Pace Environmental Law Review

Volume 22
Issue 2 *Fall 2005*

Article 5

September 2005

2005 Judges' Edition Bench Memorandum: Seventeenth Annual Pace National Environmental Law Moot Court Competition

Carlisle Tuggey

SEVENTEENTH ANNUAL PACE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

Bench Memorandum

2005 Judges' Edition

CA No. 02-2005

IN THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

FRIENDS OF SOUTH SLOPE CUTTHROAT, INC.,

and

STATE OF NEW UNION
Appellants,

v.

CAPITOL CITY, NEW UNION,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW UNION

Carlisle Tuggey
Pace University School of Law
78 North Broadway
White Plains, NY 10603

371

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, REGULATIONS and RULES

Executive Summary

Friends of the South Slope Cutthroat, Inc., (FSSC), the appellant in this action, brought suit against Capitol City, New Union under the citizen suit provision of the Clean Water Act (CWA), 33 U.S.C. § 1365, alleging that Capitol City, New Union had violated section 301, the CWA's prohibition against discharge of pollutants without a permit. Specifically, FSSC claimed that Capitol City had improperly discharged a pollutant into navigable waters when it diverted silt-laden water from the turbid Torpid River to the pristine Rapid River without a permit. The State of New Union intervened on behalf of FSSC to maintain the law suit, but joined Capitol City on all other issues. In the present appeal, FSSC seeks to overturn the District Court's summary judgment grant in favor of Capitol City on all three issues and to reverse the District Court's grant of intervention to the State of New Union.

Located on the relatively arid south slope of the Front Mountains, Capitol City is the capitol and the largest city in the State of New Union. The city has been involved in a long tradition of diverting water from the wet north slope region of the Front Mountains in order to supply its population with an adequate water supply. Specifically, and complained of here, Capitol City has diverted water from the Torpid River located on the north slope to the Rapid River on the south slope through the Torpid Aqueduct. The city has met all requisite state standards and obtained permits from all the relevant state authorities for water allocation and use.

The Rapid River is a fast flowing, clear-water river that supported a population of native South Slope Cutthroat Trout. As a result of the diversion of water from the turbid Torpid River to the pristine Rapid River, silt-laden water has entered the Rapid River, and the trout no longer thrive in the area. The trout still live in the waters of the Rapid River extending from the diversion upstream to the headwaters of the river. Nelson Spinner and Newton Creel, members of FSSC, allege that as a result of the silt-laden water, which began on August 15, 2003, the trout no longer exist and they can no longer fish in the area. They can still fish upstream or on neighboring streams located further from the homes than the Rapid River.

New Union filed a motion to intervene as of right pursuant to 33 U.S.C. § 1365(c)(2) and both original parties, FSSC and Capitol City opposed the intervention. The District Court granted the mo-

tion. Capitol City sought summary judgment on three issues against FSSC, arguing that plaintiff, FSSC, had not 1) given proper notice of their intent to sue under 33 U.S.C. § 1365(b)(1)(A), 2) proven that the diversion of the water from the Torpid River to the Rapid River added a pollutant to a navigable water from a point source as defined in 33 U.S.C. § 1251, and 3) shown that the diversion was within the jurisdiction of the CWA under 33 U.S.C. § 1251(g). The District Court granted summary judgment on all three issues in favor of Capitol City. The court relied on the wording of the statute as evidence of congressional intent and found that the statute treats states as the equivalent of the United States. The court also found that the plaintiff must strictly comply with the notice requirement and held that because an environmental organization does not have standing to sue on its own, but rather, only on behalf of its injured members. Such members are the real plaintiffs and hence must be named in the notice pursuant to the notice requirements outlined in the regulations at 40 C.F.R. § 135.3. The District Court also held that Capitol City did not violate 33 U.S.C. § 1311(a) that prohibits the discharge of any pollutant without a permit or in violation of a permit limitation. The court found that the elements of the definition of "discharge of pollutant" had not been met because pollutants had not been added to the Rapid River. The District Court also granted summary judgment on the third issue, finding that the EPA had no authority under the CWA to regulate water quality in this situation because such action would abrogate the state authority to allocate water use, violating 33 U.S.C. § 1251(g).

This Court must rule on four issues. First, the Court must determine if the District Court erred in granting New Union's motion to intervene by right under 33 U.S.C. § 1365(c)(2). FSSC contends that New Union may not intervene under statutory authorization of intervention by the United States because New Union is not the United States. New Union argues that because the CWA envisions that states implement the statute instead of EPA, states should be treated as the United States for purposes of intervention in citizen suits.

Second, the Court must determine if the District Court erred in granting Capitol City's motion for summary judgment on the grounds that the court lacked jurisdiction over the case because FSSC's members, Nelson Spinner and Newton Creel, failed to give proper notice of their intent to sue under 33 U.S.C. § 1365(b)(1)(A). FSSC argues that an environmental organization

may bring suit on behalf of its non-named members, and such members need not be named in the notice, because they are not parties to the suit. Capitol City argues that because to achieve standing FSSC must demonstrate that one or more of its members suffered injury as a result of defendant's actions, such members serve as the plaintiffs and therefore must be named in the notice.

Third, the Court must decide whether the District Court erred in granting Capitol City's motion for summary judgment that Capitol City's diversion of silt-laden waters from the Torpid River to the pristine Rapid River without a permit did not violate 33 U.S.C. § 1311(a). FSSC contends that the court erroneously granted summary judgment because the Rapid River is a tributary of a navigable water and therefore constitutes a navigable water for purposes of the CWA. Additionally, FSSC contends that intermittent streams that are connected to navigable waters, even in the past, remain navigable waters for purposes of the CWA. FSSC further contends that the transfer of polluted water from one water body to another by way of a discharge through a point source violates the CWA prohibition against the "addition" of a "pollutant" to "navigable waters." FSSC argues that the Rapid River and the Torpid River are distinctly separate water bodies and therefore a diversion from one to the other of polluted water constitutes a violation of the Clean Water Act. Capitol City and New Union argue that the District Court properly granted summary judgment because Rapid River is no longer a tributary of the navigable Platte River and therefore does not constitute a navigable water. Furthermore, appellees argue that because the Rapid River is merely a former intermittent navigable water and is no longer annually connected to navigable waters, it escapes CWA jurisdiction. Capitol City and New Union also argue that the diversion did not constitute a discharge of pollutants because 1) there was no addition of polluted waters, 2) the addition of pollutants to navigable water occurred when silt first entered the Torpid River, a navigable water, not when silt flowed from the Torpid to the Rapid River, and 3) as a public policy matter, imposition of NPDES requirements on water diversions in western states would be impractical and burdensome.

Fourth, the Court must decide whether the District Court erred in granting Capitol City's motion for summary judgment that New Union's granting of a permit for Capitol City's diversion of the Torpid River to the Rapid River as a part of the state's control over water ownership, use and allocation obviated application

of the CWA to the diversion. FSSC argues that CWA § 101(g) contemplates federal regulation of water quality and is not a bar to federal water quality regulation of waters being allocated under state authority. Capitol City and New Union ask the Court to apply the plain meaning of the statutory language, specifying that state authority over water allocation shall not be obviated.

No parties to the law suit nor the court below addressed the question of standing. Because the issue of standing is jurisdictional, the Court may interrogate the parties as to its requirements. Furthermore, the Court must raise the issue of standing *sua sponte* since it goes to the power of the Court's jurisdiction. Because Spinner and Creel are purely recreational fishermen (not eating the fish they catch) and continue to fish nearby, it can be asked whether they are sufficiently injured to establish standing.

Suggested Questions For the Judges

Issue 1: Intervention.

What policy reasons suggest that a state should have the right to intervene in a CWA citizen suit? Should these policy considerations override the plain language of the statute?

Should the plain language of a statute always persuade courts of the statutory meaning? Should legislative history of the statute always persuade the courts of the statutory meaning?

When may the court grant permissive intervention pursuant to Federal Rules of Civil Procedure § 24(a)(2)?

If the state is not permitted to intervene, will the states' role as primary enforcers of the CWA be undermined? Furthermore, if the state is prevented from intervention will this decision be consistent with the Act's preservation of state enforcement discretion?

Issue 2: Notice.

What are the two most commonly cited purposes supporting provision of proper notice prior to a citizen suit?

How does proper prior notice of a citizen suit ensure that congressional intent will be met, namely that citizen suits supplement rather than supplant government enforcement action?

Is the notice requirement jurisdictional in nature or merely a mandatory condition precedent to filing a citizen suit? Is there a difference and if so, does it matter?

If the "person" giving notice of intent to sue is actually FSSC on behalf of its many non-named members, what purpose would it serve to include the names of the injured parties Nelson Spinner and Newton Creel? Is it a violation of the notice regulation to fail to include these names, as Capitol City argues, or is it related to something broader, such as the standing requirement? Explain.

Issue 3: "Navigability" and "Addition."

What was the reasoning for *U.S. v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), holding that a water body once found navigable will remain navigable? Has *Appalachian* been overruled? (This point is significant because although the Rapid River is no longer connected to the navigable Platte River as a conse-

quence of the dam and reservoir, it was historically connected and therefore was considered navigable but raising the question of whether it is still navigable.)

Must the Torpid River and the Rapid River be considered distinct water bodies for the diversion of silt-laden water from one to the other to be considered a "discharge of pollutants?"

In what ways, if any, is application of an "unitary waters" theory consistent with or contrary to the structure of the CWA and the programs already administered by the EPA and approved states?

Issue 4: Federal Obviation of State Authority to Allocate Waters.

Does federal water pollution control law disrupt the delicate balance of federalism in state control of water use and allocation? To what degree, if any, should the federal government have control over water quality issues, even where some state authority to allocate water is obviated?

A general permit has been suggested as one remedy to the administrative burden that might fall on western states if they are required to obtain an NPDES permit for every diversion of water. In what ways does this solution meet or fail to meet the goals of the CWA? Is this an adequate solution? Suggest other alternatives.

Additional Questions.

The judges may wish to ask questions about the standing of FSSC to bring this law suit.

Is the court required to raise a standing issue *sua sponte* since neither the lower court nor the present litigants have raised the issue? Why? Is it jurisdictional? Does this relate to any other issues presented, such as the notice requirement and the naming issues that arise there? Are Spinner and Creel injured if they don't eat the fish they catch and can still catch fish nearby?

I. DID THE COURT BELOW ERR IN GRANTING NEW UNION'S MOTION TO INTERVENE BY RIGHT UNDER 33 U.S.C. § 1365(c)(2)?

Did the Court below err in granting New Union's motion to intervene by right under 33 U.S.C. § 1365(c)(2)? FSSC and Capitol City appeal the court's decision; New Union supports it.

