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Brief for the Appellee, Friends of the Roaritan, Inc., Measuring Brief: Eleventh Annual Pace National Environmental Moot Court Competition

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Civ. App. No. 98-378

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

XXX CORPORATION,
Appellant,
v.
FRIENDS OF THE ROARITAN, INC.,
and
STATE OF NEW UNION,
Appellees

XXX CORPORATION,
and
STATE OF NEW UNION,
Appellants,
v.
FRIENDS OF THE ROARITAN, INC.,
Appellee

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

Brief for the Appellee,
FRIENDS OF THE ROARITAN, INC.,
MEASURING BRIEF

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QUESTIONS PRESENTED FOR REVIEW

A. Is the addition of a pollutant to groundwater, which is tributary to, but not in close proximity with, traditionally navigable surface water a violation of 33 U.S.C. § 1311(a)?

B. 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 barred by 33 U.S.C. § 1369 from seeking dismissal of the action, on the basis that the provision is not specific enough to be an enforceable permit provision?

C. Is the interpretation of a provision prohibiting discharges that "violate water quality standards" in a permit issued by the federal government, 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 33 U.S.C. § 1341?

D. If the interpretation of the Clean Water Act provision prohibiting discharges that "violate water quality standards" is governed by federal law, is the addition of a pollutant to navigable water causing, by itself or together with other such additions, 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?

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STATEMENT OF THE CASE

This is a response to an appeal from an order entered by Judge R. N. Remus in the United States District Court for the District of New Union denying XXX Corporation's ("XXX") motion to dismiss the action brought against them by Friends of the Roaritan, Inc. ("FOR") for alleged violations of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 and 1365 *et seq.* (1996). The District Court held that the pollution of tributary groundwater is a violation of the CWA. (R. at 6). It also ruled that Section 509(b)(2) of the CWA does not bar XXX from

questioning the provisions of its permit and that federal law should be used to interpret XXX's permit. (R. at 7- 8). Finally, the Court held that the addition of a pollutant to navigable water that causes the water to be unfit for its water quality standard is a violation of its permit, even without further administrative action to establish effluent limitations on the pollutant in the permit. (R. at 10). XXX's motion to dismiss was denied, and it has appealed to this court for further review while FOR cross-appeals for review of the decision on ripeness. (R. at 1, 10).

For the purpose of review, questions of law are reviewable by the appellate court on a *de novo* standard. *See Pierce v. Underwood*, 487 U.S. 552, 558 (1988). The decision of the District Court involves controlling questions of law and thus the appropriate standard of review for this case is *de novo*.

XXX occupies a forty acre site situated one mile from the Roaritan River. (R. at 4). FOR is a non-for profit organization dedicated to protecting the Roaritan River, a historically navigable river in the State of New Union. FOR brought a citizens' suit pursuant to Section 505 of the CWA against XXX for two sets of alleged violations of Section 301(a) of the CWA, 33 U.S.C. § 1311(a) (1996). (R. at 3).

The first set of alleged violations concerns the discharge without a CWA permit of pollutants from a waste pile on XXX's property to groundwater, that eventually reach the Roaritan River. (R. at 3). FOR alleges that the waste pile contains a significant concentration of lead, confirmed by the results of sampling done by the New Union Department of Environmental Protection ("NUDEP"). (R. at 4). They also allege that precipitation causes lead to leach into the groundwater, polluting the groundwater. (R. at 4). FOR further alleges that the polluted groundwater flows into the Roaritan and contaminates it with lead. (R. at 4). New Union joins FOR in asserting these allegations. (R. at 3).

The second set of alleged violations relates to XXX's discharge of selenium into the Roaritan. (R. at 3). The EPA approved the classification of the Roaritan as a Class AAA water that was fit for human consumption without treatment as part of New Union's submission of water quality standards

pursuant to Section 303 of the CWA. (R. at 5). The discharge by XXX is authorized by a permit issued by the Region XI office of the Environmental Protection Agency ("EPA"). (R. at 4). FOR alleges that XXX violated this permit by discharging selenium into the Roaritan, despite the fact that the permit contains no limitation on selenium. (R. at 4). FOR argues that Section IIA3 of the permit prohibits any discharge that "violates water quality standards." (R. at 4). This provision is part of the standard language contained in all permits issued by Region XI of the EPA and was also in the discharge permit issued by the NUDEP. (R. at 4). The State of New Union has not adopted water quality criterion for selenium, but the EPA has promulgated a maximum contaminant level ("MCL") for selenium under the Safe Drinking Water Act, 42 U.S.C. §§ 300(f) *et seq.*, 40 C.F.R. § 141.62(b) (1997). (R. at 5). FOR further alleges that the Roaritan cannot be used for its designated water quality purpose as a direct result of XXX's discharge of selenium, which it alleges exceeds the MCL. (R. at 5).

SUMMARY OF THE ARGUMENT

FOR urges that the decision of the United States District Court for the District of New Union denying XXX's motion to dismiss should be upheld for the following reasons. First, the groundwater tributary to the Roaritan River into which toxic lead is leaching counts as "navigable water" under the CWA. Congress explicitly stated its intent to broadly protect the "waters of the United States" through the CWA. If tributary groundwaters were to be excluded from the purview of the CWA, then the entire CWA could be avoided by polluters who would simply turn their polluting pipes into the ground. Most courts, including the Supreme Court, have agreed with this interpretation of Congressional intent, and have broadly construed "navigable waters" to include tributaries to navigable surface waters and groundwaters tributary to navigable surface waters.

Second, federal law must be used to interpret the provision prohibiting discharges that "violate water quality stan-

dards" in a permit issued by the federal government pursuant to Section 402 of the CWA. The legislative and statutory history of the CWA clearly indicate that one of the main reasons that Congress passed the CWA was to maintain a uniform level of basic water pollution standards. The courts have also shown that state water quality standards, upon approval by the EPA, become part of the federal law of water pollution. Since these standards are federalized, the interpretation of the provisions, in the permit by the EPA, supersedes any interpretation set forth by the NUDEP. The right of FOR to claim a citizens' suit against XXX is a federally created right set forth in Section 505 of the CWA. The courts have held that the right to bring a citizens' suit only extends to situations where a federal issue is present.

Third, because compliance with water quality standards are independently enforceable provisions of a NPDES permit pursuant to the statutory language of the CWA, XXX has violated its discharge permit by exceeding water quality standards for selenium levels in the Roaritan River. Legislative history reveals, and the federal courts support, the necessity of recognizing both effluent limitations and water quality standards as CWA regulatory tools. If effluent limitations were the only enforcement tool of a NPDES permit, XXX would still violate the permit because discharge of selenium is not expressly authorized in its permit. Penalizing any discharge of any pollutant not specifically authorized with an effluent limitation is the only interpretation of NPDES permits that would be consistent with the intent of the CWA. The statutory language, legislative history, and strict enforcement of the CWA do not tolerate a right to pollute interpretation of NPDES permits. For the above mentioned reasons, FOR respectfully requests this Court to uphold the District Court's denial of XXX's motion to dismiss.

