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Brief for the Appellee, Goldthumb Mining Co., Inc.: Fifteenth Annual Pace National Environmental Moot Court Competition

MEASURING BRIEF*

Civ. App. No. 02-2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

UNITED STATES, Appellant,
and
STATE OF NEW UNION, Intervenor,
v.
GOLDTHUMB MINING CO., INC.,
Appellee.

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

Brief for the Appellee,
GOLDTHUMB MINING CO., INC.

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* This brief has been reprinted in its original form.

QUESTIONS PRESENTED

1. Did the court below err in holding that the CWA's definition of navigable water in CWA § 502, 33 U.S.C. § 1362, does not include the Arroyo d'Oro when it is dry?

2. Does Congress have Commerce Clause jurisdiction over dry waterbeds of intermittent interstate streams that do not meet any traditional test of navigability and are not tributary to waters that meet any such test?

3. Did the court below err in holding that enforcement by a state without a permit program approved by the EPA under the CWA can prevent EPA enforcement under CWA § 309(g)?

4. Did the court below err in holding that a state need not enforce using authority comparable to CWA § 309(g) to prevent EPA enforcement under § 309?

5. Did the court below err in holding that a state penalty assessment that prevents EPA penalty assessment under § 309(g) also prevents EPA from seeking injunctive relief?

PARTIES TO THE PROCEEDING

United States, Appellant
State of New Union, Appellant/Appellee
Goldthumb Mining Co., Inc., Appellee

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STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995); *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). The appellate court's review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). *Jesinger*, 24 F.3d at 1130. 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 that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether the district court correctly applied the relevant substantive law. *Warren*, 58 F.3d at 441; *Jesinger*, 24 F.3d at 1130. The court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial. *Jesinger*, 24 F.3d at 1130.

JURISDICTIONAL STATEMENT

The United States District Court for the State of New Union entered a final judgment on July 15, 2002. The United States Court of Appeals for 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 in the United States District Court for the District of New Union. The Court granted summary judgment in favor of defendant Goldthumb Mining Co., Inc.

PROCEDURAL HISTORY

The United States brought an enforcement action under § 309 of the federal Clean Water Act, 33 U.S.C. §§ 1251, 1319 (the "CWA") on behalf of the Environmental Protection Agency ("EPA"), against Goldthumb Mining Co., Inc. ("Goldthumb") for discharges of polluted wastewater from its gold mining operation into the Arroyo d'Oro in the State of New Union. (R.1). New Union intervened in the action as a plaintiff under CWA § 505, 53 U.S.C. § 1365, but argued that EPA lacked jurisdiction to pursue its enforcement action under the CWA § 309(g) because New

Union had earlier taken enforcement action against Goldthumb for the same discharges. (R.1). Over Goldthumb's opposition, the Court granted New Union's motion to intervene. (R.3). Goldthumb filed a motion for summary judgment for lack of subject matter jurisdiction against both the United States and New Union on two grounds. (R.1).

First, Goldthumb argued that the CWA does not confer jurisdiction over discharges into the Arroyo d'Oro for two reasons: 1) the CWA exercises jurisdiction over discharges into "navigable waters" and its definition of "navigable waters" does not include the Arroyo d'Oro when it is dry; and 2) Congress lacks authority under the Constitution to exercise jurisdiction over discharges into the Arroyo d'Oro when it is dry. (R.1). New Union joined the United States in opposing the motion on these grounds. (R.1).

Second, Goldthumb argued that CWA § 309(g) deprives EPA jurisdiction under § 309 to enforce against violations when a state has already enforced against them. (R.1). New Union argued in support of Goldthumb on this part of its motion. (R.2). The United States opposed this part of the motion. (R.2).

The District Court granted Goldthumb's motion for summary judgment that its discharge of wastewater into the dry Arroyo d'Oro is not subject to the jurisdiction of CWA § 301(a) because the discharge was on dry land, which is not within the CWA's definition of navigable water. (R.11). The Court did not address Goldthumb's alternative grounds for summary judgment that such discharges are beyond Congress' jurisdiction under the Commerce Clause of the U.S. Constitution. (R.11). Alternatively, the Court granted Goldthumb's motion for summary judgment that EPA lacks jurisdiction to enforce against Goldthumb's alleged violation of CWA § 301(a), because CWA § 309(g) forecloses the agency's jurisdiction to enforce under § 309 and § 505 against a violation if the state has already enforced against the violation, and NUDEP has already enforced against the alleged violation. (R.11). Goldthumb asks this Court to affirm the decision of the district court.

STATEMENT OF THE FACTS

The Arroyo d'Oro, located in New Union, is normally a dry riverbed. (R.1). In fact, the Arroyo d'Oro is completely dry except after a major storm. (R.4). After heavy rain it is a flowing stream and on occasion flows from New Union into the State of Progress. (R.1). Goldthumb Mining Co., Inc. is a mining company that

mines gold in an uninhabited desert portion of New Union. (R.4). Goldthumb takes care to protect the environment by employing the most modern mining methods and is very efficient at recovering gold from ore. (R.4). Goldthumb collects wastewater from its gold mining operations in impermeable evaporation ponds, where the water evaporates and the sludge is removed and disposed of in a safe manner. (R.4).

Goldthumb discharges into the Arroyo d'Oro only when it is dry. (R.1). Rainfall at Goldthumb's operation has averaged less than two inches a year since measurements were made in the area, commencing in 1940. (R.4). On rare occasions, once every two or three years, rain causes liquid to collect in Goldthumb's evaporation ponds more quickly than it evaporates, thus threatening to overflow the sides of the ponds. (R.4). In order to prevent overflow, prior to the monsoon season, Goldthumb drains enough liquid from the pond into the Arroyo d'Oro to prevent all of the pond water and the contaminated sludge from flowing into the Arroyo. (R.4). EPA's investigation concluded that this only happened on three days in June of 1999, one day in July of 2000, and two days in July of 2002. (R.4).

On the rare occasions when there is a storm powerful enough to cause water in the Arroyo to run, it runs from Goldthumb's operation thirty-seven miles into Progress where it feeds into a permanent three-acre pool known as Greenhaven. (R.4-5). The only wildlife known to survive in Greenhaven is the Greenhaven Pupfish, which are currently listed as an endangered species under the federal Endangered Species Act. (R.5).

