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MEASURING BRIEF*

Civ. App. No. 04-137

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Friends of the South Slope Cutthroat, Inc.,

and

State of New Union,
***Appellants*,**

v.

Capitol City, New Union,
***Appellee*.**

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

BRIEF FOR THE APPELLEE

Georgetown University Law Center
Johanna Hickman
David Suggs

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JURISDICTIONAL STATEMENT

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

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in granting the State of New Union's motion to intervene under 33 U.S.C. § 1365(c)(2), which permits the Administrator of the Environmental Protection Agency to intervene but makes no mention of intervention by the States.

2. Whether the district court correctly granted summary judgment for Capitol City because it lacked jurisdiction over the case as a result of plaintiff's failure to give adequate notice as required by 33 U.S.C. § 1365(b).

3. Whether the District Court correctly granted summary judgment, holding that Capitol City's diversion of the waters of the Torpid River to the Rapid River without a permit issued under 33 U.S.C. § 1342 did not constitute a violation of 33 U.S.C. § 1311(a).

4. Whether the District Court properly granted summary judgment, holding that New Union's granting of a permit for Capitol City's diversion of the Torpid River to the Rapid River as part of the State's control over water ownership, use, and allocation obviated application of the federal Clean Water Act to this diversion.

STATEMENT OF THE CASE

Appellant Friends of the South Slope Cutthroat, Inc. ("FSSC") brought suit against Capitol City, New Union, pursuant to the citizen suit provision of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1251, 1365. R. at 3. FSSC complains that Capitol City violates § 1311(a) of the Act, which forbids the addition of a pollutant to navigable water without a permit. *Id.* Specifically, FSSC contends that Capitol City violates the Act by adding silt into the Rapid River via the Torpid Aqueduct, which diverts water from the Torpid River to the Rapid River. *Id.*

The State of New Union sought leave from the district court to intervene in the suit "as a matter of right" pursuant to 33

U.S.C. § 1365(c). R. at 4. The court granted the motion over the opposition of both parties. *Id.* Capital City moved for summary judgment, and the court granted the motion on three separate grounds. R. at 4-5. First, FSSC failed to provide proper notice as required under 33 U.S.C. § 1365(b), and thus the court lacked jurisdiction over the case. Second, Capitol City does not violate § 1311(a) by its diversion of the Torpid River. Finally, the Act does not apply to the diversion of the Torpid River because New Union granted a permit to Capitol City for the diversion and the State controls water ownership, use, and application.

FSSC and Capitol City appeal the grant of New Union's motion to intervene. FSSC appeals the decision to grant summary judgment on each of the three grounds. New Union appeals the grant of summary judgment as to the sufficiency of FSSC's notice.

STATEMENT OF THE FACTS

Capitol City is the largest city in the state of New Union and is located on the dry, south slope of the Front Mountains. For many years, Capitol City has required a continuous water acquisition program to serve the water supply needs of its citizens and businesses, with much of this needed water coming from the wetter, north slope of the Front Mountains. R. at 3.

Over the years, Capitol City has acquired the legal rights to the total flow of the Torpid River, located on the north slope of the mountains, and for the past ten years, has been constructing the Torpid Aqueduct. In 2002, the city acquired a diversion permit from the state Water Engineer, in compliance with New Union's complex statutory structure governing the allocation of water within the state. R. at 4. On August 15, 2003, a diversion of water from the Torpid River to the Rapid River began. R. at 3. As a result of this diversion, water now flows from the Torpid River, through the aqueduct, and into the Rapid River, which flows into the Rapid Reservoir. The city currently uses all the water in the reservoir, effectively ending the flow of the river at that point. R. at 4.

The Torpid River and Rapid River differ somewhat with respect to water quality. The Torpid River, at the point of diversion, is a relatively slow-moving river that accumulates a substantial amount of silt from adjacent farms and scrubland. R. at 4. The Rapid River, on the other hand, is a fast-moving, cold, and clear river from its headwaters at the top of the Front Mountains to its effective endpoint at the Rapid Reservoir *Id.* The diversion of

water from the Torpid River to the Rapid River, therefore, includes movement of silt into the Rapid River that was not previously present. *Id.*

The Rapid River serves as a habitat for the South Slope Cutthroat, a species of trout indigenous to the state of New Union, a habitat that also includes three other river basins in the state. R. at 15. The Cutthroat continues to reside between the headwaters of the Rapid River and the point at which the diverted water from the Torpid River enters the river. Below that point, however, Appellants allege that the trout no longer exist because of the increased turbidity from the diversion of silt-laden waters from the Torpid River. R. at 4. Several New Union citizens enjoy recreational fly-fishing for the Cutthroat in the Rapid River, and these citizens follow a catch and release practice and do not consume, sell, or otherwise use the fish they catch. *Id.* These citizens claim that they are now unable to fish for the Cutthroat in a location that is convenient to their homes, and must travel somewhat further to fish for this species of trout. *Id.*

The flows of the Rapid and Torpid Rivers constitute a full twenty-five percent of Capitol City's water supply. R. at 15. The New Union Fish and Game Department has determined that "to remove such a great percent of [Capitol City's] water supply would be an intolerable economic burden and a danger to its public health." *Id.* The position of the State of New Union is that in this situation, where this water supply is needed for the survival of the people of Capitol City, the interests of these citizens should trump concerns about the interests of the Cutthroat. *Id.* The state has made the decision to allow this diversion, despite its awareness of the potential threat to the habitat of the Cutthroat. *Id.*

SUMMARY OF THE ARGUMENT

The ruling of the United States District Court for the District of New Union that granted New Union's motion to intervene should be reversed. The district court erred in concluding that the Act treats States as the equivalents of the federal government for the purpose of intervention. The statute clearly permits the Administrator of the EPA to intervene in a citizen suit as a matter of right, but the absence of any clearly expressed right of intervention for States indicates, as a basic matter of statutory interpretation, that the States have no such right. This position is only bolstered by the structure of both the Act as a whole and the citizen suit provision specifically, and evidence of rights afforded to

the States in other sections of the statute are not sufficient to overcome the conclusion dictated by the Act's text and structure.

The ruling of the district court granting Capitol City's motion for summary judgment on the grounds that FSSC provided insufficient notice of its intent to sue should be affirmed in its entirety. The CWA requires a citizen to give notice in accordance with the Act and the regulations promulgated thereunder. If the notice does not comply with these requirements then the court cannot exercise jurisdiction. Plaintiff's notice was inadequate. It failed to provide information regarding the standard, limitation, or order that Capitol City allegedly violated. It also did not include the proper contact information for the plaintiffs. Finally, the notice did not include the dates of all the alleged violations. As a result of the first two inadequacies, the court may not exercise jurisdiction over any of plaintiff's claims. Because of the third deficiency, the court lacks jurisdiction over the alleged violations for which no dates were provided.

