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

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FIFTEENTH ANNUAL PACE NATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

Judges' Bench Memorandum

2003 Judges' edition

Civ. App. No. 02-2003

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

UNITED STATES, Appellant,
and
STATE OF NEW UNION, Intervenor,
v.
GOLDTHUMB MINING CO., INC.,
Appellee.

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

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Executive Summary

Goldthumb Mining Company ("Goldthumb") has been discharging polluted wastewater from its gold mining operation into the Arroyo d'Oro, located in the State of New Union without a permit. The United States, on behalf of the Environmental Protection Agency ("EPA") brought an action under the Clean Water Act ("CWA") for Goldthumb's violations. The District Court granted Goldthumb's summary judgment motion, holding that the discharges were not regulated by the CWA and that EPA enforcement was precluded because of prior state enforcement actions for the same violations.

The United States and the State of New Union appeal the District Court's holding on the first issue, arguing that the discharges are within EPA's jurisdiction under the CWA. Goldthumb opposes the United States' and New Union's appeal for two reasons: first, Goldthumb argues that the CWA does not provide EPA with the authority to regulate the discharges into the arroyo when dry; and second, even if the CWA does confer this authority to the EPA, Congress exceeded its constitutional Commerce Clause jurisdiction in doing so. Because the District Court found EPA had exceeded its jurisdiction under the CWA, it did not reach the constitutional question. New Union parts company with the United States on the second issue for appeal, joining Goldthumb and maintaining that its prior enforcement actions against Goldthumb preclude further enforcement actions for the same violations by the United States. Goldthumb and New Union argue that CWA section 309(g)(6) deprives EPA of its enforcement authority because New Union had previously taken enforcement actions against the same violations. EPA argues that the CWA section 309(g)(6) preclusion does not apply under the present circumstances. This memorandum addresses the issues presented in this case and explores possible arguments of all parties.

The Clean Water Act prohibits the discharge of pollutants into navigable waters without a proper permit. Congress defines "navigable waters" as waters of the United States. EPA promulgated regulations further defining "waters of the United States." EPA requires National Pollutant Discharge Elimination System ("NPDES") permits, in accordance with the CWA, for discharges of pollutants into these waters, in which it believes the Arroyo d'Oro is included.

Goldthumb discharges mining waste into the Arroyo d'Oro only at times when the streambed is dry. The arroyo contains flowing water only after major storm events, which occur every few years. The Arroyo d'Oro is not itself navigable, nor is it a tributary to navigable water. However, the arroyo is an interstate stream, crossing the border between the State of New Union and the State of Progress, flowing into a three-acre pool, home to an endangered species in the State of Progress. This appeal must determine if Congress, pursuant to the CWA, conferred jurisdiction upon EPA to regulate discharges into the dry Arroyo d'Oro. Currently, EPA's definition of "waters of the United States" includes "interstate waters." As the administering agency of the CWA, EPA's interpretation of "waters of the United States" is afforded deference if this Court determines that Congress's definition is ambiguous and EPA's interpretation is reasonable.

If this Court finds that EPA has jurisdiction under the CWA to regulate Goldthumb's discharges into the Arroyo d'Oro, then this Court must also resolve the constitutional question, whether it is within Congress's Commerce Clause jurisdiction to regulate discharges into dry, interstate streambeds that flow intermittently. The Supreme Court has identified three types of activities that the Commerce Clause authorized Congress to regulate: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities having a substantial effect on interstate commerce. EPA's strongest argument, though not its sole argument, is that the discharges have a substantial effect on interstate commerce. This argument rests primarily on whether there is sufficient evidence demonstrating that the discharges are considered economic activities that have substantially impacted interstate commerce.

Beginning in 2000, the State of New Union issued two compliance orders, and has threatened to issue a third, for Goldthumb's discharges into the Arroyo d'Oro. The orders prohibited Goldthumb from discharging mining waste into the arroyo when it was wet and required Goldthumb to notify New Union when it was discharging waste into the arroyo when dry. This appeal must also determine whether New Union's enforcement actions bar EPA from bringing additional enforcement actions pursuant to CWA's enforcement authority.

In 1987, Congress amended the CWA and provided EPA with the authority to assess administrative penalties for CWA violations. The amendments included a provision, now found in section

309(g)(6), limiting additional penalty actions if the EPA or a state had previously assessed penalties for the same violations. Section 309(g)(6) has been interpreted differently by courts. Several circuits apply the 309 preclusion broadly, barring any subsequent enforcement action by EPA if a state has already taken enforcement measures. Other circuits apply the preclusion much more narrowly, applying the literal reading of the provision.

EPA has set forth three reasons for not precluding its current enforcement action: first, the preclusion only applies if the state is acting under a federally approved water pollution program comparable to the CWA; second, the state enforcement action must be pursuant to authority comparable to section 309(g) authority, which provides for administrative penalty assessments; and third, where the 309(g) preclusion would apply, it deprives EPA only of jurisdiction to seek the assessment of penalties and not to seek injunctive relief.

Suggested Questions for Judges

Issue I

Did Congress intend to narrow its jurisdiction under the Clean Water Act when it amended the Federal Water Pollution Control Act from regulation of interstate or navigable waters to simply navigable waters?

In light of the Supreme Court decision in *SWANCC,* which found that the CWA did not authorize jurisdiction of intrastate, isolated wetlands because it would effectively read "navigable" out of the Act, how does EPA justify regulation of discharges into the Arroyo d'Oro as an interstate water body if the arroyo does not contain water at the time of the discharge?

Did Congress intend to subsume regulation of all interstate water pollution, including pollution transported through interstate, intermittent streambeds when enacting the Clean Water Act?

Doesn't the jurisdictional element of the CWA, "waters of the United States" allow EPA to regulate only discharges into water?

Issue II

What evidence supports a finding that the arroyo substantially affects interstate commerce sufficiently to warrant regulation under the CWA?

Is the possible impact on an endangered species sufficient to trigger Congress's Commerce Clause jurisdiction under the Clean Water Act? How does the absence of any evidence showing a connection between the endangered species, pupfish, and interstate commerce, affect this argument?

What policy reasons support an argument that the disposal of defendant's mining waste into the arroyo fall within *Lopez*'s category of instrumentalities of commerce, making it within Congress's Commerce Clause jurisdiction?

Under *Lopez*'s instrumentality of commerce theory, what arguments support a finding that the discharge of Goldthumb's mining waste is not an instrumentality of interstate commerce?

Issue IIIA

What policy reasons support a finding that only states with approved permit programs may preempt federal enforcement actions?

Why should a state be afforded the benefits of the section 309 preclusion if it has not received EPA certification? Do the arguments change if the EPA has already informed the state that its permit program would be approved, yet the state never applied for certification?

Shouldn't states that have "bought into" the CWA permitting program be differentiated from those who may not be committed to its success?

Issue IIIB

How does the legislative history of the 1987 amendments affect EPA's argument that only duplicative penalty actions were of concern? Are the comments of a single Senator enough to suggest what Congress intended at the time?

What implications does the "plain meaning rule" have when interpreting section 309(g)(6)?

Should a party be able to support an analysis of the plain meaning rule for one part of its argument, while entirely dismissing it in another argument? If Goldthumb is arguing that a literal reading of section 309(g)(6) does not require the state to have an approved program, should it then be able to argue that a court should look beyond the plain meaning of the section to policy reasons when deciding if all subsequent enforcement actions are barred?

What does the language "comparable State law" mean in regards to section 309(g)(6)? Why should courts limit a comparability assessment to the provision under which a state was acting? Isn't a better line of reasoning one that does not place form over substance?

Acknowledging that most, if not all, of the case law involves the 309 preclusion under citizen's suit actions, does it and should it change the reasoning since the federal government is the party being precluded?

Issue IIIC

If Congress charged EPA with the primary responsibility of implementing the CWA, why should a court extend the 309 preclusion beyond that stated in the statute, i.e., civil penalty actions?

What are the policy reasons behind extending the preclusion to incorporate both penalty and injunctive relief actions? Is there significant importance for seeing enforcement actions, either by the state or the federal governments, as a final action on violations?

Are there reasons why EPA should not be allowed to take any subsequent enforcement actions against violations already addressed by state enforcement actions?

I. DID THE COURT BELOW ERR IN HOLDING THAT THE CWA'S DEFINITION OF NAVIGABLE WATER IN CWA § 502 DOES NOT INCLUDE THE ARROYO D'ORO WHEN IT IS DRY?

A. The Legal Framework

1. Statutory and Regulatory Background

In 1972, Congress enacted the Clean Water Act in an attempt to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2000). The general prohibition is found in section 301(a), which prohibits "the discharge of any pollutant by any person" except as authorized by a permit issued pursuant to the CWA. 33 U.S.C. § 1311 (2000); 33 U.S.C. § 1342 (2000). The "discharge of a pollutant" is defined as the "addition" of a "pollutant" through a "point source." 33 U.S.C. § 1362(12) (2000). Congress has defined "navigable waters" as "the waters of the United States including the territorial seas." 33 U.S.C. § 1362(7).

Congress has consciously expanded its control and regulation over water pollution. Prior to 1961, the Federal Water Pollution Control Act only controlled the pollution of interstate waters. Pub. L. No. 80-845, § 2(d)(1) (1948). In 1961, Congress amended it to control pollution of interstate and/or navigable waters. Pub. L. No. 87-88, § 8 (1961). The House Report accompanying the bill explained, " commerce includes navigation" and therefore "the power to regulate commerce necessarily embraces all matters pertaining to navigation on such waters." H.R. Rep. No. 87-306 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2076, 2084.

Congressional findings relating to the 1972 amendments reflect continued congressional intent to confer broad federal authority over water pollution issues. S. Rep. No. 92-414, at 77 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742. The Senate Committee on Public Works stated that:

> [t]he control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and the Great Lakes. Through a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited.

Id. The Conference Committee, resolving the differences between the Senate Bill and the House amendment, deleted the term "navigable" from in front of "waters," in the definition of "navigable waters." S. Conf. Rep. No. 92-1236, at 144 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3820-22. The Committee declared "[t]he conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." *Id.* at 3822.

Courts have routinely upheld Congress's intent "to regulate to the fullest extent possible" discharges under the CWA. *Quivira Mining Co. v. United States Envtl. Prot. Agency,* 765 F.2d 126, 129 (10th Cir. 1985); *see also United States v. Riverside Bayview Homes,* 474 U.S. 121 (1985); *Deltona Corp. v. United States,* 657 F.2d 1184 (Ct. Cl. 1981); *United States v. Earth Scis.,* 599 F.2d 368 (10th Cir. 1979). However the Supreme Court has found that this authority is not unlimited in effect, but rather, the term "navigable" imports some meaning of jurisdictional limitation into the CWA. *See Solid Waste Agency of N. Cook County v. United States*

Army Corp. of Eng'rs, 531 U.S. 159, 171 (2001) [hereinafter "SWANCC"].

