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Best Brief for Appellant: Seventeenth Annual Pace National Environmental Law Moot Court Competition

Anthony Cotton
Marquette University School of Law

Kristin Eisenbraun
Marquette University School of Law

Randall Green
Marquette University School of Law

MEASURING BRIEF*

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

FRIENDS OF THE SOUTH SLOPE CUTTHROAT, INC.,
Appellant,

And

STATE OF NEW UNION,
Appellant/Appellee,

v.

CAPITOL CITY, NEW UNION,
Appellant/Appellee

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

Brief for the Appellant,
FRIENDS OF THE SOUTH SLOPE CUTTHROAT, INC.

ATTORNEYS FOR
APPELLANT
FRIENDS OF SOUTH SLOPE
CUTTHROAT, INC.
Marquette University Law School
Anthony Cotton
Kristin Eisenbraun
Randall Green

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JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C.A. §1291, federal courts of appeal have jurisdiction over final decisions rendered by all district courts. *See* 28 U.S.C.A. §1291. The Supreme Court has held that section 1291 is to be given a "practical rather than a technical construction." *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). Indeed, the effect of section 1291 is to disallow appeal from any decision which is tentative, informal or incomplete. *See id.* at 546. In the instant matter, the District Court's decision to permit New Union to intervene as a matter of right is appealable as it is not interlocutory and occurs after the finality of judgment. Because the court granted summary judgment against FSSC on all issues raised by Capitol City, the judgment was final. On appeal of this final judgment, FSSC seeks review by the Court of Appeals as to whether the district court erred in permitting New Union to intervene as of right under Rule 24(a).

Whether the Rapid River is a navigable waterway under 33 U.S.C. § 1362(7) is an issue of federal statutory interpretation. In addition, the question of whether Congress has the power to regulate the pollution of the Rapid River is an issue that requires the interpretation of the scope of the Commerce Clause. U.S. Const. Art. I, § 8, cl. 3. Federal courts, including this Court and the United States District Court for the District of New Union, are the final expositors on question of federal law. *Katz v. Children's Hospital of Orange County*, 28 F.3d 1520, 1529 n.9 (9th Cir. 1994). As federal courts, both this Court and The United States District Court for the District of New Union have jurisdiction over these questions.

STATEMENT OF THE ISSUES

1. Did the Court below err in granting New Union's motion to intervene by right under 33 U.S.C. § 1365(c)(2)?
2. Did the Court below err in granting Capitol City's motion for summary judgment on the grounds that the Court lacked jurisdiction over the case because FSSC's members, Nelson Spinner and Newton Creel, failed to give proper prior notice of their intent to sue under 33 U.S.C. § 1365(b)(1)(A)?
3. Did the Court below err in granting Capitol City's motion for summary judgment that Capitol City's diversion of the silt-laden waters of the Torpid River to the pristine 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. Did the Court below err in granting Capitol City's motion for summary judgment 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 the diversion?

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the District of New Union ("District Court") granting defendant, Capitol City, New Union's ("Capitol City") motion for summary judgment. The District Court dismissed the action brought by Friends of the South Slope Cutthroat, Inc. ("FSSC") against Capitol City for the discharge of a pollutant into the Rapid River without a permit issued under § 402 of the Clean Water Act ("CWA"), 33 U.S.C. § 1342 (2000), thus violating CWA § 301(a), 33 U.S.C. § 1311(a) (1995). In turn, FSSC filed a complaint, under the citizen suit provision, against Capitol City under CWA § 309, 33 U.S.C. § 1311(a) (1995). New Union is an intervenor plaintiff to this action under CWA § 505, 33 U.S.C. § 1365(c)(2) (1987).

The District Court granted summary judgment on all three grounds that New Union argues. First, the District Court agreed with Capitol City that FSSC failed to give proper notice pursuant to the citizen suit provision in 33 U.S.C. § 1365(b)(1)(A). The District Court reasoned that the notice of intent to sue was insufficient under the statute and because notice is jurisdictional and Capitol City did not receive adequate notice, the court does not have jurisdiction over the complaint. (R. 6.) The District Court said the notice was not sufficient because it did not properly iden-

tify the correct plaintiffs, it failed to identify the proper pollutant, and it did not allege continuing violations of the pollutant being added to the Rapid River. (R. 5-7.)

Second, the District Court also granted Capitol City's summary judgment motion on the ground that FSSC did not satisfy all of the requirements of the statute to hold Capitol City liable. (R. 7.) Specifically, the District Court found that the Rapid River is not navigable and that the addition of pollutants occurred at the Torpid River and not the Rapid River. (*id.*) The District Court held that the Rapid River did not fall under the traditional definitions of navigable waterways and because the Rapid River is not a tributary of the Platte River, then it cannot be held to be navigable under a broad definition pursuant to 33 U.S.C. § 1362(7). The District Court also held that the pollutant was added where the pollutant naturally occurs in the Torpid River, from non-point source shore-side erosion. (R. at 9.)

Third, the District Court granted Capitol City's motion on the basis that 33 U.S.C. § 1251(g) removed the authority of the Environmental Protection Agency ("EPA") to make decisions that would "supercede, abrogate, or otherwise impair the authority of a State to allocate water within its jurisdiction." (R. at 10.) The District Court held that the McCarran Amendment ceded sole authority to the individual states for the allocation of the water in its jurisdiction, which was affirmed by adopting 33 U.S.C. § 1251(g). The District Court held that 33 U.S.C. § 1251(g), relating to the state's authority to allocate its own water, trumps any other provision of the CWA.

FSSC challenges the District Court's ruling that New Union should have been allowed to intervene in the action. FSSC and New Union challenge the District Court's ruling that FSSC did not meet the notice requirements in its notice letter. FSSC challenges the District Court's ruling that Capitol City did not add pollutants to a navigable water from a point source. (R. 8.) FSSC challenges the District Court finding that New Union has the ultimate control over the allocation of its water supply, even to the extent that it trumps the CWA and its propositions. Thus, FSSC and New Union join together on one ground and oppose each other on three grounds. Capitol City fully supports the District Court's ruling.

STATEMENT OF FACTS

FSSC is a non-profit corporation, organized under the laws of New Union (R. at 11.) The primary concern of FSSC is the preservation of the South Slope Cutthroat trout ("Cutthroat trout") that live and breed in the Rapid River. (*id.*) The overall health of the Cutthroat trout has diminished considerably in recent years. (R. at 15.) Because of urban and other intrusions, the habitat of the trout is now reduced to four river basins, including the Rapid River basin, from roughly two dozen river basins at the beginning of the twentieth century. (*id.*) Indeed, the plight of the trout is so dire that the Director of New Union's Department of Fish and Wildlife has called it "truly an endangered species." (*id.*)

On August 15, 2002 Capitol City was issued Inter-basin Diversion Permit No. 3857 from New Union's Water Engineer. (R. at 11.) For ten years prior to the issuance of this permit, Capitol City had been constructing the Torpid Aqueduct so as to divert water from the Torpid River to the Rapid River. (R. at 4.) Capitol City began using the aqueduct to divert silt-laden water from the Torpid River to the Rapid River in August 2003. (R. at 11.) Shortly after the city began introducing silt-laden water to the Rapid River, two avid fishermen and members of FSSC became alarmed when they noticed that the Cutthroat trout had entirely disappeared from the section of the Rapid River downstream from the Torpid Aqueduct. (R. at 13-14.) As indicated by New Union's Director of the Department of Fish and Wildlife, the population of the trout probably will not survive in the Rapid River below the diversion of silt-laden water. (R. at 15.)

FSSC provided the Director of the Capitol City Water Supply Agency, the Director of New Union's Water Pollution Control Agency, and the Regional Administrator of the U.S. EPA, with notice of intent to sue on June 1, 2004. (R. at 11.) This notice identified FSSC as suing on behalf of its members, the pollutant that caused the violation of the CWA, and the time frame during which the violation and pollution occurred. (*id.*)

On August 1, 2004, FSSC brought suit against Capitol City for violating 33 U.S.C. § 1311(a). (R. at 3.) The lawsuit was brought under the "citizen suit" provision of the CWA, 33 U.S.C. §§ 1251, 1365, alleging that Capitol City was in violation of the CWA because its diversion of contaminated water through the Torpid Aqueduct does not occur pursuant to an EPA issued permit. (*id.*) Shortly after FSSC filed its lawsuit against Capitol City,

New Union sought intervention as a matter of right under 33 U.S.C. § 1365(c)(2) and Fed. R. Civ. P. 24(a). (R. at 4.) New Union averred that its intervention was on behalf of FSSC, although both FSSC and Capitol City opposed its intervention. (R. at 4-5.) After the intervention was granted, New Union argued for, and supported every substantive position advanced by Capitol City for summary judgment against FSSC. (R. at 2.) As it unfolded, the only area of in which New Union supported FSSC was over the jurisdictional matter of whether proper prior notice of intent to sue was given under 33 U.S.C. § 1365(b)(1)(A).

SUMMARY OF THE ARGUMENT

This Court should reverse the District Court's decision granting New Union's motion to intervene by right under 33 U.S.C. §1365(c)(2). Rule 24(a) of the Fed. R. Civ. P. outlines the procedure whereby a party may intervene as a matter of right in pending litigation. *See* Fed. R. Civ. P. 24(a). Under Rule 24(a) a party may intervene as of right if one of two circumstances applies. First, a party may intervene if a federal statute confers an unconditional right of intervention. *Id.* New Union may not intervene under this provision as the CWA simply contains no provision conferring an unconditional right of intervention on states. Secondly, a party may intervene as of right under Fed. R. Civ. P. 24(a)(2) if an applicant claims an interest, the protection of which may, as a practical matter, be impaired or impeded if the lawsuit proceeds without the party's intervention. *Id.* New Union's motion to intervene must fail under this alternative theory as it has not demonstrated that it has a protectable interest. Moreover, even if New Union's interest can be found to be protectable, there is no evidence that this interest is not adequately represented by Capitol City.

FSSC's notice of intent to sue was proper under both 33 U.S.C. § 1365(b)(1)(A) and 40 C.F.R. § 135.3(a). This Court should reverse the District Court's opinion because this Court should not allow form to prevail over substance when considering the content of the notice of intent letter and should instead look to the purpose of the notice of intent. The intent Congress had behind CWA's citizen suit provision was to allow ordinary citizens to sue when there is a violation of the CWA. Environmental groups can sue on behalf of citizens whose rights have been violated. The notice of intent properly identified the FSSC as suing on behalf of its members. The notice of intent also properly identified the pollutant that caused the violation as well as the time frame that the

pollution took place. The purpose of the notice of intent under the CWA is to provide sufficient information so that the polluter can identify and possibly rectify the allegations of the complaint. Once the notice of intent has succeeded in this purpose, it should be considered valid.

This Court should reject any challenge to the constitutionality of the CWA. The Supreme Court of the United States has repeatedly held that Congress has the power to regulate "those activities having a substantial relation to interstate commerce" *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), if four elements are proven. First, the diversion of polluted water via the Torpid Aqueduct must be pursuant to an economic endeavor. In this case Capitol City consumes all of the water that flows downstream of the aqueduct's discharge point and presumably charges its residents for individual consumption. Second, the statute in question must have a jurisdictional element to ensure a case-by-case inquiry. The definition of "navigable waters" in 33 U.S.C. § 1362(7) provides the jurisdictional scope of the EPA, the Army Corps of Engineers, and the Coast Guard to enforce the provisions of the CWA. Third, there must be legislative history that supports the assumption that the pollution substantially affects interstate commerce. There is an abundance of such reports even prior to the introduction of this element in *Lopez*, which strongly suggest that these statements do not constitute stuffing of the legislative record. Fourth, there must be a substantial affect on interstate commerce when considered in the aggregate. The fulfillment of this element is threefold: (1) fishing is part of a $29.2 billion wildlife-related recreational industry that involves interstate travel; (2) many important medicines are discovered due to the studies of plants, animals and their ecosystems; and (3) there is a potential market in the fish of the Rapid River if the species therein are allowed to flourish. Finally, Congress has been involved with environmental efforts since the beginning of the 20th century; therefore there is little concern of Congress regulating what has traditionally been an area of state regulation.