In addition, FOR urges that the District Court's decision, with regards to the reviewability of XXX's NPDES permit, should be overruled. XXX's NPDES permit should not be reviewed by this court, as the court has no jurisdiction to do so under the provisions of the CWA. Courts have consistently held that when Congress includes specific judicial review pro-

visions in legislation, these provisions are to be viewed as the exclusive means of review. XXX's contention that it should be excused for allowing the statute of limitations to lapse because the permit was not ripe for review should be dismissed because courts have held that they will not engage in "retrospective ripeness review" except in the most extreme of circumstances. Given that the permit was clearly ripe for review during the statutorily-defined period of review, XXX may not be excused for missing the deadline.

ARGUMENT

I. GROUNDWATER TRIBUTARY TO THE ROARITAN RIVER, INTO WHICH TOXIC LEAD IS LEACHING, COUNTS AS "NAVIGABLE WATER" UNDER THE CLEAN WATER ACT.

The evidence presented at the trial court showed that lead, which is commonly known to be highly toxic to both humans and wildlife, was leaching from Defendant's waste pile and through groundwaters that discharge into the Roaritan River. (R. at 4). Because the groundwaters flow into the Roaritan River, they are *tributaries* of the Roaritan. As the trial court pointed out, the underground tributaries should be covered under the CWA since they are *navigable waters*. (R. at 6). Congress clearly intended tributary groundwaters to be considered navigable waters. This interpretation has been upheld by a majority of the courts, including the Supreme Court.

A. *Excluding "tributary" groundwater from the definition of "navigable waters" would undermine Congress' intent to protect the "waters of the United States" from pollution.*

Excluding "tributary" groundwater from the definition of "navigable waters" would undermine Congress' intent to protect the "waters of the United States" from pollution. When passing the CWA, Congress clearly stated that "[t]he objective of this chapter is to restore and maintain the chemical, physi-

cal, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1996). As noted by the Supreme Court, it was the purpose of the Act to establish an all-encompassing program of water pollution and regulation. *See City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 318 (1981). The CWA requires that either the EPA or the states eliminate all discharges of pollutants from point sources into *navigable waters* that is not allowed by an NPDES permit. 33 U.S.C. § 1342 (1996). Discharge into navigable waters without such a permit is prohibited under the CWA. *See id.* The traditional definition of "navigable waters" included only waters which could support maritime traffic ("navigable-in-fact"). *See The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). But, the CWA departs from this traditional definition and only requires that navigable waters be "waters of the United States." 33 U.S.C. § 1362(7) (1996) (See Appendix).

Groundwaters in general can be categorized as "tributary" groundwaters and non-tributary, or *isolated* groundwaters; tributary groundwaters flow into surface waters and isolated groundwaters do not. *See* Getches, *Water Law in a Nutshell*, 226 (1984). The majority of courts have found that tributary groundwaters are navigable waters. In the current matter, groundwater is flowing from XXX's facility toward the Roaritan River, thus making it *tributary groundwater*. (R. at 4).

If the tributaries of surface waters are not protected, the entire CWA may be undermined. *See United States v. Ashland Oil and Transp. Co.*, 504 F.2d 1317, 1329 (6th Cir. 1974). As the court in *Ashland Oil* suggested, if tributary groundwaters are not held to be navigable waters, polluters could simply dump unlimited amounts of pollutants into tributaries to navigable surface waters without fear of regulation. In this way, the CWA could be completely avoided simply by positioning pollution sources farther away from navigable-in-fact waters, but that are still hydrologically connected to those waters. *See id.* at 1329. Tributary groundwaters are as much tributaries as surface tributaries, and both must be protected with equal force. This position is also reflected in the regulations of the EPA, the agency primarily

responsible for implementing the CWA. 40 C.F.R. § 122.2(e) (1997) (EPA's definition of "navigable waters" includes "tributaries" of such waters, which are not distinguished between above or below-ground tributaries).

The Supreme Court in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-33 (1985), held that the term "navigable water" should be construed as broadly as possible. In *Riverside Bayview Homes*, the Court was presented with a case in which a housing developer was filling in wetland areas without an NPDES permit. *Id.* at 121. Noting from the Senate report on the CWA that "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source," the Court interpreted Congress' intent in promulgating the CWA as intending to cover as broad of a range of waters as possible. *Id.* at 134 (quoting S. Rep. No. 92-414 at 77 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3742). Noting the Corps of Engineers' finding that wetlands and "navigable-in-fact" waters were intimately connected, the Court held that wetlands must be considered navigable waters and be regulated under the CWA. *See id.* at 134-35. Interestingly, the Court also pointed out that wetlands that are not actually connected to "bodies of water" may still be regulated since they may "drain into those waters" and thus need to be regulated. *Id.* at 136. Implicit in this comment is that the Court realized the draining (when there was no surface connection) would occur through the ground, thus turning the water into *groundwater*. It flows from the Court's interpretation of the CWA that groundwaters should be regulated when they are closely connected to surface waters, because otherwise these waters that inter-circulate will contaminate each other and lead to the very contamination and pollution that the CWA was promulgated to prevent.

Nowhere in the statutory or legislative record does it state that navigable waters are not to include tributary groundwaters. *See* Phillip M. Quatrochi, *Groundwater Jurisdiction Under the Clean Water Act: The Tributary Groundwater Dilemma*, 23 B.C. Envtl. Aff. L. Rev. 603, 614 (1996). Neither can any part of the record of Congressional intent be

conclusively interpreted as excluding tributary groundwater from being navigable water. *See* Mary Christina Wood, *Regulating Discharges into Groundwater: The Crucial Link in Pollution Control Under the Clean Water Act*, 12 Harv. Envtl. L. Rev. 569, 592 (1988). Two particular pieces of legislative history have been used to argue that tributary groundwater is not navigable water, the report of the Senate Committee on Public Works on the CWA's applicability to groundwater, *see* S. Rep. No. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3739, and the defeat of Senator Aspin's amendment that would have explicitly included groundwater as navigable water. *See* Hearings on H.R. 11896 *et. al.* before the House Committee on Public Works, 92d Cong., 1st Ses. (1972), *reprinted in* Legislative History of the Water Pollution Control Act Amendments of 1972, at 597.

If Congress had any intent to group tributary and stationary groundwaters together and exclude them both from the purview of the CWA, one would have expected at least one *single* tributary groundwater example to be used somewhere in the reports of the legislative history. Yet, such a reference is nowhere to be found and only *isolated* groundwaters are mentioned, thus suggesting that Congress only intended to exclude isolated groundwater from the CWA. The Senate Committee Report states as follows: "Several bills pending before the Committee provided authority to establish federally approved standards for groundwaters which permeate rock, soil, and other subsurface 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 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3739. However, in a paragraph conveniently omitted by the court's holding that tributary groundwater is not navigable water, the report goes on to address the desirability of regulating groundwater in the future:

> *Deep-well* disposal raises a possibility of irrevocable damage to public aquifers and *slow* dissemination of pollutants into potential water supplies . . . [*D*]*eep disposal wells* are becoming more prevalent throughout the nation, while

> *deep wells* are predicted to supply increasing percentages of public water in the arid west and southwest in the next two decades.

Id. at 3739 (emphasis added). Clearly, the Senate here was talking about *isolated* groundwaters, not tributary groundwaters. After discussing the rationale for not including the term "groundwater" in the definition of navigable water, the discussion immediately turns to deep-well disposal of pollutants, aquifers and deep-well aquifers (all *isolated* groundwaters). *See id.* It would be inconsistent with the overall context of this text to construct the above as talking about tributary groundwater.