The district court's ruling granting Capitol City's motion for summary judgment on the grounds that the city's diversion of water from the Torpid River to the Rapid River without a permit did not constitute a violation of the Clean Water Act should be affirmed. First, the Clean Water Act and Congress' authority under the Commerce Clause do not extend to regulation of this diversion of water because the Rapid River is not a "navigable water." Congress lacks the power under the Commerce Clause to regulate activities that do not have a "substantial effect" on interstate commerce. Because the displacement of the Cutthroat from a portion of the Rapid River does not have such a "substantial impact," Congress' power does not extend to regulate this diversion of water. At a minimum, there are two possible interpretations of the statutory language in this case, and an interpretation of the statutory language that includes the Rapid River pushes the boundaries of Congress' power under the Commerce Clause. Absent a clear indication from Congress that it intended to push the boundaries of its power under the Constitution, the Court should follow the less constitutionally problematic interpretation and exclude the Rapid River from regulation under the Clean Water Act.

The district court's ruling granting Capitol City's motion for summary judgment on the grounds that New Union's granting of a permit for this diversion as part of the state's water allocation program obviated application of the federal Clean Water Act should be affirmed.The Clean Water Act by its terms regulates

only the "addition" of pollutants from a point source, and the diversion of silt-laden water from one navigable water to another does not constitute an "addition" of a pollutant. The plain language of the Act indicates that Congress contemplated only one body of "navigable waters," and the movement of water from one part of the "navigable waters" to another does not constitute an "addition" and is not subject to regulation under the Act.

This interpretation of the statutory language is dictated by Congress' statement of purpose, which expresses its intent that the right to allocate and manage water supplies within their jurisdictions not be limited by application of the Act. The language of 33 U.S.C. § 1251(g) reaffirms this right. The requirement that every diversion such as this one receive a permit under the Act would be costly and likely prohibitive and would interfere with the ability of the states to administer their own water allocation programs. Therefore, the reading of the language in the Act should be read in accordance with Congress' expressed intent—diversions such as this one are not an "addition" of pollutants and cannot be regulated under the Act.

STANDARD OF REVIEW

Whether a State may intervene in a citizen suit under 33 U.S.C. § 1365(c)(2) is a question of statutory interpretation. Issues of statutory construction are reviewed on appeal de novo.[1] *Boyd v. Illinois State Police*, 384 F.3d 888, 896 (7th Cir. 2004).

Whether a lower court was correct to grant summary judgment is also reviewed de novo. *Mace v. City of Palestine*, 333 F.3d 621, 623 (5th Cir. 2003). "Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmovant, there is no genuine issue of material fact precluding judgment as a matter of law for the movant." *Id.*

1. Incidentally, the standard of review for rulings on motions to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2) is also de novo, *see, e.g.*, *Stone v. First Union Corp.*, 371 F.3d 1305, 1309 (11th Cir. 2004), but that rule was not the basis for the motion at issue here.

ARGUMENT

I. *THE CITIZEN SUIT PROVISION OF THE CLEAN WATER ACT DOES NOT PERMIT STATES TO INTERVENE AS A MATTER OF RIGHT.*

The district court erred in granting New Union's motion to intervene under 33 U.S.C. § 1365(c)(2), and its ruling should be reversed. The statute's text clearly does not provide for intervention by States, and the structure of the Act indicates Congress did not intend to allow States to intervene. The district court cites to nothing in the legislative history of the Act that suggests a contrary conclusion.

A. *The Text of the Statute Cannot be Read to Allow Intervention by States.*

Congress passed the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

As part of its enforcement strategy for the CWA, Congress has granted citizens the right to file civil actions for violations of the Act. 33 U.S.C. § 1365(a); *see Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 488 (2d Cir. 2000). These "citizen suits" may be brought against any person, including governmental instrumentalities and the Administrator of the EPA,[2] so long as certain conditions are met. *See* 33 U.S.C. § 1365.

Congress has expressly authorized the Administrator to "intervene as a matter of right" in a citizen suit. 33 U.S.C. § 1365(c)(2).[3] In contrast, the statute makes absolutely no mention of a similar right vested in the States. Nevertheless, the district court below read such a right into the statute. R. at 5. It erred in doing so.

In any question of statutory interpretation, one must begin with the plain language of the statute. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) (citing *Demarest v. Man-*

2. The Administrator of the EPA is called "Administrator." 33 U.S.C. § 1251(d).
3. 33 U.S.C. § 1365(c) provides, in part:
   (1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.
   (2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

speaker, 498 U.S. 184, 190 (1991)). The language of 33 U.S.C. § 1365(c)(2) permits the Administrator *alone* to intervene in citizen suits. While the statute states explicitly that the Administrator may intervene in such suits, one searches in vain for any reference at all to "State," a term defined by the statute. 33 U.S.C. § 1362(3). Thus, applying the presumption that "a legislature says in a statute what it means and means in a statute what it says," a court would be justified in ending the inquiry at this point. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Indeed, the Court has stated that "when a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart*, 505 U.S. at 475 (citing *Demarest*, 498 U.S. at 190). The statute at issue here could hardly speak more clearly. Its text leads only to the conclusion that Congress has not given to the States the authority to intervene as a matter of right. The district court erred by granting the States this authority that Congress declined to give them.

B. The Structure of the Act Mandates a Conclusion that Only the United States May Intervene as a Matter of Right.

The district court suggests that the failure of Congress to provide in 33 U.S.C. § 1365(c)(2) that States may intervene as a matter of right is a product of the length and complexity of the Act, but courts have recognized that a complex statutory scheme indicates instead that the Act impliedly precludes that which is not provided for in the Act. In *Aminoil U. S. A., Inc. v. California State Water Res. Control Bd.*, 674 F.2d 1227 (9th Cir. 1982), the Ninth Circuit ruled that a California state court did not have jurisdiction under the CWA to join the Administrator as a party. It noted that the Act provides for jurisdiction over actions against the Administrator in federal court but makes no mention of state court remedies. *Id.* at 1235. It concluded that "[a]lthough the Act does not expressly provide that these remedies against the EPA and the Administrator are exclusive, when interpreting a statute as detailed as the [CWA], the remedies provided are presumed to be exclusive absent clear contrary evidence of legislative intent." *Id.* (citing *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974)). A similar presumption of exclusiveness is required regarding intervention. The CWA provides a right of intervention in at least 3 circumstances, *see* 33 U.S.C.

§§ 1283(e), 1365(b)(1)(B), 1365(c)(2), but nowhere does it permit the States to intervene. This is not, as the district court states, a "happenstance of statutory drafting," R. at 5 (quoting *North and South Rivers Watershed Assn. v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1992). Given the extensive nature of the Act, its prominence, and its age, one must presume that Congress intended to afford the right to intervene to only those parties specified in the Act, and the States are not among those specified parties.

Further evidence that the right of intervention in citizen suits is provided only to the Administrator is found in the fact that "Administrator" is mentioned in conjunction with "State" in three paragraphs of section 1365, but "State" is nevertheless excluded from the intervention provision. *See* 33 U.S.C. § 1365(a)(1), 1365(b)(1), 1365(e). "[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally . . . in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16 (1983)) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). This demonstrates that Congress was willing to treat States as equal to the Administrator where it deemed fit but specifically declined to do so in the case of intervention.[4]

If Congress had wanted to permit States to intervene in citizen suits it could have provided for that expressly. It did not do so. Neither the text of the statute nor its structure suggest any intent on the part of Congress to allow States to intervene under 33 U.S.C. § 1365. Therefore, the decision of the district court granting New Union's motion to intervene should be reversed.

