim of maintenance for a plumbing valve.

5. The district court erroneously found no change to the "scope, character or size" of the IDNR reservoir caused by the draining of the reservoir or the permanent removal of dredged material from the reservoir bottom.

The lower court did not apply its erroneous interpretation of "original fill design" to the facts before it. The district court found that the maintenance activities "would not (and did not) change the character, scope or size of the reservoir" (Op. at 20). This result ignores the fact that the reservoir was completely drained on May 18, 1998.²³ If this dramatic temporary change was not significant to the lower court, it also had to ignore the permanent change caused by removing 10,000 to 33,000 cubic yards from the reservoir bottom. (App. 53). If 33 CFR 323.4(a)(2) regulates the size of reservoir waters, then, the substantial deepening of the reservoir was evidence of a permanent change to its "character, scope or size."²⁴ Therefore, the discharge into Fawn River accompanying that change should not have been found exempt.

Whether as a result of erroneously interpreting "original fill design" or failure to apply that erroneous interpretation to the facts before it, the district court should be reversed for improperly

²³The district court may have assumed that temporary changes would not qualify. Nothing in the regulations or the Act commend this interpretation.

²⁴Once the discharge was shown, it became Defendants' burden to prove an exemption. Therefore, it would be Defendants' burden to show that reservoir size was not altered. Defendants offered no evidence of bottom depth, whether before or after the dredging.

applying the limitation in 33 CFR 323.4(a)(2).

6. Only discharges reasonably necessary to a claimed repair are exempt.

Plaintiffs do not dispute the wisdom of an exemption for repair of dams, bridges, etc. However, Plaintiffs do contest the district court's failure to enforce reasonable limits. The district court condones destroying large tracts of private wetlands for a discharge that Defendants admit was unnecessary to the claimed repairs. And, even had the discharge been necessary to Defendants' work, what was the repair of such importance to justify this destruction? It was a faulty plumbing valve used intermittently to pipe water to a hatchery building—a repair later performed without any draw down of the reservoir.

It was error to validate such thinly clad excuses with an exemption.

7. Accidental discharges are not exempt.

The CWA states that a “discharge of dredged or fill material” must be “for the purpose of maintenance, including emergency reconstruction” 33 USC 1344(f)(1)(B). The correct interpretation of this language exempts only purposeful discharges of construction materials that are literally used “for the purpose of maintenance, including emergency reconstruction” (i.e., a discharge of materials used to fill in a breach or hole in the structure). However, the lower court rejected this narrow construction of “purpose” under the exemption. (Op. at 20, note 14). The effect of the lower court decision is to define “purpose” broadly in favor of Defendants to include an alleged unintended discharge, even though *Huebner* directs that the exemptions be applied narrowly.

The district court erroneously chose a more liberal standard excusing an unnecessary discharge. The express statutory language does not support the lower court's argument.

Congress described two of the six listed 1344(f)(1) exceptions (A & F) as applying if the discharge resulted “from” an activity, but when describing the “maintenance” exception, Congress chose the more restrictive “for the purpose” language. 33 USC 1344(f)(1)(A-F).

[T]he language of the statute is the most reliable indicator of congressional intent: “It is that language which is chosen with the most care, subjected to the greatest scrutiny and actually voted on by Congress and signed by the President.”²⁵

Welsh v. Boy Scouts of America, 993 F.2d 1267, 1273 (7th Cir.1993). While it is disputed that Defendants had a purpose of repairing anything—even plumbing, Defendants certainly did not claim a discharge “for the purpose” of filling a hole in the dam. Rather, they have always claimed the discharge was an “unintentional consequence.” (Op. 16). Taking Defendants at their word, the discharge can be described as accidental. An accidental discharge is not “for the purpose” of maintenance—it has no purpose. “[D]ischarge of dredged or fill material” must be “for the purpose of maintenance, including emergency reconstruction” 33 USC 1344(f)(1)(B). It was error to find a purposeless discharge exempt.

D. The Recapture Provision of Section 1344 was Violated

1. The lower court disregarded the strict liability standard of the Clean Water Act by requiring specific intent for violation of the recapture provision.

