Pace Environmental Law Review

Volume 20
Issue 2 *Spring 2003*

Article 10

April 2003

Brief for the Appellant/Appellee, State of New Union: Fifteenth Annual Pace National Environmental Moot Court Competition

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Recommended Citation
Jill Brown, Melanie Kleiss, and David Zoll, *Brief for the Appellant/Appellee, State of New Union: Fifteenth Annual Pace National Environmental Moot Court Competition*, 20 Pace Envtl. L. Rev. 995 (2003)
DOI: https://doi.org/10.58948/0738-6206.1187
Available at: https://digitalcommons.pace.edu/pelr/vol20/iss2/10

MEASURING BRIEF*

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

Brief for the Appellant/Appellee,
STATE OF NEW UNION

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JURISDICTION

The district court had subject matter jurisdiction over the case at hand because this action arose under the Clean Water Act (CWA), 33 U.S.C. §§ 1251, 1319, which qualifies as "the Constitution, laws, or treaties of the United States." *See* 28 U.S.C. § 1331. This Court has jurisdiction over "all final decisions of the district courts of the United States." 28 U.S.C. § 1291. In granting summary judgment for Goldthumb on all issues, the District Court for the District of New Union issued a final order that disposed of all parties' claims. Therefore, this Court has jurisdiction over the appeals from that order.

QUESTIONS PRESENTED

1. Is the addition of a pollutant to a temporarily dry riverbed a violation of 33 U.S.C. § 1311(a)?
2. Is federal regulation of a temporarily dry riverbed of an interstate stream a valid exercise of authority under the Commerce Clause, U.S. Const. art. 1, § 8, cl. 3?
3. Does 33 U.S.C. § 1319(g) require a State to have an approved permit program in order to deprive EPA of jurisdiction under § 1319?
4. Does 33 U.S.C. § 1319(g) require a State to enforce using authority comparable to the CWA in order to deprive EPA of jurisdiction under 33 U.S.C. § 1319?
5. Does 33 U.S.C. § 1319(g) deprive EPA of jurisdiction under § 1319 to enforce against violations when a State has already enforced against them?

STATEMENT OF THE CASE

The United States Environmental Protection Agency (EPA) brought this enforcement action under the CWA, 33 U.S.C. §§ 1251, 1319, alleging Goldthumb Mining Co. Inc. (Goldthumb) violated the CWA by discharging pollutants into a navigable water without a permit issued under 33 U.S.C. § 1342.

Goldthumb filed a motion for summary judgment for lack of subject matter jurisdiction on two grounds. First, Goldthumb asserts that the Arroyo d'Oro is not subject to the CWA for two reasons: (1) the Arroyo d'Oro, when dry, is not included within the CWA's definition of "navigable waters," and (2) Congress lacks the constitutional authority to exercise jurisdiction over discharges

into the Arroyo d'Oro when it is dry. Second, Goldthumb asserts that 33 U.S.C. § 1319 precludes EPA enforcement when a state has already taken an enforcement action. The District Court granted Goldthumb's motion for summary judgment on the ground that the Arroyo d'Oro was not within the CWA's definition of "navigable waters" and did not reach the Constitutional or preclusion questions.

The State of New Union joins EPA in opposing Goldthumb's claim that Arroyo d'Oro is not subject to regulation under the CWA. Notwithstanding its support of EPA on the first ground, however, New Union joins Goldthumb in arguing that New Union's enforcement actions preclude EPA from bringing this action.

STATEMENT OF THE FACTS

Goldthumb operates a gold mining operation in a desert area within the State of New Union. To extract the gold from the ore, Goldthumb places crushed ore on an impermeable pad and drenches the pile in a cyanide bath which leaches the gold out of the ore. The spent bath is then collected and stored in impermeable evaporation ponds. The rate of evaporation usually exceeds the rate that new bath is added to the ponds, and most of the cyanide and heavy metals accumulate in sludge at the bottom of the ponds. (R. at 2).

Periodically, rainfall around the Goldthumb operation is sufficient to cause liquid to accumulate in the ponds faster than it evaporates. The filling of the ponds during these rainy periods creates the possibility that the ponds may overflow and release dangerous pollutants. An overflow may cause the berms that form the ponds to rupture, releasing all of the contents, including the cyanide-laden sludge. To prevent this catastrophic failure during the rainy season, Goldthumb drains portions of the liquid through a series of pipes and ultimately discharges the liquid onto the dry bed of an arroyo (a small steep-sided watercourse). By draining this liquid prior to the rainy season in August of each year, Goldthumb is able to maintain freeboard in its evaporation ponds. (R. at 2).

The Arroyo d'Oro, into which Goldthumb discharges the liquid from the evaporation ponds, is typically dry. After major storms, however, water runs through the arroyo for several days. (R. at 2). Periodically, storms near the Goldthumb operation are sufficient to cause the water in the arroyo to flow across the bor-

der to the neighboring State of Progress, thirty-seven miles away. About five miles after crossing into Progress, the water in the Arroyo d'Oro enters the Greenheaven Wildlife Preserve and feeds into a permanent three-acre pool that serves as habitat for the endangered Greenheaven Pupfish. (R. at 2-3).

In April 2000, the New Union Department of Environmental Protection (NUDEP) began ongoing regulation of Goldthumb's discharges from the evaporation ponds. At that time, NUDEP issued an administrative order prohibiting Goldthumb from discharging pond liquid into the Arroyo when waters of the state are present or at any other time without prior permission. In July 2000, Goldthumb requested NUDEP's permission to drain some liquid from the evaporation ponds. A NUDEP inspector found that the ponds were in danger of overflowing during the coming rainy season and that there was no water flowing in the Arroyo d'Oro. Based on these findings, NUDEP gave Goldthumb permission for limited draining in order to protect against a catastrophic failure of the berms forming the sides of the ponds. (R. at 3).

NUDEP has continued to be actively involved in the regulation of Goldthumb's discharges. In April 2002, NUDEP issued a second administrative order similar in material respects to the earlier order. In July 2002, Goldthumb requested permission to drain some liquid from the ponds and matters proceeded in the same manner as the July 2000 request. NUDEP has expressed its intention to issue a new administrative order similar to the previous orders. (R. at 3). EPA then brought this enforcement action under the CWA, 33 U.S.C. §§ 1251, 1319, against Goldthumb. EPA asserts that the discharges from the evaporation ponds violated the CWA because they were made without a permit issued under 33. U.S.C. § 1342. (R. at 1).

SUMMARY OF THE ARGUMENT

By discharging contaminated wastewater from its mining operations into a waterway, Goldthumb has violated and continues to violate the CWA, 33 U.S.C. § 1319 (proscribing the discharge of any pollutant from any point source into navigable waters). Goldthumb's contaminated water is a "pollutant" and the pipes from which the water drains is a "point source." The CWA defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1251. Even when the Arroyo d'Oro is dry, it qualifies as "navigable waters" or "waters of the United States" for two reasons. First, EPA has defined "waters of the United States" as including inter-

mittent streams such as the Arroyo d'Oro. *See* 40 C.F.R. § 122.2. EPA's definition is reasonable and does not conflict with congressional intent, so EPA's definition is entitled to deference from this Court. Second, federal judicial precedent shows that the term "waters of the United States" includes temporarily dry riverbeds and arroyos.