II. *THE COURT LACKS JURISDICTION OVER THE SUIT BECAUSE THE NOTICE PROVIDED BY FSSC WAS INADEQUATE.*

Because FSSC failed to give adequate "notice of the alleged violation" as required by the Act, 33 U.S.C. § 1365(b)(1)(A), the lower court correctly ruled that it lacks jurisdiction over the case and therefore properly granted summary judgment to Capitol City.

4. The sections cited by the district court only further support this conclusion. R. at 5. It is noteworthy that the court points to nothing in the legislative history to bolster its position.

Although Congress has given citizens a significant role in the enforcement of the CWA, citizens must fulfill certain requirements before stepping into that role. For example, the Act contains a notice provision which requires a prospective citizen plaintiff, at least 60 days before bringing an action under the Act, to give "notice of the alleged violation" to the alleged violator, as well as the EPA and the state in which the alleged violation is occurring. 33 U.S.C. § 1365(b).

The Supreme Court has ruled that the notice provision is jurisdictional and is a "mandatory condition[] precedent to commencing [a citizen] suit." *Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989).[5] In *Hallstrom*, the Court stated that Congress included the notice requirement "to strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Id.* at 29. Notice (with the accompanying 60-day delay) furthers this goal in two ways. First, notifying the EPA and the State of the alleged violation affords those entities an opportunity "to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits." *Id.* (citing *Gwaltney of Smithfield, Inc. v. Chesapeake Bay Foundation*, 484 U.S. 49, 60 (1987)). In addition, notice allows the alleged offender to take steps to "'bring itself into compliance with the Act,'" rendering a citizen suit unnecessary. *Id.* (quoting *Gwaltney*, 484 U.S. at 60). Thus, a district court is not free to disregard a failure to provide adequate notice; rather, it must dismiss the suit if the notice requirements are not met. *Id.* at 20.

The Act mandates that the precise requirements of notice are to be set by the EPA. *See* 33 U.S.C. § 1365(b). Pursuant to that delegation, the EPA has promulgated the following:

> Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons

5. Although the Court in *Hallstrom* was interpreting the citizen suit provision of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, the Court noted its similarity to the citizen suit provision of the CWA, *see Hallstrom*, 493 U.S. at 23 n.1, and lower courts have applied the holding of that case to cases involving the CWA since both citizen suit provisions were modeled after § 304 of the Clean Air Amendments, 42 U.S.C. § 7604. *See Washington Trout v. McCain Foods*, 45 F.3d 1351, 1353 n.3 (9th Cir. 1995).

> responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice. 40 C.F.R. § 135.3 (the "Notice Regulation").

By this standard, the notice provided by FSSC is sorely inadequate. FSSC failed to include in its notice several elements required by the Notice Regulation. The letter sent by FSSC to Capitol City lacked "sufficient information to permit the recipient to identify the *specific* standard, limitation, or order alleged to have been violated," and also did not include information on the actual paintiffs such that FSSC cannot be said to have provided "the full name, address, and telephone number of the person giving notice." *Id.* (emphasis added). Either of these reasons alone is sufficient to warrant the grant of summary judgment as to the entire claim. However, FSSC also alleged violations in its complaint that were not included in its notice letter, namely those alleged to have occurred subsequent to June 1, 2004. Thus, each violation alleged to have occurred after June 1 must be dismissed because FSSC did not give notice of "the date or dates of such violation." *Id.* The absence of each of these elements renders FSSC's notice incapable of furthering the goals of Congress and therefore inadequate.

A. *FSSC's Notice Letter Is Inadequate Because It Does Not Provide Sufficient Information Regarding the Specific Standard, Limitation, or Order Alleged to Have Been Violated*

The court lacks jurisdiction under *Hallstrom* because FSSC did not provide sufficient information in its notice letter to specify the standard, limitation, or order that FSSC would claim in its complaint that Capitol City has violated. FSSC's notice letter refers to a pollutant that is scarcely mentioned in the relevant portions of the Code of Federal Regulations. Moreover, the pollutant that was eventually identified in the complaint is not the pollutant included in the notice letter. Congress intended for notice letters to reduce the number of citizen suits by giving the recipients time to act on the information in the notice, but because FSSC alleged in its complaint a wholly different pollutant than it included in its notice letter, and because the pollutant listed in the notice letter provides little guidance to its recipients, the letter fails to further that objective.

In its notice letter, FSSC states that Capitol City "has violated § 1311(a) . . . by discharging silt-laden water from the Torpid River Aqueduct into the Rapid River." R. at 11. However, nowhere in the subchapter of the Code of Federal Regulations dedicated to "Effluent Guidelines and Standards" ("Subchapter N") is there any standard, limitation, or order involving silt-laden waters. *See* 40 C.F.R. §§ 401-471. In fact, a survey of those sections reveals only two references to "silt." *See* 40 C.F.R. §§ 435.11, 435.41. Unfortunately for FSSC, those references are limited to examples of the "size and texture" of "drill cuttings", *see id.*, and in no way give insight into the standard, limitation, or order that is allegedly violated.

Including sufficient information in the notice letter to inform the recipient of the relevant regulation violated is crucial. In *Fried v. SunGard Recovery Servs.*, 900 F. Supp. 758, 765 (E.D. Penn. 1995), the court ruled that the plaintiff's notice letter was adequate under the citizen suit provision of the Clear Air Act, but only because the language of the letter pointed to a specific provision of the Code of Federal Regulations. Similarly, in *Frilling v. Village of Anna*, 924 F. Supp. 821, 834 (S.D. Ohio 1996), the court held plaintiffs' notice regarding discharge of wastewater to be inadequate for "lack of clarity," noting that "[a]t no point in the Notice Letter do Plaintiffs refer to . . . 40 C.F.R. § 403.5(a)(1) and § 403.5(b)(4), upon which Count Twelve is based." *Id.* at 831. In this case, FSSC fails in its notice letter to even refer to a pollutant discussed in substance in Subchapter N, let alone point to a specific provision of the Code. To allow such notice to stand as adequate sets a dangerous precedent and could make it impossible for alleged violators and governing agencies to determine the nature of the alleged violation in time to avoid a citizen suit, defeating the intent of Congress.

In contrast to its notice letter, FSSC alleged in its complaint that Capitol City added suspended and settleable solids to the Rapid River. The use of these terms in the complaint highlights the lack of guidance provided by the notice letter as to the standard alleged to be violated. "Suspended solids" appears eighty-four times in Subchapter N and "settleable solids" appears an additional eleven times. *See* 40 C.F.R. §§ 401-471. A potential defendant would have a reasonably solid foundation from which to work if provided with such information in a notice letter. However, Capitol City was given no such direction by FSSC's notice letter.

It is not enough for FSSC to argue that "silt" is similar to "suspended solids" and should be considered equivalent for notice purposes. The Supreme Court in *Hallstrom* rejected a similar argument. In that case, plaintiffs gave notice to the alleged offender but not to the EPA and the State, thus depriving those parties of the 60-day notice period. Plaintiffs proposed that the Court stay the proceedings as the "functional equivalent of a precommencement delay." 493 U.S. at 26. Although the litigation was over seven years old at that point, the Court refused to accept this equivalence rationale and dismissed the suit for lack of jurisdiction. Likewise, in the present case, it not sufficient for FSSC to provide information regarding a standard similar to that on which they plan to bring their claim in the hope that Capitol City will divine its intentions.

