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Brief for Appellee New Union: Eleventh Annual Pace National Environmental Moot Court Competition

Southern Illinois University School of Law

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Team 8

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

FRIENDS OF THE ROARITAN, INC.)
)
and)
)
STATE OF NEW UNION,) Civ. App. No. 98-378
)
Appellees,)
)
v.)
)
XXX CORP.,)
)
Appellant.)

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

BRIEF FOR APPELLEE NEW UNION

Patrick M. Pericak
Bill Thurston
Eric Morrow
Southern Illinois University

QUESTIONS PRESENTED

I. Is the addition of a pollutant to tributary groundwater one mile away from navigable surface water a violation of 33 U.S.C. § 1311(a)?

II. Is the permittee/defendant in a 33 U.S.C. § 1365 enforcement action alleging violation of a permit provision prohibiting discharges that "violate water quality stan-

dards" barred by 33 U.S.C. § 1369 from seeking dismissal of the action on the ground that the provision is not specific enough?

III. Is the interpretation of a provision prohibiting any discharge that "violates water quality standards" governed by state or federal law when the provision is required to be in the permit by a certification condition imposed by New Union and is also routinely included as "boilerplate" language by the Regional Office of the Environmental Protection Agency issuing the permit?

IV. If the interpretation of a permit provision prohibiting any discharge that "violates water quality standards" is governed by federal law, is the addition of a pollutant to navigable water causing, by itself or together with other such additions, the water to be unfit for its water quality standard designated use, a violation of the permit without further administrative action to establish specific numeric effluent limitations on the pollutant in the permit?

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33 U.S.C. § 1369 (1994)
42 U.S.C. § 300f et seq. (1994)

Supreme Court Decisions

PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700 (1994).
Chemical Mfrs. Ass'n v. Natural Resources Defense Council, 470 U.S. 116 (1985).
Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984).
Abbot Lab. v. Gardner, 387 U.S. 136 (1967).

United States Court of Appeals Decisions

Artway v. Attorney General of the State of N.J., 81 F.3d 1235 (3d Cir. 1996).
Northwest Environmental Advocates v. City of Portland (Northwest III), 74 F.3d 945 (9th Cir. 1996).
Pennsylvania Department of Public Welfare v. United States Department of Health and Human Servs., 101 F.3d 939 (3d Cir. 1996).
Northwest Environmental Advocates v. City of Portland (Northwest II), 56 F.3d 979 (9th Cir. 1995).

Atlantic States Legal Foundation, Inc. v. Eastman Kodak Company, 12 F.3d 353 (2d Cir. 1994).
Northwest Environmental Advocates v. City of Portland (Northwest I), 11 F.3d 900 (9th Cir. 1993).
Eagle-Picher Industries, Inc. v. United States EPA, 759 F.2d 905 (D.C. Cir. 1985).
Quivera Mining Co. v. United States EPA, 765 F.2d 126 (10th Cir. 1985).
City of Rochester v. Bond, 603 F.2d 927 (D.C. Cir. 1979).
United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979).
Exxon Corp. v. Train, 544 F.2d 1310 (5th Cir. 1979).
United States v. Ashland Oil and Transp. Co., 504 F.2d 1317 (6th Cir. 1974).

U.S. District Court Decisions

Sierra Club v. Colorado Refining Company, 838 F. Supp. 1428 (D. Colo. 1993).
McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182 (E.D. Cal. 1988).
United States v. GAF Corp., 389 F. Supp. 1379 (S.D. Tex. 1975).
United States v. Phelps Dodge, 391 F. Supp. 1181 (D. Ariz. 1975).

Legislative Materials

S. Rep. No. 92-414 (1972), reprinted in 1972 U.S.C.C.A.N. 3668.
Hearing on H.R. 11896 Before the Committee on Public Works: Water Pollution Control Legislation, 92nd Cong. 282 (1971).
118 Cong. Rec. 33,756 (1972).

Administrative Materials

40 C.F.R. § 124.55(a)(2) (1998).
40 C.F.R. § 141.62(b) (1998).
45 Fed. Reg. 33,516 (1980).

Secondary Materials

Philip M. Quatrochi, Groundwater Jurisdiction Under the Clean Water Act: The Tributary Groundwater Dilemma, 23 B.C. Envtl. Aff. L. Rev. 603 (Spring 1996).

Memorandum from EPA Deputy Assistant Administrator for Water Enforcement Jeffrey G. Miller to Regional Enforcement Director, Region V, at 2 (Apr. 28, 1976).

Memorandum from Director, Office of Wastewater Enforcement and Compliance to Water Management Division Directors, Regions I-X, at 2-3 (Aug. 14, 1992).

OPINIONS BELOW

The opinion of the United States District Court for the District of New Union is unpublished.

STATEMENT OF THE CASE

Facts

XXX is a company which manufactures a variety of poisons for controlling pests and vectors. In 1985, XXX purchased a forty acre piece of property situated approximately one mile from the Roaritan River. XXX's predecessors to the property left behind recycled automobile batteries and unrecycled material in a waste pile on the property. A study conducted by the New Union Department of Environmental Protection (DEP) revealed that this waste pile contains significant concentrations of lead.

Precipitation falling on the waste pile causes lead to seep into the groundwater. Groundwater mapping done by the DEP shows that this groundwater flows into the Roaritan River and causes an increase in the concentration of lead in the Roaritan.[1] XXX has no permit for this discharge.

XXX maintains a discharge pipe which is situated on a right of way located between its property and the Roaritan

1. This is evidenced by the fact that the concentration of lead gradually increases over the half-mile stretch immediately downriver from XXX's discharge pipe even though XXX does not discharge lead from its pipe and even though there are no other known sources of lead in the area.

River. Treated wastewater is discharged through this mile-long pipe. A permit issued by the Region XI office of the Environmental Protection Agency (EPA) authorizes this discharge. The permit contains several provisions, including a standard "boilerplate" contained in all permits issued by Region XI of the EPA, located in section IIA3 of the permit. This provision prohibits discharges which "violate water quality standards." The DEP gave its certification of the permit, which is required by 33 U.S.C. § 1341, on the specific condition that the permit contain identical language.

Pursuant to 33 U.S.C. § 1313, New Union classified the Roaritan River as a Class AAA waterway, and the EPA approved. One of the uses assigned to Class AAA waters is human consumption without treatment.

New Union has not adopted a water quality criterion for selenium. However, the EPA has promulgated a maximum contaminant level (MCL) for selenium under the Safe Drinking Water Act. The MCL for selenium in water fit for human consumption is 0.05 mgl. Samples taken by the DEP show that the natural concentration of selenium in the Roaritan River is zero. However, immediately downstream from XXX's discharge the level of selenium is 0.04 mgl,[2] while immediately upstream of XXX's discharge the selenium level is 0.06 mgl. Although XXX admitted in its application that it discharged selenium, no provision in the permit addresses a limitation on discharges of selenium.