A. The Statutory Language.

"The starting point for interpreting a statute is the language of the statute itself." *Atwell v. KW Plastics Recycling Division*, 173 F. Supp. 2d 1213, 1217 (M.D. Ala. 2001) (citing *Consumer Prod. Safety Communication v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). The CWA provides that if the EPA Administrator is not a party to a citizen suit action, the Administrator "may intervene as a matter of right." 33 U.S.C. § 1365(c)(2)(2004). The "as a matter of right" language used in the CWA originates in FED. R. CIV. P. 24(a)(1) which provides that "[u]pon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene." FED. R. CIV. P. 24(a)(1) The question is whether a state, here the state of New Union, may intervene as a matter of right as if it were the United States, under 33 U.S.C. § 1365(c)(2). Neither party provides substantial case law that answers this particular question therefore it is apparently a case of first impression.

B. Statutory Interpretation.

The court must begin with the plain meaning of the statutory language. If the statutory language is ambiguous, a court may resort to legislative history to decipher the intention underlying the language. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 56 (1987); *see also Miccosukee Tribe of Indians v. Everglades Restoration Alliance*, 304 F.3d 1076, 1086 (11th Cir. 2002) (holding that where there is unambiguous statutory language, such language is the law intended by Congress); *see also United States v. LaBonte*, 520 U.S. 751, 757 (1997) (stating that when Congress drafts legislation it says what it means); *United States v. Gonzalas*, 520 U.S. 1, 6 (1997) (holding that where statutory language is clear, there is no need to resort to legislative history); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (explaining that if that statutory scheme is consistent and coherent than the inquiry into the intent must stop at the statutory language).

C. FSSC and Capitol City Argument: The Court Below Erred in Granting New Union's Motion to Intervene by Right Under the CWA.

1. Where the Statute is Clear the Court Must Apply the Plain Meaning of the Statute.

The Court below stated that "[w]hile the observation of the original parties may be true as a matter of mere statutory wording, courts may freely ignore the 'happenstance of statutory drafting' when it does not reflect congressional intent." Problem Pg. 5; *citing N. and S. Rivers Watershed Ass'n. v. Town of Scituate*, 949 F.2d 552, 555 (1st Cir. 1991). The court improperly allowed New Union's intervention because (1) where a statute is unambiguous its plain meaning must be applied, and (2) the court improperly relies on the *North and South Rivers* case.

2. The Plain Meaning of the Statute Provides that the Administrator, Not the State, May Intervene by Right in Citizen Suits Brought Under the CWA.

A Capitol possesses a statutory right to intervene only when a federal statute unambiguously grants the applicant an unconditional right to participate in the litigation. FED. R. CIV. PRO. 24(a). The statutory language of 33 U.S.C. § 1365(c)(2), based on the Federal Rules of Civil Procedure, unambiguously grants the Administrator a right to intervene, *not* the state entity. The plain language and canons of statutory interpretation dictate that the wording of the statute be followed. Because New Union is not the Administrator of the EPA, but rather the state agency, it has no authority to intervene, as-of-right, and therefore must be denied intervention in this action.

3. The Court Improperly Applied the Holding of the North and South Rivers Case to the Instant Facts.

In holding that New Union had a right to intervene in the present action, the court improperly relied on *North and South Rivers*. There the court held that the "happenstance of statutory drafting" could be ignored in isolated instances. *North and South Rivers* at 556. In *North and South Rivers* the court was trying to reconcile a state law that lacked a penalty provision with a comparable federal penalty provision. *Id.* Because state and federal statutory schemes were similar and served the same goals, namely the protection of state waterways, the court found that

penalties could exist absent the specific statutory language. *Id.* at 556. The present case is distinguishable as it does not involve determining whether a state statute is the equivalent of a federal statute. Furthermore, the *North and South Rivers* decision comes from the First Circuit, and should not outweigh the plain meaning rule that has been repeatedly upheld by the Supreme Court. *See Miccosukee Tribe of Indians v. Everglades Restoration Alliance*, 304 F.3d 1076, 1086 (11th Cir. 2002).

In *North and South River*, the court was persuaded that the dominant policy of the CWA was state administration of the water pollution program. 949 F.2d at 556 ; *See also* 33 U.S.C. § 1251. While this is a strong Congressional policy preference, it is certainly not the dominant one, which is restoration of the quality of our nation's waters. *See* 33 U.S.C. § 1251. To achieve that goal, Congress harnessed the participation of both federal and state players to undertake appropriate roles. It assigned EPA the role of promulgating regulations of general applicability including technology based standards to be met across the country; CWA §§ 301(b) and 304; the standards governing EPA approval of state permit programs; CWA §§ 304 and 402; the standards governing EPA approval of state water quality standards, CWA § 304. Moreover, Congress charged EPA to inspect water pollution sources anywhere, CWA § 308, to enforce against violation of EPA and state issued permits, CWA § 309, and to issue permits where there is no state with an EPA approved program. CWA § 402. Congress was very clear in each section whether it was authorizing EPA or state action. Thus, in an intricately interwoven web of federal and state authority, particular attention should be paid to whether Congress assigned authority to the federal or state government. Where it assigned authority to the federal government, it should be presumed it intended just that result.

4. New Union May Not Intervene Under Federal Rule of Civil Procedure 24(a)(2), Permissive Intervention, Because It Did Not Raise This Upon Intervention.

New Union argues that even if this Court does not find that it may intervene as-of-right under the CWA, it can permissively intervene at the court's discretion. New Union further contends that even though it did not raise permissive intervention in its motion to intervene, that it is harmless error and therefore the court should allow it to remain in the litigation going forward. Courts have discretionary power to grant permissive intervention

where the Capitol (1) shows independent ground for jurisdiction; (2) the motion to intervene is timely; and (3) the applicant's claim or defense and the main action have a question of law or fact in common. *Greene v. Babbitt*, 996 F.2d 973, 978 (1993) (citing *Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989)); *see also E.E.O.C. v. Nat'l Children's Center, Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998).

New Union has failed to make a timely motion for intervention, since it moves to intervene upon appeal, and therefore does not meet the second prong of the three prong criteria that has been established and applied by courts when granting permissive intervention. Consequently, the Court must prevent New Union from remaining a party in the present litigation. New Union argues that because it would have been granted the right to permissively intervene had it filed a timely motion for such intervention, that to allow it to remain in the litigation now would be harmless error. No case law supports this argument. The Court should apply the three prong permissive intervention test and remove New Union from the case.

D. New Union Argument: The Court Below Properly Granted New Union's Motion to Intervene By Right Under the CWA.

1. The Court Must Look To the Intentions of the Legislature In Its Interpretation of the Statutory Language.

A dominant purpose of the statute is to recognize states' primary role in carrying out the provisions and requirements of the CWA. A narrow reading of the intervention provision ignores this federalism policy in favor of the happenstance of the statutory drafting. *See N. and S. Rivers Watershed Assn. v. Town of Scituate*, 949 F.2d. 552, 556 (1st Cir. 1992). In that case, the court determined that although CWA § 309(g)(6) barred a citizen suit only when a state had issued a penalty under state law "comparable" to CWA § 309(g), Congress intended to bar citizen suits when a state took any enforcement action and had comparable penalty authority somewhere in its unused arsenal of enforcement sanctions. *Id.* at 556.

CWA § 101 repeatedly recognizes the important and fundamental role of the states in water pollution control. This recognition is manifested through the authorization in CWA § 401 for

states to certify state provisions in federal permits affecting water and the direction in CWA § 402(b) that EPA approves qualified state permit programs to operate in place of a federal water pollution permit program. For this reason, the rationale applied in *North and South Rivers* can also be applied to the instant case. There, because the court determined that although the statutory language did not include a penalty provision, the state could interpret a comparable federal provision for penalties because of the similarity between the state and federal statutory schemes. *North and South Rivers*, at 553. Here, because the CWA authorizes broad state authority and interpretation of the CWA but fails to explicitly provide a right of action to the State to intervene, the Court should uphold the intervention.

Because Congress in the CWA treats states on par with the United States, Congress intended the state be given intervention rights equal to the United States. States can designate water bodies, implement water quality standards, and implement state permit schemes, yet they cannot intervene as-of-right under the CWA. Congress did not intend to create an anomaly between the state authority to implement water pollution control programs on the one hand, and state inability to intervene in citizen suits to enforce such authority.

2. Even if the Court Determines that New Union May Not Intervene As-of-Right, the Court May Grant Permissive Intervention Pursuant to Fed.R. Civ. P. 24(a)(2).

New Union intervenes on behalf of its aggrieved citizens, and therefore may intervene as an interested party as-of-right. The Supreme Court established the following four-part test to determine whether an applicant may intervene under Fed. R.Civ. P. 24(a)(2) as-of-right: (1) motion to intervene must be timely, (2) the applicant must claim a significantly protectable interest relating to the property or transaction that is the subject of the action, (3) the applicant must be so situated that disposition of the action may, as a practical matter, impair the interest, and (4) the applicants interests must be inadequately represented in the action. *See Sierra Club v. EPA*, 995 F.2d 1478 (9th Cir. 1993).

If, however, the court here finds that New Union may not intervene as-of-right, it should find that New Union may permanently intervene under Fed. R. Civ. P. 24(b)(2) permissive intervention. The court has discretion to determine whether a

party may permissively intervene in an action. *See E.E.O.C. v. Nat'l Children's Center, Inc.*, 146 F.3d.1042, 1046 (D.C. Cir. 1998)(stating that permissive intervention "is an inherently discretionary enterprise"). The general rule is that a court will permit a non-party to intervene when a "non-party's claim or defense and the main action have a 'question of law or fact in common.'" *Duke Energy Field Servs. Assets, L.L.C., v. Fed. Energy Regulatory Comm'n*, 150 F. Supp. 2d 150,153 (D.D.C. 2001) (*citing* Fed. R. Civ. P. 24(6)). For a claim to go forward on the merits under FRCP 24(b), the intervenor must show: "(1) an independent ground for subject matter jurisdiction; (2) a timely motion; and (3) a claim or defense that has question of law or fact in common with the main action." *E.E.O.C*, at 1046; *see also Greene v. Babbitt,* 996 F.2d 973, 978 (9th Cir. 1993) (citing *Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989)).

Presently, the state of New Union meets all three of these criteria. Its independent ground for subject matter jurisdiction is that its citizens, on whose behalf it sues, have been injured under a federal statute. It moved for intervention at the proper time, and it joins parties to the litigation because both its claims and defenses are directly related to the diversion of water from the Rapid River. FSSC argues that because it did not raise permissive intervention in its motion to intervene, it fails to meet the criteria and therefore cannot go forward. However, had New Union raised permissive intervention upon its motion to intervene, the court could have properly granted the intervention within its discretion. Therefore, allowing it to remain in the litigation now is harmless to the proceedings and therefore New Union should be a party to the litigation moving forward.

