Pace Environmental Law Review

Volume 16
Issue 2 *Summer 1999*

Article 6

June 1999

Brief for XXX Corp.: Eleventh Annual Pace National Environmental Moot Court Competition

Jennifer Anderson
Ohio State University College of Law

Charles McChesney
Ohio State University College of Law

Michael Vollmer
Ohio State University College of Law

MEASURING BRIEF

Team Number 6

Civ. App. No. 98-378

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

FRIENDS OF THE ROARITAN, INC.
and
STATE OF NEW UNION
Plaintiffs-Appellees
v.
XXX CORP.
Defendant-Appellant

FRIENDS OF THE ROARITAN, INC.
Plaintiff-Appellee
v.
XXX CORP.
and
STATE OF NEW UNION
Defendants-Appellants

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

BRIEF FOR XXX CORP.

Jennifer Anderson
Charles McChesney
Michael Vollmer
Counsel for XXX Corp.
The Ohio State University
College of Law
December 1, 1998

465

QUESTIONS PRESENTED

I. Is The Addition Of A Pollutant To Groundwater That Is Tributary To, But Not In Close Proximity With, Traditionally Navigable Surface Water A Violation of 33 U.S.C. §1311(a)?

II. In A 33 U.S.C. §1365 Enforcement Action Alleging Violation Of A Permit Provision Prohibiting Discharges That "Violate Water Quality Standards," Is The Permittee/Defendant Permitted Under 33 U.S.C. §1369 To Seek Dismissal Of The Action On The Basis That The Provision Is Not Specific Enough To Be An Enforceable Permit Provision?

III. Is The Interpretation Of A Provision Prohibiting Discharges That "Violate Water Quality Standards" In A Permit Issued By The Federal Governement Pursuant To 33 U.S.C. §1342 Governed By Federal Or State Law When The Provision Is Included Routinely In Federally Issued Permits And Is Also Required To Be In The Permit By A Certification Condition Imposed By New Union Pursuant To 33 U.S.C. §1341?

IV. If The Interpretation Of A CWA Permit Provision Prohibiting Discharges That "Violate Water Quality Standards" Is Governed By Federal Law, Is The Addition Of A Pollutant To Navigable Water Causing The Water To Be Unfit For Its Water Quality Standard Designated Use A Violation Of The Provision Without Further Administrative Action To Establish Effluent Limitations On The Pollutant In The Permit?

PARTIES TO THE PROCEEDING

Appellant, XXX Corp. (XXX) was Defendant below. Appellee, Friends of the Roaritan, Inc. ("FOR") was Plaintiff below. State of New Union, who intervened in the action below, joined XXX as to some of the claims and FOR as to other claims. Therefore, State of New Union is now both an Appellant and Appellee.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases:

California v. United States, 438 U.S. 645 (1978)
Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 116 (1985)
Chisom v. Roemer, 501 U.S. 380 (1981)
City of Chicago v. Envtl. Defense Fund, 511 U.S. 328 (1994)
City of Milwaukee v. Illinois, 451 U.S. 304 (1981)
FTC v. Standard Oil Co., 449 U.S. 232 (1980)
Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974)
PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994)
Silkwood v. Kerr-McGee Corp., 464 U.S. 268 (1984)
United States v. Am. Trucking Ass'ns, 310 U.S. 534 (1940)

United States Court of Appeals Cases:

Ackels v. EPA, 7 F.3d 862 (9th Cir. 1993)
Algrant v. Evergreen Valley Nurseries, Ltd., 126 F.3d 178 (3d Cir. 1997)
Am. Rivers, Inc. v. FERC, 129 F.3d 99 (2nd Cir. 1997)
Andrews v. Ohio, 104 F.3d 803 (6th Cir. 1997)
Atlantic States Legal Found., Inc. v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1993, amended 1994)
Commonwealth Edison Co. v. Train, 649 F.2d 481 (7th Cir. 1980)
Exxon Corp. v. Train, 554 F.2d 1310 (5th Cir. 1977)
Hoffman Homes Inc. v. Adm'r, EPA, 999 F.2d 256 (7th Cir. 1993)
Legal Envtl. Assistance Found. v. Pegues, 904 F.2d 640 (11th Cir. 1990)
Leslie Salt Co. v. Froehlke, 578 F.2d 742 (9th Cir. 1978)
New Valley Corp. v. United States, 119 F.3d 1576 (Fed. Cir. 1997)
Northwest Envtl. Advocates v. City of Portland, 56 F.3d 979 (9th Cir. 1995)
Natural Resources Defense Council v. EPA, 16 F.3d 1395 (4th Cir. 1993)
Oregon Natural Resources Council v. United States Forest Serv., 834 F.2d 842 (9th Cir. 1987)
Roosevelt Campobello Int'l Park Comm'n v. EPA, 684 F.2d 1041 (1st Cir. 1982)

Save Our Community v. United States EPA, 971 F.2d 1155 (5th Cir. 1992)
Sierra Club v. Train, 557 F.2d 485 (5th Cir. 1977)
United States v. Hooker Chem. & Plastics Corp., 749 F.2d 968 (2d Cir. 1984)
Village of Oconomowac Lake v. Dayton Hudson Corp., 24 F.3d 962 (7th Cir. 1994)

United States District Court Cases

Friends of the Roaritan, Inc. v. XXX Corp., Civ. No. 97-8367 (D.N.U. undated)
Gill v. LDI, No. C97-461Z, 1998 WL 652529 (W.D. Wash. June 29, 1998)
McClellan Ecological Seepage Situation (MESS) v. Weinberger, 707 F.Supp 1182 (E.D. Cal. 1989)
New York v. United States, 620 F. Supp. 374 (E.D.N.Y. 1985)
United States v. GAF Corp., 389 F. Supp. 1379 (S.D. Tex.1975)
Umatilla Waterquality Protective Ass'n Inc. v. Smith Frozen Foods, Inc., 962 F. Supp. 1312 (D. Or. 1997)

State Court Cases:

Prentice v. DEP, 435 N.U. 875 (1989)

Constitutional Provisions:

U.S. Const. art. VI, cl. 2.

Statutory Provisions:

28 U.S.C. § 1292(b) (1994)
33 U.S.C. § 1251(a) (1994)
33 U.S.C. § 1252(a) (1994)
33 U.S.C. § 1254(a)(5) (1994)
33 U.S.C. § 1311(a) (1994)
33 U.S.C. § 1311(b) (1994)
33 U.S.C. § 1313 (1994)
33 U.S.C. § 1313(a)(3)(A) (1994)
33 U.S.C. § 1313(a)(3)(B) (1994)

33 U.S.C. § 1313(c)(1) (1994)
33 U.S.C. § 1313(c)(2) (1994)
33 U.S.C. § 1313(c)(2)(A) (1994)
33 U.S.C. § 1313(d) (1994)
33 U.S.C. § 1319(a) (1994)
33 U.S.C. § 1341(a) (1994)
33 U.S.C. § 1341(d) (1994)
33 U.S.C. § 1342(a) (1994)
33 U.S.C. § 1342(a)(1)(A) (1994)
33 U.S.C. § 1342(a)(1)(B) (1994)
33 U.S.C. § 1362(7) (1994)
33 U.S.C. § 1362(12) (1994)
33 U.S.C. § 1365 (1994)
33 U.S.C. § 1365(a)(1) (1994)
33 U.S.C. § 1365(f)(6) (1994)
33 U.S.C. § 1369(b)(1) (1994)
33 U.S.C. § 1369(b)(2) (1994)
Safe Drinking Water Act, 42 U.S.C.§§ 300f - 300j-25 (1994 & Supp. II 1996)
Resource Conservation and Recovery Act, 42 U.S.C. § 6901, 6972 (1994)

Code of Federal Regulations:

40 C.F.R. § 230.3(s)(3) (1994)
40 C.F.R. § 124.55(e) (1994)
33 C.F.R. § 328.3(a)(3) (1994)

State Regulations:

40 N.U.A.C. § 2346.2(a)

Secondary Materials:

S. Rep. No. 92-414 (1972), 1972 U.S.C.C.A.N. 3668
118 Cong. Rec. 10,666 (1972)
118 Cong. Rec. 10,669 (1972)
Opinion, Office of General Counsel (December 13, 1973)
Bruce Allen Morris, *The Oregon Misstep and The Texas Two Step: Two Recent Appellate Cases Expand CWA Citizen Suits*, 11 Nat. Resources & Env. 50, 50 (1996). .28

OPINION BELOW AND JURISDICTION

This case involves an appeal from the order of the United States District Court for the District of New Union denying defendant XXX Corp.'s (XXX) motion to dismiss all Clean Water Act violations asserted against it. *See Friends of the Roaritan, Inc. v. XXX Corp.*, Civ. No. 97-8367, Record 3 (D.N.U. undated). The district court certified its order for appeal pursuant to 28 U.S.C. § 1292(b) (1994) and XXX appealed to this court. Under 28 U.S.C. § 1292(b), this court has jurisdiction to review district court orders upon proper certification.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article VI, clause 2 of the U.S. Constitution provides in pertinent part that "the Laws of the United States . . . shall be the supreme Law of the Land."