This court should reverse the decision of the District Court in light of the overall purpose of the CWA to restore and maintain the integrity of the Nation's waters; the two elements of the CWA in dispute have been satisfied to constitute a violation of 33 U.S.C § 1311(a). First, the transfer of silt-laden water to the Rapid River via the Torpid aqueduct is a "discharge" of a pollutant from a point source. The violation is clear when considered in the cor-

rect context, that is, but for the construction of the Torpid Aqueduct, the silt-laden water of the Torpid River never would have entered the waters of the clear Rapid River. In addition, the "discharge" was made into a "navigable waterway" as broadly defined by the CWA: "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Courts have repeatedly held that Congress intended this broad definition to reach to the outer limits allowed by the Commerce Clause of the United States Constitution.

The District Court also erred when it granted Capitol City's motion for summary judgment on the grounds that Congress ceded sole authority to allocate water use to the States. The District Court places considerable emphasis on 33 U.S.C. § 1251(g) to support its contention that Congress did not intend for the CWA to interfere with States' ability to allocate water within their jurisdictions. This emphasis is misplaced, as there is no evidence anywhere in the CWA that 33 U.S.C. § 1251(g) was designed to prevent the government from regulating water standards within States. In addition, the District Court held that the McCarran Amendment, 43 U.S.C. § 666(a), demonstrates Congress' intention to cede sole authority to the States to regulate water quantity allocation. The Court's reasoning is inaccurate as the McCarran Amendment expresses no purpose other than to grant consent for the joinder of the United States as a defendant in suits for the adjudication of water rights of which it is the owner, or which it is in the process of acquiring.

STANDARD OF REVIEW

A grant or denial of summary judgment is reviewed by the court *de novo*. *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996). Summary judgment is warranted if the record discloses that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Upon review, the court draws all inferences in favor of the party opposing summary judgment. *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986).

The court also applies a *de novo* standard when reviewing constitutional challenges to federal statutes. *United States v. Rasco*, 123 F.3d 222, 226 (5th Cir. 1997). When reviewing the exercise of congressional power with respect to the Commerce Clause, a court must determine: (1) if there is a rational basis for finding the activity in question affects interstate commerce; and

(2) if the regulatory means chosen by Congress had been reasonably adapted to meet the end permitted by the Constitution. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). "The burden for the challenger . . . is high." *Deer Park Indep. School Dist. v. Harris County Appraisal Dist.*, 132 F.3d 1095, 1098 (5th Cir. 1998).

Finally, questions of statutory interpretation are reviewed *de novo*, in this case whether there has been a discharge of a pollutant into navigable waterways in violation of 33 U.S.C § 1311(a) of the CWA. *See United States v. Riverside Bayview Homes, Inc.*, 474, U.S. 121 (1985).

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING NEW UNION'S MOTION TO INTERVENE BY RIGHT UNDER 33 U.S.C. §1365(c)(2).

Fed. R. Civ. P. 24(a) provides that anyone shall be permitted to intervene in an action as a matter of right:

> (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed R. Civ. P. 24(a).

The District Court, in the instant matter, permitted the state of New Union to intervene in a CWA lawsuit against Capitol City under Fed R. Civ. P. 24(a). The District Court made only passing reference to Fed. R. Civ. P. 24(a) in its decision and failed to articulate whether the intervention was granted under Rule 24(a)(1) or 24(a)(2). Irrespective of the District Court's failure to articulate its reasoning, the District Court erred in permitting intervention, as New Union cannot satisfy either of the two subsections of Fed. R. Civ. P. 24(a).

A. *The CWA does not confer an unconditional right of intervention on individual States.*

In its decision, the District Court permitted New Union to intervene and noted that the CWA treats States the same as the

United States. The District Court's review of whether or not New Union should intervene was at best, cursory. It is unclear from the District Court's decision whether, because it feels that the CWA treats States and the United States the same, this automatically confers on States the ability to intervene as a matter of right. Regardless of the arguments proferred by the District Court, neither the language nor the case law surrounding Fed. R. Civ. P. 24(a) supports the contention that a State may intervene as a matter of right under the CWA.

33 U.S.C. § 1365(c)(2) confers the right of intervention in a citizen's lawsuit alleging violations of the CWA to the EPA Administrator, if the Administrator has not already been made a party. 33 U.S.C. § 1365(c)(2). Like other statutes designed to protect the environment, the CWA contains a citizen suit provision authorizing private plaintiffs to sue a purported violator of the CWA. In authorizing citizens to sue under various environmental statutes, Congress has identified who should be permitted to intervene as a matter of right in these cases. *See, e.g,,* 15 U.S.C. § 2619(c) (permitting the EPA Administrator to intervene as a matter of right in citizen suits under the Toxic Substances Control Act); 16 U.S.C. § 1540(g)(3)(B) (granting intervention as a matter of right to the United States Attorney General in lawsuits under the Endangered Species Act if requested by either the Secretary of the Interior or the Secretary of Commerce); and 30 U.S.C. § 1270 (c)(2) (authorizing the Secretary of the Interior or the State regulating authority to intervene as a matter of right in suits under the Surface Mining Control Act).

A party shall be permitted to intervene as a matter of right "when a statute of the United States confers an unconditional right to intervene." Fed. R. Civ. P. 24(a)(1). In permitting New Union to intervene as a matter of right in the instant matter, the District Court concluded that the CWA treats States and the United States as analogous and therefore "it would be anomalous not to treat States and the United States in the same manner for citizen suit intervention purposes." (R. 5.) To support its decision, the District Court cites *North and South Rivers Watershed Assn. v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1992) and concludes that it may disregard the statutory language specifying the EPA Administrator as the appropriate authority for intervention purposes. (D. 5.) This conclusion by the District Court makes the assumption that it was Congress' intent to permit States to intervene as a matter of right in citizen suits under the CWA but

merely neglected to include this in the statutory language of 33 U.S.C. § 1365(c)(2).

In interpreting statutes, the function of the courts is to construe the language so as to give effect to the intent of Congress. *See United States. v. American Trucking Assn's*, 310 U.S. 534, 542 (1940). As the Supreme Court noted in *American Trucking*, "there is no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation" *Id.* at 543. Moreover, as a basic matter of statutory interpretation, the first step a court must take is to determine whether the language at issue has a plain and unambiguous meaning. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). In determining whether the language is ambiguous the courts have been instructed to consider "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341. In the instant matter, consideration of the language Congress chose to employ demonstrates that New Union should not have been permitted to intervene as a matter of right.

The citizen suit provision of the CWA states that in an action under the Act "the Administrator, if not a party, may intervene as a matter of right." *See* 33 U.S.C. § 1365(c)(2). Unlike other statutes which confer a right of intervention on such parties as the Administrator of the Interior, State regulating authorities, or the U.S. Attorney General, Congress chose to permit only the EPA Administrator to have this right under 33 U.S.C. § 1365(c)(2). As noted, Fed. R. Civ. P. 24(a)(1) permits a party to intervene as a matter of right when a statute has conferred this right unconditionally. *See* Fed. R. Civ. P. 24(a)(1). Undoubtedly, Congress is capable of conferring this right on the parties it deems appropriate. In fact, in the body of the CWA itself, Congress has specifically allowed for intervention under certain circumstances by individual citizens, as a matter of right. *See* 33 U.S.C. § 1365(b)(1)(B) (permitting intervention as a matter of right by citizens when either the EPA Administrator or State has commenced an action to require compliance with a standard limitation or order). In enacting laws permitting citizen suits Congress decides whether it will grant a statutory right of intervention. For example, when Congress enacted the Surface Mining Control Act, Congress authorized both the United States Attorney General and state regulating authorities the ability to intervene as a matter of

right. 30 U.S.C. §§ 1201-1328 (1977). In the instant case, the District Court erred in its application of Fed. R. Civ. P. 24(a)(1) when it permitted New Union to intervene. Rule 24(a)(1) requires that intervention as a matter of right be conferred in a federal statute, and neither the state of New Union nor the District Court have been able to identify a single statutory provision of the CWA granting such a right. *See* Fed. R. Civ. P. 24(a)(1).

B. *New Union may not intervene as a matter of right under Fed. R. Civ. P. 24(a)(2) as it does not meet the standards established therein.*

Under Fed. R. Civ. P. 24(a)(2), New Union may intervene if certain requirements are met. *See* Fed. R. Civ. P. 24(a)(2). The rule on intervention as of right requires that the applicant claim an interest, the protection of which may as a practical matter, be impaired or impeded if the lawsuit proceeds without that person's intervention. *See Sierra Club, et al. v. EPA, et. al.*, 995 F.2d 1478, 1481 (9th Cir. 1993). The Third Circuit has determined that a person is entitled to intervene of right if three conditions are satisfied: "First, the party must have a sufficient interest in the matter that would be affected by the disposition. Second, this interest must be inadequately represented by the existing parties. Finally, the application must be timely." *Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501, 504 (3d Cir. 1976), *cert. denied*, 426 U.S. 921 (1976). The Ninth Circuit has reached a similar determination and applies the above-named test along with a fourth factor; the applicant seeking intervention must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest. *See Sierra Club,* 995 F.2d at 1481. The element of timeliness in New Union's motion to intervene is not in dispute as the motion was filed at the outset of litigation. However, because New Union is unable to satisfy any of the other elements of the above-named tests, it must be precluded from intervening.

1. The State of New Union lacks a protectable interest that would justify intervention under Fed. R. Civ. P. 24(a)(2).

While New Union may have an "interest" in the resolution of this case, the central issue is whether that interest is "protectable." The Supreme Court, in *Donaldson v. United States*, 400 U.S. 517 (1970), formulated the requirement of "protectability."

In *Donaldson*, the Court held that a person did not have a protectable interest in a company's records relating to that person's income tax payments. *Id.* at 542. The Court held that the interest was not "protectable" because "the records did not belong to him, he had no proprietary right, evidentiary privilege, constitutional claim to suppression, or any other right to interfere with the company's disclosure to the IRS." *Id.*

Like the interest of the taxpayer in *Donaldson*, the interest of New Union in this case is not protectable. First, the State is not the entity engaged in the appropriation of the water. Second, the State has no ownership right over the Torpid Aqueduct as it was constructed and is maintained by the city. Third, New Union has no proprietary interest in the Rapid Reservoir as this is maintained by the city and all of the water therein is consumed by the residents of Capitol City. Finally, although the outcome of this case could affect the State's ability to grant diversion permits, such right is always subject to federal approval of the State program under the CWA.

2. Even if the court finds that New Union has a protectable interest, New Union should not be permitted to intervene because Capitol City adequately represents that interest.

The Supreme Court analyzed the adequacy of representation factor under Fed. R. Civ. P. 24(a)(2) in *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 537 (1972). In *Trbovich*, the Court stated that the adequacy of representation component of Fed. R. Civ. P. 24(a)(2) is satisfied "if the applicant shows that representation of his interest may be inadequate; and the burden of making that showing should be treated as minimal." *Id.* at 537. However, courts often apply a presumption of adequate representation when the party seeking intervention has the same ultimate goal as a current party. *See, e.g.,, United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982); *Commonwealth of Pennsylvania. v. Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976); *See also*, *Chiglo v. City of Preston*, 104 F.3d 185, 188 (8th Cir. 1997) (proposed intervenors failed to rebut presumption that city, as *parens patriae*, inadequately represents their interest).

