View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by DigitalCommons@Pace

Pace Environmental Law Review

Volume 6
Issue 2 *Spring 1989*

Article 6

April 1989

Brief for Intervenor: First Annual Pace National Environmental Moot Court Competition

Follow this and additional works at: http://digitalcommons.pace.edu/pelr

Recommended Citation
, *Brief for Intervenor: First Annual Pace National Environmental Moot Court Competition*, 6 Pace Envtl. L. Rev. 423 (1989)
Available at: http://digitalcommons.pace.edu/pelr/vol6/iss2/6

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

No. 88-1001

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

ACME INDUSTRIES, INC.,
Appellant,

v.

NATIONAL COUNCIL FOR THE
PROTECTION OF THE ENVIRONMENT,
Appellee,

v.

STATE OF NEW UNION,
Intervenor.

BRIEF FOR INTERVENOR

Michael Burke*
Myron Scott
Laurie Stewart
College of Law
Arizona State University
Tempe, Arizona
Counsel for Intervenor

* The winning briefs published in this issue are reprinted essentially in their original form. The editorial staff of the Pace Environmental Law Review made minor revisions to citation form, spelling and grammar. The outline, writing style, case and statutory law use remains that of each group of authors.

QUESTIONS PRESENTED

I. Did the district court err in dismissing the pH, BOD, and TSS counts as moot for not constituting violations as required to maintain a section 505 citizen suit under the Clean Water Act, 33 U.S.C.A. § 1365 (1982)?

II. Did the district court err in failing to rule on the validity of the 1987 NPDES permit toxicity limitation due to lack of jurisdiction? ⊥ii

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINION BELOW 1

STATUTES, REGULATIONS, AND OTHER AUTHORITIES INVOLVED 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE DISTRICT COURT CORRECTLY DISMISSED THE COUNTS ALLEGING PH, BOD, AND TSS VIOLATIONS AS MOOT ON GROUNDS THAT THOSE VIOLATIONS ARE NOT CONTINUING VIOLATIONS AS REQUIRED TO MAINTAIN A CITIZEN SUIT UNDER THE CLEAN WATER ACT 6

A. *The district court decision dismissing the pH, BOD, and TSS counts is consistent with the intent of Congress in enacting § 505 and sound public policy considerations* 6

1. The district court correctly construed § 505 narrowly to avoid interference with the State's primary enforcement authority ..... 6 ⊥iii

2. Correctly applying *Gwaltney* in light of the purely supplemental function of citizen suits, the district court properly dismissed the pH, BOD, and TSS counts 10

3. Considerations of federalism and administrative and judicial efficiency support limiting the scope of § 505 actions 12

B. *NCPE's suit for pH, BOD, and TSS violations contravenes New Union's statutory role as the primary enforcer of the Clean Water Act* 16

1. Acme is not in violation of the pH limitation in its current NPDES permit 17

2. Acme is not in violation of the BOD and TSS limitations in its NPDES permit 18

3. The lower court's dismissal of NCPE's claims is not affected by the organization's permit challenges pending before the EPA . 19

C. *NCPE's claims of pH, BOD and TSS violations should be dismissed because the organization failed to make an allegation of continuous or intermittent ongoing violations* 21

1. Acme has not continuously or intermittently violated the pH limitations in its NPDES permit 23

2. Acme has not continuously or intermittently violated the BOD and TSS limitations in its NPDES permit 24

II. THE DISTRICT COURT DID NOT ERR IN FAILING TO RULE ON ACME'S CHALLENGE TO THE CERTIFICATION AND TOXICITY EFFLUENT LIMITATION BECAUSE THE COURT LACKED JURISDICTION 26

A. *Judicial intervention into the validity of Acme's NPDES permit conditions is unwarranted because Acme failed to exhaust EPA remedies and processes* 27

B. *Even assuming that judicial review of ACME's permit challenge was otherwise appropriate, the district court correctly dismissed the* ⊥[iv] *challenge because it was brought in the wrong forum* 29

1. Acme must bring its challenge to the toxicity effluent limitation in the federal court of appeals 29

2. New Union's certification of Acme's NPDES permit should be reviewed only by the agencies and courts of New Union 31

3. The district court should have abstained from adjudicating Acme's challenge to New Union's water quality standard even if it had jurisdiction because this controversy concerns a sensitive area of New Union social policy 32

C. *Because undisputed DMRs evidence Acme's violations of the enforceable toxicity effluent limitation, the district court properly granted the NCPE-New Union motion for partial summary judgment* 33

1. Acme's DMRs properly constitute admissions for purposes of summary judgment .. 33

2. Pending administrative review of ACME's permit challenge and possible subsequent judicial review, Acme's current permit limitations are binding and enforceable 34

a. The district court correctly granted NCPE's motion because the toxicity limitation is an "effluent limitation" within the meaning of the § 301 of the Act 35

b. Because the toxicity limitation is a condition in Acme's NPDES permit, it must be enforced by the EPA 37

D. *If this court reverses the district court, it should remand the case because the delay will not adversely affect the public, the parties have not fully briefed and argued the merits, and justice will not be served by considering issues not reached by the district court* 37

CONCLUSION 38

APPENDIX ..... *

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967) 37

Alabama Public Serv. Comm'n v. Southern R. Co.,
341 U.S. 341 (1951) 32

Burford v. Sun Oil Co.,
319 U.S. 315 (1943) 32

E.I. du Pont de Nemours & Co. v. Train,
430 U.S. 112 (1977) 30

Far East Conference v. United States,
342 U.S. 570 (1952) 13, 27

* The appendix set forth relevant statutes and regulations, but was deleted for publication.

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.,
484 U.S. 49 (1987) ..... *passim*

Illinois Central R.R. Co. v. Illinois,
146 U.S. 387 (1892) 9, 14

Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) 16

Pollard v. Hagan,
44 U.S. (3 How.) 212 (1845) 14

Railroad Comm'n of Texas v. Pullman Co.,
312 U.S. 496 (1941) 32

Train v. Natural Resource Defense Council,
421 U.S. 60 (1975) 38

OTHER FEDERAL CASES:

Central Hudson Gas & Elec. Corp. v. EPA,
587 F.2d 549 (2d Cir. 1978) 30

Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.,
652 F. Supp. 620 (D.Md. 1987) 8

Hamker v. Diamond Shamrock Chem. Co.,
756 F.2d 392 (5th Cir. 1985) 8, 16, 22

Mobil Oil Corp. v. Kelley,
426 F. Supp. 230 (S.D. Ala. 1976) 31, 32

New England Coalition v. United States Nuclear Regulatory Comm'n,
582 F.2d 87 (1st Cir. 1978) 29

Paskavitch v. United States Nuclear Regulatory [vi] *Comm'n*,
458 F. Supp. 216 (D.Conn. 1978) 28

Pautuxet Cove Marina, Inc. v. Ciba-Geigy Corp.,
807 F.2d 1089 (1st Cir. 1986) 16, 22

Proffitt v. Rohm & Haas,
850 F.2d 1007 (3d Cir. 1988) 8, 35

Roosevelt Campobello Internat'l Park Commission v. EPA,
394 F.2d 1041 (1st Cir. 1984) 31, 37

Student Public Interest Research Group of N.J. v. Monsanto Co.,
600 F. Supp. 1479 (D.N.J. 1985) 34, 35

Student Public Interest Group of N.J. v. P.D. Oil & Chem. Storage, Inc.,
627 F. Supp. 1074 (D.N.J. 1986) 35

United Farm Workers of Am. AFL-CIO v. Arizona Agric. Employment Relations Bd.,
669 F.2d 1249 (9th Cir. 1982) 28

United Steel Corp. v. Train,
556 F.2d 822 (7th Cir. 1977) 30

STATE CASES:

Melory v. Saint Paul Mercury Indem. Co.,
72 Ariz. 406, 236 P.2d 732 (1951) 32

STATUTES:

Federal Water Pollution Control Act:

33 U.S.C.A. § 1251(a) (West Supp. 1988) 12, 27

33 U.S.C.A. § 1311 (West 1986 & Supp. 1988) 15

33 U.S.C.A. § 1311(a) (West 1986) 13, 27, 35

33 U.S.C.A. § 1311(b)(1)(C) (West 1986 & Supp. 1988) 4, 14, 30, 36, 37

33 U.S.C.A. § 1313 (West 1986 & Supp. 1988) 14

33 U.S.C.A. § 1318 (West 1986 & Supp. 1988) 34

33 U.S.C.A. § 1319 (West 1986 & Supp. 1988) 7, 14

33 U.S.C.A. § 1319(a)(1) (West 1986) ..... 17, 22 [vii]

33 U.S.C.A. § 1319(b) (West 1986) 9

33 U.S.C.A. § 1341 (West Supp. 1988) 1

33 U.S.C.A. § 1342 (West 1986 & Supp. 1988) ...1, 7, 13, 27

33 U.S.C.A. § 1342(b) (West 1986) 14

33 U.S.C.A. § 1342(b)(7) (West 1986) 14
33 U.S.C.A. § 1342(o)(2) (West Supp. 1988) 19, 20
33 U.S.C.A. § 1342(o)(2)(B)(i) (West Supp. 1988) 19
33 U.S.C.A. § 1365(a)(1) (West 1986 & Supp. 1988) .. 10, 21
33 U.S.C.A. § 1365(a)(2) (West 1986 & Supp. 1988) 9
33 U.S.C.A. § 1365(b)(1)(A) (West 1986) 8, 13
33 U.S.C.A. § 1365(b)(1)(B) (West 1986) 7, 8, 17
33 U.S.C.A. § 1365(g) (West 1986) 12
33 U.S.C.A. § 1369(b)(1) (West Supp. 1988) 26, 27
33 U.S.C.A. § 1369(b)(1)(E) (West Supp. 1988) 30

Resource Conservation and Recovery Act:

42 U.S.C. § 6972(a)(1)(B) (1982 & Supp. III 1985) 21

Solid Waste Disposal Act:

42 U.S.C. § 6972(a)(1)(B) (1982 & Supp. III 1985) 11

Clean Air Act:

42 U.S.C. § 7604 (1982 & Supp. III 1985) 11

CODE OF FEDERAL REGULATIONS:[viii]

40 C.F.R. § 122.2 (1987) 30
40 C.F.R. § 122.21(f) (1987) 34
40 C.F.R. § 122.21(g) (1987) 34
40 C.F.R. § 122.41(a) (1987) 17
40 C.F.R. § 122.41(n) (1987) 18
40 C.F.R. Part 124 (1987) 4, 20
40 C.F.R. § 124.55(e) (1987) 31
40 C.F.R. § 124.74(a) (1987) 26, 28

40 C.F.R. § 124.91(a)(1) (1987) 28

40 C.F.R. § 124.91(e) (1987) 29

LEGISLATIVE HISTORY

H.R. Rep. No. 189, 99th Cong., 1st Sess. (1985) 15

S. Rep. No. 414, 92d Cong., 1st Sess. (1971), *Water Pollution Control Legislation Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works* 11, 22

S. Rep. No. 414, 92d Cong., 2d Sess., *reprinted in 1972 U.S. Code Cong. & Admin. News* 7, 8, 11, 31, 36

SECONDARY AUTHORITIES

Benson, *Clean Water Act After Gwaltney: Applying Mootness Principles in Private Enforcement Actions*, 4 J. LAND USE & ENVTL. L. 143 (1988) 9

Boyer and Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen's Suits Under Federal Environmental Laws*, 34 BUFFALO L. REV. 833 8

3 K.C. Davis, *Administrative Law Text*, 34-35 (1972) 13, 27

Thomas, *Citizen Suits & the NPDES Program: A Review of Clean Water Act Decisions*, 17 Envtl. L. Rep. 10050 (1987) ..... 34[1]

OPINION BELOW

The opinion of the United States District Court for the District of New Union (No. 86-631) has not been officially reported. The opinion of the district court appears on pages 9-13 of the record.

JURISDICTIONAL STATEMENT

The jurisdictional statement has been omitted pursuant

to Rule 4(c) of the 1988 Rules of the National Environmental Law Moot Court Competition and Litigation Workshop.

STATUTES, REGULATIONS, AND OTHER AUTHORITIES INVOLVED

The statutes, regulations, and other authorities relevant to the determination of this case are reprinted in full or in pertinent part in the Appendices.

STATEMENT OF THE CASE

I. *Statement of the Facts.*

Acme operates an organic chemical manufacturing plant in New Union ("New Union" or the "State") and since 1974 has discharged waste into the Fairwater River under National Pollution Discharge Elimination System ("NPDES") permits issued by the United States Environmental Protection Agency (the "EPA") pursuant to section 402 of the Clean Water Act (the "Act"), 33 U.S.C.A. § 1342 (R. 4). Under section 401 of the Act, 33 U.S.C.A. § 1341, New Union certified the 1974 permit limitations as essential to[2] meet state water quality standards for sport fishing, boating, and swimming (R. 3). The certified pH, Biological Oxygen Demand ("BOD"), and Total Suspended Solids ("TSS") limits were more stringent than otherwise would have been required under § 301(b)(1)(A) of the Act (R. 3, 4).

The 1974 permit required Acme to meet the discharge limits by July 1, 1977 (R. 3). Although Acme installed a required wastewater treatment plant before that date, the facility never achieved 100 percent compliance with the BOD and TSS limitations (R. 6, 7). After installing automated treatment equipment in June, 1985, Acme violated its pH limitation only once. That violation, however, was the result of a six-hour power outage (R. 6, 7).

In July 1987, the EPA issued a new permit in which New Union certified less stringent BOD and TSS limitations (R. 4). By 1987, discharges along Fairwater River had declined (R. 5). New Union therefore determined that less stringent discharge limits were consistent with its water quality standards for the

river. Acme's 1987 permit conditions are consistent with these standards (R. 5). Acme's performance continually improved and, by August 1986, it achieved discharges below the subsequently established 1987 permit limits (R. 8). Acme consistently has met its 1987 permit limits except during two-week periods each winter in which extreme cold curtails treatment system biological activity (R. 8). The National Council for the Protection of the Environment ("NCPE") has[3] challenged the BOD and TSS limits in proceedings now pending before the EPA (R. 6).

Acting on New Union's section 401 certification, the EPA added a toxicity effluent limitation to Acme's 1987 NPDES permit (R. 4). The New Union Department of Environmental Protection (the "Department") developed the toxicity limitation to implement New Union's narrative water quality standard (R. 4). Undisputed Discharge Monitoring Reports ("DMRs") filed by Acme with the EPA disclose that Acme violated the toxicity limitation in each of twelve monthly tests performed since the issuance of the 1974 permit (R. 9, 12).

Acme challenged the toxicity portion of the certification in a New Union court on procedural and vagueness grounds (R. 4, 5). The court dismissed Acme's challenge for lack of jurisdiction (R. 5). Acme's subsequent challenge to the toxicity effluent limitation is pending before the EPA (R. 6).