Contrary to the district court's holding, no constitutional doubt exists regarding Congress' power under the Commerce Clause to regulate waterways like the Arroyo d'Oro for three reasons. First, numerous federal court decisions have held that Congress has clear power under the Commerce Clause to regulate *both* interstate and traditionally navigable waters. Second, when activities will directly harm endangered species, courts have consistently held that Congress has Commerce Clause power to regulate those activities. Finally, as applied to the facts of this case, CWA jurisdiction over the Arroyo d'Oro meets the Supreme Court commerce power test of *Lopez*. *See United States v. Lopez*, 514 U.S. 549, 558-559 (1995). Therefore, exercising jurisdiction over *commercial* activities that impact a tributary of *interstate* waters upon which *endangered species* depend for survival does not invoke the outer limits of Congress' power or alter the federal-state balance by allowing federal encroachment upon a traditional state power.

The Clean Water Act does not permit EPA enforcement where States have taken enforcement actions. Congress has made it clear that States are the preferred enforcers of the Act and that citizens and EPA serve supplementary enforcement roles only when a State has failed to meet its enforcement obligation. The primacy of the State's role, as well as the statutory language, fail to support EPA's assertion that only States with approved permit programs may preclude EPA enforcement. New Union's enforcement action regarding the discharges from the evaporation ponds is sufficient to support application of the § 1319(g) bar on EPA enforcement.

EPA further asserts that New Union's actions do not preclude EPA enforcement because the actions were not taken under "comparable state law." The § 1319(g) bar should be understood as protecting the State's role as the preferred enforcer and the interests of the regulated party. Although NUDEP has the statutory authority to assess civil penalties similar to those included in § 1319, it chose to exercise authority granted under another statute better suited to the facts in this case. Allowing EPA enforce-

ment undermines New Union's primary role and would replace the judgment of local officials with the judgment of federal regulators. Furthermore, EPA enforcement would reopen the matter and subject Goldthumb to duplicative regulatory proceedings. New Union has created authority similar to the CWA and has taken the necessary actions in regulating Goldthumb's conduct.

Finally, the district court correctly held that NUDEP's enforcement action against Goldthumb prevents EPA from seeking injunctive relief under 33 U.S.C. § 1319(g). First, the text and legislative history of the CWA strongly suggest that Congress intended EPA enforcement actions to supplement, not supplant, State enforcement action. In this case, if EPA could seek injunctive relief it would supplant NUDEP's enforcement actions by making Goldthumb's receipt of permission from NUDEP to release pond waters irrelevant. Additonally, if EPA can seek injunctive relief, State agencies would have little to no power to negotiate compliance with violators. Since State action would only preclude further imposition of civil penalties, little incentive would exist for a violator to negotiate with a State because it would still be vulnerable to an EPA action for injunctive relief.

STANDARD OF REVIEW

A court reviews a grant of summary judgment de novo. *Butler v. City of Prairie Vill.*, 172 F.3d 736, 745 (10th Cir. 1999); *see* Fed. R. Civ. P. 56(c). When reviewing an agency's construction of a statute and interpretation of its own regulations, deferential standards apply. An agency's interpretation of its own regulation has "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). A court must defer to the responsible agency's construction of a statute if such construction is reasonable and not in conflict with the expressed intent of Congress. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-45 (1984).

When reviewing a challenge to the constitutionality of a congressional exercise of power under the Commerce Clause, a court must uphold the exercise of power if "a rational basis exists for finding that the regulated activity affects interstate commerce" and "the means chosen were reasonably adapted to the end permitted by the Constitution." *Deer Park Indep. Sch. Dist. v. Harris County Appraisal Dist.*, 132 F.3d 1095, 1098 (5th Cir. 1998). The challenger has a high burden to overcome these standards. *Id.*

ARGUMENT

I. THE DISCHARGE OF A POLLUTANT INTO A TEMPORARILY DRY RIVERBED VIOLATES 33 U.S.C. § 1362

The CWA prohibits the discharge of a pollutant from a point source to a navigable water without a National Pollutant Discharge Elimination System (NPDES) permit. *See* 33 U.S.C. §§ 1311, 1342, 1362. In the present case, Goldthumb drains water from its contaminated evaporation ponds into the Arroyo d'Oro riverbed before the rainy season, when the river is dry. Goldthumb does not have a permit for such discharges. The district court stated that the contaminated water is a "pollutant" and the pipes from which the water drains constitutes a "point source." The only remaining issue is whether draining the contaminated water into the Arroyo d'Oro when the river is dry qualifies as an "addition of any pollutant . . . to navigable water." *See* 33 U.S.C. § 1362(7), (12).

Goldthumb's actions constitute an addition of a pollutant to navigable water for two reasons. First, in the CWA implementing regulations, EPA has defined "waters of the United States" as including intermittent streams such as the Arroyo d'Oro. *See* 40 C.F.R. § 122.2. Because EPA's definition is reasonable and does not conflict with congressional intent, EPA's definition is entitled to deference from this Court. Second, federal judicial precedent indicates that the term "waters of the United States" includes temporarily dry riverbeds and arroyos.

A. EPA'S INTERPRETATION OF THE CWA AS COVERING ARROYOS WHEN THEY ARE DRY DESERVES JUDICIAL DEFERENCE

The CWA regulations promulgated by EPA include "intermittent streams" within the definition of "waters of the United States," bringing arroyos under CWA jurisdiction. EPA's action against Goldthumb for discharging into the Arroyo d'Oro when it is dry indicates that EPA has interpreted "intermittent streams" to include arroyos when they are dry, and this Court should defer to EPA's interpretation. Further, statutory construction supports the reasonableness of EPA's definition, and legislative history demonstrates that EPA's definition comports with congressional intent. Therefore, EPA's definition is entitled to deference, and

this Court should reverse the district court and hold that the CWA covers arroyos.

1. EPA Regulations Defining "Waters of the Unites States" as Including Intermittent Streams Brings Arroyos Under the CWA

An agency's interpretation of its own regulation has "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). For purposes of exercising jurisdiction under the CWA, EPA regulations define "waters of the United States" as including "intermittent streams." *See* 40 C.F.R. § 122.2. EPA interprets "intermittent streams" to include arroyos when they are dry, as evidenced by this litigation. This interpretation is far from "plainly erroneous or inconsistent with" 40 C.F.R. § 122.2, so the district court erred in holding that "EPA's inclusion of intermittent bodies of water within its definition of navigable waters means that they are navigable waters only when they are bodies of water, not when they are dry land." (R. at 6)

When intermittent streams have water and are flowing, then they are simply "streams." *See Webster's New Collegiate Dictionary* 1150 (1973) (defining "stream" as "a body of running water . . . flowing on the earth" or "any body of flowing fluid"). Therefore, if EPA regulations covered discharges to intermittent streams only when they are flowing, then the regulation's language, "including intermittent streams," would have no independent meaning because it would not describe any condition separate from "streams." To give all terms in the regulation independent meaning, the term "intermittent streams" must include such streams when they are dry. "A reluctance to treat statutory terms as surplusage" supports the reasonableness of EPA's interpretation of its regulation. *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 698 (1995). Thus, this Court should defer to EPA's interpretation and hold that the CWA applies to the Arroyo d'Oro at all times.