Capitol City adequately represents New Union's substantive interests in the lawsuit brought by FSSC. Although Capitol City and New Union differ over the jurisdictional issue as to whether proper prior notice of intent to sue was provided by FSSC pursu-

ant to 33 U.S.C. § 1365(b)(1)(A), the two parties are in complete harmony with respect to the substantive matters of this case. Even assuming *arguendo* that the District Court was correct in granting summary judgment against FSSC on the jurisdictional issue of notice, the matter is still resolved in the State's favor as the lawsuit is dismissed. Therefore, both Capitol City and New Union share the same ultimate goal, dismissal of plaintiff's suit on the following substantive grounds: 1) that Capitol City's diversion of silt-laden waters without a permit issued under 33 U.S.C. § 1342 does not constitute a violation of 33 U.S.C. § 1311(a) and 2) that 33 U.S.C. § 1251(g) of the CWA trumps all other provisions of the CWA and therefore obviates what otherwise might be a violation of 33 U.S.C. § 1311(a). Because Capitol City and New Union share a common interest in the outcome of this matter, New Union cannot be permitted to intervene as a party under Fed. R. Civ. P. 24(a)(2).

II. THE TRIAL COURT ERRED IN GRANTING CAPITOL CITY'S MOTION FOR SUMMARY JUDGMENT ON JURISDICTIONAL GROUNDS OVER THE NOTICE OF INTENT TO SUE UNDER 33 U.S.C. § 1365(b)(1)(A).

The District Court had jurisdiction over the complaint because the complaint was filed at least sixty days after giving the defendants notice of intent to sue. Providing sixty-day notice is a jurisdictional prerequisite to maintaining a suit in the trial court. *Hallstrom v. Tillamook County*, 493 U.S. 20, 26 (1989). The notice of intent to sue was also proper because it followed the guidelines set forth in 33 U.S.C. § 1365(b)(1)(A) as well as 40 C.F.R. § 135.3(a). The Second Circuit has "refused to 'allow form to prevail over substance' in considering the content required of an [notice of intent] letter, and has looked instead to what the particular notice may reasonably be expected to accomplish." *Catskill Mountains Chapter of Trout Unltd. Inc. v. City of New York*, 273 F.3d 481, 487 (2d Cir. 2001). The plaintiffs in this case have standing and jurisdiction because the notice of intent to sue properly identified FSSC as plaintiffs, properly identified the pollutant that caused the violation, and included all of the violations.

The District Court relies on *Hallstrom* for the idea that notice is jurisdictional, however; *Hallstrom* stands for the concept that the sixty-day notice provision must be strictly complied with, and the Court in *Hallstrom* does not touch on the other provisions in the statute, nor does it state that the other provisions in the stat-

ute must be strictly complied with. *Hallstrom*, 493 U.S. at 26, *see also Washington Trout v. McCain Foods, Inc.*, 45 F.3d 1351, 1354 (9th Cir. 1995). The District Court also relies on *Sierra Club v. Morton*, 405 U.S. 727 (1972), which states that the Sierra Club failed to allege harm to itself or any of its members. Unlike the plaintiffs in *Morton*, in FSSC's notice of intent to sue, FSSC alleged that it was adversely affected by the actions of Capitol City. In *Morton*, the Supreme Court recognized that environmental and aesthetic injuries were sufficient to meet the injury-in-fact standing requirement. *Id.* at 734.

A. *The notice of intent to sue was proper under 33 U.S.C. § 1365(b)(1)(A) because it properly identified FSSC as plaintiffs and environmental groups can allege violations on behalf of their members.*

1. FSSC had standing to sue under Article III of the United States Constitution because it demonstrated that it had standing to sue on behalf of its members.

If the members of the organization could have sued on their own behalf, then an environmental association also has the right to sue on the member's behalf. An environmental association has the right the bring a lawsuit on behalf of its members when (1) the members would otherwise have had the right to bring the suit, (2) the interests at stake are germane to the organization's purpose and (3) the member's participation is not required in the claim asserted nor the relief requested. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 169 (2000). In order for a citizen to fulfill Article III's standing requirements in a CWA action, the:

> plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely . . . that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

FSSC can show that it suffered an injury in fact. In *Morton*, 405 U.S. at 734, the Court held that injury in fact can be established when the environmental plaintiffs avow that they use the affected area and will be harmed if the aesthetic and recreational

values on the area are lessened by the challenged activity. In fact, the Court has stated that the injury need not be large, and an "identifiable trifle" will suffice. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n. 14 (1973). The Fifth Circuit has also held that when members of an organization submit affidavits that describe the harm felt by the addition of pollution to water, the injury-in-fact requirement is satisfied. *Sierra Club v. Cedar Point Oil Company, Inc.*, 73 F.3d 546, 556 (5th Cir. 1996). In the present case, two of the plaintiffs are fisherman that regularly fish in the portion of the Rapid River that is being polluted with silt. According to their affidavits, these two fishermen can no longer fish in the area of the river that is most convenient and closest to their homes. (R. 13-14.)

The injury also has to be fairly traceable. *Laidlaw*, 528 U.S. at 167. There must be a connection between the injury and the conduct that cannot be attributed to some third party. *NRDC v. Southwest Marine, Inc.*, 236 F.3d 985, 994-95 (9th Cir. 2000), *aff'd* 242 F.3d 1163 (9th Cir. 2001). In *Southwest Marine* the court held that the plaintiffs satisfied this requirement when it was shown that the defendant's leasehold had the pollutant in it, the defendant discharged the same pollutants, and the leasehold was devoid of life. *Id.* at 995. In the present case, the aqueduct built by Capitol City is depositing silt into the portion of the river that is used by the plaintiffs. The silt was not deposited into the river prior to the construction of the aqueduct and should be considered a pollutant under applicable federal law. This silt is causing the Cutthroat trout to die off.

The third requirement for standing is that a favorable decision would redress the injuries of the plaintiffs. *Lujan*, 504 U.S. at 561. The Torpid Aqueduct would stop depositing silt into the river and the fisherman could continue to fish in the downstream area of the Rapid River if the court issued an injunction. The injunction would stop the continuing violation and adequately address the plaintiff's concerns of silt being deposited into the river. A favorable decision in this case would fully redress the injuries of the plaintiffs.

FSSC has an interest in the lawsuit because its purpose is to preserve the Cutthroat trout for fishing purposes. The addition of silt to the Rapid River destroys the population of Cutthroat trout downstream from the point where addition of the silt is made. It may also threaten the future existence of the Cutthroat trout in the Rapid River completely. The breeding habitat of the Cutthroat

trout is currently limited to the upstream portion of the Rapid River and three nearby rivers. The purpose of FSSC is to defend the life of the fish for the future fishing habits of the fisherman and in filing the notice of intent; FSSC was protecting that very important goal.

2. The plaintiffs were properly introduced in the lawsuit because FSSC was properly identified, FSSC can sue on behalf of its members, and the notice was sufficient to cover the purpose of the statute.

The court has held in past cases that a notice of intent to sue is proper despite not having all the plaintiffs disclosed in the notice, because at least one of the plaintiffs was disclosed. *See Klickitat County v. Columbia River Gorge Comm.*, 770 F. Supp. 1419, 1423 (E.D. Wash. 1991). In the present case, FSSC was properly identified as a plaintiff because it is suing on behalf of its members and because FSSC is one of the potential plaintiffs.

The EPA requires that all persons giving notice include their "specific . . . full name, address, and telephone number of the person giving notice." 40 C.F.R. § 135.3. The notice of intent to sue in this case did include the name of FSSC's attorneys, along with the attorney's names, address and telephone number. The people responsible for giving notice were the attorneys and it was their information that was included in the claim.

B. *The notice of intent to sue was proper under 33 U.S.C. § 1365(b)(1)(A) because it properly identified the pollutant that caused the violation.*

Congress intended the notice of intent to serve the purpose of providing the recipient with effective, as well as timely notice. *Public Interest Research Group v. Hercules Inc.*, 50 F.3d 1239, 1249 (3d Cir. 1995). The purpose of the notice of intent was to allow the recipient a chance to rectify the violations in a timely manner before the plaintiffs have the opportunity to file suit. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc. et. al.*, 484 U.S. 49, 60 (1987). The point of the CWA's notice requirement has been held not to be to prove violations, rather to inform the polluter about the wrong and give the polluter an opportunity to correct the problem. *Southwest Marine, Inc.*, 236 F.3d at 996. As long as the notice of intent substantially satisfies the intention of Congress, it should be considered valid.

When the plaintiff's notice sets forth the location of the violations, the names of the people seeking compensation, and the allegations, it has been held sufficient even though it does not identify the particular dates of the violations or the activities constituting the violations. *Fishel v. Westinghouse Elec. Corp.*, 617 F. Supp. 1531, 1536 (D.C. Pa. 1985). The EPA regulations only require the plaintiff to provide sufficient information so the recipient can identify the allegations of the claim. 40 C.F.R. § 135.3. The allegations of the claim include the pollutant that the plaintiff is alleging causes the harm. "The term pollutant means dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, etc. . ." 33 U.S.C. § 1362(6). The court has found that when the pollutant from the same source, is of the same nature, and is easily identifiable, then that notice of intent letter can be considered sufficient for fulfilling the purposes of the statute. *Community Assoc. for the Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 953 (9th Cir. 2002).

The notice of intent letter in the present case identified the Torpid Aqueduct as the source upon which the pollution was coming from. It also identified the pollutant as silt. Both silt and suspended and settleable solids that were described in the complaint are easily identifiable and are also of the same type. In fact, Capitol City admits that silt, settleable solids and suspended solids are pollutants. (R. 7.) Following the precedent set forth in *Bosma*, this Court should find that the notice of intent letter in the present case was sufficient for the purposes set forth in the statute. *See Bosma*, 305 F.3d at 953.

C. *The notice of intent to sue was proper under 33 U.S.C. § 1365(b)(1)(A) because it included all of the violations alleged as ongoing.*

The CWA does not allow citizens to recover for wholly past violations of the act. *Gwaltney*, 484 U.S. at 64. The statute does confer jurisdiction over citizen suits when the citizens have made a good-faith allegation of the continuous or intermittent violation. *Id.* Plaintiffs can prove that ongoing violations took place "either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of recurrence in intermittent or sporadic violations." *Sierra Club v. Union Oil Co.*, 853 F.2d 667, 671 (9th Cir. 1988) (quoting *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170,

171-72 (4th Cir. 1988)). The court in *Chesapeake* stated "intermittent or sporadic violations do not cease to be ongoing until the date when there is *no real likelihood of repetition*. *Chesapeake*, 844 F.2d at 172 (emphasis added).

The court below relied on *Atlantic States Legal Found. v. United Musical Instruments, U.S.A., Inc.*, 1995 FED App. 0233P (6th Cir.) for the idea that a complaint should be dismissed for all violations occurring after the date alleged in the complaint. *Id.* at ¶ 10. However, *Atlantic States* stands for the concept that a complaint cannot survive when past violations have been cured by the date the action commences. *Id.* In this case, the violations were not cured by the time the action commenced. FSSC brought this case against Capitol City in an effort to "enjoin or otherwise abate an ongoing violation", in accordance with the Supreme Court decision in *Gwaltney*, 484 U.S. at 59.

Capitol City has diverted the flow of the water from the Torpid River into the Rapid River and these actions have not stopped nor is it likely that the diversion will stop unless the court issues an injunction. Therefore, there is no real likelihood that this repetitious pollution will stop. The lawsuit is what will adequately address the issues of continuing violations after it has gone to trial.

D. *If the court finds that the notice of intent letter was not sufficient for purposes of the statute, the court should dismiss without prejudice and allow a refiling after submission of an appropriate notice of intent letter.*

The Second Circuit has held that even when a notice of intent letter is not sufficient for purposes of the CWA, the suit should be dismissed without prejudice and the plaintiff allowed to refile after submitting an appropriate notice of intent letter. *Catskill Mountains*, 273 F.3d at 484. If this Court finds that the notice of intent letter in this case was not sufficient for its purposes, this Court should dismiss without prejudice and allow FSSC to submit an appropriate notice of intent letter.

