Pace Environmental Law Review

Volume 21
Issue 2 *Summer 2004*

Article 7

June 2004

Best Overall Brief: Sixteenth Annual Pace National Environmental Law Moot Court Competition

MEASURING BRIEF*

Civ. No. 03-713

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

New Union Fly Fisherman Federation,
Appellant,

v.

New Union Power & Electric Company,
Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW UNION

BRIEF FOR THE APPELLEE

TEMPLE UNIVERSITY SCHOOL OF LAW
Noah AnStraus
Louise Melchor
Jennifer Sosa

---

* This brief has been reprinted in its original form.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT DECISIONS

UNITED STATES COURT OF APPEALS DECISIONS

UNITED STATE DISTRICT COURT DECISIONS

UNITED STATES STATUTES

FEDERAL REGULATIONS

LEGISLATIVE MATERIALS

JURISDICTION

The United States District Court for the Southern District of the State of New Union entered a final judgment that addressed all parties claims. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal in accordance with 28 U.S.C. §1291.

QUESTIONS PRESENTED

1. Did the court below properly decide that NUPEC's permit limits on intake, non-contact cooling water, and summer-month flow limitations, which are not related to the discharge of pollutants, are more stringent than and beyond the scope of the CWA?
2. Did the court below properly decide that state requirements that are more stringent than and beyond the scope of the CWA cannot be enforced by a citizen suit in federal court?
3. Did the court below properly decide that citizens are barred from seeking civil penalties or an injunction for violations that have already been diligently prosecuted by the state?
4. Did the court below properly decide that where a single affirmative act or omission automatically results in the violation of several permit parameters the act should be considered one violation subject to one penalty?

STATEMENT OF THE CASE

Procedural History

This case was initiated in June of 2002 when New Union Fly Fisherman's Federation (NUFFF) sent New Union Power & Electric Company (NUPEC), New Union Department of Natural Resources (NUDNR) and the Environmental Protection agency (EPA) a valid notice of NUPEC's violations pursuant to 33 U.S.C. § 1365(b)(1)(A), and regulations promulgated under the Clean Water Act (CWA). (R. at 4). After waiting at least 60 days as required by statute, NUFFF brought this action in the United States District Court for the Southern District of New Union in September of 2002. (R. at 4). NUFFF sought civil penalties for all violations for which NUDNR had not already assessed a penalty, and injunctive relief against future violations. (R. at 4).

In its pleadings, NUFFF contended that NUPEC exceeded the intake, flow, and non-contact cooling water discharge limitations from its § 401 certificate issued by NUDNR during approximately six months of every year, and every day during the summer. (R. at 4, 12). These violations were discovered by NUFFF from reports submitted to NUDNR by NUPEC and neither party is contesting their occurrence in these proceedings. (R. at 4). NUDNR was already aware of these violations, and had issued fines and taken other administrative action. (R. at 4). When this lawsuit was filed, NUDNR immediately submitted an affidavit stating that it did not assess fines against NUPEC during the summer months because "the state was short of generating capacity, and NUDNR policy was to encourage electricity generation during those months." (R. at 4). Because the pertinent facts were not in contention, the lower court received motions for summary judgment filed by both NUPEC and NUFFF. (R. at 4).

After a thorough analysis of the issues the lower court granted NUPEC's motion in its entirety. The lower court concluded that: 1) §505 of the CWA does not authorize citizens to enforce state imposed permit limitations that are more stringent than or beyond the scope of federal CWA limitations; and, 2) NUDNR's previous enforcement actions against NUPEC deprived NUFFF of authority to bring a citizen suit against NUPEC under 33 U.S.C. §1309 (g)(6)(A). (R. at 4, 8, 10). Lastly, the lower court found that if penalties were to be assessed by the court (which they were not), only one penalty a day could be assessed since in-

take, flow and non-contact cooling water discharge limitations were the same permit provision. (R. at 4, 10).
After NUPEC was granted summary judgment, NUFFF appealed to the present court. (R. at 1). EPA, as an interested party to the litigation, has been allowed to file an amicus brief along with NUFFF's appeal. (R. at 1). Since the lower court properly decided all of the above issues, this court should uphold the lower court's ruling and enter judgment for NUPEC on all issues.

Statement of Facts

NUPEC is the operator of the Teepee One and Two electric generating facilities in Paddleboat Springs in the State of New Union. (R. at 3). In order to safely generate electricity using the best available treatment (BAT), NUPEC uses a constant flow of water to cool its generators. (R. at 3). NUPEC intakes and discharges water from the New Union River for the closed system cooling system. (R. at 3-4). Since no appreciable amount of water is lost in the cooling process, the flow level of the New Union River stays the same no matter how much water is used by NUPEC. (R. at 13)

As part of its operations, NUPEC applied for and received a permit to use New Union River water in its cooling operations. (R. at 3) NUPEC's 1997 permit issued by the NUDNR in conjunction with the EPA includes permit limits on intake, flow, and discharge levels of water at 4 million gallons per day (mgd) from September 1st to June 30th and 3 mgd from June 1st to August 31st. (R. at 12). NUDNR provided certification and the EPA issued this permit under §401 of the CWA. (R. at 4). In the permit Fact Sheet, the EPA indicated that the 4 mgd water use restrictions were based on the fact that 4 mgd is the design capacity for NUPEC's water control system. (R. at 13). Additionally, the EPA acknowledges that it does not require intake or non-contact cooling water discharge permit limits because these are both covered by the flow limit. (R. at 13).

While NUPEC attempted to comply with all relevant provisions of its permit, it occasionally used more water for cooling purposes than provided for in the permit. (R. at 4). Due to increased consumer demand for electricity, NUPEC exceeded the June 1st to August 31st 3 mgd water use limitations, and occasionally exceeded the 4 mgd water use restrictions during the remainder of the year. (R. at 4). NUDNR was made aware of these issues and fined NUPEC $1000 a day for all 4 mgd flow violations. (R. at 4).

NUPEC promptly paid all fines levied by NUDNR. (R. at 4). While NUDNR was aware of the 3 mgd violations, in a signed affidavit an official stated that penalties were not assessed "because the highest demand for electricity occurs during those months due to the necessity of air conditioning, the state was short of generating capacity, and NUDNR policy was to encourage electricity generation." (R. at 4).

NUFFF is a not-for-profit corporation organized under New Union law. (R. at 3). NUFFF discovered that NUPEC was using more water than specified in its permit and sent notice of this fact to NUPEC, NUDNR, and EPA. (R. at 4). When these unavoidable water usage overruns did not immediately stop, NUFFF filed this lawsuit under the citizen suit provisions of the CWA. (R. at 3).