Similarly, the defeat of the Aspin Amendment has been misinterpreted by a few courts as evidence that Congress did not mean for tributary groundwater to be considered navigable water. *See* Wood, *supra*, at 614. The Aspin Amendment would have included all groundwaters as navigable waters, but also would have eliminated CWA exemptions for deep gas and oil well injection disposal (where pollutants are injected into empty oil and gas wells). *See id.* at 617. Since there were these two other elements to the Amendment, its defeat cannot be interpreted as addressing the issue of tributary groundwater. Furthermore, the common understanding among members of Congress was that all tributaries to navigable-in-fact waters were to be covered under the CWA, including tributary groundwaters. *See id.* at 614-15 n.17.

Thus, it is unnecessary to believe that Congress left such a huge loophole in the CWA. As the *Ashland Oil* court stated, one would "make a mockery of those powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned." *Ashland Oil*, 504 F.2d. at 1326. Members of Congress did not mean for the CWA to be so easily circumvented, and there is no need to rely on a strained interpretation of legislative intent to hold otherwise. *See* Wood, *supra*, at 617-18.

B. *The weight of case authority in the courts have held that tributary groundwaters are navigable waters.*

Many courts have ruled that tributary groundwater is to be considered navigable water. In *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 990 (E.D. Wash. 1994), the Eastern District Court of Washington held that tributary groundwaters are to be considered navigable waters. *Washington Wilderness Coalition* involved a mine that was draining contaminated water from an unlined tailing pond into nearby surface waters. *See id.* at 985. The court reviewed the relevant legislative history, and concluded that Congress intended to regulate tributary groundwater when it passed the CWA. *See id.* at 990. The *Washington Wilderness Coalition* decision was followed by the Southern District Court of Iowa in the Eighth Circuit in *Williams Pipe Line v. Bayer Co.*, 964 F. Supp. 130, 1319-20 (S.D. Iowa 1997). Also in the Ninth Circuit, in *McClellan Ecological Seepage Situation ("MESS") v. Weinberger*, 707 F. Supp. 1182, 1196 (E.D. Cal. 1988) (*vacated on other grounds*), the court held that tributary groundwaters are covered by the CWA if a direct hydrological link can be proven. Relying on *Riverside Bayview Homes*, the court found that it was Congress' intent to protect waters that will flow into surface waters, and thus tributary groundwaters must be considered navigable waters. *See MESS* at 1196. In the current matter, it has been shown that groundwaters under XXX's facility are migrating toward the Roaritan, thus making them tributary groundwaters. (R. at 4). It is this *tributary* status that many courts have found dispositive in finding groundwaters to be navigable waters.

The Tenth Circuit Court of Appeals ruled in *Quivira Mining Co. v. EPA*, 765 F.2d 126, 129-30 (10th Cir. 1985), that an "arroyo" (a normally dry gully), was in fact "navigable water," mostly because of a groundwater connection running under the arroyo to navigable-in-fact waters downstream. *See id.* at 130. Because of the groundwater connection, even disposal into the arroyo during dry periods is covered under the CWA. *See id.* Although the ruling spoke directly to

groundwater where there is also an intermittent surface connection, this court proposed an extremely broad definition of groundwater that can include tributary groundwater, stating that "it was the clear intent of Congress to regulate the waters of the United States to the fullest extent possible." *Id.* Presently, the connection between the groundwaters under XXX's property and the Roaritan is much more obvious and much faster than the connection in *Quivira*. In *Quivira*, only the *possibility* of a connection with navigable-in-fact waters was thought required for the CWA to cover the pollution outfall. *See id.* Later in the Ninth Circuit, the *Quivira* holding was followed in *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993) and in *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp 1333, 1358 (D.N.M. 1995).

The most recent case on the point is *Mutual Life Ins. Co. of New York. v. Mobil Corp.*, No. CIVA 96-CV1781, 1998 WL 160820 (N.D.N.Y. Mar. 3, 1998), where the Northern District Court of New York concluded that there were no circuit level cases holding that tributary groundwater was not navigable water. 1998 WL 160820, at *2. Following the lead of the majority of cases, the court held that because a hydrological connection could be proved, a CWA claim was sustainable.

While not all courts have held that tributary groundwaters are navigable waters, the adverse case law is distinguishable. In *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994), a small town was attempting to prevent a warehouse from being built nearby. *See id.* at 963. The town brought a multitude of legal actions against the builders, most of which the court found spurious. *See id.* In *Dayton Hudson*, there was no evidence that pollution had occurred or would occur in the future since it dealt with a point-source that had not yet come into existence. *See id.* at 962-63.

In the current matter, there is clearly pollution already occurring as a result of the lead leaching into groundwater on XXX's property and there is a real threat to the health of the water and those who use the water. In *Dayton Hudson*, there is also every reason to believe that the entire case was spuri-

ous and that the court was simply looking for any reason to throw it out, as evidenced by Judge Easterbrook's derogatory comments towards plaintiffs in the court's opinion. *See id.* at 963. Furthermore, the Judge's reasoning about Congress' intent in passing the CWA can be criticized for flatly mis-interpreting the intent of Congress and Congress' definition of navigable waters as "the waters of the United States." As has been noted, "waters of the United States" should be interpreted to the fullest extent possible under the commerce clause of the Constitution. *See Ashland Oil*, 504 F.2d at 1324. Judge Easterbrook chose to disregard prevailing interpretations of the Constitution.

Each case that has held against classifying tributary groundwater as navigable water has relied on the same equivocal interpretation that Congress did not really intend to protect navigable surface waters through the CWA by leaving a huge loophole. Furthermore, all of the recent cases on the matter cite back to *Dayton Hudson*, a case which is easily distinguished and relies on strained logic to exclude tributary groundwaters. *See Allegany Envtl. Action Coalition v. Westinghouse Electric Corp.*, No. 96-2178, 1998 U.S. Dist. LEXIS 1838 (E.D. Pa. Jan. 30,1998); *Umatilla Waterquality Protective Ass'n. v. Smith Frozen Foods, Inc.*, 962 F. Supp. 1312 (D. Or. 1997); *Kelley v. United States*, 618 F. Supp. 1103 (W.D. Mich. 1985). Thus, there is little or no persuasive authority available on which to found a holding that tributary groundwater is *not* navigable water.

Here, the underground tributaries on XXX's property must be considered navigable waters and thus be subject to the purview of the CWA. There is a clear connection between the groundwaters and the Roaritan River, thus making it tributary groundwater. (R. at 4). To deny these tributaries the protection due to them under the CWA would have serious negative effects. Most immediately, people who use and enjoy the Roaritan River would be subject to possible lead poisoning. In the long-term, the progress made toward reducing pollution in navigable waters may be reversed by the creation of a huge loophole in the CWA. Congress did not intend for there to be such a huge loophole, and there is no reason

for this court to rely on a strained interpretation of legislative history to justify a ruling that will undercut the clear intent of Congress in protecting the waters of the United States.

II. XXX IS BARRED FROM SEEKING DISMISSAL BECAUSE CONGRESS' INTENT WAS TO PROVIDE A TIME-LIMITED VENUE AND THE ISSUE OF XXX'S PERMIT BEING ENFORCEABLE WAS RIPE WHEN IT WAS ISSUED.