In April of 2000, the New Union Department of Environmental Protection ("NUDEP") issued an administrative order to Goldthumb, prohibiting it from discharging into the Arroyo when waters of the state are present, and prohibiting it from discharging into the Arroyo at any time without prior permission of the NUDEP. (R.5). In April of 2001, NUDEP issued a new administrative order to Goldthumb in similar terms to the earlier order. (R.5). NUDEP informed Goldthumb that it will issue a new administrative order similar to the earlier two orders. (R.5).

The EPA conceded that the Arroyo d'Oro has never been used for interstate commerce (R.7). Furthermore, EPA conceded that it is not a tributary of navigable water. (R.7). Lastly, the EPA conceded that the Arroyo d'Oro is not susceptible for use in interstate commerce even with feasible improvements. (R.7).

SUMMARY OF THE ARGUMENT

This court should affirm the district court's grant of summary judgment to Goldthumb Mining Co., Inc. First, the CWA's definition of navigable water found in CWA § 502, 33 U.S.C. §1362, does not include the Arroyo d'Oro when it is dry. The CWA allows for the regulation of the navigable waters of the United States, including the territorial seas. Even using the broadest possible interpretation of navigable waters, the dry desert bed of the Arroyo d'Oro simply is not navigable water, territorial sea, or even a water of the United States.

Second, Congress has no authority under the Commerce Clause to regulate dry waterbeds of interstate streams that are not navigable or tributaries of navigable water. Regulation of the Arroyo d'Oro is not a regulation of the use of the channels of interstate commerce, or a regulation of instrumentalities, or persons or things, in interstate commerce. It is also not a regulation of intrastate activity that substantially affects interstate commerce because it is not an economic activity, there is no express jurisdictional element in the CWA, and there is no direct link to interstate commerce. Therefore, Congress is not authorized by the Commerce Clause to regulate the Arroyo d'Oro when it is dry.

Next, enforcement by a state, regardless of whether the EPA approves their permit programs, precludes the EPA from enforcement under CWA § 309. To read a requirement into § 309(g) that only a state with an approved permit program precludes the EPA from enforcement would be directly contrary to the express language of the statute, prior EPA interpretation, and the stated policy goals of the CWA. Section 309(g) includes no requirement that a state that has taken enforcement action must first have its permit program approved by the EPA, nor is there such a requirement in the definition of "States" in 33 U.S.C. § 1362(3). Therefore, the district court correctly held that the EPA is precluded from enforcement against Goldthumb because the State of New Union has already brought a comparable enforcement action.

The district court did not err by holding that the state does not need to enforce with comparable authority to the CWA to prevent EPA action. The CWA prevents the EPA from acting when the state is acting with comparable authority, but the authority exercised does not have to compare with the CWA in every enforcement action. The ability of the state to use the same authority is all that is needed to bar EPA action when the state is

effectively controlling the pollution. Further, the interpretation of comparability is a question of law. The district court is not obligated to defer to the EPA's interpretation of comparability. The district court properly determined that the pollution is under control, and therefore, the state did not need to enforce with comparable authority to the CWA.

Finally, the district court did not err in holding that the bar on civil penalties also works to bar the EPA from seeking injunctive relief. The intent of the CWA is to protect the primary enforcer status of a state actor or the EPA where appropriate. New Union is the primary enforcer in this case and is taking the appropriate steps to resolve the problem; therefore, New Union should be free from unnecessary or duplicative action by the EPA. Numerous court holdings support the district courts interpretation that the provision barring citizens seeking civil penalties also bars the use of injunctive relief. Injunctive relief in this case would unnecessarily disrupt the cooperative nature of the CWA in allowing state actors to remedy pollution problems without undue interference from the EPA.

ARGUMENT

I. THE CLEAN WATER ACT'S DEFINITION OF NAVIGABLE WATER FOUND IN CWA § 502, 33 U.S.C. § 1362, DOES NOT INCLUDE THE ARROYO D'ORO WHEN IT IS DRY

The Clean Water Act's definition of navigable water is found in CWA § 502, 33 U.S.C. § 1362. This definition does not include the Arroyo d'Oro when it is dry. CWA § 502(7), 33 U.S.C. § 1362(7) regulates "navigable waters" defined as "the waters of the United States, including the territorial seas." Congress granted the EPA authority to implement and interpret the CWA. 33 U.S.C. § 1251(d). The court below correctly found that the CWA exercises jurisdiction only over discharges into "navigable waters" and its definition of "navigable waters" does not include the Arroyo d'Oro when it is dry. (R.8).

The lower court addressed this question and correctly rested its decision on the belief that the Arroyo d'Oro does not fall within the EPA's regulatory definition of "navigable waters" when it is dry. (R.7). The EPA interprets the CWA's definition of "navigable water" broadly to include, "[A]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams) . . . the use

degradation, or destruction of which would affect or could affect interstate or foreign commerce.. . ." 40 C.F.R. § 122.2 (2001).

The court below held that EPA's inclusion of intermittent bodies of water within its definition of navigable waters means that they are navigable waters only when they are bodies of water, not when they are dry land. (R.8). Therefore, the Arroyo d'Oro, as a dry riverbed, does not fall within the EPA's definition of "navigable waters." Whether Goldthumb violated and will continue to violate the CWA thus depends on whether this court affirms the decision of the lower court. This court should affirm the district court's holding and not extend CWA jurisdiction to a dry arroyo.

A. The Arroyo d'Oro is outside the CWA's definition of navigable water

It is important to begin any analysis of a statute with the "familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, (1980). Therefore, the EPA's jurisdiction under the CWA does not attach unless the Arroyo d'Oro is a water of the United States.

The Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 171-172 (2001) held that there had to be some indicia of navigability for water to be considered navigable. In *Solid Waste Agency*, the Court was dealing with permanent bodies of water. In contrast, the Arroyo d'Oro is a bone-dry desert most of the time and wet only a few times a year. (R.7). As the court below stated, "it boggles the imagination to say that bone-dry desert is water, let alone navigable." (R.7).