SUMMARY OF THE ARGUMENT

The ruling of the United States District Court for the Southern District of New Union that granted NUPEC's motion for summary judgment in its entirety should be affirmed. The district court appropriately found that the intake, non-contact cooling water discharge, and summer-month flow limitations in the permit granted to NUPEC were not only more stringent than but also beyond the scope of the CWA. The purpose of the CWA is to limit the discharge of pollutants into waters of the United States. The business activities of NUPEC merely involved the continuous movement of pure water, which by itself is not a pollutant. The intake of water from the New Union River cannot be considered a discharge because it is merely a withdrawal of water and not an addition of a pollutant. Similarly, the non-contact cooling water discharge and summer flow limitations are outside of the scope of the CWA. Although flow limits are often present in EPA permits, their purpose is to address the water quality of the effluent, not water quantity so long as the quantity of water does not negatively affect the primary purpose of the affected body of water. Since NUPEC's intake and discharge flows are equivalent, there is no impact on the minimum stream flows.

Given that the conditions of the permit issued to NUPEC are more stringent than and beyond the scope of the CWA, NUFFF is barred from bringing a citizen suit for violations of the conditions. The limitations present in the permit are based on the certificate authorized by the state, not requirements under the CWA. There is no issue of water quality, which may be within the reach of an action by NUFFF, but only a state determination concerning

water allocation. Congruent with the principles of federalism, deference dictates that only the state is allowed to enforce its laws when they are beyond the scope of federal regulation.

Similarly, NUFFF should remain barred from seeking civil penalties for actions that have been diligently prosecuted by the state and from seeking an injunction against future violations that are merely speculative. The State of New Union has already assessed penalties against NUPEC for its permit violations. In doing so, the state struck a compromise couched in policy that favored the production of electricity over the level of water in the New Union River during the summer months. Any action taken by NUFFF would merely be duplicative of the action taken by the state and thereby prohibited by the language of the CWA. For similar reasons, NUFFF should not be allowed to pursue an action for injunction as a means to circumvent its inability to pursue civil penalties. The intent of Congress indicates that the state is the primary enforcer of violations and the statutory scheme of the CWA does not allow for a distinction between the types of actions that a citizen group may attempt to bring against a permit violation.

Finally, the lower court properly exercised discretion in holding that intake, non-contact cooling water, and discharge flow limitation violations were all subject to only one daily fine. The language of the CWA dictates that there be a maximum cap on permit violation penalties in order that they act as a deterrent, not a confiscation of property. Even if the language could be construed to apply to discrete violations, the violations at issue constitute one continuous act, not divisible violations. Therefore a penalty can only be assessed once daily.

Since there is no genuine issue as to any material fact, the lower court's grant of summary judgment on all claims should be affirmed.

STANDARD OF REVIEW

Where a district court grants a motion for summary judgment, the appellate court must conduct a de novo review. Catron County Bd. of Comm'rs, New Mexico v. U.S. Fish & Wildlife Serv., 75 F.3d 1429, 1435 (10th Cir. 1996). The appellate court must apply the same standard for summary judgment used by the district court pursuant to Federal Rule of Civil Procedure 56(c). Id. at 1435. Summary judgment is appropriate where "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). When determining whether the decision of the district court was appropriate, the appellate court is to interpret the record and all reasonable inferences in the light most favorable to the non-moving party. Catron County Bd. of Comm'rs, 75 F.3d at 1435. If the non-moving party is not able to "adduce probative evidence on an element of its claim upon which it bears the burden of proof," then the grant of the motion for summary judgment must prevail. Id. at 1435 (quoting Rorhbaugh v. Celotex Corp., 53 F.3d 1181, 1183 (10th Cir. 1995)).

ARGUMENT

I. THE INTAKE, NON-CONTACT COOLING WATER DISCHARGE, AND SUMMER MONTH FLOW LIMITATIONS IN NUPEC'S PERMIT ARE MORE STRINGENT THAN AND BEYOND THE SCOPE OF THE CLEAN WATER ACT

The lower court correctly held that intake, non-contact cooling water discharge, and summer month flow limitations in the NUPEC permit were more stringent than and beyond the scope of the CWA. EPA's regulations and guidelines do not require a limitation on intake, minimum stream flows for fish propagation, nor non-contact cooling water discharge. (R. at 13). These conditions are only present in the NUPEC permit due to the NUDNR § 401certification. (R. at 13). As such, these state imposed limitations are more stringent than, and beyond the scope of the federal limitations under the CWA.

A. The Purpose of the Clean Water Act is to Limit Discharge of Pollutants to Waters of the United States

In 1972, Congress enacted the CWA, "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251 et seq. (2000). The achievement of water quality "which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water, wherever attainable" is a goal of the CWA. 33 U.S.C. § 1251(a)(2). The CWA and its later amendments fundamentally changed the way in which water pollution is federally regulated, in shifting the focus from water quality standards to direct limitations on the discharge of pollutants. Friends of the Earth v. Gaston Copper Recycling Corp., 204 F.3d 149, 151 (4th Cir. 2000). Water quality standards still have a role in the CWA, and states have the primary role in promulgating water quality standards, by including more stringent limitation within permits. American Paper Institute, Inc. v. United States Environmental Protection Agency, 996 F.2d 346, 349 (D.C. Cir. 1993).

Water quality standards have two primary components: designated uses for a body of water and a set of "criteria" specifying the maximum concentration of pollutants that may be present in the water without impairing its suitability for designated uses. Id. (quoting 33 U.S.C. § 1313(c)(2)(A)). Criteria may be in narrative or numeric form. Id. However, in all cases, criteria are intended to translate into *chemical specific* effluent limitations for a pollutant. Id. at 350 (emphasis added). Based on this linkage, the use of a water body is not independent of the criteria. The flow limits placed on NUPEC by NUDNR are not chemical specific effluent limitations or criteria, and therefore do not fall under the category of water quality standards.

State standards also must consider antidegradation, including preservation of stream flows. 40 CFR § 131.12 (2003). Under the antidegradation regulation, no activity is allowable which could partially or completely eliminate any existing use of the waterbody. PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994) (hereinafter PUD). Where lowering of the water quantity in a body of water could destroy all of its designated uses, water quantity becomes integrated with water quality, and thus within the reach of the CWA. Id. at 718-720 (because of the degradation of the physical and biological integrity of the waterbody, the Court deemed stream flow depletion a form of pollution). However, PUD differs from NUPEC in that the intake

and discharge volumes generated by NUPEC will be equivalent, thus not impacting the stream flow. (R. at 13). Further, the Court in PUD does not state that flow is itself a pollutant, only that it may, in some circumstances, fall within the broad concept of water pollution. PUD No. 1 of Jefferson County, 511 U.S. at 720.

The CWA provides that the discharge of a pollutant is unlawful, unless a permit is provided for the discharge. 33 U.S.C. §§ 1311(a), 1342(a), 1362(12) (2000). The EPA may issue discharge permits under the national pollutant discharge elimination system (NPDES), or the EPA may delegate permit granting authority to states that establish their own state pollutant discharge elimination system (SPDES) to limit effluent that can be discharged into navigable waters from a point source. 33 U.S.C. § 1342(a), (b).