III. IT IS WITHIN CONGRESS' POWER TO REGULATE THE POLLUTION OF THE RAPID RIVER IN ACCORDANCE WITH THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

Article I, Section 8, Clause 3 of the United States Constitution grants Congress the power "[t]o regulate Commerce . . . among the

several States. As the Court pointed out in *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), Congress' power to regulate commerce extends not only to (1) the actual "channels of interstate commerce[,]" *id.* at 558, but to (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce[,]" *id.*, and (3) "those activities having a substantial relation to interstate commerce" *id.* at 558-59. FSSC contends that the discharge of silt from the Torpid River into the Rapid River by means of the Torpid Aqueduct falls under the third category in which Congress has the power to regulate commerce: "those activities having a substantial relation to interstate commerce" *Id.*

To demonstrate that Congress' power to regulate the discharge from the Torpid Aqueduct falls within the third category, FSSC must show that: (A) the pollution is pursuant to an economic endeavor, *United States v. Morrison*, 529 U.S. 598, 611 (2000) (citing *Lopez*, 514 U.S. at 559-60); (B) the statute in question has a jurisdictional element so as to ensure a case-by-case inquiry, *United States v. Bowens*, 108 F. Supp. 2d 1067, 1070 (N.D. Cal. 2000) (citing *Lopez*, 514 U.S. at 562); (C) there is existence of legislative history that supports the conclusion "that the activity in question substantially affects interstate commerce . . ." *Morrison*, 539 U.S. at 612; and (D) there is a substantial affect on interstate commerce in the aggregate. *Lopez*, 514 U.S. at 561.

A. *The four elements set forth in* Lopez *have been met.*

1. The introduction of silt from the Torpid Aqueduct to the Rapid River is in pursuit of an economic endeavor.

The first factor in determining if an activity has a substantial relation to interstate commerce is whether "the activity in question is some sort of economic endeavor." *Morrison*, 529 U.S. at 611 (citing *Lopez*, 514 U.S. at 559-60). In making the determination a court must interpret this element in broad terms. *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000). In pursuing this broad interpretation the Court has held that even a wheat farmer who retains wheat beyond a federal quota solely for his own consumption is an economic activity in that it allows him to abstain from entering a market that he would otherwise have to enter to purchase wheat, thus influencing price and market conditions. *Wickard v. Filburn*, 317 U.S. 111 (1942). The Court acknowledged this broad interpretation while setting a limit on the reach of Congress by stating: "even *Wickard*, which is perhaps the most far

reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not." *Lopez*, 514 U.S. at 560.

In *Lopez*, the Court held that a statute prohibiting the possession of a gun in a school zone would go beyond the reach of the holding in *Wickard*, and require that the Court "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a gnarl police power of the sort retained by the states." *Lopez*, 514 U.S. at 560, 567. Likewise, the Court in *Morrison* held that the gender-motivated crime statute was "not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613.

In the current case, the use of the water from the Rapid River is a more direct economic activity than even *Wickard* could purport to be. Where the *Wickard* Court held that facilitation of abstaining from a national market constituted an economic activity, it is assumed that Capitol City uses the water of the Rapid River not only to supply many companies engaged in economic activities, but charges the residents of Capitol City directly for their water usage, both of which are economic activities. As does any other city in the United States, Capitol City charges its citizens a fee for the use of running water. This direct relation should be distinguished from an activity such as possession of a gun in a school zone, or gender-motivated crimes which bear no relation to economic activity absent a vast piling of inferences, which the Supreme Court has refused to do. *Lopez*, 514 U.S. 549; *Morrison*, 529 U.S. 598.

2. The CWA includes a jurisdictional element that will ensure a case-by-case inquiry.

In large part, the striking down of both the gender-motivated crime statute in *Morrison*, and the Gun Free School Zone Act in *Lopez* were due to a lack of a "jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce." *Morrison*, 529 U.S. at 613. The jurisdictional element is to "ensure, through a case-by-case inquiry, that the [activity] in question affects interstate commerce." *Bowens*, 108 F.Supp.2d at 1070 (citing *Lopez*, 514 U.S. at 562).

The court in *Wyoming v. Hoffman*, 437 F. Supp. 114 (D. Wyo. 1977) pointed out that the definition of "navigable waters" as "waters of the United States, including the territorial seas" serves this purpose of defining the scope of regulatory jurisdiction for the

Army Corps of Engineers, the Coast Guard, and the EPA under the CWA . *Id.*

3. Previously relied-upon legislative history supports the assumption that pollution of our nation's waterways affects interstate commerce.

The third factor that the Court set forth in *Lopez* was whether "legislative history contains express congressional findings regarding the effects upon interstate commerce . . ." *Lopez*, 514 U.S. at 562. However, to avoid the problem of legislatures trying to bring certain statutes within the reach of the Commerce Clause, the Court in *Morrison* noted that "the existence of congressional findings is not sufficient, by itself. . . .Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Morrison*, 529 U.S. at 614.

Stuffing of legislative history with references as to the affect on interstate commerce in order to fulfill the third element in *Lopez* should not be of concern to this Court. There is an abundance of legislative history prior to the decision in *Lopez*, stating that water pollution affects interstate commerce. *See e.g.*, *United States v. Ashland Oil and Trans. Co.*, 364 F. Supp. 349, 351 (W.D. Ky. 1973). In 1973 the *Ashland* court recognized that "the legislative history of the CWA is laden with reports, references and statements supporting the widely accepted conclusion that water pollution is a national problem severely affecting . . . interstate commerce." *Id.*

4. The pollution of the Rapid River from the Torpid Aqueduct has a substantial effect on interstate commerce.

The final step in the Commerce Clause analysis under *Lopez* is to prove that the relationship between the activity in question and the substantial affect on interstate commerce is not attenuated. *Lopez*, 514 U.S. at 563-567. When undertaking this analysis, economic activity should be interpreted in broad terms so as not to cripple federal power. *Gibbs*, 214 F.3d at 491. In recognizing this broad interpretation, the *Lopez* Court stated: "where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence. *Lopez*, 514 U.S. at 558 (citing *Maryland v. Wirtz*, 392 U.S. 183 (1968)) (emphasis omit-

ted). The aggregate impact concept has been repeatedly adopted, most notably in *Gibbs*, where the court noted that the taking of one red wolf may not have a substantial impact on interstate commerce, but the taking of red wolves in the aggregate does. 214 F.3d at 493.

The court in *Gibbs* recognized three areas in which the taking of red wolves directly affects interstate commerce, all of which are applicable *sub judice*. 214 F.3d at 494. First, "red wolves are part of a $29.2 billion national wildlife-related recreational industry that involves tourism and interstate travel." *Id.* at 493. Second, scientific research is conducted and subsequently many important medicines are discovered due to the studies conducted on animals and their ecosystems. *Id.* at 494. Finally, if a species is to flourish, there is the possibility of the creation or renewal in a related trade or market involving interstate commerce. *Id.* at 495.

The pollution of the Rapid River is much like the taking of red wolves, in that it endangers the Cutthroat trout and their ecosystem. Fishing is part of the same $29.2 billion wildlife recreational industry as the viewing of red wolves and because there is only a small population of Cutthroat trout left in the world they it should be afforded protection by the CWA. Next, the *Gibbs* court recognized that research involving plants and animals "may have inestimable future value both for scientific knowledge as well as for commercial development. . ." 214 F.3d at 494; therefore, steps should be taken to protect the Cutthroat trout and their ecosystem so as not to prevent potential scientific findings. Finally, just as there might be a renewed trade in pelts if the red wolf is to flourish, *Id.* at 495, there very well could be an interstate market for the Cutthroat trout if it is allowed to flourish. Currently there is no trade in Cutthroat trout because most of fly-fisherman that catch this species practice the catch and release practice so as not to further deplete their population. (R. 14.)

Just as the *Gibbs* court found that the taking of red wolves was not attenuated from an economic activity, the pollution of the Rapid River that results in the diminution of the Cutthroat trout population is not attenuated either; "if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." 214 F.3d at 498 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964)).

B. *There are no policy concerns that enforcing a national environmental statute such as the CWA infringes on powers that traditionally belong to the States.*

In upholding Commerce Clause challenges, the Supreme Court has shown a great concern so as not to blur federal jurisdiction with an area traditionally of state concern. In striking down the gun-free school zone act in *Lopez* and the gender motivated violence statute in *Morrison*, the Court noted that criminal violence has always been an area of state concern. Alternatively, "[t]he federal government has been involved in a variety of conservation efforts since the beginning of [the 20th century]." *Gibbs*, 214 F.3d at 500. As would be the striking down of the Endangered Species Act, the striking down of the CWA "would throw into question much federal environmental legislation. [It] would be a portentous step, leaving many environmental harms to be dealt with through state tort law." *Id.* at 502.

IV. DUE TO THE CONSTRUCTION OF THE TORPID AQUEDUCT AND THE RESULTING DISCHARGE OF SILT FROM THAT AQUEDUCT INTO THE RAPID RIVER, CAPITOL CITY WAS AND CONTINUES TO BE IN VIOLATION OF 33 U.S.C. § 1311(a).

The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *South Florida Water Mgmt Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537, 1541 (2004); 33 U.S.C. § 1251. In order to serve that purpose, Congress has made it illegal for any person to: (1) discharge, (2) a pollutant, (3) into navigable waters, (4) from a point source, (5) without a valid NPDES permit. A violation of § 1311(a) is a strict offense; the defendant's intent or purpose is irrelevant. *Greenfield Mills v. Macklin*, 361 F.3d 934, 946 (7th Cir. 2004) (citing *Kelley v. EPA*, 203 F.3d 519, 522 (7th Cir. 2000)).

The parties to this action stipulate that elements (2), (4), and (5) have been satisfied. Therefore, the only elements in question on appeal are (1) whether there was a discharge of such pollutant, and (3) whether the Rapid River is a navigable waterway as defined by the CWA.

A. *The transfer of silt-laden water from the Torpid River to the Rapid River via the Torpid Aqueduct constitutes a discharge of a pollutant from a point source, as prohibited by 33 U.S.C. § 1311(a).*

The discharge of a pollutant is defined by the CWA as "any addition of any pollutant to navigable waters from any point source . . ." 33 U.S.C. § 1362(12)(A). The Ninth Circuit has interpreted this definition to refer "to the effect of the discharge on the receiving water; it does not require that the discharged water be altered by man." *Northern Plains Res. Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155, 1162 (9th Cir. 2003). The court's well-reasoned support for this interpretation is that "the goal of the CWA is to protect receiving waters, not to police the alteration of the discharged water." *Id.* However, where the water from one single body of water merely passes through a plant or other conveyance only to be discharged in that same body of water in the same state does not "constitute an addition of pollutants by a plant through which they pass." *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940). The scenario in *Appalachian* can be distinguished from the scenario in *Northern Plains*, where a 'but-for' test was used by the court in saying the pollution would not have occurred in the receiving water but for the process in question. 325 F.3d at 1162.

Where the addition of unaltered water is drawn from one body of water and is discharged into a biologically different body of water the courts have deemed that to be a discharge of a pollutant for purposes of the CWA. *See, e.g., Northern Plains*, 325 F.3d 1155. In support of this view the *Northern Plains* court clarified its reasoning with the following analogy:

> For it would allow someone to pipe the Atlantic Ocean into the Great Lakes and then argue that there is no liability under the CWA because the salt water from the Atlantic Ocean was not altered before being discharged into the fresh water of the Great Lakes. Or water naturally laced with sulfur could be freely discharged into receiving water used for drinking water simply because the sulfur was not added to the discharged water. Such an argument cannot sensibly be credited.

Id. at 1163.

