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Best Brief for Intervenor United States: Sixteenth Annual Pace National Environmental Law Moot Court Competition

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MEASURING BRIEF*

Civ. App. No. 03-713

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

NEW UNION FLY FISHERMEN'S FEDERATION, INC.,
Appellant,
and
UNITED STATES,
Intervenor,
v.
NEW UNION POWER & ELECTRIC COMPANY,
Appellee.

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

Brief for the Intervenor,
UNITED STATES

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* This brief has been reprinted in its original form.

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JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Twelfth Circuit has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291 (1983), which establishes federal appellate court jurisdiction for the appeals of final decisions of federal district courts. New Union Fly Fishermen's Federation, Inc. ("NUFF") is appealing the final order of the United States District Court for the District of New Union. That court granted New Union Power & Electric Company's ("NUPEC") motion for summary judgment in its entirety, thereby disposing of NUFF's claims without reaching NUFF's motion for summary judgment.

The United States District Court for the District of New Union had original jurisdiction to hear NUFF's claims under the citizen suit provision, 33 U.S.C. § 1365 (1994) of the federal Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.* (1994), as well as under 28 U.S.C. § 1331 (1983), which authorizes jurisdiction over civil actions arising under laws of the United States, including the CWA and the United States Constitution. Since NUFF brought CWA claims against NUPEC, alleging that NUPEC violated several conditions in its United States Environmental Protection Agency ("EPA")-issued permit under 33 U.S.C. § 1342 (1994), the district court had subject matter jurisdiction over New Union's claims.

STATEMENT OF THE ISSUES

1. Did the court below err in holding that the intake, non-contact cooling water discharge, and summer-month flow limitations in the NPDES permit are more stringent than and beyond the scope of the CWA?
2. 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 33 U.S.C. § 1341 (1994), when the state requirements are more stringent than or beyond the scope of the CWA?
3. 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 33 U.S.C. § 1319 (1994), citizens are barred from seeking penalties for other violations and are barred from seeking an injunction against future violations?
4. Did the court below err in holding that when a single act or omission violates several conditions in a CWA permit, there is a single violation of the permit? NUFF and EPA contest the court's decision, NUPEC supports it.

STATEMENT OF THE CASE

NUFF, a not-for-profit corporation, brought an enforcement action under § 1365 of the CWA against NUPEC for reported violations of its National Pollutant Discharge Elimination System ("NPDES") permit issued by EPA under § 1342, seeking civil penalties for all of the violations for which the New Union Department of Natural Resources ("NUDNR") did not assess penalties and injunctive relief to prevent further violations. (R. at 3, 4). The citizen suit was commenced in the district court in September 2002, more than 60 days after NUFF sent notice to NUPEC, NUDNR and EPA pursuant to § 1365(b)(1)(A) and relevant EPA regulations. (R. at 4). NUFF's standing to bring suit as a citizen group has not been contested.

NUFF and NUPEC filed cross-motions for summary judgment on dispositive issues. *Id.* NUFF moved for summary judgment on the grounds that NUPEC is liable for each and every violation each day it reported exceeding its intake, flow and discharge permit limitations. *Id.* On the other hand, NUPEC moved for summary judgment on two grounds. First, the district court lacked jurisdiction because (1) citizens may not enforce state-imposed limitations in CWA permits that are more stringent than or beyond the scope of corresponding federal limitations, and (2) citizens may not enforce against violations of a permit once a state has already commenced enforcement actions against the permit holder under § 1319(g)(6)(A). *Id.* Second, had the district court found jurisdiction, NUPEC moved for summary judgment on the grounds that violating any or all permit conditions constitutes a single violation, even though the permit contains three different conditions. *Id.*

The district court granted NUPEC's motion for summary judgment in its entirety and therefore did not reach NUFF's motion. *Id.* NUFF has appealed the judgment. *Id.* EPA has been granted permission to file a brief and argue as amicus, contesting in part and supporting in part the district court's judgment.

STATEMENT OF THE FACTS

NUPEC maintains a generating station on the New Union River in Paddleboat Springs, New Union. (R. at 3). In July 1999, EPA renewed NUPEC's NPDES permit, which limitations intake, flow and non-contact cooling water discharge to 4 million gallons per day (mgd) from September to May, and sets summer-time flow

limitations at 3 mgd from June to August. (R. at 3-4, 12). The summer-time flow limitation was imposed by NUDNR pursuant to its § 1341 authority, in order to assure fish propagation in the New Union River during the dry summer months. (R. at 13).

Since receiving its NPDES permit, NUPEC has exceeded its intake, flow and discharge limitations approximately half the time from September to May of each year and all the time during the dry summer season each year. (R. at 4). NUDNR assessed a $1,000 per month penalty against NUPEC for each month of intake violations during the September to May periods, which NUPEC paid. *Id.* However, NUDNR has not assessed any penalties against NUPEC for exceeding its flow and non-contact cooling water discharge limitations during the September to May periods, or for any of the summer-time flow violations. *Id.* An affidavit from an NUDNR official indicates that NUDNR did not assess penalties for violations that occurred during the summers because the highest demand for electricity occurs during those months. *Id.* The state was short of generating capacity in the summers, and NUDNR policy was to encourage electricity generation during those months. *Id.*

SUMMARY OF THE ARGUMENT

Because EPA contests in part and supports in part the district court's judgment, this court should reverse the district court's grant of summary judgment to NUPEC on all four issues and remand this case for further proceedings in light of the following:

First, EPA urges that this court affirm the district court's decision that the intake limitations are beyond the scope of the CWA. EPA also urges the court to reverse the District Court's decision that non-contact cooling water discharge limitations are beyond the scope of the CWA and summer-time flow limitations are more stringent than or beyond the scope of the CWA. The summer-time flow limitations are more stringent than the CWA and that the discharge limitations are duplications of flow limitations.

EPA set NUPEC's flow limitations based upon federal criterion. Because 33 U.S.C. § 1370 (1994) gives states the inherent right to impose more stringent effluent limitations than federal criterion, NUDNR could impose the more stringent summer-time flow limitations under the CWA for any reason. Thus, the summer-time flow limitations are more stringent than but within the scope of the CWA. Because the discharge limitations apply to the same pollutant (spent non-contact cooling water) on Outfall 001, they are duplications of the flow limitations. Finally, the intake requirements are beyond the scope of the CWA because (1) they are not effluent limitations; (2) the CWA does not require the regulation of intakes; and (3) intake limitations are inconsistent with the CWA's definition of state limitations that are more stringent than the CWA. Consequently, the CWA makes no provision for the regulation of intakes.

Second, the district court correctly held that citizens may not enforce violations of permit conditions that are beyond the scope of the CWA, but incorrectly held that citizens may not enforce violations of conditions that are merely more stringent than under the CWA. The CWA grants citizens the authority to sue for violations of state limitations on an NPDES permit. As NUFF is adversely affected by NUPEC's violations of its NPDES permit, it has authority under the CWA to bring a suit against NUPEC. The CWA authorizes states to set more stringent limitations than federal standards. In addition, the CWA specifically puts citizen suits in the jurisdiction of federal courts. Therefore, citizen suits are allowed to enforce such conditions when they are included on an NPDES permit. The district court erred in concluding that such a

result would violate the principles of federalism. Consequently, NUFF should be allowed to enforce against NUPEC's violations of the summer-time flow limitations on its NPDES permit. On the other hand, permit limitations that fall within the authority of the CWA and EPA regulations are beyond the scope of the CWA. Because such limitations are not authorized by the CWA, citizens cannot use the citizen suits provision of the CWA to enforce against violations in federal court. Citizen suits should be precluded from enforcing such conditions on an NPDES permit. The district court correctly concluded that such a result would violate the principle of federalism. NUFF should not be allowed to enforce against NUPEC's violations of its intake limitations on its NPDES permit.

Third, the district court erred in holding that NUFF's citizen suit is barred by New Union's enforcement measures. Under the CWA, citizen suits are only barred when: (1) the state has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under § 1319(g) or comparable state law, or (2) the State has commenced and is diligently prosecuting an action under a State law comparable to § 1319(g)(6). § 1319(g)(6). As NUDNR has not assessed any penalties against NUPEC's frequent violations of its flow and discharge permit limitations and is not diligently prosecuting these violations, New Union's enforcement measures cannot preempt NUFF's citizen suit seeking to penalize NUPEC for its violations of its flow and discharge limitations. This court should reverse the district court's holding accordingly.