Section 301 of the CWA mandates that every permit contain effluent limitations, including any more stringent limitations necessary for the waterway receiving the pollutant to meet "water quality standards." 33 U.S.C. § 1311(b)(1). EPA is required to include "any appropriate requirement of state law" in CWA permits; therefore, states must provide a water quality certification before a federal license or permit can be issued for discharges. 33 U.S.C. § 1341(d) (2000). Accordingly, NUDNR provided NUPEC a water quality certification from the State of New Union, which imposed seasonal minimum stream flow, intake, and non-contact cooling water discharge conditions. (R. at 5). The EPA incorporated these conditions into NUPEC's permit. (R. at 5). However, the EPA noted that flow and intake conditions were only included in the permit due to NUDNR's entirely state based limits included in the water quality certification. (R. at 13).

The term "discharge of a pollutant", which is the unlawful and permit requiring act noted in section 301(a) of the CWA, means "(1) any addition of any pollutant to navigable waters from any point source, (2) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft." 33 U.S.C. § 1362(12)(A). The CWA defines pollutant as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). This definition is very broad, but yet does not include flow.

As a general rule, a definition which states what a term "means" excludes any meaning that is not stated; here, restrictive phrasing is used rather than the looser "includes", which is used elsewhere in the CWA. National Wildlife Federation v. Gorsuch, 693 F.2d 156, 171-172 (D.C. Cir. 1982). EPA has stated that the statutory term 'pollutant' is more narrow than all-encompassing 'pollution'. Id. (the court found that EPA's definition of "discharge of a pollutant" was reasonable and merited full deference). Further, legislative history shows that the House had used inclusive phrasing, stating that "the term 'pollutant' means, but is not limited to, dredged spoil. . .", but this wording was rejected. H.R. 11,896, 92d Cong., 2d Sess. § 502(6) (1972). This shows that when writing the regulation Congress knew how to write a descriptive rather than an all inclusive definition and chose not to do so in this case. In Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 565 (5th Cir. 1996), cert. denied 519 U.S. 811 (1996), the Fifth Circuit court concurred with the D.C. Circuit's assessment that the definition of pollutants was limited to the terms listed.

B. NUPEC Did Not Discharge a Pollutant Because Water, By Itself, Is Not a Pollutant

Pure water is not within the definition of "pollutant" under the CWA. Orleans Audobon Soc'y v. Lee, 742 F.2d 901, 910 (5th Cir. 1984). Since water itself is not a pollutant, simply moving it from one place to another does not constitute discharge of a pollutant under the CWA. Bettis v. Town of Ontario, New York, 800 F. Supp 1113, 1119 (W.D.N.Y. 1992).

Section 304 of the CWA recognizes that water pollution may result from changes in movement, flow or circulation of navigable waters. PUD No. 1 of Jefferson County, 511 U.S. at 719-720 (citing 33 U.S.C. § 1314(f)). However, it is the discharge of a pollutant, not the creation of water pollution that is regulated by the CWA. The term pollutant does not apply to conditions inherent to water, such as oxygen content. State of Missouri ex rel. Ashcroft v. Dep't of the Army, 672 F.2d 1297, 1304 (8th Cir. 1982). See also Friends of the Earth, Inc. v. Laidlaw, 528 U.S. 167, 176 (2000) (court differentiated between the permittee's limits on discharges of pollutants and permit regulations of flow and other parameters as well as monitoring and reporting obligations); National Wildlife Federation, 693 F.2d. at 171 (water conditions distinguished from substances added to water).

Since there is no evidence in the record that NUPEC adds anything to the flow of water as it travels through its cooling system, NUPEC's discharge of water, with no additional pollutants, is not the "discharge of a pollutant" which the CWA meant to address. Thus, the limitations on flow are beyond the scope of the CWA.

C. Withdrawal From a Waterbody Is Not Considered Discharge, Therefore the Intake Limitation in NUPEC's Permit is Beyond the Scope of the CWA.

In 33 U.S.C. § 1362, the term "discharge" is found within the terms "discharge of a pollutant" and "discharge of pollutants." The definitional intent of "discharge" in 33 U.S.C. § 1362(12) reflects that the word addresses the addition, not the withdrawal, of a substance. State of North Carolina v. Fed. Energy Regulatory Comm'n, 112 F.3d 1175, 1187 (D.C. Cir. 1997), cert. denied 522 U.S. 1108 (1998) (operation of the Pipeline Project will not result in "discharge" for purposes of section 401(a)(1) of the CWA since the Project will only withdraw water from, and add nothing to, a lake). See also State of Missouri ex rel. Ashcroft, 672 F.2d at 1304 (operation of a dam did not result in the "discharge of a pollutant" as that term is defined in the CWA, since discharge of a pollutant requires addition of a pollutant from a point source); Colorado Wild, Inc. v. United States Forest Serv., 122 F. Supp. 2d 1190, 1193 (D. Colo. 2000) (withdrawal from a river tributary is not discharge of pollution, and thus not subject to regulation under the CWA).

Consistent with this view, the EPA noted in the NUPEC permit fact sheet that their regulations and guidelines do not require a limitation on water intake, since the CWA regulates discharges, not intakes. (R. at 13). Therefore, the intake limitation is beyond the scope of the CWA.

D. Since They Are Not Water Quality Based, NUPEC's Permit Limits on Cooling Water Discharge and Summer Month Flows Are More Stringent Than and Beyond the Scope of the CWA.

In general, flow limits are placed in EPA permits based on source operation/ capacity, which is directly tied to the water quality of the effluent. Coalition for a Livable West Side, Inc. v. New York City Department of Environmental Protection, No. 92-C9011, 1998 U.S. Dist. LEXIS 1955 at *3 (S.D.N.Y. Feb. 24, 1998). (SPDES permit flow regulation was based on the capacity of the

wastewater treatment plants to treat the flow directed to it). Therefore flow limits are generally not imposed to minimize discharge into a waterbody. NUPEC has a water pollution control system design basis of 4 mgd, which is greater than the permit flow limit during summer months. (R. at 4, 13). There is no treatment or capacity related reason for lowering the flow below 4 mgd. This limitation on flow and spent cooling water discharge is only in NUPEC's permit due to the state certification, and is beyond the scope of the CWA.

Although states are required to designate uses for water bodies, and establish criteria to protect these uses, it is when lowering of the water quantity in a body of water could destroy all of its designated uses that water quantity becomes integrated with water quality, and thus within the reach of the CWA. PUD No. 1 of Jefferson County, 500 U.S. at 723 (minimum stream flow requirements imposed by the state on a hydroelectric project were permissible conditions under section 401 of the CWA; upheld as water quality standards, based on the state's antidegradation policy, and the stated goals of the CWA). The CWA does not regulate the water quality effects of water diversions. Colorado Wild, Inc., 122 F. Supp. 2d at 1194. In NUPEC's situation, the discharge and intake flows generally are equivalent, thus having no impact on minimum stream flows. (R. at 6). Therefore, the flow limitations are not necessary to maintain the designated use of the New Union River for the propagation of fish, and the intake and flow limitations are beyond the scope of the CWA. Further, the non-contact cooling water limit is redundant to the flow limit. (R. at 13).