Given the discrepancy between FSSC's notice letter and its complaint, to rule that its letter is adequate would be to ignore the purpose of the statute. In enacting section 1365(b), Congress sought to decrease the number of citizen suits by affording the government an opportunity to displace the citizen plaintiff and offering the alleged offender time to come into compliance or reach a settlement. *Hallstrom*, 493 U.S. at 29. Given the short window of time in which to act, in order to accomplish this objective the notice must be sufficient to enable the government and the alleged violator to identify the alleged violation immediately. One court described the need for specificity aptly:

> When the notice is precise, sixty days is none too much time for an agency to resolve on a course of action and take necessary steps whether to settle the matter or bring an enforcement action. But if the notice is imprecise, and requires the agency to develop on its own what the scope of the alleged violations are, then it becomes entirely impractical for the notice provision to fulfill its purpose in such a short time period." *California Sportfishing Prot. Alliance v. City of W. Sacramento*, 905 F. Supp. 792, 799 (E.D. Cal. 1995).

FSSC's notice letter can only be described as imprecise. While it would be difficult enough for Capitol City to connect the dots between FSSC's notice and its complaint in sufficient time to take action to stave off a lawsuit, it would be a Herculean task for the EPA and state agencies to do so. Therefore, FSSC has not provided sufficient information to Capitol City to specify the standard allegedly violated and judgment must be entered for Capitol City.

For notice to be adequate it must indicate specifically what standard the plaintiff alleges has been violated, not simply "generally orient[ ] the agency or violator as to the type of violation." *Id.* In *California Sportfishing* the court ruled that a portion of the plaintiff's notice was sufficient, but the part that was ruled adequate specifically alleged violations of limits on "coliform, chlorine, biochemical oxygen demand, and total suspended solids," *id.* at 799, and those same pollutants were included in the complaint. In addition, each of those pollutants is discussed pervasively in Subchapter N. *See* 40 C.F.R. §§ 401-471. Thus, the alleged violator and government in that case were not required to "to develop on [their] own" the scope of the alleged violation. 905 F. Supp. at 799. In contrast, FSSC's notice letter is not clear at all and requires Capitol City and the responsible agencies to conduct their own investigations to determine what standards regarding "silt" it might have violated, thus rendering the notice incapable of achieving one of the objectives for which it was designed.

Other jurisdictions have also concluded that a plaintiff must state with precision in its notice letter the specific pollutant that will be included in the complaint, which FSSC clearly did not do. The Second Circuit has held that "EPA regulations require a potential plaintiff to include in [a notice letter] each separate pollutant that will be alleged in a subsequent complaint as the basis of a violation of the Act." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 487 (2d Cir. 2000). In *Catskill*, the City of New York ("New York") diverted water from a reservoir into Esopus Creek without a permit. Plaintiff gave notice to New York of its intent to sue, alleging that the city discharged "pollutants in the form of Total Suspended Solids and Settleable Solids into the Esopus Creek." *Id.* at 486. In its complaint, plaintiff reiterated its claim that New York discharged "suspended solids" into the creek and also alleged that it discharged "turbidity." The court ruled that the notice of "suspended solids" was adequate for the turbidity charge, but it did so because turbidity is by definition water containing suspended solids. *Id.* at 488. The same, of course, cannot be said in this case. FSSC complained that Capitol City discharges suspended solids, which are not by definition silt. Therefore, FSSC did not "include the pollutant alleged to be the basis of a violation subsequently alleged in the complaint," *id.* at 487, and its notice letter is insufficient.

Although the language of some cases suggests a more liberal approach should be applied when judging the adequacy of notice

letters, these cases ignore the fact that a fundamental purpose of the notice provision is to inform the governmental agency of the allege violation. For example, in *Atlantic States Legal Found. v. Stroh Die Casting Co.*, 116 F.3d 814 (7th Cir. 1997), plaintiff sent a notice letter to Stroh alleging that Stroh had been discharging wastewater from its die casting process into the sewer without a valid permit. The court ruled that the notice was sufficient, holding only that "notice must be sufficiently specific to inform the alleged violator about what it is doing wrong." *Id.* at 819. The Ninth Circuit has also adopted a loose standard, holding that the violations listed in the complaint need only be "sufficiently similar" to those in the notice letter for notice to be adequate. *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 952 (9th Cir. 2002). But these courts considered only the adequacy of notice as it relates to alleged violators. In explaining the rationale behind its holding, the *Atlantic States* court stated that "[t]he key to notice is to give the *accused company* the opportunity to correct the problem." 116 F.3d at 820 (emphasis added). Likewise, the *Bosma* court focused on enabling alleged violators to bring themselves into compliance. 305 F.3d at 951. Of course, the reasoning of these cases gives short shrift to Congress' efforts to avoid citizen suits by providing the government with notice. Merely informing the alleged violator "about what it is doing wrong" will not provide governmental agencies with sufficient information to identify the alleged violation, and thus this case should not be adopted as a correct statement of the law.[6] By failing to consider all recipients of the notice, these courts impede Congress' efforts to limit citizen suits. In contrast, the district court's decision furthers the goals of Congress and should be affirmed.

B. *FSSC Failed To Give Sufficient Notice Because It Did Not Properly Identify the Prospective Plaintiffs.*

The district court ruled correctly when it granted summary judgment for Capitol City on the ground that the notice given by FSSC did not identify the citizen plaintiff in accordance with the

6. In addition, the court suggests that its ruling was based in part on actions Stroh took after the complaint was filed, which suggested that Stroh understood what violation the notice letter alleged. Although this notice-in-fact argument finds no basis in *Hallstrom*, it is in any case not applicable here since Capitol City has done nothing to indicate that it understood what standard FSSC was alleging in its notice letter.

notice requirements. Because FSSC did not provide Capitol City with the names of the real plaintiffs in the case, its notice did not comply with the Notice Regulation, and the district court therefore lacks jurisdiction. Accordingly, summary judgment for Capitol City was proper.

In this case, it is Nelson Spinner and Newton Creel who claim injury, namely by having the areas in which they can fish for trout reduced. Because Spinner and Creel are unable to fish, they are the parties who have suffered injury, and they are thus the real plaintiffs. See *United States ex rel. Yankton Sioux Tribe v. Gambler's Supply*, 925 F. Supp. 658, 667-68 (D. S.D. 1996) (concluding that government is real plaintiff in a true *qui tam* suit (as distinguished from CWA citizen suits) because the injury is to the government); *Langner v. Brown*, 913 F. Supp. 260, 264 (S.D. N.Y 1996) (ruling the corporation suffers the injury in a derivative suit and is thus the real plaintiff) (citing *Ross v. Bernhard*, 396 U.S. 531, 538 (1970)). However, they are not the plaintiffs in this case; instead, FSSC sues on their behalf. R. at 3. Although this is adequate for standing purposes, *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000), it creates a fatal jurisdictional flaw for the court as it relates to notice.