The First Circuit also justifies a rejection of a unitary waters theory by noting that once the "water leaves the domain of nature and is subject to private control rather than purely natural

processes . . . it has lost its status as waters of the United States." *Dubois v. USDA, et al.*, 102 F.3d 1273, 1297 (1st Cir. 1996). Most notably the Supreme Court adopted this view in *Miccosukee Tribe of Indians* in 2004, when it held that due to the inclusion in the definition of a point source of a conveyance, the pollutant need not originate from that point source, but need only to pass through it. 124 S. Ct. at 1539.

The diversion of part of the silt-laden Torpid River through the Torpid Aqueduct into the clear Rapid River is much akin to the analogy made by the *Northern Plains* court of diverting salt water from the Atlantic Ocean and discharging it into the fresh water of the Great Lakes. The Torpid Aqueduct can be distinguished from the plant in *Appalachian*, in that, but for the construction of the Torpid Aqueduct, the silt-laden water from the Torpid River would never be introduced to the clear water of the Rapid River. On the other hand, the polluted water of the affected river in *Appalachian* would have still been present in that same river whether or not the plant was present for some of the water to pass through.

B. *The Rapid River is a "navigable waterway" as defined by the CWA and construed by the Supreme Court.*

"The term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). In order to serve the purpose of the CWA, Congress "chose to define the waters covered by the Act broadly." *Riverside Bayview*, 474 U.S. 121, 133. "Courts have agreed that Congress intended the definition of navigable waters under the Act to reach the full extent permissible under the Constitution." *United States v. Eidson*, 108 F.3d 1336, 1341 (11th Cir. 1997) (citing *United States v. Lambert*, 695 F.2d 536, 538 (11th Cir. 1983) (internal citations omitted). It is well established that the definition of navigable waters "makes it clear the term 'navigable' as used in the CWA is of limited import." *Riverside Bayview*, 474 U.S. at 133.

To prove a violation of 33 U.S.C. § 1311(a) the plaintiff "need not prove that the pollutant actually reached the navigable body of water." *Eidson*, 108 F.3d at 1342 n.7 (citing *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1329 (6th Cir. 1974)). The Tenth Circuit supports this view that waters of the United States is meant to reach to the outer bounds of the Commerce Clause. *Quivira Mining Co. v. EPA*, 765 F.2d 126, 129 (10th Cir. 1985). (A stream not navigable in fact, was located completely in

one county, and did not provide a very significant link in the chain of interstate commerce, but the court held *at least some interstate impact* (emphasis added) is all that is necessary under the Act).

The dissent in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers,* 531 U.S. 159, 180 (2001), a 5-4 opinion, recognized the true aim of the CWA, and stated: "[t]he CWA commands federal agencies to give due regard . . . to improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife [and] recreational purposes." (internal citations omitted).

The court in *Eidson* may have hinted towards the broadest definition of waters of the United States in which the EPA defined the term in 40 C.F.R. § 230.3(s) as:

> (3) All other waters . . . the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters: (i) Which are used or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are or could be used for industrial purposes by industries in interstate commerce. . .

40 C.F.R. § 230.3(s).

Additionally, "Congress is entitled to make the judgment that conservation is potentially valuable." *Eidson*, 108 F.3d at 1342. The Court held "the congressional decision to maintain abandoned railroad track [to be] reasonable even if no future rail use for it is currently foreseeable." *Id.*

In accordance with the Tenth and Eleventh Circuits, the pollution of the Rapid River via the Torpid Aqueduct is within Congress' commerce power; therefore the pollution is a violation of 33 U.S.C. § 1311(a). *See, e. .g. Quivera Mining Co.*, 765 F.2d 126, and *Eidson*, 108 F.3d 1336. The Court has also recognized that federal agencies should give 'due regard' to "improvements which are necessary to conserve such waters for the protection . . . of fish and aquatic wildlife [and] recreational purposes." *SWANCC*, 531 U.S. at 180. Accordingly, in applying the CWA, 'due regard' must be given to the Cutthroat trout and to the recreational fishermen who target that particular species along with others that thrive in the Rapid River.

The EPA defines waters of the United States to include waters "(i) [w]hich. . . could be used by interstate travelers. . . for recreational or other purposes; or (ii) [f]rom which fish. . . could be

taken and sold in intestate or foreign commerce; or (iii) [w]hich are or could be used for industrial purposes by industries in interstate commerce." 40 C.F.R. § 230.3(s). First, the Rapid River is used by domestic fishermen and if it is not currently, could be used by interstate travelers for recreational fishing purposes. Second, if Cutthroat trout are allowed to thrive in the Rapid River, they could be sold in interstate commerce. Finally, it is assumed that the water of the Rapid River is currently and will continue to be used for industrial purposes by industries in interstate commerce in Capitol City.

Just as "[t]he Supreme Court has held that the congressional decision to maintain abandoned railroad track was reasonable even if no future rail use for it is currently foreseeable," *Eidson*, 108 F.3d at 1342 (internal citations omitted), this Court should hold that it is within Congress' power, through the CWA, to reach former tributaries of which it may not currently be foreseeable if they will again directly connect to traditionally navigable waterways in the foreseeable future.

V. THE DISTRICT COURT ERRED IN GRANTING CAPITOL CITY'S MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT CONGRESS HAS CEDED SOLE AUTHORITY TO ALLOCATE WATER USE TO THE STATES.

33 U.S.C. § 1251(g) states: "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter." 33 U.S.C. § 1251(g). In enacting the CWA, Congress declared as one of its primary goals, the restoration of the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Operating with the knowledge that most water pollution occurs locally, Congress carefully constructed a legislative scheme that imposed major responsibility for control of water pollution on the States. *See District of Columbia v. Schramm*, 631 F.2d 854, 860 (Ct. App. D.C. 1980). Despite Congress' desire to allow states to develop individual systems to handle issues of water pollution, Congress specifically reserved for itself the authority to take legal action against any individual who may be in violation of the CWA. *See* 33 U.S.C. §1364(a). In the instant matter, the District Court granted a motion for summary judgment by Capitol City holding that Congress had already ceded sole authority to regulate issues of water allocation to the States. The decision of the District Court should

be reversed for two reasons: 1) the court placed an inordinate amount of weight on 33 U.S.C. § 1251(g) thereby causing it to view the remainder of the CWA myopically, and 2) the court incorrectly concluded that 43 U.S.C. § 666(a) ceded sole authority to allocate water use and ownership to the States.

A. *Congress did not enact 33 U.S.C. §1251(g) in order to trump other provisions of the CWA.*

By its terms, 33 U.S.C. § 1251(g) (the "Wallop Amendment") is a statement of great generality. The language of the Wallop Amendment indicates that Congress intended to provide some measure of clarity as to the relationship between States and the federal government under the CWA. First, the Amendment shows Congressional recognition of States' authority to allocate *quantities* of water by stating, "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired." (emphasis supplied) *Id.* Second, 33 U.S.C. § 1251(g) indicates Congressional intent as to how issues of water *quality* should be handled: "federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution." (emphasis supplied) *Id.* Thus, the plain language of 33 U.S.C. § 1251(g) refutes the District Court's conclusion that Congress intended to elevate State water ownership and use allocation over federal water pollution concerns. (R. at 10.)

The Supreme Court was confronted with an issue similar to that presented in the instant matter in *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U.S. 515 (1945). In *Connecticut Light*, the Federal Power Commission asserted jurisdiction to regulate the accounting practices of the Connecticut Light and Power Company. *Id.* at 517. The State of Connecticut, appearing *amicus curiae*, argued that the assertion of jurisdiction was an unwarranted and illegal invasion of the power of the State to regulate its local distributing company. *Id.* at 518. The State's argument was premised on the assumption that the Federal Power Act, through the inclusion of a general statement that "federal regulation is to extend only to those matters which are not subject to regulation by the States," removed from the government the ability to assert jurisdiction over the Connecticut Light and Power Company. *Id.* In disposing of the State's argument, the Court concluded that the general purpose statement is one of great generality and "cannot nullify a clear and specific grant of jurisdiction,

even if the particular grant seems inconsistent with the broadly expressed purpose." *Id.* at 527.

Applying the Court's analysis to the instant case demonstrates that Congress' general purpose statement in the CWA should not be construed so as to nullify the clear and specific grants of federal jurisdiction over matters of water pollution. As noted, in order to ensure compliance with its terms, Congress permits both individual citizens as well as the Administrator of the EPA to file suit against violators of the CWA. *See* 33 U.S.C. §§ 1364(a), 1365. Because the terms of 33 U.S.C. § 1251(g) should not be construed so as to render the language regarding States' authority to regulate water quantities superfluous, courts must interpret the declaration so as to help guide them in their interpretation of the federal law in question. *See Connecticut Light*, 324 U.S. at 527.

The plain language of the Wallop Amendment and consideration of the CWA in its entirety demonstrates that where both a state's interest in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended an accommodation. *See Riverside Irrigation District v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985). In *Riverside*, the Tenth Circuit noted that the Wallop Amendment "indicate[s] that Congress did not want to interfere any more than necessary with state water management." *Id.* (quoting *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982)). The best way for a court to reach an accommodation between the competing goals presented in 33 U.S.C. § 1251(g) is through the individual permit process, whereby the Army Corps of Engineers assesses the needs of an applicant and grants a permit pursuant to those needs.

In its decision granting Capitol City's motion for summary judgment, the District Court drew a sharp distinction between matters of water use allocation and matters of water pollution control. (R. 10.) Although the District Court maintained that these two issues "are obviously interrelated," the District Court surmised that Congress "ceded sole authority to allocate water *use and ownership* to the States." *Id.* (emphasis supplied). The District Court's emphasis on the distinction between water quantity and water quality is misguided and was specifically rejected by the Supreme Court in *PUD No. 1 of Jefferson County and the City of Tacoma v. Washington Dept. of Ecology*, 511 U.S. 700, (1994). In

PUD No. 1, the Supreme Court stated in its interpretation of the CWA that:

> water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses. . . This broad conception of pollution – one which expressly evinces Congress' concern with the physical and biological integrity of water – refutes petitioner's assertion that the Act draws a sharp distinction between the regulation of water quantity and water quality.

Id. at 719.

The intent of Congress in enacting the CWA was not to remove from the federal government any ability to regulate matters of water allocation. Indeed, as the Court noted, often times issues of water allocation are directly related to water pollution and therefore, an accommodation is appropriate.

B. *Congress did not cede sole authority to regulate water use allocation to the States through the McCarran Amendment.*

The McCarran Amendment expresses no purpose other than to grant consent for the joinder of the United States as a defendant in suits for the adjudication of water rights of which it is the owner, or which it is in the process of acquiring. 43 U.S.C. § 666(a). At most, it enables the state courts to exercise jurisdiction over water rights suits involving the United States, by permitting the United States to be joined as a defendant in state proceedings. *See Colorado River Conservation District v. United States*, 424 U.S. 800 (1976). Contrary to the decision of the District Court, this permission to join the United States is scarcely a declaration that the United States has ceded sole authority to allocate water use and ownership to the States. As the Supreme Court held in *Colorado River*, the McCarran Amendment waives the sovereign immunity of the United States as to comprehensive state water rights adjudications and provides state courts with jurisdiction to adjudicate Indian water rights held in trust by the United States. *Id.* at 1242.

The District Court's conclusion that 33 U.S.C. § 1251(g) is foreordained by the McCarran Amendment and therefore § 1251(g) trumps any other provision of the CWA is erroneous and unsupported by the text of the McCarran Amendment itself, the legislative history of that Amendment, and by the decisions of the

United States Supreme Court. The McCarran Amendment was designed to deal with a general problem arising out of the limitations that federal sovereign immunity placed on the ability of the States to adjudicate water rights. *See Arizona v. San Carlos Apache Tribe of Arizona, et al.*, 463 U.S. 545, 564 (1983). The purpose of the McCarran Amendment is therefore, exactly the opposite of what the District Court held. Rather than ceding sole authority of water allocation to the States, the Amendment recognizes the availability of comprehensive state systems for adjudication of water rights, waives the sovereign immunity of the United States so that the government can be joined in these proceedings, and ensures that state courts remain a legitimate forum for resolution of these disputes. *See id.* at 566.