E. The State Retains Authority to Allocate Water Quantity Under the CWA; Flow Limitations Not Based on Water Quality Are Beyond the Scope of the CWA.

CWA section 101(g), known as the Wallop amendment, created the distinction between the regulation of water quality and water quantity, by stating that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by [the CWA]," and that nothing in the CWA "shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." 33 U.S.C. § 1251 (g). Similarly, section 510(2) of the CWA states that nothing in the CWA shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States

with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370(2) (2000). These provisions suggest congressional observance of state water right laws that are outside the CWA.

The Fact Sheet issued by the EPA for the NUPEC permit states that the limitations on intake, flow, and spent non-contact cooling water are all based on the § 401 certification by the NUDNR. (R. at 13) While the state has the authority under section 303 of the CWA to institute designated uses of its navigable waters and water quality criteria based upon those uses, it is limited in imposing only requirements that affect water quality. PUD No. 1 of Jefferson County, 500 U.S. at 711 (minimum flow condition was an appropriate requirement of state law; enforcement of water quality standards based on designated use). The flow based requirements in the NUPEC permit will not impact water quality, as the EPA noted that intake and discharge flows are generally equal, and thus do not impact minimum streamflow. (R. at 13). Therefore, although the state may regulate distribution of water, in NUPEC's instance, where there is no clear correlation between the flow limits and the designated use and water quality criteria for the waterbody, this power is outside the bounds of the CWA.

There are no genuine issues of material fact as to the violations of the NPDES permit provisions. (R. at 4). Therefore, the lower court's judgment that the intake, non-contact cooling water discharge, and summertime flow conditions are more stringent than or beyond the scope of the CWA should be upheld. (R. at 8).

II. CITIZENS MAY NOT ENFORCE AGAINST VIOLATIONS OF CONDITIONS INCLUDED BY EPA ONLY DUE TO STATE §401 CERTIFICATION, WHEN THE CONDITIONS ARE MORE STRINGENT THAN AND BEYOND THE SCOPE OF THE CWA.

The lower court correctly held that citizens may not enforce against violations of conditions included in a CWA permit when the conditions are state requirements which are more stringent than or beyond the scope of the CWA. The structure of the Constitution provides that state law may not be enforced in federal courts; the only issue on which federal subject matter jurisdiction exists is that premised on the CWA.

A. Citizen Suits May Only Be Brought to Enforce Effluent Standards or Limitations; NUPEC's Permit Conditions on Intake and Summer Month Flow Restrictions Are Not Considered Effluent Standards or Limitations Under the CWA.

Under section 505 of the CWA, in the absence of any state or federal enforcement action seeking civil penalties, a suit to enforce any effluent standard or limitation in an NPDES permit may be brought by any "citizen", defined as "a person or persons having an interest which is, or may be, adversely affected." 33 U.S.C. § 1365(a), (f)(1), (g) (2000). The CWA defines an "effluent standard or limitation" as

> " (1) an unlawful act under 1311(a); (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; or, 6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter." 33 U.S.C. § 1365(f).

However, permit conditions are not automatically effluent limitations; a permit condition may be within the scope of the CWA, but may not be considered an effluent limitation. Coalition for a Livable West Side, Inc., 1998 U.S. Dist. LEXIS 1955, at *9, 10 (flow limits in state permits for wastewater treatment plants were consistent with, and within the scope of, federal requirements, but whether the flow limits were effluent limitations under the CWA was considered as a separate issue). In Culbertson v. Coats American, Inc., the definition of "effluent standard or limitation under this chapter" was held to not be so expansive as to include a state administrative order requiring the facility operator to conduct a fish study of the creek. 913 F. Supp. 1572, 1582 (N.D. Ga. 1995). Therefore, citizens could not bring suit under the CWA for failure to comply. Id. These courts have restricted the reach of citizen suits that attempt to enforce permit conditions which extend beyond discharge violations. The citizen suit brought against NUPEC for flow violations should be similarly dismissed.

Courts have held that violations of an NPDES permit limitation *on discharge* are violations of effluent standard or limitation under the CWA, and as such are subject to citizen suits. Atlantic States Legal Foundation, Inc. v. Universal Tool & Stamping Co.,

Inc. 786 F. Supp. 743, 746 (N.D. Ind. 1992) (emphasis added). See also Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 809 F. Supp. 1040, 1042 (W.D.N.Y. 1992), aff'd, 12 F.3d 353 (1993) (citizen suit under the CWA against a polluter may only address discharges of pollutants expressly regulated by such permit). The Fourth Circuit in Sierra Club v. Simkins Industries, noted that permit conditions which are related to discharges may also be subject to citizen suits, stating that violations of planning, monitoring, and reporting requirements are the only way in which compliance with discharge limitations can be measured. 847 F.2d 1109, 1115 n.9 (4th Cir. 1988), cert. denied 491 U.S. 904 (1989).

Discharge limitations also include state water quality standards based on section 303 of the CWA, which are incorporated into an NPDES permit. Northwest Envtl. Advocates v. Portland, 56 F.3d 979 (9th Cir. 1995) cert denied, 518 U.S. 1018 (1996). The Ninth Circuit held that citizen suits based on state water quality standards were permissible since they are more stringent state standards which are allowed by the CWA. Ashoff v. City of Ukiah, 130 F.3d 409, 412-413 (9th Cir. 1997).

However, state imposed limits beyond the scope of the CWA were not addressed by the court in Northwest Environmental Advocates. Similarly, while the Supreme Court in PUD upheld the right of a state to impose minimum stream flow requirements, the court did not provide that the requirement was mandated by the CWA or enforceable by a citizen suit; it only addressed the rights of states to enforce conditions imposed under section 401 of the CWA. Colorado Wild, Inc., 122 F. Supp. 2d at 1193.

NUPEC's intake and summer flow limits are permit conditions which are beyond the scope of the CWA; they are not effluent standards or limitations. Acknowledging the nuances of the CWA regarding citizen suits, the District Court for the Southern District of New Union commented that the argument that any permit condition is subject to citizen suit, regardless of whether it is more stringent than or beyond the scope of the CWA, was "deceptively simple", and ultimately, the court opposed this argument. (R. at 5, 8).