Procedural History

Friends of the Roaritan (FOR) brought suit under 33 U.S.C. § 1365, alleging various violations of the Clean Water Act (CWA). The first set of violations alleges that XXX's discharge of lead without a permit from the waste pile to groundwater which is tributary to the Roaritan River is a violation of the CWA. The second set of violations alleges that XXX violates the permit provision which prohibits discharges "which violate water quality standards" by causing the con-

2. As noted in the district court's opinion, this increase is caused by the discharges of Sigma Chemical.

centration of selenium in the Roaritan to increase to a level which is higher than that permitted by the Safe Drinking Water Act.

XXX made a motion to dismiss the claims brought under the CWA. The trial court denied this motion. XXX now appeals the denial of the motion to dismiss. The issues were certified for appeal pursuant to 28 U.S.C. § 1292(b).

SUMMARY OF THE ARGUMENT

The addition of a pollutant into groundwater which is tributary to, but not in close proximity with, a traditionally navigable surface water is a violation of 33 U.S.C. § 1311. This is because tributary groundwater falls within the definition of navigable waters as defined by the CWA. The legislative history evinces a congressional intent to give broad meaning to the term navigable waters in order to restore and maintain the chemical, physical, and biological integrity of the nation's waters. In order to effectuate this purpose, tributary groundwater must fall within the definition of navigable water. Furthermore, cases construing the term navigable waters have interpreted it to mean any water which ultimately reaches navigable surface waters. Tributary groundwater certainly falls in this category. No distinction is made on the basis of distance from the navigable surface water.

In addition, XXX is barred from challenging the permit provision which prohibits discharges which "violate water quality standards" on the ground that it is too vague to be enforceable. This is because the statutory time for review has passed and XXX has not alleged any extraordinary circumstances which warrant forgiveness of the failure to raise this challenge during the time allotted by statute. XXX's claim that the challenge was not ripe for review during the statutory period is completely meritless. The claim was ripe for review during the statutory period since the question of whether the provision is too vague to be enforceable is purely one of law and since the court would not have benefitted from deferring review so that the question could arise in a more definite form.

Moreover, the interpretation of the provision which prohibits discharges which "violate water quality standards" is governed by state law since the provision was included in the permit as a result of a certification condition imposed by New Union. It is irrelevant that the provision is also regularly included in permits issued by the region where this permit was issued. If the interpretation is not governed by state law, New Union's certification condition would be rendered meaningless. Issuance of the permit would therefore be violative of the CWA since the CWA prohibits the issuance of a permit without state certification. Furthermore, state law is not in conflict with federal law.

Finally, a permit provision regarding pollutant discharges which does not specify numeric effluent limitations is not enforceable. Prior to 1972, the CWA used water quality standards as the basis for enforcement. However, finding dissatisfaction with this mechanism of enforcement, Congress, in enacting the 1972 amendments, unambiguously expressed its intent to change the enforcement mechanism to numeric effluent limitations and to abandon the old enforcement mechanism. Consequently, Congress expressed its intent that permit provisions regarding pollutant discharges should not be enforceable unless they contain numeric effluent limitations. Furthermore, the EPA, the federal agency charged with enforcement of the CWA, has expressed its belief that permit provisions regarding pollutant discharges are not enforceable unless they contain specific numeric effluent limitations.

ARGUMENT

I. THE ADDITION OF A POLLUTANT INTO GROUNDWATER WHICH IS TRIBUTARY TO, BUT NOT IN CLOSE PROXIMITY WITH, A TRADITIONALLY NAVIGABLE SURFACE WATER IS A VIOLATION OF 33 U.S.C. § 1311(a).

The Clean Water Act (CWA) prohibits the addition of a pollutant from a point source to a navigable water without a National Pollutant Discharge Elimination System (NPDES)

or a State Pollutant Discharge Elimination System (SPDES) permit.[3] 33 U.S.C. §§ 1311, 1342, 1362. In the case at hand, a waste pile on XXX's property leaches lead into groundwater which leads to the Roaritan River one mile away. XXX possesses no permit for this discharge. As the trial court noted, the waste pile is considered a point source and lead is a pollutant. Therefore, the only question is whether the addition to tributary groundwater one mile away from a navigable surface water constitutes an addition to navigable water.

It is clear that this addition constitutes an addition to navigable water for two reasons. First, the legislative history reveals that Congress intended the term navigable water to be interpreted broadly and therefore to mean all tributary groundwater. Second, the case law definitively shows that all tributary groundwater is considered navigable water and that no distinction is made between tributary groundwater that is in close proximity to traditionally navigable water and groundwater that is not.

A. The Legislative History Shows That Congress Intended The Term "Navigable Water" To Mean All Tributary Groundwater.

The legislative history clearly shows that Congress intended the term "navigable water" to include all tributary groundwater. Congress defined the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). In committee, it was stated that "[t]he conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation." 118 Cong. Rec. 33,756-57 (1972). This statement was examined by Congressman Dingell in debates concerning the CWA. He supported this expansive reading of "navigable waters" by stating that "the conference bill defines the term 'navigable waters' broadly for water quality purposes. It

3. The NPDES permit system is outlined in 33 U.S.C. § 1342(a). This national permitting system applies unless it has been suspended by an approved state system. If a state system has been approved by the EPA, then the SPDES permitting system applies. This system is outlined in 33 U.S.C. § 1342(b), (c). The present case involves an NPDES permit.

means all 'the waters of the United States' in a geographical sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws." *Id.* After discussing judicial opinions which had expanded the navigable waters definition, Congressman Dingell summarized that "this new definition clearly encompasses all water bodies, including main streams *and their tributaries*, for water quality purposes." *Id.* (emphasis added).

It is also clear that Congress intended to give the term "navigable waters" a broad definition to comport with the objective of the CWA, which is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). It was recognized in committee that "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries." S. Rep. No. 414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742-43.

This history is a strong indication that it was Congress' aim to include tributary groundwater in the definition of navigable water. Congress wanted to give "navigable waters" a broad definition and emphasized the importance of controlling pollution at its source. Although underground tributaries were not specifically mentioned, tributary groundwater is part of the hydrologic cycle addressed in the Senate report. Congress recognized that to control the pollution of traditionally navigable waters it is necessary to regulate discharges into their tributaries. This reasoning certainly extends to underground tributaries, and has been used by courts to expand "navigable waters" to include tributary groundwater.

