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Best Brief for Appellant New Union Fly Fisherman's Federation, Inc.: Sixteenth Annual Pace National Environmental Law Moot Court Competition

MEASURING BRIEF*

Civ. App. No. 02-2004

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION FLY FISHERMAN'S FEDERATION, INC.,
Appellant

v.

NEW UNION POWER & ELECTRIC,
Appellee

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

Brief for the Appellant,
NEW UNION FLY FISHERMEN'S FEDERATION, INC.

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* This brief has been reprinted in its original form.

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the intake, non-contact cooling water discharge, and summer-month flow limitations in the NUPEC permit are more stringent than and beyond the scope of the CWA.
2. Whether the court below erred in holding that citizens may not enforce against violations of conditions that EPA included in a CWA permit because the state certified the conditions under CWA § 401, when the state requirements are more stringent than or beyond the scope of the CWA.
3. Whether the court below erred in holding that when a state assesses penalties for some violations of a permit under a state authority comparable to CWA §309(g), citizens are barred from seeking penalties for other violations and are barred from seeking an injunction against future violations.
4. Whether the court below erred in holding that when a single act or omission violates several conditions in a CWA permit; there is a single violation of the permit.

PARTIES TO THE PROCEEDING

New Union Fly Fishermen's Federation, Inc., Appellant

New Union Power and Electric Company, Appellee

United States, Amicus (Appellant/Appellee)

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STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*, "construing the record evidence in the light most favorable to the nonmoving party." Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 33 (1st Cir.2001). "And the party against whom summary judgment was granted has the benefit of all reasonable evidentiary inferences that can be drawn in his favor." Sherwood v. Washington Post, 871 F.2d 1144 (D.C. Cir. 1989). Summary judgment is appropriate only if "the 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 the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

District courts' interpretations of the Clean Water Act are also reviewed *de novo*. Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1300 (9th Cir. 1997).

JURISDICTIONAL STATEMENT

The United States District Court for the state of New Union entered a final judgment on September 1, 2003. The United States Court of Appeals for the Twelfth Circuit has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This is an appeal from an Order entered on September 1, 2003, in the United States District for the Twelfth Circuit on cross motions for summary judgment. The District Court granted Appellee New Union Power & Electric Company ("NUPEC")'s motion for summary judgment, disclosing an action initiated by Appellant New Union Fly Fishermen's Federation, Inc. ("NUFF") for violations of the Clean Water Act (CWA). 33 U.S.C §§ 1251 *et seq*.

PROCEDURAL HISTORY

NUFF brought a citizen suit against NUPEC under the CWA for NUPEC's on-going violations of its permit conditions for intake, non-cooling water discharge, and flow limitations. NUFF specifically sought civil penalties against NUPEC for all its CWA permit violations for which the New Union Department of Natural Resources ("NUDNR") did not assess penalties and for an injunction to prevent further violations.

The District Court granted summary judgment in favor of NUPEC on all four issues presented before the court. First, the court held that the intake, non-contact cooling water discharge and summer months flow limitations in the NUPEC permit were more stringent than or beyond the scope of the CWA. Second, the court found that citizens cannot enforce state law conditions in the CWA permits that are more stringent than or beyond the scope of the CWA. Third, the court ruled that NUDNR's assessment of penalties under state law against many of NUPEC's violations during the relevant period preempted a citizen suit against all violations during that period and also preempted a citizen suit for an injunction against continuing violations. And fourth, although Judge Remus stated that it was unnecessary to address determination or calculation of violations, he nevertheless decided that when a single act or omission violates several conditions in a CWA permit, there is but a single violation of that permit.

STATEMENT OF FACTS

NUPEC maintains a hydroelectric generating station in Paddleboat Springs, New Union. This station, known as Teepee One, has been in operation since 1965, and in 1974 NUPEC acquired an EPA permit for it as mandated under the CWA. R. at 3. In 1997, with the addition of a second generating station, Teepee Two, NUPEC applied for a renewal and a modification of its existing permit. In conjunction with this, NUPEC applied for a certification under 33 U.S.C. § 1341 with the state's department of natural resources, NUDNR. R. at 3. NUPEC applied for a flow limitation of 2 million gallons a day (2 mgd) per generating station. NUDNR issued NUPEC a flow limitation total of 4 mgd for the months of September through May only. For the remaining summer months, NUDNR restricted the permit flow to only 3 mgd, in order to protect the fish propagation during the yearly dry season. R. at 4. As a result of NUDNR's lowered flow limit in the summer months, the EPA amended the flow limitation in its permit to reflect NUDNR's certification as directed under the CWA. R. at 4.

In addition to the flow limitations, the permit regulated an intake amount and a non-cooling water discharge limit for the generating plants as prescribed by NUDNR. R. at 4. NUPEC blatantly exceeded these restrictions in countless months over the last three years, always violating the permit every day during the summer months. R. at 4, 5. NUDNR, the agency responsible for regulating NUPEC's permit, chose to overlook the violations from

June to August, and assessed monetary penalties only for the non-summer months. NUPEC paid these penalties. R. at 4. NUDNR's official position for not assessing monetary penalties during the summer months was that this omission furthered its policy of encouraging electricity generation during the highest demand months. R. at 4.

Despite the fact that NUDNR assessed and NUPEC paid penalties for *cited* permit violations in 1999, NUPEC continued to openly flout the limitations in the summer months over the next four years. R. at 4. In 2002, a non-profit organization of fishermen, NUFF, decided that NUPEC's ongoing practice of deliberately ignoring its permit restrictions and NUDNR's conscious disregard of and lack of enforcement for summer-month violations had continued long enough. In compliance with CWA regulations, NUFF sent notice in June of 2002 to NUPEC, NUDNR, and EPA, declaring its intention to file suit against NUPEC for these permit violations. R. at 4. After the requisite time period following notice, NUFF filed this suit. R. at 4.

SUMMARY OF THE ARGUMENT

NUFF has standing to bring a citizen suit against NUPEC under 33 U.S.C. § 1365. The three permit limitation violations NUFF cites against NUPEC are state-imposed conditions included by the EPA within NUPEC's federal permit. These state-imposed conditions are neither more stringent than nor beyond the scope of the federal CWA. Even if this Court were to find that the conditions are beyond the scope or more stringent than the CWA requires, NUFF still has standing to bring this citizen suit under the 33 U.S.C. § 1365. Additionally, the cited violations, which are still ongoing at the time of this appeal, have *not* been diligently prosecuted under the CWA, allowing a citizen suit to enforce the violations through civil penalties or an injunctive relief. Finally, because NUPEC has violated three separate permit limitations, this Court should find NUPEC responsible for three separate monetary penalties per day as prescribed by 33 U.S.C. § 1319.

NUPEC's permit limitations on intake, non-contact cooling water discharge, and flow are not more stringent than nor beyond the scope of the Clean Water Act. The CWA provides that any state conditions be incorporated into the federal permit based upon the state certification requirement of 33 U.S.C. § 1341. Ac-

cordingly, NUDNR's three state-imposed regulations became conditions of the federal permit issued to NUPEC under the code.

Moreover, NUDNR's three conditions set out in NUPEC's permit were included to further its state water quality standard established to protect fish propagation in the New Union River. As required by the CWA and validated by the Supreme Court, the protection of fish propagation is a factor that must be considered when a state enacts water quality standards. Further, the agency charged with interpreting the CWA, the Environmental Protection Agency has interpreted 33 U.S.C. § 1341 to mean that states have the authority to place *any* necessary conditions on their certification to ensure their state water quality standards are met. The Supreme Court has further recognized that a state's authority under 33 U.S.C. § 1341 is not limited merely to discharges, but allows a state to add any permit limitations essential to assure that the permittee adheres to the state water quality standards.

Regardless of whether this Court finds that the three state conditions set out in NUPEC's federal CWA are beyond the scope of or more stringent than the federal regulations require, NUFF still has standing to bring a federal citizen suit under the CWA. 33 U.S.C. § 1365 allows citizens to enforce all limitations set out within a CWA permit. The relevant statute provides for citizen suits against those permittees who are in violation of state effluent standards or limitations included within their federal permit. Congress has defined effluent standards and limitations to include the permit itself, thus allowing for all conditions within the permit to be the subject of enforcement action—by the proper government agency or as a citizen suit. Courts have read the CWA in this manner, permitting citizen suits for permit conditions that may be considered more stringent than or beyond the scope of CWA federal legislation.

Furthermore, NUFF is entitled to seek penalties and injunctive relief against NUPEC for violations in its permit issued under the CWA. Federal Circuits have held that when the regulatory agency charged with enforcing a permit under the CWA is not diligently prosecuting the permittee's violations, a citizen suit is not barred. Although NUDNR has assessed, and NUPEC has paid, *some* penalties, NUDNR is *not* diligently prosecuting NUPEC for summer-month violations. Year after year, NUDNR completely ignores these violations, requiring NUFF to now bring this suit to enforce the limitations.