Congress provided EPA with the authority to "prescribe such regulations as are necessary to carry out [the] functions" of the CWA. 33 U.S.C. § 1361 (2000). Courts have construed this authority to include defining terms within the CWA. *See Natural Res. Def. Council v. Costle,* 568 F.2d 1369, 1382 (D.C. Cir. 1977). In 1972, EPA proposed various regulatory definitions, including a definition of "navigable waters." In the proposed regulation, EPA defined "navigable waters" exactly as Congress defined it in section 502 of the CWA, as "waters of the United States including the territorial seas." 38 Fed. Reg. 13,528 (1973). However, the final rule promulgated by EPA amended this definition of "navigable waters" to include "[a]ll navigable waters of the United States; [t]ributaries of navigable waters of the United States; [i]nterstate waters; [i]ntrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes. . ." 38 Fed. Reg. 13,528, 13,529 (1973). EPA did not explain the reason for the change in the preamble to the final regulation, only stating that the definition was clarified "by incorporating additional language." 38 Fed. Reg. 13,528. In December 1973, EPA again amended its regulations to incorporate a definition for "waters of the United States" in place of its definition for "navigable waters." 38 Fed. Reg. 34,165 (1973). EPA presently defines "waters of the United States" as:

> (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
> (b) All interstate waters, including interstate "wetlands;"
> (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce. . ..

40 C.F.R. § 122.2 (2002).

2. Standard of Review

When a court is reviewing an agency's interpretation of the statute it administers, the court must determine the standard of review that applies to the interpretation. The Supreme Court ad-

dressed this question in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), setting forth a two-prong analysis to determine if the agency's interpretation was entitled to deference.

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43. Thus, in order for an agency interpretation to withstand judicial review, the statutory provision must be ambiguous and the resulting regulation must be a reasonable interpretation of congressional intent.

In a recent decision, the Supreme Court limited the situations in which an administrative agency is afforded *Chevron* deference. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the defendants challenged a tariff classification of its day planners by the U.S. Customs Service. The Court held that the agency ruling was not entitled to *Chevron* deference but rather respect, the amount of which depended upon the degree of the ruling's persuasiveness. *Id.* at 228-29. *Mead* limited *Chevron* deference to situations where Congress had explicitly delegated "specific interpretive authority" or where it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress . . .expect[ed] the agency to be able to speak with the force of law[.]" *Id. at* 229. Where there is an *implicit* designation of "interpretive authority," *Chevron* deference is afforded to those actions that provide for a "relatively formal administrative procedure" such as notice-and-comment rulemaking or formal adjudication. *Id.* at 230.

EPA promulgated the definition of "waters of the United States" through a notice-and-comment rulemaking procedure pursuant to its general rulemaking authority under CWA § 501. 33 U.S.C. § 1361. Under a *Mead* analysis, EPA's interpretive defini-

tion of "waters of the United States" is entitled to *Chevron* deference if it passes the two-part test. Whether Congress has spoken directly on this issue is subject to statutory analysis of the definition, including a "plain meaning" reading of the definition, a determination of its legislative purpose, an avoidance of an unconstitutional result, and an analysis of the legislative history. EPA and New Union will argue that Congress's definition of "navigable waters" is ambiguous, thus it was proper for EPA to further define and clarify the definition in its regulations. Furthermore, EPA's definition is subject to *Chevron* deference by the courts and can only be overturned if it is found unreasonable and extends beyond the statutory limits set by Congress. Goldthumb will argue that the definition of "navigable waters" is not ambiguous, EPA's definition exceeds Congress's Commerce Clause power, and therefore this Court should avoid a constitutional issue and not afford EPA deference when reviewing its regulatory definition.

B. EPA AND NEW UNION WILL ARGUE THAT THE STATUTORY AND REGULATORY DEFINITIONS OF NAVIGABLE WATER INCLUDE INTERMITTENT, INTERSTATE STREAMS THAT ARE NOT TRADITIONALLY NAVIGABLE, SUCH AS THE ARROYO D'ORO

As the administering agency of the CWA, EPA is authorized to promulgate regulations to aid in the implementation of the Act. 33 U.S.C. § 1361. Pursuant to this authority, EPA promulgated, through notice-and-comment procedures, a rule that defined various terms used in the CWA, including "waters of the United States." 40 C.F.R. § 122.2. In accordance with the Supreme Court decisions in *Chevron* and *Mead*, EPA's interpretive definition of "waters of the United States," a basic element of the general prohibition, should be given deference by the Court, because 1) the CWA definition is ambiguous; and 2) EPA's interpretation of the "waters of the United States" to include an intermittent and interstate stream is reasonable.

1. Congress's definition of "waters of the United States" is ambiguous

It is well established that Congress intended EPA to promulgate regulations interpreting provisions and definitions of the CWA that it left ambiguous. *See, e.g.*, 33 U.S.C. § 1361(a); *Natural Res. Def. Council v. Costle*, 568 F.2d at 1382 (finding that the CWA "leaves some leeway to EPA in the interpretation" of the

Act). Although Congress defined "navigable waters" as "waters of the United States," 33 U.S.C. § 1362(7), it did not further define "waters of the United States." Rather, EPA promulgated regulations to further define the term. 40 C.F.R. § 122.2.

Notably, "waters of the United States" is a basic element of the § 301 general prohibition on the unpermitted discharge of pollutants. Section 301 prohibits the "discharge of any pollutant." 33 U.S.C. § 1311. The basic elements are considered 1) addition; 2) pollutant; 3) navigable water; 4) point source; and 5) permit. As "navigable waters" is defined as "waters of the United States," the latter term can be considered a basic element. 33 U.S.C. § 1311; 33 U.S.C. § 1362(12). Courts have consistently upheld EPA's authority in defining or further defining such terms. *See Natural Res. Def. Council v. Costle,* 568 F.2d at 1382 (finding "that the power to define point and nonpoint sources is vested in EPA"); *Nat'l Wildlife Fed'n v. Gorsuch,* 693 F.2d 156, 167 (D.C. Cir. 1979) (stating that "Congress expressly meant EPA to have not only substantial discretion in administering the Act generally, but also at least some power to define the specific terms 'point source' and 'pollutant'"); *United States v. Phelps Dodge,* 391 F. Supp. 1181, 1184 (D. Ariz. 1975) (holding that Congress did not specifically define "waters of the United States" and that Congress provided EPA with broad powers to eliminate *all* water pollution, both ground and surface throughout the United States). Thus, it is clearly within EPA's authority to further define "waters of the United States."

2. *EPA's interpretation of "waters of the United States" is reasonable*

In 1961, Congress broadened the jurisdiction of federal regulation over waters of the United States. Congress amended FWPCA, a predecessor to the current CWA, extending the jurisdiction of the Act from purely interstate waters, to "interstate or navigable waters." Pub. L. No. 87-88. Citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940), the House Report accompanying this public law indicates congressional intent to broaden the reach of the statute:

> [i]n truth the authority of the United States is the regulation of commerce on its waters. Navigability . . . is a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of

> commerce control . . . that authority is as broad as the needs of commerce.

H.R. Rep. No. 87-306 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2076, 2085.

Accompanying the 1972 amendments, Senate and House reports emphasized the importance of conferring broad federal authority over water pollution problems, finding that a "narrow interpretation of the definition of interstate waters" severely limited the 1965 Federal Water Pollution Control Act and that "water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742; *see also* H.R. Rep. No. 92-911, at 131 (1972), *reprinted in* LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972 (1972) (reluctant to define "navigable waters" because the "committee intended the term to be given the broadest possible constitutional interpretation"). Simply put, Congress has continued to broaden its scope of federal jurisdiction over polluted waters since the advent of the Federal Water Pollution Control Act. The pattern of expanding federal jurisdiction over polluted waters, from "interstate," to "interstate or navigable," then simply "navigable," in addition to congressional reports emphasizing the importance of expanding federal jurisdiction, indicates Congress's intent to retain jurisdiction in the 1972 amendments over all previously regulated waters.

The Supreme Court has also determined that it was Congress's intent for the CWA to provide broad federal power to the full extent of the Commerce Clause. *See United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121 (1985) (extending regulatory authority of the CWA over wetlands adjacent to navigable waters, even though wetlands were not inundated or frequently flooded by navigable waters). Specifically, courts have established that EPA may "regulate the discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce." *United States v. Eidson,* 108 F.3d 1336, 1342-43 (11th Cir. 1997) (finding that manmade ditches and canals that flow intermittently into a creek is within the definition of "waters of the United States"); *accord Headwaters, Inc. v. Talent Irrigation Dist.,* 243 F.3d 526 (9th Cir. 2001) (determining that irrigation canals which are tributaries to natural streams are "waters of the United States); *United States v. TGR,* 171 F.3d 762 (2d Cir. 1999) (hold-

ing that non-navigable streams flowing into navigable streams are "waters of the United States"); *Quivira Mining Co. v. United States Envtl. Prot. Agency,* 765 F.2d 126 (10th Cir. 1985) (upholding EPA's authority to regulate arroyos with an intermittent surface connection and a continual underground aquifer connection to navigable waters); *United States v. Tex. Pipe Line* 611 F.2d 345 (10th Cir. 1979) (finding oil spilled into a tributary with a small amount of water flowing, which connected to another tributary that may or may not have been flowing, was within the coverage of the CWA); *United States v. Ashland Oil & Transp.,* 504 F.2d 1317 (6th Cir. 1974) (concluding that tributaries were within CWA jurisdiction because without regulation, non-navigable tributaries would be a mere conduit for upstream waste, greatly affecting downstream neighboring states); *United States v. Phelps Dodge Corp.,* 391 F. Supp. 1181 (D. Ariz. 1975) (reasoning that the scope of the Act includes "normally dry arroyos through which water may flow, where such water will ultimately end up in public waters").

In *Phelps Dodge*, the court upheld EPA's interpretation of "waters of the United States" to include waterways that are "normally dry arroyos, where any water which might flow therein could reasonably end up in any body or water, to which or in which there is some public interest. . . ." *Phelps Dodge,* 391 F. Supp. at 1187. The court reasoned that the language of the statute, previous court decisions, and legislative history indicated the concern for "uncontrolled pollution" threatening the health and welfare of the country. *Id.* at 1185-87. A failure to regulate the non-navigable tributaries would result in the tributaries "becom[ing] a mere conduit for upstream waste," where they could be used freely for discharging sewage and industrial waste, adversely affecting the downstream neighboring states. *Id.* at 1186-87 (quoting *Ashland Oil,* 504 F.2d 1317, 1326).

As previously stated, Congress, amending water pollution control acts, initially asserted federal jurisdiction over "interstate waters" only. *See* Pub. L. No. 80-845, § 2(d)(1). This was amended to include either "interstate" or "navigable waters," and finally to simply "navigable waters." *See* Pub. L. No.87-88 ; 33 U.S.C. § 1362(7). The present issue is whether the fluctuating scope of federal jurisdiction over waters indicates congressional intent to disregard only "interstate waters" or to subsume "interstate waters" within the meaning of "navigable waters." The Supreme Court has repeatedly indicated the latter, holding that the CWA

replaces the federal common law of nuisance for resolving disputes between states about interstate water pollution. Such disputes are not limited to pollution of interstate, navigable waters.