If the recapture clause is violated, even an exempt activity requires a permit.

Any discharge of dredged or fill material . . . incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

²⁵The district court chose to focus on the regulatory language. (Op. p. 20, note 14).

33 U.S.C. 1344 (f)(2). Congress did not intend to exempt discharges that “convert more extensive areas of water into dry land or impede circulation or reduce the reach or size of the water body.” *Heubner*, 752 F.2d at 1240-41.

The recapture provision must be broadly construed to prevent damage to the nations' waters. *Heubner*, 752 F.2d at 1240-41; *U.S. v. Cumberland Farms*, 647 F. Supp. 1166,1176 (D. Mass. 1986) aff'd. 826 F.2d 1151 (1st Cir. 1987) *cert. den.* 484 U.S. 1061 (1988). In contradiction of this general rule, the district court narrowly construed the recapture provision in a literal manner that condones destruction of the nations' waters. The district court held: "a literal reading of the provision requires that the maintenance have as its purpose changing the use of navigable waters." (Op at p. 23). According to the court, the recapture provision is not triggered because Defendants' stated purpose was maintenance; and therefore, Defendants could not have intended to violate the recapture provision.²⁶

The lower court, again, does not use the interpretive guidance of *Huebner*. This time, the lower court narrowly construes the word “purpose” in favor of Defendants, where in the immediately preceding section, it had broadly construed the word “purpose” in favor of Defendants. The lower court creates internal inconsistency in Section 1344. According to the court, under (f)(1) “purpose” includes alleged unintended results (the discharge) while under (f)(2) “purpose” does not include unintended results (change in use).

²⁶ The lower court completely discounts the objective evidence of bad faith, discussed in the previous section on pretext, including, that Defendants 1) knew in advance that sediment would be discharged downstream, 2) saw a substantial discharge during the operation, 3) knew conditions they could see posed a risk of harm to the stream; 4) were asked to stop because of the downstream destruction; and 5) refused to stop. Surely, with this level of understanding, a defendant cannot be excused by claiming a lack of purpose to cause harm. (*See, fact discussion, supra.*, 6-9).

The district court creates a "Catch-22," which writes the recapture provision out of the Act and disregards the CWA standard of strict liability. A discharge qualifies initially for an exemption only if there is an intent to perform maintenance. 1344(f)(1)(B). However, that does not end the inquiry. Even if a discharge is conditionally exempt because of an intent to perform maintenance, the activity will still be regulated if it violates the recapture provision. "[T]he exceptions of Section 1344(f)(1) are subject to Section 1344(f)(2) [the recapture provision]." *Huebner*, 752 F.2d at 1240 (comment added).

Under the district court's logic, because the intent is maintenance; then the activity can never have the purpose of change in use—because the intended purpose was maintenance. "[T]here is simply no evidence that the maintenance . . . had any purpose other than maintenance." (Op. at 23). Thus the district court's circular analysis will always end where it started—on the question of whether maintenance was subjectively intended—if so, then the recapture provision can never apply. Contrary to *Huebner*, this means the exemptions of 1344(f)(1) are never subject to the recapture provision of 1344(f)(2).

The district court erroneously injects fault as an element of Section 1344, excusing liability based upon claimed lack of intent.²⁷ In *Huebner*, this Circuit was not concerned with defendants' purpose; rather the inquiry was focused on whether damage to navigable waters occurred.

The district court correctly reasoned that even if the ditches at issue were irrigation ditches, the restrictions of Section 1344(f)(2) still applied. [text omitted] The district court reasoned that the side casting and spreading activity reduced the reach of the wetlands surrounding the ditches at issue. [text omitted] We affirm the

²⁷Paradoxically, after ruling "purpose" was necessary for CWA recapture liability, the district court states: "It is critical to note civil liability under the Clean Water Act is strict . . . thus Plaintiffs do not have to prove intent to prevail on their claims." (Op. at note 23).

court's conclusion that the Huebner's ditching activity, whether it involved irrigation or drainage ditches, ran afoul of the provisions of Section 1344(f)(2). The Huebners' activity constituted a discharge of dredged material onto a wetland, thereby disturbing the reach of its waters.