The district court was also incorrect in refusing to allow NUFF to seek injunctive relief against future violations of NUPEC's permit limitations. The only provisions in the CWA that bar citizen suits preempt citizens from seeking "civil penalties" when the state has already sought penalties, but do not preclude citizens from seeking injunctive relief for these same violations. *See* § 1319(g)(6)(A). As mentioned, NUDNR has not assessed any penalties for NUPEC's flow and discharge violations. Thus, even if NUFF is not allowed to penalize NUPEC civilly, it should be allowed to seek an injunction to enjoin NUPEC from further violations of its flow and discharge limitations.

And fourth, EPA urges the court to reverse the District Court's decision that multiple violations caused by a single act constitute a singe violation of its NPDES permit. Although the discharge limitations are duplications of flow limitations, the

goals of the CWA and Congress allow a court to impose penalties for both violations to aid in deterring NUPEC from future violations. Moreover, nothing in the language of § 1319(d) suggests that the flow and discharge limitations should be treated as a single violation because they are duplications. The only exception in § 1319(d) that would allow multiple violations caused by a single act to be collapsed into a single violation for penalty purposes, the "single operational upset" defense, does not apply to NUPEC's situation. Finally, NUPEC's reliance on *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542 (E.D.Vir. 1985), to establish that it cannot be penalized for both violations is unfounded. In that case, the court relied on the now-outdated 1985 version of § 1319(d) and never expressly prohibited the assessment of penalties for multiple violations caused by a single act.

ARGUMENT

I. STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment de novo. *Botosan v. Paul McNally Realty*, 216 F.3d 827, 830 (9th Cir. 2000); *Wilkins v. Jakeway*, 183 F.3d 528, 531 (6th Cir. 1999) (citing *J.Z.G. Resources, Inc., v. Shelby Ins. Co.*, 84 F.3d 211, 213 (6th Cir. 1996). "[S]ummary judgment may be granted only when there is no genuine issue of material fact." Fed. R. Civ. P. 56(c); *Wilkins*, 183 F.3d at 532 (citation omitted). The burden is on the moving party to demonstrate the absence of a factual issue in dispute. *Wilkins*, 183 F.3d at 532 (citation omitted). The facts are to be examined and reasonable inferences drawn in a *light most favorable to the non-moving party. Butler v. City of Prairie Vill.*, 172 F.3d 736, 745 (10th Cir. 1999). The role of the court is not to "weight the evidence or determine the truth of the matter but only determine whether is a genuine issue for trial." *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994).

II. NUPEC'S SUMMER-TIME FLOW LIMITATIONS ARE MORE STRINGENT THAN THE CWA, ITS DISCHARGE LIMITATIONS ARE DUPLICATIONS OF FLOW LIMITATIONS, AND ITS INTAKE LIMITATIONS ARE BEYOND THE SCOPE OF THE CWA

The district court held that intake and non-contact cooling water discharge are beyond the scope of the CWA, and that summer-time flow limitations are either more stringent than or beyond the scope of the CWA. (R. at 8). The district court was correct in finding that the intake limitations are beyond the scope of the CWA. However, the summer-time flow limitations are more stringent than the CWA, and the discharge limitations are duplications of flow limitations.

A. NUPEC's Summer-time Flow Limitations Are More Stringent Than the CWA

States are allowed to impose more stringent effluent limitations than the CWA requires. *See* § 1370; *see also United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 525 (4th Cir. 1999). EPA must submit new or modified permits to the state for § 1341 certification, which ensures that permits meet state water quality standards. *Ackels v. United States EPA*, 7 F.3d 862, 867 (9th Cir.

1993). The state may impose more stringent terms or conditions necessary to ensure that permits will meet state law water quality standards. *Id.* Federal requirements for the content of state water regulations are minimums only; state standards may be stricter. *See* § 1370; *City of Klamath Falls v. Envtl. Quality Comm'n*, 870 P.2d 825 (Or. 1994).

A state effluent limitation is more stringent than the CWA when a state imposes a standard that is more restrictive than a federal criterion. *See, e.g., Ashoff v. Ukiah*, 130 F.3d 409, 413 (9th Cir. 1997) (stating, in the context of Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* (1976), that a state methane standard of ten percent is more stringent than a federal criterion of twenty-five percent). In *Smithfield*, Virginia promulgated a regulation requiring that NPDES permits for certain facilities be modified to allow a monthly average phosphorous effluent limitation of 2.0 milligrams per liter. 191 F.3d at 520. This new limitation significantly reduced the amount of phosphorous that permit holders could discharge under the old NPDES permits. *Id.* The district court found that this new limitation was more stringent than the CWA. *See id.* at 526. Similarly, in *Ackels*, an NPDES permit issued to placer miners included arsenic limitations set to meet state water quality criteria. 7 F.3d at 866. Because the CWA requires that permits meet state water quality criteria for arsenic, the permit followed the relevant state standard of requiring that streams used in mining must be clean enough to provide a source of drinking water. *Id.* This limitation was more stringent than what EPA required. *See id.* at 867.

EPA determined that the CWA requires a flow limitation on NUPEC's Outfall 001 of 4 mgd. (*See* Ex. 2.) The agency calculated this limitation according to 40 C.F.R § 122.45(b)(2)(i) (2000), which states that effluent limitations and discharge conditions should be calculated based upon actual measures of production, and according to 40 C.F.R. § 423.13 (2000) which imposes mass limitations by multiplying flow by the concentrations of pollutants limited in the Steam Electric Effluent Guidelines. (*See* Ex. 2.) In its § 1341 certification, NUDNR reduced these limitations to 3 mgd to ensure fish propagation during summer months. *Id.* Therefore, because this effluent limitation is more restrictive than what EPA believes the CWA requires, NUPEC's summer-time flow limitations are more stringent than the CWA. *See Smithfield*, 191 F.3d at 520.

NUPEC argues that the summer-time flow limitations are beyond the scope of the CWA because NUDNR's purpose in including these limitations in its § 401 certification was to limit the amount of water that NUPEC could withdraw from the river. (R. at 7.) This argument is unfounded because NUDNR's reasons for imposing the more stringent effluent limitations are irrelevant if the standard is more stringent than what the CWA requires. *See City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996). States have an inherent right under § 1370 to impose standards or limits that are more stringent than those imposed by the federal government. *Id.* Section 1370 states:

> [N]othing in this chapter shall (1) preclude or deny the right of any State . . . to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation . . . is in effect under this chapter, such State . . . may not adopt or enforce any effluent limitation, or other limitation . . . which is less stringent than the effluent limitation, or other limitation . . . under this chapter. . .

§ 1370. Moreover, EPA only reviews state water quality standards to determine if they are stringent enough to comply with EPA's recommended standards and criteria. *Browner*, 97 F.3d at 426. Thus, neither the CWA nor EPA inquires as to a state's reasons for imposing more stringent limitations than the CWA requires. Therefore, NUDNR's reasons for imposing the more stringent flow limitations are immaterial. Consequently, contrary to the district court's holding, the summer-time flow limitations are only more stringent than the CWA.

B. NUPEC's Discharge Limitations Are Duplications of Flow Limitations

Both the flow and discharge limitations are parameters imposed on Outfall 001. (*See* Ex. 1.) The permit for Outfall 001 authorizes the permitee "to discharge spent non-contact cooling water from Outfall 001 to the New Union River. Such discharge shall be limited and monitored by the permitee . . . ." *Id.* Thus, both the flow and discharge limitations apply to spent non-contact cooling water. *See id.* Additionally, both limitations are equal in magnitude: 4 mgd during most of the year, and 3 mgd during the summer. *See id.* Because the permit applies both of these param-

eters to the same outfall, the parameters correspond to the same discharge. *See id.* Consequently, the limitations are identical.

NUPEC's contention that the discharge limitations are beyond the scope of the CWA is without merit even if the discharge limitations are not duplications of flow limitations. The release of warmed water at the end of a cooling system is a thermal discharge. *See Cent. Hudson Gas & Electric Corp. v. United States EPA*, 587 F.2d 549, 552 (2d Cir. 1978). Because the CWA defines heat as a pollutant, thermal discharges are within the scope of the CWA. *See* 33 U.S.C. § 1362(6) (1994); *see also Appalachian Power Co. v. Train*, 545 F.2d 1351, 1356 (4th Cir. 1976). Thus, the district court erred in finding that spent cooling water discharge limitations are beyond the scope of the CWA, when in fact they are within the scope of the CWA and are duplications of flow limitations.