The Supreme Court noted that the CWA usage of "navigable Waters" is broader than "the classical understanding of that term." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, (1985). In *Riverside Bayview*, the Supreme Court held that intermittent swamps are within the definition of navigable water when they are adjacent to navigable waters, but it did not address whether they are within the definition of navigable waters when they are dry, as opposed to when they are wet. In our case, the Arroyo d'Oro is dry. Furthermore, the EPA concedes that the Arroyo d'Oro is not a tributary of navigable water. (R.7). Additionally, the Court in *Riverside Bayview* noted that the term

"navigable" is of "limited import." *Id.* at 133, 106 S.Ct. 455. However, the Court did not express an opinion on whether the Corps had authority to regulate wetlands not adjacent to open water. In *Solid Waste Agency,* the Court held that the CWA statute's text will not allow extension of the Corps' jurisdiction to isolated wetlands. 531 U.S.159, 172.

Significant nexus between wetlands and "navigable waters" in *Riverside Bayview* was not present in *Solid Waste Agency* because the ponds were not adjacent to open water. The text of the statute does not allow this. Similarly, in our case, there is no nexus between any wetlands and "navigable waters." Therefore, applying the ruling in *Solid Waste Agency*, the court must hold that the text of the statute does not allow the EPA to have jurisdiction over the Arroyo d'Oro under the CWA's definition of navigable waters.

B. Dry riverbeds of intermittent streams do not have waters that flow into public waters

The question before this court is whether the Arroyo d'Oro is within the EPA's regulatory definition of "waters of the United States" when the Arroyo d'Oro is dry. Goldthumb discharges its liquid to the Arroyo only when it is dry and it not a waterway at all. (R.7). The enforcement action the EPA brought against Goldthumb shows that the EPA interprets "navigable water" to include the Arroyo d'Oro, even when it is dry. (R.7).

The court below correctly held that EPA's inclusion of intermittent bodies of water within its definition of navigable waters means that they are navigable waters only when they are bodies of water, not when they are dry land. (R.8).

In its regulations, the EPA defines "waters of the United States" to include "intermittent streams." 40 C.F.R. § 122.2 (2001). In *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975), the court found that the EPA had jurisdiction over "any waterway, including normally dry arroyos." However, the EPA's regulation and case law do not indicate whether intermittent streams are navigable when they are dry or only when they are wet. In *Phelps*, the court went on to say that the scope of the Act extends to "normally dry arroyos through which water may flow, where such water will ultimately end up in public waters". *Id.* at 1187. In order for water to flow and ultimately end up in public water, it would be necessary for water to be present in the arroyo. This would lead to the conclusion that the court in

Phelps meant that the scope of the Act extends to normally dry arroyos when there is water present. According to our facts, the Arroyo d'Oro is completely dry except after a major storm. (R.4). After a storm, water runs in the Arroyo for a few days. (R.1). When there is water is the Arroyo d'Oro, Goldthumb does not discharge. (R.1).

A major storm would cause Goldthumb's evaporation ponds to fill more quickly then liquid can evaporate, thus threatening to overflow the sides of the ponds. (R.4). Discharge into the Arroyo d'Oro happens only when, in anticipation of major storm, while still dry, Goldthumb must drain enough liquid from the pond through a series of pipes into the Arroyo d'Oro to maintain freeboard during the rainy season. (R.4). An occasion like this is rare, happening only once every two to three years. (R.4) Those characteristics would make Goldthumb's evaporation pond discharge into the Arroyo d'Oro comparable to the isolated ponds that the court considered in *Solid Waste Agency*. When the Arroyo d'Oro is dry, the evaporation ponds Goldthumb discharges into are not navigable. The court in *Solid Waste Agency* concluded that the ponds relevant to that case were not navigable. 121 S.Ct at 172. The court in that case held that isolated ponds were not subject to the jurisdiction of the Corps' jurisdiction under the CWA. 121 S.Ct. at 162.

In conclusion, the lower court correctly held that the Arroyo d'Oro does not fall within the EPA's definition of "navigable waters" when its dry.

II. CONGRESS HAS NO AUTHORITY UNDER THE COMMERCE CLAUSE TO REGULATE DRY WATERBEDS OF INTERSTATE STREAMS THAT ARE NOT NAVIGABLE OR TRIBUTARIES OF NAVIGABLE WATERS

Congress lacks authority under the Commerce Clause to regulate dry interstate waterways. The lower court did not need to address this constitutional question because it correctly held that the Arroyo d'Oro does not fall within the CWA's definition of "navigable waters" when it is dry. (R.7). However, if this court finds that the Arroyo d'Oro is a "navigable water" within EPA's regulations, it must then ask whether the Commerce Clause gives Congress the authority to exercise jurisdiction over the Arroyo d'Oro when it is dry. The answer is clearly no.

Any discussion of the scope of the Commerce Clause should begin with the "first principles." *See U.S. v. Lopez,* 514 U.S. 549, 551 (1995). First, the Constitution created a government of enumerated powers. *Id.* (citing Art. I, § 8). "The powers delegated by the . . . Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Id.* (quoting James Madison, The Federalist, No. 45, pp. 292-293 (C. Rossiter ed. 1961)).

The Constitution grants Congress the power to "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.* (citing Art. I, § 8, cl. 3). The power granted by the Commerce Clause "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution." *Id.* at 555 (quoting *Gibbons v. Ogden,* 9 Wheat. 1, 196 (1824)). Despite this broad grant of power, the Supreme Court has recognized that "limitations on the commerce power are inherent in the very language of the Commerce Clause." *Id.*

In *Lopez*, the Court identified three broad categories of activity that Congress has the power to regulate under the Commerce Clause. 514 U.S. at 558. First, Congress may regulate the use of the channels of interstate commerce. *Id.* Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things, in interstate commerce. *Id.* Third, Congress' commerce authority includes the power to regulate those activities that substantially affect interstate commerce. *Id.* at 559. Congress lacks authority to regulate the Arroyo d'Oro because it does not implicate any of the three categories identified by the Court in *Lopez*. It does not involve the "use of the channels of interstate commerce," regulate an instrumentality or thing in interstate commerce, or have a substantial affect on interstate commerce.