One of the purposes of notice is to permit the "alleged violator to head off a citizen suit by negotiated settlement." *California Sportfishing*, 905 F. Supp. at 798. To this end, the notice letter must include "the full name, address, and telephone number of the person giving notice."[7] 40 C.F.R. § 135.3. If the plaintiff is not listed in the notice, the alleged violator cannot contact the plaintiff in order to negotiate a settlement, and this purpose is defeated. In this case, that is exactly what has occurred. The notice letter did not provide the plaintiffs' "full name[s], address[es], and telephone number[s]." *Id.* Capitol City is therefore unable to contact the injured parties in an effort to reach a settlement. Therefore, this notice cannot be deemed sufficient.

7. Although the regulation refers to "person giving notice," the language of the statute makes clear that this person is the plaintiff. *See* 33 U.S.C. § 1365(b)(1)(A) ("No action may be commenced. . . prior to sixty days after the plaintiff has given notice. . ..").

C. *Notice Was Deficient as to Violations Alleged to Have Occurred After June 1, 2004, Because Plaintiff Made No Mention of Such Violations in Its Letter.*

Plaintiff did not give adequate notice of its claims regarding alleged violations subsequent to June 1, 2004. Indeed, its notice letter made no mention of violations occurring after that date. Regulations require that notice include "the date or dates" of an alleged violation of an effluent standard. 40 C.F.R. § 135.3. Because FSSC has not complied with the regulations as to violations alleged in its complaint to have occurred after June 1, the court was correct to grant summary judgment for Capitol City on that ground.

FSSC's notice letter states that "Capitol City has violated § 1311(a) each and every day from August 15, 2003 *until* the date of this notice [June 1, 2004.]" R. at 11. (emphasis added). The notice expressly sets an end date to the dates of alleged violations. It includes no references to dates after June 1, 2004. By a plain reading of the text FSSC has not met the requirements of 40 C.F.R. § 135.3. Therefore, it was proper for the court to grant summary judgment on violations alleged to have occurred after the last date for which FSSC gave notice.

Although language in some cases suggests that notice is adequate for violations occurring after the date of the notice letter if the violations are of the same nature as those alleged before the date of the notice letter, those cases are inapposite. For example, the court in *Public Interest Research Group v. Hercules, Inc.* stated that "as long as a post-complaint discharge violation is of the same type as a violation included in the notice letter (same parameter, same outfall), no new 60-day notice letter is necessary to include these violations in the suit." 50 F.3d 1239, 1250 (3d Cir. 1995); *see also California Sportfishing*, 905 F. Supp. at 800. However, in those cases the notice given for pre-notice violations was ruled to be adequate. In contrast, the alleged violations in FSSC's notice are not clearly defined (e.g. they include no parameters.) Therefore, the range of violations that could be considered "of the same nature" as the pre-notice violations in this case is much too broad. To allow the inclusion of alleged violations after June 1 would only open the door to abuse of the citizen suit provision by plaintiffs and increase confusion for both the alleged violators and government agencies. Consequently, the court should affirm the grant of summary judgment for Capitol City as to violations alleged after June 1, 2004.

III. *CAPITOL CITY DID NOT VIOLATE THE CLEAN WATER ACT'S PROHIBITION AGAINST "THE DISCHARGE OF ANY POLLUTANT" WITHOUT A PERMIT OR IN VIOLATION OF A PERMIT.*

The lower court was correct in holding that Capitol City has not violated the Clean Water Act's prohibition against "the discharge of any pollutant" without a permit. The Act provides, in part, that "the discharge of any pollutant by any person shall be unlawful" unless it is in compliance with other provisions of the Act, including the permitting program. 33 U.S.C. § 1331(a) (2004). The Clean Water Act's jurisdiction over waters hinges on the meaning of "discharge of pollutants," defined in the statute to be "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Although the statute defines "navigable waters" to mean "waters of the United States," 33 U.S.C. § 1362(7), this requirement of navigability is still significant, and Rapid River is not a "navigable water," under the meaning of the statute.

The Clean Water Act only governs "navigable waters," and the Rapid River is not a "navigable water" within the meaning of the statute; therefore, the statute cannot be construed to cover this water. First, Congress' power under the Commerce Clause does not reach non-navigable waters like Rapid River. Second, even if it were within Congress' power to regulate this water, this regulation would push the limits of that power. From the language in the statute, there is insufficient evidence to indicate that Congress intended to reach waters such as this one, and the statute should not be read to push the limits of Congress' power absent evidence of a clear intent that it be read this way.

A. *Congress' Authority Under the Commerce Clause Does Not Extend To Allow It To Regulate This Water.*

The Commerce Clause of the Constitution is the source of Congress' power to regulate "navigable waters" under the Clean Water Act, but this power does not extend to non-navigable, intrastate waters such as the Rapid River. Article I, section 8 of the United States Constitution provides that "Congress shall have the power . . . to regulate commerce with foreign nations, and among the several states." This power was first defined in *Gibbons v. Ogden*, where the Supreme Court recognized Congress' power to "prescribe the rule by which commerce is to be governed." 22 U.S.

1, 9 (1824). The *Gibbons* court noted, however, that there were limitations to this power inherent in the language of the Constitution. The Court explained:

> It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary. *Id.* at 194.

This power has been construed to allow Congress to regulate only three main categories of activity: 1) the use of the channels of interstate commerce; 2) the instrumentalities of interstate commerce, or persons or things in interstate commerce; and 3) activities having a substantial relation to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Because the Rapid River is neither a channel nor an instrumentality of interstate commerce, any regulation of this water must derive from Congress' power over the third category, activities having a substantial relation to interstate commerce.

Several decisions of the Supreme Court over the last decade have refined and limited this definition of Congress' power under the Commerce Clause. In *United States v. Lopez*, the Court struck down a statute prohibiting students from carrying guns in schools, finding that this regulation of a non-economic activity with only a tangential effect on interstate commerce exceeded Congress' power under the Commerce Clause. 514 U.S. at 567. The Court also established that for a regulated activity to fall under the third category of the Commerce Clause power, it must have a "substantial effect" on interstate commerce. *Id.* at 559.

The Court reaffirmed this limit on the Commerce Clause power in *United States v. Morrison*, five years after *Lopez*. 529 U.S. 598 (2000). There, the court struck down the Violence Against Women Act, holding that this statute exceeded Congress' power because it was regulating a non-economic activity that had only an attenuated effect on interstate commerce. *Id.* at 617. In *Morrison*, the Court was particularly concerned that Congress was attempting to regulate intrastate violence, something that "has always been the province of the States." *Id.* at 618.

The Supreme Court addressed this issue in the context of the Clean Water Act in *Solid Waste Agency of N. Cook County v. United States*. 531 U.S. 159 (2001). In that case, the Court struck

down regulation of an intrastate body of water, holding that where the only tie between the water and interstate commerce was the presence of migratory birds, its regulation under the Commerce Clause power raised serious constitutional questions. *Id.* at 173. However, the Court did not reach this constitutional question, resolving the case on the grounds that this water did not fall within the definition of a "navigable water." *Id.* at 474. Even acknowledging evidence of an expansive, multi-million dollar industry surrounding recreational pursuits relating to migratory birds, the Court maintained that this application of the Commerce Clause power was constitutionally questionable. *Id.* at 173.