Huebner, 752 F.2d at 1242. In *Huebner*, it was irrelevant that the subjectively intended activity was exempt under subsection (f)(1) if the effect was to disturb the reach of water as prohibited by Section 1344(f)(2). The district court seems not to understand that "purpose" under the recapture provision is measured by the results of the activity—not by the stated intentions.²⁸ In this case, the stated (and irrelevant) purpose was maintenance, while the objective purpose (and relevant result) was the destruction of private waterways.

In *Huebner*, this Circuit rejected defendants' stated purpose; and instead, approved a focus on "the results of Heubner's dredging activity as it affected the surrounding wetlands." *Id.* at 1242. "[R]eviewing courts have consistently looked beyond the stated or subjective intentions and determined the effect or 'objective' purpose of the activity conducted." *United States v. Sargent County Water Resource*, 876 F.Supp 1090, 1101 (D. N.D. 1994); *Leslie Salt Co. v. U.S.* 820 F. Supp. 478 (N.D. Cal. 1992) *aff'd*, *Leslie Salt Co. v. U.S.* 55 F.3d 1388 (9th Cir. 1995, disregarding the underlying subjective purpose of the activity and examining the objective result).

Defendants are not relieved from CWA liability, even if they truly intended plumbing maintenance. Intent is irrelevant under the Clean Water Act. "Nothing in the statute makes good

²⁸While the district court discusses its reasoning using the word "objective," it misapplies the test. The court says "Defendants [sic] sole objective in raising the gates was to inspect the dam and perform maintenance." This is only examining a claimed subjective intent—not addressing the objective results of Defendants' activities. (Op. at 22). And factually, the court's entire discussion here is incorrect—Defendants expressly admitted they never intended to perform any dam maintenance on May 18. The court references only future unscheduled maintenance that was definitely not planned for May 18. (*see, supra*, notes 8-9).

faith or lack of knowledge a defense. [text omitted] Civil liability under the Clean Water Act, therefore, is strict.” *Kelly v. USEPA*, 203 F.3d 519, 522 (7th Cir. 2000). This is the only way the recapture provision can be applied to prevent degradation of the nation's waters and vindicate Congressional purpose.

Under the district court’s reasoning, any dam operator may fill new wetland areas under the guise of maintenance. So long as the operator states some maintenance reason, no matter how tenuous or improbable, he is free to wreak unlimited destruction. This result is incredibly hostile to the Act's purpose of protecting the nation's waters and frustrates Congress's documented intent that only minimal impacts to wetlands can qualify as exempt.

It was error to excuse Defendants’ destruction for lack of subjective intent.

2. Purposeful changes in use in violation of the recapture provision.

Even were the district court correct in rejecting a strict liability standard and requiring purposeful violation, it did not apply its erroneous interpretations to the facts. Plaintiffs demonstrated the 1998 discharge was incidental to two activities: 1) the 1994-95 chemical stripping of the IDNR reservoir vegetation; and 2) the total draining of the IDNR reservoir on May 18, 1998. Both of these activities involved purposeful changes of use.

Destruction of wetland vegetation is a change in use.

Private defendant’s clearing of the land so it could be used for soybean production was definitely a change in use. Since wetlands do not functionally exist apart from the vegetation that defines it, the clearing of all of the wetlands’ vegetation will, in essence, destroy the wetland and, consequently, reduce the reach of the waters of the United States.

Avoyelles Sportsmen’s League v. Alexander, 473 F.Supp. 525, 535 (W.D. La. 1979, *aff’d* in relevant part, 715 F.2d 897, 925 (5th Cir. 1983)). In *Huebner*, this Circuit has approved a district

court's reasoning that removal of wetland vegetation supported a violation because "wetlands are defined by the presence of aquatic vegetation." *Huebner*, 752 F.2d at 1243. Here, too, the purpose of the 1994-95 IDNR operation was to change the use of the reservoir by destroying wetland vegetation. (App. 80, 83-85). A second uncontradicted purpose for the prior killing of vegetation in the filled-in reservoir was to create boating lanes. (*Id.*, and App. 96).