XXX's request to have its permit reviewed should be denied, since (1) following *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 909 (D.C. Cir. 1985), it should not matter whether the controversy was or was not ripe at the time specified by Congress for judicial review because Congress meant to establish an absolute deadline for review, and (2) even if the court chooses to engage in a retrospective ripeness review, the controversy was surely ripe. Whether or not the permit is too vague to enforce is a legal question presumed to be ripe from the beginning. Furthermore, the "hardship" prong of the ripeness analysis militates in favor of viewing the controversy as having been ripe from the beginning. Hardship on XXX would have been avoided if it had made a timely request for review, but instead it has made it hard on itself by delaying its petition for review until an enforcement action was initiated.

A. *There is a clear statutory limit for the judicial review of NPDES permits of 120 days after the agency permitting action is taken so that appellate court jurisdiction is eliminated if the 120-day period expires.*

The CWA clearly bars judicial review of NPDES permitting decisions 120 days after the permit is issued or denied. Section 509(b)(2) of the CWA states unequivocally that if judicial review is not sought for an NPDES permitting action as allowed by Section 509(b)(1), it "shall not be subject to judicial review in any civil or criminal proceeding for enforce-

ment." 33 U.S.C. § 1369(b)(2) (1996). Section 509(b)(1)(G) clearly states that 120 days are available to seek review in the United States Court of Appeals after an action pursuant to Section 509(b)(1)(F) in "issuing or denying any permit under section 1342 of this title." 33 U.S.C. § 1369(b)(1)(G) (1996). These two sections, read in tandem, call for a nearly absolute bar of judicial review of permitting actions that are not brought within 120-days of the issuance of the permit.

The legislative history supports this interpretation of the clear prescriptive language in Section 509 of the CWA. *See* S. Rep. No. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3750-51. The Senate Report on the CWA states, "[i]n order to maintain the integrity of the time sequences provided throughout the CWA, the section would provide that any review sought must be filed within 30 days of the date of the challenged promulgation or other action." *Id.* at 3751. The version of the CWA finally adopted included a 90-day instead of 30-day statute of limitation, but the "emphasis upon specific time limitation remained." *Peabody Coal Co. v. Train*, 518 F.2d 940, 942-43 (6th Cir. 1975). The CWA was amended in 1982, when the 90-day statute of limitation was extended to 120-days. *See* Clean Water Act Amendments of 1982, Pub. L. No. 100-4, § 505(a) (1982). The Senate Report made clear that the Supreme Court had permitted the limitation of judicial review on agency actions where there was "clear evidence of legislative intent." S. Rep. No. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3750-51 (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 140-41 (1967)).

The Circuit Courts have adopted the view that statutory limitations on review serve as a statute of limitation that bars any judicial action. *See W. Nebraska Resources Council v. EPA*, 793 F.2d 194 (8th Cir. 1986) (Safe Drinking Water Act); *Texas Mun. Power Agency v. EPA*, 799 F.2d 173 (5th Cir. 1986) (CWA); *Cerro Copper Products Co. v. Ruckelsh*, 766 F.2d 1060 (7th Cir. 1985) (CWA); *Natural Resources Defense Council, Inc. v. EPA*, 673 F.2d 400 (D.C. Cir. 1982) (CWA); *Sun Enters., Ltd. v. Train*, 532 F.2d 280 (2nd Cir. 1976) (CWA, Fish and Wildlife Coordination Act); *Tanner's Council of Am. v. Train*, 540 F.2d 1188 (4th Cir. 1976) (CWA);

Peabody Coal, 518 F.2d at 940 (CWA). The 120-day period begins to run upon the issuance of the permit. *See Appalachian Power Co. v. EPA*, 566 F.2d 451, 459 (4th Cir. 1977).

The Eighth Circuit's decision in *Homestake Mining Co. v. EPA*, 584 F.2d 862 (8th Cir. 1978), illustrates this time limitation in seeking review of permitting decisions. There, a mining company sought to have its NPDES permit reviewed pursuant to Section 509(b)(1) of the CWA. *See id.* at 863. The court held it was without jurisdiction to hear the case since Plaintiff's petition was filed after the 90-day (the limit at the time) deadline where petitioners simply waited too long to file a petition. *See id.*

The time limitations of the CWA thus bar review of XXX's permit. As noted by the District Court, XXX has failed to request judicial review of its NPDES permit within the statutory limitation. Hence, as was the case in *Homestake Mining*, the courts are without jurisdiction to review any aspects of the permit. Had circumstances arisen after the permitting procedure that brought up a new conflict, review may be available. 33 U.S.C. § 1369(b)(1)(G) (stating exception to bar of judicial review). However, no new circumstances have arisen in the current situation that would warrant the relaxation of the statute of limitations.

B. *Courts are reluctant to engage in "retrospective ripeness review," but even if this court engages in such review, any issue over whether XXX's permit was specific enough to be enforceable was ripe when the permit was issued.*

The issue of ripeness may not be invoked to give XXX an excuse for failing to file a review during the statutorily defined period. The court should hardly ever engage in "retrospective ripeness analysis." *See Eagle-Picher,* 759 F.2d at 909; *see also Pennsylvania Dep't. of Pub. Welfare v. United States Dep't. of Health And Human Serv.*, 101 F.3d 939, 945 (3rd Cir. 1996). The doctrine of ripeness is almost always applied to "here and now" situations, not to instances when one is looking back to determine if a case *would have* been ripe.

See Eagle-Picher, 759 F.2d at 912. The doctrine developed with respect to, and is applied in, the context of cases that are brought into court that are not yet decidable in litigation. *See Eagle-Picher*, 759 F.2d at 914.

The D.C. Circuit Court in *Eagle-Picher*, was asked to excuse a group of plaintiffs from missing a statutorily-imposed deadline for judicial review pursuant to a CERCLA rulemaking action. *Id.* at 908. The court harshly rejected the request, stating: [w]e emphasize first that petitioners who delay filing requests for review on their own assessment of when an issue is ripe for review do so at the risk of finding their claims time-barred. Normally, the appropriate time for a judicial determination of the ripeness of an issue is within the prescribed statutory period for review. In general, we will refuse to hypothesize whether, in retrospect, a claim would have been deemed ripe for review had it been brought during the statutory period, in order to save an untimely claim. *Id.* at 909.

The *Eagle-Picher* court stated that it was not within its bounds to second guess Congress' intent to limit the time allotted to judicial review in its pursuit of administrative efficiency. *See id.* at 912. The doctrines of timeliness and ripeness are inapposite. Ripeness is only an issue with regard to the relationship between the courts and the administrative agencies, while timeliness requirements "are intended to prevent courts from 'entangling themselves' in disputes which Congress has determined have been raised too late and to protect agencies from endless judicial interference with formalized administrative policy." *Id.* at 913. But the court warns about confusing ripeness and timeliness: [a]s a general proposition, however, if there is any doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being barred. Courts simply are not well-suited to answering hypothetical questions which involve guessing what the court might have done in the past. Furthermore, if we were routinely to conduct retrospective ripeness analyses where a late petitioner offers no compelling justification for not having filed his claim in a timely manner, we would wreak havoc with the congressional intention that repose be brought to final agency action. *Id.* at 914.

The *Eagle-Picher* court noted only two instances when the court ought to engage in a retrospective ripeness analysis: 1) when "events occur or information becomes available after the statutory review period expires that create a challenge that did not previously exist, or 2) where petitioner's claim is, under [precedent,] indisputably not ripe until the agency takes further action." *Id.* at 914.