C. Intake Limitations Are Beyond the Scope of the CWA

The regulated activity in the CWA is the discharge of pollutants into "waters of the United States." 33 U.S.C. §§ 1311(a) (1994), 1362(7) & (12). The withdrawal of water is not a discharge of pollution under the CWA. *See North Carolina v. Fed. Energy Regulatory Comm'n*, 112 F.3d 1175, 1187 (D.C. Cir. 1997); *see also Colorado Wild, Inc. v. United States Forest Serv.*, 122 F. Supp.2d 1190, 1193 (D. Colo. 2000). Moreover, because the CWA defines an "effluent limitation" as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources . . . ," 33 U.S.C. § 1362(11), NUPEC's intake limitations are not effluent limitations, unlike the summer-time flow limitations. *See also Friends of the Earth v. United States EPA*, 333 F.3d 184, 190 (D.C. Cir. 2003) (stating that effluent limitations are restrictions on discharges from point sources). Furthermore, NUPEC's intake limitations are beyond the scope of the CWA because (a) the CWA does not require the regulation of intakes; and (b) intake limitations are inconsistent with the Act's definition of more stringent state limitations.

1. The CWA does not require the regulation of intakes

Courts have held that the CWA does not require the regulation of intakes. *Fed. Energy Regulatory Comm'n*, 112 F.2d at 1189; *Colorado Wild*, 122 F. Supp. 2d 1190, 1194 (D. Colo. 2000). In *Federal Energy Regulatory Commission*, the court concluded

that the withdrawal of water from Lake Gaston was not an activity that resulted in a discharge for the purposes of § 1341 of the CWA. 112 F.2d at 1189. Similarly, in *Colorado Wild* the court found that the Forest Service did not violate the CWA by allowing withdrawals of water for use in creating artificial snow at a ski resort. 122 F. Supp. 2d at 1194. The court reached this conclusion even though the resort's withdrawal of water would increase the concentration of pollutants in the river. *Id.* As in the aforementioned cases, NUPEC's cooling system is a withdrawal of water and, as in *Colorado Wild*, this withdrawal of water could damage the environment. *See id.*; *Fed. Energy Regulatory Comm'n*, 112 F.2d at 1189. Cooling water intakes harm the environment by impingement of fish and entrainment of small organisms. *See Cronin v. Browner*, 90 F. Supp. 2d 364, 366 (S.D.N.Y. 2000). As in *Federal Energy Regulatory Commission* and *Colorado Wild*, the CWA does not require the regulation of NUPEC's intake of water from the New Union River.

2. Intake limitations are inconsistent with the CWA's definition of more stringent state standards

Additionally, NUPEC's intake limitations are inconsistent with CWA's definition of more stringent state limitations. More stringent state limitations in furtherance of the CWA's objective include "those necessary to meet water quality standards, treatment standards, or schedules of compliance." § 1311(b)(1)(C); *see also Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta*, 953 F. Supp. 1541, 1552 (N.D. Ga. 1996). Of these three elements, an intake limitation could only be a water quality standard. *See* § 1311(b)(1)(C). However, water quality standards must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A) (1994). However, an intake limitation enforces neither of these two components of water quality standards.

First, intake limitations will not protect New Union River's designated use for fish propagation. (*See* Ex. 2.) In *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994), the Court concluded that a state could issue minimum stream flow requirements to enforce a designated use of fish propagation contained in a state water quality standard. *See* 511 U.S. at 714, 723. However, intake limitations do not address designated uses, as minimum stream flow requirements do. Whereas a

minimum stream flow requirement applies directly to the body of water itself and defines the necessary water quality, an intake requirement defines what a permit holder may do with the body of water, without respect to how it affects that water. For example, during times of low stream flow, NUPEC could withdraw the maximum amount of water allowed by its intake requirement, which could potentially reduce the flow of water in New Union River below the minimum required to ensure fish propagation. On the other hand, if NUPEC's permit included a minimum stream flow requirement, NUPEC could never lower the level of the stream flow below the minimum required to ensure fish propagation. Thus, NUPEC's intake limitation is insufficient to protect a designated use of the river.

Second, the intake limitations do not address water quality criteria. Water quality criteria are convenient enforcement mechanisms for identifying minimum water conditions which will generally achieve the requisite water quality. *See id.* at 716. As discussed in the analysis for designated uses, *supra*, NUPEC's intake limitations are too disconnected from the state of water in the New Union River to address water quality conditions. Thus, NUPEC's intake limitations address neither component of water quality standards. *See* § 1313(c)(2)(A). Because the intake limitations do not address "water quality standards, treatment standards, or schedules of compliance," they do not meet the requirements for more stringent state standards. *See* 33 U.S.C. § 1311(b)(1)(C); *see also Upper Chattahoochee*, 953 F. Supp. at 1552.

Because NUPEC's intake limitations are neither required by the CWA nor consistent with CWA's definition of more stringent state limitations, the district court correctly held that intake limitations are beyond the scope of the CWA.

III. NUFF MAY BRING A CITIZEN SUIT AGAINST NUPEC TO ENFORCE SUMMER-TIME FLOW LIMITATIONS INCLUDED IN AN NPDES PERMIT WHERE THOSE LIMITATIONS ARE MORE STRINGENT THAN THE CWA, BUT NUFF MAY NOT ENFORCE NEW UNION'S INTAKE LIMITATIONS INCLUDED IN THE SAME PERMIT BECAUSE INTAKE LIMITATIONS ARE BEYOND THE SCOPE OF THE CWA

The CWA grants citizens the authority to sue for violations of state limitations on an NPDES permit. *See* § 1341; § 1370; § 1311(b)(1)(C). The district court erred in barring citizen suits from enforcing state limitations on an NPDES permit that are more stringent than the CWA, but correctly found that citizen suits are precluded from enforcing state limitations that are beyond the scope of the CWA. (*See* R. at 8).

A. NUFF Can Bring Suit Against NUPEC for Violations of NUDNR-Imposed Summer-Time Flow Limitations in Its NPDES Permit Because Those Conditions are More Stringent Than the CWA

As NUFF is adversely affected by NUPEC's violations of its NPDES permit, it has authority under the CWA to bring a suit against NUPEC. *See* § 1365. The CWA authorizes states to set more stringent limitations than federal standards. *See* §§ 1311(b)(1)(C), 1341, 1370. Therefore, citizen suits are allowed to enforce such conditions when they are included on an NPDES permit. The district court erred in concluding that such a result would violate the principles of federalism.

1. NUFF is a "citizen" for the purposes of bringing a citizen suit under the CWA

"A suit to enforce any limitation in an NPDES permit may be brought by any 'citizen,' defined as 'a person or persons having an interest which is or may be adversely affected.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 174 (2000) (hereinafter "*Laidlaw I*") (citing § 1365(a),(g)). NUFF is a not-for-profit fisherman's organization organized under the laws of New Union. (R. at 3). NUDNR set summer-time flow limitations on NUPEC's NPDES permit in order to assure fish propagation dur-

ing the dry summer months. (Ex. 2.) Because NUPEC's past and continued violations of its summer-time flow limitations would probably affect fish propagation in the New Union River, *see id.*, NUFF qualifies as a "citizen" and may bring a citizen suit to enforce NUPEC's permit conditions. *See* § 1365(a), (g).

2. Where a state's limitations are included in an NPDES permit under the CWA, those limitations may be enforced by citizens if they are more stringent than the CWA

Citizens can enforce violations of state limitations that are more stringent that the CWA. *Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy,* 305 F.3d 943, 956 (9th Cir. 2002) (citing *Ashoff,* 130 F.3d at 413). Both the statutory language and the legislative history of the citizen suit provision reflect "Congress' intention to grant *broad* authority for citizen enforcement." *Northwest Envtl. Advocates v. City of Portland,* 56 F.3d 979, 987 (9th Cir. 1995). Specifically, the Supreme Court has acknowledged citizen standing to enforce permit conditions based on both EPA-promulgated effluent limitations and state-established standards. *See* § 1365(f)(5-6); *EPA v. California,* 426 U.S. 200, 224-25 (1976). Courts have allowed citizen suits against a variety of state limitations on NPDES permits that are more stringent than the CWA, including water quality standards limiting discharge of sewage, *Northwest,* 56 F.3d at 990, manure effluent limitations, *Cmty. Ass'n for Restoration of the Env't v. Sid Koopman.*, 54 F. Supp. 2d 976, 982 (E.D. Wa. 1999), phosphorous effluent limitations, *Upper Chattahoochee*, 953 F. Supp. at 1553, and construction schedules, *Locust Lane v. Swatara Township Auth.,* 636 F. Supp. 534, 539 (M.D. Pa. 1986) (rejecting an attempt "to impose a limitation on § 1365 where one is neither supported by the language nor the legislative history."). *See* § 1311(b)(1)(C) (stating that more stringent state limitations include those "necessary to meet water quality standards, treatment standards, or schedules of compliance."). Such an interpretation furthers the CWA's goals of restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters" through increased enforcement of CWA-authorized permits. § 1251.