II. MUST THE COURT RAISE THE STANDING ISSUE *SUA SPONTE*?

Since the defendants' did not raise the question of standing at the District Court level, and it is a jurisdictional question, the Court must now consider whether FSSC has standing. The issue is whether the Court must raise jurisdictional questions *sua sponte*, particularly the question of standing in the present case.

A. The Court of Appeals Must Raise Any Jurisdictional Issue Sua Sponte *Even Where Neither the Lower Court Nor the Parties Have Raised the Issue.*

Because federal courts are courts of limited jurisdiction, they may only hear cases that they have been authorized to hear by the Constitution or Congress. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994). Therefore, the Court may assess whether there is subject matter jurisdiction *sua sponte*, even where the parties have not raised the issue. *Rembert v. Apfel*, 213 F.3d 1331, 1333 (11th Cir. 2000). Jurisdictional issues may be raised at any time, regardless of whether they were raised in the lower court. In *Steel Co. v. Citizens for a Better Env't.* the Court held that jurisdictional issues "would have to be considered by this Court even though not raised earlier in the litigation — indeed, this Court would have to raise them *sua sponte*." 523 U.S. 83, 93 (1998). Where a question exists concerning the jurisdiction of the federal court, the court must raise the jurisdictional question *sua sponte*. *See Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 278 (1977) (holding that the Supreme Court is obliged to raise *sua sponte* issues surrounding the jurisdiction of the court); *see also Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976) (finding that where neither party questioned the jurisdiction of the court, the court was obligated to do so on its own motion); *see also Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900).

1. Standing is Jurisdictional and Therefore the Court Must Raise it Sua Sponte.

Standing is a jurisdictional requirement, and failure to raise the issue in the district court does not prevent a party from raising the issue on an appeal. *Granite State Outdoor Advertising, Inc. v. City of Clearwater*, 351 F.3d 1112, 1116 n.3 (11th Cir. 2003). Furthermore, because "federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines" the instant court must raise the standing issue *sua sponte*. *United States v. Hays*, 515 U.S. 737, 742 (1995), *citing FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230 (1990); *see also Lewis v. Casey*, 518 U.S. 343, 349 (1996) (holding that standing is jurisdictional and hence, not subject to waiver). The parties here have failed to raise the required jurisdictional question of standing. Because standing is jurisdictional, and federal courts of limited jurisdiction must raise

jurisdictional questions, the Court here is required to address this issue.

B. Standing Requirements.

An organization has standing to bring a law suit on behalf of its members if it can establish that "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc., v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000). Furthermore, to establish standing an individual must show three elements which include 1) that the person must have suffered an "injury-in-fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; 2) that the injury is fairly traceable to the challenged action of the defendant; and 3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* at 180; *see also Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1003 (11th Cir. 2004) (citing *Wolff v. Cash 4 Titles*, 351 F. 3d 1348, 1353 (11th Cir. 2003).

Presently, the affidavits submitted by both Nelson Spinner and Newton Creel raise the question of standing. The question here is whether the two named individuals have suffered an injury, as they do not consume the fish that they catch. Furthermore, they can still fish for Cutthroat Trout but in order to do so have to travel further to take advantage of the fishing as a recreational endeavor. They can travel to other areas on the Rapid River and they can travel to other rivers to fish.

III. DID THE COURT BELOW ERR IN GRANTING CAPITOL CITY'S MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THE COURT LACKED JURISDICTION OVER THE CASE BECAUSE FSSC'S MEMBERS, NELSON SPINNER AND NEWTON CREEL, FAILED TO GIVE PROPER NOTICE OF THEIR INTENT TO SUE UNDER 33 U.S.C. § 1365(b)(1)(A)?

Did the court below err in granting Capitol City's motion for summary judgment because the court lacked jurisdiction over the

case when FSSC's members, Nelson Spinner and Newton Creel, failed to give proper prior notice of their intent to sue under 33 U.S.C. § 1365(b)(1)(A)?

A. The Statute and Regulations.

The citizen suit provision of the CWA, 33 U.S.C. § 1365(a)(1) grants the citizens the authority to initiate a civil action "against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation" under the Act. To exercise this right a citizen must provide the relevant parties with timely notice:

> No action may be commenced . . . under subsection (a)(1) of this section . . . prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order. . . .

33 U.S.C. § 1365(b)(1)(A).

The CWA bars citizen suits where the EPA or the applicable State authority has already "commenced, and is diligently prosecuting," an enforcement action. 33 U.S.C. § 1365(b)(1)(B).

The EPA Administrator may "prescribe by regulation" the manner in which notice must be given, including the proper content of the notice. 33 U.S.C. § 1365(b). EPA has promulgated regulations that require that appropriate citizen suit notice

> shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

40 C.F.R. § 135.3(a) (2004).

B. The Purpose and Legislative Intent of Citizen Suit Notice Provisions.

Courts have suggested different purposes behind the notice requirement. The two most commonly cited purposes for provision of proper notice of commencement of a citizen suit are: 1) to allow the alleged violator to come into compliance and thereby avoiding the need for a citizen suit, and 2) to allow EPA to pursue an en-

forcement action, thereby obviating the need for a citizen suit. *See generally Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 538 U.S. 167 (2003); *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987).

1. Opportunity for Alleged Violators to Comply with the CWA.

In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.* the Supreme Court suggested that the purpose of giving "notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." 484 U.S. at 60; *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. at 175, (citing *Gwaltney* and holding that notice gives an alleged violator of the CWA an opportunity to come into compliance with the CWA, rendering a citizen suit unnecessary). In *Hallstrom v. Tillamook County*, the Supreme Court further clarified citizen suit notice provisions stating that the congressional purpose for the notice provision is to give "agencies and alleged violators [to benefit from] a nonadversarial period to achieve compliance with [environmental] regulations" 493 U.S. at 32; *see also* 42 U.S.C. § 6972(a).

2. Primacy of Government Enforcement.

Citizen suits supplement, rather than supplant government action in enforcing statutory and regulatory requirements. *Gwaltney*, 484 U.S. at 60. The Court in *Gwaltney* arrived at this conclusion by interpreting the CWA's statutory language and legislative history. Specifically, the Court infers that "[t]he bar on citizen suits when governmental enforcement action is underway suggests that citizen suits are meant to supplement, rather than supplant governmental action." *Id.* at 60. In *Hallstrom* the Court reiterated this inference by upholding the District Court's determination that "the purpose of the notice requirement was to give administrative agencies an opportunity to enforce environmental regulations." 493 U.S. at 24. Since the purpose of the citizen suit is to supplement governmental enforcement action, the notice requirement serves to inform the government that a violation may have occurred and government enforcement may be necessary. The Administrator then has the discretion either to pursue an enforcement action, or allow the citizen suit to proceed.

The legislative history of the CWA provides support for the Court's interpretation of the citizen suit notice requirements. In *Gwaltney,* the Court explicitly relied on this legislative history. 484 U.S. at 61. The Senate Report of the Water Pollution Control Act Amendments of 1972, states that citizen suits are proper when "the Federal, State, and local agencies fail to exercise their enforcement responsibility." S. Rep. No. 92-414, at 64 (1971), *reprinted in* 2 A Legislative History of the Water Pollution Control Act of 1972, at 1482 (1973). However, "the great volume of enforcement actions" should "be brought by the State." *Id.* Surely, if Congress simultaneously intended that citizen suits supplement, not supplant, government enforcement and mandated an EPA-fashioned notice requirement, it expected that the resulting notice requirement would contain the requisite information necessary to enable EPA to preclude a citizen suit and take direct enforcement action. In addition, during the legislative hearings prior to enactment of the law, members of Congress repeatedly referred to the citizen suit provision as an "abatement mechanism." *See, e.g.*, Water Pollution Control Legislation, Hearings Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong., at 114 (1971). Thus, Congress intended citizen suits to be an environmental protection tool by either allowing individuals to bring suit against alleged polluters, or spurring "diligent prosecution" by EPA or the appropriate State authority.

C. Judicial Interpretation of the Citizen Suit Notice Provisions.

Hallstrom v. Tillamook County, 493 U.S. 20 (1989), is the leading case interpreting the citizen suit notice requirement. In *Hallstrom*, the Supreme Court held that compliance with the sixty-day notice provisions of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992(k), was a mandatory condition precedent to bringing a citizen suit. 493 U.S. 20. There, plaintiffs alleged that the County was in violation of RCRA and failed to give notice of their intention to sue to the government enforcement agencies. *Id.* Because the plaintiffs only notified Tillamook County and not the Oregon Department of Environmental Quality (ODEQ) or the Environmental Protection Agency, the Court found the plaintiffs failed to comply with the applicable notice requirement of 42 U.S.C. § 6972(b)(1). *Id.* The Supreme Court held that the "notice and 60-day delay requirements" were

"mandatory conditions precedent to commencing suit under RCRA citizen suit provision." *Id.* at 31. The Court intentionally avoided a determination regarding the jurisdictional nature of notice, stating "[i]n light of our literal interpretation of the statutory requirement, we need not determine whether [the notice provision] is jurisdictional in the strict sense of the term." *Id.* The *Hallstrom* holding has been applied to cases involving citizen suit notice provisions of other environmental statutes, including the CWA. *See, e.g., Pub. Interest Research Group, Inc., v. Hercules, Inc.*, 50 F.3d 1239, 1246 (3d Cir. 1995) (applying *Hallstrom's* interpretation of RCRA to the CWA); *see also Bettis v. Town of Ontario*, 800 F. Supp. 1113, 1118 (W.D.N.Y. 1992) (applying strictly the terms of the CWA notice provision in accordance with *Hallstrom v. Tillamook County*). The Court itself suggests this analogy by stating that the same requirements are in place in the citizen suit provisions of other statutes. *Hallstrom*, 493 U.S. at 23.

1. Liberal and Strict Construction.

Despite the Supreme Court's strict construction of the citizen suit notice requirements, some courts strictly construe the requirements and other courts liberally construe them. Because the Supreme Court in *Hallstrom* did not hold that notice was a jurisdictional requirement, some courts have used that refusal to argue against strict construction. Where courts have refused strict construction of the notice requirement, they have done so on an *ad hoc* basis depending on the facts of the case.

Identification of Proper Parties to a Citizen Suit Notice of Intent to Sue.

Did FSSC provide adequate notice even though it did not include the names and address of its member plaintiffs when it served notice on the defendants?

D. Relevant Regulatory Language.

The question before this Court is one of first impression. The Court must determine whether the failure of FSSC to include the names and addresses of the members whose interests it is representing renders the notice fatally flawed. Specifically, the regulations promulgated pursuant to the notice requirement of 33 U.S.C. § 1365(b)(1)(A) require that the notice include the "full name, address, and telephone number of the person giving notice." 40 C.F.R. § 135.3(a) (2004).

E. FSSC/NU Argument: The Court Below Erred in Granting Capitol City Summary Judgment Because it Lacked Jurisdiction to Consider the Case.