A. Dry Riverbeds of Intermittent Streams do not involve the "use of the channels of interstate commerce"

Congress' power to regulate commerce includes the power over navigation. *U.S. v. Appalachian Power,* 311 U.S. 377, 404 (1940), *rehearing denied,* 312 U.S. 712 (1941) (citing *Gibbons,* 9 Wheat. at 189). The sovereign power of the United States includes the right to use its waterways in the interest of national commerce. *Id.* at 405. The sole question to determine constitutionality is whether the waterway is navigable or is susceptible to

navigability with reasonable improvements. *Id.* at 404-6. The EPA's definition of navigable waters is irrelevant.

It is not necessary for a determination of navigability that the use be continuous (*Id.* at 409), but there must be at least "some traffic" in order for the court to find that the waterway is navigable. *Id.* at 410 (citing *U.S. v. Utah,* 283 U.S. 64, 82 (1931) (holding that "small traffic compared to the available commerce of the region is sufficient.")) For example, the Court has upheld Congress' jurisdiction over the nation's waterways when the commerce involved was the mere floating of logs. *Id.* at 405.

In this case, the EPA concedes that the Arroyo d'Oro has never been used for interstate commerce. (R.7). The Arroyo d'Oro flows only every two or three years after a major storm and has averaged less than two inches of rainfall a year since measurements commenced in 1940 (R.4). Thus, it would be impossible for it to be used for any commerce, let alone *interstate* commerce. Therefore, it is not navigable within the traditional meaning of the term (i.e. used in commerce). Furthermore, EPA concedes that it is not a tributary of a navigable water. (R.7).

"Navigable waters" also includes waterways that are susceptible to use in their "natural or ordinary conditions" with reasonable improvements. *Id.* at 407-8. "Natural or ordinary conditions" refers to the volume of water, the gradient of the stream, and the regularity of the flow. *Id.* at 407. These factors do not apply to this case since the EPA conceded that the Arroyo d'Oro it is not susceptible for use in interstate commerce even with feasible improvements. (R.7). Because the Arroyo d'Oro is not navigable or a tributary of a navigable water, or susceptible to use with reasonable improvements, EPA's regulation of it does not involve the use of the channels of interstate commerce. Thus, Congress lacks jurisdiction over the Arroyo d'Oro.

B. Dry riverbeds of intermittent streams do not involve instrumentalities of interstate commerce

The Commerce Clause grants Congress the authority to regulate and protect the instrumentalities, or persons or things, in interstate commerce. *Lopez,* 514 U.S. at 558. In *United States v. Pozsgai,* the court held that regulation of pollution of wetlands adjacent to navigable waters is not a regulation of an instrumentality of interstate commerce. 999 F.2d 719, 734 (3d Cir. 1993). If regulation of wetlands adjacent to navigable waters is not a regulation of an instrumentality of commerce, clearly regulation of a

dry waterbed that is not a tributary of a navigable water is not as well.

C. Dry riverbeds of intermittent streams have no "affect on interstate commerce"

In addition to power over the use of the channels of interstate commerce (i.e. navigable waters) and persons or things in interstate commerce, Congress' grant of power from the Commerce Clause is broad enough to permit regulation of air and water pollution "that may have effects in more than one state." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 282 (1981). In *Lopez*, the Supreme Court clarified the traditional "effects" test by requiring that the regulation "substantially affects interstate commerce." 514 U.S. at 559.

The Court identified four factors in *Lopez* that courts must consider in order to find a substantial affect on interstate commerce. *Id.* at 559-567. Activities substantially affect interstate commerce if: (1) they are economic in nature; (2) the statute contains a jurisdictional element limiting the statute's reach to conduct that has "an explicit connection with or effect on interstate commerce"; (3) there are Congressional findings that the activity in question substantially affects interstate commerce; and (4) the asserted connection to interstate commerce must not be so attenuated as to threaten the constitutional principles. *Id. See also U.S. v. Morrison,* 529 U.S. 598, 610-613 (2000). Applying the four factors from *Lopez,* there is no substantial affect on interstate commerce as a result of the EPA's regulation of the Arroyo d'Oro when it is dry.

1. The EPA's regulation of the Arroyo d'Oro when it is dry is not regulation of an economic activity

First, as the Supreme Court made clear in *Lopez* and emphasized again in *Morrison,* only regulation of intrastate activity that is economic in nature will be upheld by the Court. *Lopez,* 514 U.S. at 559; *Morrison,* 529 U.S. at 610. EPA's regulation of a dry riverbed, which flows only every two or three years after a major storm and averages less than two inches of rainfall a year since measurements commenced in 1940 (R.4), in no way regulates activity that is economic or commercial.

While it is true that Goldthumb's mining operation is a commercial business, this does not make the regulation of discharge into the Arroyo d'Oro economic activity. Under normal conditions,

Goldthumb operates without discharging any pollutants into the Arroyo d'Oro. Goldthumb collects wastewater from its gold mining operations in impermeable evaporation ponds, where the water evaporates and the sludge is removed and disposed of in a safe manner. (R.4). During heavy rains, which occur only two or three times a year, Goldthumb must drain some liquid from the ponds in order to prevent overflow of all the wastewater into the Arroyo d'Oro. (R.4). Goldthumb's discharge, which the State of New Union allows (R.5), is not related to its economic activity. Rather, it is an emergency procedure conducted in order to protect the environment from greater harm. If any connection to its economic activity could be found it would be so attenuated that it would fail the fourth prong of the *Lopez* test as discussed below.

2. The Clean Water Act (CWA) does not contain an express jurisdictional element

The second factor is whether there is an express jurisdictional element, which limits the statute's reach to activities that have "an explicit connection with or effect on interstate commerce." *Lopez,* 514 U.S. at 562. The Clean Water Act ("CWA") contains no such jurisdictional element. As the Supreme Court has stated, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id.* at 562 (quoting *U.S. v. Bass,* 404 U.S. 336 (1971)). While subsection (c) of EPA's regulations do have an "express jurisdiction element" limiting the regulation of intrastate waters to conduct having an "explicit connection with or effect on interstate commerce" ("Waters of the United States means: . . . (c) All other waters . . . which would affect or could affect interstate or foreign commerce." 40 C.F.R. § 122.2), the CWA does not.