B. The Case Law Shows That All Tributary Groundwater Is Considered "Navigable Water" And That No Distinction Is Made Between Tributary Groundwater That Is In Close Proximity With A Traditionally Navigable Surface Water And Groundwater That Is Not.

The cases undoubtedly show that tributary groundwater falls within the definition of "navigable waters" under the CWA. In addition, it is clear that no distinction is made between groundwater which is in close proximity with traditionally navigable surface water and groundwater that is not.

1. Tributary Groundwater Is Considered "Navigable Water."

The evolution of case law determining the applicability of CWA standards to tributary groundwater begins with the Sixth Circuit's decision in *United States v. Ashland Oil and Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974). The court addressed the question of whether the CWA regulated the discharge of pollution into a non-navigable tributary of a navigable river. In deciding this issue, the court found that both the plain language and the legislative history of the statute evidenced a congressional intent to construe the definition of "navigable waters" broadly. *See Ashland Oil*, 504 F.2d at 1324. In line with this, the court found that Congress intended non-navigable tributaries to fall within the definition of "navigable waters." *See id.*; *see also United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979) ("[i]t seems clear Congress intended to regulate discharges made into every creek, stream, river or body of water that in any way may affect interstate commerce."). *See id.* The court reasoned that limiting liability to traditionally navigable waters would "make a mockery" of Congress' power to control pollution if its authority was "limited to the bed of the navigable stream itself." *Ashland Oil*, 504 F.2d. at 1326. *Ashland Oil* demonstrates the willingness of courts to imply a broad reading of "navigable water" under the CWA by extending protection to non-navigable bodies of water.

When applied to the facts at hand, it is easy to imply that the reasoning underlying the decision to include "non-navigable" tributaries lends itself to including the groundwater in the present case. The government's commitment to protecting the Roaritan River would be useless if pollution of its tributary groundwater was not regulated. Allowing unpermitted dumping of harmful pollutants into groundwater which reaches the Roaritan River could lead to a situation similar to a hypothetical posed in *Ashland*. The court stated that if tributaries of a navigable river are not regulated "they could be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste." *Ashland Oil*, 504 F.2d at 1326.

The broad interpretation of "navigable water" in *Ashland Oil* is further emphasized when examined in light of the legislative intent discussed in *United States v. Phelps Dodge*, 391 F. Supp. 1181 (D. Ariz. 1975). The *Phelps Dodge* court reasoned that "[t]he intention of Congress was to eliminate or reduce as much as possible all water pollution throughout the United States both surface and *underground*." *Id.* at 1187 (emphasis added). With this intent in mind, the court held that normally dry arroyos, which served as a conduit for pollution to reach public waters, were to be considered "navigable waters" under the CWA. This holding was reached by using the logical conclusion that for the CWA to be a viable enforcement tool for controlling pollution "the scope of its control must extend to all pollutants which are discharged into any waterway . . . where any water which might flow therein could reasonably end up in any body of water, to which or in which there is some public interest, including underground waters." *Id.* at 1187. It is evident from this language that the court "focused on the final destination of the pollution, not the above- or below-ground locus of the conduit." Philip M. Quatrochi, *Groundwater Jurisdiction Under The Clean Water Act: The Tributary Groundwater Dilemma*, 23 B.C. Envtl. Aff. L. Rev. 603, 620 (Spring 1996).

Similarly, in *Quivera Mining Co. v. United States EPA*, 765 F.2d 126 (10th Cir. 1985), discharges into usually dry arroyos were held to be subject to regulation due, in part, to the

fact that "the waters of [the arroyos] soak into the earth's surface, become part of underground aquifers, and after a lengthy period, perhaps centuries, the underground water moves toward eventual discharge [into traditionally navigable waters]." *Quivera Mining*, 765 F.2d at 129.

Although neither case dealt specifically with groundwater, the reasoning of *Phelps Dodge* and *Quivera Mining* is conducive to classifying the groundwater in the case at hand as being "navigable" under the CWA. FOR contends that lead enters groundwater from a waste pile located on XXX's property and eventually reaches the Roaritan River. This groundwater is analogous to the dry arroyos discussed in *Phelps Dodge* and *Quivera Mining.* Like the arroyos in *Phelps Dodge* and *Quivera Mining*, the groundwater in this case is essentially a conduit for pollutants to "ultimately end up in public waters such as a river." *Phelps Dodge*, 391 F. Supp. at 1187. Consequently, the groundwater which serves as a pathway for pollutants from XXX's property to the Roaritan River should be defined as "navigable water" under the CWA. It would follow that the addition of lead into groundwater which leads to the Roaritan River would constitute a violation of 33 U.S.C. § 1311(a).

Finally, in *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428 (D. Colo. 1993), the court faced the issue of whether tributary groundwater constitutes navigable water under the CWA. The district court held "that the Clean Water Act's preclusion of the discharge of any pollutants into 'navigable waters' includes such discharge which reaches 'navigable waters' through groundwater." *Id.* at 1434. An emphasis was placed on the distinction between tributary and non-tributary groundwater in deciding what is regulated under the CWA. The court first stated that after a review of relevant case law it was apparent that "isolated/nontributary groundwater is excluded from regulation under the CWA." *Id.* at 1441. The court then distinguished cases such as *Exxon Corp. v. Train*, 544 F.2d 1310 (5th Cir. 1977) and *United States v. GAF Corp.*, 389 F. Supp. 1379 (S.D. Tex. 1975), which previously held non-tributary groundwater not to be covered under the CWA. Both cases dealt exclusively with

non-tributary groundwater in their holdings and did not offer an opinion on what the outcome would have been if the plaintiffs had alleged that the discharges of pollutants reached a body of navigable water. *See Sierra Club*, 838 F. Supp. at 1432. The court found it clear that tributary groundwater is included in the definition of "navigable waters."

Sierra Club, which is a culmination of litigation concerning the relevance of CWA requirements to groundwater, is readily applicable to the fact pattern in the case at hand. The Roaritan River is a traditionally navigable surface water and the discharge of lead into it without a permit is a violation of 33 U.S.C. § 1311(a). According to groundwater movement mapping conducted by the DEP, the groundwater flowing under XXX's property is tributary to the Roaritan River. Lead leaching from the waste pile seeps into this groundwater and into the Roaritan. Since XXX has no permit for this discharge, it is clear that this is a violation of 33 U.S.C. § 1311(a).

2. There Is No Distinction Between Tributary Groundwater That Is In Close Proximity With Traditionally Navigable Surface Water And Tributary Groundwater That Is Not.

