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Judges' Bench Memorandum: Sixteenth Annual Pace National Environmental Law Moot Court Competition

Kirstin Etela
Pace University School of Law

SIXTEENTH ANNUAL PACE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

Judges' Bench Memorandum

2004 Judges' edition

Civ. App. No. 03-713

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

NEW UNION FLY FISHERMEN'S FEDERATION, INC.,
Appellant,

v.

NEW UNION POWER & ELECTRIC CO.,
Appellee.

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

Kirstin Etela
Pace University School of Law
78 North Broadway
White Plains, NY 10603

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Executive Summary

New Union Fly Fishermen's Federation, Inc. (NUFFF), the appellant in this case, sued New Union Power & Electric Company (NUPEC), the appellee, for violating the Clean Water Act (CWA). Alleging jurisdiction under section 505, the CWA's citizen suit provision, NUFFF claimed NUPEC violated several permit conditions in a permit EPA issued to it under section 402. Specifically, NUFFF sought to enforce against NUPEC's violation of the permit's intake, flow, and non-contact cooling water discharges. In this appeal, NUFFF seeks to overturn the District Court's grant of summary judgment in favor of NUPEC. The Environmental Protection Agency has filed an *amicus* brief supporting NUFFF on some issues and supporting NUPEC on others.

NUPEC applied to the Environmental Protection Agency (EPA) to renew its permit for an existing facility with modification to accommodate a new generating unit that withdraws and discharges water from the New River. NUPEC applied to the New Union Department of Natural Resources (NUDNR) for state certification under section 401. In order to protect the New Union River's use as habitat for fish propagation, NUDNR limited NUPEC's withdrawal and discharge of water to four million gallons a day from September through May, and further limited it to three million gallons per day from June through August. EPA included these limits in the new permit and adjusted the permit's flow limitation accordingly.

NUPEC violated the intake, flow, and discharge conditions for half of the year during each year of operation, and it violated all three conditions every day during the summer season each year. NUDNR assessed penalties of $1,000 per day for the intake violations occurring from September through May, but it did not assess any penalties for those violations occurring in the summer months, nor did it assess penalties for the flow or discharge violations. A NUDNR official's affidavit explained that no penalties were assessed during the summer months because electricity demand peaked during that time, the state lacked adequate generating capacity, and NUDNR had a policy of encouraging electricity generation during the summer months.

At trial, NUFFF sought to enforce against all those violations that NUDNR did not penalize in its enforcement action. NUFFF also sought an injunction from further violations. The District Court awarded summary judgment to NUPEC. The court found

section 505 does not authorize citizens to enforce state imposed limitations in CWA permits that are more stringent than or beyond the scope of the federal Act. It also found NUDNR's enforcement actions against NUPEC deprive citizens of their enforcement authority under section 309(g)(6), which bars citizen suits seeking penalties where a state has diligently prosecuted those same violations under comparable state law. The District Court determined that the intake and non-contact cooling water discharge conditions were based on state law that was beyond the Act's scope. The court also held that principles of federalism barred NUFFF from enforcing those permit conditions based on state law. NUPEC successfully persuaded the court that permitting citizens to enforce such conditions would deprive states' of the discretion to enforce their own laws when deemed necessary or appropriate.

The District Court also held that section 309(g)(6) bars citizens from enforcing against violations occurring during the same period that was already subject to a state enforcement action, and it also bars citizens from seeking injunctions against those violations. The court deferred to the state's decision to enforce against some violations and not others, reasoning that it was within the state's discretion to balance its water quality laws against its energy needs. Although it did not need to reach the issue, the court did address whether the intake, flow, and discharge violations occurring on any given day constituted one or more violations of the CWA. Interpreting section 309(g), which provides for the assessment of daily penalties against violations, the court concluded that daily penalties are assessed against each act or omission that causes the violations in a given day, not the number of conditions that are violated daily as the result of a single act or omission. The court rejected the notion that 309(d) permitted penalties against each condition violated in a given day, fearing permit writers would be inclined to restate the same condition under several iterations, allowing for the assessment of penalties in excess of the congressionally stated maximum.

This Court must decide four issues. First, the Court must decide whether the District Court erred in holding citizens may not enforce against violations of state-imposed conditions that are more stringent than or beyond the scope of the CWA, which EPA included in a CWA permit because the state imposed the conditions through state certification under section 401. NUFF argues the CWA's purpose and language does authorize citizens to enforce

against any conditions in a CWA permit, whether or not those conditions are more stringent than or exceed the Act's scope. NUPEC of course defends the district court's decision on the ground that to decide otherwise is an impermissible interference with a state's discretion to determine when and how to enforce its own laws. EPA supports NUFFF in so far as citizens are authorized to enforce more stringent conditions, but EPA argues against including conditions which exceed that Act's scope in citizen enforcement authority.

Second, this Court must decide whether intake, summer month flow, and non-contact cooling water discharge limitations are in fact more stringent than or exceed the scope of the Act. Whether these conditions are more stringent than or beyond the scope may determine, in part, whether NUFFF can enforce them, if this Court determines citizens have no authority to enforce either more stringent conditions or those exceeding that Act's scope. NUFFF argues that these conditions are the kind of limitations the CWA regulates, while NUPEC argues that all three conditions are beyond that Act's scope. EPA argues intake limitation in this permit exceeds that Act's scope, the summer flow limitations are more stringent, enforceable permit conditions, and the discharge conditions duplicate the flow conditions.

Third, this Court must decide whether the District Court erred in interpreting section 309(g)(6) to bar citizens from seeking civil penalties and injunctive relief where the state has already assessed penalties against some of those violations under comparable state law. NUFFF and EPA argue the plain language of section 309(g)(6) does not bar citizen suits seeking injunctive relief against future violations, nor does it bar NUFFF from seeking penalties against those violations the state did not penalize. NUPEC argues the district court's decision is proper because to decide otherwise would deny the appropriate level of deference to the state's own enforcement decisions.

Finally, this Court must determine whether the District Court erred in finding that when a single act or omission violates several conditions in a CWA permit, there is a single violation of the permit. Both NUFFF and EPA contend the district court misinterpreted the statute, arguing that the statute assesses daily penalties against each condition violated. NUPEC argues a single act or omission, which leads to multiple permit violations on a given day, constitutes a single violation for assessing penalties.

Suggested Questions for Judges

Issue 1

Is there a difference between conditions that are more stringent and those that are beyond the scope of the CWA? Are the distinctions between "more stringent" and "beyond the scope" mainly semantic?

Does section 401 authorize states to impose conditions that are less stringent than the CWA or more limited in scope than the Act? Did Congress really intend to limit section 401 by the CWA's regulatory scope?

What policy reasons suggest that citizens should not have authority to enforce more stringent conditions? What about those conditions that are beyond the scope?

Is it appropriate for the court to determine what is more stringent and what is beyond the scope? Should EPA make this determination? Should the state make this determination? What legal standards should courts apply to determine whether a standard is more stringent or greater in scope?

Should the court defer to a state's enforcement discretion when the state has commandeered federal law to implement is own goals? Should the court still defer to that decision when the federal law gives citizens the right to sue? Would allowing citizens to enforce more stringent federal permit conditions undermine the value and efficacy of state issued permits?

If section 401 predates the CWA, why should its incorporation into the Act limit its effect? Does its incorporation limit its reach by implication? Is there any distinction between standards imposed under section 401 and section 402? Should there be?

Is there any suggestion in the CWA that EPA has the authority to regulate a facility's activities, not just its discharges, if those activities affect the Nation's waters?

Issue 2

Do intake, flow, and non-contact cooling water discharge each regulate a separate stage in NUPEC's permitted process? Does each of these parameters affect water quality?

If the CWA regulates discharges, what reasons support the inclusion of intake and flow within the scope of the Act? If, as *PUD No.*

1 concludes, activities can be regulated, are NUPEC and EPA correct to aver intake levels are beyond the scope of the Act?

Can each parameter be within the scope of the Act for some purposes and not for others?

Because the CWA authorizes states to impose any standards necessary to achieve water quality standards when certifying federal permits, can courts really consider any parameter to be more stringent than or beyond the scope of the Act?

Issue 3

Why should citizens have the right to seek injunctive relief against the same violations a state has not enjoined based on important state interests? What are the policy reasons in support of precluding citizens from seeking civil penalties but not injunctive relief?

Does this citizen suit authority undermine the states' role as primary enforcers of the CWA? Is this consistent with the Act's preservation of state enforcement discretion?

Is the First Circuit's reasoning in *North and South Rivers Watershed Association* flawed? How? Was its reliance on the Supreme Court's *Gwaltney* decision appropriate?

Is the First Circuit's rejection of plain language in deference to state enforcement action consonant with constitutional principles of federalism and the supremacy of federal law? Is the Ninth Circuit's rejection of deference towards state enforcement discretion in favor of the plain language of the statute consonant with the constitutional principles of federalism and the supremacy of federal law?

Is an action for injunctive relief duplicative of an enforcement action for the same violations? Does a citizen suit seeking an injunction really duplicate a state's enforcement action? How?

Does allowing a citizen suit seeking injunctive relief against the same violations a state has already assessed penalties against impermissibly interfere with state enforcement authority? Does allowing a citizen suit seeking penalties against violations a state has chosen not to enforce impermissibly interfere with state enforcement authority?

Issue 4

Should the plain language of the statute always persuade courts? Should legislative history of the statute always persuade the courts?

Are a permittee's due process rights violated when it can incur multiple penalties for a single act? Are a permittee's due process rights of fundamental fairness violated when the permittee had notice of permit conditions and the opportunity to challenge those conditions?

Does the permit writer ultimately control the amount of penalties a violator potentially faces? Does the state, through section 401, control the amount of penalties a violator potentially faces? Does the CWA permit writing process itself encourage the inclusion of arbitrary standards and conditions in permits?

I. DID THE COURT BELOW ERR IN HOLDING THAT CITIZENS MAY NOT ENFORCE AGAINST VIOLATIONS OF CONDITIONS THAT EPA INCLUDED IN A CWA PERMIT BECAUSE THE STATE CERTIFIED THE CONDITIONS UNDER CWA § 401, WHEN THE STATE REQUIREMENTS ARE MORE STRINGENT OR BEYOND THE SCOPE OF THE ACT?

A. THE STATUTORY FRAMEWORK OF THE CITIZEN SUIT PROVISION

The Clean Water Act was created to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2003). Its basic prohibition makes it illegal for anyone to discharge pollutants into navigable waters without a permit. *Id.* § 1311(a). The Act establishes a federal permitting process that the Environmental Protection Agency (EPA) administers and can delegate to states with approved programs to control the discharge of pollutants. *Id.* § 1342. States with approved programs have primary enforcement authority over violators. *Id.* § 1370. However, the Administrator of the EPA also may bring an enforcement action against violators of federally issued permits or state-issued permits where the state has failed to enforce. *Id.* § 1319(a)(3).

The Clean Water Act includes a provision that allows citizens to enforce against violations of the Act. Section 505 authorizes "any citizen" to bring an enforcement action against any person or entity, including the United States and federal agencies, "who is alleged to be in violation of an effluent standard or limitation," or "an order issued by the Administrator or a State with respect to such a standard or limitation," or where the Administrator has failed to perform her non-discretionary duties under the Act. 33 U.S.C. §§ 1365(a)(1), (2). Citizens can seek injunctive relief and the imposition of civil penalties. *Id.*

The Supreme Court views the citizen suit provision as a complement to agency enforcement as opposed to a replacement for it. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987). In order to initiate a suit, an interested citizen must first provide sixty days notice to the Administrator, the state, and the alleged violator informing all of what standard, limitation, or order is being violated. 33 U.S.C. § 1365(b)(1). This provision provides the Administrator with the opportunity to commence her own enforcement action and encourage her to do so.

See S. Rep. No. 92-414, at 79-80 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730.

Citizens can sue to enforce an alleged violation of an "effluent standard or limitation" established under the CWA. 33 U.S.C. § 1365(a)(1). The citizen suit provision defines an enforceable effluent standard or limitation under the CWA as, *inter alia*, an "effluent limitation or other limitation" under section 301, a permit condition under section 402, and state certification under section 401. *Id.* § 1365(f). This provision does not expressly authorize citizen suits to enforce water quality standards established under section 303 of the Act; however, permit conditions implement water quality standards, and courts may enforce against violations of permit conditions. *See Northwest Envtl. Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995), discussed *infra*.

B. State certification under section 401

1. The purpose of section 401.

Section 401 requires applicants for federal permits or licenses for activities that may result in discharges into navigable waters to obtain state certification from the state in which the discharge originates to ensure that the discharges do not violate the Act, including water quality standards. 33 U.S.C. § 1341(a)(1). The federal permitting or licensing authority may not issue the permit or license if the state denies certification. *Id.* State certification must include "any effluent limitations and other limitations" under the CWA or any state law requirement and these limitations become enforceable conditions of the federal license or permit. *Id.* § 1341(d); *see also* S. Rep. No. 92-414, at 69 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3735 (explaining that state certification becomes an enforceable condition of the federal permit or license).