The district court stated it did not understand how the prior chemical kills were related to the May 18, 1998 discharge. (Op. 22). However, Plaintiffs submitted and cited the affidavits of two highly qualified experts, giving uncontradicted testimony that much of the materials could not have been discharged from the reservoir on May 18, 1998 without the prior 1994-95 destruction of wetland vegetation. (*See, fact discussion, supra* pp. 9-10., *e.g.*, "[A] Substantial portion, potentially the majority, of the dredged materials discharged on May 18, 1998 was . . . incidental to the . . . chemical kill of the reservoir's vegetation by the DNR in preceding years." App. 55-56). These facts paraphrase perfectly into 1344(f)(2), as shown below:

[The May 18, 1998] discharge of dredged or fill material [was] incidental to [an] activity [the 1994-95 chemical kill] having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject [destruction of wetland vegetation and boating channels].

The 1998 discharge was a violation of the recapture provision.

The lower court also missed that the discharge was incidental to the total draining of the IDNR reservoir on May 18, 1998. Draining is a change in use under the regulations.

The conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States."

33 CFR 323.4(c). Citing this regulation, the court in *Leslie* denied a maintenance exemption based on draining a wetland as a "change in use" violating the recapture provision:

And even if those activities were initially exempt, the “recapture” provision of the Clean Water Act would preclude those defenses. [text omitted] The purpose of blocking the culvert was to prevent the flow of water onto that wetland. That would bring about a change and would be subject to regulation.

Leslie Salt Co., 820 F.Supp. at 481 (*aff’d*, *Leslie Salt Co.*, 55 F.3d 1388). Both in *Leslie*, and here, manipulation of flow structures to drain a reservoir violates 1344(f)(2).²⁹

Defendants draining activity also paraphrases perfectly into the statute:

[The May 18, 1998] discharge of dredged or fill material [was] incidental to [an] activity [the draining of the reservoir] having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject [a non-wetland, 33 CFR 323.4(c)].

33 U.S.C. 1344 (f)(2).³⁰

If the district court is correct that change in use must be purposeful; then, it ignored evidence that the 1998 discharge was incidental to three subjectively intended changes of use: 1) prior destruction of wetland vegetation; 2) creation of boating lanes; and 3) the 1998 draining of the reservoir. The May 18, 1998 discharge of dredged materials should have been recaptured for regulation.

3. Objectively effected changes in use in violation of the recapture provision.

Objective changes are also present in this case. The objective standard examines the

²⁹In this case, as in *Leslie*, the drained wetlands could be restored by returning the manmade structures to their prior configuration. Whether drained for the day, or drained for a year, draining of a wetland is a change in use. And as demonstrated by this case, a short-term conversion can be very destructive.

³⁰That the IDNR reservoir is man-made is irrelevant. For example, the reservoirs at issue in *Huebner* were man-made. *Huebner*, 752 F.2d at 1237-38. *See also*, *Leslie Salt Co. v. United States*, 896 F.2d 354, 358 (9th Cir. 1990, holding that a dam creates waters under the CWA).

results of the discharge without considering claims of good faith or lack of knowledge by defendants. (*See, argument, supra.* pp. 35-37).

The lake at Greenfield Mills was converted from an open water lake to a vegetative marsh. Fawn River was converted from a clean, gravel bottomed stream, providing outstanding ecological and recreational resources, to an aesthetically displeasing mud-clogged stream. (*See, fact discussion, supra.* pp. 13-15). The change to Fawn River is as compelling as the destruction cited in support of “change in use” in *Avoyelles*, 473 F.Supp. at 535 and *Huebner*, 752 F.2d 1243. Fawn River has been changed into a repository (dump) for the sediment excavated from the IDNR reservoir.