The trial court's statement that "[a] tributary is a tributary . . . whether a few yards long or a few hundred miles long" is an accurate representation of how other courts have treated the regulation of discharges into tributaries of "navigable water." As stated earlier, courts focus on whether the waters of a tributary flow into the "navigable" body of water. To hold otherwise would defeat the stated purpose of the CWA, which is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

In *United States v. Ashland Oil and Transportation Co.*, 504 F.2d 1317 (6th Cir. 1974), the court held the discharge of crude oil into the tributary of a small creek, which flowed into a larger creek, then to a small river and finally to a "navigable" river was regulated under the CWA. *See id.* at 1319. Although the facts of *Ashland Oil* do not give exact distances,

one can speculate that the distance between the discharge and the "navigable" water was relatively great because the pollution flowed through four creeks or rivers to reach the "navigable" water. However, the court made no mention of distance, only holding that water that reaches "navigable waters" is regulated under the CWA. *See id.* at 1326.

This seems to be the basis of other cases dealing with the applicability of CWA standards to tributaries whether above or underground. The emphasis is not on distance, but whether the water is "naturally connected to surface waters that constitute 'navigable waters' under the Clean Water Act." *McClellan Ecological Seepage Situation v. Weinberger*, 707 F. Supp. 1182, 1196 (E.D. Cal. 1988). It is evident that the groundwater in the case at hand is naturally connected to "navigable water," as proved by groundwater mapping, and meets this criteria.

XXX claims that *Sierra Club* does not apply to the present case because "the groundwater contamination there was immediately adjacent to surface navigable water, whereas here it was a mile away." Once again, there is no distinction drawn in *Sierra Club* between groundwater which is in close proximity and that which is not. The holding of *Sierra Club* that "the Clean Water Act's preclusion of the discharge of any pollutant into 'navigable waters' includes such discharge that reaches 'navigable waters' through groundwater," *see Sierra Club*, 838 F. Supp. at 1434, does not even comment upon the distance between the discharge and the "navigable water." It is quite clear that distance does not matter.

However, even if distance would matter in some instances, distance is irrelevant in the present case. The Roaritan River is only one mile away from XXX's discharge. In light of the congressional intent evidenced by the legislative history and subsequent case law, it would defy logic to claim that a discharge without a permit one mile away would not be a violation of the CWA.

II. XXX IS BARRED BY 33 U.S.C. § 1369 FROM CHALLENGING A PERMIT PROVISION WHICH PROHIBITS ANY DISCHARGE WHICH "VIOLATES WATER QUALITY STANDARDS" SINCE THE TIME FOR REVIEW OF THE PERMIT HAS EXPIRED AND SINCE A CHALLENGE THAT THE PROVISION IS NOT SPECIFIC ENOUGH WAS RIPE DURING THE TIME ALLOTTED BY STATUTE.

Under 33 U.S.C. § 1369, "[r]eview of the Administrator's action . . . in approving or promulgating any effluent limitation . . . [must] be had . . . within 120 days from the date . . . of such approval [or] promulgation . . . ." 33 U.S.C. § 1369(b)(1). Failure to seek review within the allocated time precludes subsequent "judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2). However, a failure to seek timely review during the statutory period may be forgiven in *extraordinary circumstances*. *See Eagle-Picher Industries, Inc. v. United States Environmental Protection Agency*, 759 F.2d 905, 912 (D.C. Cir. 1985) (emphasis added). Lack of ripeness during the statutory period may allow for a later challenge where timely review was not sought. *See id.* at 913. In the case at hand, XXX failed to seek timely review of the permit provision which it wishes to challenge in this enforcement proceeding. XXX's challenge is barred by 33 U.S.C. § 1369. Moreover, XXX's claim that this failure should be forgiven since a challenge would not have been ripe during the statutory period is meritless.

A. XXX Is Barred From Challenging The Provision Under 33 U.S.C. § 1369.

Under 33 U.S.C. § 1369, review of the approval or promulgation of an effluent limitation must be had within 120 days of the approval or promulgation. *See* 33 U.S.C. § 1369(b)(1). The failure to seek such review bars a later challenge to the provision in a later criminal or civil enforcement proceeding. *See* 33 U.S.C. § 1369(b)(2).

In the case at hand, XXX failed to seek review of the effluent limitation which prohibits discharges which "violate water quality standards" within 120 days after its promulgation/approval. FOR's present action is an enforcement proceeding. In this proceeding, XXX claims that the permit provision prohibiting discharges which "violate water quality standards" is not enforceable because it is too vague. XXX is, "in essence, challenging the provision itself." It is patently clear that, under 33 U.S.C. § 1369, XXX is barred from challenging the permit provision in this enforcement proceeding since XXX did not timely challenge the provision during the time allotted by the statute. In addition, it is apparent that there are no circumstances which warrant forgiveness for failing to obtain review during the statutory period.

B. XXX Cannot Show Extraordinary Circumstances Which Warrant Forgiveness For A Failure To Challenge Since XXX Cannot Show That The Challenge Would Not Have Been Ripe During The Statutory Period.

XXX asserts that § 1369 does not bar its claim since review was not obtainable during the statutory period. "Proffered excuses for late filing are carefully scrutinized." *Eagle-Picher*, 759 F.2d at 912. Time limits on petitions for judicial review "reflect a deliberate congressional choice to impose statutory finality on agency orders, a choice we may not second guess." *Eagle-Picher*, 759 F.2d at 911, *citing City of Rochester v. Bond,* 603 F.2d 927, (D.C. Cir. 1979). However, a failure to seek timely review during the statutory period may be forgiven in *extraordinary circumstances*. *See Eagle-Picher*, 759 F.2d at 912 (emphasis added). Lack of ripeness during the statutory period may allow for a later challenge where timely review was not sought. *See id.* at 913. Nevertheless, although lack of ripeness may be one of the exceptional circumstances in which courts may grant untimely review, courts still apply a strict analysis in deciding whether the reason for a late request is valid. *See id.* at 912. Here, XXX claims that review was not obtainable because the claim was not ripe during the statutory period.

At the outset, it should be noted that "[c]ourts simply are not well-suited to answering hypothetical questions which involve guessing what the court might have done in the past." *Id.* at 914; *see also Pennsylvania Dep't of Public Welfare v. United States Dep't of Health and Human Servs.*, 101 F.3d 939, 945 (3d Cir. 1996). "If courts were to 'routinely conduct retrospective ripeness analyses where a late petitioner offers no compelling justification for not having filed his claim in a timely manner, [it] . . . would wreak havoc with the congressional intention that repose be brought to final agency action." *Pennsylvania Dep't of Public Welfare*, 101 F.3d at 945, *citing Eagle-Picher*, 759 F.2d at 914. In the present case, this court must guess at what it would have done in the past to determine whether XXX's claim was ripe during the statutory period. This court should be reluctant to engage in such an analysis. However, if the court does engage in such an analysis, it is clear that the challenge was ripe during the statutory period.