The Water and Environmental Quality Improvement Act of 1970 amended the previous act, the Federal Water Pollution Control Act, to add state certification requirements. *See* Pub. L. No. 91-224, § 21(b), 84 Stat. 91 (1970). Before the CWA, water pollution control focused on ambient water quality standards. President Nixon issued an executive order requiring federal activities to stop contributing to water pollution. Exec. Order No. 11,288, 31 Fed. Reg. 9,261 (July 7, 1966). Initially, section 401 required state certification of a federally issued license or permit for any activity likely to discharge into waters of the United States to ensure that

"such activity will be conducted in a manner that will not reduce the quality of such waters below applicable Federal or State or local water quality standards." H. Rep. No. 91-127, pt. 2, § 3 (1969), *reprinted in* 1970 U.S.C.C.A.N. 2691. The purpose of section 401, as amended and incorporated into the CWA, is to make the section consistent with the CWA's focus on the elimination of pollutants through enforceable effluent limitations by ensuring that any federally-issued permit or license complies with a state's effluent limitations and monitoring requirements. S. Rep. No. 92-414, at 69 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3735. The amendment also "makes clear that any water quality requirements established under State law, more stringent than those requirements established under the Act, also shall through certification become conditions on any Federal license or permit." *Id.* Thus, the state may bar the federal permitting or licensing authority from issuing the applicant's permit if the discharges fail to meet state law requirements, including those state requirements that are more stringent than those imposed under the CWA.

2. Section 303 water quality standards as a component of state certification.

As already stated, section 401 provides the states with the opportunity to impose on federal permits and licenses conditions necessary to comply with states' water quality standards. Section 301 of the Act requires not only that pollutants cannot be discharged without permits, but the permits must include "any more stringent [state law] limitation, including those necessary to meet water quality standards. . . ." 33 U.S.C. § 1311(b)(1)(C). Water quality standards augment technology-based effluent limitations to ensure the maintenance of water quality despite permitted discharges of pollutants. *Envtl. Prot. Agency v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 n.12 (1976).

Section 303 establishes the policies and procedures applicable to adopting and implementing water quality standards. *See* 33 U.S.C. § 1313. It requires states to designate uses for their water bodies, establish criteria necessary to preserve those uses, and review those uses at least once every three years, following the guidelines established under section 304 and including criteria for toxic pollutants listed under section 307. *Id.* §§ 1313(c)(1), (2). Designated uses must at least meet the goal that waters be fishable and swimmable, as required by the Act. *Id.* § 1251(a)(2).

Criteria are the maximum levels of pollutants allowed to protect the designated use. *See* 33 U.S.C. § 1313(c)(2)(A). Criteria can be "expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 C.F.R. § 131.3(b) (2003). States can adopt more stringent water quality standards, *see* 33 U.S.C. § 1370, and these more stringent standards become enforceable permit conditions through the section 401 state certification process. *Id.* § 1341(d); *see also* 40 C.F.R. § 131.4(a) ("As recognized by section 510 [33 U.S.C. § 1370] of the Clean Water Act, States may develop water quality standards more stringent than required by this regulation."). Congress intended to provide states with the opportunity to ensure that any federally-permitted discharges under a section 402 CWA permit would be at least as strict as state requirements to meet water quality standards under section 303. 92 Cong. Rec. 33,698 (1972) (statement of Sen. Muskie). Indeed, when a state certifies the applicant's proposed activities, it must state with "reasonable assurance" that the activity will not jeopardize water quality standards, and it must include any conditions "necessary or desirable" concerning the discharge's effects. 40 C.F.R. §§ 121.2(a)(3), (4).

The interrelationship between state certification and water quality standards is clear. When an applicant seeks a federal license or permit for some activity likely to cause a discharge into a state water body, the state can require the federal licensing or permitting authority to include in the permit any legal requirements under state law to achieve water quality standards, even if those standards are more stringent than what the CWA requires. 33 U.S.C. §§ 1342(b), 1370. Once those conditions are part of a section 402 permit to regulate the discharges, they are enforceable. 33 U.S.C. §§ 1342(i), 1319. However, that raises the question whether a state requirement that is more stringent than the CWA requires is beyond the scope of the Act. If it is beyond the scope of the CWA, the question becomes whether it is enforceable under the CWA. Additionally, a question concerning who can enforce those provisions has also surfaced.

More important to this case is the open question of whether the CWA circumscribes state certification or whether its application extends beyond the Act. If the latter is so, what constitutes a condition that is beyond the scope of the CWA is irrelevant when dealing with conditions placed in a permit under state certification. This question arises out of the fact that section 401 predates

the CWA. It existed before the creation of the Act's regime of regulations and limitations. When Congress amended section 401 to incorporate it into the CWA, it failed to clarify whether conditions imposed under section 401 are now limited to those conditions and limitations the Act contemplates.

3. The distinction between more stringent requirements and requirements that are beyond the scope of the CWA.

As with certification, states with approved permit programs may include in permits they issue conditions more stringent than those required by the Act. 40 C.F.R. § 123.1(i)(1). In fact, the EPA has also determined that states may include in their own permits conditions that exceed the scope of the Act. *Id.* § 123.1(i)(2). However, the EPA has also determined that any conditions in state-issued permits that are beyond the scope of the Act are not part of the federally-approved program. *Id.* This means that citizen suits brought under section 505 cannot enforce such permit conditions in state-issued permits. The EPA has provided examples of what may be considered more stringent as opposed to beyond the scope. A state requirement that persons discharging into publicly-owned treatment works could do so only with a permit would be beyond the scope of federal law since the CWA exempts those discharging into treatment facilities from obtaining a permit to do so. 40 C.F.R. § 123.1(i); *see* 33 U.S.C. §§ 1311(b)(1)(A)(ii), 1317(b). EPA offers as an example of what may be considered more stringent a state's requirement that more prompt notice be supplied when an upset has occurred. 40 C.F.R. § 123.25(a). While this may seem relatively straightforward, the courts have not had such an easy time with this concept.

At least one court has held that a permit condition that exceeds the CWA's scope is enforceable. In *Connecticut Fund for the Environment v. Raymark Industries, Inc.*, the court held that a state could impose effluent conditions in a permit issued for a discharge into a man-made lagoon where wastewater was held and treated prior to being released into navigable waters. 631 F. Supp. 1283 (D. Conn. 1986). Although a treatment lagoon such as this is not a navigable water of the United States, *see* 33 U.S.C. § 1362(7), the court held that since the condition was part of a state-issued permit under section 402(b), and the citizen suit provision under section 505 authorizes citizens to enforce any permit condition, the court had jurisdiction to enforce this permit provision. *Raymark*, 631 F. Supp. at 1285.

The Ninth Circuit endorsed this view in holding that citizens are authorized to enforce water quality standards included in a state-issued permit. *Northwest Envtl. Advocates v. City of Portland*, 56 F.3d 979, 988-89 (9th Cir. 1995). In *Northwest Environmental Advocates*, the court found that a broad narrative permit condition prohibiting any discharges that would violate the state's water quality standards was, under the plain language of the citizen suit provision, an enforceable permit condition under the CWA. *Id.* at 988; *see also* 33 U.S.C. § 1365(f)(6). The court relied on the legislative history, stating, "citizens are granted authority to bring enforcement actions for violations of . . . *any condition of any permit* issued under section 402." *Id.* at 987 (quoting S. Rep. No. 92-414, at 82 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3747) (alteration in the original). Rounding out its discussion of what comprised enforceable permit conditions under the citizen suit provision, the court cited *Raymark* for the proposition that conditions exceeding the scope of the Act are enforceable. *Id.* at 988-89.

Unfortunately for us, the Ninth Circuit never distinguished the facts of *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Company*, 12 F.3d 353 (2d Cir. 1993), when it determined that Portland's broad narrative standard was enforceable. In *Eastman Kodak*, the Second Circuit held that citizens could not enforce a provision in a state-issued permit prohibiting the discharge of any pollutant not specifically addressed in the permit because this condition exceeded the scope of the CWA. 12 F.3d at 359-60. The issue was whether the citizens sought to enforce an effluent standard or limitation imposed under the CWA or a state-imposed condition. The court relied on the EPA's interpretation of the scope of the permitting scheme, stating, "polluters may discharge pollutants not specifically listed in their permits so long as they comply with the appropriate reporting requirements and abide by any new limitations when imposed on such pollutants." *Id.* at 357. The state sought to require reporting of pollutants that did not have enforceable effluent limits in the permit; therefore, this condition was not an effluent limitation imposed under the CWA.

Pointing to the regulations that define conditions of greater scope as not part of the federally approved program, *see* 40 C.F.R. § 123.1(i)(2), the court concluded that citizens could not enforce this permit provision under section 505. 12 F.3d at 359. The state's condition was outside the scope of the Act because it exceeded this limitation inherent in the permitting scheme. *Id.* at

358-59. Or, was it more stringent? The court blurred this distinction, stating that more stringent conditions could be enforced by the state or the EPA, but not by citizens because section 505(f)(6) restricts standing to effluent limitations included in the permit. *Id.* at 358. By interpreting the regulations to mean more stringent permit conditions necessarily exceed the scope of the CWA, the court concluded citizens have no standing to enforce such conditions under the federal Act. *Id.* at 360.

This treatment of "more stringent" and "greater scope" as the same thing has lead to further confusion. One court relied on *Eastman Kodak* to determine that citizens could not enforce permit conditions restricting the discharge of settleable solids because the state imposed the standards under state law, the standards were more stringent than federal standards, and they therefore exceeded the scope of the CWA. *Long Island Soundkeeper Fund, Inc. v. New York City Dep't of Envtl. Prot.*, 27 F. Supp. 2d 380 (E.D.N.Y. 1998). Conversely, another court held that citizens could sue under section 505 to enforce flow limits written into a state permit because such limits, while more stringent, were not beyond the scope of the Act because they appeared in the original EPA-issued permit. *Coalition for a Livable Westside v. New York City Dep't of Envtl. Prot.*, 92 Civ. 9011, 1998 U.S. Dist. LEXIS 1955 (S.D.N.Y. Feb. 24, 1998).

Other decisions distinguished *Eastman Kodak* because the conditions citizens sought to enforce were merely more stringent, rather than exceeding the scope of the Act; therefore, citizens could enforce those conditions. *See Swartz v. Beach*, 229 F. Supp. 2d 1239 (D. Wyo. 2002) (holding that citizens can enforce stricter state standards written into a permit to protect water quality); *Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta*, 953 F. Supp. 1541 (N.D. Ga. 1996) (holding that CWA expressly contemplates state-imposed stricter standards, and citizens can enforce such standards to further the CWA's goals). *Cf. Gill v. LDI*, 19 F. Supp. 2d 1188 (W.D. Wash. 1998) (stating it is the Ninth Circuit rule that state standards included in permits may be enforced through citizen suits). These decisions are consistent with the Supreme Court's statement that section 505(f)(6) permits citizens to enforce any permit standards and limitations, even if they are the more stringent standards imposed by states under section 510, 33 U.S.C. § 1370. *Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. at 223-24.

A pivotal case determining the scope of a state's authority under section 401 is *PUD No. 1 of Jefferson County v. City of Tacoma*, 511 U.S. 700 (1994). In *PUD No. 1*, a utility company required a federal license from the Federal Energy Regulatory Commission to build a hydroelectric facility. 511 U.S. at 709. Because the operation of this facility was likely to cause discharges into a river, the applicant had to obtain state certification under section 401. *Id.* The state imposed minimum stream flow requirements to protect the water quality standards set for the river. *Id.* The applicant sued, claiming that the imposition of conditions to protect water quality standards exceeded the scope of the state's authority under section 401 because the state was trying to put limits on the applicant's activities rather than its discharges. *Id.* at 711.

The Court held that the state had authority under section 401 to impose conditions that limited the applicant's activities as well as its discharges. *Id.* at 712. The Court found that the text of section 401(d) referred to the applicant as opposed to the discharge, allowing states to impose not only effluent limitations but also other limitations required to achieve water quality standards. *Id.* at 711-12. This statutory interpretation was consistent with the EPA's own interpretation of section 401 as requiring that the activity itself will not violate water quality standards. *Id.* at 712 (citing 40 C.F.R. § 121.2(a)(3)). Thus, the state's limits, imposed under state water quality standards, adopted as required by section 303, were within the scope of the state's authority under section 401. *Id.* at 713.

The weight of the cases above tend to support the notion that more stringent state-imposed conditions are enforceable through citizen suits while those conditions beyond the scope of the Act will not be enforceable. The issue in this case presents an even narrower question. While it may be difficult to discern what is clearly a standard that exceeds the scope of the Act rather than one that is merely more stringent, whether that distinction should even apply to state standards imposed under section 401 rather than section 402 is unclear.

C. THE ARGUMENTS THE PARTIES WILL PRESENT

1. NUFFF will argue that any permit condition is enforceable under section 505.

NUFFF will argue that the construction and purpose of the CWA necessarily authorizes citizens to enforce conditions in EPA-issued permits imposed by states through the certification process, and the case law supports this position. The plain language of the statute provides for citizen enforcement of standards imposed under section 401. 33 U.S.C. § 1365(f)(6). The statute clearly contemplates state standards more stringent than those required by the Act. *Id.* § 1370. The statute also authorizes states to impose through certification any conditions necessary to achieve water quality standards. *See id.* § 1341(a)(1). The intent behind section 401 is to ensure that states have the opportunity to protect their water quality standards when another federal agency is involved in permitting or licensing. Congress also intended that citizens be able to enforce *any* permit conditions. *See* legislative history, discussed *supra*. Therefore, it is reasonable to conclude that citizens have the authority to enforce those standards imposed under section 401 that go beyond the scope of the CWA.