3. New Union's summer-time flow limitations on NUPEC's NPDES permit are more stringent than the CWA's limitations

NUDNR's summer-time flow limitations are more stringent than the CWA.[1] EPA was required to include these conditions on NUPEC's NPDES permit because NUDNR set these condition as part of its § 1341 certification. *United States v. Marathon Dev. Corp.* 867 F.2d 96, 99 (1st Cir. 1989). Just as citizen suits were allowed against more stringent state limitations on an NPDES permit in *Northwest, Koopman, Upper Chattahoochee* and *Locust Lane*, NUFF should be allowed to enforce against NUPEC's violations on NUDNR's summer-time flow limitations on its NPDES permit.

4. Allowing citizen suits to enforce an NPDES permit against state limitations that are more stringent than the CWA does not violate the principle of federalism

For the purposes of the CWA, Congress established a distinctive variety of "cooperative federalism," a "partnership between the States and the Federal Government." *DOE v. Ohio*, 503 U.S. 607, 633 (1992). For example, "federal regulations establish the minimum size of the penalties and mandate how, and when, they must be imposed." *Id.* (citing 40 C.F.R. §§ 123.27(a)(3)(i), 123.27(b)(1), 123.27(c) (1991)). These regulations can be implemented through either an EPA or state permitting program. § 1342. Compliance with a state-issued NPDES permit is deemed compliance with the CWA. § 1342(k); *DOE*, 503 U.S. at 634.

The CWA expressly authorizes federal jurisdiction for all citizen suits, § 1365(a)(2), and also encourages states to set limitations that are more stringent than the CWA. *See* §§ 1251(b), 1311(b)(1)(C), 1370; *see Smithfield,* 191 F.3d at 525. To allow citizens to enforce such limitations in federal courts does not overstep Congress' boundaries separating federal and state powers. *See Save Our Summers v. Wash. State Dep't of Ecology*, 132 F. Supp. 2d 896, 905 (E.D. Wash. 1999) (stating that regulation of air pollution under preexisting statutory framework pursuant to the Clean Air Act, 42 U.S.C. § 7401 *et seq.* (1970), such as citizen suits, raises only minimal federalism concerns because Congress has already struck a balance between federal and state governments); S.

1. For further discussion, *see* Part I(A), *supra*.

Rep. No. 92-414, at 79 (1972) (stating that the citizen suit provision of the CWA is modeled on that of the Clean Air Act). Consequently, the district court erred in barring citizen suits against state limitations on an NPDES permit that are more stringent than the CWA because of federalism concerns. (*See* R. at 8.)

B. NUFF cannot bring a citizen suit against NUPEC for violations of NUDNR-imposed intake limitations on its NPDES permit because those conditions are beyond the scope of the CWA

Although Congress intended to grant broad authority to citizens to enforce federal permits, *Northwest,* 56 F.3d at 987, the scope of citizen suits is not without bounds. Whereas the CWA and EPA regulations specifically allow states to set more stringent limitations, *see* §§ 1311(b)(1)(C), 1370; 40 C.F.R. 123.1(i)(1) (2000), state-imposed limitations that do not fall within the authority of the federal statute and regulations are beyond the scope of the CWA, *see* 40 C.F.R. 123.1(i)(2). Citizen suits should be precluded from enforcing such conditions on an NPDES permit. The district court correctly concluded that such a result would violate the principle of federalism.

1. Where a state's limitations are included in an NPDES permit under the CWA, those limitations may not be enforced by citizens if they are beyond the scope of the CWA

NPDES permit conditions that mandate a greater scope of coverage than that required by the CWA and its implementing regulations are not enforceable by a citizen suit. *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.,* 12 F.3d 353, 359 (2d Cir. 1993). Courts have applied *Kodak* to forbid citizen enforcement of a variety of state limitations on NPDES permits. *See, e.g., id.* at 357, 360 (dismissing citizen suit because pollutants discharged were not listed in EPA's Toxic Substances Act Chemical Substance Inventory); *Long Island Soundkeeper Fund v. New York City Dep't of Envt.*, 27 F. Supp. 2d 380, 386 (E.D.N.Y. 1998) (holding that citizens could not enforce settleable solids limitations on a state-issued permit because those limitations were not required by the CWA or EPA regulations); *Culbertson v. Coats,* 913 F. Supp. 1572, 1582 (N.D. Ga. 1995) (holding that citizens could not bring suit under the CWA for failure conduct a fish study because the biomonitoring requirement on the state-issued permit

was not "so expansive as to include" the state administrative order requiring a fish study).

Alternatively, the Ninth Circuit allows citizens to enforce any conditions of a permit that a state may enforce. *Northwest*, 56 F.3d at 989. Theoretically, under this regime, citizens can bring suits against violations of any state limitation on an NPDES permit, including those that are beyond the scope of the CWA. *See id.* However, courts following the *Northwest* decision have applied a narrow construction of its holding, that the CWA authorizes "citizens to enforce permit conditions in terms of state *water quality standards*" on an NPDES permit. *Id.* at 990 (emphasis added). Water quality standards explicitly fall within the CWA's definition of what constitutes a more stringent state limitation. *See* § 1311(b)(1)(C); *see, e.g., Gill v. LDI*, 19 F. Supp. 2d 1188, 1194-95 (W.D. Wash. 1998) (allowing citizens to enforce state-imposed turbidity standards on an NPDES permit as water quality standards); *Swartz v. Beach*, 229 F. Supp. 2d 1239, 1272 (D. Wyo. 2002) (allowing citizens to enforce coal bed methane standards on an NPDES permit as a water quality standard).

This court should not broadly construe *Northwest* to allow citizen suits against state limitations on an NPDES permit that are beyond the scope of the CWA. If *Northwest* and *Swartz* were heard under a *Kodak* standard, the courts would have reached the same legal conclusion because the water quality standards in those cases were more stringent than the CWA, and citizens are allowed to enforce against violations of such conditions. *See* § 1311(b)(1)(C). Cases such as *Long Island Soundkeeper* and *Culbertson,* which were decided under a *Kodak* standard, may have come to different legal conclusions had those courts applied *Northwest* broadly to allow citizens to bring suit against violations of any condition enforceable by a state. Such a result would be contrary to CWA jurisprudence. Therefore, *Kodak* is the proper standard of analysis.[2]

2. Intake limitations are not water quality standards, as is discussed in Part I(C), *supra*. Therefore, even using a narrow reading of *Northwest* to apply only to water quality standards, citizens would still be precluded from bringing suit against intake violations.

2. New Union's intake limitations, which were included in NUPEC's NPDES permit via a § 1341 certification, are beyond the scope of the CWA

Like the settleable solids limitation in *Long Island Soundkeeper* and the fish study in *Culbertson*, the intake limitations on NUPEC's NPDES permit are not required by the CWA or its implementing regulations, and thus are beyond the scope of the CWA.[3] Although they were incorporated under the same § 1341 certification as the summer-time flow limitations, which may be enforced by citizen suits, citizens cannot bring suit to enforce intake limitations as a result of the *Kodak* standard. Therefore, NUFF should not be allowed to bring suit against NUPEC for violations of this condition in its NPDES permit.

The *Kodak* court rested its decision on an EPA regulation governing NPDES permits, which states "[i]f an approved State program has a greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program." 40 C.F.R. 123.1(i)(2); *See Kodak*, 12 F.3d at 359. The holding in *Kodak* should also apply to EPA-issued NPDES permits such as NUPEC's. Discharge of a pollutant without an NPDES permit is a violation of the CWA. § 1311; *Henry Bosma Dairy,* 305 F.3d at 946. Congress authorized EPA to issue NPDES permits, but EPA will suspend issuing permits if a state establishes its own comparable, EPA-approved permitting program. § 1342; *Piney Run Pres. Ass'n v. County Comm'rs*, 268 F.3d 255, 265 (4th Cir. 2001). These two permitting programs and permits are functionally identical: they are both promulgated under the authority of the same section of the CWA to further its goals. *See* § 1342.