B. NUFFF's Citizen Suit To Enforce State Law May Not Be Brought in Federal Court

Citizen suits under the CWA are limited to violations that are within the scope of the CWA. The Second Circuit held that state standards which are more stringent than the requirements of the

CWA may be enforced by the state or the EPA. Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353, 358-359 (2nd Cir. 1993), cert denied 513 U.S. 811 (1994) (citing 33 U.S.C. § 1342(h)). However, private citizens have no standing to enforce these standards under the CWA, since the standards do not arise under federal law. Id. (citizen suit under CWA may not be brought to enforce state regulations which mandate greater scope of coverage than that required by CWA and its implementing regulations). Nor are state regulations which are beyond the scope of the CWA enforceable through a citizen suit under 33 U.S.C. §1365. Id. In Eastman Kodak, the court cited 40 CFR § 123.1(i)(2), emphasizing that when an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program. Id. A permit issued by the EPA where the state has not been delegated to administer the program should have the same standard applied, since citizen enforcement should be consistent in both instances. EPA has acknowledged that NUPEC's permit conditions on intake and flow are beyond the scope of the CWA. Therefore, citizens do not have standing to enforce these permit provisions.

Although the plain language of 33 U.S.C. § 1365 (f)(5) appears to confer the status of "effluent limitation" on any permit condition which is certified under § 1341, interpreting the statute in this way would alter the federal-state framework by mandating that state law be enforced by citizens in a federal court. Also, in a separate section of the CWA, Congress indicated the intent that states keep the right to regulate water quantities. 33 U.S.C. § 1251(g). Since the plain language construction of the statute would raise constitutional issues, and Congress' intent is contrary to this construction, this Court should construe the statute to limit federal encroachment on a traditional state power. Solid Waste Agency of Northern Cook County v. United States Army Corps. of Engineers, 531 U.S. 159, 173 (2001). In agreement with this reasoning, the District Court for the Southern District of New Union noted that there were several options available to Congress by which it could allow citizen and EPA enforcement of state conditions in federal court. (R. at 8). The District Court also noted that Congress has not provided these options in the structure of the CWA. (R. at 8). For this reason, the District Court concluded that citizens cannot enforce permit conditions based on state law, which are more stringent than or beyond the scope of the CWA. (R. at 8).

Neither the CWA nor the federal regulations implementing it require limitations on intake of water, or seasonal limitations on flow. These operational parameters are only present in the NUPEC permit due to the state certification. The limits are beyond the scope of the NPDES program, and therefore not enforceable through a citizen suit under 33 U.S.C. § 1365. In accordance with the traditional federal-state framework, this Court should maintain deference to state systems of water allocations. A decision otherwise would create a conflict with the principles of federalism, and redistribute the right of the state to enforce state law.

III. THE DISTRICT COURT PROPERLY DECIDED THAT WHEN A STATE ASSESSES PENALTIES FOR SOME VIOLATIONS OF A PERMIT UNDER A STATE AUTHORITY COMPARABLE TO CLEAN WATER ACT § 309(G), CITIZENS ARE BARRED FROM SEEKING PENALTIES FOR OTHER VIOLATIONS AND ARE BARRED FROM SEEKING AN INJUNCTION AGAINST FUTURE VIOLATIONS.

The ruling of the district court should be affirmed and NUFFF should remain barred from seeking penalties against NUPEC because interpretation of the CWA mandates such a result. When a statutory issue arises in the course of litigation, the court must first look to the language of the statute. Robinson v. Shell, 519 U.S. 337, 340 (1997). If the language contained therein is deemed to have a "plain and unambiguous meaning", the court need not look further to effectuate the meaning of the statute. Id. at 340. In order to make a determination of the plain and unambiguous nature of the statutory language, the court must reference the actual language of the statute, the specific context of the language, and the overall context of the statute. Id. at 341. Following this analysis, if the language is found to be clear, it will only be adhered to where doing so does not lead to "absurd or impracticable consequences." Myers v. American Triumph F/V, 260 F.3d 1067, 1069 (9th Cir. 2001) (quoting Oregon Natural Resource Council, Inc. v. Kantor, 99 F.3d 334, 339 (9th Cir. 1996)).

Where the language of the statute is unclear or the plain meaning would lead to an absurd result, the court must turn its statutory interpretation to the purpose of the legislation instead of the literal statutory language. United States v. American Trucking Ass'ns, 310 U.S. 534, 543-544 (1940). Especially when Con-

gress has spoken directly on the issue at bar, the expressed intent must be given effect by the judiciary. Sierra Club v. Envtl. Protection Agency, 294 F.3d 155, 160 (D.C. Cir. 2002) (citing Chevron U.S.A., Inc. v. Natural Resource Def. Council, Inc., 467 U.S. 837, 843 (1984)).

The relevant section of the CWA authorizing suits by private citizens provides: "Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf. . ." 33 U.S.C. § 1365(a). The CWA sets out limitations to establish situations where private citizen suits are prohibited. 33 U.S.C. § 1319(g)(6)(A) (2000). The purpose of these limitations is to prevent citizen suits where administrative penalties have already been allotted. Citizens for a Better Environment-California v. Union Oil Co. of California, 83 F.3d 1111, 1115 (9th Cir. 1996), cert. denied 519 U.S. 1101 (1997). The relevant section of the CWA provides:

> [A]ny violation —
> (i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,
> (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or
> (iii) for which the Administrator, the Secretary, or the State has issued a final order to subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,
>
> shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title. 33 U.S.C. §1319(g)(6)(A).

In effectuating the CWA, Congress has expressly stated its policies and goals for the legislation. 33 U.S.C. § 1251. Of relevance to the ability of private citizen to file suits, it is indispensable to note that Congress expressly emphasized the policy to "recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). By its words, Congress intended for the States to be the principal enforcer of statutory violations, and to allow citizen suits merely as a secondary course of action. Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49, 60 (1987). It follows that where the State has begun action the

need for a citizen suit ceases to exist. North and South Rivers Watershed Ass'n v. Town of Scituate, 949 F.2d 552, 555 (1st Cir.1992) (citing Gwaltney, 484 U.S. at 60-61)

A. NUFFF Should Be Barred From Seeking Penalties Against NUPEC for the Period of June Through August As the State Has Already Commenced and Diligently Prosecuted These Actions

Under the language of § 1319(g)(6)(A), a citizen suit is barred where a state has "commenced and is diligently prosecuting an action under a state law comparable to this subsection." 33 U.S.C. § 1319(g)(6)(A)(ii). In order for NUFFF to prevail in its assertions it must show that the NUDNR has failed to bring enforcement actions against NUPEC under state law comparable to the CWA and has failed to commence and diligently prosecute the violations. There is no question that the penalty orders assessed by NUDNR were issued under state law comparable to § 309(g) of the CWA. (R. at 9). The penalty assessment orders issued by NUDNR for the relevant September to May periods affirmatively demonstrate that action has been commenced against NUPEC. (R. at 4, 9). Therefore, NUFFF should be barred unless they can show NUDNR has failed to diligently prosecute an action against NUPEC.