II. *Proceedings Below.*

Acme moved for summary judgment on the pH, BOD, and TSS counts (R. 2, 10, 11). Acme urged that NCPE's suit was moot because the company had come into compliance with its 1987 permit (R. 9, 10). New Union joined Acme's motion on the grounds that post-compliance citizen suits intrude upon the State's enforcement role (R. 10). The district court granted the Acme-New Union motion and concluded that the pH, BOD, and TSS violations were moot because they were wholly past (R. 11). These violations, therefore, could not serve as the basis[4] for a section 505 citizen suit (R. 11). Regarding NCPE's challenge to the 1987 BOD and TSS limits, the district court held that it lacked jurisdiction under section

509 of the Act and 40 C.F.R. Part 124 (R. 11).

The district court granted NCPE's motion for partial summary judgment that Acme has consistently violated the toxicity effluent limitation in its 1987 permit (R. 2, 12). New Union joined NCPE in opposing on jurisdictional grounds Acme's challenge to the toxicity limitation's validity (R. 12). NCPE and New Union also maintained that the EPA independently must apply New Union's water quality standards as required by 33 U.S.C.A. § 1311(b)(1)(C) (R. 12). New Union further maintained that the toxicity limitation is valid and that the water quality standard is not vague (R. 12). The district court held that it lacked jurisdiction under section 509 of the Act (R. 12). In addition, the court held that absent EPA action on Acme's pending permit appeal, the toxicity effluent limitation remains effective and enforceable (R. 12).

SUMMARY OF ARGUMENT

The Supreme Court has held that citizens cannot sue for wholly past violations under section 505 of the Clean Water Act. Congress intended section 505 citizen suits to supplement, not supplant, normal state and EPA enforcement. Accordingly, the Court has interpreted the role of citizen-plaintiffs narrowly to avoid interference with states' primary enforcement authority. Further, federalism, administrative, and[15] judicial efficiency considerations support limitations on the scope of citizen suits. Acme is not in violation of the pH, BOD, or TSS limits in its current NPDES permit. NCPE's challenge to the BOD and TSS limitations lacks merit, and nevertheless, is currently before the EPA. To allow a citizen suit based on the prospective outcome of that challenge would denigrate the purposes of the citizen suit provision. NCPE has failed to demonstrate continuous or intermittent violations of the pH, BOD, and TSS limitations. The abatement-oriented goal of the citizen suit provision and traditional mootness principles dictate dismissal when continuous or intermittent violations are not shown. Thus, the district court properly granted Acme's summary judgment motion as to the pH, BOD, and TSS counts.

The doctrines of primary jurisdiction and exhaustion of administrative remedies and the statutory scheme for administration of the Act support the district court's dismissal of Acme's claim. The court of appeals has exclusive jurisdiction to review the EPA's decision on that challenge. Challenges to New Union's certification should be heard by the courts of New Union, and the district court properly abstained from entering the sensitive areas of state social policy implicated by Acme's claim. Acme's DMRs are undisputed and constitute admissions for summary judgment purposes. Pending administrative review of Acme's permit challenge and possible subsequent judicial review, the current toxicity limitation is binding[6] and enforceable. The district court therefore correctly refused to hear Acme's permit challenge.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED THE COUNTS ALLEGING pH, BOD, AND TSS VIOLATIONS AS MOOT ON GROUNDS THAT THOSE VIOLATIONS ARE NOT CONTINUING VIOLATIONS AS REQUIRED TO MAINTAIN A CITIZEN SUIT UNDER THE CLEAN WATER ACT.

The district court correctly granted Acme's motion for summary judgment dismissing the pH, BOD, and TSS counts. The court's decision is consistent with sound public policy, the Congressional intent underlying the Clean Water Act, the Act's enforcement scheme, and the United States Supreme Court's recent holding in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 108 S. Ct. 376, 383 (1987).

A. *The district court decision dismissing the pH, BOD, and TSS counts is consistent with the intent of Congress in enacting §505 and with sound public policy considerations.*

The decision below is consistent with (1) the Congressional intent to limit a section 505 citizen suit to a supplemental, abatement-oriented role, (2) the language and underlying Congressional intent of section 505 by the *Gwaltney* court,

and (3) sound public policy.

1. The district court correctly construed § 505 narrowly to avoid interference with the State's primary enforcement authority.

New Union joined Acme's motion below to dismiss the pH, BOD, and TSS counts on the grounds that section 505 of the Act does not authorize citizen suits for past violations (R. 10, n. 3). New Union does not seek to eliminate citizen suits, but[17] only to limit them to the supplemental role Congress intended. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 108 S. Ct. 376, 383 (1987) ("[T]he citizen suit is meant to supplement rather than to supplant governmental action."). The plain language and statutory history of section 505 demonstrate Congress' intent to authorize citizen suits only if the government has failed to require compliance from permit violators. *Id.*; S. Rep. No. 414, 92d Cong., 2d Sess. at 64 (1971), *reprinted in* 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 1982 (1973).

Under section 505, no citizen may bring a civil action against a permit violator if, *inter alia*, the state or EPA has commenced and is diligently prosecuting a civil or criminal action to require compliance. 33 U.S.C.A. § 1365(b)(1)(B) (West 1986). In states having federally-approved NPDES permit programs, primary enforcement power rests with the State. 33 U.S.C.A. § 1342 (West 1986 & Supp. 1988). Where such programs are in force, the EPA may bring enforcement action if the state does not. *Id.* Both the state and the EPA possess broad power to enforce compliance as guardians of the Act's provisions. *See, e.g.*, 33 U.S.C.A. § 1319 (West 1986 & Supp. 1988) (authorizing administrative, civil, and criminal sanctions).

In contrast, Congress limited the power of citizen plaintiffs. *Gwaltney*, 108 S. Ct. at 381-82 (distinguishing § 505 from § 309, which grants government discretion to sue for wholly past violations). *See also* 33 U.S.C.A. §[18] 1365(b)(1)(A) (West 1986) (requiring citizens to give 60 days notice of intent to sue the State, EPA, and prospective defendants); 33 U.S.C.A. §

1365(b)(1)(B) (West 1986) (barring citizen suit if the government undertakes enforcement action). The contrast between section 505 and section 309 exemplifies the pervasive Congressional intent to place primary enforcement power in governmental hands and to make government inaction the *sine qua non* of citizen suits.

The legislative history confirms the intent. *See, e.g.*, S. Rep. No. 414 at 64, 2 Leg. Hist. at 1482 ("The Committee intends the great volume of enforcement actions [to] be brought by the State."). Subsequent judicial interpretations deferred to Congress' intent to vest primary enforcement authority in the government through a two-tiered enforcement scheme in which the citizen suit serves mainly as an impetus to governmental action. *See, e.g., Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 395 (5th Cir. 1985); *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 625 (D.Md. 1987). *See, also*, Boyer and Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFFALO L. REV. 833, 868-870 (1985).

Congress intended citizen suits to "goad the responsible agencies to more vigorous enforcement." *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1011 (3d Cir. 1988). To treat citizen suits as a substitute for government action, as one commentator [19] has urged, would encourage privatization and governmental abdication of its enforcement responsibilities. *See* Benson, *Clean Water Suits After Gwaltney: Applying Mootness Principles in Private Enforcement Actions*, 4 J. LAND USE AND ENVTL. L. 143, 156 (1988). Rather than encourage the government to default to private plaintiffs, Congress provided an additional "goad" to government action by allowing citizens to sue the EPA Administrator for failure to perform non-discretionary duties. 33 U.S.C.A. § 1365(a)(2) (West 1986 & Supp. 1988). Similarly, citizens have always been able to sue states for abdication of their public trust obligation. *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892). The Act, however, makes EPA suits for past violations discretionary, thus removing them from the reach of citizen plaintiffs. 33 U.S.C.A. § 1319(b) (West 1986).