It was error for the lower court to ignore the destructive changes of use to Fawn River.³¹

4. Impairment of flow or circulation (or reduction in reach) in violation of the recapture provision.

To escape liability under the Act, Defendants must prove they caused no impairment of the flows, reach or circulation of waters. *Huebner*, 752 F.2d at 1242. Oddly, Defendants offered no proofs on this recapture issue.³² By contrast, Plaintiffs fully documented the effects of Defendants’ discharge on flows, circulation and reach of the river. Dr. Willard of Indiana University testified:

The ecological changes . . . are extreme modifications In this case that alteration has changed the Fawn River from a clear gravelly, well-oxygenated stream, a rare type in Indiana, to a mud clogged low oxygen stream (of which we have many). Greenfield

³¹Plaintiffs believe this change of use was also supported under a subjective standard. Defendants knew their volitional acts would cause a discharge to Fawn River. (*See, fact discussion, supra.* 6-9).

³²Nor does the lower court discuss this issue.

Mills Pond was changed from an open pond to a marsh. The mud has impaired the flow or circulation of the affected waters and reduced their reach. Neither transformation is likely to be naturally reversed.

(App. 42). Professor Zaleha, an I.U. geologist, remarked on the "large deposits or mud bars, many of which are several feet deep, and all of which extend for several miles of the Fawn River through to and including Greenfield Mills...." (App. 70). Environmental Engineer John Gasper confirms these observations.

The deposits . . . I have caused to be surveyed . . . are impairing the flow and circulation of those waters and are reducing the pre-event reach of the waters . . . areas of the channel that were once flowing are currently stagnant, and other areas of quiet water have been significantly filled with mud.

(App. 54).

Where experts present uncontradicted evidence on a technical matter beyond ordinary lay expertise, a court cannot lightly disregard the experts' conclusions. *U.S. v. Larkins*, 657 F. Supp. 76, 82 (W.D. Ky. 1987, granting judgment against defendants in a Section 1344 discharge case). The district court failed to consider Plaintiffs' uncontradicted expert and lay testimony establishing the severe impairment to the flow, circulation, or reach of the waters of the United States. The district court should have granted Plaintiffs' motion for summary judgment under the recapture provision.

5. Continuing Violation.

There is no dispute that the dredged materials remain where deposited. "[T]he deposit of materials from the events of May 18, 1998 remain substantially in place." (App. 42, 77). Under Section 1344, the presence of material deposited without a permit is a continuing violation until the offending material is removed.

USX's reliance on *Gwaltney* for its construction of 33 U.S.C. § 1365(a) is misplaced because *Gwaltney* involved a wastewater violation and thus a much different situation than in the instant action. Several courts in cases involving filled wetlands have found *Gwaltney* inapplicable and held that a violation is "continuing" for purposes of the statute until illegally dumped fill material has been removed. *See Sasser v. EPA*, 990 F.2d 127, 129 (4th Cir.1993)("Each day the pollutant remains in the wetlands without a permit constitutes an additional day of violation."); *United States v. Reaves*, 923 F.Supp. 1530, 1534 (M.D.Fla.1996); *North Carolina Wildlife Fed'n v. Woodbury*, 1989 WL 106517, No. 87-584-CIV-5 (E.D.N.C. April 25, 1989); *United States v. Tull*, 615 F.Supp. 610, (E.D.Va.1983), aff'd 769 F.2d 182 (4th Cir.1985), rev'd on other grounds, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987).

Informed Citizens United, Inc. v. USX Corp. 36 F.Supp.2d 375, 377 (S.D.Texas, 1999). Based on the presence of their illegally discharged materials, IDNR Defendants' violations of the CWA continue, pending a cleanup.

E. Section 1342 Discharge of a Pollutant Without a Permit

Section 1342 prohibits the discharge of a pollutant without a permit. Defendants discharged the pollutants "dredged spoil" and "sand." 33 U.S.C. 1362(6). (*See, fact discussion supra*. pp. 13-14).

The district court refused to impose liability for this discharge because the "activity had no purpose³³ of excavating and redepositing soil downstream"; and therefore, no permit was required under Section 1342. (Op. at 29). As with Section 1344, the district court erroneously injects fault as a requirement under the Act. Fault, intent, or good faith are irrelevant to CWA liability. *Kelly*, 203 F.3d at 522.