Federal courts have deferred to EPA's interpretation and applied the CWA to arroyos and intermittent streams when those waterways are dry. For example, the Tenth Circuit Court of Appeals upheld EPA's determination that the CWA applied to discharges to arroyos, regardless of whether water was flowing when the discharge occurred. *Quivira Mining Co. v. United States*

Envt'l Prot. Agency, 765 F.2d 126, 129-30 (10th Cir. 1985); *see also United States v. Texas Pipeline Co.*, 611 F2d 345, 347 (10th Cir 1980) ("It makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense.").

2. EPA's Interpretation of the CWA Is Entitled to Deference Because It Is Reasonable and Not In Conflict With Congressional Intent

A court must defer to the responsible agency's construction of a statute if such construction is reasonable and not in conflict with the expressed intent of Congress. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. at 842-45. The district court rejected EPA's interpretation of 33 U.S.C. § 1251(12), which defines "navigable waters" as "waters of the United States," based upon a strict interpretation of the words "navigable" and "waters." (R. at 4-6). The court held that because the Arroyo d'Oro is not navigable-in-fact, and because Goldthumb's discharges were not into actual water, Goldthumb did not discharge into "navigable water." This narrow textual interpretation fails for the following reasons: (1) it undermines the explicit goals of the CWA, (2) it directly contradicts legislative history and congressional intent behind the CWA, (3) it ignores the omission of the word "navigable" from the definition of "navigable waters," and (4) it leads to an absurd and counter-productive result by allowing a major loophole in the Act.

Legislative history shows that Congress intended "that the term 'navigable waters' be given the broadest possible constitutional interpretation." *See* Sen. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144; *see also* H.R. Rep. No. 911, 92d Cong., 2d Sess. 131 (containing similar language). This intent resonates with the statutory goals of the CWA, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), and to *eliminate* the discharge of pollutants into those waters, 33 U.S.C. § 1251(a)(1). To realize these laudable goals, Congress recognized that "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, p. 77 (1972). Against the backdrop of this overarching policy of improving and maintaining the quality of the United State's water resources, rhetorical arguments of what constitutes a discharge "into water" become meaningless. Therefore, discharging contaminated waste into the Arroyo d'Oro, that will eventually carry such pollution through in-

terstate hydrologic cycles, clearly falls within the intended scope of the CWA.

Significantly, during the 1972 amendments to the CWA, Congress deleted the word "navigable" from the definition of "navigable waters" that had originally appeared in the House version of the Act. *See* 33 U.S.C. § 1362(7); *see also* Maya R. Moiseyev, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers: The Clean Water Act Bypasses a Commerce Clause Challenge, But Can the Endangered Species Act?*, 7 Hastings W.-Nw. J. Envtl. L. & Pol'y 191, 195 (2001). The definition of "navigable waters" as "waters of the United States" therefore requires a broad interpretation to comply with congressional intent and the textual structure of the statutory definition.

The district court's strict interpretation limiting "navigable waters" to liquid H_2O that is navigable-in-fact tortures the broad statutory definition and leads to potentially absurd results. It is undisputed that Goldthumb discharges contaminated water into a riverbed that will eventually flow with water and carry the pollution into other permanent, interstate waterways. If the CWA does not prohibit such activity, Goldthumb and other polluters could easily subvert the intended purposes of the CWA by discharging into temporarily dry riverbeds. When the intermittent streams flow, the pollution will directly degrade the quality of our nation's water and undermine the goals of the CWA. To allow such a loophole in the administration of the CWA would lead to absurd and counter-productive results. Therefore, EPA's interpretation of "waters of the United States" to include discharges into temporarily dry waterways is more than reasonable in light of the goal of the CWA to eliminate water pollution.

B. JUDICIAL PRECEDENT SHOWS THAT THE TERM "WATERS OF THE UNITED STATES" TAKES A FUNCTIONAL MEANING THAT INCLUDES TEMPORARILY DRY RIVERBEDS AND ARROYOS

Supreme Court and other federal court precedents strongly support the interpretation of "waters of the United States" as including temporarily dry riverbeds such as the Arroyo d'Oro. The Supreme Court in *Riverside Bayview* stated that "Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and . . . to regulate . . . waters that would not be deemed 'navigable' under the classical understanding of that term." *United States v. River-*

side Bayview Homes, Inc., 474 U.S. 121, 133 (1985). The Court then held that CWA jurisdiction extends to wetlands that are adjacent to bodies of open water because such wetlands "tend to drain" into the open water. *Id.* at 134. The Third Circuit Court of Appeals has correctly interpreted the Supreme Court's analysis and holding in *Riverside Bayview* to emphasize that the CWA supports a broad interpretation of what constitutes a discharge "into water." *See United States v. Pozsgai*, 999 F.2d 719, 727 (3d Cir. 1993). The court in Pozsgai rejected defendants' argument that the word "water" in the CWA means "the liquid state of H_2O," and not wetlands, moist soil, or dry land that a federal agency determines should be regulated. *Id.* at 728.

Similarly, the Ninth Circuit held recently that whether a stream was or was not flowing continuously at the time of discharge does not affect applicability of the CWA. *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 534 (9th Cir. 2001). The defendant in *Headwaters* had discharged pollutants into non-flowing water, and the court focused on the ultimate water quality consequences of the discharge to determine whether the water was "water of the United States": "[The tributary] is capable of spreading environmental damage and is thus a 'water of the United States.'" *Id.* Several federal courts have recognized that congressional intent and statutory effectiveness require that the CWA apply to intermittent streams and temporarily dry riverbeds. *See, e.g., United States v. Eidson*, 108 F.3d 1336, 1341-42 (11th Cir. 1997) (stating that to limit the meaning of "navigable water" to fully flowing waterways would "defeat the intent of Congress and would jeopardize the health of our nation's waters"); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975) ("For the purposes of [the CWA] to be effectively carried into realistic achievement, the scope of its control must extend to all pollutants which are discharged into any waterway, including normally dry arroyos . . . .").

Goldthumb's discharges will undisputedly degrade open, interstate waters when water flows through the Arroyo d'Oro and carries Goldthumb's waste into permanent waters in the neighboring State of Progress. According to the Supreme Court in *Riverside Bayview*, such a "tend[ency] to drain" into open waters brings the Arroyo d'Oro under the jurisdiction of the CWA. *See* 474 U.S. at 134. Further, extending CWA jurisdiction over the Arroyo d'Oro comports with overall federal court jurisprudence; courts broadly interpret "waters of the United States" to cover tempora-

rily dry waterways and overall hydrologic cycles, rather than employing a strict definition of "waters" to mean only liquid H_2O. In summary, statutory rules of construction, legislative history, and federal jurisprudence overwhelmingly support the reasonableness of EPA's interpretation of "waters of the United States" to include discharges into arroyos when they are dry.