The Supreme Court has stated that the "basic rationale" behind the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49 (1967). In line with these principles, the Supreme Court has set forth guidelines to determine whether a claim is ripe. In deciding whether a claim is ripe, the court should look at "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. In looking at these two factors, it is apparent that the issues were fit for review and that the hardship to both parties would have been great. The challenge was therefore ripe during the statutory period and XXX is now barred from challenging the provision.

1. The Question Of Whether The Provision Is Too Vague To Be Enforceable Was Fit For Review During The Statutory Period.

In *Eagle-Picher*, the court stated that, in deciding whether an issue is fit for review, the court should look "to see if the issue raises a purely legal question." *Eagle-Picher*, 759 F.2d at 915; *see also Pennsylvania Dep't of Public Welfare*, 101 F.3d at 946; *Artway v. Attorney General of N.J.*, 81 F.3d 1235, 1249 (3d Cir. 1996) ("the more that the question presented is purely one of law, and the less that additional facts will aid the court in its inquiry, the more likely the issue is to be ripe, and vice-versa." *Id.*). If the issue is purely legal, the court should "assume its threshold suitability for judicial determination." *Id.* at 915.

The only question in the case at hand is whether the permit provision which prohibits discharges which "violate water quality standards" is enforceable without including specific numeric effluent limitations in the permit provision. In other words, the question is whether the provision is specific enough or whether it is too ambiguous to be enforceable. Interpretations of a permit provision are governed by contract law. *See Northwest Environmental Advocates v. City of Portland (Northwest II)*, 56 F.3d 979, 982 (9th Cir. 1995). The determination of whether a provision is ambiguous is a question of law. *See id.* Since the question here is one of ambiguity, it is quite apparent that the issue in the case at hand is purely a legal question.

In *Eagle-Picher*, the court also stated that, in deciding whether an issue is fit for review, courts should give consideration to whether "the court will benefit from deferring the review until . . . the question arises in some more concrete and definite form." *Eagle-Picher*, 759 F.2d at 915. Here, there is no indication that the court would have benefitted from deferring review until the question arose in a more definite form. In fact, it is clear that no facts have arisen in the controversy which will benefit the court in the present matter. The court is in the same position now as it would have been during the statutory period. *See id.* at 917 ("[t]he issue is the same today

as it was during the statutory period and our understanding of it has not been enhanced by the development of a more specific factual background."). The issue was unquestionably fit for review during the statutory period.

2. The Hardship To Both Parties Would Have Been Great If Review Was Withheld During The Statutory Period.

At the outset, it should be noted that when dealing with the second prong of the *Abbott Laboratories* test, if "the first prong of the . . . test is met and Congress has emphatically declared a preference for immediate review . . . no purpose is served by proceeding to the second prong." *Eagle-Picher*, 759 F.2d at 918. It is evident that the first prong of this test is met and Congress has declared a preference for immediate review under 33 U.S.C. § 1369. However, assuming arguendo that the first prong has not been met, it is apparent that the second prong is met since there would have been a great hardship to the parties if review had been withheld.

"[T]he purpose of the 'hardship to the parties' analysis is to ascertain if the harm that deferring review will cause the petitioners outweighs the benefits it will bring the agency and the court." *Eagle-Picher*, 759 F.2d at 918. It is patently apparent that if review were withheld, the hardship to XXX would have greatly outweighed the benefit to the agency. This is because no benefit would have inured to the agency if court consideration were withheld and the burden on XXX would have been enormous.

If review were withheld, XXX would have been uncertain of its obligations under the provision. This would have drastically affected the way XXX would discharge pollutants and the way XXX does business on a daily basis. In addition, the agency would not have gained any benefit if review were withheld. In fact, the agency would have incurred a detriment if review were withheld since the agency would not be sure whether the provision was enforceable in other permits it was issuing. ("[t]his provision is part of the standard 'boilerplate' contained in all permits issued by Region XI of the EPA."). In short, both parties would have benefitted from re-

view during the allotted time. *See Pennsylvania Dep't of Public Welfare*, 101 F.3d at 946 (since both parties would have benefitted from elimination of the uncertainty, there was a hardship to the parties which would have allowed for court consideration). Because of this, there can be no doubt that the court would not have withheld consideration of the issue.

III. THE INTERPRETATION OF A PROVISION PROHIBITING DISCHARGES THAT "VIOLATE WATER QUALITY STANDARDS" IN A PERMIT ISSUED BY THE FEDERAL GOVERNMENT PURSUANT TO 33 U.S.C. § 1342 IS GOVERNED BY STATE LAW WHEN IT IS REQUIRED TO BE IN THE PERMIT BY A CERTIFICATION CONDITION IMPOSED BY NEW UNION PURSUANT TO 33 U.S.C. § 1341 AND WHEN IT IS ALSO INCLUDED ROUTINELY IN FEDERALLY ISSUED PERMITS.

Section 401 of the CWA provides:

> Any applicant for a Federal . . . permit to conduct any activity . . . 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.

33 U.S.C. § 1341(a)(1). It further provides that "[n]o license or permit shall be granted if certification has been denied by the State . . . ." *Id.*

In the present action, XXX obtained a permit from Region XI of the EPA. The permit contains a provision which prohibits discharges which "violate water quality standards." The New Union DEP granted certification on the specific condition that the permit contain this provision. In addition,

however, Region XI of the EPA regularly includes this same provision as "boilerplate" in any permit issued by the Region. XXX contends that this provision is governed by federal law. However, it is clear that the interpretation of this provision is governed by state law. The plain language, legislative history, and agency interpretation all support this contention.

A. The Plain Language Shows That The Provision Is Governed By State Law.

Under the CWA, a discharge permit may not be issued by the federal government if the state denies certification. *See* 33 U.S.C. § 1369. This necessarily means that, if a state conditions certification of a permit on the ground that a certain provision be included, and the permit is issued with that provision included, the permit contains the provision required by the state and the interpretation of the provision is governed by state law. It is irrelevant that the provision was already included in the permit as "boilerplate" language by the federal government. This is because the permit could not have been issued without state certification and therefore without the language included in the condition of certification.

Here, XXX obtained a permit from the federal government and New Union granted certification on the condition that the provision which prohibits discharges which "violate water quality standards" be included. It is clear that this provision must be the provision upon which the state conditioned certification; otherwise, the permit could not have been issued. It follows that this provision must be governed by state law.