In the CWA, Congress prohibited the discharge of pollutants into navigable waters. 33 U.S.C. §1311(a). Congress defined "navigable water" in the CWA to mean "waters of the United States." 33 U.S.C. § 1362. Congress did not define "waters of the United States." Even if this court determined that the EPA's regulation is sufficient to meet the requirement of an express jurisdictional element, that alone does not make the regulation of the Arroyo d'Oro constitutional. There still must be "the requisite nexus to interstate commerce." *Lopez,* 514 at 562. The Arroyo d'Oro, whether considered an interstate or intrastate waterway, because it is dry — does not affect interstate commerce.

3. There are no express congressional findings that regulation of dry waterways affects interstate commerce

Third, the Court will consider whether there are congressional findings regarding the effect on interstate commerce of the regulated activity. *Lopez,* 514 U.S. at 562. While Congress is not normally required to make such findings, if Congress did find a substantial affect on interstate commerce, it may help the court evaluate whether there actually is an effect on interstate commerce. *Id.* The legislative history of the Clean Water Act states that Congress intended to regulate water pollution to the full extent of the Commerce Clause. S. CONF. REP. NO. 92-1236, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3776, 3822. When promulgating the CWA, Congress made no findings that water pollution in dry waterways affects interstate commerce. Even if there were legislative findings, as the Court made clear in *Morrison,* "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." 529 U.S. at 614.

4. There is no direct link between the regulation of a dry waterbed and interstate commerce

Finally, the Supreme Court held in *Lopez* that the asserted connection to interstate commerce must not be so attenuated as to threaten the constitutional principle of enumerated powers. *Id.* at 613 and 615. EPA's regulation of a dry waterbed in the State of New Union, if any connection to interstate commerce could be found, would be so attenuated as to exceed the limits of the Commerce Clause.

In *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers ("SWANCC"),* the Court was asked to decide whether the Corps' Migratory Bird Rule was constitutional under the Commerce Clause. 531 U.S. 159, 160 (2001). While the Court did not reach the constitutional question because it disposed of the case based on the regulatory definition of navigable waters, Justice Stevens (dissenting) stated that birdwatching was a commercial activity of great value and would have upheld the Rule under the Commerce Clause. *Id.* at 194-95.

In our case, there is no similar link to recreational activities that arguably could be considered economic activity or commerce. As stated previously, the Arroyo d'Oro itself is usually dry. Dur-

ing heavy storms, which occur only once every two or three years, the Arroyo does flow thirty-seven miles into Progress and feeds into a permanent three-acre pool known as Greenhaven. (R.4-5). The only wildlife known to survive in Greenhaven is the Greenhaven Pupfish, which are currently listed as an endangered species under the federal Endangered Species Act. (R.5). Unlike the facts in *Solid Waste Agency,* there is no documented recreational activities at Greenhaven that could be linked to interstate commerce or have an aggregate affect on interstate commerce.

In conclusion, regulation of the Arroyo d'Oro is not a regulation of the use of the channels of interstate commerce, or a regulation of instrumentalities, or persons or things, in interstate commerce. It is also not a regulation of intrastate activity that substantially affects interstate commerce because it is not an economic activity, there is no express jurisdictional element in the CWA, and there is no direct link to interstate commerce. Therefore, Congress is not authorized by the Commerce Clause to regulate the Arroyo d'Oro when it is dry.

III. ENFORCEMENT BY A STATE, REGARDLESS OF WHETHER THE EPA APPROVES THEIR PERMIT PROGRAM, PRECLUDES THE EPA FROM ENFORCEMENT UNDER CWA § 309 (g)

The lower court correctly held that the EPA's enforcement action against Respondent under § 309(g) of the CWA is precluded because the State of New Union has already taken enforcement action against Goldthumb. Section 309(g)(6)(A)(ii) plainly states that if "a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection . . ." the violator shall not be subject to a civil penalty under subsection (d) of this title. 33 U.S.C. § 1319(g)(6)(A)(ii).

The CWA includes no requirement that a state permit program must be certified by the EPA under § 402 for it to be a comparable law under §309(g); nor has any court that Respondent could identify interpreted § 309(g) to include such a requirement. In *North & South Rivers Watershed Assoc., Inc. v. Scituate,* the EPA attempted to make the argument that in order for a state law to be comparable under § 309(g), it must have been certified by the EPA under § 402. 949 F.2d 552, 556 n. 8 (1992). However, the court did not address the EPA's claim because the parties below did not raise it. *Id.*

In this case, the New Union Department of Environmental Protection ("NUDEP") issued an Administrative Order to Goldthumb in April of 2000. (R.5). The Administrative Order prohibits Goldthumb from discharging in the Arroyo d'Oro when waters of the state are present, and requires Goldthumb to obtain permission from NUDEP from discharging into the Arroyo d'Oro at any time. (R.5). If Petitioner is allowed to read a requirement into § 309(g) that the comparable state law be part of a permit program approved by the EPA, it would be inconsistent with the wording and structure of the statute, prior EPA interpretations, and the legislative intent of the Clean Water Act ("CWA").

A. Interpreting § 309(g) of the CWA to include a requirement that the state have an approved permit program is inconsistent with the wording and structure of the act

First, Congress defined "State" in the CWA to mean all states. 33 U.S.C. § 1362(3) ("The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.") Congress did not limit the meaning of "States" only to those states with approved programs. As the district court stated, Congress knows how to vary the meaning of general definitions (e.g. modifying the definition of "person" in § 502(3) to include responsible corporate officers for the purposes of § 309(c)). (R.9). When Congress defined "State" in the CWA, it chose not to limit the definition.

B. Interpreting § 309(g) of the CWA to include a requirement that the State have an approved permit program is inconsistent with the EPA's past interpretation as evidenced by its regulatory definition of States

Second, the EPA adopted a similar general definition of "State" in its regulations. 40 C.F.R. § 122.2. The EPA's regulation is even more specific than the definition in 33 U.S.C. § 1362(3). The EPA defined "state" to mean "*any of the 50 states*, the District of Columbia, Guam, the Commonwealth of Puerto Rico. . ." *Id.* (emphasis added). For the EPA to now argue that the statute is limited only to states with approved permit programs is inconsistent with its prior interpretation of the CWA as expressed in its regulations. There is no question that when the EPA defined "State" to include "any of the 50 states," they intended the

statute to apply to all states regardless of whether it had an approved permit program. This interpretation is reinforced by the fact that at the time the EPA adopted 40 CFR § 122.2 in 1980, not all 50 states had an approved permit program.