The case law bolsters this argument. The Supreme Court recognized that *activities*, as opposed to only discharges, must necessarily be regulated in order to protect water quality standards, and states have the authority to impose these standards through the state certification process. *PUD No. 1*, 511 U.S. at 712. While the Second Circuit may have blurred the distinction between more stringent standards and those standards beyond the scope of the Act in *Eastman Kodak*, the Ninth Circuit rejected this position outright in *Northwest Environmental Advocates*. *See Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993); *Northwest Envtl. Advocates v. City of Portland*, 56 F.3d 979 (9th Cir. 1995). The majority of the courts have adopted this position as the more persuasive approach to this problem. This distinction has no bearing on section 401, however, since this provision itself extends beyond the scope of the CWA by regulating activities that other federal agencies license or regulate.

NUFFF will also argue that 40 C.F.R. section 123.1(i)(2) is inapplicable to permit conditions imposed under section 401. Specifically, NUFFF contends that extending this regulation to such

permit conditions has no basis in the statute, that it may challenge such an interpretation now, and since it concerns the jurisdiction of the courts, that interpretation is not entitled to deference. Section 301(b)(1)(C) mandates the implementation of any more stringent limitations required by state law or any applicable water quality standards established under the Act. 33 U.S.C. § 1311(b)(1)(C). This broad language suggests that more stringent limitations are contemplated under the Act, and that no conditions required to meet water quality standards are beyond the scope of the Act.

Further, the regulation on which *Eastman Kodak* relies, and on which NUPEC has pegged its argument, is irrelevant. Title 40 C.F.R. section 123.1(a) expressly states that the scope and purpose of the regulation is to specify EPA approval procedures under CWA sections 318, 402, and 405(a). The regulation never refers to state certification or section 401 because it does not apply to permits issued by the EPA.

The regulatory history shows that the EPA had originally proposed rules that expressly recognized that states may adopt standards that are more stringent or beyond the scope of the Act. 43 Fed. Reg. 37,083 (Aug. 21, 1978). In response to comments criticizing this proposal, EPA amended the regulation to distinguish between more stringent standards and standards that exceed the scope of the Act for state permitting programs. 45 Fed. Reg. 33,378 (May 19, 1980). Nothing in this regulation or its history suggests that state standards incorporated into EPA-issued permits under section 401 are beyond the scope of the Act or are unenforceable.

Even if EPA intended this result, this interpretation involves the jurisdiction of the courts. By stating that state programs with greater scope are not part of the federally- approved program, there is no enforcement under the federal Act of such state programs. As a result, EPA takes away federal courts' jurisdiction to hear such cases. "When Congress has 'established an enforcement scheme' that gives a party 'direct recourse to federal court,' it is 'inappropriate to consult executive interpretations of the [jurisdiction-conferring statute] to resolve ambiguities surrounding the scope of [the party's] judicially enforceable remedy.'" *Murphy Exploration & Prod. Co. v. United States Dep't of the Interior*, 252 F.3d 473, 478 (D.C. Cir. 2001) (quoting *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)).

In *Adams Fruit*, injured migrant workers sued their employer under a federal law protecting migrant workers, which created a private cause of action against employers who intentionally violated the Act. 494 U.S. at 640-41. The employer argued that a state workers compensation law preempted the federal law because it failed to explicitly state the preemptive scope, relying on the Department of Labor's interpretation of the Act. *Id.* at 649. The Court held that since Congress "expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute," the Court owed no deference to the department's interpretation. *Id.* Deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), is applicable where there is an express delegation of administrative authority, and there was none here concerning the Act's enforcement provisions. *Id.* at 650.

Like the workers compensation law in *Adams Fruit*, the CWA grants a cause of action to citizens, enforceable in the federal courts. The Act does not delegate to the EPA authority to determine under what conditions citizens may file such citizen suits or in what forum, but it does authorize the EPA to regulate how citizens give notice of intent to sue. *See* 33 U.S.C. § 1365(b). This express delegation of authority to regulate notice removes any implied delegation of authority to regulate other aspects of citizen suits. When EPA interpreted the CWA to mean that standards beyond the scope of the Act were not part of the federal program, and thereby not subject to the citizen suit provision, it was determining that the federal courts have no jurisdiction to hear citizen suits attempting to enforce standards that exceed the scope of the Act. Unless the EPA has express Congressional authority to make such determinations, the Court affords no deference to its interpretation. *Adams Fruit*, 494 U.S. at 650.

NUFFF rejects any argument that section 401 allows states through certification to impose standards only less stringent or less comprehensive than the scope of the Act. Although section 401 predates the CWA, before the limitations and the scope of federal water pollution control were completely developed as embodied in the CWA, NUFFF argues section 401's amendment and incorporation into the CWA must make it consistent with the CWA's goals and purpose. To find otherwise would defeat the CWA's goals of returning the nation's waters to a fishable, swimmable condition, and it would contradict Congress' express intention that the CWA provide a floor for those limits while

authorizing states to set more stringent limits. *See* 33 U.S.C. § 1370. NUFFF also argues that permitting states to go beyond the scope of the Act to preserve water quality standards is consistent with the Act's protective and restorative goals.

2. *NUPEC will argue that the Act precludes citizens from enforcing conditions that are more stringent than or exceed the scope of the Act.*

NUPEC seems to adopt *Eastman Kodak's* interpretation of 40 C.F.R. section 123.1(i)(2), equating the terms "more stringent" and "greater scope." NUPEC argues that the EPA interprets the CWA to mean both more stringent state standards and broader state standards are not within the federal program and are therefore not enforceable under the Act's citizen suit provision. NUPEC will contend that this interpretation is reasonable and should be afforded deference under *Chevron*. NUPEC's own interpretation of the regulation, however, appears flawed.

NUPEC argues the statutory interpretation embodied in 40 C.F.R. section 123.1(i)(2) applies both to conditions in state-issued permits and to conditions in EPA-issued permits based on state section 401 certification. If citizens could enforce broader standards in permits issued by EPA, the fact that citizens could not enforce those same standards in a state-issued permit would render permits issued by a state of lesser value and effectiveness than EPA-issued permits. That undermines states' permitting authority by allowing states to impose broader conditions in federal permits through certification, but not in their own permits. Obviously, this is not what Congress intended. Approved state permit programs have the same force and effect as federal permits. *See* 33 U.S.C. § 1342. The CWA's objectives include the goal of delegating to states the role of implementing permit programs. 33 U.S.C. § 1342(b). If citizens can enforce broader standards in federal permits, that diminishes states' authority to implement and issue permits. This two-tier permit-issuing authority diminishes the value of state permits and runs counter to the goals of the Act.

NUPEC will also argue that allowing citizens to enforce broader federal permit standards deprives states of their discretion to enforce their own laws in their own courts, disrupting constitutional principles of federalism. Section 510 embodies the constitutional requirement that states laws must be at least as stringent as federal laws. 33 U.S.C. § 1370; U.S. Const. art. VI,

§ 1, cl. 2. At the very least, state sovereignty means states retain the right to decide when and how to enforce their own laws that are more stringent than federal law. If citizens may sue in federal court to enforce a state's own standards, the state is effectively stripped of it sovereign discretion whether to enforce the standard. *Ashoff v. City of Ukiah*, 130 F.3d 409, 414 (9th Cir. 1997).

In *Ashoff*, a citizen of California sought to enforce in federal court a more stringent state standard regulating a solid waste disposal site under the Resource Conservation and Recovery Act's (RCRA) citizen suit provision. *Id.* at 410; *see also* 42 U.S.C. § 7002(a) (2000). California law did not provide for citizen suits in state court; rather, it provided administrative remedies. *Ashoff*, 130 F.3d at 413. The court distinguished RCRA from the CWA, finding that while the CWA expressly contemplated citizen enforcement of more stringent state standards, there was no such provision in RCRA. *Id.* In determining Ashoff was barred from bringing his suit in federal court, the Ninth Circuit expressed concern that to allow otherwise would ignore California's decision to provide a particular remedy as well as to insulate municipalities from certain kinds of litigation, an unacceptable interference with state sovereignty. *Id.* As with the *Ashoff* case, allowing citizens to enforce state standards that exceed the scope of the Act would inappropriately interfere with state sovereignty.

3. EPA will argue that citizens may enforce more stringent standards, but they may not enforce standards beyond the scope of the CWA.

EPA will argue that citizens may enforce more stringent standards, as contemplated by the statute, but there is no authority to suggest that standards of greater scope imposed pursuant to state certification are enforceable under the federal Act. First, its own regulations consistently recognize the Act's express endorsement in section 510 of state authority to impose more stringent conditions whether in the context of state-issued permits or state certification. 33 U.S.C. § 1370; *see, e.g.*, 40 C.F.R. § 123.1(i)(1) ("Nothing in this part precludes a State from adopting or enforcing requirements which are more stringent. . . ."); 40 C.F.R. § 124.53(e) (2003) ("State certification shall . . . include . . . any conditions more stringent than those in the draft permit which the State finds necessary to meet [sections 301 and 303]."); *Id.* § 131.4(a) ("States may develop water quality standards more stringent than required by this regulation."); *Id.*

§ 122.44(d)(1)(vii)(B)(5) (requiring permit writers to "[i]ncorporate any more stringent limitations . . . under State law. . . ."); *Id.* § 233.1(c) (pertaining to section 404 dredge and fill permits, "[n]othing in this part precludes a State from adopting or enforcing requirements which are more stringent. . . .").

As consistent as EPA's recognition is of states' authority to implement more stringent standards, the complete absence of any regulation suggesting state standards that exceed the scope of the CWA are enforceable as part of the federal program. In fact, the EPA discusses standards beyond the scope only in the context of a regulation explaining that such standards are not part of the federal program. The EPA contends that drawing this distinction is not an exercise in interpreting the jurisdiction of the federal courts. Rather, it is a reasonable interpretation of the statute's regulatory reach, an interpretation well within its authority to make and one that is due reasonable deference.

EPA will cite *Murphy*, a case about an oil and gas producer who leased federal land for production and sued the Department of the Interior (DOI) to expedite a refund of royalty overcharges which was stalled in administrative proceedings. 252 F.3d at 476. DOI argued the federal court did not have jurisdiction to hear the case because DOI's thirty-three month repayment deadline had not yet run. *Id.* DOI based its reasoning on its regulatory interpretation of a statutory provision requiring the Secretary to make a final decision on any administrative proceeding within thirty-three months from the date the proceeding began. The regulation provided that DOI's failure to issue a decision within that period was deemed a final decision in favor of the Secretary, and the appellant could seek review of that decision in federal court. DOI construed this statute to mean it had thirty-three days from the filing of an administrative appeal with the agency. *Id.* Since Murphy had not yet filed an administrative appeal, the DOI argued, the federal court had no jurisdiction.

The facts of *Murphy* are distinguishable from the circumstances in this case. In *Murphy*, the agency was interpreting a specific statute conferring jurisdiction on a federal court. The court did not have to examine whether Congress expressly spoke on this issue, and if not, examine whether the agency's interpretation was reasonable. *Chevron*, 467 U.S. at 842. No deferential analysis was required because the interpretation of such statutes is "exclusively the province of the [federal] courts." *Murphy*, 252

F.3d at 478 (quoting *Ramey v. Bowsher*, 9 F.3d 133, 136 n.7 (D.C. Cir. 1993)).

EPA regulation 40 C.F.R. section 123.1(i)(2) does not interprete any specific provision of the CWA conferring jurisdiction on the federal courts. Rather, the regulation interpretes the regulatory reach of the CWA. As the agency charged with administering the Act, it is in the best position to interpret the regulatory reach of the Act. *See Chevron*, 467 U.S. at 843-44. Specifically, the EPA was interpreting the regulatory reach of the CWA's permitting program. The statute charges EPA with issuing permits, approving state permit programs, and enforcing permit conditions. 33 U.S.C. §§ 1319, 1342(a), (b). Congress has spoken directly on the issue of the agency's responsibilities under the CWA, and EPA's interpretation of the CWA's regulatory reach is reasonable, supported by the statute, and should be afforded deference. Although EPA's determination may prevent citizens from enforcing standards in federal court, unlike *Murphy*, its interpretation does not apply to a section conferring jurisdiction on the federal courts, nor is this regulation altering the conditions under which citizens can seek redress in the federal courts. It is simply determining that the Act does not regulate some standards in the first place.

Even though 40 C.F.R. § 123.1(i)(2) does not expressly pertain to CWA section 401, EPA argues the underlying policy, that conditions greater in scope are not part of the federal Act, applies equally to state certification. If states could impose broader standards through certification, but not through their own state permitting programs, the two likely results run counter to the intent of the Act. First, Congress intended states to remain the primary enforcers of water pollution laws. 33 U.S.C. § 1251(b). States' discretion to exercise their enforcement authority may be undermined because citizens could sue to enforce states' broader conditions where states may have chosen not to for policy reasons. *See Ashoff v. City of Ukiah*, 130 F.3d 409, 413 (9th Cir. 1997) ("To allow Ashoff to bring suit in federal court would effectively disregard the choice that California has made. . . ."). States may even be dissuaded from adopting stricter standards if they cannot choose when and how those standards will be enforced. *Id.* Second, if citizens could use a federal law to enforce broader state standards in federal court, the EPA's regulatory role in interpreting the federal Act will become superfluous as state-by-state standards mesh with and expand the original federal scheme. Not only does this violate the Supremacy Clause, *see* U.S. Const. art.