The Supreme Court has held that citizen suit plaintiffs are entitled to injunctive relief when the environmental injury is sufficiently likely to occur or continue in the absence of the injunction. Because of the potential for permanent injury that cannot be remedied with mere money damages, the Court's viewpoint is that the injunction should be issued to protect the environment.

NUPEC's permit limitations exceedences for intake, non-contact cooling water discharge, and flow violate three separate permit conditions. Congress amended 33 U.S.C. § 1319(d) in order to clarify penalty assessment under the CWA. Accordingly, each violation *per day* is now subject to a *separate* penalty. EPA affirms this position, finding that violations of different parameters in a permit are counted separately. Various federal circuit courts have all held that multiple violations in a CWA permit count separately for penalty purposes, providing an incentive to the permittee to minimize violations per day as well as overall.

The single exception to this rule is when the multiple violations occur as a result of a single operational upset caused by an unusual or extraordinary event. However, NUPEC's multiple permit limitation violations are the result of a conscious choice to maximize profits during the summer months, not an operational upset.

ARGUMENT

I. THE INTAKE, NON-CONTACT COOLING WATER DISCHARGE, AND SUMMER-MONTH FLOW LIMITATIONS WITHIN NUPEC'S PERMIT ARE NOT MORE STRINGENT THAN OR BEYOND THE SCOPE OF THE CWA.

A. The CWA contemplates additional state conditions will be incorporated into the federal permit based on the state certification requirement of 33 U.S.C. § 1341.

1. NUDNR's three state-imposed regulations became conditions of NUPEC's federal permit issued under 33 U.S.C. § 1341.

The state limitations and conditions set out in NUPEC's permit are consistent with the scope of the CWA and are not more stringent than the CWA requires and, therefore, are enforceable by NUFF as a citizen suit under the CWA. 33 U.S.C. § 1341(a)(1)

establishes the connection between a state certification and a federal permit issued under the CWA. This statute explains that any "applicant for a Federal . . . permit . . . shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . ." 33 U.S.C. § 1341(a)(1). Specifically, this state certification:

> shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that the applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations . . . *and with any other appropriate requirement of State* law set forth in such certification, and *shall become a condition on any Federal . . . permit* . . . .

33 U.S.C. § 1341(d) (emphasis added). A state certification is a prerequisite for an individual who wishes to obtain a federal CWA permit. Since a state may include "any other appropriate requirement" within this mandatory certification that becomes "a condition on any federal . . . permit" issued under 33 U.S.C. § 1342, the state requirements cannot be construed as being beyond the scope of the CWA as the CWA itself explicitly contemplates adoption of additional state constraints into federal permits.

Here, NUPEC applied for and received state certification from NUDNR as required by 33 U.S.C. § 1341. The EPA, in turn, included the state conditions for flow, intake, and non-contact cooling water discharge within the permit that it issued to NUPEC. The validity of this administrative process or the subsequent federal permit has not been called into question. Accordingly, NUDNR's requirements "became a condition on" the federal permit EPA issued NUPEC, essentially making the three state conditions federal conditions set out in the federal permit. Even if the three state conditions are not viewed as *federal* conditions but merely recognized as other requirements included within the federal permit, the limitations could *not* be viewed as beyond the scope of the CWA as Congress contemplated including state requirements within the federal permit.

2. NUDNR imposed the three conditions set out in NUPEC's permit to further its state water quality standard as required by the CWA and recognized as valid additions by the Supreme Court in Pud No. 1 of Jefferson County.

The three state regulations that EPA made conditions of NUPEC's CWA permit were imposed in accordance with New Union's water quality standards and were thus appropriate "other limitations" contemplated under 33 U.S.C. § 1341. 33 U.S.C. § 1313(c)(2)(A) requires that any water quality standard adopted by a state "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." (emphasis added).

The United States Supreme Court in Pud No. 1 of Jefferson County v. Washington Department of Ecology found that water flow limitations imposed by states are permissible conditions of state CWA certification under 33 U.S.C. § 1341 if the requirement furthers state water quality standards. 511 U.S. 700, 722 (1994). There, the permittee argued that the flow limitation imposed by the state had nothing to do with pollutant discharge regulated under the CWA and was, therefore, not a valid condition under its state 33 U.S.C. § 1341 certification. The Supreme Court held that the "language of this subsection [33 U.S.C. § 1341(d)] contradicts petitioners' claim that the state may only impose water quality limitations specifically tied to a 'discharge.'" Id. at 711.

The Environmental Protection Agency ("EPA"), the federal agency responsible for administering the CWA, has interpreted 33 U.S.C. § 1341 to mean "Congress has given the states the authority to place *any conditions* on a water quality certification that are necessary . . . ." EPA, Wetlands and 401 Certification 23 (Apr. 1989). Because the Supreme Court found that EPA's interpretation of the state certification statute, which allowed for regulations of "activities—not merely discharges" was reasonable, it was entitled to deference. Pud No. 1, 511 U.S. at 712. Specifically, the Court found that a state's authority under 33 U.S.C. § 1341 is not confined to discharges and "includes limitations designed to ensure compliance with state water quality standards." Id. Accordingly, a state may include any limitation or condition within its 33 U.S.C. § 1341 certification—"not merely discharge" limitations—

as long as the condition or limitation furthers the state's water quality standards.

Here, NUDNR has adopted three specific water quality standards in the form of measurements that include intake, non-contact cooling water discharge, and summer-month flow limitations. NUDNR issued these permit conditions in furtherance of state water quality standards—for the express purpose of protecting fish propagation within New Union River. *See* Exhibit 2. NUDNR's state water quality standards were established in direct conformity with the explicit direction and goals of 33 U.S.C. § 1313 under the CWA. 33 U.S.C. § 1313 (recognizing "propagation of fish" as a mandatory consideration when a state establishes its water quality standards). Therefore, because the state conditions included in NUPEC's state certification and subsequent EPA permit were necessary to promote the state's water quality standard for fish propagation as required by the CWA, the three state-imposed conditions cannot be more stringent than or beyond the scope of the CWA.

Moreover, NUPEC's argument that intake and flow limitations are not "discharges" and, thus, cannot fall within the scope of the CWA as 33 U.S.C. § 1311 makes only the discharge of a pollutant illegal is without merit. Clearly one of Congress's purposes for enacting the CWA was to make "the discharge of any pollutant by any person . . . unlawful." 33 U.S.C. § 1311(a). Thus, a state or federal regulation of a discharge is a valid permit limitation contemplated under the CWA. In Pud No. 1, the Supreme Court clarified that activities *other than discharges* may properly be regulated within the scope of the CWA because a state may include *any* limitation within its certification under 33 U.S.C. § 1341 as long as the state is advancing its water quality standard. Pud No. 1, 511 U.S. at 712. Specifically within 33 U.S.C. § 1341(d), Congress allows states to impose limitations to ensure compliance with 33 U.S.C. § 1311. Thus, intake, non-contact cooling water discharge, and flow limitations, which may not all be classified as discharges, may still be regulated under the CWA and is not more stringent than nor beyond the scope of 33 U.S.C. § 1311.

B. Water and heat are pollutants within the scope of regulation under the CWA.

NUPEC's release of heated water into the New Union River constitutes a pollutant recognized within the federal CWA. The

CWA defines the "term 'pollutant' [to include] . . . heat . . . discharged into water." 33 U.S.C. § 1362(6). Moreover, the term "pollution" means "the man-made or man-induced alteration of the chemical, [or] physical . . . integrity of the water." 33 U.S.C. § 1362(19). Water itself is neither explicitly included or excluded from the definition of pollutant under the CWA. However, heat *is* a pollutant and the addition of heat to water alters both the chemical and physical integrity of the water, making the resulting wastewater a pollutant.

Moreover, the Ninth Circuit in Northern Plains Resource Council v. Fidelity Exploration and Development Company, found that groundwater could be an industrial pollutant under the CWA. 325 F.3d 1155 (9th Cir. 2003). The court reasoned:

> "Industrial" means "of, pertaining to, or derived from industry." "Industry," in turn, is defined as "the commercial production and sale of goods and services." "Waste" is defined as "any useless or worthless byproduct of a process or the like; excess material." Combining these ordinary meanings, "industrial waste" is any useless byproduct derived from the commercial production and sale of goods and services.

Id. at 1161 (internal citations omitted). There, the defendant CWA permittee produced methane gas for commercial sale, which resulted in water as a byproduct of the process. The Ninth Circuit held that this groundwater was an industrial waste or wastewater appropriately regulated under a CWA permit. Id.

Under the CWA, NUPEC's discharge of heated water constitutes a pollutant that disrupts the natural fish propagation environment. NUPEC, however, contends that its three permit conditions, which all regulate the movement and use of river water, cannot properly be classified under the CWA as a pollutant. This argument is deceptive and without merit. NUPEC withdraws water from the New Union River in order to cool its commercial electric-producing plant. The water "absorb[s] waste heat rejected from the [industrial] process . . . employed" and is then discharged as spent cooling water into the river. EPA, 65 Fed. Reg. 49,059-49,121 (Aug. 10, 2000). Accordingly, the heated water NUPEC discharges is a form of industrial waste or wastewater following the CWA definition of heat as a pollutant and the reasoning set forth both by the Ninth Circuit in Northern Plains and by the EPA in its "Proposed Regulation for Cooling Water Intake Structures." NUPEC's discharge of heated wastewater is properly

regulated under a CWA permit, and the violations of its permit regulations are subject to the CWA citizen suit.