B. The Legislative History Shows That The Provision Is Governed By State Law.

The legislative history of the Federal Water Pollution Control Act Amendments of 1972 reveals that the provision should be governed by state law. The purpose and policy of the CWA is set out in § 1251. Subsection (b) states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to pre-

vent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . . ." 33 U.S.C. § 1251(b). This purpose, when read in conjunction with § 1341, evidences Congressional intent to allow states a major role in the enforcement of CWA provisions.

Excerpts from the legislative history of the Act support this position. The history of the Act contains the statement that "[t]he States shall lead the national effort to prevent, control, and abate water pollution. As a corollary, the federal role has been limited to support of, and assistance to, the States." S. Rep. No. 92-414 (1972) *reprinted in* 1972 U.S.C.C.A.N. 3668, 3669. Primary responsibility for enforcement of state standards is vested in the states. *See* S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3672.

With respect to the certification process itself, the legislative history reiterates the recurring proposition that the individual states have been granted governing powers with respect to enforcement of provisions contained in permits. The history states:

> The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override state water quality requirements. It should also be noted that the Committee continues the authority of the State . . . to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such State. . . . Should such an affirmative denial occur no license or permit could be issued by such Federal agencies . . . .

S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3735.

It is clear that the legislative history reveals a Congressional intent to leave substantial power to the states in enforcing the CWA. One of the ways that Congress has done this is through the certification process. As stated above, Congress intended the states to have the power to deny permits. It also intended for the states to be able to condition

certification. In the case at hand, allowing the provision to be interpreted according to federal law would ignore New Union's power to condition the permit and eviscerate Congress' intent to leave substantial enforcement power to the states. There can be no doubt that the provision must be interpreted according to state law in order to effectuate Congress' intent.

C. The Agency Interpretation Shows That The Provision Is Governed By State Law.

The agency interpretation clearly shows that the provision is governed by state law. Under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), if Congress has not manifested its intent unambiguously with regard to a statute which is administered or enforced by a federal agency, the courts must give deferential treatment to the reasonable interpretations of the laws by the agency charged with administration or enforcement. *See id.* at 844. Furthermore, the Supreme Court has found specifically that the EPA's interpretation of the CWA is entitled to substantial deference by the courts. In fact, the Supreme Court has stated that with regard to EPA interpretations of the CWA, "[W]e need not find that it is the only permissible construction that EPA might have adopted but only that EPA's understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA." *Chemical Mfrs. Ass'n v. Natural Resources Defense Council*, 470 U.S. 116, 125 (1985).

It is clear that the agency interpretation shows that the provision is governed by state law and that this interpretation is a sufficiently rational one to preclude the court from substituting its own judgment for that of the EPA. Under the administrative regulations, "[w]hen certification is required under CWA section 401(a)(1) no final permit shall be issued . . . [u]nless the final permit incorporates the requirements specified in the certification . . . ." 40 C.F.R. § 124.55(a)(2). However, "[a] State may not condition or deny a certification on the grounds that State law allows a less stringent permit condition." *Id.* Here, certification was required and New

Union specified that the certification would be withheld unless the permit contained the provision which prohibited discharges which "violate water quality standards." Under the regulations, the permit could not have been issued if this provision was not included. It follows that, since the permit was issued, the provision is the provision required by New Union, and its interpretation is governed by state law.

Moreover, this provision is enforceable since it is not less stringent than the federal requirement. As noted in Part IV of this brief, the federal and state requirements are exactly the same. Both require the adoption of numeric effluent limitations before a permit provision regarding the discharge of pollutants is enforceable. However, even if this court finds that the federal and state requirements are not the same, it is clear that the state requirement is not less stringent. In fact, it is neither less stringent nor more stringent. It is neutral. The reason it is neutral is that it is purely procedural. It only requires adoption of numeric limitations. It says nothing about the effluent limitations themselves.[4]

4. An example is illustrative: If New Union had adopted a concentration level of 0.06 mgl for selenium, it would be clear that this would be less stringent than the federal requirement of 0.05 mgl. However, it is unclear how, if the court finds that it is not necessary under federal law to adopt effluent limitations, New Union's requirement is less stringent rather than merely different.

IV. IF A PROVISION PROHIBITING DISCHARGES THAT VIOLATE WATER QUALITY STANDARDS IS GOVERNED BY FEDERAL LAW, THE ADDITION OF A POLLUTANT TO NAVIGABLE WATER WHICH CAUSES, BY ITSELF OR WITH OTHER SUCH ADDITIONS, THE WATER TO BE UNFIT FOR ITS WATER QUALITY STANDARD DESIGNATED USE IS NOT A VIOLATION OF THE PROVISION WITHOUT FURTHER ADMINISTRATIVE ACTION TO ESTABLISH EFFLUENT LIMITATIONS ON THE POLLUTANT IN THE PERMIT.

The CWA prohibits the discharge of a pollutant into navigable water without a National Pollutant Discharge Elimination System (NPDES) or a State Pollutant Discharge Elimination System (SPDES) permit. 33 U.S.C. §§ 1311, 1342. In addition, the CWA authorizes any "person or persons [to] commence a civil action . . . against any person . . . who is alleged to be in violation of . . . an effluent standard or limitation under [the CWA]." 33 U.S.C. § 1365(a), (g). An effluent standard or limitation is defined by the CWA as, *inter alia*, "a permit or condition thereof . . . ." 33 U.S.C. § 1365(f) (2), (6). Therefore, a person may commence a civil enforcement action for the violation of a permit or a condition thereof.

In the present action, XXX obtained a permit from the Region XI office of the EPA. One of the provisions of the permit prohibited discharges that "violate water quality standards." New Union classified the Roaritan as a Class AAA water body. One of the uses of a Class AAA water body is that it is capable of human consumption without treatment. XXX's discharge of selenium allegedly raises the concentration of selenium in the Roaritan from 0.04 mgl to 0.06 mgl, a level which is higher than that permitted by the Safe Drinking Water Act for water which is capable of human consumption without treatment. *See* 42 U.S.C. § 300f *et seq.*, 40 C.F.R. § 141.62(b). FOR alleges that since XXX's discharge

makes the river's water no longer capable of human consumption without treatment, XXX violates the term in the permit which prohibits any discharge which violates water quality standards.

Assuming the interpretation of the provision is governed by federal law, this claim is completely meritless. A permit provision dealing with the discharge of a pollutant is not enforceable unless the provision designates numeric effluent limitations on the discharge of the pollutant. The legislative history, agency interpretation, and case law all support this contention.

A. The Legislative History Of The CWA Shows That A Permit Provision Dealing With Pollutants Must Designate Numeric Effluent Limitations To Be Enforceable.