Additionally, Congress subsumed the control of pollution of all interstate waters within its control of pollution of navigable waters in the Act. Immediately following the 1972 amendments, the Supreme Court determined "that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." *Illinois v. Milwaukee, Wisconsin*, 406 U.S. 91, 107 (1972) ("*Milwaukee I*"). The federal common law of nuisance to which it referred was the discharge of pollutants in one state, injuring a downstream state on an interstate waterway. Later, in *Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 317 (1981) ("*Milwaukee II*"), the Court held that the CWA preempts the federal common law of nuisance. It held that Congress replaced it with a permit program allowing downstream states the opportunity for a hearing before the upstream source state's permitting agency, a requirement that the source state explain any failure to accept recommendations from the downstream state, and by authorizing the EPA to veto a source state's issuance of any permit if the waters of another state may be affected. *Id.* at 325-36. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), the Court emphasized the only recourse available to a downstream state, other than the source state's common law, is to "apply to the EPA Administrator, who then has the discretion to disapprove the permit if he concludes that the discharges will have an undue impact on *interstate waters.*" *Id.* at 490-91 (emphasis added). Moreover, in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), the Supreme Court upheld EPA's regulation providing "that an NPDES permit shall not be issued '[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states.'" *Arkansas v. Oklahoma*, 503 U.S. at 105. Thus, the Court has repeatedly recognized that Congress intended the CWA to regulate all "controversies between a State that introduces pollutants to a waterway and a downstream state that objects." *Id.* at 98. Therefore, the inclusion of interstate waters is a reasonable interpretation of the CWA.

Here, the Defendant discharges pollutants into the Arroyo d'Oro. The arroyo is an interstate waterway, beginning in New Union, crossing over into the State of Progress and eventually connecting to a three-acre pond containing endangered pupfish. Al-

though there is only flow in the arroyo after every major storm event (every two to three years), the storms are substantial enough to have continuous water flow from defendant's discharge location to the pond. Similar to the concern expressed by the courts in *Ashland Oil* and *Phelps Dodge*, the arroyo has become a conduit for the pollution discharged upstream, eventually ending up in the three-acre pond in which the arroyo terminates. Moreover, the only recourse for the State of Progress would be to bring an action under the State of New Union's common law of nuisance. The pollution adversely affects the habitat of the pupfish—a species identified by the Department of Interior as endangered and requires protection by the federal government.

Although the Arroyo d'Oro is not a waterway considered traditionally navigable, it crosses state borders, and thus falls within EPA's definition in 40 C.F.R. § 122.2(b), of "all interstate waters. . . ." As EPA has previously stated, its definition should be accorded deference by the courts. Upon such determination, this Court should also find that the arroyo is definitionally a "navigable water" and is within the scope of EPA's jurisdiction.

C. GOLDTHUMB WILL ARGUE THAT CONGRESS DID NOT INCLUDE IN THE CWA DEFINITION WATERS SUCH AS THE ARROYO D'ORO.

EPA's definition of "waters of the United States" exceeds its jurisdiction under the Clean Water Act. The CWA prohibits the discharge of pollutants into navigable waters. 33 U.S.C. § 1311. However broad Congress intended the CWA to extend, it did limit the jurisdiction of the CWA to "navigable" waters. *See SWANCC,* 531 U.S. at 167. The history of the Federal Water Pollution Control Act indicates a narrowing of federal jurisdiction over "waters of the United States." Prior to 1961, Congress regulated all interstate waters. Pub. L. No. 80-845, § 2(d)(1). In 1961, Congress amended the FWPCA to regulate either interstate or navigable waters. Pub. L. No. 87-88, § 8 (1961). However, in 1972, Congress refined its jurisdiction to regulating only navigable waters. Pub. L. No. 92-500, § 502 (1972) (codified as amended at 33 U.S.C. § 1362 (2000)). If Congress had intended to continue regulating non-navigable, interstate waters, it could have retained "interstate" in the 1972 amendments. Given that Congress eliminated "interstate" from the 1972 amendments, the reasonable interpretation is that Congress intended to refine the CWA jurisdiction to only "navigable" waters.

The Supreme Court has found that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *SWANCC,* 531 U.S. at 172 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940)). In *SWANCC*, the Court was faced with the question of whether gravel pits that were purely intrastate in nature could be regulated by the Army Corps of Engineers (Corps) under the CWA. *Id.* at 162-63. The Court held that the CWA's language did not include intrastate, isolated wetlands because allowing the Corps jurisdiction over these would effectively read "navigable" out of the language in the Act. *Id.* at 172.

Where courts have extended jurisdiction over waters that are not traditionally navigable, they have been tributaries to a navigable body of water. *See, e.g., United States v. Eidson,* 108 F.3d 1336, 1342 (11th Cir. 1997) (storm sewer that drained into a storm drainage system that flowed into a bay); *accord Headwaters, Inc. v. Talent Irrigation Dist.,* 243 F.3d 526 (9th Cir. 2001) (irrigation canals that are tributaries to natural streams); *United States v. TGR*, 171 F.3d 762 (2d Cir. 1999) (non-navigable streams flowing into navigable streams); *Quivira Mining Co. v. United States Envtl. Prot. Agency,* 765 F.2d 126 (10th Cir. 1985) (surface connection between arroyo and navigable-in-fact stream); *United States v. Tex. Pipe Line*, 611 F.2d 345 (10th Cir. 1979) (unnamed tributary of a tributary of a navigable river); *United States v. Ashland Oil & Transp.*, 504 F.2d 1317 (6th Cir. 1974) (creek was a tributary of a stream that was a tributary to a navigable river). In fact, a court has never held that a discharge into an arroyo that is not connected in some fashion (i.e. surface flow or through underground aquifers) to a navigable waterway is within EPA's jurisdiction under the CWA.

For example, in *Quivira Mining*, the court found that the discharge of mining waste into the Arroyo del Puerto was within the CWA jurisdiction. *Quivira Mining,* 765 F.2d at 130. However, in *Quivira Mining*, the discharge occurred when the arroyo was flowing with water. *Id.* There was also evidence that the Arroyo del Puerto, during high flows, connected with a navigable-in-fact stream. *Id.* When there was not a surface connection, there was evidence of an underground aquifer beneath the arroyo that was connected to the navigable stream. *Id.* The court concluded that

this impact on interstate commerce was sufficient to satisfy the commerce clause. *Id.*

Moreover, a court has never decided that a discharge of pollutants into an arroyo, when dry at the time of the discharge, is regulated by the CWA. The discharge in *Quivira Mining* and *Texas Pipe Line* both occurred when at least a small amount of water was flowing through the bed. *Quivira Mining,* 765 F.2d at 130; *Tex. Pipe Line,* 611 F.2d at 347. Indeed, *Quivira Mining* based its holding on evidence that the streambeds "flow for a period after the time of discharge of pollutants *into the waters.*" *Quivira Mining,* 765 F.2d at 130 (emphasis added).

A finding that a discharge of pollutants into a dry arroyo, i.e. dry land, is within EPA's jurisdiction would negate congressional intent. If Congress intended to regulate discharges into dry streambeds it would not have used the term "water" in CWA § 301. 33 U.S.C. § 1311. Although extending "navigable" beyond its traditional sense, courts have still retained a meaning for "navigable" when applying the CWA. *See, e.g., SWANCC,* 531 U.S. at 172 ("The term 'navigable' has at least the import of showing . . . what Congress had in mind. . .."); *Riverside Bayview Homes,* 474 U.S. at 133 (finding that wetlands adjacent to navigable waters are inextricably bound together). Similarly to the term "navigable," the term "water" cannot be read out of the statutory definition.

The discharges that EPA and New Union claim to fall within CWA jurisdiction are discharges onto the dry land of an intermittent, interstate stream that is not navigable and is not a tributary to navigable water. When there is a discharge into the Arroyo d'Oro, it is only when the streambed is completely dry. The CWA does not provide for EPA's jurisdiction over "non-navigable" waters or discharges onto dry land. To allow EPA jurisdiction over such would render Congress's use of the terms "navigable" and "water" superfluous and without meaning.

Nonetheless, EPA has promulgated regulations attempting to include such discharges in its regulatory authority. Even though the definition went through a notice-and-comment process, no deference can be accorded to its interpretation. Congress has clearly defined what it intended the CWA to regulate, *discharges of pollutants into navigable waters. Chevron* deference only applies if Congress has explicitly designated EPA authority to define "waters of the United States" or if the term is ambiguous so that it can be implied that Congress delegated this authority to EPA.

Neither of these situations has occurred. Congress did not explicitly designate EPA authority to redefine "waters of the United States" to expand EPA's jurisdiction. Nor is the definition of "navigable waters" ambiguous, requiring EPA to clarify what "waters" means. Although courts have expanded the notion of "navigable" beyond traditional navigability, at the very least, regulation of intermittent streams still requires discharges to occur while flowing.

Absent a deferential review standard, EPA is required to show by substantial evidence that its inclusion of the Arroyo d'Oro as falling within its definition of "waters of the United States" affects interstate commerce sufficiently enough to warrant regulation under the CWA. EPA is silent on this issue. There are no findings that show intermittent, interstate streams that are not navigable and are not tributaries to navigable water, affecting interstate commerce. EPA has not brought forth any evidence that discharges into the Arroyo d'Oro have even a slight effect on interstate commerce. Therefore, this Court must affirm the lower court's holding that the CWA does not confer jurisdiction over the Arroyo d'Oro.

II. DOES CONGRESS HAVE COMMERCE CLAUSE JURISDICTION OVER DRY WATERBEDS OF INTERMITTENT INTERSTATE STREAMS THAT MEET NO TRADITIONAL TEST OF NAVIGABILITY AND ARE NOT TRIBUTARY TO WATERS THAT MEET ANY SUCH TEST?

A. History of Commerce Clause Jurisdiction

Article I, section 8 of the United States Constitution provides Congress with the authority "to regulate commerce with foreign Nations, and among the several States. . .." U.S. Const. art I, § 8. The extent of Congress's Commerce Clause authority has been the subject of many Supreme Court decisions.

During the New Deal Era, the Supreme Court substantially expanded Congress's Commerce Clause jurisdiction. The "cumulative effects" theory enunciated in *Wickard v. Filburn*, 317 U.S. 111 (1942), allowed an isolated activity that, taken cumulatively with similar isolated activities, affects interstate commerce, to be within federal jurisdiction. *Wickard v. Filburn,* 317 U.S. 111 (1942). In *Wickard*, the Supreme Court held that Congress's Commerce Clause authority extended to a single farmer growing

wheat on his farm for his family's consumption in violation of a federal quota requirement. *Id.* at 128. Although the farmer's own demand may have been too trivial to fall within federal Commerce Clause authority, the farmer's contribution, taken cumulatively with that of other farmers consuming homegrown wheat, sufficiently impacted interstate commerce to bring it within federal authority. *Id.*

The expansion of federal authority under the Commerce Clause continued into the 1960's and 1970's. *See, e.g., Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964); *United States v. Underwood,* 344 F. Supp. 486 (M.D. Fla. 1972). Throughout the late 60's and 70's Congress utilized its expanded Commerce Clause jurisdiction, enacting many of the environmental laws of today, e.g., the Clean Water Act of 1972. The prohibition on unpermitted discharges into "navigable waters" was the natural outcome of this history of congressional regulation of commerce. Commerce historically was carried out on waterways, thus Congress could clearly regulate activities on or affecting these waterways. In defining "navigable waters" in the 1972 amendments, Congress attempted to expand its jurisdiction to as far as the Commerce Clause would allow. "The conferees fully intend that the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. 92-1236, at 144 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3776, at 3822.