³³The lower court requires "purposeful" violation even while stating: "It is critical to note civil liability under the Clean Water Act is strict . . . thus Plaintiffs do not have to prove intent to prevail on their claims." (Op. at note 23).

The district court should be reversed for requiring fault as an element under Section 1342.

F. Section 1983 - Fifth Amendment Taking

1. Indiana does not recognize an action in inverse condemnation for partial takings.

The district court found that all elements of Plaintiffs' Section 1983 Fifth Amendment takings claim were met, but concluded Plaintiffs failed to exhaust Indiana inverse condemnation remedies. (Op. at 31-32). This is wrong because Indiana's inverse condemnation laws offer no remedy for partial takings.

The district court agreed that even a "minimal permanent physical occupation of real property required compensation under the clause." (Op. at 30; see also, *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992); *Lorretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419, 426 (1982)). In contrast, Indiana does not recognize inverse condemnation unless all beneficial uses have been destroyed. *Mendenhall v. City of Indianapolis*, 717 N.E.2d 1218, 1227-28 (Ind.Ct.App. 1999); *Galbraith v. Planning Dept. of City of Anderson*, 627 N.E. 2d. 850, 854 (Ind.Ct.App. 1994).³⁴

Indiana's refusal to recognize partial takings in inverse condemnation was not evident at the time of *Estate of Himmelstein v. City of Fort Wayne*, 898 F.2d 573 (7th Cir.1990) and a partial taking was not raised as an issue in the more recent opinion on Indiana takings in *SGB Financial Services, Inc. v. Consolidated City of Indianapolis-Marion County, Indiana*, 235 F.3d 1036 (7th Cir. 2000).

Plaintiffs have no inverse condemnation remedy—all beneficial uses have not been lost. The river is only a small portion of Plaintiffs' lands, and can still be used to float a canoe or for

³⁴This law was argued below, but not discussed in the district court opinion.

irrigation. Defendants agreed, citing the same cases and arguing that Plaintiffs' action is "premature," because they cannot prove a complete taking under state law. Plaintiffs' inverse condemnation action will never "mature" under state law.

Exhaustion of state inverse condemnation is only required if the remedy is available. *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985); *SGB Financial Services Ind.* 235 F.2d at 1037-38. Indiana's inverse condemnation law offers no remedy to Plaintiffs. The district court erroneously required exhaustion of that which does not exist.

G. Section 1983 - Procedural Due Process Violation

"[N]or shall any state deprive any person of life, liberty, or property without due process of law" Amendment XIV, Sec.1. The district court correctly noted Defendants' "tenuous argument" that Plaintiffs were not entitled to advance notice or opportunity for hearing before draining their reservoir. (Op. 34-35). Nevertheless, the district court dismissed Plaintiffs' Section 1983 due process claim citing two reasons. First, the court held that Defendants' conduct was merely negligent as a matter of law. Second, the court held that state post-deprivation remedies bar the claim. (Op. 32-36). Both reasons are wrong.

1. There are genuine issues of fact as to the degree of Defendants' misconduct.

The due process clause is not implicated merely by negligent conduct of an official causing unintended loss to life, liberty or property. *Daniels v. Williams*, 474 U.S. 327, 328 (1986). But "recklessness" or "deliberate or callous indifference" will sustain a violation. *E.g. Ross v. U.S.* 910 F.2d 1422, 1433 (7th Cir. 1990). Recklessness or deliberate indifference is generally accepted to mean conduct in the face of a known and significant risk. *Id. See also, Reed v. Gardner*, 986 F.2d