Concluding that Congress intended citizen suits to fill a limited, interstitial function and not to intrude upon government's primary enforcement and administrative responsibilities, the Supreme Court has narrowly construed the scope of section 505 suits. *See Gwaltney*, 108 S. Ct. at 383 (rejecting citizen suits for past violations as "potentially intrusive" and contrary to Congressional intent). The court below correctly dismissed NCPE's pH, BOD, and TSS counts as tending to supplant, rather than merely supplement the state's statutory enforcement role, and similarly rejected NCPE and Acme's attempts to intrude⊥[10] upon the EPA's administrative review role (R. 10, n.3; 11-12).

2. Correctly applying *Gwaltney* in the light of the purely supplemental function of citizen suits, the district court properly dismissed the pH, BOD, and TSS counts.

The court in *Gwaltney* based its holding that Congress intended to authorize citizen suits only for past violations on the purely interstitial function of section 505 suits, as well as on other mootness and statutory interpretation grounds. *Gwaltney*, 108 S. Ct. at 383 (noting the supplemental function of § 505); 383-84 (citing plain language and legislative history); 386 (citing "longstanding principles of mootness").

The Court in *Gwaltney* based its findings in part upon the statutory language of the Act. Section 505 gives citizens a right of civil action "against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation. . . ." 33 U.S.C.A. § 1365(A)(1) (West 1986 & Supp. 1988). The Court found that "[t]he most natural reading of 'to be in violation' is a requirement that citizen-plaintiffs allege a state of either continuous or intermittent violation — that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney*, 108 S. Ct. at 381.

Close parallels to the citizen suit provisions of several other environmental statutes support the Court's reading of

section 505. *Id.* (citing, *e.g.*, Resource Conservation and Recovery[11] Act of 1976, 42 U.S.C. § 6972 (1982 & Supp. III 1985); Toxic Substance Control Act, 15 U.S.C. § 2619 (1982 & Supp. IV 1986). Congress expressly modeled section 505 on the Clean Air Act, which provides solely for injunctive, abatement-oriented citizen suits. *See* 42 U.S.C. § 7604 (1982 & Supp. III 1985); *see also*, S. Rep. No. 414 at 79, 2 Leg. Hist. at 1497 (Section 505 modeled on Clean Air Act). Moreover, when Congress has intended to target wholly past violations it has said so explicitly. *Gwaltney*, 108 S. Ct. at 381, n.2 (citing, *e.g.*, "past or present" violation language in 1984 Solid Waste Disposal Act Amendment, 42 U.S.C. § 6972(a)(1)(B) (1982 & Supp. III 1985).

Legislative pronouncements on section 505 also demonstrate the intent of Congress to limit citizen suits to an abatement-oriented function. *Id.* at 383-84; *see also*, *Water Pollution Control Legislation Hearings Before the Subcom. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 1st Sess., pt. 2, at 707 (citizen suits "are brought for the purpose of abating pollution") (Sen. Eagleton).

Citizen suits for past violations are inconsistent with the abatement function intended by Congress. Limiting citizen suits to continuing violations is consistent, however, with the supplemental nature of section 505 actions. Congress did provide for *post hoc* and punitive sanctions, but vested that discretionary authority solely in the government. *Gwaltney*, 108 S. Ct. 381-82. In contrast, section 505 provisions on standing address present and future harm, rather than wholly past harm.[12] 33 U.S.C.A. § 1365(g) (West 1986) (defining "citizen" as one possessing "an interest which is or may be adversely affected" by violations of the Act). *See also*, *Gwaltney*, 108 S. Ct. at 382. Thus, both the intended supplemental role of citizen-plaintiffs and the intended prospective function of section 505 suits support the limitations imposed on NCPE by the lower court.

3. Considerations of federalism and administrative and judicial efficiency support limiting the scope

of § 505 actions.

Sound policy considerations support limiting the role of citizen litigators. The public interest in citizen enforcement of water quality rules must be balanced against the public interest in federalism, orderly administrative processes, judicial efficiency, and maintenance of an economically viable distribution of the costs of improved water quality. The balance struck by Congress, as interpreted by the Supreme Court, relegates citizen enforcement to an interstitial role and requires dismissal of section 505 suits if a defendant reasonably achieves reliable compliance before trial. *Gwaltney*, 108 S. Ct. at 386 (dictum).

The statutory scheme of the Act delegates significant authority to the EPA and the States. Congress set forth the broad purpose of the Act as being "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C.A. § 1251(a) (West Supp. 1988). To achieve those broad goals, section 301(a) makes unlawful any discharge of any pollutant into navigable waters except as specifically[13] authorized. 33 U.S.C.A. § 1311(a) (West 1986); *see also*, 33 U.S.C.A. § 1342 (West 1986 & Supp. 1988) (establishing a federal state NPDES system to authorize restricted pollutant discharges). Thus, in common with much contemporary legislation, Congress established broad national goals and delegated the authority to set specific requirements on a case-by-case basis to an administrative body. *E.g.*, 3 K.C. Davis, *Administrative Law Text*, 34-35 (1972). Such authority, involving the concrete realization of policy goals through enforceable rules, is largely legislative. *Id.* at 11-12. Given the technical and economic complexities involved, much environmental legislation could prove impossible without such administrative delegation of quasi-legislative authority.

Premature resort to the courts by citizen-plaintiffs threatens the orderly functioning of the administrative process. Even absent legislation expressly granting initial jurisdiction to an agency, courts generally allow the legislative functions of administrative bodies to run their intended course by applying the doctrines of primary jurisdiction and

exhaustion of administrative remedies. *E.g.*, *Far East Conference v. United States*, 342 U.S. 570 (1952). Congress demonstrated a similar intent to prevent disruption of the orderly functioning of the Clean Water Act's administrative process by requiring prior notice of intent to file a citizen suit. 33 U.S.C.A. § 1365(b)(1)(A) (West 1986).

Considerations of federalism implicit in the Act also support a limited role for citizen-plaintiffs. The Act envisions[14] a state-federal partnership in establishing, investigating, and enforcing NPDES discharge limitations. *E.g.*, 33 U.S.C.A. § 1342(b) (West 1986) (authorizing states to establish and administer permit programs in conformance with federal guidelines and subject to EPA approval); 33 U.S.C.A. §§ 1319, 1342(b)(7) (West 1986) (subjecting state permit holders to both state and federal enforcement action). Thus, the Act reflects the traditional, primary role of states as owners of inland water resources and as trustees of the public interest in navigable waters. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845) (state title under equal footing doctrine); *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452-53, 458 (1892) (public trust doctrine).

Under the Act, states retain much of their traditional authority to balance competing interests in water resources. Section 303 generally entrusts to the states determination of the specific uses designated for a body of water. 33 U.S.C.A. § 1313 (West 1986 & Supp. 1988). States necessarily balance competing interests in making that determination. Similarly, states must balance competing interests in apportioning the burden of achieving water quality goals by establishing enforceable NPDES discharge limitations on a case-by-case basis. 33 U.S.C.A. §§ 1311(b)(1)(C), 1312. (West 1986 & Supp. 1988). Congress implicitly recognized the practical necessity of accommodating competing interests to achieve a workable water quality plan in allowing NPDES and other specified exceptions[15] to the Act's broad, no-pollution goal. 33 U.S.C.A. § 1311 (West 1986 & Supp. 1988). Moreover, the EPA has never regarded 100 percent compliance with discharge limits as a feasible goal. H.R. Rep. No. 189, 99th Cong., 1st Sess., 33 (1985) (well-operated plants may be expected to exceed limits

1 - 5 percent of the time). Whereas the Act vests discretion to sue for past violations in the government, citizen suits for wholly past violations would interfere with government flexibility to the long-term detriment of a workable clean water program. *Gwaltney*, 108 S. Ct. at 383.