When a penalty has been assessed under state law, a state is diligently prosecuting an action. Knee Deep Cattle Co., Inc. v. Bindana Investment Co., 94 F.3d 514, 516 (9th Cir.1996), cert. denied 519 U.S. 1144 (1997). It is only where a monetary payment is made as a settlement to a lawsuit that a state will not be deemed to have diligently prosecuted a penalty action. Citizens for a Better Environment-California, 83 F.3d at 1115-1116. In this case the penalty issued by NUDNR was not issued because of a lawsuit, and therefore the exception found in Citizens for a Better Environment does not apply. NUFFF should be barred from pursuing a civil penalty suit against NUPEC for its flow and discharge limitations during the September through May periods because NUDNR has diligently prosecuted an action for those violations. NUDNR has assessed penalties for NUPEC's intake violations for each month during the relevant September to May periods. As noted by the district court, the penalty assessment demonstrates enforcement by the state of the limitations it created and establishes a requirement that the NUDNR protect the

fish habitat of the river to an extent that can be considered practicable. (R. at 9, 10).

Where the penalty is monetary in nature, it is not necessary that the state assess the maximum amount of penalty that is possible in order to diligently prosecute an action. Arkansas Wildlife Federation v. ICI Americas, Inc., 29 F.3d 376, 380 (8th Cir.1994), cert. denied 513 U.S. 1147 (1995). A state has diligently prosecuted an action where it has assigned affirmative penalties that it deems sufficient to correct violations. Id. at 380. Where a state agency has taken steps to enforce its environmental law, deference is to be granted to that agency even where the state has chosen a compromise in lieu of maximum penalty enforcement. Id. at 380-381.

Here it is not necessary to increase the amount of penalties assessed by NUDNR as NUFFF requests. As case law states, maximum penalties are not a necessity and agencies are to be given deference in the amount of the penalty that they have assessed. Additionally it is not a requirement that the state assess a monetary penalty for the summer months. NUDNR, within the reach of its authority, has chosen to enact a compromise rather than enforce maximum penalties.

Further, it is not even necessary that a monetary penalty be assessed in order for a state to be diligently prosecuting an action. Town of Scituate, 949 F.2d at 557. For example, when a state agency retains the authority to impose an order upon a violator of environmental limitations as a means to encourage compliance it has been held that the violation had been diligently prosecuted. Id. The court in Town of Scituate came to this conclusion because "the agency ha[d] specifically addressed the concerns of an analogous citizen's suit." Id.

In the present case NUDNR was aware of the violations that occurred during the June to August period. However, as a matter of policy, NUDNR chose to refrain from enforcing penalties during the summer because the benefits of electric service provided by NUPEC outweighed the costs of a low flow in the river. (R. at 10). Thus, NUDNR's penalty scheme had already taken into account the fact that there were summer flow month violations. Despite the fact that a separate monetary penalty was not assessed, NUFFF should not be allowed to change NUDNR's overall enforcement scheme.

Allowing NUFFF to pursue its civil suit would also contradict the intent of Congress that expressly allows states to remain the

primary enforcer of penalties for statutory violations. 33 U.S.C § 1251(b). Not only does NUFFF want to assess penalties for the summer months of years that have already been evaluated by the state, it also wants to assess penalties for the September to May periods on the basis of intake versus flow violations. Surely the latter attempt is duplicative of penalties that NUDNR has already assessed and which NUPEC has already paid. The state chose to assess a $1,000 penalty for intake violations while refraining from charging penalties for flow violations. The state is not required to charge the maximum penalty and citizens should be barred from asserting an argument that essentially splits hairs in order to say that the amount should be increased. As noted by the district court, deference should be given to the state to determine its method of enforcing the limitations that it has required. (R. at 10).

Given that NUDNR has assessed penalties against NUPEC in a manner that it sees fit and has encouraged compliance to the extent possible, it cannot be said that the state has not diligently prosecuted an action against the violations. Therefore, NUFFF should be barred from bringing a civil penalty action against all violations.

B. Congressional Intent in Enacting the CWA Should Serve as a Bar to NUFFF Seeking Injunctive Relief Against Further Speculative NUPEC Violations

Under the language of §1319(g)(6)(A) any violation with respect to which a state has commenced and is diligently prosecuting an action shall not be the subject of a *civil penalty action*. 33 U.S.C. §1319(g)(6)(A) (emphasis added). By the plain meaning of the words in the statute, NUFFF should be able to pursue an action for injunctive relief because it is not a civil penalty action. However, this conclusion would lead to an absurd result, namely that the statute would preclude claims for civil penalties but not injunctive relief. Town of Scituate, 949 F.2d at 557-558.

In Gwaltney, the Supreme Court of the United States noted that §505 of the CWA, which grants citizens the power to bring private suits, does not differentiate between the ability to bring a civil penalty action and any other civilian action, such as an injunction. 484 U.S. at 57. Although §309 of the CWA does not explicitly make reference to actions other than those involving civil penalties, the purpose of the statutory section, to provide limitations, indicates that the bar is meant to apply to all civil actions.

Town of Scituate, 949 F.2d at 558. This interpretation aligns with the overall statutory context as well as the express intent of Congress. Id. Similar to a civil penalty suit, permitting a citizen suit for injunctive relief poses threats to a state's legitimate method of enforcement, which would undermine the goals of Congress and the CWA. Arkansas Wildlife Federation, 29 F.3d at 383.

NUFFF should be barred from pursuing an action for injunctive relief, as this would interfere with the actions already being taken by the State of New Union. NUFFF asserts that it wishes to state a claim for injunctive relief in order to prevent future violations of intake, flow and discharge limitations. There is no indication that allowing NUFFF to go forward with an injunction claim would control violations that may occur in the future any more effectively than the state penalties that have been assessed. Additionally, the NUDNR has shown no sign of relenting on the assessment of monetary penalties that it deems fitting. The state's activity requires that a civil penalty action by NUFFF must be barred. It would be unreasonable to allow NUFFF to circumvent that proscription by allowing a claim of injunction. Therefore, this court should effectuate the intent of Congress by allowing the state to continue its method of penalty enforcement by affirming the district court's denial of injunctive relief.

IV. THE LOWER COURT PROPERLY HELD THAT INTAKE, FLOW, AND NON-CONTACT COOLING WATER DISCHARGE LIMITATION VIOLATIONS WERE ALL SUBJECT TO THE SAME FINE AND SHOULD BE CONSIDERED ONLY ONE VIOLATION.

Under the CWA, the first step when assessing penalties is to determine the maximum dollar amount of all possible fines that could be leveled against the alleged polluter. 33 U.S.C. § 1319(d). In order to determine the maximum penalty the number of finable events must be determined. The number of finable events is then multiplied by the maximum fine, which the statute sets at $25,000. 33 U.S.C. § 1319(d). Here, the lower court properly concluded that if NUPEC were liable at all, it would only be liable for one finable event per day. (R. at 10). The lower court's finding must be upheld because the statute only allows for one fine per day, and all three violations were really the same event.