II. A CITIZEN MAY ENFORCE VIOLATIONS OF CONDITIONS THAT THE EPA INCLUDES IN A CWA PERMIT DESPITE THE FACT THAT THE CONDITIONS ARE STATE-IMPOSED AND POTENTIALLY MORE STRINGENT THAN THE FEDERAL CWA CONDITIONS.

A. Because the definition of "effluent standard or limitation" includes "a permit or condition thereof," a citizen suit is maintainable against violators to enforce *any* limitation set out in a CWA permit.

NUFF may enforce violations of *any* limitation set out in the permit regardless of whether it is a state-imposed condition that may be construed as either beyond the scope of or more stringent than the limitations contained in the federal legislation of the CWA. A federal district court has jurisdiction under 33 USC § 1365 over citizen suits to enforce *all* permit conditions. The relevant part of the statute reads: "any citizen may commence a civil action on his own behalf against any person . . . alleged to be in violation of . . . an order issued by . . . a State with respect to such [effluent] standard or limitation" under the CWA. 33 U.S.C. § 1365(a)(1).

The definition of an "effluent standard or limitation" becomes key as these are the violations under which a citizen may commence a suit. The legislature has defined an effluent standard or limitation to include "a permit or condition thereof issued under section 1342 of this title [CWA]. . . ." 33 U.S.C. § 1365(f)(6). Thus, the statute clearly allows citizens to file suits against violators to enforce state-imposed regulations that have been set out in a permittee's state certification and subsequently included within the federal CWA as required under 33 U.S.C. § 1342. Despite NUPEC's contention that this statute should be read to exclude state conditions that are more stringent than federal regulation, the statute does not discriminate between state regulations that are more stringent than or beyond the scope of federally established limitations. *All* violations of *any* condition recited within the permit, then, may be the subject of a citizen suit under the CWA.

Moreover, because the definition of effluent standard or limitation encompasses all of the regulations set out in the permit, Congress not only anticipated but supported citizen suits for *any* violation of a regulation set out in the permit approved by the EPA. Courts have effectuated these statutes inline with Congressional intent. Most jurisdictions allow citizen suits in cases where the state has imposed conditions within the permit that may be construed as more stringent than required under the federal guidelines. As one scholar has observed, citizens may bring "suits to enforce violations of any condition in the CWA permit," marking an "enormous advance in water pollution control policy." Jason A. Boren, *Northwest Environmental Advocates v. Portland: Citizens May Now Have Standing Under the Clean Water Act, But Will It Stand?*, 16 J. ENERGY NAT. RESOURCES & ENVTL. L. 117 (1996) (discussing the ramifications of the decision in Northwest Environmental Advocates v. Portland). "A citizen suit can be used for the enforcement of maintenance and operating conditions contained in a permit. . . . even valid permit conditions that regulate discharges outside the scope of the Federal Water Pollution Control Act." 61C AM. JUR. 2D *Pollution Control* § 924 (2003). "Maintenance and operating conditions" is a purposefully broad category of restrictions outlined within a permit that may include any elements associated with the daily actions of a permittee, including intake and flow limitations, and any discharge even if it is outside of the scope of the CWA. Accordingly, NUPEC's cited permit limitation violations are the proper catalyst that enables NUFF to bring a citizen suit under the CWA.

B. Courts have found that state conditions, even if more stringent than federal requirements, may be the subject of a citizen suit.

Based upon past court decisions interpreting or applying the citizen suit provision under the CWA, NUFF has standing to proceed under a citizen suit for NUPEC's violations of its CWA permit even if the state-imposed regulations set out in the permit are stricter than or beyond the scope of the federal legislation. In Upper Chattahoochee Riverkeeper Fund, Inc. v. Atlanta, a group of non-profit environmental organizations brought a suit against Atlanta to enforce conditions imposed pursuant to state law within the CWA permit. 953 F. Supp. 1541 (N.D. Georgia 1996). After a review of the CWA legislation, the court in Upper Chattahoochee Riverkeeper Fund held that "the Clean Water Act . . . expressly

reserves to the states the right to adopt and enforce *state standards or limitations more stringent that* [sic.] *those imposed by the federal government.*" 953 F. Supp. 1541, 1552 (N.D. Georgia 1996), *citing* 33 U.S.C. § 1370 (emphasis added).

The court went on to state: "More stringent state limitations in furtherance of the Clean Water Act's objectives include 'those necessary to meet water quality standards, treatment standards, or schedules of compliance . . . ." Id. Accordingly, despite the fact that the defendants argued that the non-profit organizations could not bring a citizen suit to enforce more stringent state standards set forth in the CWA permit, the court held that the plaintiffs did have standing under the CWA because they sought to enforce a standard or limitation included under the CWA permit. Id. at 1551, *citing* 33 U.S.C. § 1365.

Similarly, the Ninth Circuit holds that the "plain language of CWA § 505 [33 U.S.C. § 1365] authorizes citizens to enforce *all* permit conditions." Northwest Envtl. Advocates v. Portland, 56 F.3d 979, 986 (9th Cir. 1995) (emphasis in original). There, the defendant argued that citizen suits could be brought only to enforce water quality standards that were translated into effluent limitations in the permit as required by the CWA. The Circuit Court reviewed the CWA legislative history in order to conclude that "nowhere does Congress evidence an intent to *preclude* the enforcement of water quality standards that have not been translated into *effluent discharge limitations*." Id. (emphasis added). Moreover, the court observed:

> The Senate Committee expressly stated that "*[i]n addition to violations of section 301(a)* [33 U.S.C. § 1311, Effluent Limitations] citizens are granted authority to bring enforcement actions for violations of . . . *any condition of any permit issued under section 402* [33 U.S.C. § 1342]."

Id. at 987 (alteration in original). "Thus, consistent with the statutory language, the legislative history of the citizen suit provision reflects Congress' intention to grant *broad* authority for citizen enforcement." Id. (emphasis in original).

Similarly in Pirgim Public Interest Lobby v. Dow Chemical Company, Dow Chemical argued that court lacked jurisdiction to enforce the permit's phosphorous limitation because it was a Michigan state-imposed requirement and not part of the federal program. 44 ERC 1294 (E.D. Mich. 1996). The United States District Court, however, disagreed with Dow. The court found signifi-

cant the fact that the CWA "requires each state to either design its own, EPA approved, water quality standards, or be subjected to an EPA promulgated standard." Id., *citing* 33 U.S.C. § 1313. Because the state's water quality standard had to be approved by the EPA and included within its permit, the court found that all of the limitations set out in Dow's permit were "part of the federal program such that it can be enforced in a citizen suit." Id. *See also* Cape Ann Citizens Ass'n v. Gloucester, 121 F.3d 695 (1st Cir. 1997) (First Circuit held that permit that contained *state* water quality standard fell within the federal CWA.); Ashoff v. Ukiah, 130 F.3d 409 (9th Cir. 1997) ("citizens can sue on the basis of more stringent state standards").

Here, NUFF has filed a citizen suit to enforce state regulations issued in furtherance of the state's water quality standards. EPA incorporated these regulations, including intake, non-contact cooling water discharge, and summer-month flow limitations, when it issued NUPEC's federal permit as required by 33 U.S.C. § 1341. Even if this Court were to find that the state conditions are more stringent than federal regulations under the CWA, NUFF would still be able to enforce these conditions because of their incorporation within the CWA permit and the recognition by federal courts that even those state regulations that are more stringent than federal guidelines may be the subject of a citizen suit under the CWA.

C. Permit conditions beyond the scope of the CWA—even those conditions not tied to pollution—may be enforced through a citizen suit under the CWA.

By filing this citizen suit, NUFF is simply attempting to enforce the conditions of NUPEC's permit, as approved by the EPA, which NUPEC is continuously violating. NUFF is not trying to enforce an unregulated limitation not incorporated into NUPEC's permit. Courts have held that the CWA legislation 33 U.S.C. § 1365(f)(6), which defines "effluent standard or limitation," to include "a permit or condition thereof," may be broadly enforced. The Fourth Circuit in Sierra Club v. Simkins Industries, Inc., held that the permittee's "reporting requirements are expressly made conditions of its permit, and therefore violations of these conditions, by operation of § 1365(f)(6), are violations of an effluent standard or limitation of § 1365(a)" that may be the subject of a citizen suit. 847 F.2d 1109, 1115 (4th Cir. 1988). Similarly, the Third Circuit affirmed a United States district court's holding that

conditions within a permit relating to maintenance could be enforced as a citizen suit under the CWA. Pymaturing Water Shed Citizens for a Hygienic Env't v. Eaton, 644 F.2d 995 (3d Cir. 1981).