Following the reasoning in earlier Supreme Court decisions, courts have upheld Congress's power to regulate discharges into non-navigable tributaries that eventually connect with navigable waters when the tributaries impact navigable waters. *See United States v. Ashland Oil & Transp.*, 504 F.2d 1317 (6th Cir. 1974); *Quivira Mining Co. v. United States Envtl. Prot. Agency*, 765 F.2d 126 (10th Cir. 1985). In *Ashland Oil*, the court upheld the government's authority to regulate a non-navigable tributary, based in part on the government's argument that "water pollution is subject to Congressional restraint because it affects commerce in innumerable ways and because it affects the health and welfare of the nation." *Ashland Oil*, 504 F.2d at 1328. The court had reasoned that the purpose of Congress's navigation power was to protect the "availability" of the nation's waterways to serve navigation purposes, regardless of whether they currently serve such purposes. *Id.* Since the purpose of the federal power was to

protect the highways of interstate commerce, the tributaries that influence the highways' capacity to bear commerce also falls within the federal power. *Id.*

However, recent Supreme Court decisions have curtailed the reach of federal jurisdiction under the Commerce Clause. In *United States v. Lopez*, the Court held that Congress exceeded its authority by enacting the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (1988 & Supp. V 1990), which made it a federal crime to possess a gun in a school zone. *United States v. Lopez,* 514 U.S. 549, 566 (1995). In rejecting the government's Commerce Clause argument, the Court identified three types of activities that the Commerce Clause authorized Congress to regulate: (1) channels of interstate commerce; (2) instrumentalities of interstate commerce; and (3) activities having a substantial effect on interstate commerce. *Id.* at 558-59. Finding that the Act did not fall within the first two categories, the Court examined whether the Act substantially affected interstate commerce. *Id.* at 559. Activities that fall within this third category are economic activities that substantially affect interstate commerce, whether considered individually or cumulatively. *Id.* at 560; *see also Wickard*, 317 U.S. at 111 . The Court held that "[t]he possession of a gun in a local school zone [was] in no sense an economic activity that might. . .substantially affect any sort of interstate commerce. *Id.* at 567.

In *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court further restricted interstate commerce jurisdiction. *Morrison*, 529 U.S. at 627. The Court applied the *Lopez* test to determine whether to invalidate a civil remedy provision in the Violence Against Women Act, 42 U.S.C. § 13981 (1994), allowing victims of gender motivated violence to bring suit in federal court. *Id.* at 612-13. Although finding that the regulated activities had a substantial effect on interstate commerce, the Court concluded that the regulated activities were not economic, and therefore not within Congress's Commerce Clause jurisdiction. *Id.* The economic rationale was far too attenuated to validate congressional regulations of a non-economic activity, an activity that is traditionally within the state's police power to regulate. *Id.*

Most recently, *SWANCC* raised the question of whether Congress's Commerce Clause power extended to intrastate, isolated wetlands. The majority decision avoided the constitutional issue by finding that the Army Corps had exceeded its authority when defining "navigable waters." *SWANCC,* 531 U.S. at 173. How-

ever, the dissenting opinion, finding that the Corps had not exceeded its authority, addressed this constitutional question. *Id.* at 192.

Justice Stevens, in dissent, concluded that the federal government's commerce power includes regulating "isolated wetlands that serve as habitat for migratory birds[.]" *Id.* (internal quotations omitted). Stevens stated that the "discharge of fill material into isolated wetlands that serve[d] as migratory bird habitat [would] in the aggregate, adversely affect migratory bird populations." *Id.* at 194 (internal quotations omitted). In support of this determination, Stevens found that the "millions of people regularly participat[ing] in birdwatching and hunting" generated "a host of commercial activities of great value." *Id.* at 195.

Stevens also rejected the claim that upholding the Corps regulation would "blur the 'distinction between what is truly national and what is truly local.'" *Id.* (quoting *Morrison,* 529 U.S. at 617-18). In *Missouri v. Holland,* the Court had found that the protection of migratory birds was best left to the federal government, rather than the individual states. 252 U.S. 416, 435 (1924) ("Here, a national interest . . . can be protected only by national action. . .. The subject matter is only transitorily within the State. . .. It is not sufficient to rely upon the States. The reliance is vain."). Stevens concluded that the federal government's power to regulate commerce "includes the power to preserve the natural resources that generate such commerce." *SWANCC*, 531 U.S. at 196.

Here, the Court is faced with the question of whether it is within Congress's commerce power to regulate a discharge of a pollutant into the Arroyo d'Oro. Should this Court find defendant's regulatory and statutory arguments persuasive, then this Court need not reach the constitutional question presented. However, should plaintiffs prevail on their argument that the dry Arroyo d'Oro is intended to be regulated under the CWA, then this Court must address whether the regulation of an intermittent, interstate stream is within Congress's jurisdictional boundaries under the Commerce Clause.

B. EPA AND NEW UNION WILL ARGUE THAT IT IS WITHIN CONGRESS'S COMMERCE CLAUSE JURISDICTION TO REGULATE THE DISCHARGE OF POLLUTANTS INTO THE ARROYO D'ORO

The Plaintiffs will argue that the discharge of pollutants into the Arroyo d'Oro falls under all of the Supreme Court's classes of

activities that are within congressional commerce power. As a "channel of interstate commerce" or an "instrumentality of interstate commerce," Plaintiffs' argument for federal commerce jurisdiction is relatively weak. Plaintiffs could argue that the arroyo is a channel of interstate commerce. As the arroyo is dry for several years in a row and there is no evidence showing the use of the arroyo as a channel of interstate commerce, this argument would be difficult to prevail on.

Plaintiffs may also argue that the arroyo is an instrument of commerce, as it facilitates the service of disposal of Defendant's spent cyanide bath. In order to prevail on this argument, the disposal of spent cyanide bath must be considered interstate commerce in which the arroyo facilitates the service of disposal in interstate commerce. The Supreme Court has previously upheld federal authority to regulate the disposal of wastes under the commerce clause. *See Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978) (finding a state regulation prohibiting the importation of out-of-state waste violated the commerce clause because the interstate movement of waste was under the federal government's commerce clause jurisdiction). The "waste" in *Philadelphia v. New Jersey* is analogous to the mining "waste" that defendant is discharging into the arroyo. If the regulation of the disposal of discharged pollutants is within a state's jurisdiction and not the federal government's power, a state could allow industries to pollute interstate waterways, including non-navigable waterways that had a sufficient amount of water flow to carry away the pollutants. The pollutants could then be carried into a neighboring state, which could not prevent the pollution from crossing its borders. Similar to the reasoning in *Philadelphia*, federal regulation of these activities would prevent states from benefiting in-state industries (by decreasing the cost of production by eliminating the cost of waste disposal) at the expense of non-residents (those adversely affected by the pollution in the neighboring state).

However, Plaintiffs' best argument is based upon the "substantial impact" on interstate commerce theory. Under the substantial impact category, it is not necessary that each discharge substantially affect interstate commerce; rather, as long as the "class of activities" in the aggregate substantially affects interstate commerce, Congress may regulate that particular class. *Lopez*, 514 U.S. 549; *Perez v. United States*, 402 U.S. 146 (1971); *Wickard,* 317 U.S. 111.

Defendant is a gold mining company that discharges mining wastewater into a dry arroyo that flows after major storm events. Mining wastewater containing highly toxic pollutants discharged into an arroyo pollutes streambeds, whether the streambed is wet or dry. The pollution is carried downstream after storms when the arroyo is flowing, destroying the ecosystem through which it flows, and polluting the three-acre pool in which the water ends. The pool is one of only three habitats left to the pupfish, a listed endangered species.

Plaintiffs maintain that the activity being regulated under the Clean Water Act is within Congress's commerce power. The defendant is discharging pollutants into a streambed in the normal course of its business operations. These discharges, taken individually, impact an endangered species habitat, and when aggregated, would affect the citizens' ability to use and enjoy the streambed ecosystem.

The affect of defendant's single activity, its discharge, on an endangered species alone is enough to substantially impact interstate commerce. Indeed, in *Missouri v. Holland*, the Court found that the protection of migratory birds [was] a textbook example of a national problem. *Missouri v. Holland,* 252 U.S. 416, 435. Subsequently, Congress has identified the loss of species as a national problem. *See* Endangered Species Act, 40 U.S.C. §§ 1531-1544 (1973). Courts continually find the loss of a species as impacting interstate commerce. *See, e.g., Nat'l Ass'n of Home Builders v. Babbitt,* 130 F.3d 1041, 1051 (D.C. Cir. 1997) (endangered species of fly found to substantially impact interstate commerce because of "destruction of biodiversity" and possible "adverse affects of interstate competition"); *United States v. Bramble*, 103 F.3d 1475, 1481 (9th Cir. 1996) ("extinction of the [bald] eagle would substantially affect interstate commerce"); *Bldg. Indus. Ass'n of Superior Cal. v. Babbitt*, 979 F. Supp. 893, 907 (D.D.C. 1997) ("species preservation substantially affects national economic interest"). The Department of Interior has identified the pupfish as an endangered species and has found that the "pool" is one of only three habitats left that this species has been found in. Pollution being carried during times of flow, adversely impact the habitat and survivability of the pupfish.

Regardless of the pupfish, the discharge of pollutants, when considered in the aggregate, affects the rights of individuals to use and enjoy rivers, lakes and streams. The Senate Committee Report noted that the effort to abate and control water pollution was

inadequate prior to the 1972 amendments. The committee's objective was to "provide for the protection and propagation of fish, shellfish and wildlife, and for recreation in and on the water." S. Rep. No. 92-414, *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674. Congress had a rational basis on which to believe that pollution of the Nation's waterways negatively impacts interstate commerce. Indeed, courts have already upheld this determination. *See Riverside Bayview Homes, Inc.,* 474 U.S. 121; *Ashland Oil,* 504 F.2d 1317; *Quivira Mining Co.,* 765 F.2d 126. The Arroyo is an interstate waterway; water flows through the streambed after storms, and crosses state lines. If industries were allowed to discharge their contaminated sludge and wastewater into these waterways, the soil in the streambeds would become highly contaminated. After storms, the polluted soils would be carried downstream. Congress, under its commerce power, chose to regulate the activities that result in these affects.