II. CONGRESS HAS AUTHORITY UNDER THE COMMERCE CLAUSE TO REGULATE TEMPORARILY DRY WATERBEDS OF INTERSTATE STREAMS SUCH AS THE ARROYO D'ORO

The Constitution of the United States grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Numerous federal court decisions have held that Congress has clear power under the Commerce Clause to regulate *both* interstate and traditionally navigable waters. *See, e.g., United States v. Sasser*, 967 F.2d 993, 996 (4th Cir. 1992), *citing Kaiser Aetna v. United States*, 444 U.S. 164, 170-72 (1979). Further, when activities will directly harm endangered species, courts have consistently held that Congress has Commerce Clause power to regulate those activities. *See, e.g., Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1046 (D.C. Cir. 1997). Finally, Congress' Commerce Clause power allows it to regulate Arroyo d'Oro under the CWA as it satisfies the Commerce Clause test espoused by the Supreme Court in *Lopez*. *See United States v. Lopez*, 514 U.S. 549, 558-559 (1995). Because exercising jurisdiction over a tributary to interstate waters upon which endangered species depend for survival does not invoke "the outer limits of Congress' power" or alter "the federal-state framework by permitting federal encroachment upon a traditional state power," there exists no constitutional doubt regarding Congress' power to regulate such waters. *See Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 683 (2001). Therefore, this Court should defer to EPA's reasonable interpretation of "waters of the United States" to include all interstate waterways and their tributaries. *see* 40 C.F.R. § 122.2.

A. JUDICIAL PRECEDENCE SHOWS THAT THE COMMERCE CLAUSE EMPOWERS CONGRESS TO REGULATE INTERSTATE WATERS, IRREGARDLESS OF NAVIGABILITY

If a body of water is connected with a continuous interstate waterway, then the water qualifies as "navigable waters of the United States" over which federal jurisdiction based on the Commerce Clause power attaches. *State of Georgia v. City of East Ridge*, 949 F. Supp. 1571, 1578 (N.D. Ga. 1996); *see also Sasser*, 967 F.2d at 996, *citing Kaiser Aetna*, 444 U.S. at 170-72. The Fourth Circuit in *Sasser* emphasized four tests of whether a water body falls under federal jurisdiction, only two of which refer to traditional navigability. Id.

The District Court of Arizona extensively analyzed the interstate commerce justification of the CWA and held that the CWA applies to "any waterway within the United States also *including normally dry arroyos* through which water may flow, where such water will ultimately end up in *public waters*." *Phelps Dodge Corp.*, 391 F. Supp. at 1187 (emphasis added). Thus, the court did not focus on navigability, but rather on the public nature of a body of water. In other words, Congress has Commerce Clause power over all waters that may eventually lead to waters that in any manner may affect interstate commerce, despite traditional navigability of such waters. *See Eidson*, 108 F.3d at1341-42; *United States v. Earth Sci.s, Inc.*, 599 F.2d 368, 374-75 (10th Cir. 1979). Therefore, contrary to the district court's holding in the case at hand, courts have consistently recognized that non-navigable waters can greatly affect interstate commerce.

B. GOLDTHUMB'S DISCHARGES INTO THE ARROYO D'ORO SATISFY THE SUPREME COURT'S *LOPEZ* TEST AND THEREFORE JUSTIFY FEDERAL REGULATION UNDER THE CWA

The Supreme Court has determined that Congress may regulate three broad categories of activity under its Commerce Clause power: (1) the use of channels of interstate commerce; (2) the instrumentalities of interstate commerce, including persons or things; and (3) activities that substantially affect interstate commerce. *Lopez*, 514 U.S. at 558-559. In *Lopez*, the Court held that the Gun-Free School Zones Act of 1990, which made it a federal offense to possess a firearm in a school zone, exceeded Congress'

Commerce Clause power as it did not substantially affect interstate commerce. *Id.* at 551. The Court emphasized that the Act, a criminal statute, was wholly unrelated to commerce. *Id.* at 561.

Five years after *Lopez*, the Court again applied its Commerce Clause test in *United States v. Morrison*, appearing to narrow the range of the third category. The Court held that the Violence Against Women Act of 1994 was not within Congress' Commerce Clause powers, as it did not substantially affect interstate commerce. The Court found that gender-motivated violent crimes did not have anything to do with commerce, stating that where the Court has "sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity has been some sort of economic endeavor." *United States v. Morrison*, 529 U.S. 598, 611 (2000).

In *Gibbs v. Babbitt*, 214 F.3d 483, 491 (4th Cir. 2000), the Fourth Circuit held that Congress' Commerce Clause power allowed it to regulate the taking of endangered red wolves on private land under the Endangered Species Act. Focusing its analysis on the third *Lopez* category, the Court determined that the taking of a red wolf was an economic activity due to the fact that protection of commercial and economic assets was a primary reason for the taking. *Id.* at 492. The court cited specifically the impact on a "$29.2 billion national wildlife-related recreational industry that involves tourism and interstate travel" as well as scientific research and the trade in fur pelts. *Id.* at 493-95. Similarly, the D.C. Circuit held that Congress had Commerce Clause power to regulate the taking of an entirely intrastate species of fly, under the channels and substantial effects prongs of the *Lopez* analysis. *Home Builders*, 130 F.3d at 1046. The court held that the transportation of endangered species, destruction of biodiversity, and potential medicinal uses of species qualified as channels and substantial effects of interstate commerce, justifying federal regulation under the Commerce Clause. *Id.* at 1046-47, 1053, 1056.

1. Regulation of Goldthumb's Discharges Into the Arroyo d'Oro Qualifies as Regulation of a Channel, as Set Forth by the Supreme Court in *Lopez*

"[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." *Lopez*, 514 U.S. at 558 (quoting *Heart of Atlanta Motel, Inc. v. United*

States, 379 U.S. 241, 256 (1964)). Unlike the facts in *Lopez*, regulation of Goldthumb's discharges into the Arroyo d'Oro, which connects to interstate waters, qualifies as regulation of a channel of interstate commerce for two reasons. First, unlike an entirely intrastate public school, the Arroyo d'Oro is a channel in a literal sense because it contributes to a physical connection between the States of New Union and Progress, carrying pollution and other by-products of economic production across state lines. Such disposal of contaminated wastewater from gold mining activities easily qualifies as an "injurious use" of the Arroyo d'Oro channel because such waste ultimately comes to rest in the Greenheaven Wildlife Preserve of the State of Progress. Second, even an entirely intrastate endangered species such as the pupfish qualifies as a channel of interstate commerce, due to the historic transportation of endangered species. *See Home Builders*, 130 F.3d at 1046.

2. Regulation of Goldthumb's Discharges Into the Arroyo d'Oro Qualifies as Regulation of an Instrumentality, as Set Forth by the Supreme Court in *Lopez*

"Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Lopez*, 514 U.S. at 558 (citing *Shreveport Rate Cases,* 234 U.S. 342 (1914)). Goldthumb's contaminated sludge and pond water results from mining gold. This gold not only likely flows in interstate commerce, but can also serve an interstate fiscal investment function. Therefore, Goldthumb's discharges result from the processing of an instrumentality of commerce. Regulation of such discharges directly impacts the commercial operations, production, and distribution of that instrumentality, gold. This Court should hold that regulation of Goldthumb's discharges also qualifies as regulation of an instrumentality of interstate commerce.

3. Regulation of Goldthumb's Discharges Into the Arroyo d'Oro Qualifies as Regulation of Substantial Effects on Interstate Commerce, as Set Forth by the Supreme Court in *Lopez*

"Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . ." *Lopez*, 514 U.S. at 558-59 (citing *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, at 37 (1937)).