The Court in *Gwaltney* warned of the possibility that citizen suits for past violations could interfere with the administrative discretion essential to an effective clean water program. *Id.* (The Court hypothesized an agreement by which a permittee agreed to undertake corrective actions in exchange for a governmental pledge to forego other enforcement action. A section 505 plaintiff then filed suit, upsetting the agreement and delaying the corrective action.) Similarly, the district court noted and rejected attempts by both NCPE and Acme to turn this case into a vehicle for an "end run" around the orderly functioning of the established administrative process for permit challenges (R. 11, 12). Indeed, NCPE's attempt to challenge the current limitations is closely analogous to the *Gwaltney* hypothetical. In both instances, an overzealous citizen-plaintiff seeks to constrain the sound exercise of administrative discretion in achieving compliance without pursuing established[16] administrative remedies (R. 11). The Court in *Gwaltney* wisely criticized, and the court below correctly rejected, such an approach.

Finally, citizen suits for past violations would threaten judicial efficiency. To allow citizens to sue for violations months or years after compliance could result in a barrage of litigation that would clog the courts without advancing any present public interest. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19 n.27 (1981). Thus, government enforcement of the Act constitutes sound public policy. In limiting NCPE's suit to Acme's continuing violations, consistent with *Gwaltney* and its predecessors, the district court furthered the long-term public interest in improved water quality. *See, e.g., Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392 (5th Cir. 1985); *Pautuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir. 1986).

B. *NCPE's suit for pH, BOD, and TSS violations*

contravenes New Union's statutory role as the primary enforcer of the Clean Water Act.

The plain language, legislative history, and judicial interpretations of the Act all support the conclusion that section 505 citizen suits play a supplemental role in the enforcement of the Act's compliance provisions. The Act's two-tiered enforcement scheme, however, necessarily presupposes that governmental compliance efforts are appropriate only when a violation actually has occurred, and that citizen suits properly can fulfill their function as an impetus to governmental action[17] only when governmental action is required. A threshold question, therefore, is whether the Act's enforcement provisions obligated New Union to seek compliance by Acme.

Under the Act, a "violation" would occur if Acme were to discharge its wastewater in contravention of the "conditon[s] or limitations" of its NPDES permit. 33 U.S.C.A. § 1319(a)(1) (West 1986). *See also*, 40 C.F.R. § 122.41(a) (1987) (Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action.). Thus, NCPE could maintain a citizen suit under section 505 only if (1) Acme were in violation of its current NPDES permit and (2) New Union failed to bring the company into compliance with that permit. *See* 33 U.S.C.A. § 1365(b)(1)(B) (West 1986). Acme, however, is not in violation of its current NPDES permit. NCPE cannot commence an action against Acme consistent with the enforcement provisions of the citizen suit, when New Union cannot fulfill its primary enforcement role.

1. Acme is not in violation of the pH limitation in its current NPDES permit.

Acme's current NPDES permit was issued in July, 1987 (R. 4). The new permit maintained the pH limitation established by Acme's previous permit (Range: 6-9), and Acme has complied with that limitation since 1985, when it installed an automatically operated lime addition system (R. 10). The lower court noted that only one violation has occurred since[18] 1985, that the violation was caused by extraneous events unlikely to recur, and that NCPE's claim of pH viola-

tions is clearly moot (R. 10). Although the court determined that it did not need to reach the question of whether the sole pH violation constituted an "upset" under 40 C.F.R. § 122.41(n), the court's decision to disregard the aberrant event is consistent with the congressional intent apparent in provisions like the "upset defense": the focus of the Act is to prevent continuing violations of NPDES permits. *See, e.g., Gwaltney*, 108 S. Ct. 376. The lower court correctly held that NCPE's claim of pH violations is moot.

2. Acme is not in violation of the BOD and TSS limitation in its current NPDES permit.

The 1987 permit increased the limits on permissible BOD and TSS discharges. The new limit for BOD is 1500 pounds per day, with a 750 pounds per day average. The new limit for TSS is 1800 pounds per day, with a 900 pounds per day monthly average (R. 5). Acme has consistently met the standards of its current NPDES permit regarding these limitations (R. 10). In accordance with the enforcement provisions of the Act, 33 U.S.C.A. § 1319, Acme is not in violation of the limitations or conditions of its current NPDES permit and, neither New Union nor the EPA is presently under an obligation to enforce compliance. As with the claim of pH violations, NCPE's claims of BOD and TSS violations are moot, and the lower court correctly dismissed them.[19]

3. The lower court's dismissal of NCPE's claims is not affected by the organization's permit challenges pending before the EPA.

The propriety of the lower court's decision is not affected by a challenge, currently before the EPA, in which NCPE questions the validity of the BOD and TSS limitations in Acme's permit. In its challenge, NCPE claims that the EPA acted in contravention of section 402 of the Act, 33 U.S.C.A. § 1342, by increasing the amount of effluent Acme may discharge, that the new limits are invalid, and that the older limits, therefore, remain in effect (R. 11).

The "antibacksliding" provisions of section 402(o) are the

focus of NCPE's attack on the new effluent limitations. Although these provisions prevent the states and the EPA from issuing permits with effluent limitations that are more lenient than those found in earlier permits, several notable exceptions are included in the section. *See* 33 U.S.C.A. § 1342(o)(2) (West Supp. 1988). One of these exceptions allows the state and the EPA to establish less stringent guidelines if "information is available which was not available at the time of permit issuance . . . and which would have justified the application of a less stringent effluent limitation at the time of permit issuance." 33 U.S.C.A. § 1342(o)(2)(B)(i) (West Supp. 1988).

The increased BOD and TSS limitations in the Acme permit (although still more stringent than those required by the Act) resulted from new information that other BOD and TSS discharges into the Fairwater River had ceased (R. 5). New Union determined that it could allow Acme to increase the amount of the company's ⊥[20] BOD and TSS discharges, while continuing to maintain the State's commitment to keeping Fairwater River safe for sport fishing, boating, swimming and use by migratory fowl (R. 3, 5). Given the purpose of the Clean Water Act, such a conclusion seems well within the prerogative of the State to determine and administer water quality standards for its rivers.[1]

The questions presented by NCPE's challenge, however, are not before this court, but properly will be decided by the EPA in a full adjudicatory hearing. *See* 40 C.F.R. § 124 (1987). In any event, the outcome of that hearing is not dispositive of the question before this court. At issue in this ap-

---

1. Section 402 apparently would allow the state to introduce less stringent standards based on the "new information" exception only in the following situation: Where the cumulative effect of a revised waste load allocation results in a decrease in the amount of pollutants being discharged into the waters covered by the allocation *and* the revised waste load allocation is not the result of a discharger eliminating or substantially reducing its discharge pollutants due to complying with the requirements of the Clean Water Act or for reasons unrelated to water quality. 33 U.S.C.A. § 1342(o)(2) (West Supp. 1988). Due to the lack of information in the record regarding why the additional BOD and TSS discharges ceased, determining whether the Acme permit is affected by this restriction is difficult. The question, however, is not before this court, but rather will be determined by the permit challenge pending before the EPA.

peal is whether the lower court correctly dismissed NCPE's claims of pH, BOD, and TSS violations. The dismissal was correct simply because under the provisions of the Act, Acme is not in violation of its current NPDES permit. Even assuming *arguendo* that the EPA determines that the State raised Acme's discharge limitations in contravention of section 402, the Act's compliance[21] scheme would dictate that a citizen suit would be appropriate only after New Union and the EPA failed to enforce compliance of any revised effluent limitations. To allow a citizen suit before that time would denigrate the purpose of the Act.