As *Lopez* requires, the activity attempting to be regulated is commercial or economic in nature. *Lopez*, 514 U.S. at 560. There can be no dispute that a mining company is economic in nature. Spent cyanide bath is an integral part of the mining process. Mining companies account for waste disposal as a part of their normal operations—operations that are economic in nature. An activity that is involved in the disposal of waste is economic in nature, including discharging contaminated pond liquid into a streambed.

Therefore, because the discharge of mining waste is part of an economic activity, and substantially impacts interstate commerce, either by avoiding cost of disposal or through the loss of a species and the health of its habitat, the regulation of this activity is within Congress's commerce power.

C. Goldthumb will argue that regulation of the Arroyo d'Oro under the CWA exceeds Congress's Commerce Clause authority

Goldthumb will argue that if the court finds Congress intended the Clean Water Act to extend to waters such as the Arroyo d'Oro, then Congress exceeded its authority under the Commerce Clause. The test in *Lopez* sets forth three broad categories in which congressional regulation under the Commerce Clause is within the constitutional limits. *Lopez,* 514 U.S. at 558. The discharge into the Arroyo d'Oro fails to satisfy any of these three factors. A dry arroyo is not a channel of interstate commerce, nor is it an instrumentality in interstate commerce nor is

the discharge an economic activity "substantially affecting" interstate commerce.

Lopez highlights the importance of protecting "the distinction between what is national and what is local" in order to maintain constitutional limits on the federal government's power. *Id.* at 565, 566-67 (citing *United States v. A.L.A. Schecter Poultry Corp.*, 76 F.2d 617, 624 (2d Cir. 1935) (L. Hand, J., concurring)). Finding the Gun Free School Zones Act unconstitutional, the Court based its reasoning on two main propositions. First, the Court found that the regulated activity was a non-economic activity and therefore outside of Congress's commerce power. *Id.* at 565. The Court also concluded that the activity did not, even when taken cumulatively, substantially affect interstate commerce. *Id.* at 567. The Court refused to adopt the Government's "national productivity" reasoning, noting that under this theory, Congress, could in fact, "regulate any activity that it found was related to the economic productivity of individual citizens." *Id.* at 564. The Court also found the statute lacking in both the jurisdictional element limiting its reach to those specific activities substantially affecting interstate commerce and legislative findings that supported an effect on interstate commerce. *Id.* at 561.

Defendants will argue that the discharge of pollutants into a dry arroyo cannot be regulated under either the instrumentality of interstate commerce or channel of commerce theory. Regulating the discharge of pollutants into the Arroyo d'Oro is not an attempt "to prohibit the interstate transportation of a commodity through the channels of commerce." *Lopez,* 514 U.S. at 559. The discharge of pollutants is not necessarily an item of interstate commerce; here, the discharge was merely *intrastate*—simply the discharge of waste resulting Defendant's mining activities into a non-navigable dry streambed. Thus, Plaintiffs cannot prevail on a theory that the discharges can be regulated as an instrumentality of interstate commerce.

Additionally, Plaintiffs cannot prevail by arguing that this is an attempt to regulate "the use of the channels of interstate commerce." *Lopez,* 514 U.S. at 558. The Arroyo d'Oro is not a channel of interstate commerce because it does not support the transport of interstate commerce. Railroads, highways, air traffic, radio and postal communication, and *navigable waters* are examples of channels of commerce for they all provide a means of transportation. *See* S. Rep. No. 93-1 (1973) (statement of Rep. Dingell). A

dry riverbed cannot be likened to roads or waterways and therefore cannot be regulated through Congress's commerce power.

Defendants will admit that certain activities do fall within the jurisdiction of the Clean Water Act. If Defendant was to discharge pollutants directly into a navigable river, or even a tributary to navigable water, this could be construed as substantially impacting interstate commerce. However, Defendants will argue that their discharge into a dry streambed of a stream that even when running is not navigable and does not connect to navigable water, and therefore does not "substantially affect" interstate commerce.

The congressional findings accompanying the 1972 amendments rationalize the connection between the regulation of pollution in the Nation's waters and its effect on interstate commerce. "Many of the Nation's navigable waters are severely polluted, and major waterways near the industrial and urban areas are unfit for most purposes." S. Rep. No. 92-414 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3674. Congress found increasing pollution in the water on the waterways directly impacted ability to the use waterways and thus impacted interstate commerce. Yet, there is no discussion in the Clean Water Act, or in the congressional findings accompanying the 1972 amendments, that discharges onto dry land affect interstate commerce.

Plaintiffs have not provided any evidence that Defendant's discharges "substantially affect" interstate commerce. Plaintiffs have failed to even show that this single activity, even if considered cumulatively, would affect interstate commerce. There is no evidence showing that the dry arroyo supports a commercial activity. Nor is there any evidence supporting any indirect impact on a commercial or economic activity. The record is completely void of a connection between Defendant's discharges onto dry land and any impact on interstate commerce.

The only effect that Plaintiffs have provided is a possible impact on the localized pupfish community living in the small pool to which the arroyo eventually feeds. However, Plaintiffs have failed to establish any connection between the pupfish and interstate commerce. The dissenting opinion in *SWANCC,* based its determination of constitutional authority upon the finding that "millions of people regularly participate in birdwatching and hunting and that those activities generate a host of commercial activities." *SWANCC,* 531 U.S. at 195. The dissent also relied upon the finding in *Gibbs v. Babbitt*, in which the Fourth Circuit stated that

"[t]he relationship between red wolf takings and interstate commerce is quite direct—with no red wolves, there will be no red wolf related tourism." *Id.* (quoting *Gibbs v. Babbitt,* 214 F.3d 483, 492-93 (4th Cir. 2000)). Here, there is no evidence that the pupfish support any type of commercial activity, including any pupfish related tourism.

Furthermore, unlike the Act in *Lopez*, which was held unconstitutional in part for lacking a "jurisdictional element," the Clean Water Act does contain a "jurisdictional element." Regulated discharges are restricted to those discharges occurring into "navigable waters," which is defined as "waters of the United States." Although the definition of navigable waters extends to non-navigable waters that are tributaries to navigable waters, or are wetlands adjacent to navigable waters, the expanded definition retains the jurisdictional limit of "water." The discharges from Goldthumb's operations are released onto dry land, not water. Courts require the jurisdictional element to maintain the constitutionality of the statute under Congress's commerce power. If Congress were allowed to insert a jurisdictional element solely to uphold the constitutional issue, but then be allowed to exceed this limitation, the requirement for a jurisdictional element would be futile.

The Court, in the absence of any showing of an impact on interstate commerce, cannot uphold the constitutionality of the expansion and application of the CWA in this instance.

III. SECTION 309(G) PRECLUSION

Presently, the State of New Union has issued two administrative orders to Goldthumb and is threatening to issue a third. The orders prohibited Goldthumb from discharging into the arroyo when running, and required Goldthumb to inform NUDEP of discharges into the arroyo when it was dry. Goldthumb and New Union maintain that these administrative orders preclude EPA from bringing any type of enforcement action for these violations. EPA argues that it is not precluded from bringing an enforcement action because (1) only states with EPA approved permit programs can preempt EPA enforcement under § 309(g); (2) New Union must have used its administrative penalty provision to preclude EPA action under § 309(g); and (3) only EPA actions for penalties are precluded by § 309(g)(6), not EPA actions for injunctive relief.

Section 309 of the Clean Water Act provides EPA with its enforcement authority. 33 U.S.C. § 1319 (2000). Under § 309, the EPA can issue administrative compliance orders, bring a civil or criminal action, or issue administrative penalties and orders. 33 U.S.C. § 1319(a), (c), (d), (g) (2000). Administrative penalties issued pursuant to subsection (g) do not limit the ability of the EPA to enforce the CWA, except under three situations provided in § 309(g)(6)(A). Section 309(g)(6)(A) bars additional penalty assessment actions and citizen suits where the EPA or the Secretary "has commenced and is diligently prosecuting an action under this subsection," where the "State has commenced and is diligently prosecuting an action under a State law comparable to this subsection" or "for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be. . .." 33 U.S.C. § 1319(g)(6)(A). If one of these conditions occur, then § 309(g)(6)(A) provides that the violation in question "shall not be the subject of the a civil penalty action under [section 309(d)] or section 1321(b) of this title or section 1365 of this title." 33 U.S.C. § 1319(g)(6)(A).

A. DID THE COURT BELOW ERR IN HOLDING THAT ENFORCEMENT BY A STATE WITHOUT A PERMIT PROGRAM APPROVED BY EPA UNDER THE CWA CAN PREVENT EPA ENFORCEMENT UNDER CWA § 309(G)?

1. *The Statutory and Legislative History*

Congress amended CWA section 309 in 1987 to provide EPA with the authority to issue administrative penalties. Pub. L. No. 100-4 (codified as amended at 33 U.S.C. § 1319(g) (1987)). Prior to the 1987 amendments, EPA had to commence a civil or criminal fine action for penalties to be assessed against violators of the CWA. Subsection (g) authorizes EPA to assess penalties after an administrative hearing and public comment period. Subsection (g) precludes EPA action when a state has taken action under a comparable state law. EPA contends that its enforcement actions are not precluded if the state issuing the enforcement order does not have an approved CWA permitting program. Section 309(g) makes no explicit mention of whether the state must have an EPA approved permit program to preclude EPA enforcement action. 33 U.S.C. § 1319(g)(6)(A). If a statutory provision is vague or un-

clear in its meaning, the statutory structure should be examined to determine the intent of Congress.

The Clean Water Act was implemented to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). When adopting the 1972 amendments, Congress's policy was to "recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution." 33 U.S.C. § 1251(b). To carry out its environmental goal, Congress established a permit program to be implemented by the EPA. 33 U.S.C. § 1362. To carry out its federalism goal, Congress provided a mechanism for states to implement the CWA permit program, allowing states to submit permit programs, which upon EPA approval, would operate in lieu of the EPA permitting program. 33 U.S.C. § 1362(b)-(c). In the event that a state program is approved, EPA still retains its authority to take action pursuant to section 309. 33 U.S.C. § 1342(i).

Beyond subsection (g), the legislative history for the 1987 amendments gives some insight into Congress's intent for adding section 309(g)(6). The Committee Conference Report is void of any indication of whether the preclusion only applies if the state has a federally approved permit program. H.R. Conf. Rep. No. 99-1004, at 135-39 (1986), *reprinted in* LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, at 124-28 (1988). Remarks made during the floor debates by Senator Chaffee shed some light on Congress's intent:

> New paragraph 309(g)(6) sets out limitations that preclude citizen suits where the Federal government or a State has commenced and is diligently prosecuting an administrative civil penalty action or has already issued a final administrative civil penalty order not subject to further review and the violator has paid the penalty. The same provision limits Federal civil penalty actions under subsections 309(d) and 311(b) for any violation of the Federal Water Pollution Control Act. While redundant enforcement activity is to be avoided and State action to remedy a violation of Federal law is to be encouraged, the limitation on Federal civil penalty actions clearly applied only in cases where the State in question has been authorized under section 402 to implement the relevant permit program.

133 Cong. Rec. S733-S769 (daily ed. Jan. 14, 1987), *reprinted in* LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, at 367 (1988).