A. 33 U.S.C. § 1319(d) Should be Read to State That There Can Only Be One Fine Per Day For All Violations of a CWA Permit, Making the Number of Alleged Violations in This Case Moot.

Before a court can assess a civil penalty for CWA violations, it must first determine the maximum penalty. Civil penalties are assessed under 33 U.S.C. §1319(d) of the CWA. When interpreting 33 U.S.C. §1319(d) the courts have stated that the language as originally written and amended was "not a model of clarity. Indeed, it leaves several questions regarding the calculation of fines unresolved." Atlantic States Legal Foundation Inc. v. Tyson Foods, Inc., 897 F.2d 1128, 1137 (11th Cir. 1990). Because of this ambiguity, courts have had to interpret how to assess fines under 33 U.S.C. § 1319(d). When interpreting 33 U.S.C. § 1319(d) many courts have held that it establishes a maximum daily limit on fines.

In United States v. Detrex Chemicals Industries the court interpreted 33 U.S.C. § 1319(d) and determined that the statute established a maximum daily fine for all violations of a permit. 393 F. Supp. 735 (D.C. Ohio 1975). The court held that section 1319(d) "authorizes a maximum of $10,000 per day in civil penalties. . . even where the defendant has violated discharge limitations for several substances during the same day." Id. at 736-7. See Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd. 611 F. Supp 1542 (E.D. Va. 1985), aff'd 791 F.2d 304 (4th Cir. 1986), rev'd on other grounds, 484 U.S. 49 (1987). The court interpreted §1319(d) to be a maximum cap on penalties because it wanted to ensure that penalties would not "tend more towards confiscation than mere deterrence." Detrex Chemicals Industries, 393 F. Supp. at 738. By capping the daily maximum on penalties the Detrex court ensured that long term polluters would still face severe sanctions, while also ensuring that one bad day would not cripple a company that violated its permit.

This court should follow the precedent set by the court in Detrex and hold that NUPEC's maximum possible liability is capped at $25,000 per day in fines. If NUPEC were found liable for all the violations alleged by NUFFF, this would still come out to a very significant amount of money. By calculating the fine in this manner the court would ensure that NUFFF is not forcing the confiscation of NUPEC's property, while still providing an adequate deterrence.

NUFFF urges an alternative calculation of damages because the courts in Detrex and Chesapeake Bay Foundation interpreted 33 U.S.C. § 1319(d) when the language at issue read "$10,000 per day of *such* violation," instead of its current version that reads "$25,000 per day of each violation" Chesapeake Bay Foundation, 611 F. Supp. at 1554 (emphasis added). In the bill that authorized the changes to 33 U.S.C. § 1319(d) the changed penalties provision was simply called an "increased penalty," not something more elaborate like a restructuring of the penalty system. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 76 (1987). This "increased penalty" wording makes sense because Congress did raise the maximum daily penalty from $10,000 to $25,000 a day. Thus, Congress already made the provisions of § 1319(d) more stringent then they were before, so this court should not further increase the number of penalties assessed. While there is some evidence that the Senate might have intended to make the penalties apply to each discrete violation multiple times a day, this is limited to the Senate, and does not necessarily reflect the will of the entire Congress. H.R. Conf. Rep. No. 99-1004 at 132 (1986). Therefore, no matter how many permit violations NUPEC is alleged to have committed they should only be charged a maximum of $25,000 per day.

B. Alternatively, Because Any Violation of Intake, Summer Month Flow, or Non-Contact Cooling Water Discharge Necessitated a Violation of the Other Conditions, and All Three Conditions Regulate the Same Parameter, the Provisions Should be Considered One Violation for Purposes of Assessing Penalties Under 33 U.S.C. § 1319(d)

When deciding the instant case the lower court carefully deliberated and determined that if penalties were to be assessed, NUPEC would only be in violation of one permit condition. The lower court came to this holding in part out of a fear that "pettifogging state and federal permit-writing bureaucrats [would] multiply the congressionally set maximum penalty level simply by cloning a permit condition [multiple times in the same permit]." (R. at 11). The lower court's concern was a valid one, as it is exactly what NUFFF is attempting to say the permit writing bureaucrats did with the NUPEC permit. NUFFF has erroneously claimed that because the NUPEC permit has separate limits for intake, flow, and non-contact cooling water, these limitations create separate violations. Given that NUFFF is not the first litigant

to allege that the same act should count for multiple violations, several courts have already ruled on this issue.

In Atlantic States Legal Foundation v. Tyson Foods, Inc., the court was called upon to determine the maximum amount of penalties that a discharger faced for violations of its NPDES permit. 897 F.2d 1128, 1130 (11th Cir. 1990). The court faced a situation where the NPDES permit was written in such a manner that a single discharge of a single chemical could violate both a daily and monthly discharge limitation. Id. at 1140. The court stated "Each excessive discharge of a *pollutant* on a given day will subject the polluter to a $25,000 maximum fine." (emphasis added). Id. It is important to note that when the court made this statement it mentioned individual pollutants and not permit violations. The court additionally stated that "fining the violator twice may result in imposing two fines for the same illegal act" and held that it would "decline to interpret the statute to create this result." Id.

This court should adopt the approach taken by the Eleventh Circuit Court in Tyson Foods, and hold that one act can only result in one violation. In Tyson Foods the court's analysis of the issue from a monthly versus daily violation standpoint is applicable to the present case. As in the Tyson Foods analysis, the relevant aspects of NUPEC's permit cover only the rate of flow of water. Like the defendant in Tyson Foods, a single discharge of this one substance by NUPEC resulted in the violation of several permit limits. In NUPEC's case, violating the permit by taking in too much water automatically violated the permit condition relating to the discharge of that same water from the plant. This is the exact same result as Tyson Foods where, by violating the daily limit, the permittee automatically was in violation of the monthly limit. NUPEC used a "closed system" where virtually no water escapes during the entire cooling cycle. (R. at 3-4). While it might have been technically possible for NUPEC to somehow collect and hold the water once it withdrew it from the river, and thus delay the violation of flow and discharge provisions, only a delay would occur. Eventually NUPEC would complete its action and return the water to the river. Because the three sections of the permit deal with the same rate of flow, and the first violation led to the unavoidable violation of the other two provisions, the violation should be considered only one illegal act and thus subject to only one penalty.

The Third Circuit considered the question of whether penalties had been double assessed in Public Interest Research Group

of New Jersey v. Powell Duffryn Terminals Inc., 913 F.2d 64 (3rd Cir. 1990), cert. denied 498 U.S. 1109 (1991) (hereinafter PDI). In PDI the defendant alleged that it should not be charged separate penalties for violating both the daily average and daily maximum concentrations of certain pollutants. Id. at 78. This court decided that the defendant should be penalized twice because it would be possible for the defendant to clean up its discharge after it found a violation and thus not violate the daily average. Id. However, because the defendant did not complete this simple remedy, it was liable for both violations.