C. *NCPE's claims of pH, BOD, and TSS violations should be dismissed because the organization fails to make an allegation of continuous or intermittent ongoing violations.*

Under the provisions of the Clean Water Act, private citizens may commence an action against any person "who is alleged to be in violation of" an effluent standard or limitation established pursuant to the Act. 33 U.S.C.A. § 1365(a)(1) (West 1986 & Supp. 1988). This language implies that citizens may sue only for ongoing violations of the Act. The provision's plain language and subsequent judicial interpretations of the section 505 citizen suit provision confirm this conclusion.

A review of other environmental legislation, as well as other provisions of the Act, demonstrates that Congress intended the citizen suit to be used only to abate ongoing violations. For example, in the Solid Waste Disposal Act, 42 U.S.C.A. § 6972(a)(1)(B) (West Supp. 1988), Congress, *inter alia*, granted citizens the authority to sue any person who "has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal" of hazardous waste. In addition, numerous statements in the Clean Water Act's legislative history reflect Congress' intent that citizen suits would serve a prospective, abatement-oriented purpose. *See, e.g., Water Pollution Control Legislation Hearings Before the*[22] *Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 92d Cong.,

1st Sess. 114 (1971) (citizen may sue "to abate a violation") (staff analysis), *id.* at 707 (citizen suits "are brought for the purpose of abating pollution") (Sen. Eagleton). That the Act expressly grants much broader enforcement powers (including the right to commence actions for past violations) to the states and the EPA Administrator than are available in the corresponding citizen enforcement provisions also suggests that the citizen's role is limited to abating ongoing violations of the Act. *See, e.g.*, 33 U.S.C.A. § 1319(a) (West 1986).

Judicial interpretations of the Act also uniformly agree that the plain language of the citizen suit provision indicates Congressional intent to limit this portion of the Clean Water Act to ongoing violations. *See, e.g., Hamker v. Diamond Shamrock Chem. Co.*, 756 F.2d 392, 395 (5th Cir. 1985) (Plain language of the statute requires an ongoing violation.); *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1092 (1st Cir. 1986), *cert. granted* 107 S.Ct. 872 (1987) (If Congress had intended to give citizens the right to sue for past violations, it easily could have worded the provision to grant such a right.)

If any ambiguity remained after these successively consistent interpretations of the Act, the United States Supreme Court dispelled all doubts in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 108 S. Ct. 376 (1987). In *Gwaltney*, the Court held a citizen may not maintain⊥[23] a suit for wholly past violations of the Clean Water Act. *Id.* at 386. Rather, the citizen must make a good faith allegation of a continuous or intermittent ongoing violation. *Id.* at 381. NCPE's allegations of pH, BOD, and TSS violations, however, are based on neither continuous nor intermittent violations and under the *Gwaltney* standard, therefore, are moot. Consistent with the Court's discussion in *Gwaltney*, Acme has challenged the sufficiency of NCPE's complaint through its motion for summary judgment. *Id.*

The Court in *Gwaltney* did not define the scope of a "continuous" violation; however, the term presumably is self-explanatory. An "intermittent" violation occurs when a permit holder exceeds the permit limitation one month out of every three. *Gwaltney* at 384. The effect of these two terms is

to make "a reasonable likelihood that a past polluter will continue to pollute in the future" an indispensable element of every section 505 suit.

1. Acme has not continuously or intermittently violated the pH limitations in its NPDES permit.

Acme consistently has complied with the pH limitation in its NPDES permit. Although all parties agree that until June of 1985 Acme violated its pH limitation approximately thirty percent of the time, these violations ceased when the company installed a mechanized, computer-operated lime addition system to neutralize the pH effluent (R. 6). Since the system was installed, Acme has violated the effluent limit only once.[24] The violation resulted from a power outage which caused the system to fail. This event lasted only six hours (R. 7).

To maintain its claim that Acme "is in violation" of the pH limitation in its NPDES permit, NCPE must allege in good faith that the company continuously or intermittently violates that limitation. Given the sole six-hour violation, NCPE simply cannot allege in good faith that a reasonable likelihood exists that future pH violations will occur. As the lower court correctly held, "[c]learly the case is moot as to pH violations" (R. 10).

2. Acme has not continuously or intermittently violated the BOD and TSS limitations in its NPDES permit.

For NCPE to commence a citizen suit against Acme for BOD and TSS violations, it must allege in good faith that the company continuously or intermittently violates those limitations. *Gwaltney* at 383. For NCPE to maintain its action, however, "longstanding principles of mootness" require that a reasonable expectation must exist that the wrong will be repeated. *Id.* at 386 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). This requirement thus prevents citizens from contravening the Act's intent by maintaining suits that are not concerned with ongoing violations of effluent limitations. The lower court correctly dismissed NCPE's claims

of BOD and TSS violations because the facts of the case clearly indicate that the allegedly wrongful behavior cannot reasonably be expected to recur. *See id.*

Acme consistently has met the BOD and TSS effluent[25] limitations in its NPDES permit since the permit was issued in 1987 (R. 10). In addition, the company has demonstrated that its effluent discharges have been consistent with those limitations since 1986 (R. 10). During a two week period each winter, however, the company's discharges exceeded the permit limitations because extreme cold causes biological activity in the treatment system to diminish (R. 8).

Given these facts, NCPE maintains that Acme is a violator of the Clean Water Act. The organization's claims, however, simply do not meet the standards discussed in *Gwaltney*. Acme clearly is not a "continuous" violator of the Act: The company currently is in compliance with its permit limitations. For Acme to be an intermittent violator it must exceed its effluent limitations once a month out of every three. Although the company is unable to meet the permit limitations for a two week period every winter, these aberrations clearly do not meet the "intermittent" violation threshold. As the lower court correctly noted: "The fact that extremely cold weather - an act of God - interferes with the proper functioning of Acme's treatment system on an occasional basis does not demonstrate that the earlier violations continue" (R. 11).

The dismissal of NCPE's claims was proper under the *Gwaltney* decision, and the validity of the court's ruling is not undermined by factual variations between *Gwaltney* and this case. Specifically, although the defendant in *Gwaltney* achieved compliance prior to the filing of the citizen suit while Acme[26] achieved compliance after filing but before trial, the basis for the *Gwaltney* decision indicates that this variation alone cannot allow NCPE to maintain its claims. *See Gwaltney* at 379-80. Because the Court in *Gwaltney* premised its decision on the finding that Congress intended to authorize citizen suits only in cases of continuous or intermittent violations, the Court's suggestion that section 505 suits become moot if a defendant achieves compliance after filing but before trial necessarily follows from an application of the

Gwaltney rule. *Id.* at 386. The lower court properly dismissed NCPE's counts alleging BOD and TSS violations as moot on grounds that those violations are not continuing violations as required to maintain a section 505 action.

II. THE DISTRICT COURT DID NOT ERR IN FAILING TO RULE ON ACME'S CHALLENGE TO THE CERTIFICATION AND TOXICITY EFFLUENT LIMITATION BECAUSE THE COURT LACKED JURISDICTION.

The district court's rejection of Acme's challenge to the toxicity limitation's validity is supported by the long-standing judicial doctrines of primary jurisdiction and exhaustion of administrative remedies. Act provisions allowing for administrative procedures established by the EPA, and precluding judicial review of specified administrative actions in enforcement proceedings, further support the district court's decision. 33 U.S.C.A. § 1369(b)(1) (West 1986 & Supp. 1988); 40 C.F.R. § 124.74(a) (1987).[27]

A. *Judicial intervention into the validity of Acme's NPDES permit conditions is unwarranted because Acme failed to exhaust EPA remedies and processes.*

The district court rejected attempts by both NCPE and Acme to use this case as a vehicle to evade an initial EPA decision on their respective permit challenges (R. 11, 12). Given the broad, no-pollution purpose of the Act, the case against such "end runs" by polluters is especially strong. 33 U.S.C.A. §§ 1251(a), 1311(a), and 1342 (West 1986 & Supp. 1988). In particular, Act provisions restricting review of agency actions to the court of appeals suggest a general Congressional intent to prevent polluters from turning enforcement proceedings into forums for collateral attacks on permit validity. 33 U.S.C.A. § 1369(b)(1) (West Supp. 1988). Thus, application of the doctrines of primary jurisdiction and exhaustion of administrative remedies is consistent with Congressional intent.