1. FSSC Did Not Violate the Naming Requirement of the Notice Regulation by Omitting the Names of Nelson Spinner and Newton Creel From its Notice of Intent to Sue.

This is a case of first impression. Contrary to defendant's assertions, Nelson Spinner and Newton Creel are not new parties to this lawsuit, but rather, are members of the plaintiff organization which is suing Capitol City on behalf of all of its non-named members. Where an organization sues on behalf of the non-named individuals, the organization, not its members, is the plaintiff. *See generally Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167.

A membership association has standing to sue on behalf of its members when (1) those members would have standing to bring the same suit on their own behalf, (2) the interests the association seeks to protect are germane to the association's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 181 (2000); *N.Y. State Club Ass'n. v. City of New York,* 487 U.S. 1 (1988). FSSC must establish its standing to bring this suit against Capitol City and can achieve such standing by showing injury to one or more of its members. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). However, the defendants have not raised the question of FSSC's standing. Rather, defendants allege that FSSC improperly served notice by failing to include the names of Nelson Spinner and Newton Creel in their notice. [EXHIBIT A]. Because FSSC properly brings suit on behalf of its members and is the appropriate plaintiff in the instant action, FSSC has properly named itself and not its members in the notice.

Defendants erroneously rely upon *Washington Trout* in their response to FSSC's complaint. In *Washington Trout*, the District Court found that the plaintiffs failed to provide the alleged violators with sufficient notice to enable them to initiate settlement negotiations. *Washington Trout v. Scab Rock Feeders*, 823 F. Supp. 819 (E.D. Wash.1993). Plaintiffs' defective notice of intent to sue also precluded the government from initiating an enforcement action against the alleged violators. *Id.* at 820. These facts

are not analogous to the instant case since neither outcome is present in the current case. Instead, the content of FSSC's notice to Capitol City provides sufficient specificity to allow either the defendant or the relevant enforcement agency to take action to address the allegations in the notice. Capitol City's reliance on *Washington Trout* is also dubious because in that case the court held that the sole purpose behind the citizen suit notice provisions is to provide for the opportunity for settlement negotiations between plaintiff and defendant. *Id.* This holding contravenes the legislative intent of the CWA, the Supreme Court's finding in *Hallstrom*, and subsequent interpretation of the statute and regulations by the lower courts. *See, e.g.*, Water Pollution Control Legislation, Hearings Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, 92d Cong., at 114 (1971); *see also Hallstrom v. Tillamook County*, 493 U.S. 20 (1989); *Public Interest Research Group, Inc. v. Hercules, Inc.*, 50 F.3d 1239 (3d Cir. 1995); *Bettis v. Town of Ontario.*, 800 F. Supp. 1113 (W.D.N.Y. 1992).

F. Capitol City Argument: The Notice Submitted by FSSC is Fatally Flawed Because it Did Not Include the Full Name, Address, and Telephone Number of the Plaintiffs Nelson Spinner and Newtown Creel in the Manner Prescribed by the Administrator.

1. The Statutory Language Must be Strictly Construed to Require that FSSC Name Each Individual Plaintiff in its Notice of Intent to Sue.

Naming of each individual bringing a lawsuit is a mandatory precondition for the suit. *Wash. Trout v. Scab Rock Feeders*, 823 F. Supp. 819 (E.D. Wash.1993). In *Washington Trout*, the plaintiffs timely served notice on the alleged violators, but failed to provide any of the names of the plaintiffs bringing the action. 823 F. Supp. at 822. The court strictly read the language of the statute and dismissed the plaintiffs' claims. In its holding, the *Washington Trout* court reasoned that 1) plaintiffs had failed to follow the plain language of the notice requirements and 2) that such failure contravened the purpose underlying the notice provision, i.e., to provide the alleged violators with information required for them to pursue negotiations. *Id.* Similarly, FSSC has directly violated the naming requirement of the notice regulations by failing to include the names of the injured parties, Nelson Spinner and Newton Creel, in its notice of intent to sue.

Post-Notice Violations.

G. Relevant Regulatory Language and Legislative History.

EPA's regulations require that "[n]otice . . .shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order *alleged to have been violated. . .*" 40 C.F.R. § 135.3(a) (Emphasis added).

Legislative history from the 92nd Congress, which enacted the citizen suit provision, 33 U.S.C. §1365, provides the most probative evidence of what was intended by legislation. Some courts have also sought to interpret the legislation from the legislative history of the 99th Congress, in 1987, when the CWA was amended.

H. Relevant Case Law Concerning Post-Notice and Continuing Violations.

The question before the court here is whether violations that occurred subsequent to service of notice may be included in the complaint or these proceedings. A number of courts have confronted the issue of whether violations need to be continuous upon date of service of notice and the date that the complaint is filed. It should be noted that here, the question centers around the violations that occurred following the notice and whether the failure to include such violations, renders the notice inadequate or flawed. The issue of whether the plaintiffs must allege ongoing violations in order to establish standing has not been raised, however, the court may raise the question because standing is jurisdictional.

Courts have determined that the notice provision requires that citizens allege ongoing violations as opposed to wholly past violations in their complaint. *See generally, Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S at 49. *See also Friends of the Earth v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 175 (2000)(holding that citizens lack standing under CWA for "violations that have ceased by the time the complaint is filed"). The reasoning in these cases is the congressional intent underlying the citizen suit and notice provisions that the notice provision allows the alleged violator to bring itself into compliance with the Act or the government to carry out its enforcement role. *Id.* Hence, if violations have occurred wholly in the past, and are not ongoing and continuing, the purposes of the provisions have been met and

the suit is no longer needed to achieve compliance. *See Gwaltney*, 484 U.S. at 59 (noting that if "citizen suits may target wholly past violations, the requirement of notice to the alleged violator becomes gratuitous"). This rationale is further supported by the notice provision which provides that citizens suits will be barred when the Administrator has commenced an action "to require compliance." *Id.* at 59 (citing 33 U.S.C. § 1365(b)(1)(B); CWA § 505(b)(1)(B)). The Court asserts that the statutory language directs that citizen suits are not merely actions for penalties for past violations, but are compliance based and seek to prevent further harm. *Id.*

The Court in *Gwaltney* held that even where notice provisions fulfill the statutory content requirements, a second prerequisite for citizen suits is that the alleged violations are continuous or intermittent and that the violator is therefore *presently* "in violation" of the standard. 484 U.S. at 57. The Court found that there must be a "reasonable likelihood that a past polluter will continue to violate in the future." *Id.* On remand to the Fourth Circuit, the *Gwaltney* court established two ways in which ongoing violations could be established by the plaintiff which include either, (1) proving violations on or after the date that the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a likelihood of a recurrence in intermittent or sporadic violations. 890 F.2d 690, 693 (4th Cir. 1989). Furthermore, the *Gwaltney* court noted on remand that sporadic violations "do not cease until the date when there is no real likelihood of repetition. *Id.* at 693. In its interpretation of the *Gwaltney* holding, the Supreme Court recognized that the present tense language in the CWA bars suits for wholly past violations and that such suits would render the citizen suit notice requirements meaningless. *Citizens for a Better Environment v. Steel Co.*, 90 F.3d 1237, 1242 (7th Cir. 1996). *Gwaltney* and *Citizens for a Better Environment* addressed the notice issue, as well as the standing issue, but the court in the present action needs focus primarily on the notice issue.

I. FSSC and New Union Arguments: The Statute and Regulations Do Not Require That FSSC Allege On-Going Violations In Order to Serve Proper Notice on Capitol City.

1. The Regulations Only Require Notice of Past Violations.

The regulations provide that proper notice "include[s]. . .the specific standard, limitation, or order *alleged to have been violated*. . .." (Emphasis added.) The regulation's use of the past tense, i.e., that a prohibition has "been violated," makes it clear that FSSC need not allege Capitol City's on-going violation in order to serve proper notice. This reading of the rule is supported by the regulations' requirement of the dates of such past violations. 40 C.F.R. § 135.3(a)(2004). Thus, the regulations do not require FSSC to allege that Capitol City's violations are on-going and, as a result, FSSC's notice to Capitol City is proper.

2. The Purpose of the Citizen Suit Notice Requirement Would Not Be Served By Requiring FSSC to Allege That Capitol City's Violations Would Be On-Going Sixty Days Prior to Issuing Such Notice.

As describe above, one of the purposes behind the notice requirement is to obviate the need for a citizen suit by allowing the alleged violator to bring itself into compliance with the relevant standards, limitations, or guidelines, presumably by ceasing to discharge. *See, e.g., Gwaltney,* 484 U.S. at 60. *See also Friends of the Earth*, 528 U.S. at 175; *Hallstrom*, 493 U.S. at 24. It would not only be pragmatically impossible for a notice to accurately allege that violations will occur sixty days in the future, but to do so runs counter to the purpose behind the notice requirement. If the notice requirement serves its purpose, the notice recipient will cease its ongoing violations by the time the 60 day period has tolled, obviating the need for a complaint.

J. Capitol City Argument: FSSC Failed to Give Proper Notice Because It Does Not Allege Continuing Violations In Its Notice of Intent to Sue.

1. FSSC Must Allege Post-Notice Violations In Order to Bring Suit.

Failing to allege ongoing violations that will occur post-notice renders the notice fatally flawed and therefore defeats jurisdiction. The language of the notice states, "Capitol City has violated

§ 1311(a) each and everyday from August 15, 2003 until the date of this notice. . ." Exhibit A, p 11. In *Gwaltney, supra*, the court held that because the EPA or state that issued the permit could begin suit sixty-days subsequent to receiving notice, citizens could only seek civil penalties for a suit brought to abate ongoing violations. As with the requirement to allege ongoing violations upon filing of the complaint, the same rationale applies to the notice requirement. If the violations do not continue at the time the notice is served, presumably such violations have ceased rendering the notice and subsequent remedial actions, enforcement actions, or citizen suit unnecessary.

2. The Purpose of the Citizen Suit Notice Provision is Not Fulfilled Through FSSC's Notice.

The judicial precedent and congressional intent behind the notice provision has been repeatedly referenced as including 1) the opportunity for the alleged violator to come into compliance with the requisite standard or limitation, and 2) to provide the government the opportunity to pursue an enforcement action thereby alleviating the need for the citizen suit to continue. *Gwaltney of SmithfieldLtd. v. Chesapeake Bay Foundation,* 484 U.S. 49, 60. By failing to allege continued violations in the notice, it remains unclear that the violations persist and that therefore, government enforcement or compliance is needed. The court must dismiss FSSC's citizen suit.

Proper Definition of the Regulated Pollutant.