Goldthumb's mining operations and discharges are substantially related to interstate commerce for three reasons. First, as an economic activity which results in discharges into a tributary of an interstate waterway, Goldthumb's gold mining operations substantially affect interstate commerce. Second, if Goldthumb's discharges remain unregulated, it has an economic advantage over gold mining operations in other states that incur additional costs to comply with the CWA. Regulating polluters that rid themselves of their economic by-products by discharging such wastes into tributaries of interstate waters certainly balances the economic advantage that an upstream polluter would otherwise have over a downstream business in another state. *See, e.g.*, *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389 (1994) (finding that the urge to dispose of waste is fundamentally economic); *United States v. Darby*, 312 U.S. 100, 121-22 (1940) (upholding federal wage and hour regulations so as to prevent states with higher standards to be disadvantaged vis-a-vis states with lower standards).

Third, the potentially negative effects of Goldthumb's discharges on the endangered pupfish substantially relates to interstate commerce, even though the pupfish resides entirely within the State of Progress, because overall destruction of biodiversity and potential medicinal uses provide the substantial nexus between all endangered species and interstate commerce. *See, e.g.*, *Home Builders*, 130 F.3d at 1046. The Supreme Court has held that the "incalculable value" of endangered species even outweighs public projects that cost millions of dollars. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 187-88 (1978). The district court's opinion that the Greenheaven pupfish does not enjoy federal protection because "the citizens of Progress see fit to spend their tax dollars prolonging for a few generations the ultimate extinction of an otherwise unremarkable species" woefully disregards federal and Supreme Court precedent. Not only will Goldthumb's discharges potentially harm an endangered species, but those pollution impacts result from out-of-state economic activities, establishing an even more direct link to interstate commerce than the facts involved in *Home Builders*. 130 F.3d at 1043, 1046 (holding that Congress has commerce power to regulate a local county construction project that would impact a purely intrastate endangered species).

Even if this Court finds that Goldthumb's activities do not alone substantially relate to interstate commerce, the aggregate

effect of activities like Goldthumb's mining operations has a substantial relationship to interstate and warrants federal regulation under the Commerce Clause. *See Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942). In summary, the discharges resulting from Goldthumb's activities meet any of the three factors of the Supreme Court's *Lopez* test. This Court should hold that Congress has power under the Commerce Clause to regulate such discharges.

C. CONTRARY TO THE DISTRICT COURT'S HOLDING, THE CANON OF CONSTRUING A STATUTE TO AVOID CONSITUTIONAL DOUBT DOES NOT APPLY IN THIS CASE

The Supreme Court has held that when an agency interpretation of a statute "invokes the outer limits of Congress' power" or "alters the federal-state framework by permitting federal encroachment upon a traditional state power," Congress must clearly intend such a result for the court to defer to the agency's interpretation. *See SWANCC*, 531 U.S. at 683. In *SWANCC*, the Supreme Court majority declined to analyze whether or not Congress could extend the jurisdiction of the CWA to isolated, intrastate, non-navigable, man-made ponds used by migratory birds under its Commerce Clause power.

As shown earlier, courts have consistently understood the Commerce Clause to allow federal regulation of both interstate waters and activities that impact the critical habitat of endangered species. The connection to interstate commerce resonates in the inherently economic nature of water pollution, in addition to the incalculable and established commercial value of endangered species. Therefore, extending CWA jurisdiction over waterways like the Arroyo d'Oro does not begin to approach the outer limits of Congress' power under the Commerce Clause. Further, the specific facts of the case at hand logically invoke the Commerce Clause because Goldthumb's contaminated waste actually results from commercial activities and ultimately travels via waterways to the neighboring State of Progress, where the endangered pupfish depends upon the integrity of the waters flowing from New Union.

EPA's regulations also do not alter the federal-state balance by permitting federal regulation of a traditional state power. While states have traditional and primary power over land and water use, such power only rests with intrastate, isolated waters.

See SWANCC, 531 U.S. at 171-72 (holding that federal jurisdiction over "ponds and mudflats falling within the 'Migratory Bird Rule'" would infringe on the States' primary power over land and water use); *see also United States v. Interstate Gen. Co.*, 152 F. Supp. 2d 843, 847 (D. Md. 2001) (holding that *SWANCC*'s ruling narrowly applies to water bodies that fall under the CWA by only the Migratory Bird Rule); *United States v. Buday*, 138 F. Supp. 2d 1282, 1287 (D. Mont. 2001) (distinguishing *SWANCC* by the *interstate* nature of the water bodies at issue). The power of New Union to manage the Arroyo d'Oro direct impacts the ability and power of Progress to manage the Greenheaven Wildlife Preserve, where discharges into the Arroyo d'Oro ultimately accumulate. Federal jurisdiction naturally attaches in such circumstances, and applying the CWA to the Arroyo d'Oro does not upset the federal-state balance, but rather enhances it. Therefore, no constitutional doubt exists in the applicability of the CWA to the Arroyo d'Oro, and this Court should reverse the district court's holding to the contrary.

III. STATES ARE NOT REQURIED TO HAVE PERMIT PROGRAMS APPROVED UNDER THE CWA TO PRECLUDE EPA ENFORCEMENT PURSUANT TO 33 U.S.C. § 1319

The CWA does not allow EPA to initiate an enforcement action under § 1319 when the State has already acted on the matter. 33 U.S.C. § 1319(g)(6)(A). This bar applies when the State has either commenced and is diligently prosecuting an action or has issued a permit and required payment of a penalty. In this case, NUDEP has undertaken consistent and ongoing enforcement actions to prevent discharges of pollutants by Goldthumb. NUDEP has considered the matter and chosen the course of action that best serves the interests of the State and protects the environment. EPA now seeks to reopen this matter and initiate enforcement proceedings against Goldthumb for actions permitted by NUDEP.

EPA attempts to avoid the § 1319(g) bar by contending that only states with approved permit programs may preclude EPA enforcement pursuant to CWA § 1319(g). This unduly narrow reading of the CWA supplants the State's primary enforcement role and misconstrues the language of the Act. Congress clearly expressed its intent that the States serve as the primary enforcers of the CWA and included provisions throughout the Act that protect

that primary role. Beyond upsetting the balance of enforcement power struck by Congress, EPA's interpretation requires this Court to read a requirement into the Act that is not apparent on its face. Federal courts have consistently refused to add words or requirements when interpreting a statute. *Bates v. United States*, 522 U.S. 23, 29 (1997); *62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596 (1951).

A. REQUIRING A STATE TO HAVE AN APPROVED PERMIT PROGRAM IN ORDER TO APPLY THE § 1319(G) BAR UNDERMINES THE STATE'S ROLE AS PRIMARY ENFORCER OF THE CWA

Congress has clearly stated in the CWA that States are to serve as the primary enforcers of the Act. "It is the policy of Congress to recognize, preserve, and protect the primary responsibility of the States to prevent, reduce, and eliminate pollution . . . ." 33 U.S.C. § 1251(b). The Senate Committee Report provides further evidence of Congress' intent to place States in the primary enforcement position: "The Committee does not intend this jurisdiction of the Federal government to supplant state enforcement. Rather the Committee intends that the enforcement power of the Federal government be available in cases where States and other appropriate enforcement agencies are not acting expeditiously and vigorously to enforce control requirements." S. Rep. No. 92-414 at 73-74 (1972), *Reprinted in Legislative History of the Clean Water Act*, at 1481-82 (1973).