Similarly, in this case, Congress' power under the Commerce Clause does not extend to cover regulation of an intrastate diversion of water with only an attenuated connection to interstate commerce. Although this diversion of water is, arguably, an economic activity, unlike the activities being regulated in *Lopez* and *Morrison*, the attenuated connection to interstate commerce is similar. The only possible effect that the diversion of water from the Torpid River to the Rapid River could have on interstate commerce is the loss of fishing capabilities in one section of the Rapid River. As the court below noted, the South Slope Cutthroat, a species of trout, has allegedly been displaced from a portion of the river below the diversion point. These trout are still present in the headwaters of the river and two adjacent streams, however. R. at 4. They can also be found in the nearby Trout, Blue, and Clear Rivers and their tributaries. R. at 13. Furthermore, the only even arguably economic use of these fish that was made before the diversion was occasional recreational, catch-and-release fly fishing. R. at 13, 14. Even now, after the elimination of trout from this particular stretch of the Rapid River, these trout can still be found and fished in several other areas. R. at 13.

Just as the various recreational uses for migratory birds in *SWANCC* were a questionable link to interstate commerce, possibly failing to provide constitutional support for federal regulation, these trout-fishing activities do not substantially affect interstate commerce and cannot form the basis for regulation of the Rapid River under the Clean Water Act. Even in the aggregate, this kind of recreational fishing could have little or no effect on interstate commerce.[8] No evidence has been provided to indicate that

8. *Cf. Wickard v. Filburn*, 317 U.S. 111 (1942). In that case, the Supreme Court held that the private, small-scale wheat production of a farmer for his own home consumption could, in the aggregate, affect demand for the commercial wheat market

people travel from outside the state to fish this river, possible evidence of an effect on interstate commerce that was even available in *SWANCC*. This is a species of trout that is indigenous to New Union, lives only within New Union, and has an effect only on a small group of people within New Union. R. at 15. It has even less of an effect on interstate commerce than the migratory birds did in *SWANCC*. This certainly fails to rise to the level of a "substantial effect" on interstate commerce, and, therefore, Congress does not have the power to regulate this body of water under the Commerce Clause.

B. *Under the Language of the Statute, the Rapid River Is Not a "Navigable Water," Nor Is It a Tributary of a "Navigable Water," So It Cannot Be Regulated.*

The application of the Clean Water Act to the Rapid River, at a minimum, raises strong questions of constitutionality; absent a clear indication of Congress' intent to regulate intrastate waters such as this one, the language of the statute should not be construed to do so. The Supreme Court has held that where interpretations of statutory language push the outer limits of Congress' authority, a "clear indication that Congress intended that result" is required. *SWANCC*, 531 U.S. at 172. The Court also recently reaffirmed the principle that when a statute can be construed in two ways, one of which raises serious constitutional issues and the other of which does not, the Court is obligated to follow the latter reading. *Jones v. United States*, 529 U.S. 848, 857 (2000). By its terms, the Clean Water Act applies to "navigable waters," and the Rapid River does not fall within this definition. Therefore, the Act should not be construed to cover this water, absent any indication that Congress intended it to reach this far.

A variety of definitions establish and refine what is considered to be a "navigable water" under the Clean Water Act. The "discharge of pollutants," the activity regulated by the Act, is de-

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and, thus, had a sufficient effect on interstate commerce to justify regulation under the Commerce Clause. *Id.* The recreational instances of trout fishing in this case do not even measure up to the low standard set in *Wickard*—the fish are not consumed, kept, or otherwise used by the fishers, in contrast to the wheat in *Wickard*, which was used for essential needs of the farmer's home. Furthermore, the Court in *Wickard* noted that home-grown wheat, in the aggregate, was a substantial factor in the national wheat market, *id.* at 127, while recreational fishing for the South Slope Cutthroat cannot be said to play any significant role in fish or seafood markets, even in the aggregate. This case fails to satisfy even this attenuated rationale for regulation under the Commerce Clause.

fined in the statute to be "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The statute defines "navigable waters" to mean "waters of the United States." 33 U.S.C. §1362(7). EPA has defined "waters of the United States" to include "all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce . . .", including tributaries of waters of the United States. 40 CFR 122.2. The factor upon which all these definitions turn is navigability.

The Supreme Court has also contributed to our current understanding of the meaning of the phrase "navigable waters." In *The Daniel Ball v. United States*, the Court held that "navigable waters" were those that "are used, or are susceptible of being used, in their ordinary condition, as high-ways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." 77 U.S. 557, 563 (1871). This definition was further expanded to include waters that, with reasonable improvement, could be made navigable. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

The Rapid River, under any of these definitions, is not a navigable water. It is choked with rapids and waterfalls, so it has never been used for navigation and cannot ever be so used. R. at 8. Furthermore, the Rapid River is not now a tributary of any navigable water, and although it was once a tributary of a navigable river, it will never be a tributary of this water again as long as Capitol City exists. R. at 8. These facts are not contested by Appellant. Rather, Appellant argues that by defining "navigable waters" to mean "waters of the United States," Congress was signaling its intent that the Act cover more than just navigable waters. However, the term "navigable" cannot be read out of the statute simply because of its later definition. The use of this term, at a minimum, indicates Congress' own conception of the source of its authority to regulate, and it cannot be ignored. *SWANCC*, 531 U.S. at 172. As argued above, Congress' authority under the Commerce Clause at least arguably does not allow it to regulate intrastate waters such as the Rapid River. The language of the statute, referring to "navigable waters," is, at a minimum, susceptible of two interpretations, one of which being that the statute is intended to cover waters that are, in fact, navigable. Given that this interpretation lacks the serious constitutional issues posed by any interpretation that includes regulation of the Rapid River, this in-

terpretation should be applied, and the Rapid River should be excluded from regulation of "navigable waters.'

Congress' power to regulate "navigable waters" under the Clean Water Act derives from its authority under the Commerce Clause. This authority, however, does not extend to cover non-navigable, intrastate waters, such as the Rapid River, that have no substantial effect on interstate commerce. At the very least, any interpretation of the statutory language that would apply the Clean Water Act to the Rapid River is constitutionally problematic. The less constitutionally problematic interpretation, that this statute extends to cover only navigable waters and their tributaries, is not contrary to Congress' intent; rather, the plain language of the statute supports this interpretation. Therefore, this Court should apply the latter interpretation to the Act, and hold that the Rapid River is not a "navigable water" and is not susceptible to regulation under the Clean Water Act.

IV. *NEW UNION'S GRANTING OF A PERMIT FOR CAPITOL CITY'S DIVERSION OF THE TORPID RIVER TO THE RAPID RIVER WAS PART OF THE STATE'S EXERCISE OF CONTROL OVER WATER ALLOCATION AND OBVIATES APPLICATION OF THE CLEAN WATER ACT TO THIS DIVERSION.*

Capitol City received a permit for this diversion as part of New Union's comprehensive water allocation system. This action, combined with the language of the Act, dictates that this diversion of water is not an "addition" of pollutants under the Act, and therefore should not be regulated under the Act. First, the language of the Act indicates that Congress contemplated only one, unitary body of navigable waters to be regulated under the Act, and so the movement of water from one part of the "navigable waters" to another does not constitute an "addition" to be regulated. Second, the cost of obtaining a permit under the Act for every such diversion would be prohibitive. Finally, Congress' expressed purpose in the Act indicates that particularly in cases such as this one, where a diversion is being made as part of an overall state water allocation program, the Act should be construed not to interfere with state water allocation rights. The diversion of water in this case, from the Torpid River to the Rapid River, should not be regulated as an "addition" under the Act.