K. Defining "Settle-able Solid," "Silt," and "Turbidity."

The EPA has included within its definition of "conventional pollutants" suspended solids. *See* 33 U.S.C. § 1314(a). This definition includes "settle-able solids," "silt," and "turbidity." The term "silt" is often used interchangeably with the terms "mud" and "muddy," both of which connote the presence of "settle-able solid[s]." *See, e.g., The American Heritage Dictionary of the English Language* 1621 (4th ed.1996). Furthermore, the word turbid is defined by *The American Heritage Dictionary of the English Language* to mean "having sediment or foreign particles stirred up or suspended; muddy," and turbidity is further defined to mean "muddiness created by stirring up sediment or having foreign particles suspended." *Id.* at 1856.

According to guidance documents issued by EPA Office of Water, turbidity involves water that contains suspended solids. *See* http://www.epa.gov/owowwtrl/monitoring/volunteer/stream/vms55.html (last viewed October 20, 2004). EPA goes on to state that "[s]uspended material include[s] soil particles (clay, silt, sand)." *Id.* Further, the U.S. Army Corps of Engineers *Fisheries Handbook* defines "silt loads" as synonymous with "settle-able solids."M.C. Bell, U.S. Army Corps of Eng'rs, *Fisheries Handbook of Engineering Requirements and Biological Criteria*, (1986). Finally, in its guidance for water quality standards, EPA explains that "[t]otal solids are dissolved solids plus settle-able solids. . .Suspended solids include silt and clay particles. . .and other particulate matter." *See* EPA Office of Water, Monitoring Water Quality, Volunteer Stream Monitoring, A Methods Manual, *available at* http://www.epa.gov/volunteer/stream/stream.pdf (last viewed September 24, 2004). As a result, FSSC's use of the term "silt-laden water" in its citizen suit notice of intent to sue Capitol City sufficiently used the term "silt-laden water" to identify the pollutants in contention as regulated "settle-able solids."

1. Sufficient Information.

Proper citizen suit notice need not identify all details of an alleged violation, but sufficient information that allows the alleged violator to identify the elements of the alleged violation. *See Public Interest Research Group, Inc. v. Hercules, Inc.*, 50 F.3d 1239 (3d Cir. 1995). *See also San Francisco Baykeeper, Inc. v. Tosco*, 309 F.3d 1153 (9th Cir. 2002). *See also ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1143 (9th Cir. 2002)(holding that notice need only be sufficiently specific to inform an alleged violator of its wrong and how it could avert an impending law suit or enforcement action); *NRDC v. Southwest Marine, Inc.*, 236 F.3d 985, 996 (9th Cir. 2000)(citing *Atlantic States Legal Found. v. Stroh Die Casting Co.* 116 F.3d 814 (7th Cir. 1997) holding that notice must be sufficiently specific).

The Court in *Hallstrom* did not address the nature or extent of the information required in a notice. 493 U.S. at 24. Rather, the Court's holding applied only to the fact that plaintiffs in that case had failed to serve any notice on the requisite Federal and State enforcement authorities. *Id.* The plaintiffs' notice failed because it ignored the regulatory requirement that notice be served not only to the alleged violator, but also to the Administrator and to the State in which the alleged violation occurs. *Hallstrom*, 493

U.S. at 27 (citing the requirements of 33 U.S.C. § 1365(b)(1)(A)(i)-(iii)). Further, the failure to provide notice to the government contravenes entirely the *purpose* of the notice provision which is to allow the government to initiate an enforcement action thereby alleviating any need for the citizen suit to go forward. *Gwaltney*, 484 U.S. 49

L. FSSC and New Union Arguments: Proper Notice was Served Because FSSC Adequately Described the Pollutants in Question.

1. "Silt-Laden Water" Adequately Describes "Settle-able Solids," Which Are Included in EPA's Regulations.

Capitol City argues that FSSC's use of the term "silt-laden waters" as the subject pollutant in its notice to sue does not adequately identify the "specific standard, [or] limitation" violated as required by the regulations. However, based on the guidance documents of EPA and the U.S. Army Corps, FSSC's use of the term "silt-laden waters" is acceptably interchangeable with "suspended solids" or "settle-able solids." Guidance documents from the EPA and U.S. Army Corps further specify that suspended and settleable solids will have constituent parts that include silt, clay, sand and other particles that remain in the water column for some period of time before settling out. In accordance with these definitions, FSSC's notice of intent to sue was appropriately specific in identifying "silt-laden waters" as the regulated pollutant in contention. FSSC's use of the term "silt-laden waters" is more descriptive than either "suspended solid" or "settle-able solid" and provides adequate notice of the pollutant in contention. Further, "silt" is used interchangeably with terms contained in the guidance documents of EPA and the U.S. Army Corps. Consequently, FSSC's identification of "silt-laden water" in the notice provided Capitol City with effective notice of the regulated pollutants in contention.

Also, Courts have allowed citizens suits under the CWA to proceed even where the violations identified in the notice were not specific; the requirement is that the notice be sufficiently specific to inform the alleged violator of its wrong-doing. *See Atlantic States Legal Found. v. Stroh Die Casting Co.*, 116 F.3d 814, 819 (7th Cir. 1997). *See also, ONRC Action v. Columbia Plywood, Inc.*, 286 F.3d 1137, 1143 (9th Cir. 2002)(holding that notice need only be sufficiently specific enough to inform an alleged violator of its

wrong and how it could avert an impending law suit or enforcement action); *NRDC v. Southwest Marine, Inc.*, 236 F.3d 985, 996 (9th Cir. 2000)(citing *Atlantic States* holding that notice must be sufficiently specific).

2. *FSSC's Notice Provided Sufficient Information to Capitol City and Fulfilled the Purpose of the Notice Requirement.*

Unlike the plaintiffs in *Hallstrom*, who did not give notice of their citizen suit to the relevant Federal and State enforcement authorities, FSSC merely used the term "silt-laden waters" interchangeably with "settle-able solid" to characterize the regulated pollutant in its notice. *Hallstrom*, 493 U.S. at 25. As noted above, the *Hallstrom* did not address the issue of sufficiency of the *content* of the notice, but rather dealt with a situation wherein the plaintiffs completely failed to notify two of the three required notice recipients, namely the State and EPA Administrator. 493 U.S. at 26-27. This failure, unlike the harmless error in the present notice, contravenes the purpose underlying the notice requirement, to provide the government with warning of an impending citizen suit and thereby allowing it to bring an enforcement action.

Further, contrary to Capitol City's contention, proper notice need only be "sufficiently specific to inform the alleged violator about what it is doing wrong, so that it knows what corrective actions will avert a lawsuit." *Atlantic States Legal Found. v. Stroh Die Casting Co.*, at 819; *see also San Francisco Baykeeper, Inc., v. Tosco,* 309 F. 3d 1153, 1158 (9th Cir. 2002)(holding that the notice is sufficient if it specifies enough detail to give the accused an opportunity to remedy the problem). Furthermore, the regulations do not require that plaintiffs "list every specific aspect or detail of every alleged violation." *San Francisco*, 309 F.3d at 1158 (quoting *Public Interest Research Group v. Hercules, Inc.*, 50 F.3d 1239, 1248 (3d Cir. 1995)). The error complained of by defendants, Capitol City, does not defeat the purpose of the notice requirement. Rather, FSSC's use of the term "silt-laden water" provided Capitol City with sufficient information regarding the regulated pollutant in contention and fulfilled the requirements of the citizen suit notice.

M. Capitol City Arguments: The Term "Silt-Laden Waters" Does Not Adequately Describe the Regulated Pollutant in Contention.

The Court in *Washington Trout v. Scab Rock Feeders* unequivocally established that a notice failing to contain the information required by EPA's regulations must be dismissed. 45 F.3d 1351 (9th Cir. 1995); *see also Bettis v. Town of Ontario*, 800 F. Supp 1113 (W.D.N.Y 1992). Relying, in part, on *Hallstrom* the *Washington Trout* court dismissed a suit where two of the plaintiffs actually bringing suit were named in the notice. *Wash. Trout v. Scab Rock Feeders*, 45 F.3d at 1354. Because the CWA notice requirements state that "full name, address, and telephone number of the person giving notice" must be included, the Court followed *Hallstrom* dismissing the case finding that proper notice had not been served. *Id. at* 1353 (*quoting* 40 C.F.R. § 135.3(a) (1994).

Importantly, in the present case, as in *Washington Trout*, not only are the technicalities of the notice provision violated, but the omissions undercut the purpose that underlies the requirement. Frequently cited language from *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, has been repeatedly relied on, that the purpose of the notice requirement is to allow the government to pursue its own enforcement action or for the violators to negotiate with the notifying parties seeking a resolution before a citizen suit is filed. 484 U.S. 49, 59- 60. In *Washington Trout* the parties were not named and therefore the defendants were not in a position to negotiate. 45 F.3d at 1354. Similarly, in the instant case, the failure to identify settle-able solids, not only expressly violates the regulations, but also fails tell the defendant the violations it must remedy to avoid suit. And lastly, the failure to specify the violations as defined by the regulations also disenables the government from bringing an enforcement action, as it is unclear what such enforcement action would seek to enforce.

IV. DID THE COURT BELOW ERR IN GRANTING CAPITOL CITY'S MOTION FOR SUMMARY JUDGMENT THAT CAPITOL CITY'S DIVERSION OF SILT-LADEN WATERS OF THE TORPID RIVER TO THE PRISTING RAPID RIVER WITHOUT A PERMIT ISSUED UNDER 33 U.S.C. § 1311(a)?

A. Did The Court Below Properly Determine that the Defendant, Capitol City, Did Not Violate 33 U.S.C. § 1311(a) Because it Does Not Discharge Into Navigable Waters?

1. Relevant Statutory and Regulatory Language.

Subsection 301(a) of the CWA makes it illegal to discharge pollutants to navigable waters without a permit or in violation of a permit. 33 U.S.C. § 1311(a). The National Pollutant Discharge Elimination System (hereafter NPDES) program mandates that any person to discharge a pollutant without obtaining a permit has acted unlawfully and will be subject to penalties. *Id.* The "discharge of a pollutant" means "any addition of any pollutant to navigable waters from any point source. . ." 33 U.S.C. § 1362(12). To establish a violation of 33 U.S.C. § 1311 and the prohibition against the discharge of pollutants, plaintiffs must show that defendants have 1) discharged, 2) pollutants, 3) from a point source, 4) into navigable waters without a permit in violation of permit conditions. *Mich. v. Allen Park*, 501 F. Supp. 1007, 1014 (E.D. Mich. 1980), *affd without op* 667 F.2d 1028 (6th Cir. 1981).

"Addition" is not defined by the legislature but "pollutant," "navigable waters," and "point source" are defined within the statute and have been interpreted by the courts. 33 U.S.C. § 1362(6), (7), (12) and (14).

The Act defines "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). EPA further defines "waters of the United States" in its regulations to include "[A]ll waters which are currently used, were used in the past, or may be susceptible to use in interstate. . .commerce. . .[W]aters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds. . ."
40 C.F.R. § 122.2 (2003).