New Union is a state within Congress and the EPA's definition of "State." Regardless of whether its program is approved by the EPA, its enforcement actions carry the same force and effect as other states with approved programs. (R.10). As a result, New Union's enforcement actions preclude the EPA from enforcing against Goldthumb Mining under § 309(g) of the CWA.

C. Interpreting § 309(g) of the CWA to include a requirement that the State have an approved permit program is inconsistent with the legislative intent of the CWA

Finally, construing the statute in terms of its plain meaning to include all states, whether or not their permit program is approved by the EPA, is consistent with Congress' stated policy goal "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). Specifically with respect to enforcement, Congress intended for states to have primary enforcement responsibility:

> The Committee does not intend that this jurisdiction of the Federal government so supplant state enforcement. Rather the Committee intends that the enforcement power of the Federal government is available in cases where States . . . are not acting expeditiously and vigorously to enforce control requirements.
>
> The Committee intends the great volume of enforcement actions be brought by the state. It is clear that the Administrator is not to establish an enforcement bureaucracy but rather to reserve his authority for the cases of paramount interest.

S. REP. NO. 92-414, at 73-74 (1972).

In sum, for this court to read a requirement into § 309(g) that only a state with an approved permit program precludes the EPA from enforcement would be directly contrary to the express language of the statute, prior EPA interpretation, and the stated policy goals of the CWA. Section 309(g) includes no requirement that a state that has taken enforcement action must first have its permit program approved by the EPA, nor is there such a requirement in the definition of "States" in 33 U.S.C. § 1362(3). Therefore, the district court correctly held that the EPA is pre-

cluded from enforcement against Goldthumb because the State of New Union has already brought its own enforcement action.

IV. A STATE NEED NOT ENFORCE WITH COMPARABLE AUTHORITY AS LONG AS THE OVERALL INTENT OF THE ACTION IS THE SAME AS THE CWA IN CURTAILING THE POLLUTION VIOLATION

The district court did not err in holding that a state need not enforce pollution control laws using comparable authority to CWA § 309(g) in order to prevent EPA enforcement of the CWA. The district court properly determined that the CWA's intent is to keep the state the primary enforcer, and that allowing the EPA to assess penalties in this proceeding violates that intent. The EPA's determination of when it could assess penalties is only entitled to respect by the district court, and the court had the discretion not to follow the EPA's interpretation.

A. The CWA limits agency action when a State is enforcing with 'comparable' authority

The CWA bars EPA enforcement action when a state is acting with comparable authority to correct pollution problems. Section 1319(g)(6)(ii) states that the Administrator's authority to enforce any provision of the act is limited when "a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection." The law is designed to allow a primary enforcer to stop the pollution problem without unnecessary influence or duplicity of enforcement. *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376, 382 (8th Cir 1994).

The district court properly determined that the comparable requirements of the statutes and authority bar EPA enforcement. The term comparable does not mean identical. *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428 (Dis. Co. 1993). The law must to contain:

> comparable penalty provisions which the state is authorized to enforce, [have] the same overall enforcement goals as the federal CWA, provide interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their legitimate substantive interests.

Arkansas Wildlife, 29 F.3d at 381. In *Arkansas Wildlife*, the court also writes that states are afforded some latitude in selecting the specific mechanisms of their enforcement program without losing the comparable quality to the federal statutes. *Id.* at 380. Finally, the statutes are comparable when their overall scheme is aimed at correcting the same violations. *North & South Rivers Watershed Assoc., Inc. v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1993).

The district court determined that the statutes of the CWA and NUDEP are virtually identical. (R.6). The district court also found that the enforcement action has been effective in controlling Goldthumb's actions. (R.11). The pollution violations that the EPA is concerned with are virtually eliminated by the comparable actions of the state program. It is clear by the findings of the district court that the statutes are comparable because the two statutes are aimed at alleviating the same pollution problems, are effective in enforcement, and have the same overall schemes. As the district stated, "this is exactly the intent of the 309(g) preclusion." (R.11).

In conclusion, the district court is correct in determining that New Union need not enforce using authority comparable to the CWA. There exists some leniency in how the state chooses to enforce pollution regulations so long as the overall scheme maintains the intent of the CWA. The intent of the two statutes is to stop pollution using the same type of enforcement procedures, and therefore, the two statutes are of comparable nature thus meeting the criteria of § 1319(g).

B. The district court is not obligated to follow the agency interpretation of comparable in this case

The interpretation of "comparable" by the EPA does not warrant deference in this case. The Supreme Court has articulated when to defer to agency interpretations of statutes. The first question that the court must determine is what type of issue is to be decided. In this case, the interpretation of the statute is a question of law. The Supreme Court holds that when the issue involves a question of law that the agency's interpretation does not warrant deference on the matter. *NLRB v. Hearst*, 322 U.S. 111, 120 (1944). However, the Court also reasoned that although questions of law are for the courts, the agency interpretation is subject to some amount of respect. *Christensen v. Harris County*, 529 U.S. 576, 586 (2000). The appropriate amount of respect given to an agency interpretation hinges on the thoroughness of

the consideration given to the matter, the validity of the reasoning, and "all factors which give it the power to persuade, if lacking power to control." *Skidmore v. Swift & Co*, 323 U.S. 134, 140 (1944). This case presents a situation in which the agency interpretation does not have the power to persuade, and therefore, the district court's decision that the statutes are comparable warrants upholding by this court.

The agency interpretation has the power to persuade when it comports with the policy and objectives of the statute. Just as courts are required to do, agencies should construe the statute's language by looking to the provisions of the whole law and to its objectives and policy. *Dole v. United Steelworkers*, 494 U.S. 26 (1990). Additionally, the case may warrant examining the legislative history in order to determine the intended policies and objectives. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 US 102 (1980).