In the current matter the court should presume that the controversy was ripe and thus should bar review of the permit provisions. Given the record, there is no evidence that any new events or information have arisen after the expiration of XXX's window of statutory review. The only excuse that XXX could raise to defend its failure to meet Congress' statutorily imposed deadline is to construe the current controversy as having been "indisputably not ripe" during the period of review.

The current controversy was indisputably ripe during the review period, and it should certainly be barred from present review. In promulgating a two prong pre-enforcement ripeness test the Supreme Court stated in *Abbott Laboratories* that the court should consider "[1)]the fitness of the issues for judicial decision and [2)]the hardship to the parties of withholding court consideration." *Abbot Lab.*, 387 U.S. at 149. Several cases have held that purely legal questions are automatically assumed to be ripe. *See id.*; *Continental Airlines, Inc. v. CAB*, 522 F.2d 107, 126 (D.C. Cir. 1974). In the instance of such a legal question, no actual facts would serve a purpose in the dispute. Under the second prong of "hardship to parties," the *Continental Airlines* court held that the court must evaluate "the interest of those who seek relief from the challenged action's 'immediate and practical impact' upon them." *Continental Airlines*, 522 F.2d at 126.

No courts have ever found challenges to NPDES permit decisions to be unripe. Typically, successful ripeness challenges have been brought with respect to general rulemaking agency actions. *See Diamond Shamrock Corp. v. Costle*, 580 F.2d 670, 672 (D.C. Cir. 1978). In *Diamond Shamrock*, a group of plaintiffs challenged rules that were designed to guide NPDES permit making decisions. *See id.* The court

held the controversy to be unripe, because it was unclear how the new rules would effect actual permit making decisions. *See id.* at 674. Since it was the actual NPDES permits themselves that imposed limitations on the effluent outfall from the petitioner's plants and not the rules on the issuance of the permits, the controversy could not be ripe until the permits were actually issued. *See id.* Thus, the issues were found to be unfit for review and there was no demonstrated hardship on the petitioners in delaying adjudication until the issue was ripe. *See id.* at 675.

Similarly, the cases cited by the District Court in the present matter to support the finding that the controversy was not ripe are easily distinguished from the current situation where XXX has formally received an NPDES permit. (R. at 7). In *Commonwealth Edison Co. v. Train*, 649 F.2d 481 (7th Cir. 1980), the court ruled on a regulation that was directed at the states that might or might not result in state water regulations. *See id.* at 488. In the current matter, XXX is contesting an NPDES permit itself that has clear implications, it is not contesting a guideline about a future permitting action. In *National Resources Defense Council, Inc. v. EPA*, 16 F.3d 1395 (4th Cir. 1993), the controversy was found to be unripe because EPA guidelines were found not to constitute "final agency action" that would warrant review, in that they were general unenforceable guidelines rather than rules. *Id.* at 1408. In the present case, XXX's permit is the result of a final agency action that has resulted in a final and currently unreviewable NPDES permit. Therefore, even if this court chooses to conduct a "retrospective ripeness review," the court should find that the permit was ripe for review when it was originally issued.

III. THE INTERPRETATION OF A PROVISION PROHIBITING DISCHARGES THAT "VIOLATE WATER QUALITY STANDARDS" IN A PERMIT ISSUED BY THE FEDERAL GOVERNMENT IS GOVERNED BY FEDERAL LAW WHEN THE PROVISION, ROUTINELY INCLUDED IN FEDERALLY ISSUED PERMITS, IS REQUIRED TO BE IN THE PERMIT BY A CERTIFICATION CONDITION IMPOSED BY NEW UNION.

Federal law should be used to interpret the provision in the permit because XXX's contention that state law should govern this matter is based on the erroneous conclusion that a state which develops its own water quality standards is the exclusive judge of whether those standards are violated. XXX's conclusion is flawed because it ignores the federal government's interest in maintaining a uniform level of basic water pollution standards, one of Congress' main objectives in passing the CWA. It also fails to take into account the case law that clearly articulates that state water quality standards are to be incorporated into the federal statute upon approval by the EPA. Furthermore, FOR's claim of the right to bring a citizens' suit under the CWA is a federally created right that necessitates the application of federal law.

A. *The application of federal law is necessary to maintain a uniform, basic standard for the quality of water.*

The CWA's goal to maintain a uniform, basic standard for the quality of water requires that federal law be used to interpret XXX's permit. If federal law is not used to interpret basic water quality standards, then states will be able to subvert this goal of the CWA by maintaining water pollution programs that do not meet the minimum standards of the federal government.

Congress passed the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1996). Prior to the passage of the legislation, the federal water pollution control program

had been inadequate in every vital respect. *See EPA v. California State Water Resources Control Bd.*, 426 U.S. 200, 203 (1976). The problems stemmed from the awkwardly shared federal and state responsibility for promulgating such standards and the lack of enforcement procedures. *See id.* The fact that some states developed water quality standards and plan to implement them, whereas others did not and some dischargers were required to obtain both federal and state permits made it very difficult to develop and enforce standards to regulate the conduct of individual polluters. *See id.*

The Supreme Court characterized the CWA as "an all encompassing program of water pollution regulation whose main purpose was to establish a comprehensive long range policy for the elimination of water pollution." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 318 (1981). Although Congress created this comprehensive federal program, it still delegated a great deal of power to the states. Specifically, the program grants states the authority to issue NPDES permits that meet basic federal requirements. 33 U.S.C. § 1342(b) (1996) (See Appendix). Once the state program has been approved, the federal program that had been operating in the state is suspended. *See* 33 U.S.C. § 1342(c)(1) (1996) (See Appendix). Water pollution is clearly a matter of both federal and state interest and regulation. *See Connecticut Fund for the Env't v. Upjohn Co*, 660 F. Supp. 1397, 1406 (D. Conn. 1987).

The federal interest in maintaining basic, uniform standards of water pollution laws provides a compelling reason why federal law should apply in this case. In *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 (1972), the Supreme Court held that the pollution of the nation's navigable waterways requires a uniform federal rule of decision. *See id.* In order to maintain this uniform, basic level of water protection, all state programs that seek to issue NPDES permits must be approved by the EPA. 33 U.S.C. §§ 1314(i) and 1342(b). The requirement in XXX's permit that prohibits discharges that "violate water quality standards" is routinely included in every federal permit and sets a basic standard for water pollution programs. (R. at 4).

The CWA itself suggests that federal law should be used to interpret the basic provisions of the permit. The law gives the Administrator of the EPA a veto over state programs that fall below the basic requirements set by the federal government. When the Administrator determines that a state is not administering a program in accordance with the basic requirements of the CWA, he or she can take appropriate corrective action and withdraw approval of the program. 33 U.S.C. § 1342(c)(3) (1996) (See Appendix). The Administrator can also block the issuance of an NPDES permit if he or she determines that the permit does not uphold the guidelines and requirements of the CWA. *See* 33 U.S.C. § 1342(d)(2) (1996) (See Appendix). If the state does not resubmit a permit that addresses these objections, the Administrator may then issue the permit in accordance with federal guidelines and requirements. 33 U.S.C. § 1342(d)(4) (1996) (See Appendix). Furthermore, "if the EPA recommends changes to the standards and the state fails to comply with that recommendation, the Act authorizes the EPA to promulgate water quality standards for the State." *Arkansas v. Oklahoma Envtl. Protection Agency*, 503 U.S. 91, 101 (1992) (citing 33 U.S.C. § 1313(c)). These powers of the Administrator are consistent with the savings provision of the CWA which only prohibits the federal government from interfering with state water pollution laws that are more stringent than federal laws. 33 U.S.C. § 1370 (1996) (See Appendix).