The primacy of State enforcement is especially appropriate in cases, such as this one, where the geography and climate of the State has created a unique situation requiring specially crafted regulation. Congress explicitly stated that concerns about regional differences in geography and climate prompted the protection of State enforcement under the Act. *Miss. Comm'n on Natural Res. v. Costle*, 625 F. 2d 1269, 1275 (5th Cir. 1980). NUDEP's expertise placed it in the uniquely competent position to balance the threats of a controlled discharge from the evaporation ponds against the possibility of a catastrophic failure resulting in the release of highly contaminated sludge. After careful assessment of the situation, NUDEP chose to permit the controlled release.

Congress carefully drafted the CWA not only to reflect the preference for State enforcement of the Act but also to include provisions protecting the State's primary role. The CWA prevents both the United States and citizens from infringing upon the

State's enforcement authority. EPA is precluded from initiating enforcement where the State has taken appropriate action in addressing violations of the CWA. 33 U.S.C. § 1319(g)(6)(A). Congress also refused to allow citizen's suits under substantially similar circumstances. 33 U.S.C. § 1365(b). Courts have consistently interpreted these provisions as protecting the primary enforcer's role under the CWA. *See Gwaltney of Smithfield, Ltd. v. Cheaspeake Bay Found., Inc.*, 484 U.S. 49, 60-61 (1987); *N. and S. Rivers Watershed Ass. v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991); *Knee Deep Cattle Co. v. Bindana Inv. Co.*, 904 F. Supp. 1177, 1181 (D. Or. 1995); *Pub. Interest Research Group of N. J. v. Rice*, 774 F. Supp. 317, 327 (D.N.J. 1991); *Detroit Audubon Soc'y v. City of Detroit*, 696 F. Supp. 249, 259 (E.D. Mich. 1988).

In *Gwaltney*, the Supreme Court was asked to determine the proper role of citizen's suits within the overall enforcement scheme developed in the CWA. The Supreme Court held that enforcement actions by citizens are intended "to supplement rather than to supplant governmental enforcement." *Gwaltney*, 484 U.S. at 60. The Supreme Court reasoned that allowing a citizen suit after EPA or State enforcement would severely curtail the government's discretion in enforcing the Act in the public interest. *Id.* at 61.

The Court supported its decision with reference to the Senate Committee Report which stated: "[t]he Committee intends the great volume of enforcement actions [to] be brought by the State," and that citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility." *Id.* at 61 (quoting S.Rep. No. 92-414, at 64 (1972)). This congressional statement allowed the Court to determine that actions by the supplementary enforcers is appropriate only where the primary enforcer has failed to act. This reasoning extends to this case where New Union's role as the preferred enforcer must be protected from EPA intrusion, and New Union has exercised its enforcement responsibility by regulating Goldthumb's discharges from the evaporation ponds and ensuring that the highly contaminated sludge does not threaten the Arroyo D'Oro or the permanent pool in Progress.

The *Gwaltney* Court further explained its reasoning with an example strikingly similar to the instant case. The Court imagined a situation where the Administrator issued a compliance order to a violator of the Act and agreed not to assess civil penalties on the condition that the violator take corrective actions

not otherwise required by law. Unless the Court implements Congress's intent that the governmental enforcement hold a primary position, citizens may upset the settled agreement by initiating a private action and seeking civil penalties. In addition to curtailing governmental discretion in enforcing the CWA, such action is fundamentally unfair and discourages settlements by violators. Violators would be unlikely to enter into settlement agreements if they believed that they could be subjected to further penalties through the use of citizen's suits.

In the instant case, New Union, through NUDEP, exercised its discretion in enforcing the CWA in the public interest. NUDEP permitted Goldthumb to discharge water from the evaporation ponds so as to eliminate the risk that the ponds may rupture and release highly contaminated sludge. Goldthumb operated under the assumption that its dealings with NUDEP were final and that it would not be subject to prosecution for the discharges from the evaporation ponds. As in the example in *Gwaltney*, allowing EPA's action would undermine New Union's discretion in enforcing the Act and would unfairly prejudice Goldthumb. EPA's action also threatens New Union's authority to continue to enforce the CWA and places the future protection of the State's water in jeopardy.

EPA may argue that the holding in *Gwaltney* should be read narrowly and that it therefore does not inform this Court's decision regarding the relationship between State and EPA enforcement. The Supreme Court addressed both State and EPA enforcement categorically as "governmental enforcement" in contrast to citizen suits. Such an interpretation of the holding, however, belies the reasoning of the Court. The Supreme Court's decision was premised on concerns related to fairness and protection of the primary enforcer. 484 U.S. at 60 (stating that restrictions on citizen suits provide the regulated party with the opportunity to bring itself into compliance with the Act). These concerns apply equally regardless of whether it is the EPA or citizens seeking to usurp the State's regulatory authority and upset the decision made in the State's interest. This Court should apply the reasoning of the *Gwaltney* line of cases and interpret the § 1319(g) bar in a manner that advances the congressional goal of protecting the State's role in enforcement.

B. EPA'S ASSERTION THAT STATES ARE REQUIRED TO HAVE APPROVED PERMIT PROGRAMS IN ORDER TO PRECLUDE EPA ENFORCEMENT UNDER § 1319(G) IS UNSUPPORTED BY THE LANGUAGE OF THE ACT

Not only does the reading of § 1319(g) proposed by EPA undermine Congress's decision that States are to hold the primary role in enforcing the Act, it is wholly unsupported by the language of the Act. The CWA defines "State" to include the States, Washington, D.C., Puerto Rico, and territories of the United States with no further limitation. 33 U.S.C. § 1362(3). This definition makes no mention of approved permit programs and Congress did not alter the definition in § 1319 (g). EPA asks this Court to read language into § 1319 that Congress did not include in drafting the Act and that would alter the definition of "State."

It is a well-established principle that "the starting point for interpreting a statute is the statute itself." *Consumer Prod. Safety Comm'n. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). While other interpretations may be possible, the most natural reading of § 1319(g) does not include a requirement that the State have an approved permit program. Congress easily could have included language creating this requirement, but it chose not to do so. Where Congress has chosen to not include a requirement in an Act, the courts should not read such a requirement into the Act. *Bates*, 522 U.S. at 29 (1997); *62 Cases, More or Less, Each Containing Six Jars of Jam*, 340 U.S. at 596 (1951).

The only reading of § 1319 supporting EPA's assertion—that only States with approved permit programs may prevent federal enforcement—eliminates EPA's authority to bring this action under § 1319. Section 1319 allows an EPA enforcement action only when the "Administrator finds that any person is in violation of any condition or limitation . . . in a permit issued by a State under an approved permit program." 33 U.S.C. § 1319(a)(1). EPA appears to rely upon this language in asserting that New Union must have an approved permit program to prevent federal enforcement under § 1319. The plain language of the Act, however, leads to a much different conclusion. Congress chose to allow EPA enforcement actions only for violations of permits issued by States with approved permit programs; no such permit has been issued in this case. The requirement that States operate under an approved permit program serves as a jurisdictional limit and therefore prevents the initiation of EPA enforcement actions. This

jurisdictional limit does not allow a State to avoid enforcement responsibility while EPA stands aside because states must continue to diligently exercise its enforcement requirements in order to preserve their primary enforcement position. *Gwaltney*, 484 U.S. at 60 (stating that an action by a secondary enforcer is an appropriate enforcement method only when the primary enforcer has failed to meet its enforcement responsibilities).