Point source is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14); 40 C.F.R. § 401.11(d) (2003).

2. Purpose and Legislative Intent.

The purpose that underlies the NPDES program is the abatement of pollution discharges from pollution sources with the aim of overall improvement of water quality within the receiving body of water. 33 U.S.C. § 1251(a). Section 101 of the CWA states the Congressional Declaration of Goals and Policy as follows:

> "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters; and to achieve the objective . . .it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for creation in and on the water body. . ."

33 U.S.C. § 1251(a); *see generally PUD No.1 v. Wash. Department of Ecology*, 511 U.S. 700 (1994).

Of further relevance is the Congressional intent that "navigable waters" be broadly construed in 33 U.S.C. § 1362(7). Historically, Congress used the term "navigable waters" to mean waters that were "navigable in fact" or could be rendered navigable, exercising its power over interstate commerce to improve water highways of interstate commerce, under U.S. Const. Art. I. sec. 8, cl. 3. *Compare, e.g., The Daniel Ball*, 77 U.S. 557 (1870) *with Kalur v. Resur,* 335 F. Supp. 1 (D.D.C. 1971). By defining "navigable waters" to mean "the waters of the United States, including territorial seas," Congress meant to invoke federal jurisdiction over United States waters to the broadest possible extent allowable under the commerce clause of the U.S. Constitution. *Leslie Salt Co. v. Froehlke*, 578 F. 2d 742, 755 (9th Cir. 1978); (citing *Cal. ex rel. State Water Res. Control Bd. v. EPA*, 511 F.2d 963 (9th Cir.1975)); *see also EPA v. State Water Resources Control Board*, 426 U.S. 200 (1976); *see also NRDC v. Callaway*, 392 F. Supp. 685, (D. Colo. 1975); *see also Avoyelles Sportsmen's League, Inc., v. Alexander,* 511 F. Supp. 278, 286 (W.D. La. 1981). Courts have determined in light of precedent and legislative history that the Congressional intent to extend the CWA's jurisdiction to the con-

stitutional limit includes tributaries of rivers which, "when combined with other waters or systems of transportation . . . the commerce on such waters would have a substantial economic effect on interstate commerce." *Cal. ex rel. State Water Res. Control Bd. v. EPA*, 511 F.2d 963, 964 (9th Cir. 1975) *citing* Report of the Conference Committee on S. 2770, reported in A Legislative History of the Water Pollution Control Act Amendments of 1972, 166, 178 (Comm. on Publ. Works Print, 1973) [hereinafter cited as Legislative History].

B. Supreme Court Precedent.

1. Degree of Agency Discretion Afforded.

When reviewing an agency's interpretation of statutes it interprets, courts give its interpretation a high standard of deference, as articulated by the Court in *Chevron*. *Chevron v. NRDC*, 467 U.S. 837 (1984). There the Supreme Court stated that courts "[had] long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . ." *Id.* at 844. However, in *United States v. Mead, Corp.*, 533 U.S. 218 (2001), the Court limited the *Chevron* deference test. *Mead* held that administrative interpretation of statutory provisions qualify for *Chevron* deference "when it appears that Congress delegated authority to the agency . . . to make rules carrying the force of law" and that the deferred to interpretation "was promulgated in the exercise of that authority." *Id.* at 226. The Supreme Court has also held that "[i]nterpretations such as those in opinion letters . . . do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). The Court there determined that agency interpretations and opinions that are expressed through opinion letters or other communications not codified in law or expressed in formal rule-makings "are 'entitled to respect,' but only to the extent that those interpretations have the power to persuade." *Id.* at 587 (*citing Skidmore v. Swift and Co.*, 323 U.S. 134, 140 (1944).

2. Diversion Supreme Court Precedent.

The Supreme Court has not expressly determined whether a transfer between two water bodies requires an NPDES permit. In *Miccosukee*, it remanded for the district court to determine whether a canal from which water was pumped and the reservoir into which it was pumped were "meaningfully distinct" water bod-

ies. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004). If they were not, then no NPDES permit would be required. *Id.* In remanding on this factual question, the Supreme Court left open the question pertaining to the "unitary waters" theory, advanced by the government in that case, *see id.*, and advanced by Capitol City and New Union in the instant case.

Navigable Waters

Does the Rapid River Constitute "navigable waters" under the CWA?

C. *FSSC Argument: The Court Erroneously Determined That Capitol City Did Not Violate the Requirement of 33 U.S.C. § 1311(a) Because the Rapid River is a Navigable Water.*

1. *A Tributary of a Navigable Water Constitutes a Navigable Water for Purposes of the CWA.*

As cited above, the EPA definition of "navigable waters" was intended to reach the extent of the constitutional limits of the commerce clause and it includes tributaries of "navigable waters." *Cal. ex rel. State Water Res. Control Bd. v. EPA*, 511 F.2d 963 at 964. Courts have frequently held waters not traditionally considered "navigable in fact" to be navigable within EPA's definition and thereby covered by the Clean Water Act. *See, e.g., Quivira Mining Co. v. EPA*, 765 F.2d 126, 130 (10th Cir. 1985) (holding that because there is a surface connection between non-navigable "arroyos" and creeks and navigable streams during periods of "intense rainfall" such waterways affect interstate commerce); *Residents Against Indus. Landfill Expansion v. Diversified Systems, Inc.*, 804 F. Supp. 1036, 1039 (E.D. Tenn. 1992) (finding that tributaries of creeks constitute navigable waters under the Clean Water Act); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975) (holding that "navigable waters" under the CWA include waterways within the United States "including normally dry arroyos through which water may flow, where such water will ultimately end up in public waters such as a river or stream, tributary to a river or stream, lake, *reservoir*, bay, gulf, sea or ocean either within or adjacent to the United States)(emphasis added).

It has been determined that the vantage point from which a waterway is to be classified as navigable is the time of statehood rather than the present perspective. "When once found to be navi-

gable, a waterway remains so." *United States v. Appalachian Electric Power Co.*, 311. U.S. 377, 408 (1940). The Court there also found that for a water way to be navigable it need not be continually used for navigation. *Id.* at 409. The Rapid River was historically connected to the traditionally navigable Platte River. Therefore, although it is no longer directly connected to it, as a result of the Torpid Dam, it maintains its navigable character and is thus subject to the CWA. Capitol City argues that because the *Appalachian* Court was interpreting navigability in the traditional sense, rather than the navigability intended by Congress in the instant case, its reasoning can not be presently applied. This argument is flawed; although the *Appalachian* Court determined navigability as navigable-in-fact, it also discussed the ability for Congress to regulate navigable waters to the extent allowable under the Commerce Clause. *Id.* at 404. Presently, the definition of navigable waters envisioned by Congress when drafting the CWA was the broadest allowable definition under the Constitution. *See United States v. Phelps Dodge Corp.*, 391 F.Supp. at 1187; *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. at 162. Therefore, the two cases can be reconciled, and the reasoning from *Appalachian* that once found navigable, always navigable, applies instantly.

It should also be noted that the water originating in the Rapid River and filling the Torpid Reservoir is the water supply for Capitol City. The fact that the water enters commerce via consumption patterns in Capitol City, may be a further argument that the Rapid River constitutes a navigable water when it is used as a resource it may enter interstate commerce, or is at least connected to interstate commerce.

2. *Intermittent Streams, Connected to Navigable Waters, Constitute Navigable Waters for Purposes of the CWA*

In referring to the purpose of the CWA, the *Quivira* court stated that "[i]t is the intent of the Clean Water Act to cover, as much as possible, all waters of the United States instead of just some. *Quivira Mining Co. v. EPA*, 765 F.2d 126, 129 (10th Cir. 1985) *(citing Deltona Corp. v. United States*, 657 F.2d 1184, 1186 (Ct. Cl. 1981)). The court in *Quivira* held that a permit was required for the discharge of a pollutant into a dry arroyo, which periodically ran as a stream, because discharges into every creek, stream, river, or body of water affecting interstate commerce are regulated. *Quivira* 765 F.2d at 129. Because the purpose of the

CWA directs a broad interpretation of "navigable waters" and the holding in *Quivira* found that a dry arroyo constituted a navigable water, the court in the present case should conclude that the Rapid River is a navigable water. An arroyo is a dry ditch for most of the year. It is inundated with water during portions of the year when there is heavy rainfall. The court in *Quivira* reasoned that although an arroyo is inundated only periodically throughout the year, during such times of intense rainfall, the waters of the arroyo have a surface connection with other navigable-in-fact waters and must therefore come within the jurisdiction of CWA § 401.

The question concerning the fact that the Rapid River flows throughout the year is not in dispute. Surely, if a dry arroyo has a surface connection during part of the year to navigable waters, so too does the Rapid River that flows all year long. Even if it does not have a direct surface connection to other navigable waters, it has some impact on interstate commerce throughout the year, as it feeds the water supply of the nearby city. *See United States v. Earth Scis., Inc.*, 599 F.2d 368 (10th Cir. 1979) (holding that the stream in question was a "water of the United States" even though it was not navigable-in-fact because all that is needed is some impact on interstate commerce from the stream).

D. Capitol City and New Union Argument: The Court Properly Determined That Capitol City Did Not Violate 33 U.S.C. § 1311(a) Because the Rapid River is Not a Navigable Water.

1. The Rapid River is No Longer a Tributary of the Platte River and Will Never Be Again in the Foreseeable Future; Therefore it Does Not Constitute a Navigable Water.

FSSC relies on the outdated case of *United States v. Appalachian Electric Power Co.*, to support its argument that once a water is found to be navigable it remains so, even after it becomes unconnected to the waters of the United States. 311 U.S. 377, 408 (1940) This argument must fail as Congress did not intend to regulate non-navigable waters that would not again be navigable at any time in the future. The general rule is that isolated waters that are separated from navigable waters are not subject to CWA prohibition against discharge of pollutants. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S.

159 (2001). Rather, for a waterway to be subject to the CWA prohibition against point source pollution it must be used or usable for navigation or connected, in some way, to navigable water. *Id.* at 172.

The Congressional intent behind regulating tributaries of traditionally navigable waters under CWA was to control pollution of the "navigable waters" by controlling the pollution on the non-navigable upstream waterway, often a tributary. This intention is reflected in the congressional definition. Capitol City and New Union concede that at one time the Rapid River was an indirect tributary of the Platte River and therefore, was subject to CWA jurisdiction. However, the Rapid River was dammed by the Torpid Reservoir in 1934 to provide a drinking water supply to Capitol City. As a consequence of the dam, the Rapid River has been unconnected to navigable water for almost a century and as an isolated waterway, is not subject to 33 U.S.C. § 1311(a).