Additionally, Senator Chaffee remarked that where an unpermitted discharge may violate state and federal laws, the state could enforce under its law, as the federal government may enforce under the CWA. *Id.* However, a state cannot prosecute a violation of federal law "if [it] has not received authorization under section 402 to implement a particular permitting program." *Id.*

Courts have not addressed the question of whether a state must have an approved permitting program to preclude federal enforcement actions. EPA, in *N. and S. Rivers Watershed Ass'n Inc., v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991) ("*Scituate*"), argued in its amicus brief that the 309(g) bar requires EPA to certify the "comparable state law" under section 402. However, the court did not resolve this issue because neither of the parties involved had raised it previously in their arguments. *Id.* at 556, n.8.

2. EPA's Argument

Congress's goal when enacting the CWA was "to restore and protect . . . the integrity of the Nation's waters." 33 U.S.C. § 1251. The congressional policy was to achieve the CWA environmental goals while recognizing, preserving and protecting the states' rights and responsibilities in combating water pollution. 33 U.S.C. § 1251(b).

Congress determined that the best method to achieve its environmental goal was through an EPA administered permit program. *See* 33 U.S.C. § 1342. The permitting program applied effluent limitations based upon technology-based standards and water-quality based standards. *Id.* Congress implemented its federalism policy by authorizing states to implement the CWA permit program if EPA determined the state had authority meeting the CWA standards. 33 U.S.C. § 402(b). Congress provided that even when EPA approves a state's permitting program, EPA still maintains oversight and supervision of the state permitting program. *See, e.g.,* 33 U.S.C. § 1342(d) (requiring states to provide EPA with a copy of each permit application and allowing EPA to veto permits it objects to); 33 U.S.C. § 1342(i) (preserving EPA's right "to take action pursuant to section 1319"). Those states without an approved permitting program may continue with their own state water pollution programs, *as long as* the states do not interfere with the federal CWA program. 33 U.S.C. § 1370 (2000) (allows states to adopt and enforce stricter standards than required by the national program). Further, those states without an

approved program may bring an enforcement action under the CWA by means of the citizen suit provision. 33 U.S.C. § 1365 (2000). Section 505 allows citizens, including states, to bring an action to enforce violations of the CWA. *See* 33 U.S.C. § 1365(a), (g); 33 U.S.C. § 1362(5) (defining "citizen" to include states with an interest being adversely affected).

Remarks made in the floor debates during the passage of the 1987 amendments clearly indicate Congress's intention that the section 309(g) preclusion only arises if the enforcing state acted pursuant to an EPA approved permitting program. Senator Chaffee, the Senator leading the amendments, stated "the limitation on Federal civil penalty actions clearly applied only in cases where the State in question has been authorized under section 402 to implement the relevant permit program." 133 Cong. Rec. S733-S769, *reprinted in* LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, at 367. Moreover, the purpose of section 309(g) was not to curtail EPA's enforcement authority in favor of the states, but rather to augment EPA's enforcement authority. Senator Chaffee explained that subsection (g) was incorporated to "add new authority for the Administrator to assess administrative penalties." *Id.*

The legislative history also highlights the purpose of the 309(g)(6) bar, to ensure that the federal government did not assess duplicative penalties. *Id.* An enforcement action would only be duplicative when the state was using authority equivalent to EPA's to enforce the CWA violation. Where the state has enforced its state law, that enforcement action has not addressed the violation of the CWA. The state water pollution law and the CWA are two separate laws, not substitutes for one another, as is the case under a state approved program.

The overall structure of the CWA supports the interpretation that only enforcement by a state with an approved permitting program can preclude an EPA enforcement action. Congress intended that state actions supplant EPA actions only when EPA approved a state's program as meeting the CWA standards. *See* 33 U.S.C. § 1342(a), (b), (i). If section 309(g)(6) is interpreted to preclude EPA enforcement action when any state has taken a prior enforcement action, the bar would curtail much of the authority that Congress delegated to EPA. Rather than award those states which have submitted a suitable permitting program to EPA, reading 309(g) to include non-approved states would fail to distinguish between those who have and those who have not fol-

lowed Congress's requests. Those states without an approved program would possess the equivalent enforcement authority to preclude EPA action, regardless of whether the permitting program would be suitable for federal standards.

Policy reasons support the requirement that a state be acting under an EPA approved permitting program to preclude EPA enforcement action. States implementing an approved program have "bought into" the federal permitting program (NPDES) and are committed to its success. They are unlikely to undermine the national program that is integrated into their state program. However, states without an approved program have no commitment to the NPDES program and may feel free to undermine it by issuing inconsequential compliance orders to in-state sources and contending the orders block EPA actions. For example, if unpermitted discharges occurred in a state that did not have federally approved permitting program, the state could assess minimal penalties without considering the penalty factors required to be considered in the national program and without allowing for public participation as required by the national program. The state could then claim that nominal penalties assess by it precluded EPA from further enforcement of even health threatening violations. Clearly, this situation was not what was envisioned by section 510. *See* 33 U.S.C. § 1319; 33 U.S.C. § 1342; 33 U.S.C. § 1370; *United States v. City of Toledo,* 867 F. Supp. 603, 606 (N.D. Ohio 1995) (finding the effect of sections 309(a) and 402(i) is "to ensure that State agencies, for whatever reason, do not directly or indirectly defeat implementation of the provisions of the Clean Water Act").

Here, the State of New Union issued an administrative order to Goldthumb for discharging a pollutant in violation of New Union's law, 50 N.U.R.S. § 28(a). New Union lacks an EPA approved permitting program and therefore was acting under its own state law, not a state substitute of the CWA. The appropriate interpretation of section 309(g)(6) is to preclude EPA action only in the event that the acting state has an EPA approved permitting program. Any other reading would ignore the statutory structure of the CWA and Congress's intent for section 309(g). Since New Union was not acting under an approved program, the 309(g) bar does not apply to EPA's enforcement action.

3. Goldthumb's Argument

The federal government's argument is based largely on the legislative history of the 1987 amendments. However, courts have pointed out that while "legislative history is an element to be considered in construing a statute,. . .the reliance on legislative history in divining the intent of Congress is. . .a step to be taken cautiously. . .and that statements of individual legislators, even the sponsors of legislations, should not be given controlling effect." *Scituate*, 949 F.2d at 556, n.6. The first step in statutory interpretation is determining the plain meaning of the statute. *See, e.g., Chicago v. Envtl. Def. Fund,* 511 U.S. 328, 334-35 (1994) (analyzing a RCRA exemption under the "plain meaning rule" while dismissing the legislative history as irrelevant); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay,* 484 U.S. 49, 56 (1987) (examining CWA language and recognizing that "the starting point for interpreting a statute is the language of the statute itself"). Section 309(g)(6)(A) states that EPA may not enforce violations "which a State has commenced and is diligently prosecuting an action under a comparable state law" or "for which . . . the State has issued a final order not subject to further judicial review. . .." 33 U.S.C. § 1319(g)(6)(A)(ii), (iii). Congress did not include any language requiring a state have an approved permitting program for the 309 bar to take effect. In contrast, in section 309(a), Congress incorporated specific language referencing state approved programs when allowing EPA to issue Administrative orders. 33 U.S.C. § 1319(a).

Moreover, court decisions have not required states to have approved permitting programs to uphold the 309 bar. In *Scituate,* a citizen's group brought an action under section 505 of the CWA for discharging sewage pollutants into coastal waters. *Scituate,* 949 F.2d 552, 554. The State, which did not have an approved permitting program, had previously issued an administrative order under its state water pollution laws. *Id.* at 553. The court held that the 309(g) bar extended to the action brought by the citizens group because the State had already issued the administrative order against the defendants. *Id.* at 558.

Turning to the case at bar, New Union has taken enforcement actions against Goldthumb's discharges. The authority under which New Union proceeds is much like the CWA. In fact, section 28(a) of the state law prohibits the "addition of any pollutant from any source to the waters of the State" without a permit. 50 N.U.R.S. § 28(a). This section is equivalent to and even broader

than CWA § 301, which prohibits unpermitted discharges from only point sources to waters of the United States. 33 U.S.C. § 1311. Simply because New Union has not received EPA's approval of its permitting program, does not suggest that New Union has not adequately addressed water pollution violations within its state. In fact, EPA has strongly suggested that New Union's program would be approved upon its submission.

Allowing EPA to bring an action subsequent to NUDEP's administrative orders because New Union is not acting under an approved program results in duplicative enforcement actions for the same violations. It does not further the goal of Congress, "to restore and maintain . . . the integrity of the Nation's waters;" rather it interferes with Congress's intent to provide the states with their rights to enforce and protect against water pollution. 33 U.S.C. § 1251. Additionally, it destabilizes NUDEP's enforcement actions, as violators will be exposed to additional sanctions regardless of NUDEP's enforcement order.

B. Did the court below err in holding that a state need not enforce using authority comparable to CWA § 309(g) to prevent EPA enforcement under § 309?

1. *The Statute and the Legislative History*

Section 309(g)(6)(A) precludes EPA from issuing an administrative penalty order for violations which "the State has commenced and is diligently prosecuting an action under a State law comparable to this subsection" or "the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law. . .." 33 U.S.C. § 1319(g)(6)(A)(ii), (iii). The issue before this Court is whether the state must be acting under its administrative penalty provision or whether it is sufficient that the state law contains such provision even though the state chose another enforcement mechanism.

The purpose of section 309 is to provide EPA with the authority to bring enforcement actions against CWA violators. Section 309(a) allows EPA to issue administrative orders; section 309(c) authorizes the federal government to commence criminal actions; section 309(d) permits EPA to commence actions for civil penalty; and section 309(g) provides EPA with administrative penalty assessment authority. 33 U.S.C. § 1319. Subsection (g) is the only subsection that includes specific limits on EPA enforcement ac-

tions. Subsection (g) also contains factors that the EPA must consider to determine the amount of administrative penalties and requirements for public participation in the administrative penalty assessments. 33 U.S.C. § 1319(g)(3), (4).

The legislative history of section 309(g) provides some insight into Congress's meaning of "comparable State law." The Senate intended the 309 preclusion to apply to EPA actions that "that the Federal Government or a State has commenced and is diligently prosecuting an administrative civil penalty action or has already issued a final administrative civil penalty order. . .." 133 Cong. Rec. S733-S769, *reprinted in* LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, at 367. During the Senate floor debates, Senator Chaffee remarked, "the limitation of 309(g)(6) applies only where a State is proceeding under a State law that is comparable to section 309(g)." *Id.* Senator Chaffee explained that a comparable state law would provide equivalent public participation procedures, penalty factors and other provisions that are analogous to the elements of section 309(g). *Id.* Congress's intent for the 1987 amendments was to "beef up" EPA's enforcement authority by allowing EPA to assess penalties in lieu of commencing a judicial action for smaller and less controversial cases (i.e. violations which can be proved by permittee's own discharge monitoring reports). 133 Cong. Rec. S733-S769, *reprinted in* LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, at 367; H.R. Conf. Rep. No. 99-1004, at 138, *reprinted in* LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, at 827. The House bill ambiguously provided that "if the State demonstrates that the state-imposed penalty is appropriate" then the federal government "is not authorized to take any action under [subsection (g)]." H.R. Conf. Rep. No. 99-1004, at 136, *reprinted in* LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, at 825. The Senate report stated that the limitation only applies "to an action for civil penalties for the same violations which are the subject of the administrative civil penalties proceeding." *Id.* at 133. The 309(g) preclusion language from the Senate bill rather than the House bill was the final language adopted into the conference substitute. *Id.* at 139.