VI. CONCLUSION

For the reasons stated in this Brief, FSSC respectfully requests this Court to reverse the District Court's grant of summary judgment in favor of Appellees Capitol City and the State of New Union and remand this case for further proceedings on the merits.

2005 National Environmental Law Moot Court Competition

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.

Civ. App. No. 04-137

ORDER

Friends of the South Slope Cutthroat, Inc. (FSSC) brought suit against Capitol City, New Union, under the citizen suit provision of the Clean Water Act (CWA), 33 U.S.C. §§ 1251, 1365. FSSC alleged that Capitol City violated the CWA by adding silt, a pollutant, from the turbid Torpid River to the clear Rapid River, a navigable water, through the Torpid Aqueduct, a point source, without a CWA permit, in violation of the basic prohibition of the CWA, 33 U.S.C. § 1311(a). The District Court granted the motion of the State of New Union (New Union) to intervene of right under 33 U.S.C. § 1365(c)(2). Although such intervention is assumedly on behalf of the Plaintiff, New Union argued both for and against positions advanced by FSSC. Indeed, while it argued for FSSC's right to maintain the suit, it argued for Capitol City on all other issues. Perhaps New Union should have been realigned as intervening on behalf of the Defendant. That need not be decided in this appeal.

Capitol City filed a motion for summary judgment to dismiss the action on three grounds. The District Court granted the motion in its entirety. FSSC appeals the granting of both New Union's motion to intervene and Capitol City's motion for summary judgment.

Each party is instructed to brief the following questions:

1. Did the Court below err in granting New Union's motion to intervene by right under 33 U.S.C. § 1365(c)(2)? FSSC and Capitol City appeal the Court's decision; New Union supports

2. Did the Court below err in granting Capitol City's motion for summary judgment on the grounds that the Court lacked jurisdiction over the case because FSSC's members, Nelson Spinner and Newton Creel, failed to give proper prior notice of their intent to sue under 33 U.S.C. § 1365(b)(1)(A)? FSSC and New Union appeal the Court's decision; Capitol City supports it.

3. Did the Court below err in granting Capitol City's motion for summary judgment that Capitol City's diversion of the silt-laden waters of the Torpid River to the pristine Rapid River without a permit issued under 33 U.S.C. § 1342 did not constitute a violation of 33 U.S.C. § 1311(a)? FSSC appeals the Court's decision; Capitol City and New Union support it.

4. Did the Court below err in granting Capitol City's motion for summary judgment 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 the diversion? FSSC appeals the Court's decision; Capitol City and New Union support it.

The parties are limited in their briefs to the above issues, but are not limited to the arguments for their positions raised in the Court below.

For purposes of briefing and argument, legal authorities may be cited that date until September 1, 2004. Legal authorities dated September 1, 2004 or after may not be cited or otherwise referred to in briefs or oral argument.

Entered, September 1, 2004

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION

FRIENDS OF THE SOUTH SLOPE CUTTHROAT, INC.,
Plaintiff,

and

STATE OF NEW UNION,
Intervenor,

Civ. No. 04-894

v.

CAPITOL CITY, NEW UNION,
Defendant.

ORDER

Friends of the South Slope Cutthroat (FSSC) gave notice to Capitol City pursuant to the "citizens suit" provision of the Clean Water Act (CWA), 33 U.S.C. §§ 1251, 1365, of its intent to sue the City for alleged violations of the statute. In its notice, FSSC alleged that the City's diversion of the Torpid River to the Rapid River through the Torpid Aqueduct (a combination of tunnels and pipes) is illegal because it occurs without a permit issued under the Act. *See* Exhibit A. The statute makes it illegal to add a pollutant to navigable water without a permit. 33 U.S.C. §§ 1311(a), 1362(12). FSSC alleged in its notice that the diversion constituted the addition of pollutants (silt in the Torpid River) to navigable water (the Rapid River) by a point source (the Torpid Aqueduct) without a permit from August 15, 2003 (the day the diversion began) until the date of the notice, June 1, 2004. The statute authorizes EPA or a State with an EPA approved program to issue a permit. Since EPA has not approved New Union's program, any permit here would have to have been issued by EPA. More than the requisite sixty days later, FSSC, on behalf of two of its members, Nelson Spinner and Newton Creel, sued the City for violating CWA § 1311(a), by discharging suspended and settleable solids from the Torpid Aqueduct to the Rapid River from August 15, 2003 until the filing of the suit on August 1, 2004 and continuing thereafter.

Capitol City is the largest city in, and the capital of, the State of New Union. Capitol City is located on the relatively dry south slope of the Front Mountains. Almost since Capitol City's founding, it has engaged in a continuous program of water acquisition

to supply the needs of its citizens and their businesses. Much of the water it has acquired is from rivers on the relatively wet north slope of the Front Mountains. The Torpid River is on the north slope and the Rapid River is on the south slope. New Union has an elaborate statutory structure governing the allocation and acquisition of water, including a requirement that diversions of water from one river basin to another (a trans-basin diversion) requires a permit from the State's Water Engineer. Capitol City legally acquired the total flow of the Torpid River from its earlier users during the course of the past sixty years. It legally constructed the Torpid Aqueduct over the past ten years. It legally acquired a diversion permit from the Water Engineer in 2002.

The Torpid River arises on the slopes of the Front Mountains and flows north. For its first thirty miles, the River is a mountain stream, flowing fast and relatively clear. After its first thirty miles, its bed becomes relatively flat, and it meanders slowly through farm and scrubland. In this later stretch it accumulates a considerable amount of silt from the adjacent land and becomes relatively turbid. The City's diversion of water from the Torpid River occurs from this part of the River.

The Rapid River arises at the tops of the Front Mountains and flows south. Its waters flow fast and are relatively clear. The River flows into the Rapid Reservoir, which the City built in 1938 as a water supply reservoir. The City uses all of the water in the reservoir, effectively ending the flow of the River at the dam forming the Reservoir. The Rapid River supported a population of native South Slope Cutthroat trout from its headwaters to the Reservoir before the diversion began. These trout require clear, cold, fast flowing water to thrive. The Rapid River still supports a population of the trout from its headwaters to the point where the Aqueduct adds the waters of the Torpid River. From there to the Reservoir, the Plaintiff alleges the trout no longer exist because of the turbidity from the added, silt-laden waters of the Torpid River.

Nelson Spinner and Newton Creel allege in affidavits that they fished for South Slope Cutthroat trout from the waters of the Rapid River to its entry into the Rapid Reservoir until shortly after August 15, 2003. *See* Exhibits B & C. They allege that since that date they can no longer fish for trout downstream from the discharge of the diversion, although they admit that they can fish for the trout upstream from the diversion and on nearby rivers. They allege they can no longer easily fish for South Slope Cut-

throat Trout because the trout's habitat is now confined to the headwaters of the Rapid River and two adjacent streams, farther from the affiants' homes than the locations on the River they were able to fish before the new discharge began. They support their argument with a letter from the New Union Fish and Game Department's Director. *See* Exhibit D. Both admit they do not eat the trout they catch. Since they do not eat the fish and can still conveniently catch it, query what their injury is for standing purposes. But Defendant did not raise this issue at the District Court level. In any event, we need not address it for we dismiss Plaintiff's suit on other grounds.

The State of New Union filed a motion to intervene in the suit by right, under 33 U.S.C. § 1365(c)(2), arguing that it is the equivalent of the United States for purposes of the citizen suit. Both original parties opposed the motion. We granted the motion in open court and explain our reasons below. Capital City filed a motion for summary judgment arguing: Plaintiff failed to give proper notice of their suit pursuant to 33 U.S.C. § 1365(b)(1)(A); Defendant's diversion does not add pollutants to navigable water from a point source as defined in 33 U.S.C. § 1362; and the diversion is not governed by the Clean Water Act pursuant to 33 U.S.C. § 1251(g). Plaintiff, of course, opposed the motion in its entirety. The State opposed the first part of the motion but supported the second and third parts. The facts stated herein are alleged in Plaintiff's complaint, Defendant's answer, Defendant's motion for summary judgment, and supporting documents. They are not contested. For the reasons set forth below, the Court grants both motions. The suit, accordingly, is dismissed.

The citizen suit provision of the CWA authorizes the United States to intervene "as a matter of right." "As a matter of right" is a reference to FED. R. CIV. P. 24(a). Plaintiff and Capitol City contend that New Union has no right to intervene under Rule 24(a) because the Clean Water Act grants that right to the United States and New Union simply is not the United States. This appears to be a matter of first impression, for the parties cite no precedent on the question. While the observation of the original parties may be true as a matter of mere statutory wording, courts may freely ignore the "happenstance of statutory drafting" when it does not reflect congressional intent. *North and South Rivers Watershed Assn. v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1992). Here the congressional intent is clear. The statute treats States as the equivalents of the United States. It sets forth as

national policy the preservation and protection of the "rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). It authorizes States to issue permits, in the same manner as the United States. 33 U.S.C. § 1342. In the citizen suit provision, it requires citizens to give notice both to the United States and to States before the citizens can sue, and it forestalls citizen enforcement if either the United States or States have commenced enforcement actions. 33 U.S.C. § 1365(b)(1)(A) & (B). Indeed, in some ways it gives States more power than it gives EPA. In 33 U.S.C. § 1341, for instance, it requires federal permits to incorporate applicable requirements of State law, while it does not require State permits to incorporate applicable requirement of federal law. In a statute as long and complex as the Clean Water Act, Congress could not be expected to be accurate in all its wording. When the statute treats States on a par with the United States, especially in the citizen suit provision, it would be anomalous not to treat States and the United States in the same manner for citizen suit intervention purposes. We therefore grant New Union's motion to intervene.

I

Capitol City's first justification for summary judgment is that FSSC failed to give prior notice of its citizen suit as required by the statute, which establishes that notice be given "in such manner" as EPA requires by regulation. 33 U.S.C. § 1365(b). EPA's regulations require that notice 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 responsible for the alleged violation, the location of the alleged violation, the date or dates of such violations, and the full name, address and telephone number of the persons giving notice.

40 C.F.R. § 135.3 (emphasis added).
Defendant asserts that Plaintiff's's notice was fatally deficient in several respects. First, it did not properly identify the prospective Plaintiffs, in this case Nelson Spinner and Newton Creel, rather than FSSC itself. Second, its notice was defective because it failed to identify in the notice the pollutant it alleged in its complaint. Third, its notice was deficient because it did not include all of the violations alleged in its complaint, *i.e.*, the violations occurring af-

ter the date of the notice. Either of the first two justifications warrant dismissal of the entire complaint. The third warrants dismissal of the complaint for violations occurring after the notice was given. For the reasons that follow, the motion is granted in its entirety.

Notice is jurisdictional. *See Hallstrom v. Tillamock County*, 493 U.S. 20 (1989). Therefore, unless Plaintiff strictly complies with the notice provision, this Court does not have jurisdiction over the purported lawsuit. It is well established that an environmental organization does not have standing to sue on its own account, but only as a representative of its members who do have standing. *See Sierra Club v. Morton*, 405 U.S. 727 (1972). Nelson Spinner and Newton Creel, therefore, are the real Plaintiffs here. Because they did not give notice and were not identified in the notice, they cannot maintain suit now. A notice given by some plaintiffs does not suffice to allow other plaintiffs to maintain suit. *New Mexico Citizens for Clean Air and Clean Water v. Espanola Mercantile Co.*, 72 F.3d 830 (10th Cir. 1995); *Washington Trout v. McCain Foods, Inc.*, 45 F.3d 1351 (9th Cir. 1995). Neither the notice, the complaint, nor any other filing alleged any facts to justify FSSC's standing on its own to sue. EPA's regulation requires that all persons giving notice include in the notice their "*specific* . . . full name, address and telephone number." 40 C.F.R. § 135.3 (emphasis added). Since FSSC was not suing on its own behalf, but on behalf of Spinner and Creel, they are the real parties at interest and their suit fails because they did not give proper notice of their identity.