EPA cannot issue an NPDES permit without state certification. *Marathon,* 867 F.2d at 99; *see* § 1341. Thus, states have an integral role in determining restrictions on an NPDES permit in both EPA and state permitting regimes. *See* §§ 1251(b), 1341. The state can impose identical conditions under either type of permit. *See* § 1341. As a result, *Kodak* should not be construed to treat identical, state-imposed conditions as "beyond the scope" of the CWA on a state permit, but to find the opposite on an EPA permit. Such an interpretation would render state-issued permits second-rate because state limitations would not have the same force of law under the parallel permitting mechanisms and would thus discourage states from assuming permitting responsibilities.

3. For a more detailed discussion, *see* Part I(C), *supra*.

See Ashoff, 130 F.3d at 413. This result would also be contrary to the CWA's policy that states have the primary role in pollution control. *See* § 1251(b). Therefore, *Kodak* should apply to both EPA- and state-issued permits equally and preclude NUFF from bringing suit against NUPEC's violations of NUDNR's intake limitations on its NPDES permit.

3. Allowing citizen suits to enforce an NPDES permit against state limitations that are beyond the scope of the CWA would violate the principle of federalism.

State limitations that go beyond the scope of the CWA are *qualitatively* different than federal requirements. They touch upon subjects that the CWA is without authority to regulate. EPA cannot review these state requirements. *Roosevelt Campobello Int'l Park Com. v. United States EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982). It may only include the state limitations on an NPDES permit, *see Marathon*, 867 F.2d at 99; § 1341, or refuse to issue the permit, § 1342(d)(2). Without pendent jurisdiction, other violations on NPDES permit conditions or other means of obtaining federal jurisdiction, a citizen should not be allowed to bring suit in federal court for a violation of a state limitation that is beyond the scope of the CWA under that statute's authority. *See Roosevelt*, 685 F.2d at 1056. Just as state courts are the proper venue to review such requirements, they are also the proper venue to enforce such requirements. *See id.* It is possible for an NPDES permit holder to be compliant with all permit requirements authorized by the CWA and to only be in violation of state limitations that are beyond the scope of the CWA. Enforcement of such a violation in federal court would constitute unjustified federal enforcement of state law. The district court correctly barred NUFF from bringing suit against NUPEC for violations of intake violations on its NPDES permit because those state-imposed limitations are beyond the scope of the CWA.

IV. WHEN A STATE ASSESSES PENALTIES FOR PERMIT VIOLATIONS UNDER STATE AUTHORITY COMPARABLE TO 33 U.S.C. § 1319(g)(6), CITIZENS ARE NOT BARRED FROM SEEKING PENALITIES FOR OTHER VIOLATIONS AND ARE NOT BARRED FROM SEEKING INJUNCTIVE RELIEF

The district court was incorrect in holding that NUFF is barred from seeking penalties for NUPEC's flow and discharge violations and that NUFF is barred from seeing an injunction against future violations. NUFF should be allowed to seek these civil penalties and injunctions.

The holder of a state NPDES permit is subject to administrative, civil and criminal sanctions for failure to comply with the conditions of its permit. §§ 1319, 1342(b)(7). Under the CWA, states have the primary responsibility for preventing, reducing and eliminating pollution. § 1251(b). When drafting the CWA, Congress intended to "recognize, preserve and protect" that right and responsibility. *Id.* Thus, citizen suits are "meant to supplement rather than to supplant governmental action," *Gwaltney of Smithfield, Ltd., v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987), and are only allowed when the government fails to exercise its enforcement responsibility, *North & South Rivers Watershed Assn., Inc. v. Town of Scituate*, 949 F.2d 552, 558 (1st Cir. 1992).

Congress intended to permit citizen suits against any person in violation of the conditions of an effluent standard or limitation, as long as the state is enforcing "expeditiously and vigorously." S. Rep. No. 92-414, at 3730 (1971); *see* § 1365(a)(1). According to the language of the CWA, citizen suits are only barred when: (1) the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under § 1319(g) or comparable state law, or (2) the State has commenced and is diligently prosecuting an action under a State law comparable to § 1319(g)(6). § 1319(g)(6). Because New Union does not meet either requirement, the state cannot bar NUFF's citizen suit, which is necessary to supplement the state's enforcement shortcomings.

A. New Union Has Only Assessed Nominal Penalties for NUPEC's Intake Violations, and Has Not Assessed Any Penalties Against Violations of Flow or Discharge.

Citizen suits are meant to supplement and not supplant governmental enforcement, so a citizen suit will be barred if the state is already enforcing an action. § 1365(a)(1). "The focus of the statutory bar to citizen's suits is . . . whether corrective action already taken and diligently pursued by the government seeks to remedy the same violations as duplicative civilian action." *Scituate*, 949 F.2d at 556 (finding that the state agency was already acting to correct the violations upon which the citizen-plaintiffs focused their action). Citizen suits are barred in such circumstances because duplicative enforcement actions do not add to the compliance actions that have already been initiated, and therefore they do not further the underlying goal of all actions brought under the CWA. *Id.*

Section 1319(g)(6) mandates that citizen suits are barred if the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under § 1319(g) or comparable state law. Although "NUDNR issued final penalty assessment orders, not subject to further judicial review, for NUPEC's intake violations during the relevant September to May periods . . . ," NUDNR has not assessed any penalties against violations of limitations on flow or discharge. (R. at 9).

In addition to the fact that NUDNR only enforced a minority of NUPEC's violations, the final penalty assessment orders that NUDNR has issued (for intake violations during the September to May time periods only) are inappropriately small. While states have discretion in working out the details of their enforcement programs, *Ark. Wildlife Fed'n v. ICI Ams., Inc.*, 29 F.3d 376, 397 (8th Cir. 1993), the methods of enforcement should be effective. Since its permit requirements were last updated in July 1999, NUPEC has violated its intake, flow and cooling water discharge permit limitations "*approximately half the time* during each year" for the last *four years*. (R. at 4) (emphasis added). NUPEC has also exceeded all three permit limitations "*all of the time* during

the dry summer season each year" for the last four summers. (R. at 4, 5) (emphasis added).[4]

Under § 1319(d), civil penalties may be imposed up to $25,000 per violation per day. § 1319(d). Thus, NUPEC could have been penalized up to $75,000 per *day* for many days during the past four years, as a result of its regular, egregious pollution.[5] In response to NUPEC's four years of regular and frequent non-compliance, NUDNR only assessed a relatively modest penalty of $1,000 per *month* for the months NUPEC polluted beyond its limitations. (R. at 4.) NUPEC's systematic violations of its various permit limitations for the last four years, despite these $1,000-per-month penalties, demonstrate that the enforcement methods used thus far have been ineffective in deterring NUPEC's permit violations. The CWA provides for much larger penalties, yet New Union has not once increased the amount NUPEC is penalized.

Moreover, NUDNR's modest enforcement efforts have not furthered the CWA's purpose. If NUPEC is allowed to hide behind New Union's insufficient enforcement measures, the CWA is doomed to a "race to the bottom," whereby polluting manufacturers will flock to states like New Union that are known for lax environmental enforcement – and the CWA's purpose will be completely undermined. In order to deter NUPEC from further pollution violations and to preserve the CWA from this fate, NUFF should be allowed to seek civil penalties against NUPEC's flow and discharge limit violations.

B. New Union Has Not Commenced and Diligently Prosecuted Any Violations of Flow or Discharge Limitations

Furthermore, NUFF's suit is not preempted by state enforcement because NUDNR has not commenced and diligently prosecuted NUPEC under a state law comparable to § 1319(g). § 1319(g)(6)(A)(ii). States may "commence" action by either issuing a formal notice of violation or by entering into a consent administrative order with the defendant. *Ark. Wildlife Fed'n.* 29 F.3d at 379. Since NUDNR issued a final penalty assessment order against NUPEC, New Union can be said to have commenced an action against the polluter. However, NUFF is not precluded

4. For further discussion of why New Union may have stricter permit requirements in the summer than the winter, see discussion in Part I(A), *supra*.