VI, § 1, cl. 2, but it eliminates judicially manageable standards since the federal courts would no longer be able to look to the agency for regulatory guidance. *See Baker v. Carr*, 369 U.S. 186 (1962).

D. THIS COURT HAS JURISDICTION OVER CITIZEN SUITS ENFORCING MORE STRINGENT STANDARDS, BUT IT DOES NOT HAVE JURISDICTION OVER CITIZEN SUITS ENFORCING STANDARDS BEYOND THE SCOPE OF THE ACT

This Court should find that a state's more stringent standards imposed through certification are included in the federal program and, therefore, are subject to enforcement through citizen suits brought under the CWA. "The starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The CWA unequivocally recognizes a state's right to impose more stringent standards than those included under the Act. 33 U.S.C. §§ 1311(b)(1)(C), 1370. Through its certification of federal licenses and permits, states may impose more stringent standards necessary to meet state water quality standards. *Id.* § 1341(a)(1). Once included in permits under section 401, those conditions become enforceable permit standards. *Id.* § 1341(d). Section 505(f)(6) expressly authorizes citizen suits to enforce certification conditions. *Id.* § 1365(f)(6). This statutory scheme reflects Congress' intent that a state's more stringent water quality standards, once included in the permit, become enforceable conditions. 92 Cong. Rec. 33,696 (1972) (statement of Sen. Muskie). Where the EPA declines to enforce such federal permit conditions, citizens may file suit instead. 33 U.S.C. § 1365(a)(2). This view is entirely consistent with EPA regulations and the majority of the case law. *E.g.*, *PUD No. 1*, 511 U.S. 700; *Northwest Envtl. Advocates*, 56 F.3d 979; *United States v. Marathon Dev. Corp.*, 867 F.2d 96 (1st Cir. 1989).

The issue of whether state standards exceeding the scope of the Act are enforceable under the Act's citizen suit provision is more obtuse. First, EPA itself apparently believed at one time that states' broader standards were enforceable under the CWA when proposed rules stipulated that states may "operate programs with a greater scope than mandated by the Act," and that such approved state programs operated "in lieu of the Federal program. . . ." 43 Fed. Reg. 37,083. Reacting to comments it received, the EPA never promulgated this regulation. *See* 45 Fed. Reg.

33,378 (obliquely stating, "Most of the Comment [sic] included in proposed § 123.1(f) regarding State programs with greater scope of coverage than required by Federal law has been incorporated into the regulation, § 123.1(k)(2) [today's § 123.1(i)(2)]."). Of course, this provision dealt with state permit programs and makes no mention of state certification.

Then there is the language and construction of the statute itself. The very function of state certification reaches out beyond the CWA's permitting scheme with permits issued by either the EPA or the state under an EPA-approved program. Applicants for federal, not state, licenses or permits from federal agencies whose activities "*may* result in *any* discharge into the navigable waters," must receive state certification that the discharge will comply with state water quality standards as well as the broad requirements of section 301. 33 U.S.C. § 1341(a)(1) (emphasis added). The Supreme Court has determined that conditions imposed under section 401 do not pertain only to the discharge, but also to the activity causing the discharge. *PUD No. 1*, 511 U.S. at 712. It is reasonable to conclude that such a broad statutory provision, which reaches outside of the Act to regulate the permitting process of other federal agencies, endorses the notion that the federal program implicitly recognizes state standards of greater scope.

Perhaps more compelling, however, is the broad language of section 401(d), authorizing states to include "any other appropriate requirement of State law" in the certification. 33 U.S.C. § 1341(d). The breadth of this provision, embracing any state or law or regulation, by its terms seems to reach beyond the CWA. Section 401, which is effectively regulating non-CWA activities that may have an affect of navigable waters, recognizes that some laws and standards are going to be greater in scope than the standards set out in the Act itself. *See id.* The language of section 301(b)(1)(C), "any more stringent limitation . . . established pursuant to any State law or regulations," suggests that this reality is necessary to achieve the goals of the Act itself. 33 U.S.C. § 1311(b)(1)(C).

In this case, NUDNR certified NUPEC's federal permit, imposing seasonal flow restrictions to meet water quality standards designed to protect New Union River's designated use for fish propagation. The district court determined that the conditions imposed were beyond the scope of the CWA; therefore, NUFFF could not sue in federal court to enforce against violations of the permit that New Union itself chose not to enforce. New Union had

to balance two competing interests: protection of its waters and adequate electricity supply for its citizens during the summer months. Determining that citizens have authority under the CWA to enforce a state's broader standards conflicts with another express statutory provision, that states are the primary enforcers. Furthermore, such a result trumps state sovereignty.

Courts interpret conflicting provisions of a statute to avoid unconstitutional results. *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citations omitted). In this instance, the state chose not to enforce violations of summer flow because of electricity demand. That is a decision our federalist system prescribed by the Constitution entitles the state to make. One might ask why the state imposed this condition on NUPEC in the first place. However, there are always varying circumstances calling for judgment. Allowing citizens access to federal court to enforce a state's own law where the state may have had good reason to refrain from enforcement runs counter to the constitutionally prescribed balance between federal and state interests. EPA recognizes this federalist interest in its regulation identifying applicable state procedures as the appropriate means of challenging limitations and conditions imposed under state certification. 40 C.F.R. § 124.55(e).

While not exactly on point, *American Rivers, Inc. v. Federal Energy Regulatory Commission*, 129 F.3d 99 (2d Cir. 1997), is helpful in understanding how EPA and the courts have come to view section 401. In *American Rivers*, Vermont and an environmental group sued the Federal Energy Regulatory Commission (FERC) to enjoin it from striking permit conditions it considered to be beyond the scope of the CWA. *Id.* Some of these conditions included a requirement that the applicant provide canoe portage on the facility's site along a river, that twenty-four hour fish passage be assured, and that the state could reevaluate the effects of any significant changes in operations. *Id.* at 104.

The court did not determine whether these conditions exceeded the scope of the Act; rather, it held that FERC had no authority to remove the conditions from the permit. *Id.* at 112. In so holding, the court recognized the state's authority to impose *any* conditions, and the state court was the proper forum for challenging the validity of those conditions. *Id.*; *see also Roosevelt Campobello Int'l Park Comm'n v. Envtl. Prot. Agency*, 684 F.2d 1041 (1st Cir. 1982) (stating, "The courts have consistently agreed with [the EPA's interpretation in 40 C.F.R. § 124.55(e)] that the proper fo-

rum to review the appropriateness of a state's certification is the state court," and federal courts and agencies have no authority to review the validity of state law requirements). The court did not say those conditions could not be enforced in federal court, and it explicitly recognized that states could impose any conditions. Section 505(f) authorizes citizens to enforce those conditions imposed through state certification. 33 U.S.C. § 1365(f). While the state courts are the appropriate fora to review state standards, once included in a federal permit, those conditions are enforceable in federal court.

However, even if the CWA confers authority on citizens to enforce broader state standards under the Act in federal court, this Court would have no jurisdiction to entertain the matter. The Constitution extends federal judicial power to all cases "arising under" the United States Constitution, laws, and treaties. U.S. Const. art. III, § 2, cl. 1; 28 U.S.C. § 1331. The laws citizens seek to enforce, if beyond the scope of the federal Act, necessarily arise under state law. Thus, when a case presents no "federal question" for disposition, such as the applicability of a state standard under state law, a federal court is without jurisdiction to hear the case. *See Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824); *see also Verlinden B.V. v. Central Bank of Nig.*, 461 U.S. 480, 496 (1983) (stating that a statute conferring federal jurisdiction does not automatically create an action under federal law). It is not difficult to ascertain that a state standard requiring canoe portage implicates no federal interest, and the federal CWA does not address these types of standards in its effort to control water pollution. Thus, the Act's citizen suit provision does not extend to state standards that clearly exceed the scope of the CWA.

This Court should find for NUFFF and EPA on the issue of whether citizens can enforce under the CWA a state's stricter standards imposed under section 401. This Court should find for EPA and NUPEC on the issue of whether citizens can enforce under the CWA a state's broader standards imposed under section 401.

II. DID THE COURT BELOW ERR IN HOLDING THAT THE INTAKE, NON-CONTACT COOLING WATER DISCHARGE, AND SUMMER-MONTH FLOW LIMITATIONS IN THE NUPEC PERMIT ARE MORE STRINGENT THAN AND BEYOND THE SCOPE OF THE CWA?

A. THE STATUTORY FRAMEWORK OF WHAT THE CWA REGULATES

The CWA regulates discharges of pollutants from point sources through the National Pollutant Discharge Elimination System (NPDES) permitting scheme. 33 U.S.C. § 1311(a). In order to achieve the objectives of the CWA, "any more stringent limitation [than those required under the Act], including those necessary to meet water quality standards" shall be written into permits. *Id.* § 1311(b)(1)(C); *see also id.* § 1342(a)(1)(A). Permit writers include a state's more stringent conditions necessary to achieve water quality standards in the NPDES or SPDES permit. *Id.* §§ 1342(a), (b). In this instance, New Union's more stringent conditions were written into the permit because New Union included them in its certification of NUPEC's permit. *See id.* §§ 1341(a), (d).

The EPA is required, after consultation with the states, to research and make available information explaining what measures must be taken to "restore and maintain the chemical, physical, and biological integrity" of the Nation's waters, including information on the water quality criteria "necessary for the protection and propagation of shellfish, fish, and wildlife for classes and categories of receiving waters." 33 U.S.C. § 1314(a)(2). Additionally, the Administrator must review and approve state water quality standards and publish regulations to achieve water quality standards. *Id.* §§ 1313(a), (b). The states must review their water quality standards at least every three years and make appropriate revisions to protect existing or newly designated uses. *Id.* § 1313(c)(2)(A).

Congress did not intend for the CWA's focus on water quality to interfere with state allocation of water quantity. Section 510(2), entitled "State authority," states the policy that the Act is not intended to interfere with states' rights or jurisdiction over states' water bodies. *Id.* § 1370(2). In section 101(g), the Act expressly reserves states' authority to allocate water quantities between individual users. 33 U.S.C. § 1251(g). Congress amended

the Act in 1977 to include section 101(g) as recognition of states' historic rights to regulate water quantities while also recognizing that "[l]egitimate water quality measures authorized by . . . [the CWA] may at times have some effect on the method of water usage." 123 Cong. Rec. 39,212 (1977) (statement of Sen. Muskie). Thus, section 101(g) was intended to prevent the undermining of state water allocation systems, and to insure "that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations." *Id.*

Of particular concern in this case are permit conditions limiting the amount of water the permittee can withdraw for use as non-contact cooling water and limits on the flow, discharge, and spent cooling water. *See* Exhibit 1. The CWA makes reference to flow in section 304(f)(2)(F), requiring the EPA to develop information to control pollution as a result of movement, flow, or circulation changes brought about in waters as a result of flow diversion facilities such as dams, levees, causeways, and channels. 33 U.S.C. § 1314(f)(2)(F). Courts have construed this provision to pertain only to nonpoint sources of pollution. *See, e.g., Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988). Subsequently, the Supreme Court construed this provision to support its holding that it was appropriate for a state, through state certification, to impose in a permit minimum stream flows to protect water quality standards. *PUD No. 1*, 511 U.S. at 719-20.

B. EPA REGULATIONS CONCERNING FLOW, INTAKE WATER, AND NON-CONTACT COOLING WATER

1. Flow

EPA regulations address flow in a number of instances to avoid dilution as a substitute treatment for the removal of pollutants. Specifically, the regulations convert concentration limits achievable by dilution to mass limits, which cannot be diluted. 40 C.F.R. §§ 122.44, 122.45. NPDES permit applications and program requirements identify discharge flow as a quantifiable effluent characteristic. 40 C.F.R. § 122.21 (h)(4)(i)(I). Permit applicants are also required to provide a description of flow frequency as well as the occurrence and length of seasonal or intermittent flow discharges. *Id.* § 122.21(h)(5). There are different requirements for different facilities, but each type must address flow. For instance, existing facilities must include in their applications descriptions of average flows, flow treatment, and inter-

mittent or seasonal flows. *See id.* §§ 122.21(g)(3)-(4). As for a source water's natural flow, new facilities designing intake structures must ensure that the intake does not exceed a certain amount of a source's annual flow based on the amount of water withdrawn. *Id.* § 125.84(b)(3)(i). There are also flow-reduction reporting requirements for new facilities with intake systems. *Id.* § 125.86.

2. Intake water

EPA regulations deal with intake water in two contexts: (1) limiting discharges of pollutants where intake waters contained pollutants, and (2) in constructing new intake facilities. When intake waters contain pollutants, permittees may be eligible for credits to discharge those pollutants already existing in the intake. 40 C.F.R. § 122.45(g) (net/gross provision). This follows from the basic prohibition in the statute against the "addition" of pollutants without, or in violation of, a permit and the fact that the discharger does not add pollutants that are already present in its intake waters. *Id.* § 122.44(i)(1)(iii).