Relevant statutory provisions of the Clean Water Act (CWA) are addressed in the text. Other relevant statutes include the Safe Drinking Water Act, 42 U.S.C.§§ 300f to 300j-25 (1994 & Supp. II 1996) and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901, 6972 (1994). The full text of all relevant statutory provisions are laid out in the attached Appendix.

Relevant regulatory provisions are laid out in the attached Appendix and include: 40 C.F.R. § 230.3(s)(3) (1998); 40 C.F.R. § 124.55(e) (1998); 33 C.F.R. § 328.3(a)(3) (1998).

STATEMENT OF THE CASE

Statement of Facts

In 1985, XXX, a manufacturer of poisons designed for controlling pests and vectors, purchased a forty acre site located one mile from the Roaritan River. *See* Record 4. On that property sits a waste pile where XXX's predecessor discarded all unrecycled material from it's automobile battery recycling business. *See id.*

This waste pile is the source of Friends of the Roaritan, Inc.'s (FOR) first set of allegations against XXX. FOR alleges that samples of the waste pile obtained by the New Union Department of Environmental Protection (DEP) contain concentrations of lead, and FOR alleges that the groundwater has been polluted with lead that seeped into the ground from precipitation falling on the pile. *See id.* FOR further alleges that its data indicates that levels of lead in the Roaritan increase gradually over the half mile stretch downriver from XXX's discharge pipe. However, the data also shows that no lead is discharged from the actual pipe. *See id.* FOR bases its allegations against XXX partially on DEP mapping, which shows that groundwater in the general vicinity of the XXX property moves in the direction of the Roaritan. *See id.*

FOR's second set of allegations relate to the discharge, authorized by a National Pollutant Discharge Elimination System (NPDES) permit issued by the Region XI office of the U.S. Environmental Protection Agency (EPA), of wastewater that has been treated and released through a mile-long pipe situated between XXX's property and the Roaritan. *See id.* FOR alleges that XXX, by discharging selenium into the Roaritan, is violating standard language in EPA permits that prohibits discharges that "violate water quality standards." *See id.* This language was included in section IIA3 of XXX's permit as a condition to certification by New Union that the permit satisfies CWA and state law requirements. Selenium is not specifically limited in the permit. *See id.* FOR alleges that parts of the Roaritan downstream from XXX's discharge pipe cannot be used for human consumption as a result of selenium discharge. Therefore, FOR alleges, XXX is violating water quality standards by contributing to selenium levels in excess of the maximum contaminant levels for selenium under the Safe Drinking Water Act, even though New Union has not adopted speicific water quality criterion for selenium. *See id.* at 5.

Procedural History

FOR brought a citizen's suit against XXX under the Clean Water Act, 33 U.S.C. §§ 1251, 1365 (1994) (CWA), and the Re-

source Conservation and Recovery Act, 42 U.S.C. §§ 6901, 6972 (1994) (RCRA). *See id.* at 1. The suit was based upon two sets of alleged violations of § 301(a) of the CWA, 33 U.S.C. § 1311(a) (1994). *See id.* at 3. New Union intervened in the action, joining FOR as to some causes of action and XXX as to others. *See id.*

XXX subsequently filed a motion to dismiss all of the CWA causes of action filed against it, and the United States District Court for the District of New Union denied XXX's motion in an undated opinion. *See id.* at 3. The district court certified its order for appeal under 28 U.S.C. § 1292(b) due to common factual issues between the CWA causes of action and the RCRA causes of action. *See id.* at 1. XXX appealed the order. *See id.*

Standard of Review

This appeal seeks review of the district court's rejection of a motion to dismiss. In review of a district court's decision on a motion to dismiss, the issues raised are questions of law and the courts of appeal apply a de novo standard of review. *See Algrant v. Evergreen Valley Nurseries Ltd.*, 126 F.3d 178, 181 (3d Cir. 1997); *New Valley Corp. v. United States*, 119 F.3d 1576, 1580 (Fed. Cir. 1997); *Andrews v. Ohio*, 104 F.3d 803, 806 (6th Cir. 1997).

SUMMARY OF THE ARGUMENT

The addition of a pollutant to groundwater which is tributary to, but not in close proximity with, traditionally navigable surface water is not a violation of § 301(a) of the CWA for two reasons. First, groundwater is not "navigable water" under the CWA, and therefore groundwater is beyond the scope of the statute. A combination of the actual language of the statute and legislative history of the statute indicate that groundwater was purposely excluded from the enforcement provisions of the statute. Second, even if this court finds that some groundwater should be included within the statute, water which is not in close proximity with surface water, like the water at issue, must be excluded. Such a broad interpre-

tation would be over-inclusive and would have negative practical consequences.

XXX still has standing to challenge the provisions in section IIA3 of its EPA issued NPDES permit. Section 509(b)(2) of the CWA does not prohibit XXX from having standing to challenge the application of CWA standards and New Union's purely aspirational water quality goals to section IIA3 of XXX's permit. XXX did not have an opportunity to challenge the permit when it was first issued because the issue was not ripe for judicial review. The legal issues lacked sufficient specifics at the time the XXX's permit was issued, so the permit and DEP's water quality standards were not "final" reviewable agency actions until now. Because § 509(b)(2) of the CWA only prohibits judicial review that should have taken place at an earlier time and no such earlier review was available for XXX due to a lack of ripeness, XXX still has standing to challenge the provisions of section IIA3 of its NPDES permit.

The provision in XXX's NPDES permit that prohibits discharges that "violate water quality standards" must be interpreted in accordance with state law for three reasons. First, under § 303 of the CWA, states are given authority to issue and revise water quality standards. Because states do this pursuant to state law, any interpretation of the scope and meaning of water quality standards must be governed by state law. Second, under § 401 of the CWA, states can condition approval of a NPDES permit on inclusion of requirements that the permit comply with state law. Because New Union required the provision in section IIA3 of XXX's permit so that the permit would comply with state law, interpretation of the water quality standards in that provision must be governed by state law. Finally, even though the EPA is required to approve all state-adopted water quality standards, EPA approval does not cause the standards to become a part of federal law and, as a result, have interpretation in accordance with state law pre-empted by federal law. Instead, interpretation of water quality standards is still governed by state law because such an interpretation complies with the

Supreme Court's presumption against pre-emption of state law.

If the provision in XXX's NPDES permit that prohibits discharges that "violate water quality standards" is governed by federal law, then, before FOR can enforce this permit provision through a citizen's suit, further administrative action is required to either establish water quality criteria or allocate total effluent waste load among polluters. FOR cannot bring its citizen's suit for two reasons. First, the plain meaning, the legislative history, and the federal courts' interpretation of the CWA require that water quality standards must contain water quality criteria and must be reduced to specific numerical limitations before the standards can be enforced in a citizen's suit. Because New Union's water quality standards do not contain water quality criteria and have not been reduced to numerical limitations, they cannot be enforced in FOR's citizen's suit. Second, under federal law, either the EPA or New Union must allocate, among all dischargers, the total effluent waste load that a water body can handle before a discharger can be found in violation of its NPDES permit. Because the EPA and New Union have failed to make such an allocation for discharge of selenium, FOR's enforcement of XXX's selenium discharge is premature.

ARGUMENT

I. The Addition Of A Pollutant To Groundwater Which Is Tributary To, But Not In Close Proximity With, Traditionally Navigable Surface Water Is Not A Violation Of 33 U.S.C. § 1311(a).

Section 301(a) of the Clean Water Act (CWA), provides that the "discharge of any pollutant by any person shall be unlawful" except as in compliance with other sections of the Act. 33 U.S.C. § 1311(a) (1994). One such exception is found in § 402(a) of the CWA, which allows regulated discharges of pollutants for people who have obtained a permit through the National Pollutant Discharge Elimination System (NPDES). *See* 33 U.S.C. § 1342(a) (1994). The term "discharge of any

pollutant" is further defined in section 502(12) of the CWA, as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (1994).

The term "navigable waters" has been defined broadly to mean "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Some courts have interpreted the term as broadly as possible under Congress' commerce power. *See, e.g., Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978); *United States v. GAF Corp.*, 389 F. Supp. 1379 (S.D. Tex.1975). Despite this broad definition, there is currently a split within the federal courts as to whether *groundwater* should be included within the definition of navigable water, or whether Congress instead intended for the CWA general enforcement provisions to apply to surface water only.

This court should follow the jurisdictions holding that all groundwater is excluded from the definition because both the language of the CWA and legislative history demonstrate that Congress did not intend to include any groundwater within the scope of the regulatory and enforcement sections. However, if this court wishes to follow the other jurisdictions and find that some groundwater was meant to be included in § 301(a) of the CWA, practical considerations require that groundwater sources such as the one at issue must not be regulated. To include such groundwater that is tributary to, but not in close proximity with, navigable waters would be over-inclusive and would lead to difficulty in both permitting and enforcement.

A. This court should reverse the lower court's holding denying XXX's motion to dismiss FOR's claims because groundwater is not "navigable water" for purposes of § 301(a) of the Clean Water Act and therefore no cause of action can exist.

Congress, in defining the term "navigable waters" to include "waters of the United States," did not intend to include groundwater within that definition, and therefore the lower court erred in ruling that a cause of action could lie against

XXX for an alleged discharge into groundwater in violation of § 301(a) of the CWA. Congress simply did not intend for any groundwater to be included in the enforcement section at issue here, and this court should follow the various jurisdictions which have so held.