Some United States district courts have also allowed citizen suits to enforce valid permit conditions that regulate discharges outside the scope of the CWA. See Connecticut Fund for Env't v. Raymark Indus., Inc., 631 F.Supp. 1283, 1285 (D. Conn. 1986) (allowing a citizen suit for regulation of discharges that may never reach navigable waters and, therefore, should not be regulated under the CWA).

Federal courts as well as the EPA have read the CWA legislation on permits to require the inclusion of any state condition tied to that state's water quality standard, including those conditions that might otherwise be considered outside the scope of the federal CWA. Reporting requirements, facility maintenance, and pollutants not specifically set forth within the CWA are just some of the "other limitations" that the EPA has included within federal CWA permits as a result of state certifications which have already been the subject of a valid citizen suit under the CWA. Accordingly, NUFF has standing to bring a citizen suit to enforce CWA permit limitations against NUPEC even if this Court finds that the three state conditions are outside the scope of the federal CWA.

D. Public policy requires citizen suits for any violation set out in an EPA CWA permit.

Public policy mandates that NUFF be allowed to bring a citizen suit to enforce any and all of NUPEC's permit requirements that NUPEC continues to violate several months a year because NUDNR and the EPA have not taken affirmative action to end NUPEC's noncompliance. Besides the CWA itself and the legislative history behind it, the Ninth Circuit has also found persuasive policy reasons for allowing citizens to bring suit to enforce stricter state regulations set out in the violator's EPA permit. Northwest Envtl. Advocates, 56 F.3d at 990. By excluding citizen suits filed to enforce state regulations set out in the CWA permit, the court explained that it would be immunizing a body of regulations from the important enforcement tool that is the citizen suit. Id. at 989. The Circuit clearly held that citizens could bring a suit to enforce permit conditions included only as a result of the state certification. Id. at 990. Thus, if NUFF were denied standing to bring this suit to enforce the state conditions within NUPEC's CWA permit,

the Court would allow NUPEC to continue violating an entire set of regulations without recourse.

III. EVEN WHEN A STATE ASSESSES PENALTIES FOR SOME VIOLATIONS OF A PERMIT, CITIZENS ARE NOT BARRED FROM SEEKING PENALTIES FOR OTHER VIOLATIONS NOR ARE THEY BARRED FROM SEEKING INJUNCTIONS.

The District Court erred in holding that NUFF is barred from seeking penalties and injunctive relief against NUPEC for violating its permit issued under the CWA because New Union has already assessed some penalties. A CWA permit violator is subject to enforcement by both federal and state action for failure to comply with the limitations established in the permit. 33 U.S.C. §§ 1319, 1342(b)(7) (2003). "In the *absence of federal or state enforcement*, private citizens may commence civil actions against any person 'alleged to be in violation of' the conditions of either a federal or state . . . permit." Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 53 (1987), *citing* §1365(a)(1) (emphasis added). The relevant statutory language provides that any citizen may commence a civil action to enforce the statute except when "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) (2003).

A. NUDNR has not met the "diligent prosecution bar" as set out in § 1319 by failing to develop and implement a "plan of attack" to address NUPEC's permit violations.

Although NUDNR has admittedly taken steps to address NUPEC's continuing violations and has enforced penalties against it, NUDNR is *not* diligently prosecuting NUPEC under the laws of New Union. NUDNR has consistently refrained from enforcing any of NUPEC's summer month violations. The Supreme Court explained that the CWA "does not permit citizen suits for wholly past violations" but the statute "confers jurisdiction over citizen suits when the citizen-plaintiffs make a good-faith allegation of continuous or intermittent violations." Gwaltney, 484 U.S. at 64. After remand, the Fourth Circuit in Gwaltney II said, "a plaintiff may satisfy his burden either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing

evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd, 844 F.2d 170, 171 (4th Cir. 1988) (internal citations omitted). *See also* Am. Canoe Ass'n v. Murphy Farms Inc., 326 F.3d 505, 521 (4th Cir. 2003).

The Ninth Circuit has determined that in order for a citizen suit to be barred by 33 U.S.C. § 1319, the state's diligent prosecution must "contain penalty provisions *and* a penalty must actually have been assessed under the state law." Knee Deep Cattle Co. v. Bindana Investment Co. Ltd., 94 F.3d 514, 516 (9th Cir. 1996), *citing* Citizens for a Better Env't v. UNOCAL, 83 F.3d 1111, 1115 (9th Cir. 1996) (emphasis added). In Knee Deep, a cattle company filed a suit against a CWA permittee for its effluent discharge of wastewater from its RV park and sewage treatment facility. As a result of the facility's permit violations over a period of two years, waste seeped into the groundwater that the cattle company used to water their stock. The agency charged with enforcing the violations did not impose penalties for all of the violations uniformly. The Ninth Circuit found that the violations were ongoing and not diligently prosecuted, allowing a citizen suit.

In 2000, the Ninth Circuit addressed when sporadic violations ceased to be ongoing in Natural Resources Defense Council v. Southwest Marine, Inc., 236 F.3d 985 (9th Cir. 2000). The court "adopted the Fourth Circuit's conclusion that intermittent or sporadic violations do not cease to be ongoing until the date when there is *no real likelihood of repetition*." Id. at 998 (internal citations omitted) (emphasis in original). There, the court found the permittee's failure to meet its permit limitations and failure to adequately implement its planned improvements constituted ongoing violations of its CWA permit, permitting a citizen suit. Id. at 999.

In the present case, NUPEC has violated their permit restrictions in each of the summer months and NUDNR has deliberately ignored these violations. Thus, NUDNR cannot be said to be diligently prosecuting under § 1319. Moreover, since NUFF filed the suit in September of 2002, the violations have continued in each of the summer months. This clearly indicates the "ongoing" nature of the violations and that there is not only a strong "likelihood of repetition," but that NUPEC is repeating the violations every summer. Accordingly, NUFF can maintain a citizen suit because there is no diligent prosecution and because NUFF has made out

"a good-faith allegation of continuous or intermittent violations" as required by the Supreme Court. Gwaltney, 484 U.S. at 64.

B. NUFF is entitled to either civil penalties or a civil injunction under the CWA to prevent NUPEC's ongoing violations.

As a result of the permit violations, NUFF is entitled to either civil penalties or a civil injunction against NUPEC. According to the Fifth Circuit, a moving party must establish four elements to obtain an injunction:

> (1) that there is a substantial likelihood of success on the merits; (2) that there is a substantial likelihood that he will suffer irreparable injury if the injunction is not issued; (3) that any threatened injury outweighs the damage the injunction might cause the opponent; and (4) that the injunction will not disserve the public interest.

Griffin v. Box, 910 F.2d 255, 259 (5th Cir. 1990).

In U.S. Public Interest Research Group v. Atlantic Salmon of Maine, two fish farms were releasing pollutants into the water in violation of their state permits issued under the CWA. 339 F.3d 23 (1st Cir. 2003). The Research Group filed a citizen suit to enforce the permits and obtain an injunction to stop the polluting. "[O]nce a citizen suit is brought and establishes a present violation, there is nothing in the statute . . . that prevents a court from ordering equitable relief to remedy the harm done in the past." Id. at 33. The First Circuit found that a district court's issuance of an injunction against the salmon farms, which was to remedy past and ongoing violations of state permit, was not an overreach of authority under the CWA. Id.

In Louisiana, the Eastern District Court held that when "a favorable decision is likely to redress plaintiff's injuries through 1) requiring defendant to comply with discharge limitations in the permit and 2) the deterrent effect of both civil penalties both on this defendant and other permit holders" it is appropriate to grant an injunction to the plaintiff. La. Envtl. Action Network, Inc. v. Evans Indus., et al., 1997 WL 824310 at 7 (E.D. La. 1997) (where a defendant continued to violate its permit limitations despite the fact that the EPA had commenced a suit but was not judicially enforcing penalties against defendant).

The Supreme Court favors erring on the side of the environment when a question of injunction arises in a citizen suit. "Envi-

ronmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco Prod. Co. v. Gambell, AK, 480 U.S. 531, 545 (1987). In the instant case, the longer NUPEC continues to violate the existing effluent flow limitations, the greater the chance of irreparable harm to the fish of New Union River.

NUPEC has demonstrated its clear disregard for its permit limitations by continuing to exceed the mgd in all of the summer months. NUDNR has made a conscious decision not to enforce these unending violations. NUDNR's order is nothing more than mere winking, allowing NUPEC to continue to exceed its permit limitations in each of the summer months with the acquiescence of a regulatory agency.

Thus, the district court erred in holding that NUFF is not entitled to injunctive relief. In every one of the summer months, there is an absence of *any* enforcement of NUPEC's permit limitations. In fact, NUPEC's summer months compliance history is one of non-compliance. Without an injunction and the ability of NUFF to bring a citizen suit, NUPEC will continue its unrestrained use of the waters of New Union River in violation of it permit.

IV. WHEN NUPEC EXCEEDS ITS PERMIT LIMITATIONS FOR INTAKE, NON-CONTACT COOLING WATER DISCHARGE, AND FLOW, IT HAS VIOLATED THREE SEPARATE PERMIT CONDITIONS, REQUIRING SEPARATE PENALTY ASSESSMENTS FOR EACH.