There are a series of regulations concerning cooling water intake structures for new facilities. *See* 40 C.F.R. 125.1. EPA has also proposed such regulations for existing facilities' intake structures, to be promulgated in 2003. National Pollutant Discharge Elimination System–Proposed Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities, 67 Fed. Reg. 17,122 (Apr. 9, 2002) (to be codified at 40 C.F.R. pts. 9, 122, 123, 124, 125). EPA developed these regulations under the authority of section 316(b), which requires "the location, design, construction, and capacity of cooling water intake structures [to] reflect the best technology available for minimizing adverse environmental impact[s]." 33 U.S.C. § 1326(b).

The adverse environmental impacts comprise the impingement and entrainment of fish and fish eggs that result as intake systems withdraw water. National Pollutant Discharge Elimination System: Regulations Addressing Cooling Water Intake Structures for New Facilities, 66 Fed. Reg. 65,256 (Dec. 18, 2001) (codified at 40 C.F.R. pts. 9, 122, 123, 124, 125). The new facilities regulations were designed to "preserve aquatic organisms and the ecosystems they inhabit in waters used by cooling water intake structures. . . ." *Id.* As already mentioned, intake structures designs must apply proportional flow limitations to ensure the intake does not exceed five percent of the annual mean flow of the

source water. 40 C.F.R. § 125.84(b)(3)(i). In the case of a river, a facility may not withdraw more than five percent of a freshwater river flow to ensure entrainment is limited to no more than five percent of entrainable organisms in the river. 66 Fed. Reg. at 65,277. Minimizing entrainment will not only preserve aquatic life, but it will also enhance commercial and recreational fishing activities in those affected waters. *Id.*

The new facilities regulations achieve their goals through the implementation of technologies to reduce intake structure capacity, velocity of withdrawals, and impingement prevention systems. 40 C.F.R. § 125.84(b). The regulations also expressly recognize states' rights under sections 401 and 510 of the CWA to include more stringent requirements concerning the design, location, construction, and capacity of intake structures necessary to achieve water quality standards. 40 C.F.R. § 125.84(e). This includes any requirements concerning designated uses, water quality criteria, and anti-degradation. *See* 66 Fed. Reg. at 65,277-278 (citing *PUD No. 1* for the proposition that states are authorized to include any more stringent requirements necessary under state law and consistent with the restorative goals of the Act).

3. Non-contact cooling water

Regulations concerning non-contact cooling water involve discharge calculations. NPDES permit applicants must identify any type of discharged waste including non-contact cooling water as well as any cooling water additives the facility plans to use. 40 C.F.R. § 122.21(h)(3). States desiring to implement their own permit programs must enter into a memorandum of agreement with EPA acknowledging that EPA and states may not waive review of uncontaminated cooling water discharges exceeding a daily average of 500 million gallons per day. *Id.* § 123.24(b)(5).

C. NUFFF WILL ARGUE THAT FLOW, INTAKE WATER, AND NON-CONTACT COOLING WATER ARE WITHIN THE SCOPE OF THE CWA

NUFFF argues that flow, intake water, and non-contact cooling water are all within the scope of the CWA because they are in effect different measures of the same parameter. Intake and non-contact cooling water, NUFFF contends, are different ways of expressing the flow limitations imposed in the permits: both intake water and non-contact cooling water are limiting the proportional flow of the river. The Supreme Court found flow to be an appro-

priate state-imposed limitation under section 401 to achieve water quality standards to protect fish propagation. *PUD No. 1*, 511 U.S. 700, 722. Citizens have been able to enforce water quality standards incorporated in permits since permits must comply with section 301, which incorporates by reference section 303 requirements for water quality standards. *Northwest Envtl. Advocates v. City of Portland*, 56 F.3d 979, 988 (9th Cir. 1995) , *cert. denied*, 518 U.S 1018 (1996) (citing *PUD No. 1* for the proposition that section 303 is incorporated by reference in section 301; therefore, compliance with section 402 permitting process includes compliance with section 303 requirements). These limitations taken together are protecting the flow necessary to achieve water quality standards; therefore, the conditions are valid and within the CWA's scope.

NUFFF will point to regulations underlying section 316(b) in support of its positions. Section 316(b) requires the regulation of an intake structure's capacity in order to minimize adverse environmental effects. In this case, New Union has imposed a limit on the amount of water NUPEC may withdraw, in effect limiting the structure's capacity to withdraw and hold more water. This is consistent with the EPA's justification for proportional flow limits because "[s]izable proportional withdrawals from a stream or river might also change the physical character of the affected reach of the river and availability of suitable habitat, potentially affecting the environmental or ecological value to the aquatic organisms." 66 Fed. Reg. at 65,277. This is precisely New Union's goal: to protect fish propagation by preserving a minimum quantity of water in the river necessary to maintain suitable habitat. The intake parameter ensures no more than the permitted amount is withdrawn; the discharge parameter ensures the return of no more than the permitted amount; and the flow parameter ensures the maintenance of the necessary volume of water.

D. NUPEC WILL ARGUE THAT FLOW, INTAKE WATER, AND NON-CONTACT COOLING WATER EXCEED THE SCOPE OF THE CWA

NUPEC avers that all three parameters exceed the CWA's scope. NUPEC points out that EPA does not include intake limitations in permits unless required to do so by a state's certification. *See* Exhibit 2 ("EPA's regulations and guidelines do not call for a limitation on water intake, for the CWA regulates discharges, not intakes."). NUPEC contends that the reason why EPA does not limit intake water lies in section 101(g) of the Act, preserving

the right of states to allocate water. *See* 33 U.S.C. § 1251(g). Since this permit's intake limit is a limitation on the quantity of water to be withdrawn, as opposed to the quality of the water discharged, this parameter goes beyond the scope of the Act. The summer flow parameters also exceed the scope because they too limit quantities of water withdrawn rather than quality.

NUPEC will also argue section 316(b) intake regulations are intended to prevent entrainment and impingement rather than to maintain the river's water flow, quantity, or volume. The regulations reduce capacity so that less water is withdrawn, thereby limiting the number of entrained fish and fish eggs. 66 Fed. Reg. at 65,277-278; *see also* 40 C.F.R. § 125.84(b)(1). The velocity of the withdrawal is reduced to minimize the number of aquatic organisms affected. 66 Fed. Reg. at 65,278; *see also* 40 C.F.R. § 125.84(b)(2). Other design and construction technologies involve the use of intake screen systems, diversion and avoidance systems, passive intake systems, and fish handling systems all aimed at reducing entrainment and impingement. 66 Fed. Reg. at 65,279; *see also* 40 C.F.R. § 125.84(b)(4). Proportional flow limits for rivers are limited to five percent of the river's mean annual flow based on the estimations limiting the percentage of entrainment to five percent of organisms living in the water. 66 Fed. Reg. at 65,277; *see also* 40 C.F.R. § 125.84(b)(3)(i). The intake regulations simply do not regulate a water source's volume. There are no other regulations requiring the maintenance of minimum water volumes, unlike the flow limit in this permit, which ensures a consistent volume of water in the river. Thus, the flow parameter exceeds the Act's scope.

NUPEC argues non-contact cooling water exceeds the scope because it too is in the permit only because of the state's certification. EPA regulates the source water flow used by a facility. *See* 40 C.F.R. § 122.45(b) (explaining that facilities must make projections of discharges based on capacity or operation). NUPEC explains that the flow limit indirectly limits the amount of the discharge, *i.e.*, a facility cannot discharge more water than it withdrew in the first place. Thus, the only reason the cooling water limit is in the permit is due to the state's certification, and that limit exceeds the CWA's scope.

E. EPA WILL ARGUE THAT INTAKE LIMITATIONS EXCEED THE SCOPE OF THE ACT, SUMMER FLOWS ARE MORE STRINGENT, AND THE COOLING WATER DISCHARGE LIMITS ARE DUPLICATIVE

There is no question that EPA regulations include flow. The regulations outlined above discuss flow in the context of discharge parameter estimates in applications, measured and enforced in permits, and protected when designing new intake structures to withdraw cooling water. The EPA will argue that the summer flow limits in these permits are the type of more stringent standards states are authorized to impose under the Act to protect water quality standards. As set out in Issue I, the Act expressly reserves the rights of states to impose more stringent standards. *See* 33 U.S.C. §§ 1311(b)(1)(C), 1370(1)(B). EPA must approve state water quality standards and promulgate new standards where a state establishes standards that are inconsistent with the Act. *Id.* § 1313(a)(3)(C). EPA regulations expressly recognize that states may include standards regarding low flow when establishing water quality standards. 40 C.F.R. § 131.13. In this instance, New Union imposed a flow of four million gallons a day (mgd), reduced to three mgd during summer months, in order to achieve water quality standards necessary to protect fish propagation in the New Union River. This low flow standard in exactly the kind of more stringent standard states may impose under the CWA.

The EPA agrees that proportional flow limitations do ensure the availability of suitable fish habitat, as it stated in publishing new intake structure regulations. *See* 66 Fed. Reg. at 65,277. Although the CWA generally regulates discharges, section 316(b) regulates water withdrawal to the degree it affects the goal of restoring the chemical, physical, and biological integrity of the water, including marine life protection and propagation. *See* 33 U.S.C. §§ 1251(a), 1326(b). The intake regulations were ultimately intended to protect and facilitate fish propagation by minimizing the occurrence of entrainment and impingement of fish and fish eggs resulting from water withdrawal. The elements of location, design, construction, and capacity are geared towards minimizing this adverse environmental impact, as required by the Act, as is the proportional flow requirement. No estimates were included in the rules based on the volume of water necessary to sustain appropriate fish habitat.

NUDNR designed the intake parameter in NUPEC's permit to maintain the volume of water remaining in the river by limiting

the amount withdrawn. The Act does not regulate intake for maintaining minimum volume; therefore, it exceeds the scope. As EPA explains in the NUDNR permit fact sheet, intake and discharge volumes are usually equal to each other making it unnecessary to impose a separate limitation on intake water. *See* Exhibit 2.

EPA will argue that the non-contact cooling water limitation is duplicative of the flow limitation. The imposition of this standard in a permit exceeds the Act's scope, although the standard itself, already achieved via the flow limitation, is within the scope of the Act. EPA explains that non-contact cooling water discharges do not have to be limited to protect fish propagation because "the flow limitation already limits the volume of water that may be used and discharged," and if the intake water included pollutants requiring treatment, those conditions would be included in the permit. *See* Fact Sheet, Exhibit 2.

EPA will argue it is charged with implementing the CWA, and this Court must therefore defer to EPA's interpretation and the regulations it promulgated to achieve the Act's objectives. When reviewing an agency's interpretation of the statute it administers, a court must first determine "whether Congress has spoken to the precise question at issue." *Chevron*, 467 U.S. 837, 842. However, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Through the CWA, Congress charged EPA with the authority to issue "rules carrying the force of law," and EPA is now claiming deference for rules "promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). The Act charges the administrator of the EPA with administering the Act. 33 U.S.C. § 1251(d). In terms of water quality standards, the Administrator is expressly charged with approving state water quality standards and implementing standards where the state has either failed to do so or fails to establish standards sufficient to achieve the purpose of the Act. *Id.* §§ 1313(a)(3)(C), (b). Thus, on the face of the statute, Congress delegated to EPA the authority to issue rules with the "force of law." *See Mead*, 533 U.S. at 231-32.

The CWA's central tenet is that it is illegal to discharge a pollutant into navigable waters without a permit. 33 U.S.C. § 1311(a). The intake of water is the exact opposite of a discharge. However, the Act also expressly authorized the imposition of any other conditions in permits to achieve water quality standards.

Id. §§ 1311(b)(1)(C), 1342(a). EPA will counter that it achieves this statutory objective without regulating the intake amount because any pollutants in intake water are accounted for upon discharge from the facility, and water quality standards reliant on the amount of water in the source water are protected through flow limitations.

EPA will also point to CWA section 304(f)(2)(F) to demonstrate that the statute itself unambiguously contemplates the regulation of flow, not intake, to control pollution. *See id.* § 1314(f)(2)(F). The flow regulations and the regulation of intake pollutants adequately address any threat posed by the discharge of non-contact cooling water. While the Act does not explicitly speak to the issue of spent cooling water as a measure of "pollution" or a "pollutant," EPA's regulations at 40 C.F.R. sections 122 on permit conditions, 123 on approval of state programs, and 131 on water quality standards account for the discharge of spent cooling water. These regulations fill in the interstices of the Act based on a permissible construction of the statute, are consistent with the statute's purpose, and are reasonable in substance. *See Chevron*, 467 U.S. at 844.