First, the language of the statute itself leads to the conclusion that Congress purposely chose to exclude groundwater from the section because it explicitly included groundwater within the scope of several other sections within the CWA but failed to do so in the enforcement provisions at issue here. Congress considered groundwater to be a different category of water than navigable water and did not intend to require NPDES permits for discharge of pollutants to groundwater.

Second, legislative history demonstrates that when Congress was writing the CWA, it did not feel confident that groundwater should be handled in the same way that other forms of water should be handled. Instead, language demonstrates that legislators felt that groundwater legislation would be more appropriately placed in the jurisdiction of the individual states and therefore did not intend for groundwater to be considered navigable water for the purposes of § 301(a). Additionally, this issue was debated in a heated House argument, and a bill that would have had the effect of explicitly including groundwater in the definition section failed to pass.

For these reasons, this court should follow the clear intent of the legislature, evident both through statutory language and legislative history, and limit the broad interpretation of navigable water asserted by the lower court.

1. The language of the CWA demonstrates that Congress did not intend for groundwater to be included as "navigable water" in the regulatory and enforcement provisions.

Congress, in writing the CWA, specifically included the word "groundwater" in several provisions of the Act but failed to include such language in the enforcement section of

§ 301(a). This evidences an explicit intent to exclude groundwater from the section. For example, in one section, Congress stated that the Administrator shall "prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters *and* ground waters and improving the sanitary condition of surface and underground waters." 33 U.S.C. § 1252(a) (1994) (emphasis added). Another section states that the Administrator shall "establish, equip, and maintain a water quality surveillance system for the purpose of monitoring the quality of the navigable waters *and* ground waters and the contiguous zone and the oceans." 33 U.S.C. § 1254(a)(5) (1994) (emphasis added).

These sections demonstrate that Congress considered groundwater to be a different category than other waters. The use of the connecting word "and" between the terms "navigable waters" and "ground waters" shows that Congress viewed those two types of water as mutually exclusive. Groundwater was not intended as a subset of the larger category "navigable waters." Therefore, FOR is incorrect in its assertion that groundwater is meant to be included as part of the broad term "navigable waters." Furthermore, these sections, along with others that specifically use the term "ground waters," demonstrate that Congress specifically included the term where it so desired and could have included it in the enforcement section if it chose to do so.

Indeed, in *Umatilla Waterquality Protective Association, Inc. v. Smith Frozen Foods, Inc.*, the court was asked to decide whether the leaching of sodium and chloride from a brine lagoon into groundwater traveling to a creek was an impermissible discharge of pollutants into navigable waters. *See* 962 F. Supp. 1312 (D. Or. 1997). The court reviewed these two quoted statutory provisions and concluded that "Congress did not consider discharges to groundwater to be discharges that would trigger the NPDES permit requirement." *Id.* at 1318.

Additionally, administrative interpretations of the term have limited the reach of the term "waters of the United States." *See* 33 C.F.R. § 328.3(a)(3) (1998); 40 C.F.R. § 230.3(s)(3) (1998). The regulations do not specifically ad-

dress groundwater and state that "waters of the United States" includes "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds." 40 C.F.R. § 230.3(s)(3). Because this list is specific, it can be inferred that the list was meant to be exhaustive, thus excluding groundwater from the scope of the definition.

2. Legislative history demonstrates that Congress did not intend to regulate groundwater.

Legislative history of the CWA conclusively demonstrates that Congress purposely declined to include groundwater within the scope of the federal regulatory power of the CWA. This legislative evidence rebuts any potential assertion by FOR that Congress intended to utilize its powers to the fullest extent of its Commerce Clause capability. FOR may argue, as it did in the court below, that all prior groundwater regulation caselaw is distinguishable from the factual circumstances of this case because this case specifically addresses tributary groundwater, whereas the bulk of litigation up to the present time has not dealt squarely with this tributary water issue. Although that may be true, a detailed caselaw analysis is not helpful in reaching a decision in this case because the jurisdictions have disagreed on their interpretations of what Congress intended to regulate in the CWA. Instead, this court should look directly to what Congress itself has said and done when implementing the CWA. Such an analysis of legislative history leads to the conclusion that Congress did not intend to include any groundwater within the enforcement provisions of the CWA.

a. In passing the CWA, the Senate intentionally excluded groundwater from federal regulation.

A report accompanying the Senate version of the CWA stated that "[s]everal bills pending before the Committee provided authority to establish Federally approved standards for groundwaters which permeate rock, soil, and other surface

formations. Because the jurisdiction regarding groundwaters is so complex and varied from State to State, the Committee did not adopt this recommendation." S. Rep. No. 92-414, at 73 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3749.

Therefore, it is apparent that the Senate did consider including groundwater within the CWA and yet refused to do so because of the lack of adequate knowledge regarding groundwater. Instead, Congress left the regulation of groundwater to the individual states because it was considered impracticable to create federal legislation to control pollution of groundwater when groundwater rules varied greatly among the states. *See, e.g.*, *Exxon Corp. v. Train*, 554 F.2d 1310, 1325 (5th Cir. 1977).

b. In passing the CWA, the House specifically rejected an amendment that would have brought groundwater within the enforcement and permitting sections of the bill.

An amendment was proposed by Democratic Representative Les Aspin during the floor debate on the House Bill that advocated bringing groundwater within the permit provisions. Representative Aspin noted that groundwater "is under the title dealing with definitions. But when it comes to enforcement, Title IV, the section on permits and licenses, then groundwater is suddenly missing. . . . [T]o control only navigable waters and not the ground water makes no sense at all." 118 Cong. Rec. 10,666 (1972). After debate on the proposed amendment in H.R. 11896, the amendment was rejected on March 28, 1972 by a vote of 86 to 34. *See* 118 Cong. Rec. 10,669 (1972).

This debate illustrates that the House had ample opportunity to include groundwater within the pollution control provisions but declined to do so. The failure of the proposed amendment "strongly militates against a judgment that Congress intended a result that it expressly declined to act." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974). Therefore, this court should not act where Congress has con-

ferred no jurisdiction. *See, e.g., United States v. GAF Corp.*, 389 F. Supp. 1379 (S.D. Tex. 1975).

FOR may assert that the Aspin Amendment also contained provisions that would have deleted exemptions for oil and gas well injections and assert that it was the oil and gas provisions that caused the amendment to fail rather than the groundwater provisions. Such an assertion is mere speculation, and the fact remains that the groundwater provisions were not passed either at the time the CWA took effect or at any time in the future. Surely, if the House had wanted the amendment to pass, it could have resubmitted a similar provision at some later point, but it has not.

c. The EPA has not promulgated regulations or interpreted the statute in a way indicating that groundwater should be subject to the enforcement and permitting requirements.

Despite the fact that there has been much recent debate concerning the breadth of the term "navigable waters," the EPA has declined to assert that even hydrologically connected groundwater is subject to NPDES permitting. Indeed, if the EPA did interpret the statute to say that such groundwater should be included in the definition of "navigable waters," this interpretation would be afforded much deference. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 116, 125 (1985). Instead, the Office of General Counsel advised EPA that "[u]nder § 502(12) the term 'discharge of a pollutant' is defined so as to include only discharges into navigable waters. Discharges into ground waters are not included." Opinion, Office of General Counsel (1973), *reprinted in Exxon Corp. v. Train*, 554 F.2d 1310, 1321 n. 21 (5th Cir. 1977).

Therefore, in light of the statutory language of the CWA, the legislative history behind the CWA, and the absence of contrary guidance by the EPA, groundwater should not be included within the meaning of "navigable waters." For the judiciary to hold otherwise would be usurping the role of the legislature because Congress explicitly left groundwater reg-

ulation to the states. Any potential unfavorable results that this may create must be changed by clear legislative mandate rather than through judicial alteration of the applicable statutory language.

B. Even if this court determines that some groundwater should be included within the definition of "navigable water," groundwater that is tributary to, but not in close proximity with, traditionally navigable surface water should be excluded from the § 301(a) provision.

Assuming arguendo that this court concludes that Congress did intend for the CWA to include at least some types of groundwater, groundwater of the type at issue here must not be regulated because the connection with navigable water is too tenuous to bring it within the parameters of CWA jurisdiction. The various types of groundwater may be considered as part of a continuum. On one extreme is isolated groundwater that will not reach surface waters, which has been held by various courts to not be navigable. *See, e.g.*, *Village of Oconomowac Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994); *Exxon Corp. v. Train,* 554 F.2d 1310 (5th Cir. 1977). On the other extreme is surface water, which is clearly held to be navigable. All other groundwater fits somewhere in the middle of that continuum, and a line must be drawn delineating navigable from not navigable.

FOR asserts that groundwater that is tributary to surface water must be considered navigable because it may eventually run into surface water, and therefore to hold otherwise would frustrate the general goal of the CWA to "restore and maintain the chemical, physical and biological integrity of the nation's waters." 33 U.S.C. § 1251(a) (1994). However, to hold that groundwater not in close proximity with surface water, whether tributary to it or not, is navigable water and therefore subject to permitting would be over-inclusive and impractical.

1. A broad interpretation of "navigable water" that would include groundwater not in close proximity with surface water would be over-inclusive.