Currently there is a split in the circuits on how to interpret the "comparable State law" language. The Supreme Court has not granted certiorari on this issue. One approach, led by the First Circuit decision in *Scituate*, examines the entire state statute to determine if the whole act contains comparable penalty assess-

ment authority. As long as the state has the power to seek penalties, but has exercised its regulatory discretion not to do so, any enforcement action by the state is deemed sufficient to bar further EPA action under section 309(g). *See Scituate,* 949 F.2d 552. Other circuits have adopted the Ninth Circuit approach, examining only the provision that the state is using in the enforcement proceeding to determine whether the state acted under a "comparable State law." *See Citizens for a Better Env't-Cal. v. Union Oil Co.,* 83 F.3d 1111 (9th Cir. 1996).

2. EPA's Argument

Section 309(g) authorizes EPA to issue administrative penalties for violations of the CWA. Section 309(g)(6)(A) limits EPA action where the federal government has already issued administrative penalties for the violations, or if the state is currently or already has issued administrative penalty orders under a state law comparable to subsection (g). 33 U.S.C. § 1319(g)(6)(A).

The plain meaning of section 309(g)(6) only limits EPA action when the state is acting "under a State law comparable to this subsection," i.e. subsection (g). 33 U.S.C. § 1319(g)(6)(A). To interpret the provision differently would contradict Congress's intent for the CWA. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive."); *Chevron U.S.A.,* 467 U.S. at 842-43 ("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."). The Clean Water Act was implemented to "restore and maintain. . .the integrity of the Nation's waters." 33 U.S.C. § 1251. Although Congress recognized and preserved states' rights to prevent water pollution, Congress provided the federal government with the primary responsibility of supervising and enforcing the provisions of the CWA. *See* 33 U.S.C. § 1251 (d); 33 U.S.C. § 1319; 33 U.S.C. § 1342. States can take over much of the responsibility upon submission and approval of a state permitting program. 33 U.S.C. § 1342(b). However, the federal government still retains a supervisory role and its full authority to enforce against violations of the CWA. 33 U.S.C. § 1342. Reading the comparability requirement any broader than its plain meaning would allow states to issue orders or take other non-penalty enforcement actions precluding the fed-

eral government from bringing an action for penalties. In effect, states could control the type of enforcement action brought against violations, simply by adopting comparable provisions somewhere in their statute and not using them.

Remarks by Senator Chaffee during the Senate Debates clearly indicate that the intent was to require a state act under the comparable state provision, not simply that the state statutory scheme contain such provision. Specifically, Senator Chaffee stated that the preclusion "applies only where a State is *proceeding* under a State law that is comparable to section 309(g)." 133 Cong. Rec. S733-S769, *reprinted in* LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, at 367 (emphasis added). The House Conference Report stated that the purpose of § 309(g) was to allow EPA to issue penalties for cases that did not require judicial actions. H.R. Conf. Rep. No. 99-1004, at 138-39, *reprinted in* LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, at 827-28. However, Congress included safeguards such as public participation, public hearings, and factors that must be taken into account when issuing penalties, in order to prevent the federal government from issuing small administrative penalties in place of appropriate civil actions. *See* 33 U.S.C. § 1319(g)(3), (4). States would be able to overcome these "safeguards" by issuing administrative orders or other actions under different provisions of the state's laws and claiming that other enforcement actions for these violations are precluded by 309(g) because somewhere in the state's act are provisions that are comparable to section 309(g).

Although circuits have split on this issue, the more appropriate line of reasoning follows the Ninth Circuit's opinion of *Citizens for a Better Environment-Cal. v. Union Oil Co.*, 83 F.3d 1111 (9th Cir. 1996) (hereinafter "CBE"). *See also Wash. Pub. Interest Research Group v. Pendleton Woolen Mills*, 11 F.2d 883, 885-86 (1993) (looking to the "plain language of the statute," the court held that there was no evidence in the legislative history that suggested Congress intended to extend the bar on subsequent actions to a context beyond administrative penalty actions). Although *CBE* involved a citizen suit action, the court interpreted the language of section 309(g)(6)(A), which is the same section that precludes EPA action. Because the same language cannot mean one thing for one party and another for a different party (unless specified), the court's interpretation is applicable to EPA actions as well.

In *CBE,* the organization filed a citizen suit action under CWA § 505, claiming that defendants violated CWA effluent standards and water quality standards. *CBE*, 83 F.3d 1111, at 1113. The defendant moved to dismiss, maintaining that because the Regional Board's cease-and-desist order ("CDO") was issued pursuant to a statutory scheme containing administrative penalty authority, the CDO was issued under a "comparable State law" within the meaning of CWA § 309(g). *Id.* at 1117. The district court dismissed defendant's motion, finding that the "comparability assessment is conducted by examining the state statutory enforcement provision involved," rather than the "state statutory enforcement scheme as a whole." *Id.* at 1117 (citing *Citizens for a Better Environment-Cal. v. Union Oil Co. of Cal.*, 861 F. Supp. 889 (N.D. Cal. 1994)).

Rejecting the *Scituate* analysis as too dependent upon the "concern that the discretion of enforcement authorities to choose enforcement methods be preserved," the Ninth Circuit offered three reasons for requiring a state action be assessed under the provision of the state law that is comparable to section 309(g). *CBE*, 83 F.3d at 1118. First, the plain meaning of the statute leads to this conclusion; second, the inclusion of public notice and comment provisions within 309(g) requires a state action be exposed to these same public participation constraints; and third, the "holding from *Scituate* leads to the anomalous conclusion that state administrative enforcement actions would more broadly preclude citizen suits than the administrative enforcement actions of the EPA." *Id.*

Other courts have also determined that the proper analysis for comparability is to examine the specific provision which the state used for the enforcement action. The District Court of Colorado found that "by specifying that state action, to be preclusive, must have been brought under a law comparable to subsection (g), without mentioning subsection (a) compliance actions, Congress expressed its intent to preclude citizen actions only when the state is actively seeking an administrative penalty." *Old Timer, Inc. v. Blackhawk-Cent. City Sanitation Dist.*, 51 F. Supp. 2d 1109, 1114 (D. Colo. 1999). The District Court of New Mexico has also rejected the policy arguments of the *Scituate* opinion, reading the statute in its literal sense. *Friends of Santa Fe County v. LAC Minerals, Inc.,* 892 F. Supp. 1333, 1345 (D. N.M.1995). "'This subsection'" clearly refers to subsection (g) of section of 1319, or the administrative penalties subsection." *Id.* at 1345-46; *see also Mo-*

lokai Chamber of Commerce v. Kukui Inc., 891 F. Supp. 1389, 1404 (D. Haw. 1995) (relying on the specificity of the 309(g) bar, i.e., "this subsection," meaning subsection (g), which only provides for administrative penalties to find the State notice order was not "comparable"); *United States v. City of Toledo*, 867 F. Supp. 603, 607 (N.D. Ohio 1994) (finding defendant's 309 preclusion argument inapplicable because a penalty was neither assessed nor paid).

Defendant claims that EPA is barred from bringing this action because the State has previously issued administrative orders for the violations. NUDEP chose to issue administrative orders rather than assess penalties under its comparable administrative penalty section. A literal reading of section 309(g)(6)(A), which unambiguously states "this subsection," does not preclude EPA's action since NUDEP has not assessed administrative penalties. To hold otherwise, would nullify the meaning of the words Congress chose to employ for the section 309 preclusion.

3. Goldthumb's Argument

The goal of the Clean Water Act is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251. Section 309 provides the federal government with its enforcement discretion to determine which method will best achieve a violator's compliance with the CWA. 33 U.S.C. § 1319. Congress's intent for including the 309(g)(6) preclusion was to prevent duplicative enforcement actions for the same violations.

Circuit courts have determined that the appropriate approach to interpreting the section 309(g) preclusion focuses on whether the statute contains administrative penalty authority comparable to section 309(g) rather than on whether the state used that authority when enforcing the violation at issue. *Scituate,* 949 F.2d at 555-56. The leading case for this line of reasoning is the First Circuit's decision in *Scituate*. In *Scituate,* a citizen's group brought an action under the CWA's citizen suit provision, section 505, to enjoin defendant from discharging pollutants into an estuary without a NPDES permit. *Id.* at 553. The Massachusetts Department of Environmental Protection (DEP), had statutory authority comparable to section 309(g). *Id.* Prior to the commencement of the citizen suit, the DEP issued an administrative order requiring the town of Scituate to prohibit any new connections to the sewer system, to take the necessary steps for con-

structing a new wastewater treatment facility and to begin upgrades at the current facility. *Id.* at 554. Although the DEP chose not to assess penalties at the time of the order, the order reserved DEP's right to do so at a future date. *Id.* The district court held that the citizen's group was barred under section 309 of the CWA. The citizen's group appealed, claiming that the 309 bar only extended to those "suits where the State has brought an action comparable to subsection 309(g)." *Id.* at 555. On appeal, the First Circuit upheld the district court's determination, finding that the DEP order in conjunction with Massachusetts overall statutory scheme satisfied the requirements of the 309 bar. *Scituate*, 949 F.2d at 556.

Although the court examined the language of section 309(g) with respect to a bar on citizen suits, the same language also bars federal enforcement actions. The court found that "a narrow reading of section 309(g)(6)(A). . .turns on the logical happenstance of statutory drafting, ignor[ing] two important considerations." *Id.* First, the focus of the bar is the whether the state action seeks to remedy the same violations as the duplicative action, not on the state statutory construction of such enforcement authority. *Id.* Second, as long as the CWA's goal of restoring and maintaining the integrity of the Nation's waters is preserved, duplicative actions "aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well under way do not further this goal." *Id.* The court held that since Massachusetts was "authorized to assess those penalties, and that the overall scheme of the two acts [was] aimed at correcting the same violations, thereby achieving the same goals[,]" the state administrative order was "an action comparable to section 309(g)." *Id.*

The Fourth Circuit has also determined that the proper focus for assessing comparability is to look at the entire state enforcement scheme. *See United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769 (E.D.Va. 1997) *aff'd in part, rev'd in part on other grounds,* 191 F.3d 516 (4th Cir. 1999). In *Smithfield Foods*, EPA brought an enforcement action under the CWA against a pork processing company. *Id.* at 773. The defendant claimed that the EPA action was barred by section 309(g) because the State had already issued an administrative order for the same violations. *Id.* at 791. Although ultimately holding that EPA's action was not barred, the court stated that "[t]he proper focus in determining the comparability is on the substance of the law, not its form." *Id.*

In the present case, New Union has already issued two administrative orders for the discharges that EPA is attempting to enforce. New Union's statute authorizes the NUDEP to enforce against violations of its water pollution laws through the issuance of injunctions, civil penalties and administrative penalties. In fact, the administrative section of New Union's statute is a "virtual clone of CWA § 309(g)." Moreover, EPA has previously recommended that New Union submit its permit program for approval because of the high likelihood that EPA would approve it. Although New Union did not assess a penalty under the section that is the clone of section 309(g), the laws of New Union do provide for administrative penalty authority. As courts should not place form over substance when interpreting statutory language, this Court should bar EPA's action, finding that New Union's statutory scheme as a whole, is comparable to CWA § 309(g).