F. THIS COURT SHOULD FIND THAT FLOW IS WITHIN THE ACT'S SCOPE, THE LIMITS ON INTAKE WATER EXCEED THE ACT'S SCOPE, AND NON-COOLING WATER DISCHARGE LIMITS ARE REDUNDANT

The Supreme Court's analysis in *PUD No. 1* is extremely helpful in this situation since the situations are very similar. In *PUD No. 1*, the Court addressed the issue of whether minimum seasonal stream flows to protect fish habitats were appropriate conditions for a state to impose in a permit through section 401. 511 U.S. at 703. As in this case, the state of Washington certified a federal license for a hydroelectric facility, including in the permit a condition limiting seasonal minimum stream flow necessary to preserve the Dosewallips River's designated use as spawning waters for steelhead and salmon. *Id.* at 706. The Court reasoned that the river's designated use, as protected fish habitat, was consistent with the CWA's goal of "maintaining the chemical, physical, and biological integrity of the Nation's waters." 511 U.S. at 714 (quoting 33 U.S.C. § 1251(a)).

The Court noted "the Act defines pollution as 'the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water.'" 511 U.S. at 714 (quoting 33

U.S.C. § 1362(19)). The proposed hydroelectricity project would cause pollution because it would interfere with the water's flow, or physical integrity. Flow, as a permit condition, was the kind of condition contemplated by the Act necessary under section 301(b)(1)(C) to counter the effect of this type of pollution and achieve water quality standards, including the propagation of fish, under section 303. 511 U.S. at 714; *see also* 33 U.S.C. § 1311(b)(1)(C) (requiring implementation of "any more stringent limitation, including those necessary to meet water quality standards. . . .").

The Court also addressed the quality versus quantity argument that NUPEC seeks to raise in this case. First, the Court observed that water quality and quantity are interrelated: lower water quantity could diminish or destroy a water body's designated use, resulting in diminished water quality. 511 U.S. at 719. The Court then pointed again to section 502(19)'s definition of "pollution," concluding, "the Clean Water Act itself [recognizes] that reduced stream flow, *i.e.*[,] diminishment of water quality, can constitute water pollution." *Id.* The Court also considered section 304(f)(2)(F)'s recognition that changes in water flow can cause water pollution. *Id.* at 719-20. Finally, the Court considered sections 101(g) and 510(2), reserving state rights over water allocation. Dismissing the application of these sections to the facts, the Court concluded that these sections "do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation." *Id.* at 720.

In this case, New Union has imposed on NUPEC a flow condition necessary to promote fish propagation. The flow condition in NUPEC's permit is similar to the flow condition at issue in *PUD No. 1* because both permits are based on water quality standards. Point sources must meet water quality standards pursuant to section 301(b)(1)(C). 33 U.S.C. § 1311(b)(1)(C). The CWA expressly recognizes the effect changes in flow may have on designated uses, and the statute goes so far as to term these changes "pollution." *See id.* § 1314(f)(2)(F). Therefore, the flow condition cannot be more stringent than the Act, nor is it beyond the scope, because it is a necessary limitation imposed to achieve water quality standards. New Union's flow conditions are well within the Act's scope.

Like the defendant in *PUD No. 1*, NUPEC tries to argue that New Union imposed the flow condition under its expressly re-

served authority to regulate and allocate water quantities. *See* 33 U.S.C. §§ 1251(g), 1370. Under these circumstances, the flow condition exceeds the scope of the Act, which does not allocate water quantities, and NUFFF would not be able to enforce this condition under the citizen suit provisions. However, there are no facts in this case to suggest New Union was allocating water quantities. Even if New Union was concerned in part with quantity, as the Supreme Court observed, the Act's reservation of states rights to allocate water does not limit states' abilities to impose pollution controls on those who have obtained an allocation. *See PUD No. 1*, 511 U.S. at 720.

NUPEC's permit condition limiting the amount of water the facilities withdraw exceeds the CWA's scope for two reasons: the CWA generally regulates discharges, but where intake structures are concerned, it also regulates locations, design, construction, and capacity of the structure to minimize entrainment and impingement. *See* 33 U.S.C. § 1326(b); *see also* 40 C.F.R. §§ 122.45(g), 125.84(b). The practical effect of the intake limitation in this instance is to duplicate the limitation on flow. This condition is not regulating the intake structure location, design, or construction. Nor is it regulating the intake structure's capacity: capacity within the meaning of the Act refers to the amount of water the structure uses to cool a facility. By reducing the capacity, the intake structure improves its efficiency because it is using less water. Any attempt to regulate water intake for any reason other than to prevent pollution and protect water quality standards is clearly outside the scope of the Act. In this instance, the intake parameter exceeds the scope of the Act because it is not regulating the location, design, construction, or capacity of the intake structure. Even though the withdrawal of water may affect the water quality, the permit already regulates flow for the same purpose of preserving a minimum river volume. The intake parameter in this permit exceeds the Act's scope.

The condition limiting the amount of spent cooling water discharged also duplicates the flow condition. The permit limits the intake, the flow, and the spent cooling water discharge to four mgd during the cooler months and three mgd during the summer months of June through September. As a practical matter, the facility cannot discharge more water than it withdraws, and the amount of water it takes in for cooling will be roughly the amount of water that it discharges as spent cooling water. The limitations of both intake and spent cooling water are satisfied by the flow

condition which represents the maximum amount of water that can seasonally be withdrawn and discharged to maintain water quality standards to support fish propagation. The only distinction between the intake limitation and the spent cooling water limitation, although each achieves the same purpose as the flow limitation, is that the intake parameter limits the amount of water taken into the facility while the spent cooling water parameter limits the amount of water discharged from the facility. Spent non-contact cooling water limitations are not outside the scope of the Act because they regulate discharges. However, in this instance they are serving the same purpose as flow limitations, to regulate the discharge; thus, they are duplicative.

Both NUFFF and NUPEC presented arguments concerning whether water was a pollutant and whether water, as such, could constitute a discharge of a pollutant when the system expels it back into the river from which it came. However, neither of these arguments is relevant to the issues in this case. The analysis of the statute, the regulations, and the legislative history has demonstrated that the regulation of flow is necessary to combat pollution and protect the integrity of the Nation's waters. Implicit in this is the recognition that water, which constitutes flow, must be discharged either into the water body from which it is withdrawn or into another water body, and this is a regulated event consistent with the Act's goals.

III. DID THE COURT BELOW ERR IN HOLDING THAT WHEN A STATE ASSESSES PENALTIES FOR SOME VIOLATIONS OF A PERMIT UNDER A STATE AUTHORITY COMPARABLE TO CWA § 309(G), CITIZENS ARE BARRED FROM SEEKING PENALTIES FOR OTHER VIOLATIONS AND ARE BARRED FROM SEEKING AN INJUNCTION AGAINST FUTURE VIOLATIONS?

A. THE STATUTORY FRAMEWORK AND LEGISLATIVE HISTORY OF THE ENFORCEMENT PRECLUSION PROVISION

1. The Statute

Violators of the CWA are subject to enforcement actions for civil penalties. 33 U.S.C. § 1319(g). In the context of state enforcement actions, section 309(g)(6)(A)(ii) bars the Administrator from enforcing the Act when the state has either begun prosecu-

tion of the violation under "state law comparable to this subsection," or if the state has issued a final order and the violator has paid a penalty assessed under "state law comparable to this subsection." *Id.* § 1319(g)(6)(A)(ii). This limitation on civil penalty actions is extended to citizen suits except when the citizen suit is filed prior to commencement of the state action or where notice of intent to sue under section 505 has been given before any state action has commenced, and the citizen suit action is filed within 120 days after notice is given. *Id.* § 1319(g)(6)(B).

2. The Legislative History

Congress amended the CWA in 1987 to add to the EPA's enforcement arsenal the ability to assess administrative civil penalties as an additional enforcement mechanism to address obvious violations that were not so serious as to require judicial enforcement. Congress intended the new authority to "address past, rather than continuing, violations. . . . Continuing violations are more appropriately addressed by abatement orders or injunctive actions," and the limitations in section 309(g)(6) were "intended to assure that violations of greater magnitude are handled judicially and are pursued in a judicial forum." S. Rep. No. 99-50, at 26 (1985).

Congress was also concerned with preventing duplicative enforcement of violations, but sought to bar such actions "only where a State is proceeding under a State law that is comparable to section 309(g)." 133 Cong. Rec. S. 733 (Jan. 14, 1987) (statement of Sen. Chafee). State laws would be considered comparable to section 309(g) so long as they included similar provisions for public notice and participation procedures, "analogous penalty assessment factors and judicial review standards," and other provisions similar to those included in the section. *Id.*

The two houses debated exactly what kinds of subsequent or additional actions are barred. Ultimately, the language of section 309(g)(6) embodied the compromise. Thus, the limitations do not apply to citizen suits filed prior to the state action, citizen suits commenced within 120 days of notice, or "to an action seeking relief *other than* civil penalties (*e.g.*, an injunction or declaratory judgment). . . ." H.R. Conf. Rep. No. 99-1004, at 133 (1986) (emphasis added). This bar "allows citizens to go to court in the case of continuing violations which . . . is a fair compromise." 131 Cong. Rec. H5993 (July 22, 1985) (statement of Rep. Edgar). The Senate Report finalized these intentions, precluding subsequent

enforcement actions "only . . . for the same violations which are the subject of the administrative civil penalties proceedings." S. Rep. No. 99-50, at 28.

B. How the courts have interpreted the section 309(g)(6) bar

In *North and South Rivers Watershed Ass'n v. Town of Scituate*, the First Circuit concluded that the section 309(g)(6) bar acts to preclude *any* citizen suits against violators who are the subject of a state enforcement action diligently prosecuted under comparable state law. 949 F.2d 552, 555 (1st Cir. 1992). The Town of Scituate was subject to a state administrative order requiring it to upgrade its sewage treatment plant. *Id.* at 553-54. The state chose not to assess penalties, reserving in the order the right to do so at a later date. *Id.* at 554. A citizens' group filed a lawsuit under section 505 seeking civil penalties, declaratory, and injunctive relief against the town's ongoing CWA violations. *Id.* at 554-55. The court rejected the argument that the bar only applied to civil penalty actions. *Id.* at 555. The court first noted that it afforded deference to the administrative agency's enforcement decision. *Id.* at 556-57. The court then explained that both Congress and the Supreme Court recognize a state's administrative order bars citizens from seeking any relief because (1) the CWA gives states primary enforcement authority, (2) citizen suits are designed to supplement the state's primary enforcement authority, and (3) citizen suits are appropriate only where the state has failed to act. *Id.* at 558. To allow citizens to commence a suit for any kind of relief against the same violations the state chose not to prosecute would ignore the state's primary enforcement authority and discretion. *Id.*

Rejecting arguments that the literal language of section 309(g)(6), which refers only to civil penalty actions, was of any import, the court determined that this would lead to an "absurd result" because this would mean that courts deferred to government enforcement actions only when civil penalty actions commenced. 949 F.2d at 558. The court relied on the Supreme Court's decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, which explained in *dicta* that the citizen suit provision was a supplemental enforcement provision available only when federal or state agencies failed to act. 484 U.S. 49, 60-61 (1987). In *Gwaltney*, the Court concluded that allowing citizens to seek civil penalties for past violations the state chose not to prosecute in ex-

change for the violator's undertaking of corrective measures would permit an unacceptable intrusion into a state's enforcement authority. *Id.* at 61. The First Circuit believed that *Scituate* presented the same policy issues presented by the facts in *Gwaltney*. Allowing citizens to seek declaratory and injunctive relief against violations the state sought to leverage in an administrative order impermissibly intruded on the state's valid exercise of its enforcement discretion. 949 F.2d at 558.

Other courts have followed *Scituate*, liberally construing section 309(g)(6) to promote the policy that it is appropriate to defer to a state's enforcement decisions under the Act. Thus, the bar acts to preclude all citizen suits, including those seeking only declaratory and injunctive relief, so long as the state has made some enforcement decision. *Ark. Wildlife Fed'n v. ICI Ams., Inc.*, 29 F.3d 376, 383 (8th Cir. 1994) (holding that to permit citizen suits for declaratory and injunctive relief against violations the state has subjected to its own administrative enforcement action would be unnecessarily duplicative and result in undue interference); *Jarrett v. Water Works & Sanitary Sewer Bd.*, No. 00-A-527-N, 2001 U.S. Dist. LEXIS 522, *17 (M.D. Ala. 2001) (agreeing with *Scituate's* interpretation of section 309(g)(6) bar); *Conn. Coastal Fishermen's Ass'n v. Remington Arms Co., Inc.*, 777 F. Supp. 173, 181 (D. Conn. 1991) (rejecting interpretation of section 309(g)(6) barring citizen suits only when state has assessed civil penalties), *rev'd in part on other grounds*, 989 F.2d 1305 (2d Cir. 1993). *See also N.Y. Coastal Fishermen's Ass'n v. N.Y. City Dep't of Sanitation*, 772 F. Supp. 162, 165 (S.D.N.Y. 1991) (finding citizen suits seeking penalties are barred when there is a pending consent order in which state has chosen to forgo penalties, and to find otherwise would unnecessarily undermine state enforcement decisions). *Cf. Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1347 (D.N.M. 1995) (describing the policy concerns of courts seeking to prevent citizen suits from interfering with state enforcement actions as well-founded, but finding that the literal language precludes barring citizen suits for declaratory and injunctive relief).