Because almost all groundwater has at least some chance of eventually flowing into surface water at some point, there is arguably no water that is completely isolated and non-tributary. Therefore, the broad interpretation of "navigable" put forth by FOR would have the effect of regulating almost all groundwater. This concern was addressed in *Village of Oconomowac Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994). There, the court had to decide whether the federal government had asserted authority over artificial ponds that might drain into ground waters. The court stated that even though there was a possibility of a hydrological connection, "neither the statute nor the regulations makes such a possibility a sufficient ground of regulation." *Id.* at 965.

The court was concerned that to some extent, all waters would be considered within the power of the national government, which would be too far of an extension. The court also noted another Seventh Circuit case and concluded that "even a rule with such broad scope did not cover a one-acre wetland 750 feet from a small creek." *Id.* at 965 (*citing Hoffman Homes, Inc. v. Adm'r, EPA,* 999 F.2d 256, 260-61 (7th Cir. 1993)). In the instant case, XXX is located at a distance of one-half mile away from the navigable surface water, which is simply too far away. *See* Record 4. To include such water as navigable would render virtually all water open to federal regulation under the CWA.

2. A broad interpretation of "navigable water" that would include groundwater not in close proximity with surface water would have negative practical consequences.

In addition to the fact that regulation of distant groundwater would be over-inclusive, it would also be counterproductive and make permitting and enforcement extremely impracticable.

First, over-regulation may actually damage society as a whole because it may prevent companies from undertaking economically advantageous activities on their private land. If the CWA is extended to include any groundwater that may eventually reach some surface water, potential companies might decide it is not worth the difficulty of obtaining and upkeeping a permit and would instead refrain from using their land for any advantageous purpose.

A related problem would be that extending the definition of groundwater will make it virtually impossible to observe and sample potential problem areas. This is particularly true in a case such as this one where groundwater is not in close proximity with the navigable surface water because the potential areas that would need to be sampled would be endless. Additionally, it would be difficult to pinpoint who the polluter is because often the pollutant could be emanating from various sources. Although that fact does not appear to be an issue in this case, it may be a problem in other cases in more populated areas.

These difficulties in sampling and accountability would make permitting impracticable. Scientific uncertainty would make it difficult to cover all possible contingencies when issuing a permit. Similarly, permits usually contain reporting requirements wherein the company must track pollutant discharge. Reporting pollution of groundwater that may be connected in any way to surface water would be difficult because such pollution would be difficult to detect. Groundwater leaching would be difficult to detect because it is not as exact, for example, as leakage from a stationary pipe containing materials known to the company.

These practical consequences were addressed in *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312 (D. Or. 1997), which held that the NPDES program does not apply to any discharges to groundwater. It voiced concern by saying that a rule that would include groundwater "would add a new level of uncertainty and expense to NPDES permitting and would expose potentially hundreds of WPCF permittees to current or future litigation." *Id.*

It is crucial to note that a limited interpretation will not lead to a situation where corporations are free to pollute groundwater without any accountability. There are other federal statutes designed specifically to deal with the groundwater pollution dilemma. The Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Underground Injection Control Program are examples of other federal legislation that specifically encompass groundwater within their scope. Also, states are free to enact tougher regulations pertaining to groundwater pollution. Additionally, Congress is still free to implement regulations that would expressly include groundwaters within the jurisdiction of the CWA. However, until that happens, this court must effectuate the CWA as written and intended by Congress, and the CWA currently cannot be read to include groundwaters within its scope.

II. Because The Issue Was Not Ripe When XXX's NPDES Permit Was Issued, XXX Now Has Standing To Call For A Judicial Review.

A. Because XXX could not have successfully sought judicial review when its NPDES permit was issued it is not banned from seeking review at this point.

XXX has standing to ask for a judicial review of section IIA3 of its NPDES permit and the DEP controls over water quality. The discharge permit issued to XXX and the purely aspirational water quality goals incorporated therein are agency actions. However, agency actions are subject to judicial review by the courts once they have become "final" decisions. *See generally FTC v. Standard Oil Co.*, 449 U.S. 232 (1980); *Abbott Lab. v. Gardener*, 387 U.S. 136 (1967). It is essential that the court recognize that agency action at the time the NPDES permit was issued to XXX could not have been a final agency decision because the permit and the water quality standards issued by the DEP failed to specify selenium levels, so a judicial review was not possible under § 509 (b)(1) of the CWA. Because it was not possible for XXX to seek a judicial review at the time the permit was issued, XXX is *not*

banned by § 509(b)(2) of the CWA from seeking a judicial review. *See* 33 U.S.C. § 1369 (b)(2) (1994). The reasoning of the court below was accurate when it held that the issue was not ripe for review earlier but is ripe for review now. *See* Record 7. Without ripeness, XXX did not have standing to seek judicial review when the discharge permit was issued; thus XXX currently has standing to ask this court for review.

In *Abbott Laboratories* the United States Supreme Court laid out a two part test to determine if an issue is ripe for judicial review: (1) a court must determine the fitness of an issue for a judicial decision and (2) evaluate the hardship to the parties in withholding the courts review. *See Abbott Lab.*, 387 U.S. at 149. At the time the discharge permit was first granted to XXX a request for review would have failed the *Abbott Laboratories* test.

B. Because an issue must be grounded in enough facts to be ripe, a judicial review of XXX's NPDES permit was not possible when the permit was first issued.

In applying the *Abbott Laboratories* test *for* a judicial review to a regulation issued by an government environmental agency, the courts can look to specific applications of the *Abbott Laboratories* test. Part one, examining "fitness of the issue," may be evaluated by determining if an obligation imposed by the regulation would require an "immediate and significant change" in a party's conduct. *Commonwealth Edison Co. v. Train*, 649 F.2d 481, 484 (7th Cir. 1980); *see also Abbott Lab.*, 387 U.S. at 153. In *Commonwealth Edison*, the Seventh Circuit found that when it is impossible to predict how a regulation will affect a party, an issue is not ripe for judicial review. *Commonwealth Edison*, 649 F.2d at 484-485. In that case, the court found that criteria imposed by a water pollution regulation were too unspecified to merit a judicial review. Likewise, when the NPDES permit containing section IIA3 was issued to XXX, it was too unspecified to merit a judicial review. Section IIA3 of the NPDES permit contained general boilerplate language used by the EPA in all of its NPDES permits, *see* Record 4, and the DEP had not adopted any water quality standards specifically limiting dis-

charges of selenium, *see id.* at 5. If XXX had tried to seek judicial review of the permit at the time it was issued, a court would not have been able to rule because the issue was not yet ripe for review.

In addition, the U.S. Supreme Court has detailed criteria on what makes an agency decision "final" and reviewable, and thus fit for judicial review. In *FTC v. Standard Oil Co.*, the Court set out the following criteria for identifying if an agency decision is final (and, thus, reviewable): (1) whether the action is a definitive statement of the agency's position; (2) whether the action had the status of law and immediate compliance with its terms was expected; (3) whether the action had a direct impact on the day to day business of the plaintiff; and (4) whether a pre-enforcement action was calculated to speed enforcement. *See Standard Oil Co.*, 449 U.S. at 239-40, *cited with approval in Natural Resources Defense Counsil, Inc. v. EPA*, 16 F.3d 1395, 1407 (4th Cir. 1993).

The language of section IIA3 of XXX's permit is not specific; New Union has not adopted any specific numerical requirements for selenium; and the Supreme Court of New Union has ruled that water quality standards for designated uses are purely aspirational and require numerical or other specific limitations to be enforceable. *See* Record 5-6. Thus, section IIA3 of XXX's permit was neither (1) a definitive statement of an agency's position nor (2) a status of law requiring immediate compliance. When the permit was issued there was no clear indication from the DEP of what limits for selenium were enforceable. Thus, it would have been impossible for XXX or a court to determine if there was a violation of the permit when it was first issued.

Regarding the third part of the *Standard Oil* test, the interpretation and application of section II3A of XXX's permit had no direct impact on the day to day business of XXX when the permit was issued. However, now that a legal claim has been made against XXX, and it faces liability for water quality levels in the Roaritan, the permit section's interpretation and application will have significant impact not only on liability for past action, but on future conduct.

Finally, since section IIA3 is boilerplate and New Union has not set specific requirements regarding water quality standards, *see* Record 4, it would not have been an efficient use of judicial resources to view section IIA3 as a "final" reviewable agency decision regarding specific water quality standards at the time it was issued to XXX. New Union may decide to set specific pollutant standards that are very different from any standards a court may have come upon in a challenge by XXX at the moment the permit was issued. If XXX would have tried to challenge the permit when it was first issued, it is likely that they would have faced the same fate as the plaintiffs in *Natural Resources Defense Counsil*, where the court refused to review the agency's water pollution regulation. *See Natural Resources Defense Council* 16 F.3d at 1395.

Because, the discharge permit and the DEP water quality standards were unspecified and not final reviewable agency decisions at the time the discharge permit was issued, a challenge by XXX of the permit was not "fit" for a judicial decision, and thus not ripe. However, because of change of circumstance and recent arguments presented by third parties XXX now feels that it is a ripe issue.