In *Appalachian* the Court was not considering a river navigable because it was a tributary to navigable water but whether the river itself was navigable. The Court held that "rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used in their ordinary condition, as highways for commerce." *United States v. Appalachian Electric Power Co.*, 107 F.2d 769, 780 (4th Cir. 1939) (citing *The Daniel Ball*, 77 U.S. 557, 563 (1870). As opposed to the navigable-in-fact meaning of navigability there, presently, the meaning is entirely dependant on the definition imposed by Congress in the CWA. For this reason, the *Appalachian* interpretation can not be applied to the meaning intended by Congress and argued presently, and therefore, although the Rapid River was once navigable, it has been cut off from its connection to navigable waters and can not be interpreted as maintaining its navigable character.

2. The Rapid River is, at Best, a Formerly Intermittent Navigable Water and Because it is No Longer Annually Connected to Navigable Waters Flow it is Not Subject to the CWA.

Plaintiffs further rely on the intermittent connection theory to establish that the Rapid River is within the jurisdiction of the CWA. The plaintiffs may not rely on *Quivera* because there the arroyos in question were intermittently connected with navigable waters on an *annual* basis during the rainy season. Here, because

the Torpid Reservoir and Dam will be used into the foreseeable future to supply drinking water to the local communities, such annual inundation is not present. Rather, the Rapid River is completely disconnected from navigable waters as it ends in the Torpid Reservoir and then is consumed by Capitol City.

"Discharge of a Pollutant"

Did the release of silt-laden water from the Torpid River to the Rapid River through a diversion, constitute the "discharge of a pollutant" under the CWA?

E. FSSC Argument: The Court Improperly Held That Capitol City Did Not Violate the Permit Requirement of the Act Because the Discharge of Silt-laden Water From the Diversion Pipe Did Constitute the "Discharge of a Pollutant."

1. The Transfer of Polluted Waters from One Waterbody to Another by Way of a Discharge Through a Point-source Violates CWA § 301 Prohibition on the "Addition" of a "Pollutant" From a "Point Source" to "Navigable Waters."

Read together, the statutory and regulatory language and associated definitions established by Congress and EPA under the CWA encompass the transfer of polluted water from one water body and the discharge into another water body through a pipe, channel, tunnel, or conduit. 33 U.S.C. § 1362(14) (2004). A recent Second Circuit opinion held that the transfer of water from one water body to another through a "discrete conveyance" constitutes a violation of CWA § 301 and therefore requires an NPDES permit under CWA § 402. *See Catskill Mountains Chapter of Trout Unlimited, Inc., v. City of New York*, 273 F.3d 481 (2nd Cir. 2001). There, the court held that the discharge of mud and silt through a tunnel constituted the discharge of a pollutant from a point source in violation of CWA § 301 and required an NPDES permit. *Id.* at 492. Presently, the diversion of silt-laden water from the Torpid River to the Rapid River causes the "addition" of the polluted silt-laden water via a discharge through a "discernible, confined, and discrete conveyance," the diversion itself. 33 U.S.C. § 1362 (2004). Were it not for the presence of the diversion of water from the silt-laden Torpid River to the clear and rapid running Rapid River, the Rapid River would remain unpolluted.

In the recent Supreme Court decision *South Florida Water Management District v. Miccosukee Tribe of Indians*, the Court confronted the specific issue of whether a human induced transfer of water, through a pump constituted the "discharge of [a] pollutant" within the meaning of the CWA. 124 S. Ct. 1537, 1542 (2004). The court ultimately held that the definition of "discharge of pollutant" includes "point sources that do not themselves generate pollutants." *Id.* at 1543. The court declined to rule on the "unitary waters" theory and remanded the case on that question.

Of further significance is that the *Gorsuch* and *Consumers Power* cases, relied on by the defendant were distinguished by the First Circuit in *Dubois v. USDA*, 102 F.3d 1273 (1st Cir. 1996) and also by the Second Circuit in *Catskill Mountains*, 273 F.3d 481 (2nd Cir. 2001). In the *Dubois* case, water was transferred from a river to a pond and that court held that the transfer constituted an addition. 102 F.3d at 1299. *Gorsuch* and *Consumers Power* are relied on by the defendant for the proposition that there is no "addition" of a pollutant unless the source of the addition "physically introduces" the pollutant "from the outside world." *Gorsuch* 693 F.2d at 175. However, the discharges in both *Gorsuch* and the *Consumers Power* were transferring pollutants within the same body of water, rather than between two different bodies of water. In distinguishing these cases, the *Dubois* court found that the water in those cases was flowing within a single body of water, as opposed the facts before it, where water was flowing "from one flowing water body into another." 102 F.3d 1273, 1299 (1st Cir. 1996). The *Dubois* facts and holding should be applied to the present case as there is no question that the Torpid River and the Rapid River are separate and distinct bodies of water and the "addition" of the polluted silt-laden water into the Rapid River comes from the outside world.

One further relevant case is that of *Dague v. City of Burlington* where the Second Circuit held that a pollutant released from one distinct water body into a another distinct water body constituted an addition of a pollutant. There a "discharge" of leachate from a landfill that entered a nearby pond and then subsequently entered a marshland via a culvert constituted the discharge of a pollutant. 935 F.2d 1343, 1354 (2d Cir. 1991). Similarly, silt enters the Torpid River, then enters the diversion and is added to the Rapid River constituting a "discharge of a pollutant."

2. The Structure and Legislative History of the CWA Require the Conclusion That the Transfer Through a Point Source From One Body of Water to Another Body of Water Violates CWA § 301.

The respondents argue that the addition of silt-laden waters into the Rapid River from the Torpid River is not an "addition" of a pollutant because the silt-laden water was present in the Torpid River and therefore has already been added to navigable waters. This argument fails because it undermines the legislative intent of the pollution prohibition of CWA § 301 and it is not supported by statutory structure of the CWA.

The CWA aims "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a) (2004). The meaning of this goal is illustrated in the House Committee on Public Works report that accompanied the CWA Bill. The report states the following:

> [t]he word "integrity" as used is intended to convey a concept that refers to a condition in which the natural structure and function of ecosystems is maintained. . .Any change induced by man that overtaxes the ability of nature to restore conditions to "natural" or "original" is an unacceptable perturbation.

H. R. Rep. No. 92-911, at 76-77 (1972).

Clearly, Congress intended to regulate the type of perturbation in the waters of the United States that results from the diversion of the silt-laden waters of the Torpid River to the clear flowing waters of the Rapid River. The "change induced by man" in the instant case involves the transfer of the diverted water and the discharge of such water through a point source into the Rapid River. The consequence of such man induced alteration of the water system results in the inability of the Rapid River to restore itself to its "original" condition and as a result fish are dying, and humans are harmed in their attempt to use and enjoy the waters and resources that would natural thrive in the waters.

In addition to contravening the purposes of the CWA, and ignoring its plain language, the respondent's "unitary waters" argument would disrupt the structure of the statute. The "unitary waters" theory runs counter to the scheme designed to maintain water quality and it also disrupts other provisions related dredged spoil and materials. The structure of the CWA water quality scheme functions on an individual water body basis, requiring

states to adopt water quality standards for each water body in the its state. 33 U.S.C. § 1313 (2004); *see also* 40 C.F.R. § 131.20 (2003). The distinct water body scheme for designated uses and water quality standards accords with the *Dubois, Dague,* and *Catskills* holdings cited above.

Besides water quality standards, application of the "unitary waters" theory runs counter to other CWA provisions. For instance, CWA § 404 requires a permit for the deposit of "dredged. . .material" into navigable waters, 33 U.S.C. § 1344(a). CWA § 502 includes "dredged spoil" within the "pollutant" definition, 33 U.S.C. § 1362(6). Both dredged material and dredge spoil are materials removed from one body of water and are reintroduced into another water body or another part of the same water body. Regardless of whether the materials are already present in a navigable water, their deposit constitutes an "addition" and therefore, such activity violates CWA § 301 without a permit. If respondents' argument succeeds, these provisions would have new meaning. For these reasons, the structure of the statute and its subsequent application weigh heavily against the respondents' "unitary waters" theory.

3. The Respondent's Argument Must Fail Under the "Unitary Waters" Theory Because That Theory Has Not Been Decided and Also Because the Rapid River and the Torpid River are Distinguishable Hydrologic Units.

Capitol City would have this court apply an undecided doctrine of law that has no solid origin in the legislative history of the CWA. It is the contention of Capitol City that the court should apply the "unitary waters" theory treating navigable waters as a collective whole, thereby making it impossible to ever find more than one "addition."

The Supreme Court in *Miccosukee* explicitly stated that the statutory scheme of the CWA "suggests that the Act protects individual water bodies as well as the "waters of the United States" as a whole." 124 S.Ct. at 1544. The Court supported this conclusion by citing the water quality scheme in general that isolates waters on a water-body-by-water-body basis. *Id.* Because the Rapid River and the Torpid River are distinctly separate water bodies, exemplified by the fact that their connection now is through a human construction diversion, the *Miccosukee* reasoning must apply.

F. Capitol City and New Union Argument: Even if the Court Determines That the Rapid River is a Navigable Water, the Court Properly Held That Capitol City Did Not Violate the Requirement of 33 U.S.C. § 1311(a) Because the Discharge of Silt-laden Water Did Not Constitute the "Discharge of a Pollutant."

1. The Statutory Language of CWA § 402 Does Not Apply to Diversions of Water Where There Has Been no "Addition" of a Pollutant to Navigable Waters.

The statutory language indicates that, although there may be multiple additions, multiple pollutants, and multiple point sources, there is only one navigable water. Therefore the addition of silt occurred when it was added to the navigable Torpid River, not when the Torpid River was diverted to the Rapid River. The definition of "discharge of pollutants" includes that there be "an addition" of "any pollutant" from "a point source" to "navigable waters." 33 U.S.C. § 1362(12) (2004). This language requires that the point source in question be the source of the pollutants' initial entry into navigable water. *United States v. Riverside Bayview*, 474 U.S. 121 (1985). Furthermore, once the court of appeals has held that an "addition" of pollutants to navigable waters from a point source "occurs only if the point source itself physically introduces a pollutant into water from the outside world." *National Wildlife Found. v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). Similarly, in *National Wildlife Fed'n v. Consumer Power*, the court held that water polluted with destroyed aquatic life and released from the turbines of a dam did not constitute the addition of a pollutant because such pollutant was merely being moved from one location in navigable water to another. 862 F.2d 580 (1988). Such release was not *adding* anything to the water. *Id.* These cases suggest, but do not hold that a polluted water passing through a point source from one body of navigable water to another would constitute an addition. *Gorsuch* 693 F.2d at 175; *Consumers Power* 862 F.2d at 586.

2. The "Unified Waters" Theory Applies and Therefore, the Diversion Does not Constitute an Addition as the Addition Occurred Upstream as Non Point-Source Runoff.