EPA urges this court to read a requirement into the § 1319(g) preclusion of federal enforcement that is not apparent on the face of the Act and which undermines the congressional intent that States serve as the primary enforcers of the CWA. To do this, however, requires the Court to ignore the express statement of § 1319(a)(1) that grants EPA enforcement authority only when there is a violation of a permit issued under a State's approved permit program. Stated simply, EPA asks the court to ignore the express provision of § 1319(a)(1) and then read precisely the same language into § 1319(g) thereby undermining the balance of enforcement authority created by Congress.

The federal prosecution bar that exists in § 1319 must be read in light of Congress' preference for State enforcement and the Act's various provisions protecting the role of the primary enforcer and the plain language of the statute. Following the *Gwaltney* line of cases, the court should read the § 1319(g) bar in a manner that preserves the role of States in enforcing the Act. This bar is part of a comprehensive enforcement scheme where citizens and EPA would step into the shoes of a State that has failed to meet its enforcement responsibilities. There is no evidence that New Union has failed to meet this responsibility. Finally, there is no language in the Act that supports EPA's assertion that States are required to have approved permit programs in order to preclude EPA enforcement under § 1319.

IV. STATES ARE NOT REQUIRED TO ENFORCE USING AUTHORITY COMPARABLE TO 33 U.S.C. § 1319 TO PRECLUDE EPA ENFORCEMENT

CWA § 1319 requires that States take action under "comparable state law" before they are able to prevent the EPA from exercising its jurisdiction in a case. Courts have given the term "comparable state law" broad meaning and have allowed States to preclude action by secondary enforcers exercising authority granted by statutes not identical to the CWA. *N. and S. Rivers Watershed v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991).

In this case, New Union, through NUDEP, has exercised its statutory power to regulate Goldthumb's discharges from the evaporation ponds in a manner sufficient to preclude an EPA enforcement action.

EPA argues that § 1319 should not deprive EPA of enforcement authority in this case because New Union has not used enforcement authority comparable to § 1319(g) in this case. As mentioned above, however, the States are the preferred enforcers under the CWA and the provisions of § 1319 should be interpreted to implement the regulatory scheme established by Congress. New Union's statutes grant NUDEP the authority to assess administrative penalties comparable to § 1319(g). NUDEP's decision to regulate Goldthumb's conduct under regulations more suited to the facts of this case should not open the door for EPA to undermine New Union's preferred position and replace its judgment for that of NUDEP.

Courts have interpreted "comparable state law" to mean a state law with the same basic penalty and notice provisions as the CWA. *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 381-382 (8th Cir. 1994); *N. and S. Rivers Watershed*, 949 F.2d at 556. In order to meet the "comparable state law" requirement of § 1319(g), the state law provisions are not required to be identical to the CWA; they must only be substantially similar. *Saboe v. Oregon*, 819 F. Supp. 914, 917 (D. Or. 1993). Furthermore, States are not required to actually assess a penalty so long as the state law includes penalty assessment provisions similar to the CWA and provides the authority to assess such a penalty. *N. and S. Rivers Watershed*, 949 F.2d at 556.

In *North and South Rivers Watershed*, the First Circuit held that Massachusetts enforced a violation under comparable state law even though the precise section of the statute used by the State did not include a provision allowing the assessment of civil penalties. *N. and S. Rivers Watershed*, 949 F.2d at 556. The court reached this conclusion because the section used by Massachusetts is part of a statutory scheme implemented by the State for the protection of its waters and other provisions of this scheme provided for the assessment of civil penalties similar to the CWA.

Federal CWA jurisprudence has established the principle that the courts define comparable state law to effectuate three related polices. First, the courts should seek to implement Congress' desire that the State serve as the primary enforcer of the CWA. *Id.* at 555-556. Second, the courts should apply the bar on actions by the

secondary enforcers broadly so as to protect the interests of the regulated party. *Ark. Wildlife Fed'n,* 29 F.3d 376 (basing their decision on extensive discussion of the regulated party's efforts to comply with State enforcement actions); *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. at 60. (stating that restrictions on citizen suits provide the regulated party with the opportunity to bring itself into compliance with the Act). Finally, the courts should apply the bar in a manner that implements the overall purpose of the CWA. As discussed in the preceding section, courts have consistently applied the CWA's bars on secondary enforcement in a manner that protects the role of the Act's preferred enforcers. In this context, the courts have applied the broad meaning of comparable state law to protect the State's discretion in administering the Act and enforcing violations. *N. and S. Rivers Watershed*, 949 F.2d at 556.

The courts have also interpreted the requirement to protect the interests of the regulated parties. *Gwaltney*, 484 U.S. at 60; *Ark. Wildlife Fed'n*, 29 F.3d 376. Regulated parties enter into settlement agreements with enforcers under the presumption that they will not be subject to duplicative proceedings. Potential disruption of the agreements may cause regulated parties to hesitate before entering these settlements and delay action to protect or restore water quality. Whether a particular statute constitutes a "comparable state law" does not involve whether the statutes have precisely the same provisions, but rather whether the enforcement action pursued by the State seeks to remedy the same violations as the duplicative action. *Gwaltney*, 484 U.S. at 60.

The goal of all actions brought under the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation's water. 33 U.S.C. § 1251(a). When a state has taken action to protect its waters, duplicative actions do not further this goal. *N. and S. Rivers Watershed*, 949 F.2d at 556. In fact, duplicative actions may actually undermine this goal by directing resources towards defending litigation rather than protecting the waters. *Id.*

All three considerations used by the courts in applying a broad meaning of "comparable state law" suggest that this Court should extend this reasoning and find that New Union is not required to regulate Goldthumb's discharges under "comparable state law" in order to preclude an EPA enforcement action. EPA enforcement disrupts New Union's status as the preferred en-

forcer of the Act, undermines Goldthumb's expectations, and does not advance the goal protecting the nation's waters.

EPA admits that the New Union statutes grant NUDEP the authority to assess penalties in a manner similar to § 1319(g). Even though NUDEP did not use the statutory provision that granted the authority to assess penalties, the holding of *N. and S. Rivers Watershed* allows the court to hold that NUDEP did act under comparable state law. The court allowed preclusion of a citizen suit where a State prosecuted a violation of the CWA under a statutory provision that did not provide for the assessment of civil penalties, but rather was part of a regulatory program that did provide such authority. *N. and S. Rivers Watershed*, 949 F.2d at 556. Similarly, NUDEP acted under part of a statutory scheme created by New Union to protect the integrity of the State's environment.

It must be emphasized that the primary purpose of the bar is to prevent duplicative enforcement proceedings for the same violation. NUDEP chose to use the State authority best suited to the facts at hand. Rather than stretching the power of the CWA, NUDEP chose to regulate Goldthumb's discharges under a separate State law. Therefore the critical fact in this case is not the law chosen by NUDEP, but rather the action regulated. EPA is seeking to institute enforcement proceedings against Goldthumb for precisely the same actions permitted by NUDEP. The CWA establishes the State as the preferred enforcer, and the State's choice to pursue enforcement under an alternate program should not open the door for EPA to usurp the State's preferred status.