C. Because XXX could not have presented a ripe issue at the time the its permit was issued, § 509(b)(2) of the CWA does not prohibit a current review of the permit and the DEP's water quality standards.

The second prong of the *Abbott Lab.* test examining the hardship on the parties of withholding a court decision did not merit the issue ripe when the discharge permit was first issued. When considering whether an issue is ripe for judicial review, courts have considered whether there will be opportunities for later review. *See Commonwealth Edison*, 649 F.2d at 486-487. Many regulations, especially those imposed by a state agency, may have subsequent opportunities for review, such as if New Union's DEP adopts a more specific water quality standard regarding selenium content. In order to grant judicial review at the time the discharge permit was issued to XXX, a court would have to be convinced that there

would be no other possibility for judicial review. Despite the possible application of § 509(b)(2) of the CWA as precluding any later review, there is no reason that XXX had to demand the judicial review at the time the discharge permit was issued. Section 509(b)(2) only applies to judicial reviews which "could have been obtained' at an earlier date. However, as discussed above, it was impossible for XXX to seek a review on such an unspecified and non-final agency decision.

There was no possibility that a court could have granted review of section IIA3 when the permit was issued. For a court to now apply § 509(b)(2) would place XXX between the proverbial rock and a hard place. When the permit was issued there were insufficient specifics to determine exactly what XXX would have asked a court to determine, yet § 509(b)(2) might be interpreted as prohibiting a review at the current time. This conflict is simply untenable. The Supreme Court has set out standards for ripeness of judicial review of agency decisions in *Abbott Lab.* and *Standard Oil.* Applying these precedents to § 509(b)(2) of the CWA cannot preclude a judicial review at this time because § 509(b)(2) only applies in situations where an earlier review "could have been obtained." 33 U.S.C.A. § 509(b)(2). Because the issue was not ripe when the XXX's permit was first issued, XXX could not have obtained a judicial review at that time; thus, XXX still has standing to seek review.

III. State Law Should Govern Interpretation Of The Provision That Prohibits Discharges That "Violate Water Quality Standards" In XXX's Federally Issued NPDES Permit.

The provision of XXX's NPDES permit that prohibits discharges that "violate water quality standards" must be interpreted in accordance with state law. Under the CWA, the water quality standards referenced in XXX's permit are issued by the state and are issued in accordance with state law. *See* 33 U.S.C. § 1313(a)(3)(A) (1994). Therefore, in interpreting whether a particular discharge violates "water quality

standards," a reviewing court must allow the state law under which the standards are issued to govern that interpretation.

This court should reject the holding below and allow state law to govern interpretation of when a discharge "violates water quality standards" for three reasons. First, § 303 of the CWA expressly mandates that water quality standards are to be promulgated by the states in accordance with state law. *See* 33 U.S.C. § 1313(a)(3)(A). Second, § 401 of the CWA requires that an applicant for a federal NPDES permit must first obtain state certification that the permit meets all CWA and state law requirements. *See* 33 U.S.C. § 1341(a) (1994). Finally, the EPA's approval of state water quality standards under § 303 of the CWA does not make those standards part of federal law. *See* 33 U.S.C. § 1313.

If state law governs interpretation of state water quality standards, then XXX's selenium discharges cannot be found to violate its NPDES permit. The lower court acknowledged that, under the applicable state law of New Union, designated water quality uses are not independently enforceable. *See* Record 8. The Supreme Court of New Union has affirmed regulations of the DEP providing that designated uses are simply goals and, unless reduced to "numerical or other specific limitations for individual permitted discharges" they are unenforceable. Record 8 (citing *Prentice v. DEP*, 435 N.U. 875, 883 (1989) (affirming validity of 40 N.U.A.C. § 2346.2(a))). XXX's NPDES permit does not reduce the designated water quality use for the Roaritan to numerical or specific limitations. Thus, if this court, pursuant to the following analysis, should reverse the lower court and rule that state law governs interpretation of the state water quality standards in XXX's permit, this court should also apply the state law of New Union and dismiss FOR's citizen enforcement action because XXX's permit incorporates only an unenforceable designated water quality use.

A. This court should reverse the lower court because water quality standards are promulgated by the states in accordance with state law and state law should govern interpretation of when discharges "violate water quality standards."

Because the CWA exclusively delegates responsibility for the establishment and maintenance of water quality standards to the states, the courts have consistently found that all reference in NPDES permits to water quality standards or interpretations of water quality standards must be governed by the same state law that originally gave rise to the water quality standards. *See, e. g., PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 713-716 (1994); *Arkansas v. Oklahoma*, 503 U.S. 91, 111-112 (1992) (affirming an EPA interpretation of Oklahoma state water quality standards when that interpretation was based on the same Oklahoma law that originally gave rise to the water quality standards).

In *PUD*, the Supreme Court outlined the "distinct role[ ] [of] the . . . State Governments" established by the CWA. *PUD*, 511 U.S. at 704. First, § 303 of the CWA requires each state to adopt "*pursuant to its own laws* water quality standards applicable to intrastate waters." 33 U.S.C. § 1313(a)(3)(A) (emphasis added). These water quality standards are to consist of both: (1) designated uses for the waters and (2) water quality criteria based upon the designated uses. *See* 33 U.S.C. § 1313(c)(2)(A). Second, the CWA requires that *each state review and*, if necessary, *revise* these water quality standards once every three years. *See* 33 U.S.C. § 1313(c)(1). Finally, states are responsible for enforcing water quality standards in intrastate waters. *See* 33 U.S.C. § 1319(a) (1994).

The *PUD* Court found that because the CWA exclusively delegates responsibility for the establishment and maintenance of water quality standards to the states, any interpretation of water quality standards in a NPDES permit was governed by the same state law that originally gave rise to the water quality standards. *See PUD*, 511 U.S. at 713. At

issue in *PUD* was the State of Washington's right to condition their certification of a proposed NPDES permit upon a minimum stream-flow requirement. This minimum stream-flow requirement was required by Washington so that the affected stream's designated water quality use would not be impaired. *See id.* at 709. The affected stream was designated as a Class AA water body. *See id.* at 705. In order to preserve a Class AA water body's characteristic uses of fish migration, rearing, and spawning, Washington determined that minimum stream-flow requirements must be preserved. *See id.* at 709.

In interpreting whether the minimum stream-flow requirement was in fact necessary to comply with state water quality standards, the Court looked to not federal law, but the same state law that originally gave rise to the water quality standards. *See id.* at 713-718. Specifically, the Court turned to Washington's definition of a Class AA water body and the designated uses Washington attributed to a Class AA water body. *See id.* at 714. The Court found that the state's determination of when a minimum stream-flow requirement "would be inconsistent with one of the designated uses of Class AA water" was controlling. *See id.* Thus, the *PUD* Court found that state law, not federal law, governed interpretation of water quality standards in a NPDES permit.

This court should follow the approach established in *PUD* and find that state law governs interpretation of when a discharge violates state water quality standards. The two cases are very similar. First, both *PUD* and this case involve a NPDES permit limitation imposed by the state in order to ensure that discharges did not violate state water quality standards. Second, both permit limitations were imposed as a condition to state certification of a NPDES permit. Third, in both cases the states had promulgated, and EPA had approved, the state water quality standards at issue. Thus, this court must find, pursuant to the holding in *PUD*, that state law governs interpretation of when discharges "violate water quality standards" in XXX's NPDES permit.

B. This court should reverse the lower court because state certification of a NPDES permit and the limitations imposed by state certification are based on state law, are the exclusive purgative of the state, and should be governed by state law.

The prohibition in XXX's NPDES permit on discharges that "violate water quality standards" was included, pursuant to § 401 of the CWA, as a condition of New Union's permit certification. *See* 33 U.S.C. § 1341(a). Because the prohibition was imposed as a certification condition, its interpretation should be governed by state law. Courts have developed a rule that any challenge to or review of limitations or conditions imposed by a state's certification must be governed by state law only and must be challenged in state judicial proceedings only. *See American Rivers, Inc. v. FERC*, 129 F.3d 99, 107-111 (2d Cir. 1997); *Ackels v. EPA*, 7 F.3d 862, 867 (9th Cir. 1993); *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1055-1056 (1st Cir. 1982). This rule should be extended by analogy to require that when a state certification condition results in a limitation to a NPDES permit, any reliance in that limitation on water quality standards should be interpreted in accordance with state, not federal, law.

Under § 401 of the CWA, an applicant for a NPDES permit must seek and be granted certification by the state in which discharges will occur. *See* 33 U.S.C. § 1341(a). A state certifies the NPDES permit when it is satisfied that the permit complies with applicable CWA requirements, state water quality standards, and any additional state law requirements. *See* 33 U.S.C. § 1341(a), (d). The state may approve the NPDES permit as proposed, may deny certification, may waive its right to certify, or may impose conditions or additional limitations on certification. *See* 33 U.S.C. § 1341(a), (d). Any conditions or additional limitations imposed by the state become a part of the NPDES permit when issued by the EPA. *See* 33 U.S.C. § 1341(d).