Even if the court finds that *Gorsuch* and *Consumers Power* are distinguishable, the appellants' argument still fails under the "unitary waters" theory. In its recent decision, the U.S. Supreme Court remanded the "unitary waters" theory to be decided. The theory espoused by the United States views all "waters of the United States" as joined. The court should apply the "unitary waters" theory treating navigable waters as a collective whole, thereby making it impossible to ever find more than one "addition."

Because the language of CWA defines "discharge of a pollutant" as "*any* addition of *any* pollutant to navigable waters from *any* point source" and such language does not modify the words navigable waters with the word any, the plain meaning suggests that only one navigable waters was envisioned.

3. As a Public Policy Matter Imposition of the NPDES Permit System Requirements on Water Diversions Would be Impractical and Burdensome for Western States and Should be Avoided.

New Union and Capitol City contend the CWA does not regulate the alteration of water that occurs as a result of release or diversion from every dam, reservoir, pipe, or tunnel. Such an imposition would be highly burdensome on much of the west as a result of the complex water supply and allocation implemented through those arid states. FSSC contends that a general permit could be utilized to avoid the administrative burden on such states. This is not an adequate solution to the problems resulting form imposition of the CWA on water diversions and inter-basin transfers of waters. A general permit, although administratively less taxing, still imposes a restriction on the right of the water rights owner to divert the water right. Such restriction is prohibited by the CWA § 101(g) prohibition against obviation of states water allocation rights by the CWA.

V. DID THE COURT BELOW ERR IN GRANTING CAPITOL CITY'S MOTION FOR SUMMARY JUDGMENT THAT NEW UNION'S GRANTING OF A PERMIT FOR CAPITOL CITY'S DIVERSION OF THE TORPID RIVER TO THE RAPID RIVER AS PART OF THE STATE'S CONTROL OVER WATER OWNERSHIP, USE AND ALLOCATION OBVIATED APPLICATION OF THE FEDERAL CLEAN WATER ACT TO THE DIVERSION?

Did the Court below err in granting Capitol City's motion for summary judgment that New Union's granting of a permit for Capitol City's diversion of the Torpid River to the Rapid River as part of the State's control over water ownership, use and allocation obviated application of the federal Clean Water Act to the diversion? FSSC appeals the Court's decision; Capitol City and New Union support it?

A. Relevant Statutory and Regulatory Language.

The CWA preserves to the states in CWA § 101(g) authority to allocate water quantity and water rights. The provision describes as follows:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act, 33 U.S.C. §§ 1251 et seq. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g)(2004).

Additionally, CWA § 510, State Authority, directs the following "Except as expressly provided in this chapter, nothing in this chapter shall. . .be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters. . .of such States."33 U.S.C. § 1370

The CWA provides that where an applicant can demonstrate that the cost and benefit of a water quality standard are not related, relief to the permit applicant will be granted.

> The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for pollutants other than toxic pollutants if the applicant demonstrates at such hearing that there is no reasonable relationship between the economic and social costs and the benefits to be obtained from achieving such limitation.

33 U.S.C. § 1312(b)(2)(A).

CWA § 101(g) is commonly referred to as the "Wallop Amendment" as it was Senator Wallop that sponsored the amendment in 1977. In the legislative history of the amendment, Senator Wallop stated that CWA § 101(g) should not "take precedence over legitimate and necessary water quality considerations." 123 CONG. REC. 39, 212 (1977), *1977 Leg. Hist.* 532. Referencing this legislative history, the Supreme Court stated that the 1977 amendment adding CWA § 101(g) did not intend to prohibit incidental effects of the requirements of the Act on individual water rights, but to "insure that state allocation systems are not subverted and that any effects on individual rights are prompted by legitimate and necessary water quality standards." *PUD No. 1 of Jefferson Country v. Washington Dept. of Ecology*, 511 U.S. 700, 734 (1994).

B. The Federal-State Tension over Water Rights.

The issues of Federalism that have existed in the United States since the early days of its inception are apparent and continually debated in the problems that arise between state rights to allocate water and the federal government's authority to prevent pollution of navigable waters.

Courts have found that the federal interest in protecting the nation's waters and the state interest in providing water to its citizens are not necessarily mutually exclusive and that federal regulation does not wholly preclude state allocation. *See Alameda Water & Sanitation District v. Reilly*, 930 F. Supp. 486, (D. Colo, 1996)(holding that a challenge to the EPA's veto of a water storage project must fail where the water entities argued that that EPA had violated 33 U.S.C. § 1251(a) prohibiting interference with state allocation laws regarding water quantity, because EPA did nothing to prevent city or other water rights owners from using or transferring their rights); *James City County v. EPA*, 12 F.3d 1330 (4th Cir. 1993)(finding that EPA has the authority to base its veto under the CWA solely on grounds of adverse effects to the

environment; the agency need not consider the local need for water).

C. *FSSC Argument: The Court Below Erred in Finding That New Union's Permit Grant Allowing Capitol City to Divert Water Obviated Application of the CWA.*

1. *CWA § 101(g) Contemplates Considerable Federal Regulation of Water Quality.*

Congress has assigned considerable responsibility for the implementation of CWA water quality protection programs to the states, with guidance, oversight, and cooperative certification of the federal government. It is not disputed that Congress has directed that federal authority must not "supercede or abrogate rights to quantities of water." 33 U.S.C. § 1251(g). However, coupled with this directive, is the language that "[f]ederal agencies shall *co-operate* with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution *in concert* with programs for managing water resources." *Id. (emphasis added).* Based on this language, it is clear that state authority does not wholly obviate the application of federal law to state waters where allocation schemes are in place. Rather, the federal government and state agencies must work together to ensure that water quality is maintained while providing adequate water supply to the current and future citizens of the states.

There is substantial case law indicating that state authority to allocate water does not preclude federal authority to implement the NPDES permit program to protect water quality. The U.S. Supreme Court held that CWA water quality requirements may affect some characteristic of the water allocation schemes, specifically the way a particularly affected water right is managed. *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994). The Court there found the distinction between water quality and water quantity control: "reduced stream flow, i.e., diminishment of water quantity, can constitute water pollution.

Appellate courts have also come to the conclusion that the Wallop Amendment does not limit water restrictions on the exercise of water rights, provided that the restriction serves a legitimate purpose under the CWA and does not abrogate the underlying water right or water allocation system.

2. Any Burden to Western States as a Result of Federal Regulation Under CWA § 401 Can be Remedied by a General Permit and Such Federal Regulation is Consistent With State Water Allocation Schemes.

The Supreme Court in *Miccosukee* noted that the administrative burden that could likely result from imposition of the NPDES program on diversions could be remedied by the general permit system under the CWA. 124 S.Ct. at 1545. Furthermore, Capitol City contends that the quality of general permits has been questioned. However, the court in *Environmental Defense Center v. EPA*, 344 F. 3d 832 (9th Cir. 2002), stated that general permits are lawful and adequate.

Capitol City contends that the administrative burden created by imposition of CWA to diversions is overly burdensome. Any administrative difficulty that results can be remedied by the general permit program. However, it is important to note that administrative burden is not a valid reason to avoid application of the CWA where there is a "discharge of pollutant."

The last argument espoused by Capitol City is that the cost of imposing technology based effluent limitations or water quality standards on waters and discharges within the allocation scheme was outside Congress' vision for CWA application. However, Congress specifically recognized that some cost burden may come to bear on permit applicants and is reflected in the statute itself. The CWA contemplates that cost will be a factor in the technology based effluent limitations, CWA § 304, and water quality scheme and therefore such costs may be balanced against the benefits. 33 U.S.C. § 1312(b)(2)(A). If the permit applicant can make a showing that the costs do outweigh the benefits, than the permit may be avoided. Since Congress not only recognized the likelihood of a cost burden but set out a means by which permit applicants could avoid such costs, the court hear must not make a sweeping holding exempting all diversions from CWA regulation. Rather, costly impositions that result from CWA imposition on diversions must be dealt with one diversion at time.

D. Capitol City and New Union: The Court Below Properly Found That New Union's Permit Grant For Capitol City to Divert Water as Part of the New Union's State Control Over Water Ownership, Use and Allocation Obviated Application of the CWA.

1. Application of CWA § 401 Permitting Requirements to Diversions Will Be Overly Burdensome on Western States and Inconsistent With the State Authority to Allocate Water Quantities.

Although the Court in *Miccosukee* did not directly decide the matter, it verified New Union's contention here that if the NPDES program proscribes transfers of water for allocation purposes, the CWA § 101(g) will be violated. Capitol City and New Union contend that the provision will be violated in two primary ways, 1) by economically impairing the State right to allocate water quality, and 2) by being generally inconsistent with the purpose and intention underlying the provision. In *Miccosukee* the Court emphasized the possibility that if the NPDES program prohibits water transfers, such as the diversion made presently from the Torpid River to the Rapid River, that the costs of water may be prohibitively increased and thereby frustrating the state's authority to control its water uses protected by CWA § 101(g). *Miccosukee* at 1545. The cost of treating pollution in every diversion in the west, and specifically the diversion at issue here, directly abrogates the State's authority to allocate water and violates CWA § 101(g).

2. The Administrative Solution of General Permits is not Appropriate as it Also Infringes on the State's Authority to Control Water Ownership, Use and Allocation.

In relying on *Miccosukee*, the appellants suggest the administrative remedy of general permits to alleviate the chaos and burden that may result if every diversion is subject to CWA regulation. 124 S.Ct at 1545 (recommending that if water transfers must be regulated to protect water quality, the associated cost could be controlled through the general permit system). While it may be true that a general permit would reduce the burdensome nature of the envisioned permitting scheme by requiring only one permit or a small number of permits, rather than permits for every diversion, it does require that states meet an effluent limitation for such diversions. The regulations mandate that a general

permit must include effluent limitations to "[a]cheive water quality standards." 40 C.F.R. § 122.44(d)(1). Therefore, regardless of whether it is CWA § 401 NPDES permit or a general permit under the regulations, either scheme will abrogate the State's right to allocate quantities of water, to some degree. Such abrogation was not envisioned by either CWA § 101(g) or CWA § 510 and therefore application of CWA has been properly obviated.

Another important point regarding the use of general permits was the holding in the recent the 9th Circuit decision that stated general permits for municipal stormwater systems do not properly ensure that the CWA requirements are met. *Environmental Defense Center v. EPA*, 344 F.3d 832, 855-856 (9th Cir. 2002). Since NPDES permits abrogate State authority and general permits don't do enough to ensure water quality, and alternative approach is required. The result for the present circumstance is that the Court below properly upheld New Union's permitting that allowed Capitol City to divert water from the Torpid River to the Rapid River for water supply purposes.

Last, even if the administrative burden can be remedied through the general permit scheme, the cost of meeting NPDES limitations or water quality standards outweighs the benefit that would be realized through regulation of diversions. Congress did not intend to burden private water rights through additional costs by imposition of the CWA on the allocation scheme extensively used in much of the United States. For these reasons, the FSSC arguments below must fail.