The CWA's legislative history shows that a permit provision dealing with pollutants must designate numeric effluent limitations, or so called end of the pipe limitations, in order to be enforceable. Prior to the 1972 amendments, the CWA approached the job of protecting and preserving the nation's waters through a program of establishing and enforcing water quality standards. *See Northwest Environmental Advocates v. City of Portland (Northwest II)*, 56 F.3d 979, 992 (9th Cir. 1995) (Kleinfeld, J., dissenting). As such, numeric limitations on the discharge of pollutants were not used as a basis for enforcement. However, Congress expressed its dissatisfaction with this mechanism. Specifically, Congress found that this mechanism led to an "almost total lack of enforcement." S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3672 (noting that in two decades only one case reached the courts).

The goal of the amendments was therefore to provide for a better enforcement mechanism. This mechanism came in the form of specific numeric effluent limitations. A review of the legislative history shows that the 1972 amendments represented Congress' unambiguous intent to require that numeric effluent limitations be adopted before they are en-

forceable in a permit. *See Northwest II*, 56 F.3d at 992 (Kleinfeld, J., dissenting).

During House hearings before the Committee on Public Works, William D. Ruckelhaus, Administrator of the EPA, stated that "the basis of pollution prevention and elimination will be the application of effluent limitations. Water quality will be a measure of program effectiveness and performance, not a means of elimination and enforcement." *Hearings on H.R. 11896 Before the Committee on Public Works: Water Pollution Control Legislation*, 92nd Cong. 282 (1971). This position was later reiterated in the statement of Committee Findings in the Senate. *See* S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3675.

In addition, it was stated that, "[t]he legislation recommended by the Committee proposes a major change in the enforcement mechanism of the Federal water pollution control program from water quality standards to effluent limits." S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3675. It is quite apparent from these definitive statements that the purpose of the 1972 amendments was to require numeric discharge limits and to eliminate the program that was in place prior to 1972.

B. The EPA's Interpretation Of The CWA Shows That Numeric Effluent Limitations Must Be Adopted In Order For A Permit Provision To Be Enforceable.

Under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), if Congress has not manifested its intent unambiguously with regard to a statute which is administered or enforced by a federal agency, the courts must give deferential treatment to the reasonable interpretations of the laws by the agency charged with administration or enforcement. *See id.* at 844. Furthermore, with regard to EPA interpretations of the CWA, the Supreme Court has found that a court should uphold the EPA's interpretation if the court finds that it is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA. *Chemical*

Mfrs. Ass'n v. Natural Resources Defense Council, 470 U.S. 116, 125 (1985).

As shown above, it is clear that Congress has expressed its unambiguous intent to require the adoption of numeric effluent limitations in permit provisions before they are enforceable. However, assuming Congress has not expressed its unambiguous intent, it is apparent that the EPA believes that permit provisions are not enforceable without adoption of numeric effluent limitations. It is also apparent that this construction is sufficiently rational to preclude the court from substituting its judgment for that of the EPA.

Evidence of the EPA's belief that permit provisions are not enforceable without the adoption of numeric effluent limitations is contained in the EPA's comments regarding a proposed regulation applying the application-based limits approach to the implementation of CWA's reporting scheme. In the comments, the EPA noted that "[t]here is still some possibility . . . a permittee may discharge a large amount of a pollutant not limited in its permit, and EPA will not be able to take enforcement action against the permittee as long as the permittee complies with the notification requirements." 45 Fed. Reg. 33,516, 33,523 (1980). This, the EPA noted, is a "regulatory gap." *See id.* The EPA has addressed this gap by amending permits to list and limit a pollutant when necessary to safeguard the environment. *See Atlantic States Legal Foundation, Inc. v. Eastman Kodak Company*, 12 F.3d 353, 358 (2d Cir. 1994). However, the EPA has not attempted to bring enforcement actions for pre-amendment discharges. *See id.*

Evidence of the EPA's belief that permit provisions are not enforceable without the adoption of numeric effluent limitations is also contained in a memorandum from a high-ranking EPA official regarding policy on water-quality based effluent limitations. In the memo, the official stated that:

> EPA did not intend to require water quality-based permit limitations on all pollutants contained in a discharge . . . . The proper interpretation of the regulations is that developing water quality-based limitations is a step-by-step pro-

> cess . . . . [W]ater quality-based limits are established where the permitting authority reasonably anticipates the discharge of pollutants by the permittee at levels that have the reasonable potential to cause or contribute to an excursion above any state water quality criterion.

Atlantic States, 12 F.3d at 358, *citing* Memorandum from Director, Office of Wastewater Enforcement and Compliance to Water Management Division Directors, Regions I-X, at 2-3 (Aug. 14, 1992). It is quite apparent from these statements that the EPA believes that permit provisions are not enforceable unless they include specific numeric effluent limitations.

C. The Case Law Shows That A Permit Provision Dealing With Pollutants Must Designate Numeric Effluent Limitations In Order To Be Enforceable.

A review of the case law reveals that a permit provision must designate specific numeric effluent limitations on pollutants in order to be enforceable. In *Atlantic States*, Atlantic States brought suit claiming that the CWA grants limited permission to discharge pollutants identified in a permit and prohibits the discharge of any pollutants which are not expressly permitted. *See id.* at 357. The court disagreed and held that the discharge of a pollutant not listed in a permit is not unlawful under the Clean Water Act. The court stated:

> Viewing the regulatory scheme as a whole, . . . it is clear that the permit is intended to identify and limit the most harmful pollutants while leaving control of the vast number of other pollutants to disclosure requirements. Once within the NPDES or SPDES scheme, therefore, polluters may discharge pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants.

Id. at 357.

The court reasoned that the EPA acknowledges the existence of tens of thousands of chemical substances yet does not demand information as to whether many of these compounds

are even present in a manufacturer's wastewater. *See id.* This is because "'it is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants.'" *Id.*, *quoting* Memorandum from EPA Deputy Assistant Administrator for Water Enforcement Jeffrey G. Miller to Regional Enforcement Director, Region V, at 2 (Apr. 28, 1976). The court further reasoned that "[c]ompliance with a permit [which only designates pollutants which are permitted] would be impossible and anybody seeking to harass a permittee need only analyze that permittee's discharge until determining the presence of a substance not identified in the permit." *Atlantic States*, 12 F.3d at 357.

In the case at hand, FOR has not alleged that XXX discharged a pollutant which was not included in the permit, but rather that XXX violated a permit provision which prohibits discharges of a pollutant which "violate water quality standards." Although seemingly distinguishable from the case discussed above, a closer review reveals that the cases are analogous. FOR is, in effect, attempting to find XXX liable for the discharge of a pollutant which is not included in the permit, rationalizing that it is a violation of one of the provisions.