A. *The Diversion of Water From the Torpid River to the Rapid River Does Not Constitute an Addition of a Pollutant From a Point Source and Is Not, Therefore, in Violation of the Clean Water Act.*

The use of the Torpid Aqueduct to divert water from the Torpid River to the Rapid River is not an "addition" of pollutants to navigable waters. First, the language of the Clean Water Act contemplates only one, unitary body of water that is protected. Second, the movement of pollutants from one part of the navigable waters to another does not constitute an "addition" of a pollutant.

1. *The language of the Clean Water Act indicates that Congress intended to regulate only one, unitary body of "navigable waters" in the Act, so the addition of a pollutant, silt, to navigable waters was made through unregulatable, non-point sources.*

The language of the Clean Water Act contemplates that only one, unitary body of "navigable waters" be regulated under the Act. The Act defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(12). This language notably excludes the word "any" before the phrase "navigable waters," although it includes it before "addition," "pollutant," and "point source," indicating that although the statute contemplates any number of additions, pollutants, and point sources, it intends to cover only one body of water—the "navigable waters" of the United States as a whole.

The structure of the statute supports this reading of the statutory language. The Act, in 33 U.S.C. § 1314(f)(2)(F) addresses "pollution resulting from . . . changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." In this section, it directs EPA to give states information on the evaluation and control of such pollution from non-point sources. The language of this provision indicates that Congress contemplated the very situation we face in this case, pollution caused by the redirection of navigable waters, and considered it to be a different problem than the addition of pollutants from a point source, one which should be regulated by the states. The federal regulation of discharges from point sources, on the other hand, only applies to actual additions of pollutants from the point source to the navigable waters of the

United States. In this case, because the pollutant in question, silt, entered the navigable waters of the United States from non-point sources along the Torpid River, this addition of a pollutant would be subject only to possible state regulation, not federal regulation.

Another provision of the Act, however, does allow states to set up ambient water quality standards for particular waters, indicating that the Act could possibly contemplate protection of individual water bodies as well as "navigable waters" generally. 33 U.S.C. §1313(c)(2)(A). This provision provides that states may revise or adopt new water quality standards, based on designated uses such as drinking water and recreational purposes, for "the navigable waters involved." *Id.* This is an optional portion of the Act, however, and one that seems to contemplate dividing off a subset of "navigable waters" for heightened regulation based upon usage. The language refers to the "navigable waters involved," rather than referring to specific bodies of water, indicating that Congress intended this provision to focus on parts of the overall unitary body of "navigable waters," not to refer to individual, discrete bodies of water. This provision of the Act, therefore, only strengthens the statutory reading of the phrase "navigable waters" to mean one, unitary body of water.

The plain language and structure of the Clean Water Act indicate that in the context of federal regulation of the discharge of pollutants from point sources, Congress intended that the "navigable waters of the United States" be considered to be one unitary water. The addition of silt to "navigable waters" in this case, therefore, occurred when silt was added to the Torpid River from non-point sources. The Clean Water Act does not regulate the addition of pollutants from non-point sources, leaving that regulation up to the states. Therefore, the addition of silt to the navigable waters of the United States cannot be regulated under the Clean Water Act.

2. *The movement of water from one part of the "navigable waters" to another through the Torpid Aqueduct does not constitute an "addition" under the Clean Water Act.*

The movement of water from the Torpid River to the Rapid River via the Torpid Aqueduct, a point source, does not constitute an "addition" of a pollutant under the Clean Water Act, and this diversion of water, therefore, is not subject to the Act's permitting requirements. Although the courts of appeal and the Supreme

Court have not spoken to the "unitary waters" interpretation of the statutory language outlined above, a number of circuits have held that for there to be an "addition" for the purposes of the Act, the point source must be adding a pollutant from the outside world. Because the Torpid Aqueduct is not adding anything new from the outside world that was not already in the navigable waters, the movement of water through the aqueduct and into the Rapid River does not constitute an "addition," and is not subject to regulation under the Act.

A number of courts of appeal have recognized that movement of waters containing a pollutant into the same waters does not constitute an "addition" under the Act. The DC circuit, in *Nat'l Wildlife Fed'n v. Gorsuch*, held that the language of the statute supported EPA's contention that an "addition" occurs only when a "the point source itself physically introduces a pollutant into water from the outside world." 693 F.2d 156, 174 (D.C. Cir. 1982). Similarly, the Sixth Circuit held in *Nat'l Wildlife Fed'n v. Consumers Power Co.* that there was no "addition" where a hydroelectric plant withdrew water and then released it back into the same body of water. 862 F.2d 580 (6th Cir. 1988). The court there also noted that the language used by Congress indicated that it did not intend to regulate all pollution released through a point source, but only pollution that was *added* by a point source. Id. at 586. These cases found that the point sources involved, dams in both cases, did not add a pollutant where they simply removed water from a body of water and returned it to that body of water.

More recently, the Second Circuit has reaffirmed this principle in *Catskill Mountains Chapter of Trout Unlimited v. New York*, holding that the reading of the word "addition" in *Gorsuch* and *Consumers Power* was the correct one. 273 F.3d 481 (2d Cir. 2001). The court noted that "if one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not "added" soup or anything else to the pot . . . in requiring a permit for such a discharge, the EPA might as easily require a permit for Niagara Falls." *Id.* at 492. In that case, however, the court held that the waters in question were two separate bodies of water. The court noted that the movement of water from a reservoir to an unrelated creek by way of a tunnel constituted an addition for the purposes of the statute. *Id.* at 492. The court's finding in *Catskill Mountains* hinges on the its determination that the two bodies of water were, in fact, separate. This premise is not supported by the language of the statute, analyzed above, that in-

dicates that the statute contemplates regulation of one, unitary body of "navigable waters." Therefore, under this interpretation of the statutory language, the court's holding in *Catskill Mountains* would likely have been the opposite—that the movement of silt-laden water from the reservoir to the creek was not an addition for the purposes of the statute. That case, like the current one, involves only a removal of water and a re-depositing of that same water—no more.

The pollutant in this case, silt, entered the "navigable waters" of the United States from non-point sources along the Torpid River, an addition that cannot be regulated under the Act. The point source in question, the aqueduct, simply moved that water from one part of the "navigable waters" to another, which is not an "addition" under the Act. Therefore, this point source does not require a permit, because no "addition" of pollutants has taken place.

B. *The Costs of Requiring a Permit For Every Diversion of Water Would Be Prohibitive, And Would Supercede or Abrogate the Rights of the State of New Union To Allocate Water Within its Jurisdiction and the Rights of Capitol City to the Water That Has Been Allocated to it Under the State Water Allocation System.*

If, as Appellant suggests, the statute is read to cover diversions such as this one as "additions" of pollutants, and a permit were required under the Clean Water Act for diversions of water, the costs of administering a comprehensive water allocation program, such as the one in New Union, would effectively eliminate the ability of the state to regulate allocation of waters within its jurisdiction. As the Supreme Court noted in dicta in *S. Florida Water Management District v. Miccosukee Tribe of Indians*, if the Act's permitting requirement is read to require a permit for every diversion of navigable waters, "thousands of new permits might have to be issued, particularly by western States, whose water supply networks often rely on engineered transfers among various natural water bodies." 124 S. Ct. 1537, 1544-45 (2004).