A. The 1987 Clean Water Act Amendment clarified that when permittees violate separate permit conditions, they are considered separate violations and must be penalized accordingly.

The Court should assess penalties against NUPEC *for each separate violation* of a permit condition as required under the CWA. Thus, NUPEC would potentially be required to pay a fine of up to $75,000 per day for the three separate violations of intake, non-contact cooling water, and flow limitations. Prior to February 4, 1987, 33 U.S.C. § 1319(d) stated in relevant part, that any person who violated conditions in a permit issued by the Administra-

tor or by a State "shall be subject to a civil penalty not to exceed $10,000 per day of such violation." Courts interpreted the language of 33 U.S.C. § 1319(d) differently, resulting in varying assessments of the maximum penalty available under the Clean Water Act. For example, some courts held that if a permittee violated more than one condition on a given day, the permittee's liability was limited to $10,000 per day, regardless of the multiple violations on that same day. *See, e.g.* U.S. v. Detrex Chem. Indus., Inc., 393 F. Supp. 735, 738 (N.D. Ohio 1975) ("Had Congress intended a *per violation* unit for computation of penalties, the Court is of the opinion that it would have more clearly expressed such an intent.") (emphasis added).

However, other courts interpreted Congressional intent differently. In dicta, the court in United States v. Amoco Oil Co., stated that "a good argument can be made for the idea that violations of the daily limit for two or more *different effluents* should be subjected to separate penalties." 580 F. Supp. 1042, 1046 (W.D. Mo. 1984) (emphasis in original). Similarly, the District of New Jersey held that, "[e]ach violation of any express limitation in the permit may, of course, be treated as a separate violation for the purposes of assessing a penalty." Student Pub. Int. Research Group of New Jersey, Inc. v. Monsanto Co., 1988 WL 156691 (1988).

Realizing the inconsistent interpretations courts gave of this section of the CWA, in February of 1987 Congress amended 33 U.S.C. § 1319(d). The relevant language changed to read that a violator "shall be subject to a civil penalty not to exceed $25,000 per day for *each* violation." 33 U.S.C. § 1319(d) (emphasis added). After the amendment it became clear that there was "only a single reasonable interpretation: the daily maximum penalty applies separately to each violation of an express limitation." Atlantic States Legal Found. v. Tyson Foods, Inc., 897 F.2d 1128, 1138 (11th Cir. 1990). Further, "*each* successive discharge. . .on a given day will subject the polluter to a $25,000 maximum fine." (emphasis in original) Id. at 1139.

The EPA has made its position on multiple violations clear. When referring to the number of effluent limit violations, the EPA states, "[v]iolations of different parameters at the same outfall are counted separately and violations of the same parameter at different outfalls are counted separately." Interim Clean Water Act

Settlement Penalty Policy, p 9, EPA, March 1, 1995.[1] A reading of the accompanying Conference Report elucidates congressional intent. It is clear that the purpose of the amendment was in part "to increase the civil judicial penalty from $10,000 to $25,000 per violation, [and] *to clarify that each distinct violation is subject to a separate daily penalty assessment of up to $25,000.*" H.R. Rep. No. 99-1004, at 132 (1986) (emphasis added).

According to the District of Hawaii, in order to calculate the total penalty assessment, the court or regulatory body must first determine the number of violations and then multiply by the maximum daily penalty of $25,000. Hawaii's Thousand Friends v. City and County of Honolulu, 821 F. Supp. 1368, 1395 (D. Haw. 1993). The court considered each limitation contained in the permit to be a different parameter and thus, each subject to the maximum daily penalty.

The Eastern District of Virginia held that, "if multiple violations of the [p]ermit occur on the same day, defendants are liable for a separate day for each violation of the [p]ermit." U.S. v. Smithfield Foods, Inc., 972 F. Supp 338, 340 (E.D. Va. 1997). The court reasoned that "[i]f the court found that the maximum penalty for any single day was $25,000, there would be no incentive for a permittee to comply with other pollutant limitations in the permit, once one limitation in the permit was violated on that day." Id. at 341. Moreover, the court held that "[e]ach limit is a separate, distinct requirement in the Permit which can be violated. Accordingly, where multiple violations of defendants' Permit occur on one day, the maximum penalty on that day may exceed $25,000." Id.

Courts in other circuits have also held that when each effluent limitation is violated in a permit, there is a separate and discrete penalty to be assessed. *See e.g.* Pub. Int. Research Group of New Jersey, Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64 (3d Cir. 1990), *cert. denied* 498 U.S. 1109 (1991) (denying argument that a discharge which violated more than one permit parameter should be counted as a single violation, and holding that violation computations should be undertaken "on a parameter by parameter basis"; regarding different kinds of limitations, holding that each kind of limit is "clearly separate" and there is "no reason why [a defendant] should not be penalized separately for violating

1. Available at: http://www.epa.gov/Compliance/resources/policies/civil/cwa/cwapol.pdf.

each limitation"); Natural Res. Def. Council Inc. v. Texaco Refining and Mktg., Inc., 800 F. Supp. 1, 20-21 (D. Del. 1992) (holding that distinct overages of limits can constitute separate violations,) aff'd in part, rev'd in part on other grounds, 2 F.3d 493 (3d Cir. 1993); Stud. Pub. Int. Research Group of New Jersey, Inc. v. Monsanto Co., 1988 WL 156691, 11 (holding that the total penalty for any particular day might exceed the statutory maximum because each violation of any explicit limitation in the permit may be treated as a separate violation for the purposes of penalty assessment).

Here, NUPEC's CWA permit contains limitations in three areas: flow, intake, and non-contact cooling water discharge. NUPEC has admittedly reported violating all three of these permit regulations over the course of several years. Accordingly, NUPEC is plainly violating three *separate* permit conditions and a court should assess a separate penalty for each of the three violations. If these violations were only counted as one $25,000 penalty, NUPEC would have no incentive to comply with all or even more than two of its permit conditions once one condition had been exceeded. Congressional intent is clear and *mandatory*. After the 1987 amendment to 33 U.S.C. § 1319(d), a violator "shall be subject to a civil penalty not to exceed $25,000 per day *for each violation*." 33 U.S.C. § 1319(d) (emphasis added).

B. The Clean Water Act's provision treating a single operational upset that leads to simultaneous violations of more than one permit limit as a single violation does not apply to NUPEC's violations.

NUPEC's continuous and ongoing violations with respect to the flow, intake, and non-contact cooling water discharge limitations were not caused by an operational upset at the plant, foreclosing NUPEC from asserting a defense that all three, separate permit violations should be combine into a single violation and, thus, a single penalty. The relevant CWA legislation establishes that for the purposes of assessing penalties, "a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation." 33 U.S.C. § 1319(d). "Upset" is further defined in the regulation as "an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations

because of factors beyond the reasonable control of the permittee." 40 C.F.R. § 122.41(n)(1).

Clearly the cause of NUPEC's unending violations cannot be construed as an "upset" within the statutory meaning of the term as their violations are not "unintentional" nor beyond the "reasonable control of the permittee." NUPEC deliberately exceeded its separate permit limitations on intake, flow, and non-contact cooling water discharge when it was expedient and profitable to do so, particularly during the summer months when the demand for electricity is at its peak. Moreover, NUPEC continues to violate all three of these conditions, evidencing a pattern of disregard for the limitations set out in its CWA permit due to the continued profitability of the violations. NUPEC's CWA violations of *three permit limitations* must be counted as separate and distinct for penalty assessment purposes, especially in light of NUPEC's continuous and deliberate permit noncompliance.

CONCLUSION

For the reasons stated in this brief, Appellant New Union Fly Fishermen's Federation, Inc. respectfully requests that this Court reverse in its entirety the district court's grant of summary judgment in favor of New Union Power & Electric Company and remand this case for further proceedings on the merits.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TWELTH CIRCUIT

NEW UNION FLY FISHERMEN'S FEDERATION, INC.,
Appellant,

v.

NEW UNION POWER & ELECTRIC COMPANY,
Appellant.

ORDER

New Union Fly Fishermen's Federation, Inc. (NUFF), plaintiff in the case below, filed suit against New Union Power & Electric Company (NUPEC), defendant in the case, for violating the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* NUFF alleged jurisdiction under the citizen suit provision of the CWA, § 505, 33 U.S.C. § 1365. It alleged that NUPEC violated several conditions in the permit EPA has issued to it under CWA § 402, 33 U.S.C. § 1342. NUFF and NUPEC filed cross-motions for summary judgment on dispositive issues in the case. The court below granted NUPEC's motion in its entirety and therefore did not reach NUFF's motion. NUFF appeals the decision. The United States has filed a motion to file a brief and argue as amicus, contesting in part and supporting in part the judgment below. We have granted the motion of the United States to file a brief of the same length as the original parties may file and to argue for as much time as the original parties may argue.