The legislative history, however, is an area to which courts should be mindful of its limited uses. Two Justices have written on the subject and come to different conclusions. Justice Scalia points out for courts to be mindful of the changing nature of legislative history in that the content may not be helpful because of the lack of member participation in the debates. *A Matter of Interpretation*, (Amy Gutmann & Gordon S. Wood eds., 1996). As a counterpoint, Justice Breyer maintains that legislative history is important in five situations. The relevant situation in this case "is to avoid an absurd result." *On the Uses of Legislative History in Interpreting Statutes*, 65 S. Cal. L. Rev. 845 (1992). The absurd result that he urges to avoid is apparent upon review of the facts of this case.

The district court determined that the enforcement by New Union has been effective in solving the problem. (R.1). Goldthumb is not allowing highly or even lightly contaminated materials to flow into the Arroyo. (R.11). New Union does issue permits for Goldthumb to release contaminated materials; however, the contaminants do not enter the waters of the state and only occur when an inspector is on site to monitor the process. (R.5). New Union plans to issue further administrative orders to monitor and control the effects of the actions of Goldthumb. (R.5). These actions by New Union are controlling the problem effectively. (R.11).

The district court's determination to not allow the EPA to assess penalties on Goldthumb avoided an absurd result that the

EPA's interpretation of the statute would create. The EPA's interpretation disrupts the intent of the CWA by disturbing the states' position as the primary enforcer of pollution violations. The states' position as primary enforcer is found in the CWA text, legislative history, and interpretive cases.

The text of the CWA could not provide a clearer statement that states are the primary enforcer of pollution violations. Section 1251 specifically 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 Act.

33 U.S.C. § 1251. In addition to Section 1251, the Senate House Committee notes announce that the

> Committee does not intend that this jurisdiction of the Federal government so supplant state enforcement. Rather the Committee intends that the enforcement power of the Federal government is available in cases where States. . .. are not acting expeditiously and vigorously to enforce control requirements.
>
> The Committee intends the great volume of enforcement actions be brought by the state. It is clear that the Administrator is not to establish an enforcement bureaucracy but rather to reserve his authority for the cases of paramount interest.

S. Rep. No. 92-414, at 73-73 (1972), *reprinted in* Legislative History of the Clean Water Act, at 1481-82 (1973). These notes give radical insight to the meaning of the statute itself because they shed light onto the reason that the law was enacted. As Justice Scalia points, the reason for the law is its soul and if the reasons change, then the law does as well. *Judicial Deference to Agency Interpretations of Law*, 1989 Duke L.J. 511 (1989). Courts are to strive to give effect to the reasons for the statute when deciding the meaning of the statutory language. Even further the Supreme Court accepts the proposition that states are to be the primary enforcer of pollution violations. *Gwaltney*, 484 U.S. at 60.

The EPA's interpretation causes an absurd result that Justice Breyer says to avoid. The EPA's action in assessing penalties on Goldthumb displaces New Union's status as the primary enforcer of pollution violations which would contravene the intent and pur-

pose of the CWA. The EPA contended below that the criteria of 'comparable authority' allows for the assessment of penalties in this case. The EPA asserts that the authority of New Union in enforcing the pollution measures did not match the authority possessed by the EPA. This argument fails as prior case law holds that the comparability requirement is found in situations that are identical to the case at hand, and as such New Union should remain the primary enforcer.

In summary, the district court is not bound by the EPA's interpretation of the CWA. The interpretation merely had the power to persuade; however, in this case, the power to persuade was lacking. Allowing the penalties in this case would have abrogated the intent of the statute and created an absurd result of allowing the EPA to displace New Union as the primary enforcer of pollution violations.

V. THE EPA IS BARRED FROM SEEKING INJUNCTIVE RELIEF BECAUSE NEW UNION IS THE PRIMARY ENFORCER AND IS TAKING APPROPRIATE ENFORCEMENT ACTIONS

The CWA precludes the EPA from seeking injunctive relief when a state has commenced an action and is working to solve the alleged problem. The statutory scheme of precluding civil penalties when a state is acting to enforce pollution regulations also works to bar injunctive relief. Additionally, the CWA places restrictions on injunctive relief that are not met in this case.

A. The intent of the CWA to keep the State as the primary enforcer bars the EPA's use of injunctive relief

The EPA is precluded from acting to correct pollution violations if a state is acting to curtail the pollution problem. Section 1319(g)(6)(A)(ii) of the CWA states that:

> 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 the chapter; except that any violation with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection 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.

This section of the CWA curtails the agency's ability to act when a state is alleviating the problem. The section specifically sets out the mandate to bar the agency from seeking civil penalties against the alleged violators.

Section 1319(d) allows the EPA to seek civil penalties to deter polluters from further action. Within this section, the details for the use of civil penalties and the classification are given. However, the civil penalties section does not include injunctive relief.

Injunctive relief is found in a separate subsection. Section 1319(b) details the agency's ability to bring a civil action. Within the civil action provision, the agency administrator is authorized:

> to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section.

33 U.S.C. § 1319(b). The plain text of the statute separates the use of civil penalties and civil actions that include injunctive relief; however, numerous courts are not persuaded by the plain text argument that the bar for civil penalties should not bar injunctive relief.

1. Numerous courts hold that the provision barring citizens seeking civil penalties also bars the use of injunctive relief

The CWA allows citizens to seek enforcement against pollution violators. The enforcement is limited to when the EPA or states are acting to curtail the pollution violation. Numerous courts hold that the bar found in citizen suits against seeking penalties also bars injunctive relief. As the District Court stated, "the same provisions of § 309(g), indeed the very words of § 309(g), barring the citizen suit in *Scituate* also bar EPA actions. The same words cannot mean one thing when applied to citizen suits and another when applied to EPA actions, unless Congress explicitly indicated so, and it did not." (R.10).

In *Scituate*, the court held that citizens are barred from seeking penalties and injunctive relief when a primary enforcer is acting. 949 F.2d 552 at 558. The court's concern in this case is that the literal interpretation of the statute leads to an "absurd result" by displacing the government, who is the primary enforcer. *Id.* at 558. The U.S. Supreme Court instructs courts in this situation to

"strive to provide an alternative meaning that avoids the irrational consequence." *Id.* at 558, quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989)(Scalia, J., concurring). The concurrence in *Scituate* further solidifies the argument. Judge Selya points out that the "vagaries of draftsmanship" should not destroy the uniformity of the federal law." *Id.* at 559. Other courts follow this rational.