C. DID THE COURT BELOW ERR IN HOLDING THAT A STATE ENFORCEMENT ACTION THAT PREVENTS EPA PENALTY ASSESSMENT UNDER § 309(G) ALSO PREVENTS EPA FROM SEEKING INJUNCTIVE RELIEF?

1. The Statutory and Legislative History

The question before this Court is whether a state enforcement action precludes all enforcement actions by the EPA, or if it only precludes EPA penalty actions. The relevant language of section 309(g)(6)(A) provides that violations previously enforced "shall not be the subject of a civil penalty action under subsection (d) of this section or. . .section 1365 of this title [citizen suit provision]." 33 U.S.C. § 1319(g)(6)(A).

As already stated, Congress's goal of the CWA was to "restore and maintain. . .the Nation's waters," and in doing so, it provided several enforcement methods to ensure compliance with the prohibition against unpermitted discharges. 33 U.S.C. § 1251; 33 U.S.C. § 1319. EPA's authority to assess and/or seek injunctive relief and penalties is separated into several subsections throughout section 309. Section 309(a) authorizes EPA to issue administrative orders for violations of the CWA; section 309(b) permits EPA to commence a civil action for relief "including a permanent or temporary injunction;" subsection (c) authorizes EPA to commence a criminal action against a violator; subsection (d) authorizes EPA to commence an action seeking civil penalties; and

subsection (g) allows EPA to assess administrative penalties. 33 U.S.C. § 1319(a), (b), (d), (g).

EPA has discretion on the method of enforcement used; however, Congress included safeguards throughout section 309 and the CWA to ensure adequate remedies are obtained for violations of the CWA. For example, prior to issuing an administrative order, EPA must notify the state of its intention and give the public notice of such order. 33 U.S.C. § 1319(a)(2). If EPA chooses to commence a civil action, a citizen may intervene as a matter of right. 33 U.S.C. § 1365(b)(1)(B). Additionally, if EPA assesses an administrative penalty, the violator still maintains its duty to comply with the CWA. 33 U.S.C. § 1319(g)(7).

During the passage of the 1987 amendments, there was discussion on the scope of the 309 preclusion. The Senate report accompanying the Senate bill stated that the 309 limitation "applies only to an action for civil penalties for the same violations which are the subject of the administrative penalty proceeding. . ..In addition, this limitation would not apply to (1) an action seeking relief other than civil penalties (e.g. an injunction or declaratory judgment. . .." H.R. Conf. Rep. No. 99-1004, at 135, *reprinted in* LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, at 824. Additionally, during the floor debates, Senator Chaffee explained that the preclusion extends to "civil penalty actions under 309(d), 311(b), or 505" and that "a Federal judicial penalty action or a citizen suit is not to be commenced if an administrative penalty proceeding is already underway." 133 Cong. Rec. S733-S769, *reprinted in* LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, at 367.

Circuits are split on whether the preclusion extends to penalty actions and actions for injunctive relief. The *Scituate* court has led the argument extending the bar to both types of enforcement actions. *Scituate,* 949 F.2d 552. Other courts have limited the preclusion to only actions seeking civil penalties. *Coalition for a Liveable W. Side, Inc., v. New York City Dep't of Envtl. Prot.*, 830 F. Supp. 194, 196 (1993) (finding that the language of 309 only bars *civil penalty* actions); *cf. PMC Inc., v. Sherwin-Williams,* 151 F.3d 610, 619 (7th Cir. 1998) (finding that although a broad reading of a RCRA provision would be consistent with Congress's evident desire to make citizen suits supplement rather than supplant state actions, the argument was not "strong enough to override the statutory text"). However, both of these analyses of section 309 are in the context of a citizen's suit action, so although the

reasoning for interpreting section 309(g)(6) one way or the other is persuasive, neither is exactly on point with the issue before this Court.

2. EPA's Argument

A plain reading of the limitation in section 309(g)(6)(A) provides that only "civil penalty actions" under section 309(d) or 311(b) are precluded if a state has already issued a final order. The limitation does not contain any language, directly or indirectly, referencing the intent to preclude injunctive actions as well. The district court erroneously extended the limitation to include injunctive relief actions, however, neither the statute, the legislative history nor the policy underlying the CWA support such a finding. Additionally, any supporting decisions that Defendant relies on from case law, can only apply to the limitation with respect to citizen suits, not to federal enforcement actions.

Congress charged EPA with the primary responsibility of implementing the Clean Water Act; this responsibility includes the enforcement of the CWA. 33 U.S.C. § 1251; 33 U.S.C. § 1319. The legislative history of the 1987 amendments does not contain any language suggesting the preclusion extends beyond that which is stated in the statute. *See* 133 Cong. Rec. S733-S769, *reprinted in* LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, at 367. In fact, the legislative history supports the plain language of the statute, "the limitation would not apply to (1) an action seeking relief other than civil penalties (e.g. an injunction or declaratory judgment). . . ." *Id.*

Although split, courts that have not extended the 309 bar to actions seeking injunctive relief, base their conclusions upon the plain meaning of the statute and the legislative history; rather than on one pure policy argument as in the case of those courts extending the preclusion. *Compare Orange Env't, Inc. v. County of Orange*, 860 F. Supp. 1003, 1018 (S.D.N.Y. 1994) (holding that the language of the CWA simply does not support a broader interpretation of the preclusion provision to include in that "it unequivocally states that any violation 'with respect to which a State has commenced and is diligently prosecuting an action under state law. . .shall not be subject to a civil penalty action'"), *and Coalition for a Liveable W. Side, Inc., v. New York Dep't of Env't Prot.*, 830 F. Supp. 194, 197 (S.D.N.Y. 1993) (concluding that the language of § 309 clearly and unambiguously applied to *civil penalty* actions, finding "no basis for the First Circuit's redrafting of the

statute"), *with N. and S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 555-56 (1st Cir. 1991) (basing its conclusion to bar citizen's suit for penalties and injunctive relief where state was diligently enforcing state Clean Waters Act on the policy considerations regarding citizen suits), *and Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 382 (8th Cir. 1994) (holding that "policy considerations which prevent AWF from bringing claims for civil penalties equally apply to AWF's claims for declaratory and injunctive relief"). Based upon the Supreme Court's plain meaning interpretation in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay,* 484 U.S. 49 (1987), the plain meaning of section 309(g)(6)(A) clearly limits the preclusion to only those actions seeking civil penalties.

Even if this Court finds the First Circuit's argument persuasive, the holding must be limited to the context of the case, i.e. citizen suits. The court in *Scituate* based its policy considerations upon section 505 of the CWA, the citizen suit provision. *Scituate,* 949 F.2d. at 557. The court held that because section 505 did not differentiate between injunctive relief and penalties, as section 309 did, the limitation on citizen suits extended to all actions. *Id.* However, section 309(g)(6)(A) states that the preclusion extends to "civil penalty action[s] under subsection (d). . .or section [505]." 33 U.S.C. § 1319(g)(6)(A).

Here, EPA has brought an enforcement action subsequent to NUDEP's administrative orders. NUDEP has not previously brought an action seeking penalties for the discharges at issue. Based upon the language of section 309(g), EPA is not precluded from bringing an action requiring Goldthumb's compliance with the CWA.

3. Goldthumb's Argument

Goldthumb will argue that the scope of the preclusion encompasses both penalty and injunctive relief actions. This position is supported only by a policy argument. First, Congress intended to provide the states with the primary responsibility of enforcing the CWA. Second, the basis for courts extending the bar to actions for injunctive relief is applicable not only to citizen suits but to governmental actions as well.

When Congress enacted the CWA, it specifically recognized and preserved the primary responsibilities of the states "to prevent, reduce and eliminate pollution. . .." 33 U.S.C. § 1251(b). Congress's intent for the inclusion of § 309(g)(6)(A) was to prevent

actions that would ultimately result in actions duplicating prior state enforcement. *See* H.R. Conf. Rep. No. 99-1004, at 139, *reprinted in* LEGISLATIVE HISTORY OF THE WATER QUALITY ACT OF 1987, at 828; *Scituate*, 949 F.2d 552. If violations, previously addressed by state enforcement actions, are subjected to subsequent enforcement actions by the federal government, or citizens, the authority of the state will be undermined. Violators will less likely become involved in settlement discussions if the final order by the state is not technically "final."

Since this limitation also applies to federal actions under subsection (g), it would be possible for the federal government to take two separate enforcement actions against a party for the same violation. For example, if EPA were to assess an administrative penalty for violation X, EPA could later decide that its action was not severe enough and issue an administrative order for the very same violation, even if no additional violations occurred.

Courts have also recognized the policy behind the 309 limitation favors precluding injunctive relief and penalty actions. Although these cases involved citizen suits, the policy arguments remain relevant to limitations on federal actions as well. In *Scituate*, the court held that the entire scope of civilian enforcement remedies was precluded because the State had diligently prosecuted the violations. *Scituate*, 949 F.2d at 558. The court relied on the supplementary role of citizens for the enforcement of the CWA in that "citizen suits are only proper if the government fails to exercise its enforcement responsibility." *Id.* The court concluded that if the limitation were to have "any beneficial effect on enforcement of clean water legislation, the section 309(g) ban must cover all civil actions." *Id.* The court deferred to the State's enforcement action, stating that "violations may continue despite everything reasonably possible being done by the State and [defendant] to correct them. . .. Merely because the State may not be taking the precise action [plaintiff] . . . desires does not entitle [plaintiff] to injunctive relief." *Id.* Additionally, allowing the limitation to extend only to penalty actions and not injunctive relief, would defer primary enforcement responsibility only in cases where a penalty is sought. This interpretation, the *Scituate* court held, leads to absurd results. *Id.*

Here, the State has chosen to enforce by means of administrative orders. NUDEP, prior to this action, issued Goldthumb two administrative orders pursuant to New Union's water pollution statute. NUDEP possesses the authority to assess administrative

penalties, but chose not to in this situation. NUDEP evaluated the seriousness of the violation and the best means to prevent further pollution; NUDEP concluded that penalties were not necessary. Allowing EPA to duplicate NUDEP's administrative enforcement actions because NUDEP found that penalties were not needed to address these violations, undermines the state's authority during settlements. To extend the preclusion to injunctive relief actions, supports NUDEP's (and other states') enforcement authority, which will ultimately increase their ability to enter into "finalized" consent agreements with violators. For these reasons, this court should uphold the district court's finding that EPA is precluded from bringing an action.