In *Ackels*, the Ninth Circuit restated a rule developed by the courts and the EPA that a challenger's "only recourse is to challenge the state certification in state judicial proceed-

ings." *Ackels*, 7 F.3d at 867. The *Ackels* court found that, no matter the merit of the applicant's challenge to certification, any challenge to or review of limitations or conditions imposed by a state's certification must be governed by state law only and must be challenged in state judicial proceedings only. *See id.*

The same result was reached in *American Rivers*. *See American Rivers*, 129 F.3d at 111 (holding that an agency does not qualify as a state judicial panel qualified to review a state's certification condition). The *American Rivers* court noted that even the EPA operates under a regulation requiring that "[r]eview and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State." *Id.* (quoting 40 C.F.R. § 124.55(e)). An EPA interpretation of the CWA is due considerable deference by the circuit courts. *See Chevron*, 467 U.S. at 842-844.

The rule developed in *Ackels* and *American Rivers*, and adopted by EPA regulation, should be extended to the case at hand. First, the cases are factually similar. Like the permit limitations in the *Ackels* and *American Rivers* cases, the prohibition against discharges that "violate water quality standards" in XXX's NPDES permit arose out of a certification condition imposed by the state. In addition, in all these cases, the EPA was powerless to do anything but incorporate the state's certification conditions into the NPDES permit. Thus, the rule of *Ackels* and *American Rivers* provides that, at a minimum, because state certification of a NPDES permit is based on state law, any challenge to or review of limitations or conditions imposed by New Union's certification must be governed by New Union law only and must be challenged in New Union judicial proceedings only.

The rationale of the rule in *Ackels* and *American Rivers* lends itself to extension in this case. The rule's rationale is based on the fact that it is the state or a state agency that takes action in issuing a certification condition. Because it is the state or a state agency that takes action, and not the federal agency issuing a NPDES permit, the action is taken in accordance with state law. Thus, any challenge to the action

must be a challenge to state law and a court that sits in review of the challenge must be competent to review state law. *See American Rivers*, 129 F.3d at 105-106; *Ackels*, 7 F.3d at 867. This rationale lends itself to extension in the case at hand.

Because it is the state of New Union that takes action in issuing the certification condition, that action is taken in accordance with state law. In addition, New Union's certification condition, in prohibiting discharges that "violate water quality standards," incorporates water quality standards which are issued by New Union pursuant state law. Thus, the certification condition imposed by New Union involves: (1) action taken pursuant to state law and (2) applies standards developed pursuant to state law. Thus, by extending the rule of *Ackels* and *American Rivers*, any interpretation of the certification condition must be an interpretation of state law and a court that reviews that condition must use state law to govern its interpretation of the condition. By so extending the rule of *Ackels* and *American Rivers*, this court should reverse the district court decision that federal law governs interpretation of the water quality standards referenced in XXX's permit. In place of that decision, this court should find that state law governs any interpretation of the water quality standards incorporated into XXX's NPDES permit.

C. This court should reverse the lower court and rule that state law governs interpretation of New Union's water quality standards because EPA approval of the standards does not make the standards subject to pre-emption or subject to incorporation into federal law.

Under § 303 of the CWA, states are required to establish and adopt state water quality standards pursuant to state law. *See* 33 U.S.C. § 1313(a)(3)(A). EPA is then required to approve the standards if they comport with the requirements of the CWA. *See* 33 U.S.C. § 1313(a)(3)(B). States are then required to review the water quality standards every three years and make necessary revisions pursuant to state law. *See* 33 U.S.C. § 1313(c)(1), (2). This statutory structure estab-

lishes the clear and manifest purpose of Congress that states have the primary role in adopting water quality standards and that states rely on state law to do so. The purpose of Congress is most persuasively evidenced by the language of the statute. *See Chisom v. Roemer*, 501 U.S. 380, 396 (1991); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 542 (1940); *Save Our Community v. EPA*, 971 F.2d 1155, 1162-1163 (5th Cir. 1992); *Sierra Club v. Train*, 557 F.2d 485, 489 (5th Cir. 1977).

Under the Supremacy Clause of the U.S. Constitution, federal laws that conflict with state laws pre-empt the state laws. *See* U.S. Const. art. VI, cl. 2. However, the Supreme Court has stated that there is a presumption "against finding pre-emption of state laws in areas traditionally regulated by the States . . . unless that was the clear and manifest purpose of Congress." *Cal. v. Fed. Energy Regulatory Comm'n*, 495 U.S. 490, 497 (1990) (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989)). Areas traditionally regulated by the states include powers over water exploitation, *see Cal. v. United States*, 438 U.S. 645, 655 (1978), and over regulation of water quality, *see City of Milwaukee v. Ill.*, 451 U.S. 304, 317 (1981). The Supreme Court's pre-emption test provides that state laws addressing traditionally regulated areas such as water quality are pre-empted only if they "actually conflict with federal law, that is, when it is impossible to comply with both state and federal law." *Cal. v. FERC*, 495 U.S. at 506 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 268, 248 (1984)).

Because the use of state law in adopting and interpreting water quality standards is the clear and manifest purpose of Congress and because the use of state law in interpreting water quality standards does not conflict with federal law or make it impossible to comply with federal law, the use of state law in interpreting water quality standards satisfies the Supreme Court's test of pre-emption. This court should reverse the lower court's holding that water quality standards are governed by federal law because the lower court based that holding on the erroneous assertion that federal law has

pre-empted state law in establishing water quality standards. *See* Record 8.

Further, the Supreme Court has explicitly recognized that establishing and revising intrastate water quality standards remain the exclusive responsibility of the state pursuant to state laws. *See Ark. v. Okla.*, 503 U.S. 91, 101 (1992). While the Court has held that EPA approval of a state's water quality standards makes those standards part of the federal law of water pollution control, *see id.* at 110, the Court has limited this holding to the "interstate context," *Id.* In the *intrastate* context, state water quality standards remain the exclusive purview of the issuing state.

The case at hand involves the intrastate context because, unlike the situation in *Arkansas*, the pollutant discharges occurred within the boundaries of New Union and will not affect water quality standards in another state. Thus, according to *Arkansas*, in this intrastate context, interpretation of "water quality standards" as incorporated into XXX's NPDES permit must be governed by state law. Because the lower court's order did not correctly apply *Arkansas*, this court should reverse and rule that interpretation of water quality standards referenced in XXX's permit is governed by state law.

IV. If Federal Law Governs Interpretation of the Provision in XXX's NPDES Permit that Prohibits Discharges which "Violate Water Quality Standards", Then Further Administrative Action to Either Establish Water Quality Criteria or Allocate Effluent Waste Load Is Necessary Before a Citizen's Suit Can Enforce this Permit Provision.

Under § 505 of the CWA, a citizen action, such as that brought by FOR, must be brought "against any person . . . who is alleged to be in violation of (A) *an effluent standard or limitation* . . . or (B) an order issued . . . with respect to *such standard or limitation*." 33 U.S.C. § 1365(a)(1) (1994) (emphasis added). Thus, XXX must be violating an effluent stan-

dard or limitation for FOR's suit validly to lie. Under § 505, an "effluent standard or limitation" includes "a permit or condition thereof . . . which is in effect under this chapter." 33 U.S.C. § 1365(f)(6).

FOR alleges that XXX is in violation of § 505 because XXX is in violation of an effluent standard or limitation. That violation, FOR alleges, occurred because XXX's discharge of selenium violated the prohibition in XXX's NPDES permit against discharges that "violate water quality standards." However, water quality standards for the Roaritan consist only of a designated water quality use and do not include water quality criterion for selenium. Violation of a designated use cannot, of itself, constitute violation of an effluent standard or limitation.

Because XXX cannot violate an effluent standard or limitation by violating a designated use, the lower court's ruling that FOR's § 505 suit validly lies is incorrect. There are two reasons why this court should reverse the lower court. First, under federal law, XXX could not have violated either its NPDES permit or state water quality standards because the state standards contain only a designated water quality use and a designated use is not, in a citizen's suit, independently enforceable as a water quality standard. Second, even if a designated use is independently enforceable in a citizen's suit, before that designated use can be enforced, either New Union or the EPA must determine how much of a pollutant's effluent waste load is allocated to various polluters on the water body.

A. This court should reverse the lower court because, under federal law, a designated water quality use without accompanying water quality criterion is not an independently enforceable water quality standard in a citizen's suit.

It is very common for a NPDES permit to contain, as did XXX's permit, prohibitions against violation of water quality standards. *See* Bruce Allen Morris, *The Oregon Misstep and The Texas Two Step: Two Recent Appellate Cases Expand*

CWA Citizen Suits, 11 Nat. Resources & Env. 50, 50 (1996). However, it is not clear whether violations of these prohibitions may be enforced by a citizen suit when water quality standards consist solely of a designated use. *See id.* This court should reverse the lower court's ruling that citizen suits may be used to enforce these prohibitions because the plain language of the CWA, the legislative history of the CWA, and the rulings of the federal courts show that, under federal law, a designated use is not independently enforceable without accompanying water quality criteria that establish specific, numerical effluent limitations.

1. Under the plain meaning of the CWA, an enforceable water quality standard in a citizen's suit must include a water quality criterion.