The court in *Arkansas Wildlife* agrees with the court in *Scituate*. 29 F.3d 376 at 382. In the present case, the state is prosecuting, but the EPA wants to interfere much like the citizens in *Arkansas Wildlife*. In *Arkansas Wildlife*, the court states that "Allowing suits for declaratory and injunctive relief in federal courts, despite a state's diligent efforts at administrative enforcement, could result in undue interference with, or unnecessary duplication of the legitimate efforts of the state agency." *Id.* at 382. The court calls this result "unreasonable" because it "would undermine, rather than promote, the goals of the CWA, and is not the intent of Congress." *Id.* at 382.

These cases fit directly with the issue of this case. The district court determined that the state is the primary enforcer and that the EPA is merely a supplemental enforcer. (R.10). The district court stated, just as the cases point out, that all of § 309(g) should be interpreted with this scheme of keeping the primary enforcer free of unnecessary interference. (R.10). The enforcement action by New Union is working. (R.11). The action has been affective in controlling Goldthumb's actions to assure that the contaminated material does not overflow into the Arroyo d'Oro and that Goldthumb does not release even small amounts of lightly contaminated materials when the Arroyo d'Oro is flowing. (R.11).

The district court, the First Circuit, and the Eight Circuit are correct in determining that both civil penalties as well as injunctive relief are barred when a primary enforcer is acting to curtail pollution. To read the statute another way would lead to the absurd or unreasonable result of allowing the state to be forced out of its primary enforcer status. Further support for this contention is found when §1319(g) is read in conjunction with § 1215. Section 1215 recognizes that states are the primary enforcer of pollution regulations. 33 U.S.C. § 1251. The resulting conclusion to read the state as the primary enforcer and then severe the status would indeed be the unreasonable or absurd result that the courts sought to avoid.

2. The Supreme Court has not addressed the issue directly; therefore, the interpretation remains unsettled

The Supreme Court has not made a definitive interpretation on the issue whether the bar on civil penalties also bars injunctive relief when the EPA wants to enforce in conjunction with state enforcement action. The Court has, however, recognized the separate nature of injunctive relief and civil penalties.

In *Gwaltney*, the Supreme Court recognizes that civil penalties and injunctive relief stem from two different sections of the CWA. 484 U.S. 49. The Court noted that:

> Section 1319 § 309 does not intertwine equitable relief with the imposition of civil penalties. Instead each kind of relief is separately authorized in a separate and distinct statutory provision. Subsection (b), providing injunctive relief, is independent of subsection (d), which provides only for civil penalties.

Gwaltney at 58,quoting *Tull v. U.S.*, 481 U.S. 412, 425 (1987). The distinction pointed out in *Gwaltney* has no bearing on the issue in this case for two reasons.

First, the distinction as pointed out is only dicta of the court and does not address the exact holding of the *Gwaltney* decision. The Supreme Court states that dictum bears no authority in terms of its precedential value. *City of Elkhart v. Brooks*, 532 U.S. 1058, 1059 (2001); *Aron v. U.S.*, 291 F.3d 708, 717 (11th Cir. 2002). This statement cannot bear the burden to determine the outcome in the present case. The distinction is apparent in the statute between civil penalties and injunctive relief; however, in the context of this case, the interpretation remains unsettled, as *Gwaltney* was not addressing the bar of EPA actions when a state is enforcing.

The distinction in the *Gwaltney* case fails to provide guidance in this case for a second reason. 484 U.S. 49. The *Gwaltney* Court relied on a statement made in *Tull v. U.S.*, 481 U.S. 412, to show the distinct character of the sections containing injunctive relief and civil penalties. For the purposes of *Tull*, the distinction is very important because the issue before the court is whether the causes of action needed separation to determine the need for a jury trial for imposition of civil penalties and injunctive relief. The Court is entirely unconcerned with whether or not §1319(g) bars civil penalties *and* injunctive relief. The Court was only trying to distinguish between equitable relief and legal remedies.

In summary, the Court has distinguished between civil penalties and injunctive relief. The distinction, however, has not been used to address specifically whether injunctive relief remains in the EPA's power to use if a state is commencing an action as found in § 1319(g)(6). The issue remains unsettled; therefore, this court should follow the holding of the district court's determination that both civil penalties and injunctive relief are barred.

B. The use of injunctive relief is subject to additional criteria of which bars the EPA from seeking injunctive relief

The text of the CWA places restrictions on the use of injunctions that bars their use in this case. The directive for use of injunctions is found in § 1319(a). This section of the act allows the EPA to issue compliance orders to violators of the CWA. However, the administrator may only resort to civil actions, including injunctive relief, when the administrator has notified "the person in alleged violation and such State of such finding." 33 U.S.C. § 1319(a). This section of the CWA seems to give the EPA the ability to apply injunctive relief to violators of the CWA, but this ability is further limited in the very same portion of the statute.

Section 1319(a) places a restriction on injunctive relief in that the EPA must wait thirty days after they have sent notification to the violator, and then can only request injunctive relief when "the State has not commenced appropriate enforcement action." 33 U.S.C. § 1319(a). Thus, the reading of § 1319(a) places another restriction on when the EPA can act after New Union has commenced appropriate enforcement action.

The district court determined that the NUDEP "enforcement has been effective in controlling Goldthumb's actions." (R.11). The actions have been controlled and Goldthumb is not releasing highly or even lightly contaminated materials into the Arroyo. (R.11). Without a doubt, the appropriateness of New Union's action is apparent just from the fact that the solution is working to curtail the pollution problem. New Union took the appropriate enforcement action, and therefore, the EPA is barred from seeking injunctive relief.

To conclude, injunctive relief may be granted when the state has not commenced an appropriate enforcement action. The action by NUDEP has been successful in curtailing the pollution and is indeed an appropriate and comparable enforcement action.

CONCLUSION

For the reasons state in this brief, Goldthumb Mining Co., Inc., respectfully requests that this Court affirm the judgment of the district court in all respects.