FSSC's notice alleged additions of silt to the Rapid River. Its complaint did not reiterate this allegation, but alleged additions of suspended and settleable solids. EPA's regulations require the notice to identify the "*specific* standard, limitation, . . ." violated. 40 CFR § 135.3 (emphasis added). EPA's standards are replete with limitations on discharges of suspended and settleable solids. *E.g.*, 40 C.F.R. §§ 405-411. Its standards are not replete with limitations on discharges of silt. Because FSSC did not identify with specificity the pollutant it would sue on, its notice did not comply with EPA's regulations and its suit must therefore be dismissed in its entirety.

FSSC's notice alleged violations occurring up to the date of the notice, June 1, 2004. The notice did not allege any violations after that date. EPA's regulations require the notice to identify the "*specific* . . . date or dates" of the violations alleged. 40 C.F.R.

§ 135.3 (emphasis added). FSSC's complaint included allegations of violations up to and after the date the complaint was filed, August 15, 2004. Because the notice alleged no violations after June 1, the complaint is dismissed for all violations alleged to have occurred after that date. *See Atlantic States Legal Foundation v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473 (6th Cir. 1995).

Plaintiff and New Union[1] argue all these errors are harmless and that purely technical failures in actual and adequate notice do not require dismissal. *See NRDC v. Southwest Marine, Inc.*, 236 F.3d 985 (9th Cir. 2000). They argue that Capitol City would have been none the wiser if the notice had identified Spinner and Creel, suspended and settleable solids, and continuing violations after the date of notice. They argue the case should not be dismissed for harmless errors in the notice or that it merely be stayed for the requisite sixty-day period. The Court rejected the stay stratagem in *Hallstrom*, 493 U.S. at 26. Plaintiff mistakes the meaning of jurisdictional requirements. Notices that fail to contain the information required by EPA's regulations are defective. *Washington Trout v. Scab Rock Feeders*, 823 F. Supp. 819 (E.D. Wash. 1993); *Bettis v. Town of Ontario*, 800 F. Supp. 1113 (W.D.N.Y. 1992). Unless Plaintiff meets all jurisdictional requirements established by the statute, this Court simply has no jurisdiction to hear their case. Moreover, the errors here are not harmless. If the notice had identified the actual plaintiffs, the actual pollutants, and the actual dates of alleged violations, Capitol City, New Union and EPA could have accurately determined the seriousness of the case and would have had sixty days to take steps to avoid the suit. If Capital City thought the notice had merit, it might have avoided suit either by coming into compliance or by negotiating a settlement with FSSC. If it thought the notice had no merit, it might have avoided suit by demonstrating its lack of merit to FSSC. If either of the governments thought the suit had merit, they could have avoided suit by taking their own enforcement action. Instead, Capitol City has had to spend considerable public funds defending a baseless suit that might have been avoided had proper notice been given.

1. New Union might have been expected to argue for the motion. When asked the reason for its posture at oral argument, it responded that it occasionally used citizen suit provisions to sue federally owned facilities for violations and therefore favored liberal interpretations of the section's procedural requirements.

II

Capitol City's second justification for summary judgment is that the City did not violate 33 U.S.C. § 1311(a). That prohibition is against the "discharge of any pollutant" without a permit or in violation of the limitations in a permit. "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Thus there are four elements to the offense: 1) any addition 2) of any pollutant 3) to navigable water 4) from any point source. *Id.* Defendant admits that the Torpid Aqueduct, composed of pipes and tunnels, is a point source. *See* 33 U.S.C. § 1362(14). It also admits that silt, suspended solids, and settleable solids are pollutants. *See* 33 U.S.C. § 1362(6). It contends, however, that the Rapid River is not navigable water and that the addition of pollutants *to* the Rapid River is not *from* a point source.

Defendant advances two arguments that the Defendant did not add pollutants to navigable water from a point source. First, the Rapid River is not navigable. Second, all navigable waters are one and addition of the pollutants to navigable water occurred at the Torpid River, not the Rapid River.

First, Defendant argues the Rapid River is not navigable under either the traditional definition of navigability or under EPA's definition of navigability. Under state law, Defendant has appropriated every drop of water in the Rapid River and has the exclusive right to use it. Plaintiff does not contest this. Defendant also owns the banks on the side of the river and the land beneath it. Plaintiff does not contest this. If the River was navigable in fact, therefore, Defendant controls whether anyone can navigate it. But the Rapid River is not navigable in fact; it has never been used for navigation and is too choked with rapids and waterfalls ever to be so used. Plaintiff does not contest this. Defendant argues that under these circumstances the Rapid River does not come close to meeting the traditional definition of "navigable water," water which in its ordinary condition forms a continuous highway or part of a continuous highway for interstate or foreign commerce, *The Daniel Ball*, 77 U.S. 557 (1870), or water that could be made navigable with reasonable improvements, *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

Plaintiff does not contend that the Rapid River meets the traditional definition of navigable water. Instead, it notes that Congress defined navigable waters for purposes of the Clean

Water Act to be "waters of the United States." 33 U.S.C. § 1362(7). This congressional use of an expansive definition, Plaintiff argues, means that Congress intended to reach more than just traditionally defined navigable waters. Plaintiff also points to legislative history indicating congressional intent that navigable waters be interpreted to extend to the outer limits of Congress' interstate commerce jurisdiction. *House Consideration of the Conference Committee*, Oct. 4, 1972, *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, 251 (statement of Rep. Dingell). Against this background of congressional intent for a broad reading of "navigable waters," Plaintiff contends that the River meets EPA's definition of navigability in 40 C.F.R. § 122.2, because the definition includes tributaries of navigable water and the Rapid is a tributary of the Platte River, which Defendant concedes is navigable.

Defendant responds that the Rapid is not a tributary of the Platte River, has not been a tributary of the Platte for seventy years and will not be a tributary of the Platte River as long as Capital City exists. Plaintiff responds that the Rapid River nevertheless is an intermittent tributary to the Platte River and intermittent streams tributary to navigable waters are themselves navigable. *See Quivera Mining Company v. United States Environmental Protection Agency*, 765 F.2d 126 (10th Cir. 1985). Defendant counters that the Rapid River is a former tributary of the Platte River, not a present one, intermittent or otherwise, and that *Quivera* and its ilk concern tributary waters that flow to navigable waters annually, not waters that ceased to be tributaries seventy years ago and will not be tributary waters again for the foreseeable future. Defendant also reminds us that the Supreme Court recently pointed out that Congress' use of "navigable waters" as a jurisdictional element of the Clean Water Act had to have some relation to navigation, or Congress would not have used the term. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 172 (2001). Defendant argues that while EPA's definition includes tributaries of navigable waters, it does not specifically mention intermittent tributaries and it nowhere specifically mentions any water that was a tributary only long ago and that will not be a tributary again. The Court agrees with Defendant that EPA's definition does not specifically cover the Rapid River and can be made to do so only with a significant stretch.

Indeed, Defendant argues that Congress could not regulate pollution of the Rapid River under the congressional power over interstate commerce. U.S. Const. art I, § 18, cl. 3. Defendant buttresses its position with the Court's recent decisions curtailing Congress' authority to regulate matters that have no real relation to or affect on interstate commerce. *Jones v. U.S.*, 529 U.S. 848 (2000); *U.S. v. Morrison*, 529 U.S. 598 (2000); and *U.S. v. Lopez*, 514 U.S. 549 (1995).

Luckily, this Court need not navigate the turbulent waters of whether the Rapid River is within Congress' interstate commerce jurisdiction, for it does not clearly come within EPA's own definition of what waters are within the jurisdiction of its permit program. As the Supreme Court held in *SWANCC*, courts should not interpret agency regulations broadly when to do so would take them to the "outer limits" of Congress' interstate commerce authority. Since EPA's definition does not clearly include such waters within its definition of navigable waters, we must hold that it is not, thereby avoiding the constitutional issue.

Defendant's alternative argument is equally persuasive. Briefly, it argues that the addition of silt to navigable waters does not occur when water flows from the Torpid Aqueduct point source to the Rapid River, but occurs when silt naturally enters the Torpid River from non-point source shore-side erosion. In other words, Defendant argues that the silt first enters navigable waters on the north slope, not on the south slope as alleged by the Plaintiff. If so, there is no cause of action, because the addition is not by Defendant and is not from a point source. This argument assumes that all navigable waters are one, regardless of whether they are from different river basins.

Defendant bases its argument on the "unitary theory" of navigable water recently argued by the United States as *amicus* before the Supreme Court in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004). The basis of this argument is that in the statement of the basic prohibition of the Clean Water Act, "*any* addition of *any* pollutant to navigable water from *any* point source" (emphasis added), the word "any" is used before three of the four elements. It is conspicuously absent from the fourth element, navigable water. This means that while there are many different additions, pollutants and point sources, there is only one, unitary body of navigable water. While this may at first appear to be another "happenstance of legislative drafting," the wording makes scientific sense because the hydro-

logical cycle is a unitary whole, constantly connecting all navigable water. Thus, the unitary theory of navigable water interprets the statute in accordance with its plain meaning, the preferred interpretation, and is true to the science of hydrology upon which water pollution control is based. Although the Court did not reach the argument, it commented that it had considerable merit, especially in the context of trans-basin diversions in states regulating them as part of their comprehensive systems of water allocation and ownership. *Id.* at 1344-45. That, of course, is precisely the situation in this case.

On either argument, Congress' ceding to the States control over the ownership and allocation of water use, addressed in IV, makes Defendant's arguments impregnable.

V

Capitol City's third argument for summary judgment is that Congress entirely removed from EPA the authority to make decisions that would supersede, abrogate or otherwise impair the authority of a State to allocate water within its jurisdiction. *See* 33 U.S.C. § 1251(g). While every state has authority to regulate the use of water within its boundaries, subject to applicable federal servitudes, eastern, humid states, and western, arid states have developed very different legal regimes to deal with water use. Eastern states have developed so-called "riparian systems," allowing use of a waterbody by owners of land adjacent to it on a "share-and share-alike basis," while western states have developed so called "allocation systems," allocating rights to use water on a "first-come, first served" basis. *See generally* A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES. New Union, of course, is a relatively arid state with a comprehensive water allocation system.

The regulation of water quantity (use allocation) and of water quality (pollution control) are obviously interrelated. Some upstream water uses can degrade water by adding pollutants that inhibit or even prevent some downstream water uses. Some upstream water uses can divert enough water from a river that it can no longer support downstream fisheries. By the same token, prevention of downstream water pollution and maintenance of downstream fisheries could inhibit or even prevent some upstream water uses. While in the Clean Water Act Congress established a co-equal partnership between EPA and States for regulating water pollution, it had already ceded sole authority to

allocate water use and ownership to the States in the McCarran Act, 43 U.S.C. § 666(a). Congress reiterated this in 33 U.S.C. § 1251(g) when it stated that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by" the Clean Water Act. Congress' elevation of State water ownership and use allocation over federal water pollution concerns in 33 U.S.C. § 1251(g) is foreordained by the McCarran Act and must be honored here. Accordingly, we hold that 33 U.S.C. § 1251(g) trumps any other provision of the Clean Water Act, including 33 U.S.C. § 1311(a). Thus, a state's water use allocation decisions, including a transbasin diversion permit, obviate what otherwise might be a violation of 33 U.S.C. § 1311(a). At the very least, 33 U.S.C. § 1251(g) makes Defendant's argument that the Rapid River is not navigable, III above, impregnable.

Plaintiff's complaint accordingly DISMISSED.