The veto that the CWA delegates to the Administrator over state programs shows that there is a significant federal interest at stake when the states do not meet the minimum requirements set by the federal government. In *Int'l. Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987), the Supreme Court stated, "it is not enough to say that the ultimate goal of both federal and state law is to eliminate pollution. A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal." *Id.*

In *Chesapeake Bay Found., Inc. v. Virginia State Water Control Bd*, 495 F. Supp. 1229, 1233 (E.D. Va. 1980), the District Court for the Eastern District of Virginia held that a federal question existed when a court had to determine "whether

the State Board had satisfied the Act's minimum federal guarantees for NPDES permits." *Id.* The prohibitions set forth in the CWA cannot be negated by a state law or statute. *See City of Milwaukee v. Illinois and Michigan*, 731 F.2d 403, 407 (7th Cir. 1981); *United States v. Bd. of Harbor Comm'rs*, 73 F.R.D. 460, 462 (D. Del. 1977).

XXX argues that the particular water standards should be governed by state law because they were developed by the New Union Department of Environmental Protection. If state law governs this matter and the less stringent requirements are upheld, then the states would effectively have the power to subvert the goals of the federal government. The water pollution standards would inevitably revert to their pre-1972 form where each state maintained a different level of water pollution. The federal interest in maintaining these basic standards leads to the conclusion that "it is federal, not state law that in the end controls the pollution of interstate or navigable waters." *Illinois v. City of Milwaukee*, 406 U.S. at 102. "If the Act's basic requirements are violated, the allegations would necessitate the interpretation of federal statute." *Chesapeake Bay Foundation*, 495 F. Supp. at 1234.

B. *Upon approval by the EPA, a state's water quality standards become federalized and the EPA's interpretation of them supersedes the state's interpretation.*

In order to maintain a uniform, national standard of water quality, EPA regulations require an NPDES permit to comply with the applicable water quality requirements of all affected states. *See Arkansas v. Oklahoma*, 503 U.S. at 109. These regulations incorporate into federal law those state law standards the Agency determines to be applicable. *See id.* The state water quality standards, promulgated by the states with substantial guidance from the EPA and approved by the Agency, then become part of the federal law of water pollution control. *See id.*

The Supreme Court in *Arkansas v. Oklahoma* held that the EPA could mandate that Arkansas comply with the more

stringent water pollution regulations set by Oklahoma. *See id.* at 105. The Supreme Court stated, "[t]he application of state water quality standards in the interstate context is wholly consistent with the Act's broad purpose to 'restore and maintain the chemical, physical, and biological integrity of the Nation's water.'" *Id.* at 106 (citing 33 U.S.C. § 1251(a)). In *City of Albuquerque v. Browner*, 97 F.3d 415, 423 (10th Cir. 1996), the Tenth Circuit Court of Appeals held that the EPA may impose the more stringent water quality standards of an Indian tribe in federal NPDES permits in upstream states. *See id.* In both of these situations, the EPA adopted the state water pollution regulations and made them part of the federal law. They then forced other entities to conform to these newly federalized standards.

Arkansas v. Oklahoma and *City of Albuquerque* show that the clean water laws passed by states are federal in nature because they are incorporated into the CWA. *Arkansas v. Oklahoma*, 503 U.S., at 109; *City of Albuquerque*, 97 F.3d at 424. Since the state water quality standards have a federal character, "the EPA's reasonable, consistently held interpretation of those standards is entitled to substantial deference." *Arkansas v. Oklahoma*, 503 U.S. at 110 (citing *INS v. National Ctr. for Immigrants' Rights*, 502 U.S. 183, 189-90 (1991); *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). In *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 260 (7th Cir. 1993), the Seventh Circuit Court of Appeals deferred to the judgment of the Chief Judicial Officer of the Environmental Protection in interpreting a federal regulation dealing with wetlands. *See id.* The Seventh Circuit stated, "an agency's construction of its own regulation binds a court in all but extraordinary cases." *Id.* (quoting *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987)). This judgment was reiterated in *Arkansas v. Oklahoma* when the Supreme Court concluded, "[i]t is not our role, or that of the Court of Appeals, to decide which policy choice is the better one, for it is clear that Congress has entrusted such decision to the Environmental Protection Agency." *Arkansas v. Oklahoma*, 503 U.S. at 114.

The adoption of the state water quality standards by the federal statute clearly indicates that the interpretation by federal law should govern this matter. Therefore, XXX's assertion that the state water quality standards were promulgated by NUDEP is not an important factor in this analysis.

C. *The rights claimed in a citizens' suit under the CWA are federal in nature and should be governed by federal law.*

The right claimed by FOR in a citizens' suit against XXX is a federally created right, which requires the application of federal law. According to Section 505 of the CWA, any citizen may commence a civil action on his own behalf against any other person or governmental agency who is alleged to be in violation of an effluent standard or limitation under this chapter. 33 U.S.C. § 1365(a) (1996) (See Appendix). The district courts have jurisdiction to enforce this right without regard to the amount in controversy or the citizenship of the parties, because of the presence of a federal issue. *See id.*

The rights of citizens to bring actions through this provision is a federally created right set forth by a federal statute. "Federal law, not state law, must control in determining the rules governing enforcement in a federal court of rights and remedies created by a federal statute." *Bd. of Harbor Comm'rs*, 73 F.R.D. at 462. Justice Frankfurter observed, "[w]here resort is had to a federal court not on grounds of diversity of citizenship but because a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State." *Id.* (quoting *Angel v. Bullington*, 330 U.S. 183, 192 (1947)). In *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 359 (2nd Cir. 1994), the Second Circuit Court of Appeals held that "state regulations, including the provisions of SPDES permits, which mandate a greater scope of coverage than that required by the federal CWA and its implementing regulations are not enforceable through a citizen suit." *Id.*; *see also United States Dep't of Energy v. Ohio*, 503 U.S. 607, 616 (1992). This holding shows that citizens' suits are only applicable when a basic federal issue is in question. Since a fed-

eral statute provides FOR the right to bring forth this citizens' suit that alleges that basic federal standards have been violated, federal law should govern this matter.

IV. BECAUSE COMPLIANCE WITH WATER QUALITY STANDARDS IS AN INDEPENDENTLY ENFORCEABLE CONDITION OF FEDERALLY GOVERNED DISCHARGE PERMITS, XXX HAS VIOLATED ITS DISCHARGE PERMIT WITHOUT FURTHER ADMINISTRATIVE ACTION TO ESTABLISH EFFLUENT LIMITATIONS.

XXX has discharged selenium, a toxic pollutant, into the Roaritan River, making it unfit for human consumption. (R. at 5). This violation of the water quality standards of the river is an explicit violation of the conditions of the discharge permit issued to XXX from the EPA. The CWA permit provision precluding XXX Corp from activity that "violates water quality standards" is an enforceable condition under federal law without further establishment of any effluent limitation. The statutory language, legislative intent, and case law conclusively establish that water quality standards are independent, enforceable conditions of discharge permits.