The Appellant will argue first, the Appellee will argue second, and amicus United States will argue third. The Appellee and Appellant may reserve five minutes of their argument time for rebuttal. Should they rebut, Appellee will rebut first and Appellant last.

The parties shall brief the following issues, as designated:

1) Did the court below err in holding that the intake, non-contact cooling water discharge, and summer-month flow limitations in the NUPEC permit are more stringent than and beyond the scope of the CWA? NUFF contests the court's decision and NUPEC supports it. EPA argues the intake limitations are beyond the scope of the CWA, the summer flow limitations are

more stringent than the CWA and that the cooling water discharge limitations are duplications of the flow limitations.

2) Did the court below err in holding that citizens may not enforce against violations of conditions that EPA included in a CWA permit because the state certified the conditions under CWA § 401, when the state requirements are more stringent than or beyond the scope of the CWA? NUFF contests the court's decision and, NUPEC supports it. EPA contests the decision as it relates to conditions that are more stringent than under the CWA and supports it as it relates to conditions that are beyond the scope of the CWA.
3) Did the court below err in holding that when a state assesses penalties for some violations of a permit under a state authority comparable to CWA § 309(g), citizens are barred from seeking penalties for other violations and are barred from seeking an injunction against future violations? NUFF and EPA contests the court's decision and NUPEC supports it.
4) Did the court below err in holding that when a single act or omission violates several conditions in a CWA permit, there is a single violation of the permit? NUFF and EPA contest the court's decision, NUPEC supports it.

The parties are limited in their briefs to the above issues, but are not limited to the arguments for their positions raised in the District Court. For purposes of briefing and argument, legal authorities may not be cited that date after September 1, 2003.

Entered, September 1, 2003

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW UNION

NEW UNION FLY FISHERMEN'S FEDERATION, INC.,
Plaintiff,

v. Civ. No. 03-713

NEW UNION POWER & ELECTRIC COMPANY,
Defendant.

ORDER

The New Union Fly Fishermen's Federation, Inc. (NUFFF), a not-for-profit corporation organized under the laws of the State of New Union, filed a complaint under § 505 of the Clean Water Act (CWA), 33 U.S.C. § 1365, against New Union Power & Electric Company (NUPEC), alleging that NUPEC violated § 301(a) of the CWA, 33 U.S.C. § 1311(a), at its Teepee Generating Station (TGS) in Paddleboat Springs, New Union, by withdrawing more water for cooling its plant from the New Union River than allowed by the permit issued to it by the United States Environmental Protection Agency (EPA) under § 402 of the CWA, 33 U.S.C. § 1342, and by discharging more spent cooling water into the River than allowed by that permit.

NUPEC has maintained the Teepee One generating unit since 1965 and first obtained a permit for it from EPA under the CWA in 1974. Since EPA's renewal of the permit in 1984, the permit's effluent limitations have been constant, representing best available treatment (BAT). In 1997 NUPEC applied for a permit renewal with modifications to accommodate the addition of Teepee Two, a new generating unit, doubling the capacity of the Generating Station. The earlier permit contained a "flow" limitation for Teepee One of two million gallons a day (2 mgd). When NUPEC applied for the renewal and modification of its permit in 1997, it also applied to the New Union Department of Natural Resources (NUDNR) for a certification pursuant to § 401 of the CWA, 33 U.S.C. § 1341. Although NUPEC had applied for a renewal permit allowing it a flow of 2 mgd for Teepee One and a permit modification allowing it a flow of 2 mgd for Teepee Two, for a total of 4 mgd, NUDNR issued a § 401 certification allowing it to withdraw from the river and discharge to the river a total of 4 mgd from September through May, but only a total of 3 mgd from June through August, citing as a reason the need to maintain minimum

flows in the river for fish propagation during the annual dry summer season. EPA included these limitations in the permit, as required by § 401, and adjusted the permit's flow limitation to match them. The relevant pages from the permit and the accompanying fact sheet explaining these limitations are annexed to this opinion as Exhibits 1 & 2.

Since the renewed permit was issued to NUPEC in July of 1999, it has reported exceeding the intake, flow, and cooling water discharge limitations approximately half the time during each year, and it has reported exceeding them all of the time during the dry summer season each year. NUDNR has assessed a penalty against NUPEC of $1,000 for each month of intake violations during the September through May periods, which NUPEC immediately paid. NUDNR has not assessed penalties against NUPEC for violations during the summer months. A NUDNR official submitted an affidavit that NUDNR did not assess penalties for violations during summer months 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 during those months.

In June of 2002, NUFF sent a notice of NUPEC's violations to NUPEC, NUDNR and EPA pursuant to § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A), and EPA's regulations promulgated there under. NUPEC does not contest the adequacy of the notice. More than 60 days later, in September of 2002, NUFF filed this suit, seeking civil penalties for all of the violations for which NUDNR did not assess penalties, and an injunction to prevent further violations.

NUFF and NUPEC have filed cross motions for summary judgment. NUFF seeks summary judgment that NUPEC is liable for violations of the CWA every day that it reported exceeding either or all of the intake, flow, and discharge limitations. NUPEC seeks summary judgment on numerous grounds. Because we grant NUPEC's motion in its entirety and much of it is dispostive of this litigation, we do not reach NUFF's motion.

NUPEC moves for summary judgment on grounds that this court has no jurisdiction over the matter because: 1) § 505 does not authorize citizens to enforce state imposed limitations in CWA permits that are more stringent than or beyond the scope of corresponding federal limitations; and 2) NUDNR's enforcement actions against NUPEC deprive citizens of authority to enforce against NUPEC under § 309(g)(6)(A) of the CWA, 33 U.S.C.

§ 1309(g)(6)(A). In the event we find we have jurisdiction over this matter, NUPEC moves for summary judgment that the court may not assess more than one penalty a day for violations of the intake, flow, and cooling water discharge limitations, because while those three limitations appear to be three separate limitations, they are, in reality, only one limitation.

A. General Background of State and Citizen Enforcement of the CWA

The First Circuit, in *North and South Rivers Watershed Assn. v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1992), succinctly stated the role of states and citizens in enforcing the CWA.

> The primary function of the provision for citizen suits is to enable private parties to assist in enforcement efforts where Federal and State authorities appear unwilling to act. Congress has found it necessary expressly to "recognize, preserve and protect the *primary responsibility and rights of the states* to prevent, reduce and eliminate pollution." 33 U.S.C. § 1251(b) (emphasis supplied). It follows that "the citizen suit [under section 505] is meant to supplement rather than to supplant governmental [enforcement] action." *Gwaltney of Smithfield v. Chesapeake Bay Foundation,* 484 U.S. 49, 60 (1987). Presumably, then, when it appears that governmental action under either the Federal or comparable State Clean Water Acts begins and is diligently prosecuted, the need for citizen's suits vanishes. *Gwaltney*, 484 U.S. at 61.

Id. at 555. Although there are hundreds of reported decisions in citizen suits and a plethora of literature and commentary on them, this quotation captures the role that Congress, the Supreme Court, and the judiciary generally have assigned to citizen suits. It must frame our evaluation of the questions before us in this case.

B. The Enforceability under § 505 of State Imposed Limitations that Are More Stringent or beyond the Scope of Federal Limitations under the CWA.

NUFF's argument is deceptively simple. Section 401 requires EPA to include in CWA permits any "appropriate requirement of State law," *see* 33 U.S.C. § 1341(d), set forth in a certification by the proper state authority, a conclusion supported by *PUD # 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700

(1994). NUPEC does not dispute that the NUDNR is the proper state authority to issue the certification. NUPEC does not dispute that NUDNR made its certification of the NUPEC permit conditional on EPA including separate limitations on intake, flow, and spent-cooling water discharge of 4 mgd each, reduced to 3 mgd each in the June through August period. EPA included those limitations in the permit. NUPEC has violated all three of these conditions half the time in the September through May periods and every day in the summer periods since the last permit was issued, through at least August 31, 2003. There is every reason to believe it will continue to do so each summer. NUFF reads § 301(a) of the CWA to make NUPEC liable for a separate violation each day that it discharges a pollutant in excess of one of those permit conditions and it reads § 505 as authorizing citizens to enforce against such violations.

NUPEC's reply makes it clear that the world, even the CWA world, is not so simply structured as NUFF would have us believe. First, NUPEC notes that § 301(a) only makes the "discharge of a pollutant" illegal. NUPEC then argues that: its water intake is not the discharge of a pollutant; its flow is not the discharge of a pollutant; and its return of water drawn from the river to the river is not the discharge of a pollutant, although its addition of material to that water after it is withdrawn may be a discharge of a pollutant (but only of the added material, not the river water itself) when it is returned to the River.