1122, 1127 (7th Cir. 1993). It may also include "a deliberate decision not to prevent a loss." *Parratt v. Taylor*, 451 U.S. 527, 548-9 (1981, concurring opinion of J. Powell, overruled in part on other grounds in *Daniel v. Williams*, *supra*.) In this case, like the defendants in *Ross* and *Reed*, *supra*, the officials created the risk, then stood by, doing nothing in the face of an obvious and serious harm. Doing nothing while watching for hours as sediments were dredged onto Plaintiffs' property was gross abuse of government power. There was ample evidence to take the issue of recklessness or deliberate indifference to the jury. (*See, discussion of facts, supra*, pp. 6-13). There was never a necessity to open the dam gates in the first instance, and there was no reason not to close them promptly when it was obvious that the reservoir bottom was being dredged and discharged onto Plaintiffs' property.³⁵ Defendants Meyer and Clary, in particular, made a "deliberate decision not to prevent a loss" every minute they failed to close the dam gates. (*Id.*).

Analogy to a police brutality case is apt. If a beating continues after it is apparent that the suspect may be crippled, or after other officers express warnings, it becomes at least deliberately indifferent or reckless. Here, Plaintiffs produced compelling evidence that if Defendants' conduct was merely negligent when it began, it became reckless or deliberately indifferent to Plaintiffs' rights as it continued. (*Id.*) "When the state puts a person in danger, the Due Process clause requires the state to protect him to the extent of ameliorating the incremental risk." *Archie v. City of Racine*, 847 F.2d 1211, 1223 (7th Cir. 1988).

³⁵The district court said nothing suggests "Defendants knew the full extent of sediments that would be drawn into Fawn River" (Op. at note 23). But Defendants certainly knew they were causing significant harm. (*See, fact discussion, supra*, pp. 6-9). Because Defendants claim not to have known the "full extent" of harm does not relieve them from the knowledge that their deliberate acts were causing damage.

There is also circumstantial evidence of bad faith or a pretext for Defendants' actions, the evidence supports an inference that they deliberately dredged the reservoir without a permit to suit their own purposes. (*See, fact discussion supra*. pp. 3-13). Summary judgment on Defendants' degree of fault was inappropriate.

2. The district court erred in dismissing the due process claim for failure to exhaust state remedies.

Unlike Fifth Amendment taking claims, post-deprivation remedies are irrelevant to a Fourteenth Amendment due process claim. It is pre-taking process that is guaranteed by the Fourteenth Amendment. Therefore, unless the State could not have provided pre-deprivation process, the Fourteenth Amendment violation is complete when property rights are infringed without advance notice and hearing. *Williamson*, 473 U.S. at 195-96. The courts look to post-deprivation remedies only if the actions are "random and unauthorized," or there is "the necessity of quick action by the State or the impracticality of providing any pre-deprivation process...." *Logan v. Zimmerman Brush Co.* 455 U.S. 422, 435-38 (1982).

Defendants don't claim an emergency—only a faulty plumbing valve. Nor was the sluicing of the reservoir random or unauthorized, the action was pre-authorized by the head of IDNR hatchery division. In this case, there is no evidence that pre-deprivation process could not have been given to downstream property owners.

Because there is sufficient evidence of recklessness or deliberate indifference, and because the exhaustion doctrine does not apply, the district court's dismissal of Plaintiffs' Section 1983 procedural due process claim should be reversed.

VII. CONCLUSION

Plaintiff-appellants respectfully request that this court:

1. Reverse the entry of judgement in favor of Defendants on Section 1344 CWA claim, and order the district court to grant Plaintiffs' motion for summary judgment under the CWA, Section 1344.
2. Reverse the district court's holding that Section 1342 was not violated because Defendants' dredging was alleged to be unintentional;
3. Reverse the district court's grant of summary judgment to Defendants on the Section 1983 Fifth Amendment taking claim;
4. Reverse the district court's grant of summary judgment to Defendants on the Section 1983 Fourteenth Amendment due process claim.

_____ DATED: August, ____ 2002.

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)(7)

I hereby certify that Appellants' Brief complies with the type-volume limitations of F.R.A.P. 32(a)(7), and that this Brief contains 13,786 words excluding the Corporate Disclosure, Table of Contents, Table of Citations, Appendix and Certificates of Counsel, but the word count does include all footnotes. Counsel is relying upon the word count prepared by Word Perfect 8.0 in making this certification.

Neal Lewis