There are courts that have rejected this interpretation of section 309(g)(6) in favor of the statute's plain language. The Ninth Circuit found that the literal meaning of section 309(g)(6) bars citizen suits only when the state has actually exercised its enforcement authority through the imposition of civil penalties. *Citizens for a Better Env't v. Union Oil Co. of Cal. (UNOCAL)*, 83 F.3d

1111, 1117-18 (9th Cir. 1996). In *UNOCAL*, California entered into a settlement agreement with UNOCAL requiring payment of a sum of money and implementation of removal technologies in exchange for an extended deadline on selenium discharge limitations. *Id.* at 1114. The Citizens sued for violations of the CWA. *Id.* at 1115. The court rejected the notion that the settlement money was a penalty, instead finding it to be a payment releasing UNOCAL from legal liability. *Id.* at 1116. This was not a penalty assessed as contemplated by section 309(g)(6); rather it was akin to an administrative compliance order. *Id.* at 1116-17.

The court cited an earlier Ninth Circuit decision holding that, based on the plain language of the statute, section 309(g)(6) barred citizen suits only when the state was diligently prosecuting an administrative civil penalty action. *Id.* at 1117 (citing *Wash. Pub. Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 885 (9th Cir. 1993)). Since California entered into an administrative compliance order with UNOCAL, as opposed to prosecuting a civil penalty action against it, there was no state administrative civil penalty proceeding barring the citizen suit. *Id.* at 1117-18. Following *Pendleton Woolen Mills'* rejection of *Scituate*, the court dismissed the notion that it should ignore the legislative history and the plain language of the statute in favor of concern for preserving state enforcement discretion. *Id.*

Other courts have followed *UNOCAL's* plain reading analysis to find that section 309(g) bars citizen suits only when the state is diligently prosecuting an administrative civil penalty action. In *Coalition for a Livable West Side, Inc. v. New York City Dep't of Environmental Protection*, the court found the language of section 309(g) to be "clear and unambiguous" in applying the bar to civil penalty actions only. 830 F. Supp. 194, 197 (S.D.N.Y. 1993). Many other courts have been persuaded by this logic. *See Atl. States Legal Found., Inc. v. Hamelin*, 182 F. Supp. 2d 235, 248 (N.D.N.Y. 2001) (holding that the plain language of § 309(g)(6) bars citizen suits seeking civil penalties but not claims for injunctive or declaratory relief); *Sierra Club v. Hyundai Am. Inc.*, 23 F. Supp. 2d 1177, 1180 (D. Or. 1997) (stating, "It would require a significant departure from the plain meaning of the statute to find plaintiffs' case for injunctive or declaratory relief [is] barred by [section 309(g)(6)]."); *Cal. Sportfishing Prot. Alliance v. City of W. Sacramento*, 905 F. Supp. 792, 806 (E.D. Cal. 1995) (finding section 309(g)(6) is "unambiguous that only civil penalty actions are barred"); *Orange Env't, Inc. v. City of Orange*, 860 F. Supp. 1003,

1017-18 (S.D.N.Y. 1994) (noting section 309(g)(6) "precludes only citizen suits seeking civil penalties.").

C. NUFFF WILL ARGUE THAT SECTION 309(G)(6) DOES NOT BAR CITIZEN SUITS SEEKING INJUNCTIVE OR DECLARATORY RELIEF OR CIVIL PENALTY ACTIONS FOR VIOLATIONS NOT SUBJECT TO ADMINISTRATIVE PENALTY ACTION

NUFFF will argue that section 309(g)(6) bars only citizen suits seeking to impose civil penalties for violations already subject to an administrative civil penalty action under comparable state law. New Union did not assess civil penalties against the summer months' violations, so there is no state action that can serve to bar a citizen suit to enforce against those violations. The statutory language bars citizen suits from enforcing against violations for which penalties were paid. 33 U.S.C. § 1319(g)(6)(A)(iii); *see also UNOCAL*, discussed *supra*. The use of the past tense must mean that the Act does not bar citizens and the Administrator from enforcing other violations. The legislative history bolsters this interpretation, stating that the Act precluded subsequent enforcement actions "only . . . for the same violations which are the subject of the administrative civil penalty proceedings." S. Rep. No. 99-50, at 28. Barring a citizen suit to impose penalties on unpunished violations defeats the purpose of citizen suits to supplement state action where it fails to enforce the law.

Following *UNOCAL*, NUFFF will argue that the plain language of the statute imposes a bar against civil penalties only. The legislative history supports this reading of the statute. The legislative history explicitly refers to injunctions as the type of actions that are not barred when a federal or state agency has commenced an administrative civil penalty action under § 309(g) or comparable state law. *See* H.R. Conf. Rep. No. 99-1004, at 133 (1986). Therefore, NUFFF is legally entitled to bring a citizen suit seeking an injunction against NUPEC to prevent future permit violations.

D. NUPEC WILL ARGUE THAT THIS COURT SHOULD DEFER TO NEW UNION'S ENFORCEMENT DECISIONS

NUPEC will argue that *Scituate* and *Gwaltney* apply to this case. The CWA expressly recognizes the states as the primary enforcement authority of the Act. *See* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and

eliminate pollution. . . ."). As the Supreme Court's analysis of the legislative history demonstrates, section 309(g)(6)'s bar on citizen suits when the state has commenced and is diligently prosecuting a violation "reinforces" Congress's view of citizen suits as "meant to supplement rather than to supplant governmental action." *Gwaltney*, 484 U.S. 49, 60 (1987). To find otherwise would "change the nature of the citizens' role from interstitial to potentially intrusive." *Id.* at 61.

The *Scituate* court correctly recognized that this statutory expression of a state's role as primary enforcer means courts must defer to state enforcement decisions. To find otherwise would lead to a contradictory result that must be avoided. "Where literal interpretation of a statue [sic] would lead to an absurd result, the Court must strive to provide an alternative meaning that avoids the irrational consequence." *Scituate*, 949 F.2d at 558 (citing *Green v. Block Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring)). Here, the Court should seek to avoid two absurd results. First, it is nonsensical to bar only citizen suits seeking penalties where a state has already done so and yet allow citizen suits for injunctive or declaratory relief regardless of the state's enforcement action.

Second, the Act preserves the states' primary enforcement role, and to allow citizens to interfere with state enforcement decisions would contravene the federalist policy embodied in the act. A "hyper-technical" reading of section 309(g) interferes with Congress' prevailing policy that states are the primary enforcers. This Court must avoid any statutory interpretation that interferes with this policy. Congress expressly incorporated a policy of federalism into the Act. In this case, New Union faced power shortages during the summer months, and it chose not to enforce against violations during that time. It assessed appropriate penalties for permit violations while balancing its environmental needs with its energy producing needs. Congress' federalist principles embodied in the Act were intended to preserve for the states the authority to make these local policy decisions.

E. THIS COURT SHOULD FIND THAT SECTION 309(G)(6) DOES NOT BAR CITIZEN SUITS SEEKING DECLARATORY OR INJUNCTIVE RELIEF OR THE ENFORCEMENT OF VIOLATIONS NOT SUBJECT TO ADMINISTRATIVE CIVIL PENALTIES

The canons of statutory interpretation compel this Court to conclude that section 309(g)(6) does not bar citizen suits seeking

declaratory or injunctive relief when administrative civil penalty actions are proceeding, nor does it bar citizen suit enforcement of violations that have not been the subject of a diligently prosecuted civil penalty action under comparable state law. Beginning with the plain language of the statute, section 309(g)(6) prevents the Administrator from commencing an enforcement action against:

> [A]ny violation . . . with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or . . . for which . . . the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law. . . .

33 U.S.C. §§ 1319(g)(6)(A)(ii), (iii). These limitations are extended to citizen suits under section 505, except where the citizen suit was filed before the state action or where the citizen suit is commenced within 120 days after giving notice. *Id.* § 1319(g)(6)(B).

The expression of one thing in a statute suggests the exclusion of others. *See Sullivan v. Hudson*, 490 U.S. 877, 895 (1989); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978). The preclusion provisions are located in section 309(g), entitled "Administrative penalties." The specific language of this subsection refers only to civil penalty actions. The section mentions no other type of relief, and civil penalties are one of three possible remedies citizens can pursue under section 505(a)(1). 33 U.S.C. § 1365(a)(1) (permitting citizens to seek injunctions, declaratory orders, or civil penalties under section 309(d)). The subsection also refers to civil penalties assessed under "this subsection, or such comparable State law. . . ." *Id.* § 1319(g)(6)(A)(iii). Although this language is not identical to language barring a state's diligent prosecution under "state law comparable to this subsection," the obvious meaning is, in both instances, that states must be prosecuting *civil penalty actions* under state law comparable to section 309(g) in order to bar enforcement actions brought by either the EPA or citizens.

The legislative history, discussed *supra*, supports this statutory interpretation, and the majority of the courts agree. Section 309(g)(6) does not bar citizens from seeking injunctions against violators who are subject to or have paid penalties as a result of state enforcement actions. Additionally, section 309(g)(6)'s focus on *any* violations subject to such civil penalty actions demonstrates that any violations *not* subject to civil penalty actions are

fair game. The use of the past tense in section 309(g)(6)(A)(iii) bolsters this position, referring to penalties paid. Indeed, the Senate Report explicitly states that the section 309(g)(6) bar precludes EPA or citizen enforcement actions "only . . . for the same violations which are the subject of the administrative civil penalties proceeding." S. Rep. No. 99-50, at 28 (1987).

The record from the court below does not indicate whether New Union enforced against the permit violations under comparable state law. There is no discussion about New Union's laws used to bring the enforcement action against NUPEC. Penalties of $1000 per month of violations may seem paltry when the statute provides for penalties of up to $25,000 for Class I violations and $125,000 for Class II violations. However, NUFF has not challenged the comparability of New Unions laws, and NUPEC only urges this Court to avoid a hyper-technical reading of section 309(g) that would interfere with New Union's enforcement discretion.

NUPEC's argument that NUFFF must be barred from seeking injunctive relief because it conflicts with the federalist goals of the Act is unpersuasive. The Supreme Court has instructed courts not to defer to governments' enforcement discretion when Congress chooses to restrict it under a federal statute. *Heckler v. Chaney*, 470 U.S. 821, 832-33 (1985). Under the CWA, Congress created a federal scheme to prevent water pollution and implemented enforcement provisions to achieve that end. States are delegated authority to enforce the Act under comparable state law. Likewise, citizens are delegated enforcement authority under specific circumstances, such as when there is no prosecution of permit violations or abatement of ongoing violations.

The *Scituate* decision on which NUPEC relies is flawed, and it runs counter to the reasoning applied by a majority of courts that have grappled with section 309(g)(6). *Scituate* ignores the plain language of the statute, and it does not analyze the legislative history. Instead, it relies on *dicta* from a Supreme Court case referring to legislative history from 1972 concerning citizen suits to interpret a 1987 amendment to the Act, concerning enforcement provisions. In *Gwaltney*, the Court determined that Congress intended citizen suits to supplement rather than supplant state enforcement actions. 484 U.S. at 60. This conclusion arose from its reading of the Senate Report referring to section 505, which explained that states were anticipated to represent "the great volume of enforcement actions" and citizens could step in where

federal and state agencies failed to act. *Id.* (quoting S. Rep. No. 92-414, at 64 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3746). The Court then mused that Congress would not have intended citizens to interfere with states' enforcement decisions to forgo civil penalties and pursue other administrative remedies instead. *Id.* at 61. *Scituate* then expanded this to mean state enforcement decisions required deferential treatment, and the section 309(g)(6) bar must preclude all citizen suits against violators already subject to some state administrative proceeding because to find otherwise would interfere with this deference.

The *Scituate* decision ignores the effect of its interpretation. Congress amended the Act in 1987 to give EPA stronger enforcement authority and an alternative to going to court for less serious violations. At the same time, Congress wanted to prevent duplicative enforcement actions in which a violator was faced with an action from the state and the administrator, each seeking penalties for the same violations. *See* Jeffrey Miller, *Themes and Variations in Statutory Preclusions Against Successive Enforcement Actions by EPA and Citizens in Environmental Statutes*, at 14-17, 22 (2002) (unpublished manuscript, on file with the author). At the same time, Congress did not want states to insulate polluters from enforcement actions. *Id.* It would be all too tempting for a state to negotiate a deal with polluters whereby the state commences an enforcement action or administrative order protecting polluters from much larger penalties in exchange for jobs, taxes, community investment, or kickbacks. Finding section 309(g)(6) to bar all subsequent citizen actions must logically mean that EPA is also barred, and this undermines Congress' intent to give EPA this enhanced enforcement authority in the first place. Such a result simply does not make sense.

In the instant case, NUFFF seeks an injunction against NUPEC to prevent further permit violations. NUFFF also seeks civil penalties for violations of permit conditions during the summer months, which were not subject to New Union's enforcement action. This Court should find that NUFFF is not barred from seeking injunctive relief from further permit violations. This Court should also find that NUFFF is not barred from enforcing any violations not subject to New Union's administrative civil penalty action.

IV. DID THE COURT BELOW ERR IN HOLDING THAT WHEN A SINGLE ACT OMISSION VIOLATES SEVERAL CONDITIONS IN A CWA PERMIT THERE IS A SINGLE VIOLATION OF THE PERMIT?