An analysis of whether a designated water quality use is, in a citizen's suit, independently enforceable as a water quality standard under the CWA, must begin by turning to the plain meaning of the statute. *See City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 337 (1994). Under § 303 of the CWA, states are required to adopt, and EPA is required to approve, water quality standards that comply with all CWA requirements. *See* 33 U.S.C. § 1313(a)(3)(A), (B). To comply with CWA requirements, state adopted water quality standards are required to consist of two equally important components: (1) designated water quality uses and (2) water quality criteria based on those uses. *See* 33 U.S.C. § 1313(c)(1); *see also PUD*, 511 U.S. at 714. "The text makes it plain that water quality standards contain [these] two components." *Id.*

However, New Union's water quality standards for the Roaritan do not contain both of the components required by the CWA. *See* 33 U.S.C. § 1313(c)(2)(A). The water quality standards are missing the water quality criterion required by 33 U.S.C. § 1313(c)(2)(A). Because the plain language of the CWA requires that valid water quality standards must contain *both* a designated water quality use *and* water quality criterion, *see* 33 U.S.C. § 1313(c)(1), XXX could not properly comply with the water quality standards. XXX must know

what the water quality criterion for selenium are before it can violate water quality standards by discharging selenium. Otherwise, the statute would allow numerous "citizen suits to proceed on the basis of permit violations, where the permittee complied with end-of-pipe discharge limitations but the water still wound up being too polluted." *Northwest Envtl. Advocates v. City of Portland*, 56 F.3d 979, 989 (9th Cir. 1995) (Kleinfeld, dissenting). Because New Union must adopt water quality criterion for selenium before XXX can violate water quality standards, this court should reverse the lower court's ruling that a designated use is an independently enforceable water quality standard.

2. According to the legislative history of the CWA, Congress intended that only an effluent limitation or a water quality standard that included a water quality criterion may be enforced in a citizen's suit.

Congress did not intend that citizen's suits could be brought to enforce a designated water quality use. *See United States v. Hooker Chem. & Plastics Corp.*, 749 F.2d 968, 979-980 (2d Cir. 1984). The Senate Report on the CWA concluded that enforcement proceedings in a citizen suit were "limited to effluent standards or limitations established administratively under the Act." S. Rep. No. 92-414, at 80 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3747. When contemplating citizen enforcement of the CWA, Congress specifically intended that citizens would be able to enforce only the sections of permits that provide "administratively established criteria" and would be prohibited from enforcing "technical evaluations [of] pollutants for which no effluent levels have been established." *Hooker*, 749 F.2d at 980 (citing S. Rep. No. 92-414, at 78-79 (1972)).

In XXX's NPDES permit, prohibitions against the discharge of selenium could come in two forms. First, the permit could contain EPA established effluent limitations for selenium. *See* 33 U.S.C. § 1342(a)(1)(A) (incorporating effluent limitations issued by the EPA under 33 U.S.C. § 1311(b) into NPDES permits). Second, the permit could incorporate sele-

nium discharge levels based on water quality criteria for selenium established under the water quality standards for the Roaritan. *See* 33 U.S.C. § 1342 (a)(1)(B). However, neither of these forms is included in XXX's permit. The only prohibition against the selenium discharge is a broad proscription against discharges that "violate water quality standards." And those water quality standards contain only a designated water quality use and lack any water quality criterion. A designated use is "open-ended" and provides broad goals for water quality without "specific limitations" for individual pollutants. *PUD*, 511 U.S. at 716-717. Water quality criteria, on the other hand, provide "specific numerical limitations" with established effluent levels upon which a permittee can rely. *Id.* at 716.

Because Congress, through its legislative history, intended that only administratively established effluent levels be enforceable in a § 505 citizen's suit, water quality standards must contain the specific effluent levels of water quality criteria before they can be enforced in a § 505 citizen's suit. In light of the absence of water quality criteria for the Roaritan and the absence of numerical effluent limitations in XXX's NPDES permit, this court should reverse the lower court and dismiss FOR's citizen suit as invalid because it seeks to enforce broad designated water quality uses that Congress intended to foreclose from citizen suit enforcement.

3. According to the federal courts, a water quality standard must be reduced to specific numerical limitations in the form of either water quality criteria or effluent limitations before it is enforceable in a citizen's suit.

The federal courts have held that a water quality standard must be reduced to a specific numerical limitation in a NPDES permit before that standard can be enforced in a citizen's suit. Specific numerical limitations can take the form of either EPA established effluent limitations or discharge levels based on the water quality criteria component of water quality standards.

a. The Supreme Court has opined that the designated use component of a water quality standard is not independently enforceable and, instead, water quality criteria must be reduced to specific numerical limitations in a NPDES permit.

In *PUD*, the Supreme Court addressed the validity of a state's condition that minimum stream flow be maintained before the state would certify a proposed NPDES permit. *See PUD*, 511 U.S. at 703. Under § 401 of the CWA, a state can condition its certification of a proposed NPDES permit on compliance with various CWA and state law requirements. *See* 33 U.S.C. § 1341(a), (d); *PUD*, 511 U.S. at 712-713. The Supreme Court held that it is proper for a state to base its certification conditions solely on the designated use component of water quality standards rather than on water quality criteria or effluent limitations. *See PUD*, 511 U.S. at 715. However, *PUD* does not stand for either the proposition that a designated use can be incorporated into a NPDES permit as an independent permit requirement or the proposition that violation of a designated water quality use can be independently enforced in a citizen's suit.

First, the *PUD* Court only addressed the narrow question of whether the State of Washington could, pursuant to § 401 of the CWA, base its certification condition on a designated water quality use. The Court held that the State of Washington acted properly in reducing its broadly worded designated use to a specific numerical minimum stream flow requirement. *See id.* at 709. Further, the Supreme Court noted that "water quality standards are typical in that they contain several open-ended criteria which, like the use designation of the river as a fishery, *must be translated into specific limitations for individual projects*." *Id.* at 716 (emphasis added). Thus, the *PUD* Court required that designated uses must be reduced to numerical limitations before they are incorporated into a permit. Because the designated use component of the water quality standards incorporated into XXX's permit were not reduced to numerical limitations, this

court should reverse the lower court and rule that the water quality standards cannot be enforced by FOR.

Second, the *PUD* Court only addressed reliance on a designated use in the narrow context of a state's certification of proposed NPDES permits. The Court held that, under § 401 of the CWA, a state is authorized to base its numerical certification conditions on a designated use. *See id.* at 714-715. However, the opinion did not extend that holding so far as to authorize that a citizen's suit, under § 505, could base an enforcement action on a violation of a designated use.

Citizen's suits cannot be used to enforce all CWA violations. *See Atlantic States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 358-359 (2d Cir. 1994) (citizen suits not permitted to enforce state regulations in a NPDES permit); *Hooker*, 749 F.2d at 980-981 (citizen suits not permitted to enforce emergency powers provision of the CWA). Instead, citizen's suits are limited to enforcement of those violations outlined in § 505 of the CWA. *See* 33 U.S.C. § 1365; *Save Our Community*, 971 F.2d at 1162. State and federal enforcement, however, is broad, and encompasses enforcement of all CWA requirements. *See, e.g., Atlantic States*, 12 F.3d at 358-359 (only states or EPA may enforce state standards in a NPDES permit); *Legal Envtl. Assistance Found. v. Pegues*, 904 F.2d 640 (11th Cir. 1990) (government decides what pollutants are included in a permit); *Hooker*, 749 F.2d at 979 (government enforces emergency powers provision of CWA) .

The *PUD* Court did not extend its holding to citizen's suits because of this difference in the enforcement responsibilities of citizens, states, and the EPA under the CWA. State water quality standards are intended to be broad goals toward which enforcement activities of the government can be aimed. *See Northwest Envtl. Advocates*, 56 F.3d at 992 (Kleinfeld, dissenting). To that end, the Court permitted a state to base a specific numerical minimum stream flow requirement on a designated use. *See PUD*, 511 U.S. at 714-715. However, the Court did not intend that designated uses could become independently enforceable in a citizen's suit. The Court instead required that "water quality standards . . . must be translated into specific limitations for individual

projects." *Id.* at 716. This court should follow the intent of the *PUD* Court and rule that FOR, in its citizen suit, cannot enforce the broad designated water quality uses incorporated into XXX's permit because those designated uses have not been translated into specific effluent limitations.

b. A majority of the federal courts have held that water quality standards must be reduced to specific numerical limitations before they can be enforced in a citizen suit.

A majority of the federal courts reviewing the issue have held that citizens may not sue under § 505 of the CWA to enforce water quality standards when those standards have not been reduced to specific, numerical effluent limitations. *See Atlantic States*, 12 F.3d at 358-359; *Oregon Natural Resources Council v. United States Forest Service*, 834 F.2d 842, 850 (9th Cir. 1987); *McClellan Ecological Seepage Situation (MESS) v. Weinberger*, 707 F.Supp. 1182, 1200 (E.D. Cal. 1989); *New York v. United States*, 620 F.Supp. 374, 383-384 (E.D.N.Y. 1985). Other courts have implicitly held the same. *See Save Our Community*, 971 F.2d at 1162; *Hooker*, 749 F.2d at 979 (noting that citizen enforcement "is limited to effluent standards or limitations established administratively") (quoting S. Rep. No. 92-414 (1972)). This court should follow the trend set by other federal courts and rule that FOR, in a citizen's suit, cannot enforce XXX's permit provision when that permit has failed to reduce water quality standards to specific, numerical effluent limitations.