Furthermore, by not enforcing water quality standard conditions in discharge permits, the court will limit the enforcement of discharge permits solely to the violation of effluent limitations. Under such enforcement, any discharge not authorized via specific effluent limitations in a federally approved permit would violate the CWA and be subject to penalties. Any other enforcement of discharge permits would be inconsistent with the language, intent, and strict enforcement of the CWA. Because XXX was not specifically authorized to discharge selenium via an effluent limitation in its permit, XXX has violated the permit even if the water quality standard provision is found unenforceable. (R. at 4).

A. *The Clean Water Act endorses the enforcement of the water quality standards in the XXX discharge permit.*

Because compliance with water quality standards is a condition of the XXX permit under Section 401 of the CWA, violation of this condition is subject to citizen enforcement pursuant to Section 505(f). 33 U.S.C. §§ 1341 and 1365(f) (1996) (See Appendix). As interpreted by the Supreme Court, the statutory language in Section 401 of the CWA authorizes the inclusion of water quality standard provisions in NPDES discharge permits. *See PUD No.1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 711-13 (1994). Thus, as conditions of a permit, water quality standards are enforceable under the citizen suit provision of Section 505(f) of the CWA. *See Northwest Envtl. Advocates v. City of Portland*, 56 F.3d 979, 986 (9th Cir. 1995).

Since any activity discharging any pollutant into navigable waters is fundamentally prohibited by Section 301 of the CWA, all potential dischargers must obtain an NPDES permit pursuant to Section 401 for such activity. 33 U.S.C. §§ 1311(a) and 1341. The enforcement and certification provisions of Section 401(d) require permits to set forth effluent limitations that comply with Sections 301 and 302 as well as appropriate requirements of state law. 33 U.S.C. § 1341(d) (1996) (See Appendix).

By allowing permits to contain "any other appropriate requirement of State law," Section 401(d) endorses the inclusion of water quality standards as conditions of a permit because states are required to adopt water quality standards pursuant to Section 303. 33 U.S.C. §§ 1313 and 1341(d). Also, Section 401(d) authorizes limitations on the permits pursuant to Section 301, which incorporates the Section 303 water quality standards by reference. Thus, water quality standards are viable conditions of a permit pursuant to Section 401(d) because they are both a "limitation" under Section 303 and an "appropriate requirement of State law." *PUD No.1 of Jefferson County*, 511 U.S. at 715. This interpretation of Section 401 is consistent with EPA regulations, which only allow issuance of a permit if "there is reasonable assurance

that the activity . . . will not violate applicable water quality standards." 40 C.F.R. 121.2(a)(3) (1997) (See Appendix). Not only are water quality standards allowable restrictions of NPDES permits pursuant to Section 401(d), but they are enforceable under the citizen suit provision Section 505(f). Section 505 allows citizens to enforce "an effluent limitation or other limitation" under the Clean Water Act. 33 U.S.C. § 1365(f). Because Section 505(f) defines "effluent limitation" as ". . .a permit or condition thereof," water quality standards that have not been translated into end-of-pipe limitations are enforceable conditions of a permit. 33 U.S.C. § 1365(f); *see also Northwest Envtl. Advocates*, 56 F.3d at 986.

Therefore, even though XXX's permit does not contain any effluent limitations for selenium, the EPA has promulgated limitations for selenium under the Safety Water Drinking Act. (R. at 5). Because the maximum acceptable level of selenium in the Roaritan River is 0.05 mgl, XXX has violated the water quality standards by elevating the selenium pollution to 0.06 mgl downstream of the discharge. (R. at 5). This discharge has to stop because the activity is making the Roaritan unfit for human consumption.

B. *According to case law and legislative records, effluent limitations have supplemented, not replaced, the regulatory role of water quality standards.*

Effluent limitations, adopted in the 1972 Amendments, do not replace water quality standards as a way of regulating and protecting navigable waters. *See PUD No. 1 of Jefferson County*, 511 U.S. at 704; *Northwest Envtl. Advocates*, 56 F.3d at 986. Water quality standards provide a supplemental basis for monitoring water quality resulting from multiple discharges to ensure water quality meets acceptable levels despite individual compliance with effluent limitations. *See EPA v. California State Water Resources Control Bd.*, 426 U.S. 200, 205 n. 12 (1976). Congress endorses water quality standards as both a means to measure performance and as "an avenue of legal action against polluters." *Northwest Envtl. Advocates*, 56 F.3d at 986 (quoting S. Rep. No. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3671).

Moreover, regulating point source discharges through both effluent limitations and water quality standards is the policy adopted by the EPA. In a statement clarifying the agency's interpretation of water quality-based effluent limitations, the EPA stated that "[w]ater-quality based limits are established where the permitting authority reasonably anticipates the discharge of pollutants by the permitee at levels that have the reasonable potential to cause or contribute to an excursion above any state water quality criterion. . . ." *Atlantic States Legal Found.*, 12 F.3d at 358 (quoting Memorandum from Director, Office of Wastewater Enforcement and Compliance to Water Management Division Directors, Regions I-X, at 2-3 (Aug. 14, 1992)). By employing effluent limitations only for pollutants at risk of breaching of water-quality standards, the EPA must be utilizing a baseline level of acceptable pollution, such as water quality standards, to regulate those pollutants not assigned as effluent limitation in the permit. Otherwise, the permits would not be valid, as they must at least comply with water quality standards pursuant to Section 401(d). 33 U.S.C. § 1341(d). Enforcement of water quality standards in discharge permits is consistent with the notion that effluent limitations have merely added to the regulatory force of the CWA, not supplanted any previous part of it.

C. *Both effluent limitations and water quality standards are imperative to the effective implementation of the CWA.*

Water quality standards are reserved as a basis for legal action and regulation because both specific and broad limitations are required for the CWA to effectively protect all navigable waters in the United States. Water quality standards complement effluent limitations just as the broad and specific components of the water quality standards complement each other. 40 C.F.R. §131.3(b) (1997) (See Appendix); *PUD No.1 of Jefferson County*, 511 U.S. at 716. The need for water quality standards as a regulatory tool is also recognized by the Supreme Court and other Circuit Courts of Appeals. *See PUD No.1 of Jefferson County*, 511 U.S. at 723; *Northwest*

Envtl. Advocates, 56 F.3d at 990; *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1115 (4th Cir. 1988).

If effluent limitations were intended to be the only regulatory tool employed under the 1972 Amendments, the CWA would only regulate those pollutants whose effluent limitations have been properly developed and promulgated by federal or state agencies. While effluent limitations provide useful, measurable limits to specific pollutants, the CWA prohibits the discharge of "any pollutant." 33 U.S.C. § 1311(a). Given the tens of thousands of chemical substances listed in the *Toxic Substances Control Act Chemical Substance Inventory*, regulatory agencies could not practically develop efficient methods for identifying and measuring every known pollutant. *See Atlantic States Legal Found.*, 12 F.3d at 357. While effluent limitations are effective for enforcing those pollutants which have developed numeric criteria, water quality standards provide an avenue for maintaining a baseline limitation for those pollutants that have not been specifically identified in individual permits. Furthermore, not enforcing water quality standards would require states to conduct detailed studies of the waters and activities of permit applicants to fully protect designated uses via solely numeric criteria. *See PUD No.1 of Jefferson County*, 511 U.S. at 717-18. Recognizing the impossibility and burden of requiring states to comply with the CWA through only numeric end-of-pipe limitations, the legislature retained the regulatory power of water quality standards.