NUFF replies that even water can be a pollutant. *Atlantic States Legal Found. v. Eastman Kodak Co.*, 12 F. 3d 353, 357 (2d Cir. 1993), *cert. denied*, 513 U.S. 811 (1994) ("Indeed, at oral argument [appellant] could provide no principled reason why water itself, which is conceded to be a chemical, would not be a 'pollutant' under its view of the Act."). More importantly, it argues that § 301(a) reads differently than NUPEC would have us believe. Under NUFF's reading, a permittee may violate the § 301(a) prohibition in many ways other than discharging pollutants in excess of a permit's effluent limitation. For instance, a permittee violates the prohibition by not correctly monitoring its discharges and reporting them to EPA as required in its permit. Monitoring and reporting, of course, are not discharges of pollutants. By violating a permit's monitoring terms, while discharging pollutants, a permittee violates the § 301(a) prohibition. Similarly, by violating a permit's intake, flow, and cooling-water discharge terms while discharging pollutants, NUPEC violates the § 301(a) prohibition, re-

gardless of whether they are discharges of pollutants. NUFF's reading of § 301(a) is consistent with: § 309(a), which authorizes EPA to enforce against any violation of a permit; § 402(k), which protects a permittee from enforcement for violating the CWA as long as it is in compliance with the terms of its permit; and § 505(f), which defines the violations citizens may enforce to include any violation of a permit. NUFF seems to have the better of this first argument.

Second, NUPEC notes that EPA does not include limitations on intake volumes in CWA permits, unless required to do so by a § 401certification. Therefore, limitations on intake volumes are beyond the scope of the CWA. NUPEC argues this is established by § 101(g), distinguishing between the regulation of water quality and water quantity. It provides that the preservation of water quality is pollution control, subject to the CWA, but that approval and allocation of water withdrawals from waterways is the control of water use, reserved to the states. NUPEC further supports its argument by a statement by EPA in the Fact Sheet it issued for the draft NUPEC permit.

> EPA's regulations and guidelines do not call for a limitation on water intake, for the CWA regulates discharges, not intakes. It is generally not necessary to regulate intakes to preserve minimum stream flows for fish propagation because the intake and discharge normally are equal to the flow, or nearly so. The limitations on intake, flow, and spent non-contact cooling water discharge . . . are all based on the § 401 certification by the NUDNR. . .

See Exhibit 2. Because the intake limitation would not be in the permit except for the state certification, NUPEC argues that condition is beyond the scope of the CWA.

As part of its second argument, NUPEC contends that the limitation on spent cooling-water discharges falls into the same category, but for a different reason. Ordinarily EPA does not directly limit the volume of water that may be discharged to the River, but instead places a flow limitation in permits, based on the flow used by the capacity or operation of the facility. 40 CFR § 122.45(b)(2)(i). This flow limitation indirectly limits the amount of water discharged by the facility into the River. Here, EPA did both, again as a result of NUDNR's § 401 certification. *See* Exhibit 2. Because the limitation on spent cooling water discharge

would not be in the permit except for the state certification, it is a condition that is beyond the scope of the CWA.

Again as part of its second argument, NUPEC contends that the summer-time limitations on flow are beyond the scope of the CWA because they are based entirely on NUDNR's § 401 certification, and the purpose of the requirement is to limit the amount of water that NUPEC may withdraw from the River. NUPEC contends that purpose, and hence that condition, is beyond the scope of the CWA.

NUPEC finally argues that EPA's regulations establish that neither EPA nor citizens may enforce against violations of permit conditions based on state-imposed conditions beyond the scope of the CWA. 40 CFR § 123.1(i)(2). *Accord Eastman Kodak*, 12 F.3d at 359-60.

NUFF replies that because EPA permits normally contain flow limitations, the 3 mgd limitation in the summer is not beyond the scope of the CWA, but at most is more stringent than required by the CWA. It replies further that the intake and non-contact cooling water discharge limitations are nothing more than flow limitations stated in other ways. It argues that all three are based on water quality standards established by the state and approved by EPA under the CWA. Specifically, it argues that New Union designated the use of the New Union River as it runs by the Teepee Generating Station for propagation of fish, and the intake and flow limitations are necessary to maintain that use. *See* Exhibit 2. NUFF argues this situation is exactly comparable to the situation in *PUD #1*, in which the Supreme Court ruled that fish-propagation based intake limitations were authorized by the CWA's water quality standards provisions, making the summertime intake and flow limitations in NUPEC's permit neither more stringent than the CWA nor beyond the scope of the CWA. Of course *PUD #1* does not control here. Although it holds that a flow limitation is a proper § 401 certification condition that must be placed in a federally issued permit, it does not hold that citizens or EPA may enforce the condition if it is beyond the scope of the CWA. NUFF further argues that 40 CFR § 123.1(i)(2) is inapplicable because it addresses conditions in permits issued by states with approved programs, not conditions based on state certification in permits issued by EPA. Indeed, it notes that § 505(f) specifically authorizes citizens to enforce against violations of conditions in permits based on § 401 certifications.

NUFF also argues that if 40 CFR § 123.1(i)(2) or the interpretation on which it is based is applicable here, the interpretation has no basis in the statute, may be challenged now, and is entitled to no deference because it concerns the court's own jurisdiction and is properly a matter for judicial, not administrative, determination and interpretation. *Murphy Exploration & Prod. Co. v. U.S. Dept. of Interior*, 252 F.3d 473, 478-80 (D.C. Cir. 2001). Properly interpreted, NUFF contends, the statute does not limit citizen enforcement of permit conditions, whether they are more stringent than or beyond the scope of the CWA. If the conditions are included in a finally issued permit no longer subject to judicial review, they are enforceable by citizens under § 505(f).

In response to the latter point, NUPEC argues the interpretation of the statute articulated in 40 CFR § 123.1(i)(2) applies to conditions based on state law that are included both in permits issued by states with approved CWA programs and in permits issued by EPA as a result of a § 401 certification. NUPEC argues that it would make no sense for citizens to be barred from enforcing such a permit condition in a permit issued by a state with an approved CWA program, while allowing citizens to enforce such a condition in a permit issued by EPA. That would make state-issued permits second-rate permits, clearly not the intent of Congress when it enunciated its policy that states have the primary role in pollution control. CWA § 101(b), 33 U.S.C. § 1251(b).

NUPEC argues the statute does not, cannot, and should not be interpreted to authorize citizens to enforce state requirements that are more stringent than or beyond the scope of the CWA. It suggests it would not be consonant with the principles of federalism embedded in the Constitution for Congress to enact a statute authorizing citizens to bring suit in federal court to enforce against any and all violations of state law. Once that principle is established, it follows that Congress may not authorize citizens to bring suit in federal court to enforce against violations of state water pollution or water resource management laws that are more stringent than or beyond the scope of the CWA. Of course, Congress could condition approval of state permit programs under the CWA on the state agreeing that when it includes in state-issued permits requirements more stringent than or beyond the scope of the CWA, citizens and EPA may enforce those conditions in federal court. Congress also could condition the placement of state § 401 certification conditions in EPA-issued permits on the state agreeing that when the certification includes conditions more

stringent than or beyond the scope of the CWA, citizens and EPA may enforce those conditions in federal court. But Congress has not done that. NUPEC argues the statute should not be interpreted to achieve that result, for it contorts the federalist structure. NUPEC further argues such a result would discourage states from applying for approval to implement the CWA permit program or from issuing § 401 certifications, for doing so would remove from their discretion the decision whether and how to enforce their own law that is more stringent than or beyond the scope of the CWA. *See Ashoff v. City of Ukiah*, 130 F.3d 409, 413 (9th Cir. 1997).

These are close questions. But the Court is persuaded by NUPEC's federalism argument that citizens cannot enforce against conditions in CWA permits based on state law that are more stringent than or beyond the scope of the CWA. It further holds that the intake and non-contact cooling water discharge conditions are beyond the scope of the CWA. Because the summertime flow condition is merely an intake limitation in another guise, it too is more stringent than or beyond the scope of the CWA.

C. The Effect on Citizen Suits of the State's Administrative Penalties under State Law Comparable to § 309(g)

Section 505 authorizes citizen suits against violations of the CWA "except as provided" in § 309(g)(6), 33 U.S.C. § 1319(g)(6). That provision bars citizen suits where "a State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under . . . comparable State law. . .." CWA § 309(g)(6)(A)(iii), 33 U.S.C. § 1319(g)(6)(A)(iii). There is no dispute that NUDNR issued final penalty assessment orders, not subject to further judicial review, for NUPEC's flow violations during the relevant September to May periods and there is no dispute that it did so under state law comparable to § 309(g). NUPEC argues that NUFF is thereby barred from pursuing this action. NUFF counters that § 309(g)(6)(A) bars only citizen enforcement against "any violation" for which the NUDNR has assessed a penalty, and it has assessed penalties only against violations of limitations on flow and only against violations occurring during the September through May periods. It therefore asserts it may proceed against violations of intake and spent cooling water discharges during the September through May periods and violations of all three limitations during the June through August

periods. It further counters that the § 309(g)(6)(A) bar only provides that such a violation "shall not be subject of a civil penalty action" under § 505. NUFF therefore asserts that it may proceed for an injunction against further violation of the three permit limitations during any period.