5. *See* Part IV, *infra*, for further discussion of penalty assessment.

from bringing a citizen suit because New Union has not diligently enforced NUPEC's permit conditions. 33. U.S.C. §1319(g)(6).

A court must analyze a plaintiff's allegation of lack of diligence "against the background of agency action." S. Rep. No. 92-414, at 3746. Various factors have been considered when assessing whether a state's prosecution of a polluter is diligent, including: whether the penalty assessed was far more lenient than the maximum penalty, whether the state enforced its consent order, whether the state calculated and recovered the economic benefit the polluter received by its non-compliance, the history of pollution and the polluter's good-faith efforts to comply with the applicable requirements. § 1319(d); *Friends of the Earth v. Laidlaw Envtl. Servs.*, 890 F. Supp. 470, 490-91 (D.S.C. 1995) (hereinafter "*Laidlaw II*").

The state of Arkansas was found to have been "diligently prosecuting" an administrative penalty action when it required the polluter to correct its violations, imposed a compliance and reporting schedule, regularly assessed monetary penalties and reserved the right to assess additional penalties. *Ark. Wildlife Fed'n*, 29 F.3d at 380. Furthermore, the defendant in that case submitted and implemented a comprehensive remedial action plan, spent approximately $0.5 million making technological improvements, and ultimately came into compliance with the effluent standards under the NPDES permit. *Id.* In contrast, South Carolina did not diligently prosecute its action against Laidlaw when the polluter's economic benefit from noncompliance substantially exceeded the $100,000 fine imposed by the state agency; the state settled its suit against the polluter quickly, to the polluter's benefit and before citizens had the chance to intervene; and the state's consent order did not require compliance with the permit or stipulate penalties for future violations. *Laidlaw II*, 890 F. Supp. at 489-90.

NUDNR fulfilled none of the criteria set forth in § 1319(d) and *Laidlaw II*, so the state cannot be said to have been diligently enforcing NUPEC's permit limitations. New Union assessed penalties that are far more lenient than the maximum allowed, it did not enforce its consent order, and there is no indication that the state even calculated NUPEC's economic benefit received from non-compliance. At the same time, NUPEC has a long history of regular and egregious pollution and has no demonstrated good-faith effort to comply with its permit requirements. NUDNR has also failed to take any of the remedial steps mentioned in *Arkan-*

sas Wildlife Federation. *See* 29 F.3d at 380. There is no evidence that NUDNR has set forth its expectations of NUPEC in an administrative order, nor that NUPEC has been required to explain and demonstrate its plans to come into compliance with its permit limits. Instead, the only evidence shows that while NUPEC has consistently violated its effluent limitations for the past four years, NUDNR has assessed a relatively meager penalty which is exponentially smaller than what is provided for under the CWA, and NUDNR's enforcement measures have remained unaltered in the face of this continued noncompliance. NUDNR's lenient penalties and enforcement efforts more resemble the South Carolina agency's actions in *Laidlaw II*. In fact, although New Union has not determined the economic benefit to NUPEC from its noncompliance, NUDNR's penalties were far smaller than the $100,000 found insufficient by the *Laidlaw II* court. (*See* R. at 4). As in *Laidlaw II*, a half-hearted enforcement effort that has not led to any improvement cannot be considered "diligent enforcement."

C. Because New Union's Enforcement was Minimal and Incomplete, NUFF May Seek Penalties for the Flow and Discharge Violations, Which Were Not Penalized

Because New Union has not upheld its responsibility for preventing, reducing and eliminating pollution, it is appropriate that NUFF be permitted to file a citizen suit to supplement NUDNR's uncommitted efforts. NUDNR's enforcement plan has not addressed NUPEC's flow and discharge violations. (*See* R. at 9.) As a result, NUFF should be allowed to enforce all "ongoing" or "continuous" violations of flow and discharge, since penalties have not been assessed for these violations, nor are they being diligently prosecuted.[6]

Although Congress gave the primary responsibility of enforcement to the States, it also gave citizens "the right to seek vigorous enforcement action" "if the Federal, State and local agencies fail to exercise their enforcement responsibility." S. Rep. No. 92-414, at 3730. Congress has no interest in discouraging the important back-up function of citizen suits. *See Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985), quoting *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976) (referring to

6. Citizens may not obtain civil penalties for wholly past violations of the CWA. *Gwaltney*, 484 U.S. at 58.

the citizen suit provision of the Clean Air Act). When, as here, the citizen-plaintiffs are filling in the enforcement gaps and there is no overlap between what the citizen-plaintiffs and the state are attempting to enforce, the court should not fear that NUPEC will be subject to duplicative proceedings or that NUFF will undermine the State's enforcement efforts. *See Hudson River Fishermen's Assn. v. Westchester County*, 686 F. Supp. 1044, 1053-53 (S.D.N.Y. 1988).

D. Because New Union Is Not Enforcing NUPEC's Effluent Limitations, and NUPEC Shows No Indication of Future Compliance, NUFF May Seek Injunctive Relief Against Future Violations

The limitations on citizen suits set forth in § 1319(g)(6)(A) mandate that, if the state meets the requirements to preempt a citizen suit, the polluter "shall not be the subject of a *civil penalty action*." § 1319(g)(6)(A) (emphasis added). There are no mentioned limitations on injunctions. *See id.* Thus, according to the plain language of the statute, even if the court finds that NUFF is preempted from bringing a citizen suit for civil penalties under § 1365, it may still grant an injunction prohibiting NUPEC from future violations of its permit requirements. *See Citizens for a Better Env't-Cal. v. Union Oil Co.*, 83 F.3d 1111 (9th Cir. 1996) (reading § 1319(g) on its face to mean that a state penalty action only bars a citizen suit for penalties, not injunctive relief, and only bars relief for those same violations); *Coalition for a Liveable West Side v. New York City Dept. of Envt'l Protection*, 830 F. Supp. 194 (S.D.N.Y. 1993) (rejecting the *Scituate* court's "rewrite" of § 1319(g), and instead taking the statute to mean what it says).

"If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). The language of § 1319(g)(6)(A) is clear. *Citizens for a Better Env't*, 83 F.3d at 1118; *Natural Res. Def. Council, Inc. v. Fina Oil & Chem. Co.*, 806 F. Supp. 145, 146 (E.D. Tex. 1992). There is also no indication in the legislative history that Congress meant to extend the bar on citizen suits to injunctions. *See Citizens for a Better Env't*, 83 F.3d at 1118, citing *Wash. Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883, 885-886 (9th Cir. 1993); *see also* H.R. Conf. Rep. No. 99-1004, at 133 (1986).

Despite the statute's clear language and legislative history limiting preemptions to civil penalties, a few courts have muddled injunctive relief with the civil penalties provision in § 1319(g)(6). *See Scituate* at 557-558 (interpreting "any citizen may commence a civil action on his own behalf . . . " in § 1365(a) to include all remedies, injunctions as well as civil penalties); *Ark. Wildlife Fed'n*, 29 F.3d at 383 (following *Scituate*). However, the better approach is to follow the "clear and unambiguous" language of § 1319(g)(6), which only bars civil penalty actions, rather than to "redraft" the statute as the First Circuit has been accused of doing in *Scituate*. *Coalition for a Liveable West Side*, 830 F. Supp. at 197. In fact, Congress explicitly criticized the First Circuit's interpretation in Senate Report 257. S. Rep. No. 103-257, at 90 (1994) ("The broad interpretation of section 309(g)(6)(A) in the *Scituate* decision and other decisions undermines vigorous enforcement.")

The *Coalition for a Liveable West Side* court held that the CWA intended to permit a federal district court to consider a suit seeking injunctive relief in situations where "a permit holder may have paid the relevant civil penalties but continues to violate its permit limitations or where the injunctive relief obtained in the state proceedings turns out to be inadequate to address the violations at issue." 830 F. Supp. at 197. This is such a case. NUPEC has paid the penalties NUDNR has assessed, but NUPEC continues to violate its permit limitations. (R. at 4-5) The penalties assessed by New Union clearly are not doing enough to make NUPEC comply, and the state's inadequate enforcement has encouraged NUPEC's complacence. Injunctive relief against NUPEC is necessary to force this longtime polluter to comply with New Union's statutorily mandated permit requirements.