It cannot be supposed that Congress intended the regulatory framework adopted in 1972 to be evaded so easily. The entire reason for the 1972 amendments was to adopt a regulatory framework which allowed for ease of enforcement along with fair notice to dischargers. It would be absurd to allow this scheme to be changed so easily. Such a "view of the regulatory framework [would] stand[ ] th[e] scheme on its head." *Atlantic States*, 12 F.3d at 357. It is therefore prudent not to allow enforcement of provisions dealing with discharges of pollutants which do not contain specific numeric effluent limitations on the pollutants.

FOR may rely on *Northwest Environmental Advocates v. City of Portland* (*Northwest II*), 56 F.3d 979 (9th Cir. 1995), which is directly on point with the case at bar. In *Northwest II*, the Ninth Circuit withdrew its previous opinion and held that citizens have jurisdiction to enforce water quality standards when they are conditions of a CWA permit. *See id.* at 990. The court found that, in light of *PUD No. 1 of Jefferson*

County v. Washington Department of Ecology, 511 U.S. 700 (1994), it was necessary to withdraw its previous opinion which had held that citizens lack standing to enforce provisions of a permit which do not translate discharges into end-of-the-pipe limitations. *See Northwest II*, 56 F.3d at 990; *see also Northwest Environmental Advocates v. City of Portland* (*Northwest I*), 11 F.3d 900, 911 (9th Cir. 1993) (opinion withdrawn).

FOR's reliance on this case is misplaced, since the case was undoubtedly wrongly decided. A review of the dissent's opinion and the dissent from denial of the petition for rehearing en banc reveals the faulty reasoning of the majority.

In the dissent, Judge Kleinfeld first noted that "[t]he history [of the CWA] shows that because of the ineffectiveness of water quality standards as a pollution limiting device, Congress decided to change the enforcement mechanism to effluent limitations." *Northwest II*, 56 F.3d at 992. He then stated that "[w]ater quality standards are a useful device for government enforcement authorities . . . because they provide standards for effluent limitations and goals toward which enforcement should be aimed. They are too uncertain and amorphous, however, for use against specific polluters." *Id.* at 992.

Kleinfeld reasoned that allowing enforcement through water quality standards would create undesirable situations similar to the one in the case at bar. He posed a hypothetical in which water quality standards permit 100 units of a pollutant into a body of water where there are upstream dischargers and non-point sources who discharge 50 units of pollutant and a downstream discharger who discharges 50 units of pollutant. *See id.* Kleinfeld reasoned that if the effluent discharge of the upstream dischargers is increased to 80 units, it does not follow that the discharge of the downstream discharger should be limited to 20 units. *See id.* Kleinfeld stated, "[t]he burdens of so severe a limitation may exceed the burdens of the extra pollution, or enforcement efforts might more appropriately be directed at the other polluters." *Id.* at 993.

This is exactly the situation which has arisen in the case at bar. The Roaritan has no measurable natural concentration of selenium. Furthermore, XXX does not discharge enough selenium to make the Roaritan's concentration level of selenium exceed the amount allowed for a Class AAA waterbody. Therefore, XXX's alleged violation of the permit provision, as it relates to discharges of selenium, was completely the result of upstream discharges in conjunction with XXX's discharges. Moreover, any alleged future violations of this permit provision will always be contingent on discharges of selenium from upstream dischargers. This means that XXX will always have to adjust its discharge according to the upstream discharge.

This does not make practical sense. As Kleinfeld noted, it would be more practical to allow the burden of the extra pollution, realizing that the permits of the upstream and downstream dischargers could be amended to include limitations on discharges of selenium, instead of imposing such an extreme limitation on XXX.

In agreeing with Kleinfeld's position, four other Ninth Circuit judges dissented from the denial of the petition for rehearing en banc. *See Northwest Environmental Advocates v. City of Portland* (*Northwest III*), 74 F.3d 945, 946 (9th Cir. 1996). These judges reasoned that since Congress did not intend and no other circuit recognized a cause of action for citizens seeking to enforce state water quality standards contained in a permit provision, it was a complete misstep for the court to withdraw its previous opinion. *See id.* at 948. The judges further opined that by its decision the court had "significantly reshaped federal environmental law [ ] without consent of Congress . . . ." *Id.* at 946.

FOR may also rely on *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994). However, reliance on *Jefferson County* is faulty since Jefferson County did not resolve the question involved in the case at hand. In *Jefferson County*, the State of Washington conditioned certification of a project involving the construction of a hydroelectric plant on the maintenance of minimum stream flow requirements. *See Jefferson County*, 511 U.S. at 700.

The question before the Court was "whether the minimum stream flow requirement that the State imposed on the [p]roject [wa]s a permissible condition of a § 401 certification under the Clean Water Act." *Id.* at 711. The Supreme Court held "that the State may include minimum stream flow requirements in a certification issued pursuant to § 401 of the Clean Water Act insofar as necessary to enforce a designated use contained in a state water quality standard." *Id.* at 723.

In *Northwest II*, the Ninth Circuit relied on *Jefferson County* to conclude that numeric criteria are not necessary in order for permit provisions to be enforceable. *See Northwest II*, 56 F.3d at 989. As the dissent noted, however, *Jefferson County* said nothing about whether citizen suits may be used to enforce water quality standards. *Northwest II*, 56 F.3d at 990 ("*Jefferson County* does not involve a citizens' suit, says nothing about citizens' suits, and implies nothing about citizens' suits."). It only decided whether states could condition certification on the maintenance of minimum stream flow requirements. *See id.* Furthermore, it did not say anything about permit provisions dealing with the discharge of pollutants. It is therefore imprudent to draw from *Jefferson County*'s holding that permit provisions which do not specify numeric effluent limitations are enforceable.

CONCLUSION

For the foregoing reasons, the State of New Union respectfully requests that this Court affirm the district court's decision that groundwater, which is tributary to but not in close proximity with, traditionally navigable surface water is a violation of 33 U.S.C. § 1311(a); reverse the district court's decision that XXX is not barred by 33 U.S.C. § 1369 from challenging a permit provision which prohibits the discharge of any pollutant which "violates water quality standards" on the ground that it is too vague to be enforceable; reverse the district court's decision that the interpretation of a provision prohibiting the discharge of any pollutant which "violates water quality standards" which is required by a certification condition imposed by New Union is governed by federal law;

reverse the district court's decision that, if the interpretation is governed by federal law, a permit provision which prohibits the discharge of any pollutant which "violates water quality standards" is enforceable without further administrative action to establish effluent limitations on the pollutant in the permit.