PDI should have little bearing on the present case because at all times in the cooling process NUPEC was unable to change the flow, and discharge after they withdrew water. Since NUPEC operates a "closed system" water cooling process as soon as water enters the system it is not diverted and there is no point in the process to significantly change the amount of flow or discharge. Thus in NUPEC's situation, unlike the situation in PDI it was impossible for NUPEC to avoid future violations. In fact, the PDI court's analysis of the possibility of the defendant avoiding some penalties points to the fact that NUPEC should not face three separate penalties because NUPEC could not avoid the subsequent violations.

In Borden Ranch Partnership v. United States Army Corps of Engineers, a circuit court was once again asked to determine what should be a single act, and thus a single violation for purposes of setting penalties under the CWA. 261 F.3d 810 (9th Cir. 2001), aff'd 537 U.S. 99 (2002). In Borden Ranch a developer intended to divide up and sell off parcels of a wetland and turn them into orchards and vineyards. Id. at 812. However, in order to do this the developer needed to "rip" the wetland by dragging a metal bar through the soil and thus allow the water to escape leaving behind dry land. Id. The court allowed a separate penalty for each separate "rip" of wetland soil, no matter how many occurred a day. A cursory glance at the Borden Ranch decision might convey the impression that the court awarded multiple penalties for the same action. However, a close reading of the case would show that this is not accurate, as the court only awarded penalties when the defendant "committed the same unlawful act repeatedly." Id. at 818. In Borden Ranch the repeated action occurred when the defendant took the ripper out of the ground, repositioned it, and made a separate pass over a different area of the wetland. The court went on to say that their rule would result in multiple penalties for a dis-

charger who violated a permit several times throughout the day and only one maximum penalty for the discharger who continuously discharged. Id. However, the court said that the proper remedy for the inequity in penalties was to be found when assessing how much of the maximum daily fine to actually apply, not in determining the hypothetical maximum penalty. Id.

Because the violations of intake, flow, and non-contact cooling water discharge in the present case were not discrete and divisible but were instead one continuous act, extending the Borden Ranch logic would result in the assessment of only one penalty. In the present case NUPEC's permit regulates the taking of water from the river for cooling purposes and then the re-introduction of said water to the river. NUPEC's permit covers only one positive action of NUPEC, the temporary diversion of river water to cool its power plant. In Borden Ranch, the developer ripped the land multiple times in different locations and each rip affected a different ecosystem. Here NUPEC merely took water from one location and returned it to the river after using the water to cool the plant, all in one continuous action. At no point in the intake and discharge process was NUPEC able to store water or divert the water to another location, the water simply flowed through the system in one integrated transaction. Since there were not multiple actions on NUPEC's behalf, NUPEC should only be subject to one daily fine if liability is found.

C. The EPA's Contention that NUPEC Should be Liable for Multiple Daily Fines Does Not Warrant any Deference Because According to EPA Admissions All Three Permit Conditions Are Really the Same Event.

Under the Supreme Court's Chevron analysis, where a statute is silent or ambiguous on a certain issue, the court shall look to see if the agency's interpretation of the statute is permissible. 467 U.S. at 843. If the ambiguity in the statute is not explicit, and is instead implicit, the court is not to substitute its own construction of the statute for a permissible interpretation made by the agency. Id.

In this case the statute at question is arguably ambiguous. However, the EPA has not created its own unambiguous interpretation of the relevant provisions. Here, the EPA has promulgated conflicting interpretations on whether intake, summer month flow limitations, and discharge are really separate permit conditions subject to special fines. When issuing permits under the 33 U.S.C.

§ 1342 permit program, EPA does not require inclusion of restrictions on intake and discharge for non-contact cooling water. According to the fact sheet for the NUPEC permit, EPA does not require these limitations because they view all three conditions as the same since "the flow limitation already limits the volume of water that may be used and discharged." (R. at 13). Thus, these limitations were only listed separately because NUDNR included them in their submission to the EPA. (R. at 13). This sets up a situation where in the fact sheet EPA claims flow, discharge, and intake are the same provision, but in the court proceeding they claim they are different provisions.

Because the EPA has not consistently interpreted the CWA in regard to this provision, this court can freely decide the issue. Chevron deference should only apply where the agency has made a clear and permissible interpretation. Here EPA has created multiple conflicting interpretations. In this case fairness and equality dictate that the EPA should not be allowed to state that intake, flow and discharge are the same event when issuing the permit, and then allow multiple damage awards for these events without giving NUPEC advance warning or time to review the permit. Therefore, the lower courts ruling that NUPEC be liable for only $25,000 in maximum daily fines should be upheld.

CONCLUSION

For the foregoing reasons, NUPEC respectfully requests that the Court uphold the district court's grant of summary judgment on the issue of whether the permit limits were more stringent and beyond the scope of the CWA, and therefore not enforceable by a citizen suit. Further, NUPEC respectfully requests the Court to affirm the district court's holding that citizens may not seek additional penalties or injunctions when the state has already assessed penalties for the violations, in recognition that although several permit conditions were violated, there was a single violation of the permit.

APPENDIX A

RELEVANT STATUTES AND REGULATIONS

STATUTES

CLEAN WATER ACT

33 U.S.C. § 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) 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 recreation in and on the water be achieved by July 1, 1983;

. . .

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(g) Authority of States over water

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 chapter. It is the further policy of Congress that nothing in this chapter 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. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law
Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.
(b) Timetable for achievement of objectives
In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

33 U.S.C. § 1313. Water quality standards and implementation plans

(c) Review; revised standards; publication

. . .

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

33 U.S.C. § 1314. Information and guidelines

(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from—

(A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands;

(B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines;

(C) all construction activity, including runoff from the facilities resulting from such construction;

(D) the disposal of pollutants in wells or in subsurface excavations;

(E) salt water intrusion resulting from reductions of fresh water flow from any cause, including extraction of ground water, irrigation, obstruction, and diversion; and

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Such information and revisions thereof shall be published in the Federal Register and otherwise made available to the public.

33 U.S.C. § 1341. Certification

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereun-

der, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or

under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which-

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;
(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;
(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and
(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

33 U.S.C. § 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces"

within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means

> (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limita-

tion or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title.

(g) "Citizen" defined

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

33 U.S.C. § 1370. State authority

Except as expressly provided in this chapter, nothing in this chapter shall

. . .

(2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

REGULATIONS

40 C.F.R. § 123.1. Purpose and scope

(i) Nothing in this part precludes a State from:

. . .

(2) Operating a program with a greater scope of coverage than that required under this part. If an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.

40 C.F.R. § 131.12. Antidegradation policy

(a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following:

(1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

(2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.

(3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.

(4) In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Act.