Furthermore, even if this court follows the First Circuit's interpretation of "civil penalties" to include injunctions, New Union still has not assessed penalties or even attempted compliance for the violations for which NUFF seeks an injunction. Because § 1319(g)(6)(A) only bars citizen suits from seeking civil penalties where the State has assessed penalties, this court should grant injunctive relief against any future violations of flow or spent cooling discharge violations.

The district court erred in holding that citizens are barred from seeking penalties for other violations and are barred from seeing an injunction against future violations. NUPEC should be penalized for its violations of its flow and discharge permit limitations, and enjoined from such future violations.

V. NUPEC MAY BE PENALIZED FOR MULTIPLE VIOLATIONS CAUSED BY A SINGLE ACT OR OMISSION

The district court erred in holding that NUPEC's multiple violations caused by a single act constitute a singe violation of its NPDES permit.

NUPEC may be penalized for multiple violations of permit conditions even if those violations were the result of a single act. A permit holder who "violates . . . *any permit condition or limitation* . . . shall be subject to a civil penalty not to exceed $25,000 per day *for each violation*." § 1319(d) (emphasis added). Because § 1319(d) allows a penalty to be imposed for the violation of any permit condition or limitation without further qualification, there is nothing in the language to suggest that NUPEC's discharge and flow limitations, which are listed as separate limitations on its permit, should be treated specially even though they are effectively duplications. *See* § 1319(d); (Ex. 1). In accordance with the goals of the CWA and Congress, the court may impose stiff penalties to deter future violations by penalizing NUPEC for both discharge and flow violations. Furthermore, the only provision in the statute that allows multiple violations to be collapsed into a single violation for penalty purposes, "a single operational upset" defense, does not apply to NUPEC. *See* § 1319(d). Finally, NUPEC's reliance on *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 611 F. Supp. 1542 (E.D.Vir. 1985), *aff'd*, 791 F.2d 304 (4th Cir. 1986), *rev'd on other grounds*, 484 U.S. 49 (1987) is unfounded.

A. Legislative Intent for Deterrence

The court may impose penalties for both discharge and flow violations, even though they are duplications, to further the legislative intent of deterring future violations of the CWA. Congress has found that civil penalties in the CWA not only promote immediate compliance by limiting the defendant's economic incentive to delay its compliance with its permit limits, but they also deter future violations. *Laidlaw I,* 528 U.S. at 185. "Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties." *Tull v. United States*, 481 U.S. 412, 422 (1987) (citing 123 Cong. Rec. 39191 (1977)). In *Smithfield*, the court found that counting all violations gives courts considerable flexibility in tailoring penalties

to the unique facts of a case. 191 F.3d at 527. Similarly, that court found that this method of counting creates influential incentives for polluters to comply with the terms of their permits. *Id.* at 527-28. As a result, the court could impose penalties for duplicate limitations such as discharge and flow as a means to deter future violations. *See id.* Moreover, if this court imposes penalties for both discharge and flow violations, NUPEC would have a greater incentive to follow its permit conditions. As discussed in Part III, *supra*, NUDNR's nominal penalties thus far have given NUPEC little incentive to comply in the future. Additionally, if the court imposes penalties for both violations, it will encourage other NPDES permit holders to comply with the conditions of their permits.

B. NUPEC May Not Assert a Single Operational Upset Defense

The only exception to § 1319(d) in which multiple simultaneous violations may be collapsed into a single violation for penalty purposes is the "single operational upset" defense. *See* § 1319(d). This exception states, "for purposes of this subsection, a *single operational upset* which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation." *Id.* (emphasis added). However, this language does not suggest that a single cause of multiple violations should always be treated as a single violation. *See Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 77 (3d Cir. 1990). In rejecting an NPDES permit holder's argument that a single discharge that violated multiple permit conditions should count as a single violation, the *Powell Duffryn* court found that a "single operational upset" was limited to unusual or extraordinary events. *See id.* The court adopted EPA's definition of a "single operation upset" as an "exceptional incident which causes simultaneous, unintentional, unknowing . . . , temporary noncompliance with more than one Clean Water Act effluent discharge pollutant parameter. Single operational upset does not include . . . noncompliance to the extent caused by improperly designed or inadequate treatment facilities." *Id.* The court also adopted EPA's definition of "extraordinary" as a "non-routine malfunctioning of an otherwise generally compliant facility." *Id.*

Consequently, the *Powell Duffryn* court found that the permit holder could not limit damages by a "single operational upset" defense because there was no evidence of such an extraordinary

event. *See id.* Similarly, in *United States v. Gulf States Steel, Inc.*, 54 F. Supp. 2d 1233 (N.D. Ala. 1999), the court rejected a permit holder's assertion of a single operational upset defense for violations that occurred during the summer. *Id.* at 1247. The court stated that "violations that are long standing, continuous, or recur every year at the same time are generally not considered to result from 'exceptional incidents' and such noncompliance is not merely 'temporary' and therefore such violations do not qualify as 'upsets'." *Id.*

NUPEC has not proven that its permit violations were the result of operational upsets. In the absence of unusual or extraordinary events, NUPEC is not entitled to a limitation of damages based upon the single operational upset defense. *See Powell Duffryn*, 913 F.2d at 77. Based upon NUDNR's reasons for not assessing penalties during summer months, it is most likely that NUPEC violated the permit conditions to satisfy the high demand for electricity. (*See* R. at 4). However, even if NUPEC were to argue that its violations were the result of extraordinary events, its violations are not entitled to a "single operational upset" defense because, as in *Gulf States*, its violations are long standing, continuous and recur every year at the same time. *See* 54 F. Supp. 2d. at 1247.

Because the single operational upset defense is the only part of § 1319(d) that addresses collapsing multiple violations into a single violation, there is nothing in the CWA to suggest that NUPEC should not be penalized for both discharge and flow violations. *See* § 1319(d).

C. *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.* Is Inapplicable

NUPEC may point to *Gwaltney II* to suggest that multiple violations from a single act should be treated as a single violation. In *Gwaltney II*, the court limited the penalties it imposed on an NPDES permit holder to $10,000 per day even though the holder violated more than one discharge limitation in the same day. 611 F. Supp. at 1555. The court relied on the language of the now-outdated 1985 version § 1319(d), which stated that "any person who violates . . . any permit condition or limitation . . . shall be subject to civil penalty not to exceed $10,000 *per day of such violation*." *See id.* at 1554-55 (emphasis added). Furthermore, though the permit holder violated both fecal coliform standards and minimum chlorine standards simultaneously, the court imposed penal-

ties only for the former because minimum chlorine standard violations could only harm the environment by causing fecal coliform violations. *See id.* at 1560.

Gwaltney II, however, is inapposite for two reasons. First, the court applied the now- outdated 1985 version of § 1319(d), which limited penalties to "$10,000 per day *of such violation*." *Id.* at 1554 (emphasis added). Because the current version of the statute limits penalties to "$25,000 per day *for each violation*," § 1319(d) (emphasis added), one cannot rely on *Gwaltney II* for an interpretation of maximum penalties because the current statute clearly limits penalties based upon the number of violations. *See Smithfield*, 191 F.3d at 527. Second, although the *Gwaltney II* court declined to impose penalties for both fecal coliform and minimum chlorine standard violations, the court never stated that it *could not* impose penalties for both. *See Gwaltney II*, 611 F. Supp. at 1560. Consequently, *Gwaltney II* does not prohibit the assessment of penalties for duplicate violations if doing so would have a beneficial deterrent effect. For these reasons, the *Gwaltney II* court's reasoning does not apply to NUPEC's situation.

For the previously stated reasons, the court may impose penalties for NUPEC's violations of discharge and flow even though they were caused by a single act. To deter NUPEC from future violations, which the legislature hoped to accomplish through harsh penalties, the court should impose penalties for both violations. Furthermore, the facts do not support a single operational upset defense, which is the only part of the statute to address such a matter. Thus, the district erred in holding that NUPEC's multiple violations caused by a single act constitute a singe violation of its NPDES permit. NUPEC should be penalized for both violations.

CONCLUSION

For the reasons stated above, EPA respectfully requests that this Court affirm in part and reverse in part the judgment of the district court.