Even absent clear Congressional intent to vest initial ju-

risdiction in agencies, courts generally have deferred to the administrative process for a preliminary determination of issues within the special competence of an agency. Davis at 374, 381. Several of the reasons justifying this primary jurisdiction doctrine were summarized by the Court in the *Far East Conference* case:

> Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedures.[28]

342 U.S. at 574-75.

The need to avoid conflicting court-agency pronouncements in the distribution of the costs of meeting Clean Water Act goals parallels the concerns addressed in *Far East Conference.*

The district court properly dismissed Acme's permit challenge because Acme's failure to exhaust administrative processes should not be waived. The considerations supporting the exhaustion doctrine merge with those supporting primary jurisdiction. Davis at 394-95. A party should exhaust administrative remedies before it seeks judicial relief from an agency decision. *United Farm Workers of America AFL-CIO v. Arizona Agri. Employment Relations Bd.*, 669 F.2d 1249, 1253 (9th Cir. 1982). The exhaustion doctrine avoids unnecessary or premature judicial intervention, *id.*, and allows the expertise of the agency to sharpen complicated issues of technical fact. *Paskavitch v. United States Nuclear Regulatory Comm'n*, 458 F. Supp. 216, 217 (D.Conn. 1978).

EPA regulations provide that an applicant for an NPDES permit may petition for an agency review of the final permit at an evidentiary hearing. 40 C.F.R. § 124.74(a) (1987). Further, any denial of an evidentiary hearing may be appealed to the EPA administrator. 40 C.F.R. § 124.91(a)(1) (1987). Acme did not initially pursue its challenge to the toxicity limitation before the EPA, rather Acme pursued its administrative rem-

edies only after its initial state court challenge was dismissed for lack of jurisdiction (R. 4, 5). Thus, any urgency Acme now[29] claims is of its own making. Judicial intervention will be unnecessary if the EPA rules favorably on Acme's challenge. Finally, the judiciary would benefit from the more complete record available after an EPA determination.

Failure to exhaust agency remedies may be waived if appeal to a superior agency authority is not mandatory. *New England Coalition v. United States Nuclear Regulatory Comm'n*, 582 F.2d 87, 99 (1st Cir. 1978). EPA regulations, however, expressly provide that appeal "to the Administrator [of the EPA] under paragraph (a) of this section for review of any initial decision or the denial of an evidentiary hearing is, under 5 U.S.C. § 704, a prerequisite to the seeking of judicial review of the final decision of the Agency." 40 C.F.R. § 124.91(e) (1987). Because Acme has not yet completed the EPA appeals process (R. 6) and EPA regulations make the appeal mandatory, the district court properly declined to waive Acme's failure to exhaust administrative remedies.

B. *Even assuming that judicial review of Acme's permit challenge was otherwise appropriate, the district court correctly dismissed the challenge because it was brought in the wrong forum.*

Congress intended that original jurisdiction to adjudicate challenges concerning NPDES permits would be vested in specific federal and state courts. For example, federal appellate courts have jurisdiction over effluent limitations and state courts have jurisdiction over section 401 certifications.

1. Acme must bring its challenge to the toxicity effluent limitation in the federal court of appeals.[30]

The Court of Appeals for the Twelfth Circuit has exclusive jurisdiction to hear Acme's challenge to the toxicity effluent limitation promulgated by the EPA. Courts of appeal have exclusive jurisdiction to review EPA actions enumerated in section 509(b)(1) of the Act. *Central Hudson Gas and Elec.*

Corp. v. Environmental Protection Agency, 587 F.2d 549, 555 (2d Cir. 1978). Administrator action "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title" is reviewable in the court of appeals. 33 U.S.C.A. § 1369(b)(1)(E) (West. Supp. 1988). This provision undeniably confers original jurisdiction on the court of appeals to review EPA-promulgated effluent limitations for existing point sources under 22 U.S.C. §311. *E.I.du Pont. be Nemours & Co. v. Train,* 430 U.S. 112, 137 (1977). The Act requires that NPDES permits include "any more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to any State law or regulations (under authority preserved by section 1370 of the title) . . . ." 33 U.S.C.A. § 1311(b)(1)(C) (West 1986); *see United Steel Corp. v. Train,* 556 F.2d 822, 835 (7th Cir. 1977). An existing point source means "any discernible, confined, and discrete conveyance . . . from which pollutants are or may be discharged." 40 C.F.R. § 122.2 (1987). The EPA promulgated Acme's toxicity effluent limitation to implement New Union's narrative water quality standard (R. 4). Because Acme discharges pollution into Fairwater River (R. 1), its facility[31] is an existing point source. Under these circumstances, the court of appeals has exclusive jurisdiction to review the toxicity effluent limitation in Acme's NPDES permit. The district court properly held that it lacked jurisdiction to hear Acme's challenge.

2. New Union's certification of Acme's NPDES permit should be reviewed only by the agencies and courts of New Union.

The courts and agencies of New Union have original jurisdiction to review the Department's certification of Acme's permit. The purpose of state certification, 13 U.S.C. § 1341, is to insure that the EPA and other federal agencies do not override state water quality standards. S. Rep. No. 414, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 3735. If the state or its agency denies certification, the EPA may not issue an NPDES permit "unless the State action was

overturned in the appropriate courts of jurisdiction." *Id.* The state court is the proper forum to review state certification. *Roosevelt Campobello Internat'l Park Comm'n v. Environmental Protection Agency*, 684 F.2d 1041, 1056 (1st Cir. 1984); *Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 235 (S.D. Ala. 1976). The EPA also recognizes that review of limitations set forth by a state pursuant to 33 U.S.C. § 1341 "shall be made through the applicable procedures of the state . . . ." 40 C.F.R. § 124.55(e) (1987). The courts and agencies of New Union have jurisdiction to adjudicate Acme's challenge to the certification. Dismissal by a lower state court, as in this case (R. 5), for lack of jurisdiction is a[32] final judgment which may be appealed to a higher state court. *See Melory v. Saint Paul Mercury Indem. Co.*, 72 Ariz. 406, 407, 236 P.2d 732, 733 (1951) (A judgment dismissing an action is a final decision and therefore an appealable judgment). Furthermore, Acme may use any available Department procedures for review of the certification and its process.

3. The district court should have abstained from adjudicating Acme's challenge to New Union's water quality standard even if it had jurisdiction because this controversy concerns a sensitive area of New Union social policy.

Assuming, *arguendo*, that the district court had jurisdiction over some part of Acme's challenge to New Union's water quality standard, the court should have abstained from adjudicating this controversy. Federal courts should abstain from deciding NPDES permit controversies concerning state laws or political questions if state avenues for review are available. *See Mobil Oil*, 426 F. Supp. at 235. In *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 498-99 (1941), the Court set forth the criteria for federal abstention: (1) the challenge regards a sensitive area of state social policy which federal courts should not enter unless alternative review is unavailable, (2) a ruling on the state issue may resolve the federal question, and (3) proper interpretation of the state law is uncertain. Where the suit involves possible disruption of com-

plex state administrative processes, all three *Pullman* elements are not required. *See Alabama Public Serv. Comm'n v. Southern R. Co.*, 341 U.S. 341 (1951); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). New Union's legislature carefully balanced the economic and[33] recreational benefits derived from the use of Fairwater River and determined that the river should be available for general recreational purposes (R. 2). The Department, a state administrative body, promulgated the more stringent toxicity limitation as a condition to its certification of Acme's NPDES permit (R. 4). Presumably, the state court dismissed Acme's challenge for primary jurisdictional reasons (R. 5). A Department or New Union court ruling on state constitutional grounds could resolve Acme's challenge. The proper interpretation and application of New Union's water quality standard should be determined by the state court or Department. All the *Pullman* elements therefore apply.