This is precisely the situation in the State of New Union generally, and in Capitol City specifically. Capitol City is located on the dry south slope of the Front Mountains, and almost since its founding, the city has relied on a water acquisition program to serve the needs of its citizens and businesses. R. at 3. The state of New Union has a complicated statutory structure that governs

this water acquisition and allocation program in which trans-basin diversions of water require a permit from the state's Water Engineer. R. at 3-4. Capitol City has, through this elaborate state statutory structure, secured the rights to the total flow of the Torpid River and has received a diversion permit from the state's Water Engineer in 2002. R. at 4.

If the Clean Water Act is now construed to require an NPDS permit for every such diversion in the state, the costs of traversing the federal permitting program would effectively eliminate the ability of the state to administer its water allocation program—one on which Capitol City depends for acquisition of a sufficient water supply for its citizens. This abrogation of the state's ability to regulate and allocate waters within its jurisdiction, as well as of Capitol City's rights to the water allocated to it by the state, would violate § 1251(g)'s requirement that the Act not be construed to supercede, abrogate, or impair the states' ability to administer their own water allocation programs.

C. *The Expressed Purpose of the Clean Water Act Dictates the Interpretation That This Diversion is Not An "Addition" of a Pollutant and Indicates That Congress Did Not Intend That Diversions Such As These Be Regulated By the Act.*

Even under a comprehensive federal statutory scheme designed to protect the nation's waters, the right of the states to authority over water allocation remains intact, and the diversion of water in question in this case is part of a comprehensive water allocation plan in the state of New Union. The Wallop Amendment to the Clean Water Act specifies that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superceded, abrogated, or otherwise impaired by this Act" and that "nothing in this Act shall be construed to supercede or abrogate rights to quantities of water which have been established by any State." 33 U.S.C. § 1251(g). This provision, appearing in the "Congressional Declaration of Goals and Policy" section of the Clean Water Act, is a clear indication that Congress did not intend for federal regulation of water quality to impair the traditional power of the states to allocate and manage their own water resources. The construction of the statute asserted in Section A above, that the diversion of water from one part of "navigable waters" to another does not constitute an "addition" under the statute, is therefore not only a reasonable construction of the

statutory language, but is actually dictated by the purposes of the statute.

Decisions regarding allocation of water within a state have traditionally been within the sole power of that state. Prior to the passing of the Clean Water Act, Congress had already recognized that water allocation decisions were within the purview of traditional state power. In the Federal Reclamation Act of 1902, codified at 43 U.S.C. § 372 et. seq., Congress recognized the obligation of the federal government to abide by state law regarding water allocation and rights. Later, the McCarran Amendment provided a structure and procedure wherein parties could secure judgment against the United States in cases regarding the adjudication of water rights. 43 U.S.C. § 666. When Congress passed the Clean Water Act, it was already functioning within a federal statutory structure that acknowledged the dominance of state law with respect to water allocation and water rights. The policy, codified in § 1251(g), simply provides additional recognition that this new federal statute was not to be construed to interfere with this traditional state right.

The Supreme Court has held that policy declarations in federal regulations "cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose." *Connecticut Light & Power Co. v. Fed. Power Comm'n*, 324 U.S. 515, 527 (1945). However, this language regarding the policies of the Act should be read as "a guide in resolving any ambiguity or indefiniteness in the specific provisions which purport to carry out its intent." *Id.* at 527. As submitted above in section A, the definition of the word "addition" in the Act is at a minimum susceptible to the interpretation that it does not include diversions of water, such as this one, within the navigable waters of the United States. The "guide" provided by Congress in § 1251(g), however, resolves this ambiguity clearly. The provisions of the statute, including its definition of an "addition" should not be read to interfere with the traditional water allocation rights of the states, and to consider diversions and allocations of water within a state to be an "addition" of pollutants under the statute would interfere with these rights and burden the State of New Union's ability to carry out its water allocation plan.

The few courts who have addressed this issue have interpreted § 1251(g) in different ways, but a decision to regulate diversions of water as an "addition" of pollutants under the Act would

be nearly unprecedented.[9] The Court of Appeals for the District of Columbia Circuit has held that this provision provides "specific indication . . . that Congress did not want to interfere any more than necessary with state water management . . ." *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982). There, the court held that a dam, which produced a number of negative changes in water quality, including sedimentation, did not have to be regulated under the Act's permitting program. The EPA had argued that dams generally did not require discharge permits but would be subject to state regulations, and the court held that EPA's interpretation of the statute was reasonable, particularly in light of the language of § 1251(g), which indicated an unwillingness on the part of Congress to interfere with state water regulation schemes.

These three courts concur on one main point in their interpretations of § 1251(g)—that states' rights to allocate water and the rights of those to whom water has been allocated by the states are to be given at least some deference in the Clean Water Act's regulatory scheme. In this case, both the State of New Union's right to allocate water and the rights of Capitol City to the water that has been allocated to it are threatened by the Appellant's assertion that this diversion of water is an "addition" of a pollutant and requires a permit under the Act. The statutory language is at a minimum susceptible to two interpretations, and the language of § 1251(g) dictates that the Clean Water Act should not be interpreted in such a way as to impair these water allocation rights, rights which have traditionally been the purview of the states.

Congress did not intend that the Act be construed to require federal permitting for a traditionally state law function—the allocation of water. Therefore, to the extent that there is any question as to the meaning of the language of the statute regarding an "addition" of pollutants, this ambiguity should be resolved in light of Congress' expressed purpose in 33 U.S.C. § 1251(g). The costs of obtaining a permit for every such diversion in New Union would eliminate the state's ability to administer its water allocation program, and the regulation of this diversion would abrogate the

9. The Ninth Circuit, in *United States v. Akers*, has held that where the federal regulation in question is aimed at "the type of legitimate purpose for which the Act was intended," the federal government would be justified in its regulation of an activity, even if that regulation affected state-allocated water rights. 785 F.2d 814, 821 (9th Cir. 1986). However, this case involved a farmer's dredge and fill activities on a wetland area, which is a far cry from a municipal water diversion as part of an overall water allocation program administered by the state.

rights of Capitol City to the water that has been allocated to it by state law. The fact that this diversion is a permitted part of New Union's comprehensive water allocation program, therefore, dictates that it should not be held to be an "addition" of pollutants and should not be regulated under the Act, and the district court's grant of summary judgment on these grounds should be upheld.

CONCLUSION

For the foregoing reasons, Capitol City respectfully requests that the Court overturn the district court's grant of New Union's motion to intervene by right under 33 U.S.C. § 1365(c)(2). Further, Capitol City respectfully requests that the Court affirm the district court's grant of summary judgment on the grounds that the court lacked jurisdiction over the case because FSSC failed to give proper prior notice of their intent to sue under 33 U.S.C. § 1365(b)(1)(A), that Capitol City's diversion of waters from the Torpid River to the Rapid River does not constitute a violation of the Clean Water Act, and that New Union's water allocation rights supercede the application of the Clean Water Act to this diversion.