/s/

Romulus N. Remus
District Court Judge

EXHIBIT A

By certified mail

Director, Capitol City Water Supply Agency
100 Liquid Street

Capitol City, New Union
Director, New Union Water Pollution Control Agency
150 Liquid Street
Capitol City, New Union

Regional Administrator
U.S. Environmental Protection Agency, Region XIII
100 Federal Way
Capitol City, New Union

June 1, 2004

To whom it may concern:

This letter gives notice that Friends of the South Slope Cutthroat, Inc., a non-profit corporation organized under the laws of New Union, intends to file suit against Capitol City for violations of the Clean Water Act, 33 U.S.C. § 1311(a). Capitol City has violated § 1311(a) each and every day from August 15, 2003 until the date of this notice by discharging silt-laden water from the Torpid River Aqueduct into the Rapid River in the State of New Union, at a point on the Rapid River identified in and authorized by Interbasin Diversion Permit No. 3857 issued by the New Union Water Engineer on August 15, 2002. Subsection 1311(a) prohibits the addition of pollutants to navigable water from a point source without a permit issued pursuant to 33 U.S.C. § 1342. Silt is a pollutant under the statute. The Rapid River is navigable water under the statute. The aqueduct is a point source under the statute. And Capitol City adds silt to the Rapid River from the aqueduct. FSSC will seek an injunction against further discharges of silt to the Rapid River except in accordance with a duly issued permit and the assessment of penalties.

The primary concern of FSSC is the preservation of the South Slope Cutthroat Trout that live and breed in the Rapid River. Before Capitol City began its diversion of silt-laden water into the Rapid River, the trout thrived from its headwaters to the Rapid Reservoir. Now the trout can no longer survive in the silt-laden water below the discharge from the Torpid Aqueduct and it is not clear whether there is sufficient habitat available to it to survive

upstream from that discharge. That could be fatal to the survival of the trout, whose breeding habitat is now limited to the Rapid River and three nearby rivers.

Attorneys for FSSC are June Bride and August Moon. Their address is 89 Bleak Street, Capitol City, New Union. Their telephone number is 800-000-0000. We look forward to working with you to save the South Slope Cutthroat Trout.

Very truly yours,

June Bride

August Moon

EXHIBIT B

Affidavit of Nelson Spinner

I, Nelson Spinner, of 208 Heathcliff Way, Capitol City, New Union, do hereby depose and say:

1. I am and for the last fifteen years have been an avid fly fisherman. I fly fish one or two days every week during fly fishing season. My favorite target fish is the South Slope Cutthroat Trout because it is native to the waters of the area and occurs there naturally, without stocking by the Fish and Game Department.

2. To the best of my belief and knowledge, the South Slope Cutthroat is found only in the Rapid River and the nearby Trout, Blue, and Clear Rivers and their tributaries. I fish the Rapid River more than the others because it is closer to my home. Until late August 2003 I fished the Rapid River close to the Rapid Reservoir most often because that is the Cutthroat habitat closest to my home. After late August, 2003, however, I stopped fishing that area because the trout had disappeared, apparently because of the introduction of silt from the Torpid Aqueduct into waters that had been clear before. I have never seen the trout thrive in waters that were not clear and was not surprised when they stopped living below the Aqueduct discharge.

3. Since August, 2003 I have continued to fish for the South Slope Cutthroat in the headwaters of the Rapid River and on the Trout, Blue, and Clear Rivers. My fishing there is as good as ever. But I am worried that the habitat that remains available to the Cutthroat on the Rapid is too small to support a viable population on the Rapid River. And I worry that if their habitat is reduced to only three rivers that they may not survive as a species.

4. To preserve the Cutthroat, all my fishing is catch and release.

/Nelson Spinner/

State of New Union
County of Capitol

Then appeared before me this first day of August, 2004, Nelson Spinner, attesting that he signed the above affidavit under oath and that the facts he stated therein are true and accurate.

/Melba Toast/

Notary Public

My commission expires on 6/10/07 (seal)

EXHIBIT C

Affidavit of Newton Creel

I, Newton Creel, of 110 Franklin Place, Capitol City, New Union, do hereby depose and say:

1. I am and for the last seven years have been an avid fly fisherman. Since I learned to fly fish, I have fly fished in eight states and three Canadian provinces. My favorite fishing, however, is in New Union, on the Rapid River, because it is close to home, it is beautiful, and is home to the South Slope Cutthroat trout, a native fish that can be caught no where else but in New Union.

2. I fish two or three days a week during fly fishing season, during the early morning on weekdays and into the day on the weekends. I, and all of the other fly fishermen I know, follow the catch and release practice so as not to deplete the small Cutthroat fishery.

3. To the best of my knowledge and belief, the South Slope Cutthroat trout is an endangered species in all respects except the official designation. I have not seen or heard of it except in four river basins here in New Union, including the Rapid River. Since Capital City began discharging silty water into the Rapid River at the end of the Torpid Aqueduct, I have not been able to see or catch Cutthroat down stream from the discharge. Prior to the discharge, the Cutthroat population on the Rapid River was the greatest of those on the four rivers. It no longer is. I am worried about the survival of the fish and am deprived of what was the most accessible place for me to fly fish for it. My fear for the future of the Cutthroat is confirmed by the Director of the New Union Fish and Game Department, dated August 1, 2003.

/Newton Creel/

State of New Union
County of Capitol

Then appeared before me this first day of August, 2004, Newton Creel, and attested that he signed the above affidavit under oath and that the facts he stated therein are true and accurate.

/Melba Toast/

Notary Public

My commission expires on 6/10/07 (seal)

EXHIBIT D

NEW UNION FISH AND GAME DEPARTMENT
17 Moose Street
Capitol City, New Union

Office of the Director,
Gabriel B. Horne

August 1, 2003

Dear Mr. Creel:

Thank you for your recent letter raising concerns about the future of the South Slope Cutthroat Trout, in view of the impending diversion of the silt laden flow of the Torpid River into the Rapid River.

You are quite right that the Cutthroat is part of our priceless heritage, the only large fish indigenous in our state, indeed, indigenous to the southern slope of the Front Mountains. As you note, because of urban and other intrusions, its habitat is now reduced to four river basins, including the Rapid River basin, from perhaps two dozen river basins at the beginning of the twentieth century. As you also note, it probably will not survive in the Rapid River below the impending diversion of the silty water from the Torpid River. Indeed, its habitat on the Rapid River may be sufficiently constricted so that it may not survive at all on the Rapid River. That is particularly disturbing because its population on the Rapid River is greater than on any of the other three rivers in which it is presently found. One might say the Cutthroat is a truly endangered species, but, of course, it has not been listed as endangered under the federal Endangered Species Act. This is an unfortunate consequence of its habitat being precisely in the way of the necessary water supply of Capitol City. The State of New Union has consistently and effectively opposed any consideration of listing the Cutthroat as an endangered species by the Department of the Interior, because its status as an endangered species would interfere with Capitol City's use of the flows of the Rapid and Torpid Rivers for water supply, and they will constitute twenty five percent of that supply. To remove such a great percent of its water supply would be an intolerable economic burden and a danger to its public health.

We here at the Department applaud your concern for the Cutthroat and the environment of our wonderful state. We must agree with our Governor, however, that in the contest between the

lives of people and the lives of fish, people must win. This is not a question of a Tellico Dam, that wasn't needed to insure anyone's survival, but it is a question of the continued availability of life-sustaining water for the inhabitants of Capital City.

Although the removal of Cutthroat habitat downstream from the diversion imperials the Cutthroat population in the Rapid River, we are hopeful that the Cutthroat population in the Trout, Blue, and Clear River basins can survive and prosper. We are mindful of the urban pressures on those basins, but they are not presently critical to the water supply of Capitol City, so we are optimistic about the survival of the Cutthroat.

See you on the River,

Gabriel B. Horne
Director
New Union Department of Fish and Wildlife

CONSTITUTIONAL PROVISIONS AND STATUTES

CONSTITUATIONAL PROVISIONS

U.S. CONST. ART. I, § 8 CL.3: The Commerce Clause states that Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]"

STATUTES

15 U.S.C. § 2619. Citizens' civil actions

. . .

(c) General.

(1) In any action under this section, the Administrator, if not a party, may intervene as a matter of right.

(2) The court, in issuing any final order in any action brought pursuant to subsection (a), may award costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate. Any court, in issuing its decision in an action brought to review such an order, may award costs of suit and reasonable fees for attorneys if the court determines that such an award is appropriate.

(3) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of this Act [15 USCS §§ 2601 et seq.] or any rule or order under this Act [15 USCS §§ 2601 et seq.] or to seek any other relief.

. . .

16 U.S.C. § 1540. Penalties and enforcement

. . .

(g) Citizen suits.

. . .

(3) (A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

. . .

30 U.S.C. § 1270. Citizen Suits

. . .

(c) Venue; intervention.

(1) Any action respecting a violation of this Act [30 USCS §§ 1201 et seq.] or the regulations thereunder may be brought only in the judicial district in which the surface coal mining operation complained of is located.

(2) In such action under this section, the Secretary, or the State regulatory authority, if not a party, may intervene as a matter of right.

. . .

CLEAN WATER ACT

33 U.S.C. § 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective.

The objective of this Act [33 USCS §§ 1251 et seq.] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act [33 USCS §§ 1251 et seq.]—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983

. . .

(g) Authority of States over water.

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act [33 USCS §§ 1251 et seq.]. It is the further policy of Congress that nothing in this Act [33 USCS §§ 1251 et seq.] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

. . .

33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law.

Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act [33 USCS §§ 1312, 1316, 1317, 1328, 1342, 1344], the discharge of any pollutant by any person shall be unlawful.

. . .

33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act [33 USCS §§ 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [33 USCS § 1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 USCS §§ 1311, 1312, 1316, 1317, 1318, 1343], (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.].

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899 [33 USCS § 407], shall be deemed to be permits issued under this title [33 USCS §§ 1341 et seq.], and permits issued under this title [33 USCS §§ 1341 et seq.] shall be deemed to be permits issued under section 13 of the Act of March 3, 1899 [33 USCS § 407], and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act [33 USCS §§ 1251 et seq.].

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899 [33 USCS § 407], after the date of enactment of this title [enacted Oct. 18, 1972]. Each application for a permit under section 13 of the Act of March 3, 1899 [33 USCS § 407], pending on the date of enactment of this Act [enacted Oct. 18, 1972], shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act [33 USCS §§ 1251 et seq.], to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act [enacted Oct. 18, 1972] and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304(h)(2) [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act [33 USCS §§ 1251 et seq.]. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs.

At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 [304(i)(2)] of this Act [33 USCS § 1314(i)(2)], the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall

approve each such submitted program unless he determines that adequate authority does not exist:

. . .

33 U.S.C. § 1362. Definitions

Except as otherwise specifically provided, when used in this Act [33 USCS §§ 1251 et seq.]:

. . .

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

. . .

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

. . .

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means

(A) any addition of any pollutant to navigable waters from any point source,

. . .

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

. . .

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

. . .

33 U.S.C. § 1364. Emergency powers

(a) Emergency powers. Notwithstanding any other provision of this Act [33 USCS §§ 1251 et seq.], the Administrator upon receipt of evidence that a pollution source or combination of sources is presenting an imminent and substantial endangerment to the health of persons or to the welfare of persons where such endangerment is to the livelihood of such persons,

such as inability to market shellfish, may bring suit on behalf of the United States in the appropriate district court to immediately restrain any person causing or contributing to the alleged pollution to stop the discharge of pollutants causing or contributing to such pollution or to take such other action as may be necessary.

(b) [Repealed]

. . .

33 U.S.C. § 1365. Citizen suits

. . .

(b) Notice. No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation

(i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

. . .

(c) Venue; intervention by Administrator; United States interests protected.

(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.

(3) Protection of interests of United States. Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

. . .

McCARRAN AMENDMENT

43 U.S.C. § 666. Suits for adjudication of water rights

(a) Joinder of United States as defendant; costs.
Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

. . .