These issues turn on whether the courts should adhere to a hyper-technical reading of § 309(g) or should read the provision to effectuate Congress' overriding intent, as articulated by the Supreme Court, that enforcement should be left to states, with citizens enforcing only when states are unwilling to do so. *See Town of Scituate,* 949 F. 3d at 555. Although the circuit courts are split on this, the first, last, and majority of circuits to address the issue came down on the side of protecting the state's enforcement decisions by not hewing woodenly to the perorations of the statute. *Lockett v. EPA*, 319 F.3d 678 (5th Cir. 2003) (supporting deference to state's enforcement discretion by reading "comparable State law" in § 309(g) liberally); *McAbee v. Fort Payne*, 318 F.3d 1248 (11th Cir. 2003) (interfering with state's enforcement discretion by reading "comparable State law" in § 309(g) hyper-technically); *Citizens for a Better Env't v. Union Oil Co. of Cal., Inc.*, 83 F.3d 1111 (9th Cir. 1996) (rejecting *Scituate* in favor of a hyper-technical reading of § 309(g) to hold state penalty action bars only citizen suit for penalties and only for same violations); *Ark. Wildlife Fed. v. ICI Americas, Inc.*, 29 F.3d 376, 381-82 (8th Cir. 1994) (supporting deference to state's enforcement discretion by reading "comparable State law" in § 309(g) liberally); *Town of Scituate*, 949 F.2d 552 (supporting deference to state's enforcement discretion by reading "comparable State law" in § 309(g) liberally and also holding that under § 309(g), state action of any sort against the violator bars citizen suits for any sort of relief for any violation).

Here the state has not stood idly by, allowing NUPEC to violate with impunity. It has enforced against every violation occurring in the September through May periods. NUFF complains that NUDNR's penalty amounts are inappropriately small, that NUDNR has never sought compliance, and that NUDNR has never issued a penalty for violations during the June through August periods, which are the most important periods for maintaining minimum stream flow to assure fish propagation. What NUFF forgets, however, is that the limitations it seeks to enforce are the State's own limitations. By imposing those limitations, NUDNR has required NUPEC to protect fish habitat as far as is practicable. If it strictly enforced those limitations, the impact

would be to curtail electricity production. Unfortunately, low flow in the river and peak power demands both occur in the summer period. This forces NUPEC to make a policy decision whether or not to enforce the limitations in the summer. It has clearly made a reasonable and sensible balancing choice between blackouts for people and blackouts for fish. We should defer to the state's choice in enforcing its own requirements. We therefore hold that under § 309(g), NUDNR's assessment of penalties under state law comparable to § 309(g) against many of NUPEC's violations during the relevant period pre-empts a citizen suit against all violations during that period and also pre-empts a citizen suit for an injunction against those violations.

D. Whether Violations of Intake, Flow, and Spent Cooling Water Discharge Limitations by the Same Act are One or Three Violations for Penalty Purposes

Because our decisions on the above issues are sufficient to dismiss NUFF's entire case, it is unnecessary to address whether the withdrawal of water from and discharge of more than the specified amount of spent cooling water to the New Union River on a given day constitutes one or more violations of the statute. Because it is clear that NUFF will appeal this Court's decision, judicial economy will be served by indicating how the Court would decide that issue. In the unlikely event the Court of Appeals reverses this Court's ruling on NUPEC's motion for summary judgment, it would also have the opportunity to comment on our likely disposition of this issue to save another appeal.

Section 505(a) authorizes the court in citizen suits to assess civil penalties under § 309(d). Section 309(d), in turn, authorizes the court to assess penalties against a person who violates "any permit condition or limitation" in an amount "not to exceed $25,000 per day for each violation." 33 U.S.C. § 1319(d). NUFF contends that under the plain words of the statute violations on any day by NUPEC of the intake, flow, and non-contact cooling water discharge limitations of the permit are three separate violations, each subject to the $25,000 penalty maximum, for a maximum penalty of $75,000 that day. NUPEC counters that while there appear to be three separate limitations here, they are merely reiterations of the same condition that only so many gallons of water may flow from the river through the plant and back to the river again on a given day. Because one act or omission will violate all three limitations if it violates any one of them, it is the

act or omission itself that is the violation, and there is only one act or omission no matter how many reiterations of the condition it counters. NUPEC relies on *Chesapeake Bay Found. 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). There the court considered violations of coliform and chlorine residual effluent limitations in the defendant's permit. Coliform are potentially harmful bacteria and chlorine is used to control the bacteria. The effluent limitation on bacteria is a maximum limit, designed to limit the amount of bacteria discharged to safe levels. The effluent limitation on chlorine is a minimum limit, designed to require a minimum amount of chlorine to remain after disinfection to indicate a sufficient amount of chlorine was used to kill bacteria. If not enough chlorine is used for disinfection, both the coliform and chlorine residual limits will be violated. Because the same act or omission inevitably causes both conditions to be violated, the court held only one violation occurred.

NUFF counters that *Gwaltney* is not good precedent because it was decided under a previous version of § 309(d) that established a penalty for each violation, while § 309(d) was amended to authorize a penalty "per day for each violation." This merely begs the question of whether a violation is the single act or omission that causes a contravention of several permit conditions or the several permit conditions that are violated. Traditionally statutes are violated by acts or omissions. A single act does not become multiple acts because it contravenes several reiterations of a permit condition. If it did, pettifogging state and federal permit-writing bureaucrats could multiply the congressionally set maximum penalty level simply by cloning a permit condition into a family of conditions that appear to be separate but, in reality, restate the same condition in different guises.

/s/

Romulus N. Remus
District Court Judge

EXHIBIT 1

Permit No. R12NU799021
P. 4

A. INTAKE LIMITATIONS AND MONITORING REQUIREMENTS

1. Intake Structure 001. During the period beginning with the effective date and lasting through the expiration date of this permit, the permittee is authorized to withdraw 4 mgd* from the New Union River for use as non-contact cooling water. The permittee shall monitor the volume of the intake continuously.

* 3mgd from June 1 through August 31 every year.

B. EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

1. Outfall 001. During the period beginning with the effective date and lasting through the expiration date of this permit, the permitee is authorized to discharge spent non-contact cooling water from outfall 001 to the New Union River. Such discharge shall be limited and monitored by the permitee as specified below:

Effluent Characteristics	Discharge Limitations		Monitoring Requirements	
	Average Monthly	Maximum Daily	Measurement Frequency	Sample Type
Flow	N/A	4 mgd*	continuous	N/A
Spent cooling water	N/A	4 mgd*	continuous	N/A

* 3 mgd from June 1 through August 31 every year.

EXHIBIT 2

Permit No. R12NU799021
Fact Sheet
P. 6

The flow limitation on the discharge of 4 mgd during the September through May period is based on experience at the facility and EPA's regulations. According to DMRs submitted by NUPEC, Teepee One has run at its full capacity for at least 40% of the time during the last five years. NUPEC projects, and EPA sees no reason to doubt that Teepee Two will experience similar utilization. The flow limitations in the Teepee permit are calculated in accordance with 1) the requirements of 40 CFR § 122.45(b)(2)(i) that effluent limitations and other conditions on discharges be based on actual measures of operation or, for new discharges, on reasonably projected operation and 2) the requirements of 40 CFR § 423.13 that the permit issuing authority establish mass limitations in permits by multiplying flow times the concentrations of pollutants limited in the Steam Electric Effluent Guidelines. Because the experience and expectation is that both Teepee units will run at full capacity for a significant amount of time, their full capacity is used to limit and measure flow. TGS' water pollution control system has a design basis based on 4 mgd, also supporting the flow limitation.

EPA's regulations and guidelines do not call for a limitation on water intake, for the CWA regulates discharges, not intakes. It is generally not necessary to regulate intakes to preserve minimum stream flows for fish propagation, for the intake and discharge volumes normally are equal to the flow, or nearly so. Nor do EPA's regulations and guidelines call for a limitation on non-contact cooling water discharge. It is not necessary to regulate such a discharge, for the flow limitation already limits the volume of water that may be used and discharged and if there are pollutants in the cooling water for which treatment must be provided, EPA would include in the permit effluent limitations on such pollutants. Because NUDNR included in its § 401 certification conditions on intake and non-contact cooling water discharge, however, EPA must include those conditions in the permit. The limitations on intake, flow, and spent non-contact cooling water discharge of 3 mgd during the June through August period are all based on the § 401 certification by the NUDER and are calculated by it as necessary to assure fish propagation during summer months in New Union River.

APPENDIX B: Relevant Provisions

28 U.S.C. § 1291. Final decisions of district courts.

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

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;
>
> (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;
>
> (4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;
>
> (5) it is the national policy that area wide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(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.

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.

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

. . .

c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold pub-

lic hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(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. § 1319 Enforcement.

. . .

(d) Civil penalties; factors considered in determining amount.

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

. . .

(g) Administrative penalties

. . .

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any 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 not 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. § 1341 Certification.

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that

any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

. . .

(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.

33 U.S.C. § 1362 Definitions.

(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.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

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 chap-

ter 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.

(b) Notice

No action may be commenced—
(1) under subsection (a)(1) of this section—
(A) 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, or
(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.
(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

. . .

(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 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; (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.

40 C.F.R. § 122.41

(n) Upset—
(1) Definition. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.