A. THE STATUTORY FRAMEWORK AND THE LEGISLATIVE HISTORY

Section 309(d) subjects violators of the CWA to civil penalties "not to exceed $25,000 per day for *each* violation." 33 U.S.C. § 1319(d) (emphasis added). Citizens can seek the appropriate civil penalties under this section. *See id.* § 1354(a). The current statutory language differs from the original language of section 309(d), which imposed a penalty "per day of *such* violation." *See* 100 Cong. Rec. 983 (1987) (emphasis added). The amendment changing "of such" to " for each" was intended to "clarify that each distinct violation is subject to a separate daily penalty assessment. . . ." S. Rep. No. 99-50, at 25 (1985). Section 309(d) distinguishes the penalty treatment for a single operational upset that causes violations of several permit conditions. In that situation, "simultaneous violations of more than one pollutant parameter shall be treated as a single violation." 33 U.S.C. § 1319(d). This exception, by identifying a particular situation in which multiple violations are treated as a single violation for penalty assessment purposes, implies that other acts or omissions leading to multiple violations will be subject to penalties for each parameter exceeded. This is consistent with the canon of statutory interpretation that the inclusion of one means the exclusion of others. Thus, the statutory construction indicates that each violation of a permit condition, not each violating act, is subject to civil penalties, unless those violations result from a single operational upset.

B. THE COURTS' INTERPRETATION AND APPLICATION OF SECTION 309(D)

Prior to section 309(d)'s amendment, the last court to deal with the old language "of such violation" construed it to mean that the maximum penalty amount was assessed on the basis of how many days the permit was violated, regardless of how many conditions were violated on any given day. *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542, 1555 (E.D. Va. 1985), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *rev'd and remanded on other grounds*, 484 U.S. 49 (1987). In *Gwaltney*, the permittee vio-

lated several pollutant parameters each day. The court found the statute ambiguous on whether penalties were leveled against each violation of an effluent limit per day or for each day on which violations occurred. *Id.* The court found nothing helpful in the legislative history and rejected another district court's amenability to such an interpretation of the statute. *Id.* at 1554; *see United States v. Amoco Oil Co.*, 580 F. Supp. 1042, 1046 n.1 (W.D. Mo. 1984).

Subsequent to the amendment, most courts have applied penalties consistently with Congress' intent that each violation occurring on a given day is subject to penalties, unless a single operational upset has caused the violations. In *United States v. Smithfield Foods*, a single daily wastewater discharge violated multiple pollutant parameters contained in Smithfield's permit, including the daily average, monthly concentration, and monthly loading discharge limits for several pollutants. 191 F.3d 516 (4th Cir. 1999). Affirming the district court decision, the circuit court held, "[I]f multiple violations of the Permit occur on the same day, defendants are liable for a separate day for each violation of the Permit, including the daily maximum, monthly average concentration, and monthly average loading limits for each pollutant." *Id.* at 527 (quoting 972 F. Supp. 338, 340 (E.D. Va. 1997)). The circuit court agreed with the district court that the language of section 309(d) compels the result of penalizing each violation, not the underlying act that causes the violations. 191 F.3d at 527.

The court rejected the defendant's argument that daily and monthly limits of the same pollutants constituted double counting. It noted that daily averages were twice as high as monthly averages, so a violation of one did not automatically constitute a violation of the other. 191 F.3d at 527. The court also cited policy reasons in support of the conclusion that this did not represent double counting, finding that this scheme provided courts with flexibility in setting penalties commensurate with the level of culpability. *Id.* Additionally, the court noted that to hold otherwise would mean that permittees could violate as many permit conditions as they wanted on a single day and never face stiffer penalties; this was contrary to the deterrent purpose of section 309(g). *Id.* at 527-28. Once a permittee violated one daily limit, there would be no incentive to comply with the rest of the limits for that day. *Id.* at 528.

The *Smithfield* holding is consistent with several decisions considering how to calculate daily penalties against multiple vio-

lations resulting from a single act or omission. *Natural Res. Def. Council v. Texaco Ref. & Mktg., Inc.*, 800 F. Supp. 1, 20 (D. Del. 1992) (finding exceedances of mass loading limits and concentration limits for the same parameter constitute two separate violations because each limit serves a specific regulatory function); *Pub. Interest Research Group v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 78-79 (3d Cir. 1990) (finding daily violations of the mass and concentration limits for a single pollutant constituted two separate violations and violating the seven-day average limit and thirty-day average limit of a single pollutant also constituted two separate violations); *Student Pub. Interest Research Group v. Monsanto Co.*, No. 83-2040, 1988 U.S. Dist. LEXIS 16702, at *32-33 (D.N.J. Mar. 30, 1988) (assessing separate penalties against each time a single parameter's daily average discharge limit and monthly daily maximum discharge limit was exceeded). *Cf. Atl. States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1140 (11th Cir. 1990) (agreeing that multiple daily violations are subject to penalties, but declining to treat daily and monthly violations of the same parameter as separate violations: "[W]e find that because discharge of a single pollutant may be the cause of both daily and monthly violations, fining the violator twice may result in imposing two fines for the same illegal act.").

C. NUFFF AND EPA ARGUE THAT A SINGLE ACT OR OMISSION WHICH LEADS TO VIOLATIONS OF SEVERAL PERMIT CONDITIONS ON A GIVEN DAY RESULTS IN PENALTIES ASSESSED AGAINST EACH VIOLATION OF EACH PERMIT CONDITION

NUFFF and EPA argue that permittees are subject to penalties for each permit condition violated on a given day because of a single act or omission, except where the single operational upset exception applies. Thus, NUPEC is subject to penalties each day for each discharge that exceeded the intake, flow, and cooling water discharge limits. NUFFF and EPA will point to the statute, the legislative history, and the majority of court decisions in support of this argument. These three elements do in fact support NUFFF and EPA's position. This position contradicts NUFFF's argument that intake, flow, and discharge limits are all within the Act's scope because they all regulate flow, which is within that scope; however, the interpretation of section 309(d) NUFFF adopts in this argument is consistent with the statutory language.

D. NUPEC ARGUES THAT A SINGLE ACT OR OMISSION WHICH LEADS TO MULTIPLE PERMIT VIOLATIONS ON A GIVEN DAY CONSTITUTES A SINGLE VIOLATION

NUPEC argues that a single act or omission, which leads to multiple permit violations on a single day, constitutes a single violation for purposes of calculating penalties. Under this interpretation, NUPEC's single discharge exceeding the permitted intake, flow, and cooling water discharge limitations constitutes one violation subject to penalties as opposed to three separate violations. The plain language of the statute, referring to each violation per day, does not support NUPEC's argument. The statute itself provides an exception to the rule that multiple violations resulting from a single act or omission are subject to penalties. Single operational upsets that cause multiple violations are treated as a single violation for penalty purposes. 33 U.S.C. § 1319(d). This exception is not applicable here.

NUPEC relies on *Gwaltney* to support its argument. However, NUPEC's reliance on *Gwaltney* is misplaced for several reasons. After the *Gwaltney* decision, Congress amended section 309(d) to clarify whether penalties should be assessed based on a day of violations or multiple violations occurring on one day. Congress intended the clarification to support the latter. Following that amendment, the Fourth Circuit, the same court that affirmed the *Gwaltney* decision, affirmed the district court in *Smithfield Foods* in support of this clarification. The Fourth Circuit's application of section 309(d) is consistent with the majority of courts dealing with this issue.

NUPEC analogizes the *Scituate* court's analysis of section 309(g)(6)(A), preventing citizen suits when EPA or the state is diligently prosecuting violations, to this case in which duplicative penalties are allegedly being assessed. In *Scituate*, the court rejected an environmental group's citizen suit because it found the state was diligently prosecuting CWA violations under comparable state law when it decided not to assess penalties against a violator. 949 F.2d 552. Finding the state's statutory scheme to be comparable to the Act, the court reasoned that the state's decision to forgo penalties in exchange for an administrative order compelling the violator to upgrade its facility constituted diligent prosecution. *Id.* at 556. In so doing, the court determined that allowing the citizen suit to proceed would be duplicative enforcement of the same violations. *Id.* "[E]xacting financial penalties in the name of environmental protection at a time when remedial measures are

well underway do not further [the Act's] goal." *Id.* This case is similar, NUPEC avers, because assessing penalties against all three violations, regardless of the fact that the violations were the result of a single act, is a duplicative enforcement action for the sake of exacting penalties only.

NUPEC also argues that violations of duplicative permit conditions could not possibly constitute separate violations. NUPEC avers intake, flow, and cooling water discharge conditions all limit flow. NUPEC points to the *Smithfield Foods* decision, which distinguished between daily and monthly limits as intended to protect against separate, distinct effects stemming from the daily and monthly discharges. 191 F.3d at 527. NUPEC contends that if this Court accepts that section 309(d) penalizes each parameter violated on a given day, the parameters must serve distinct purposes to be enforceable. If Congress intended penalties to deter dischargers from violating multiple permit violations on a given day, the different parameters must serve distinct purposes, and that distinction is rendered meaningless when it applies to two or more parameters, which serve no distinct, separate purpose. To hold otherwise would allow permit writers to arbitrarily treat some dischargers more harshly than others by including duplicative conditions in permits.

NUPEC will also argue that its due process right of fundamental fairness is violated by being penalized two or three times for one alleged illegal act that resulted in permit violations. New Union acted arbitrarily in imposing duplicative permit conditions for which it can now collect multiple penalties. While NUPEC acknowledges it cannot litigate this issue in this proceeding, it nevertheless argues that this Court should consider this factor in its decision. The Eleventh Circuit in *Tyson Foods* was reluctant to penalize a discharger for violating the daily and monthly limits for the same pollutant because that was tantamount to fining the violator twice for the same act. 897 F.2d at 1140. Likewise, in this case, NUPEC faces fines for violating three conditions all regulating the volume of water in the river because of a single act. This is a fundamentally unfair result, violating NUPEC's due process rights. Since courts should avoid reaching an unconstitutional result when interpreting statutes, this Court should reject interpreting section 309(b) to allow NUPEC to sustain multiple penalties for a single act. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (citing *Crowell v. Benson*, 295 U.S. 22, 62 (1932) (explaining that

the Court will interpret a statute to avoid an unconstitutional result)).

E. THIS COURT SHOULD DECIDE THAT A SINGLE ACT OR OMISSION WHICH CAUSES DAILY VIOLATIONS OF MULTIPLE PERMIT CONDITIONS CONSTITUTES MULTIPLE VIOLATIONS EACH OF WHICH ARE SUBJECT TO PENALTIES

The statutory language and legislative history support the proposition that a single act or omission that results in multiple parameter violations causes the discharger to be subject to penalties for each parameter violated on a given day. The canon of statutory interpretation that the inclusion of one means the exclusion of others is applicable to section 309(b). Other courts' decisions have been consistent with this interpretation. To decide otherwise would give permittees a huge incentive to violate all of their permit conditions in a given day once the permittee has violated one condition.

Section 309(b) identifies single operational upsets as the exception to the rule that a single underlying act that causes multiple violations will incur multiple penalties. One rationale offered for this interpretation is that multiple permitted discharge limits for a single pollutant are included for separate, distinct purposes. For instance, in *Smithfield Foods*, the court determined the daily maximum effluent limits served to protect against the adverse effects of large, single releases, while the monthly averages sought to prevent "chronic effects occurring at lower levels." *Smithfield Foods*, 191 F.3d at 527 (citing 972 F. Supp. at 340-42). *See also Natural Res. Def. Council v. Texaco Ref. & Mktg., Inc.*, 800 F. Supp. 1, 20 (D. Del. 1992) (finding mass loading limits and concentration limits of the same parameter each serve a specific regulatory function). Thus, violations of daily and monthly limits for the same pollutant were subject to separate penalties and did not constitute double counting. 191 F.3d at 527. While the *Tyson's Food* court rejected this result, its reasoning runs counter to the majority of the courts and to the reasonable interpretation of the statute.

The *Smithfield Foods* court's rejection of double-counting, and other courts' willingness to follow suit, implies that these courts would be receptive to the argument that violators would not be subject to separate penalties for each parameter violated where those parameters are duplicative. In the instant case, NUPEC violated three permit conditions. Unlike those courts that found

daily and monthly limits of a single pollutant serve distinct purposes, it has been determined that the intake and non-contact cooling water conditions in this case actually duplicate the flow condition. In this permit, each condition does not serve a separate and distinct purpose.

From a policy perspective, to allow duplicative penalties for violating duplicative permit conditions allows one violator to be treated more harshly than others who had the good fortune to avoid duplicative permit conditions. Additionally, the Court should find that the intake limit exceeds the scope of the Act; therefore, NUFFF has no jurisdiction to enforce those violations. *See* Issue II, discussed *supra*.

Congress has delegated to the courts the authority to assess civil penalties under the CWA. *Tull v. United States*, 481 U.S. 412, 425-27 (1987). Courts must exercise their discretion in calculating such penalties. *Id.* Therefore, this Court should hold that NUPEC is subject to daily penalties for exceeding permitted flow limits only. Summary judgment in favor of NUPEC should be reversed, and the case remanded to the trial court to determine the appropriate penalties. The Court does not need to reach NUPEC's due process argument because section 309(b), as interpreted by the majority of the courts, does not on its face cause a fundamentally unfair result, and, as applied to NUPEC in this instance, it is not determinative since the three permit conditions were found to be redundant.