Respectfully submitted,

Counsel for Intervenor,
United States Environmental Protection Agency

APPENDIX

RELEVANT PROVISIONS

STATUTES

CLEAN WATER ACT

33 U.S.C. § 1251 (1994): Congressional declaration of goals and policy

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

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

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

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

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

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, to plan the development and use

(including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water
It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1311 (1994): Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law
Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(b)(1)(C) (1994): Effluent limitations, timetable for achievement of objectives

Not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

33 U.S.C. § 1313(c)(2)(A) (1994): Water quality standards and implementation plans

Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, en-

hance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

33 U.S.C. § 1319 (1994): Enforcement

(d) Civil penalties; factors considered in determining amount
Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

33 U.S.C. § 1341 (1994): Certification

(a) Compliance with applicable requirements; application; procedures; license suspension
(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent

limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the im-

position of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water

quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification
Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

33 U.S.C. § 1342 (1994): National pollutant discharge elimination system

(a) Permits for discharge of pollutants
(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.
(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.
(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a

State permit program and permits issued thereunder under subsection (b) of this section.
(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.
(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

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

out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and
(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator
(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.
(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.
(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so

notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.
(4) Limitations on partial permit program returns and withdrawals.
A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of—
(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and
(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator
(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(k) Compliance with permits
Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) sec-

tion 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(*l*) Limitation on permit requirement
(1) Agricultural return flows
The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.
(2) Stormwater runoff from oil, gas, and mining operations
The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

33 U.S.C. § 1362 (1994): Definitions

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

33 U.S.C. § 1365 (1994): Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—
(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice
No action may be commenced—
(1) under subsection (a)(1) of this section—
(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or
(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.
(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected
(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such stan-

dard or limitation may be brought under this section only in the judicial district in which such source is located.
(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.
(3) Protection of interests of United States
Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs
The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted
Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation
For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title.

(g) "Citizen" defined

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors
A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

33 U.S.C. § 1370 (1994): State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

REGULATIONS

40 C.F.R § 122.45(b)(2)(i) (2000): Calculating NPDES permit conditions

Except in the case of POTWs or as provided in paragraph (b)(2)(ii) of this section, calculation of any permit limitations, standards, or prohibitions which are based on production (or other measure of operation) shall be based not upon the designed production capacity but rather upon a reasonable measure of actual production of the facility. For new sources or new dischargers, actual production

shall be estimated using projected production. The time period of the measure of production shall correspond to the time period of the calculated permit limitations; for example, monthly production shall be used to calculate average monthly discharge limitations.

40 C.F.R. § 123.1(i) (2000): Purpose and scope

(i) Nothing in this part precludes a State from:
(1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this part;
(2) Operating a program with a greater scope of coverage than that required under this part. If an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program.
Note: For example, if a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits.

40 CFR § 123.27(a)(3)(i) (1991): Requirements for enforcement authority

Civil penalties shall be recoverable for the violation of any NPDES permit condition; any NPDES filing requirement; any duty to allow or carry out inspection, entry or monitoring activities; or, any regulation or orders issued by the State Director. These penalties shall be assessable in at least the amount of $5,000 a day for each violation.

40 C.F.R. § 123.27(b)(1) (1991): Requirements for enforcement authority

The maximum civil penalty or criminal fine (as provided in paragraph (a)(3) of this section) shall be assessable for each instance of violation and, if the violation is continuous, shall be assessable up to the maximum amount for each day of violation.

40 C.F.R. § 123.27(c) (1991): Requirements for enforcement authority

A civil penalty assessed, sought, or agreed upon by the State Director under paragraph (a)(3) of this section shall be appropriate to the violation.
Note:—To the extent that State judgments or settlements provide penalties in amounts which EPA believes to be substantially inad-

equate in comparison to the amounts which EPA would require under similar facts, EPA, when authorized by the applicable statute, may commence separate actions for penalties.

Procedures for assessment by the State of the cost of investigations, inspections, or monitoring surveys which lead to the establishment of violations;

In addition to the requirements of this paragraph, the State may have other enforcement remedies. The following enforcement options, while not mandatory, are highly recommended:

Procedures which enable the State to assess or to sue any persons responsible for unauthorized activities for any expenses incurred by the State in removing, correcting, or terminating any adverse effects upon human health and the environment resulting from the unauthorized activity, whether or not accidental;

Procedures which enable the State to sue for compensation for any loss or destruction of wildlife, fish or aquatic life, or their habitat, and for any other damages caused by unauthorized activity, either to the State or to any residents of the State who are directly aggrieved by the unauthorized activity, or both; and

Procedures for the administrative assessment of penalties by the Director.

40 C.F.R. § 423.13 (2000): Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT)

Except as provided in 40 C.F.R. 125.30 – 125.32, any existing point source subject to this part must achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the best available technology economically achievable (BAT).

(a) There shall be no discharge of polychlorinated biphenyl compounds such as those commonly used for transformer fluid.

(b)(1) For any plant with a total rated electric generating capacity of 25 or more megawatts, the quantity of pollutants discharged in once through cooling water from each discharge point shall not exceed the quantity determined by multiplying the flow of once through cooling water from each discharge point times the concentration listed in the following table:

	BAT Effluent Limitations
Pollutant or pollutant property	Maximum concentration (mg/l)
Total residual chlorine	0.20

(2) Total residual chlorine may not be discharged from any single generating unit for more than two hours per day unless the discharger demonstrates to the permitting authority that discharge for more than two hours is required for macroinvertebrate control. Simultaneous multi-unit chlorination is permitted.

(c)(1) For any plant with a total rated generating capacity of less than 25 megawatts, the quantity of pollutants discharged in once through cooling water shall not exceed the quantity determined by multiplying the flow of once through cooling water sources times the concentration listed in the following table:

	BAT effluent limitations	
Pollutant or pollutant property	Maximum concentration (mg/l)	Average concentration (mg/l)
Free available chlorine	0.5	0.2

(2) Neither free available chlorine nor total residual chlorine may be discharged from any unit for more than two hours in any one day and not more than one unit in any plant may discharge free available or total residual chlorine at any one time unless the utility can demonstrate to the Regional Administrator or State, if the State has NPDES permit issuing authority, that the units in a particular location cannot operate at or below this level of chlorination.

(d)(1) The quantity of pollutants discharged in cooling tower blowdown shall not exceed the quantity determined by multiplying the flow of cooling tower blowdown times the concentration listed below:

	BAT effluent limitations	
Pollutant or pollutant property	Maximum concentration (mg/l)	Average concentration (mg/l)
Free available chlorine	0.5	0.2

Pollutant or pollutant property	Maximum for any 1 day - (mg/l)	Average of daily values for 30 consecutive days shall not exceed=(mg/l)
The 126 priority pollutants (Appendix A) contained in chemicals added for cooling tower maintenance, except:	( )	( )
Chromium, total	0.2	0.2
Zinc, total	1.0	1.0

[1] No detectable amount.

(2) Neither free available chlorine nor total residual chlorine may be discharged from any unit for more than two hours in any one day and not more than one unit in any plant may discharge free available or total residual chlorine at any one time unless the utility can demonstrate to the Regional Administrator or State, if the State has NPDES permit issuing authority, that the units in a particular location cannot operate at or below this level of chlorination.

(3) At the permitting authority's discretion, instead of the monitoring specified in 40 CFR 122.11(b) compliance with the limitations for the 126 priority pollutants in paragraph (d)(1) of this section may be determined by engineering calculations which demonstrate that the regulated pollutants are not detectable in the final discharge by the analytical methods in 40 CFR Part 136.

(e) The quantity of pollutants discharged in chemical metal cleaning wastes shall not exceed the quantity determined by multiplying the flow of chemical metal cleaning wastes times the concentration listed in the following table:

	BAT effluent limitations	
Pollutant or pollutant property	Maximum for any 1 day (mg/l)	Average of daily values for 30 consecutive days shall not exceed (mg/l)
Copper, total	1.0	1.0
Iron, total	1.0	1.0

(f) [Reserved—Nonchemical Metal Cleaning Wastes].
(g) At the permitting authority's discretion, the quantity of pollutant allowed to be discharged may be expressed as a concentration limitation instead of the mass based limitations specified in paragraphs (b) through (e) of this section. Concentration limitations shall be those concentrations specified in this section.
(h) In the event that waste streams from various sources are combined for treatment or discharge, the quantity of each pollutant or pollutant property controlled in paragraphs (a) through (g) of this section attributable to each controlled waste source shall not exceed the specified limitation for that waste source.

(The information collection requirements contained in paragraphs (d)(2) and (c)(2) were approved by the Office of Management and Budget under control number 2040-0040. The information collection requirements contained in paragraph (d)(3) were approved under control number 2040-0033.)