EPA's enforcement action has the additional consequences of upsetting Goldthumb's reliance upon NUDEP's regulatory actions and failing to further the goal of protecting water quality. EPA's action thereby reopens a settled agreement between Goldthumb and New Union and may subject Goldthumb to liability for conduct it believed was fully permissible and to which New Union assented. Furthermore, there is no evidence that EPA's enforcement regarding the wholly past actions by Goldthumb will have any effect on the goal of protecting water quality except discouraging future cooperative actions between Goldthumb and New Union.

The same policies that have supported the broad interpretation of "comparable state law" apply in this case. The Court should extend the § 1319 bar to situations where EPA attempts to commence enforcement proceedings when a State, although it has

the authority to assess civil penalties similar to § 1319, chose to regulate the conduct under a different statutory provision also seeking to protect the environment.

V. A STATE PENALTY ASSESSMENT THAT PREVENTS EPA PENALTY ASSESSMENT UNDER 33 U.S.C. § 1319 (g) ALSO PREVENTS EPA FROM SEEKING INJUNCTIVE RELIEF

Section 1319(g)(6) of the CWA provides that EPA may not enforce against violators of the CWA if a State has already done so. 33 U.S.C. § 1319. As explained above, "it is the policy of the Congress to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. § 1251(b). Thus, on the basis of the State's status as the preferred and primary enforcer of the CWA, jurisprudence concerning citizen suits, a secondary enforcement measure, is relevant to the issue of whether or not EPA, as a secondary enforcer, is barred from seeking injunctive relief under § 1319(g)(6)(A).

The federal appellate courts are split as to whether 33 U.S.C. § 1319 (g)(6)(A) bars not only civil penalty actions, but also citizen suits for injunctive relief. Applying this split to EPA enforcement actions under § 1319(g)(6)(A), some courts would only bar EPA from assessing penalties for violations against which the State had already assessed penalties. Other appellate courts would bar any EPA enforcement of violations that the State has already enforced in order to effectuate the statute's goal of allowing States to take the lead in addressing water pollution within their boundaries.

This Court should adopt the latter position and hold that EPA's action for injunctive relief is barred because (a) Congress intended the role of EPA enforcement actions to supplement, not supplant, State enforcement action, and (b) the State agency would otherwise have little power to enforce remediation. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987); *N. and S. Rivers Watershed Ass'n, Inc.*, 949 F.2d 552 (1st Cir. 1991). In addition, the dicta in *Gwaltney* suggests that the Supreme Court would hold EPA enforcement actions for injunctive relief to be barred under 33 U.S.C. § 1319(g)(6)(A). 484 U.S. at 60-61.Congress intended that EPA enforcement actions supplement, not supplant, State enforcement action, as evidenced by legislative history, and therefore

§ 1319(g)(6)(A) bars injunctive relief. This intention is evidenced by both the structure of the Act and its legislative history. S. Rep. No. 92-414, at 73-74 (1972), *reprinted in Legislative History of the Clean Water Act*, at 1481-82 (1973). (relevant language quoted herein, *see supra* Part III.A).

On the basis of this legislative history, the Supreme Court in *Gwaltney* interpreted the CWA to prevent a primary enforcer from being supplanted by a subordinate enforcer. *Gwaltney*, 484 U.S. at 60; *accord N. & S. Rivers Watershed*, 949 F.2d 552 (cited and followed by, *e.g.*, *Ark. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 383 (8th Cir. 1994) (different reasoning, same conclusion); *United States v. Smithfield Foods Co.*, 965 F. Supp. 769, 792 (E.D. Va. 1997), *aff'd on other grounds*, 191 F.3d 516 (4th Cir. 1999)). While the facts in *Gwaltney* concerned a citizen group acting as the subordinate enforcer, Congress' intent strongly supports finding that as between a State and EPA, the State is to serve as the primary enforcer and the EPA as the secondary enforcer.

Furthermore, unless Congress explicitly indicates that the words of § 1319(g) have one meaning when applied to citizen suits and another when applied to EPA actions, the text of § 1319(g) barring citizen suits must be read as having the same meaning in relationship to citizen suits as it does to EPA enforcement actions. Congress did not indicate that different meanings should apply, and therefore EPA enforcement actions, like citizen suits, are barred under § 1319(g). Moreover, if EPA could bring actions for injunctive relief despite the diligent prosecution by the State, then EPA actions would clearly supplant State action.

In the case at bar, NUDEP issued two administrative orders to Goldthumb in 2000 and 2001, pursuant to the New Union statute, prohibiting the discharge of pond liquid into the Arroyo d'Oro when waters of the state are present and without prior permission of NUDEP. Since the issuance of the initial administrative order in 2000, Goldthumb has complied with NUDEP's orders. If EPA were to now seek injunctive relief against Goldthumb, such action would unquestionably supplant NUDEP's enforcement action and likely destroy its successful mitigation effort. NUDEP's grant of permission to Goldthumb to responsibly discharge pond wastes would be rendered meaningless, and Goldthumb's practice of keeping NUDEP informed of such discharges would serve no purpose. Therefore, this Court should defer to NUDEP and bar an EPA enforcement action for injunctive relief.

Finally, State agencies would again have little to no power to negotiate compliance if such settlements failed to shield polluters from actions for injunctive relief. Remediation and mitigation measures tailored by the agency to the particular violation would still render the violator vulnerable to EPA compliance injunctions, leaving little incentive to cooperate with the State agency. To encourage State authority and cooperative efforts between States and violators to keep our nation's waters clean, this Court should hold that EPA enforcement actions for injunctive relief are also barred under § 1319(g)(6)(A).

Because the State enforcement agency, NUDEP, diligently prosecuted Goldthumb for their alleged violation of the New Union statute this Court should affirm the lower court's ruling that a State penalty assessment that prevents EPA penalty assessment under § 1319(g) also prevents EPA from seeking injunctive relief.

CONCLUSION

For the foregoing reasons, the State of New Union respectfully requests that the Court reverse the district court's grant of summary judgment on the issue of whether the CWA confers jurisdiction over discharges into the Arroyo d'Oro when it is dry. While New Union recognizes federal authority over Goldthumb's discharge, it respectfully requests the Court to affirm the district court's holding that New Union's previous enforcement actions preclude EPA's enforcement of the discharges. Should this Court not find that New Union's actions preclude EPA enforcement under the CWA, New Union respectfully requests that the case be remanded for further proceedings on the merits.

APPENDIX A

RELEVANT CONSTITUTIONAL CLAUSES, STATUTES, AND REGULATIONS

CONSTITUTIONAL CLAUSES

U.S. Const. art. I, § 8, cl. 3. Commerce Clause: Congress has the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

STATUTES

CLEAN WATER ACT

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

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective. The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objection it is hereby declared that, consistent with the provisions of this chapter—

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

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

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

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

33 U.S.C. § 1319. Enforcement

(a) State enforcement; compliance orders

. . .

(1) Whenever, on the basis of information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section

1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(g) Administrative penalties

. . .

(6) Effect of Order

(A) Limitation on actions under other sections: Actions taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation-

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or for

(iii) 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,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

33 U.S.C. § 1362. Definitions

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Somoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

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

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, . . .

REGULATIONS

40 C.F.R. § 122.2. Definitions

Waters of the United States or waters of the U.S. means:

(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 tot eh 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 including any such waters:

  (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

  (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

  (3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.