Congress, under the Act, envisioned a federal partnership with the traditional state and tribal guardians of the public trust in inland waters. *See supra* p. 10. Abstention similarly respects federal principles and accords with the general Clean Water Act enforcement scheme intended by Congress.

C. *Because undisputed DMRs evidence Acme's violations of the enforceable toxicity effluent limitation, the district court properly granted the NCPE-New Union motion for partial summary judgment.*

The district court correctly granted NCPE's summary judgment motion on the unrebutted evidence contained in the DMRs that Acme continuously violated the toxicity effluent limitation.

1. Acme's DMRs properly constitute admissions for purposes of summary judgment.

Acme's DMRs evidence violations of the toxicity limitation for each of the twelve monthly reporting periods since issuance[34] of Acme's current permit (R. 9, 12), and constitute admissions sufficient to support NCPE's motion for par-

tial summary judgment. The Act requires NPDES permit holders to submit DMRs of pollution discharges to EPA on a regular basis. 40 C.F.R. §§ 122.21(f), (g), 122.44(i) (1987); 33 U.S.C.A. § 1318 (West 1986 & Supp. 1988). DMRs are based on required effluent tests conducted by the permittee. *Id.* Acme's NPDES permit requires monthly toxicity DMRs (R. 9). DMRs showing that discharges exceeded permit levels are proof of permit limitation violations and, absent an adequate defense, constitute admissions for summary judgment purposes. *Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Co.*, 600 F. Supp. 1479, 1485 (D.N.J. 1985); *see also*, Thomas, *Citizen Suits and the NPDES Program: A Review of Clean Water Act Decisions*, 17 Envtl. L. Rep. 10050 - 10052 (1987) (summarizing numerous examples of DMRs so used). Acme has not disputed that it has violated the permit toxicity limitation on each of the several occasions it conducted the required testing (R. 11). Assuming that the NPDES permit limitation is valid, Acme's DMRs constitute unrebutted admissions for summary judgment purposes and sufficiently support the district court's order.

2. Pending administrative review of Acme's permit challenge and possible subsequent judicial review, Acme's current permit limitations are binding and enforceable.

The district court properly granted partial summary judgment on NCPE's claim because the existing permit limitations remain active and enforceable pending the outcome of Acme's permit[35] challenge before the EPA. The court's role in section 505 actions is limited to a determination of whether Act provisions requiring compliance with existing permit discharge limits have been violated. *Student Public Interest Research Group of New Jersey, Inc. v. P. D. Oil & Chemical Storage, Inc.*, 627 F. Supp. 1074, 1083 (D.N.J. 1986). Acme undisputedly has failed to comply with existing permit toxicity limitations (R. 12). Moreover, Acme's challenge substantially relates to New Union's water quality standard, rather than the discharge limitations upon which enforcement action

is based. *See infra* p. 36. Indeed, only if a polluter holds an NPDES permit authorizing discharges or falls within other specific statutory exemptions is the pollution lawful under the Act. 33 U.S.C.A. § 1311(a) (West 1986). The absence of final administrative or judicial action on a challenged permit does not give a polluter a license to pollute indefinitely. *Proffitt*, 850 F.2d at 1013 (section 505 action to enforce limitation not properly dismissed despite EPA stay pending validity challenge); *Monsanto*, 600 F. Supp. at 1483 ("Pendency of a modification proceeding does not excuse violations of a permit prior to actual modification."). The district court, therefore, correctly found Acme's existing NPDES permit limitations to be enforceable and properly granted NCPE's summary judgment motion.

a. The district court correctly granted NCPE's motion because the toxicity limitation is an "effluent limitation" within the meaning of § 301 of the Act.[36]

Effluent challenge limitations are the basis for permit enforcement under the 1972 Clean Water Act Amendments. 33 U.S.C.A. § 1311(b)(1)(C) (West 1986); *Environmental Protection Agency v. State Water Resources Control Board*, 426 U.S. 200, 204-05 (1976) (Amended Act focuses on tolerable discharges measured by technology-based effluent limitations to achieve its purposes). The 1972 Amendments substituted permit effluent limitations for collective water quality standards as the keystone of the Act. *Trustees for Alaska v. Environmental Protection Agency*, 749 F.2d 549, 556-57 (9th Cir. 1984) ("Effluent limitations are a means of *achieving* water quality standards.")(Emphasis in original); *see also* S. Rep. No. 414, 92d Cong., 1st Sess., 5, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3675 ("Under this Act 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 and not a means of elimination and enforcement."). Much or all of Acme's validity challenge relies on procedural and vagueness objections to the

State's narrative water quality standard (R. 4, 5). Acme presumably does not suggest that the 96 hour *in situ* bio-assay limitation is a collective water quality standard, rather than a technical measure of discharge effects (*See* R. 4). The toxicity effluent limitation, not the water quality standard, is the basis for enforcing Acme's permit. Therefore, the district court properly granted NCPE's summary judgment motion.[37]

b. Because the toxicity limitation is a condition in Acme's NPDES permit, it must be enforced by the EPA.

The EPA must enforce the toxicity limitation in Acme's permit even if New Union's certification were procedurally defective. To achieve Congressional objectives, any certification under section 1341 must establish effluent limitations that become a condition to the NPDES permit. 33 U.S.C.A. § 1341(d) (West 1986). Furthermore, absent state certification, the EPA must enforce effluent limitations established pursuant to state law that are more stringent than federal limitations set forth in 33 U.S.C.A. § 1311(b)(1)(C). *Roosevelt Campobello*, 684 F.2d at 1056. New Union established the toxicity limitation to implement its narrative water quality standards (R. 4). The toxicity limitation is now an enforceable condition to Acme's permit with which Acme must comply or face the sanctions provided by the Act.

D. *If this court reverses the district court, it should remand the case because the delay will not adversely affect the public, the parties have not fully briefed and argued the merits, and justice will not be served by considering issues not reached by the district court.*

If the court reverses the district court, it should remand the case for further proceedings on the merits. The better practice is to remand rather than to reach the merits. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 156 (1967). Exceptions to the practice may be made if the following criteria are met: (1) no issues of fact remain, (2) all parties seek summary judg-

ment, (3) the parties have fully briefed and argued the issues, (4) delay may adversely affect the public, and (5) ⊥[38] justice requires consideration of issues not reached by the lower court. *Central Hudson Gas v. Environmental Protection Agency*, 587 F.2d 549, 557-58 (2d Cir. 1978).

The first two criteria are met: no parties dispute that Acme consistently violated the toxicity limitation (R. 12) and all parties moved for summary judgment (R. 2). The last three criteria, however, have not been met. Briefs are limited to full argument of only those issues contained in Order No. 88-1001, dated September 15, 1988, by Chief Judge B. M. Romulus. New Union citizens will benefit directly from enforcement of the toxicity limitation, which will make Fairwater River safe for swimming, sport fishing, and boating (R. 3). Finally, justice is served when polluters litigate on their own time and with their own money. *Train v. Natural Resource Defense Council*, 421 U.S. 60, 92 (1975).

CONCLUSION

Upon the facts and law presented, Intervenor respectfully requests that the judgment of the District Court for the District of New Union be affirmed.