Only the Ninth Circuit and a single district court relying on that Ninth Circuit opinion have failed to follow the general trend. The Ninth Circuit instead held that a citizen suit may be used to enforce permit provisions that prohibit violations of water quality standards without first reducing those standards to specific numerical effluent limitations. *See Northwest Envtl. Advocates*, 56 F.3d at 987; *Gill v. LDI*, No. C97-461Z, 1998 WL 652529 (W.D. Wash. June 29, 1998) (to be published in F. Supp.2d). However, in so ruling, the Ninth Circuit erroneously relied on the Supreme Court's opinion in *PUD*. The Ninth Circuit believed *PUD* stood for the "view

that Congress intended to confer citizens standing to enforce water quality standards." *Northwest Envtl. Advocates*, 56 F.3d at 987. However, the Ninth Circuit acknowledged that *PUD* did not involve a citizen suit action. *See id.* at 988. And the dissent objected to this interpretation of *PUD* because *PUD* "does not involve a citizen's suit, says nothing about citizen's suits, and implies nothing about citizen's suits." *Id.* at 990 (Kleinfeld, dissenting). Because the Ninth Circuit erroneously interpreted and applied the Supreme Court's *PUD* opinion, this court should not follow the Ninth Circuit. Instead, this court should reverse the lower court and should adopt the position of a majority of federal courts that FOR cannot enforce the water quality standards in XXX's permit because they have not been reduced to specific, numerical effluent limitations.

B. This court should reverse the lower court because, under federal law, an administrative determination allocating a pollutant's effluent waste load among various polluters must be made before XXX can be found in violation of its permit.

Even if the designated water quality use component of a water quality standard is independently enforceable, federal law requires additional administrative action before XXX can be found in violation of its NPDES permit. Federal law requires that either the EPA or New Union, for each discharged pollutant, administratively allocate, among all dischargers on a water body, the total effluent waste load that the water body can handle. *See* 33 U.S.C. § 1313(d); *Arkansas*, 503 U.S. at 108; *Atlantic States*, 12 F.3d at 358. This equitably allocates the cost of reducing undesirable discharges between existing sources. *See Arkansas*, 503 U.S. at 108.

New Union and the EPA have failed to allocate the total effluent waste load for selenium in the Roaritan River. The record indicates that, in addition to XXX's discharges, at least one other polluter is discharging selenium into the Roaritan. *See* Record 9. Together, the selenium discharged by XXX and the other polluter lead to selenium levels that exceed the maximum contaminant level (MCL) for selenium under the

Safe Drinking Water Act, 42 U.S.C.§§ 300f - 300j-25 (1994 & Supp. II 1996). *See* Record 9.

While XXX does not concede that the selenium MCL has any bearing on water quality standards, the EPA and New Union have still failed to comply with federal law requirements that selenium's total effluent waste load be allocated among all dischargers. Without allocation, neither XXX nor other selenium dischargers can know if it is their discharges that cause selenium levels in the Roaritan to exceed the MCL or if a reduction in their own selenium discharges will have any effect on selenium levels in the Roaritan. Thus, it is essential that the selenium waste load be allocated before XXX's selenium discharges are held to violate water quality standards.

This court should reverse the lower court ruling that XXX's selenium discharges could be a violation of its NPDES permit for two reasons. First, because the EPA and New Union have failed to allocate selenium's total effluent waste load, enforcement of XXX's selenium discharge as a violation of water quality standards would be premature. Second, because the EPA and New Union have failed to allocate selenium's effluent waste load, XXX cannot reasonably know if its selenium discharges would lead to a violation of water quality standards for the Roaritan.

CONCLUSION

For the foregoing reasons, XXX respectfully requests that this court: (1) reverse the ruling of the United States District Court for the District of New Union that tributary groundwater is navigable water under the CWA; (2) affirm the ruling of the district court that the provision in XXX's permit that prohibited discharges that "violate water quality standards" was ripe for review; (3) reverse the ruling of the district court that interpretation of the provision in XXX's permit is not governed by state law; and (4) if the interpretation of that permit provision is instead governed by federal law, reverse the ruling of the district court that a designated water quality use can constitute an independent grounds for enforcement of water quality standards.

APPENDIX

28 U.S.C. § 1292(b) (1994):

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

33 U.S.C. § 1251(a) (1994):

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

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

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

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

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

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

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

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

33 U.S.C. § 1252(a) (1994):

(a) Preparation and development

The Administrator shall, after careful investigation, and in cooperation with other Federal agencies, State water pollution control agencies, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters. In the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes. For the purpose of this section, the Administrator is authorized to make joint investigations with any such agencies of the condition of any waters in any State or States, and of the discharges of any sewage, industrial wastes, or substance which may adversely affect such waters.

33 U.S.C. § 1254(a) (1994):

(a) Establishment of national programs; cooperation; investigations; water quality surveillance system; reports

The Administrator shall establish national programs for the prevention, reduction, and elimination of pollution and as part of such programs shall—

(1) in cooperation with other Federal, State, and local agencies, conduct and promote the coordination and accel-

eration of, research, investigations, experiments, training, demonstrations, surveys, and studies relating to the causes, effects, extent, prevention, reduction, and elimination of pollution;

(2) encourage, cooperate with, and render technical services to pollution control agencies and other appropriate public or private agencies, institutions, and organizations, and individuals, including the general public, in the conduct of activities referred to in paragraph (1) of this subsection;

(3) conduct, in cooperation with State water pollution control agencies and other interested agencies, organizations and persons, public investigations concerning the pollution of any navigable waters, and report on the results of such investigations;

(4) establish advisory committees composed of recognized experts in various aspects of pollution and representatives of the public to assist in the examination and evaluation of research progress and proposals and to avoid duplication of research;

(5) in cooperation with the States, and their political subdivisions, and other Federal agencies establish, equip, and maintain a water quality surveillance system for the purpose of monitoring the quality of the navigable waters and ground waters and the contiguous zone and the oceans and the Administrator shall, to the extent practicable, conduct such surveillance by utilizing the resources of the National Aeronautics and Space Administration, the National Oceanic and Atmospheric Administration, the United States Geological Survey, and the Coast Guard, and shall report on such quality in the report required under subsection (a) of section 1375 of this title; and

(6) initiate and promote the coordination and acceleration of research designed to develop the most effective practicable tools and techniques for measuring the social and economic costs and benefits of activities which are subject to regulation under this chapter; and shall transmit a re-

port on the results of such research to the Congress not later than January 1, 1974.

33 U.S.C. § 1311(a) (1994):

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

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

33 U.S.C. § 1311(b) (1994):

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

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

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title;

(B) Repealed. Pub.L. 97-117, S 21(b), Dec. 29, 1981, 95 Stat. 1632.

(C) with respect to all toxic pollutants referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 1317 of this title which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable, but in

no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989;

(E) as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989, compliance with effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 1314(a)(4) of this title shall require application of the best conventional pollutant control technology as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(4) of this title; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph as expeditiously as practicable but in no case later than 3 years after the date such limitations are established, and in no case later than March 31, 1989.

(3)(A) for effluent limitations under paragraph (1)(A)(i) of this subsection promulgated after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 1314(b) of this title, and in no case later than March 31, 1989; and

(B) for any effluent limitation in accordance with paragraph (1)(A)(i), (2)(A)(i), or (2)(E) of this subsection established only on the basis of section 1342(a)(1) of this title in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established, and in no case later than March 31, 1989.

33 U.S.C. § 1313(a), (c) (1994):

(a) Existing water quality standards

(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3)(A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

. . . . .

(c) Review; revised standard; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

33 U.S.C. § 1313(d) (1994):

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

(4) Limitations on revision of certain effluent limitations

(A) Standard not attained

For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total

maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained

For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

33 U.S.C. § 1319(a) (1994):

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any 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.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends be-

yond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of

an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

33 U.S.C. § 1341(a), (d) (1994):

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be

compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

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

provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

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

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

. . . . .

(d) Limitations and monitoring requirements of certification

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

33 U.S.C. § 1342(a) (1994):

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

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

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

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator

may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

33 U.S.C. § 1362 (7), (12) (1994):

Except as otherwise specifically provided, when used in this chapter:

(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, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1365(a) (1994):

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty

under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

33 U.S.C. § 1365(f) (1994):

(f) Effluent standard or limitation

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

33 U.S.C. 1369 (b)(1),(2) (1994)

(b) Review of Administrator's action; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section

1314(l) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

40 C.F.R. 230.3(s)(3) (1994):

For purposes of this Part, the following terms shall have the meanings indicated:

(s) The term "waters of the United States" means:

(1) All waters which are currently used, or 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;

(2) All interstate waters including interstate wetlands;

(3) 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 could affect interstate or foreign commerce including any such waters:

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

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

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

(4) All impoundments of waters otherwise defined as waters of the United States under this definition.

(5) Tributaries of waters identified in paragraphs (1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1)-(6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

40 C.F.R. § 124.55(e) (1994):

(e) Review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in this part.

33 C.F.R. § 328.3(a)(3) (1994):

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

(1) All waters which are currently used, or 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;

(2) All interstate waters including interstate wetlands;

(3) 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 could affect interstate or foreign commerce including any such waters:

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

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

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

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

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.