The enforcement of both designated use and water quality criteria components of water quality standards illustrates the need to promulgate the CWA through both effluent limitations and water quality standards. Water quality standards contain two components: 1) the designated use of the navigable water and 2) water quality criteria. 33 U.S.C. § 1313 (See Appendix); *see also American Paper Institute, Inc. v. EPA*, 996 F.3d 346, 349 (D.C. Cir. 1993). Though designated uses are broader restrictions than numeric criteria, they "ensure that each activity – even if not foreseen by the criteria – will be consistent with the specific uses and attributes of a particular body of water." *PUD No.1 of Jefferson County*, 511 U.S. at

716. The EPA echoes the recognition that numeric standards are not always sufficient to protect designated uses: "[w]hen criteria are met, water quality will *generally* protect the designation use." 40 C.F.R. §131.3(b) (See Appendix) (emphasis added). Because the broader designated use component may be violated even though the specific water quality criteria are met, the designated uses are independently enforceable. Similarly, as compliance with effluent limitations does not ensure compliance with water quality standards, these standards should be independently enforceable.

Disregarding the necessity for water quality standards to effectively implement the CWA would disregard the decisions of the Supreme Court and other Circuit Courts of Appeals, which have explicitly endorsed the enforcement of water quality standards in permits. *See PUD No.1 of Jefferson County*, 511 U.S. at 723; *Northwest Envtl. Advocates*, 56 F.3d at 990; *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d at 1115. In *PUD No. 1 of Jefferson County*, the Supreme Court held that an NPDES permit issued pursuant to Section 401 of the CWA, may be used to enforce the designated use component of water quality standards. 511 U.S. at 723. Following the interpretation adopted by the Supreme Court, the Ninth Circuit Court of Appeals overturned its prior ruling in *Northwest Env'l. Advocates* and held that citizens have standing to enforce water quality standards contained in an NPDES permit. 56 F.3d at 990.

The situation with XXX is a testament that while effluent limitations may be met, water quality standards may be violated. If the court does not recognize independent enforcement of water quality standards dischargers like XXX will reap privileges to pollute simply because the courts have constructed enforcement loopholes in the CWA.

D. *If the court chooses to enforce only effluent limitations in permits, then a discharger who emits any pollutant not expressly authorized by effluent limitations violates the permit and the Clean Water Act.*

Water quality standards must be enforceable because an NPDES permit only susceptible to enforcement of effluent limitations is problematic. While a narrow interpretation of the NPDES permit strictly enforces the CWA by penalizing the discharge of any pollutant not specifically and numerically authorized, this interpretation places strain on litigation and the activities of dischargers. A broad interpretation, however, gives dischargers a right to pollute and refutes the language, intent, and precedent of permit enforcement of the CWA. The logical middle ground is the enforcement of water quality provisions that are included in permits. Water quality provisions help to force the polluting activity to remain within the bounds of acceptable pollution levels, while still protecting dischargers from penalties for discharging trace levels of unforeseeable or immeasurable pollutants.

1. *Broad interpretation of effluent limitations conflicts with statutory provisions, legislative intent, and the strict enforcement of the CWA.*

   a. *Both the language of Section 401 and the "antidegradation policy" of the EPA are inconsistent with a broad interpretation of NPDES permits.*

The statutory language of the CWA conflicts with a broad interpretation of NPDES permits. Section 402(1) provides that the Administrator or State "*may* . . . issue a permit for the discharge of any pollutant . . . *upon the condition that* such discharge will meet . . . all applicable requirements . . ." set forth by the other sections of that title. 33 U.S.C. § 1342(a)(1) (emphasis added). In no way does this language imply that a right to pollute is afforded by an NPDES permit. This language of Section 401 allows the discharge of pollutants only with a specific, controlled, and conditional permit.

The "*may*" gives the Administrator discretion either to issue the permit or leave the applicant to the total prohibition of Section 301. *See Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369, 1373 (D.C. Cir. 1977). The permit XXX obtained from the EPA authorized limited discharge activity but did not give XXX free reign to discharge any pollutant not otherwise restricted in the permit.

Furthermore, a right to pollute interpretation of the NPDES permit would violate "antidegradation policy." Section 303 of the CWA explicitly requires states to set water quality standards that prevent further degradation of navigable waters. 33 U.S.C. § 1313 (See Appendix). In response to the language in Section 303, the EPA requires state to include "a statewide antidegradation policy" to ensure that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 C.F.R. § 131.2 (1997); *see also PUD No.1 of Jefferson County*, 511 U.S. at 704. Interpreting the XXX permit to allow discharge of selenium despite the violation of water quality standards would frustrate the antidegradation policy specified by the EPA.

b. *Legislative intent, especially with respect to toxic pollutants, does not tolerate a right to pollute interpretation of discharge permits.*

Legislative history illuminates Congress' intent that specific authorization under an NPDES permit is the only means by which a discharger may escape total prohibition of Section 301(a). A Senate Report discussing Section 301 emphasized that "this legislation would clearly establish that no one has the right to pollute – that pollution continues because of technological limits, not because of any inherent rights to use the nation's waterways for the purpose of disposing wastes." *Costle*, 568 F.2d at 1374-75 (quoting S. Rep. No. 92-414 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668).

The refusal to grant dischargers any right to pollute is most forcefully communicated through the legislative concern for toxic substances. The CWA states that national policy is "that the discharge of toxic pollutants in toxic amounts be

prohibited." 33 U.S.C. § 1251(a)(3). Because of the legislative determination to control the toxics problem, Congress authorized the EPA to ban the discharge of toxic pollutants pursuant to Section 307(a)(2) based solely on health and environmental concerns. 33 U.S.C. § 1317(a)(2) (1996) (See Appendix). Clearly, there is little, if any, toleration of toxic water pollutant discharge in violation of the CWA.

This zero tolerance for toxic pollutants is reflected in the manner with which courts have applied strict liability in enforcing CWA violations. *See Atlantic States Legal Found., Inc. v. Tyson Foods*, 897 F.2d 1128, 1142 (11th Cir. 1990); *Stoddard v. W. Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986). In *Northwest Envtl. Advocates*, the court illustrated the harsh enforcement of the Act in the face of abatement measures estimated to cost the city of Portland between $500 million and $1.2 billion dollars. *See* 56 F.3d at 981.

XXX asserts that the court should tolerate the pollution of the Roaritan River with toxic substances because XXX is not solely responsible for the concentration of selenium in the River. Consideration of another discharger does not change the fact that upstream of XXX the selenium concentration meets applicable water quality standards and downstream it does not. In fact, from a liability standpoint, the presence of another discharger is no different than if the level of selenium in the water had been raised by non-point, unidentifiable sources; XXX is still causally responsible for the violation of the water quality standards. XXX proposes a broad interpretation of NPDES permits because it is the only interpretation that would not subject it to penalties for violating the CWA. Unfortunately for XXX, extending dischargers the right to pollute is clearly not consistent with the provisions or intent of the CWA and is refuted by existing case law.

2. *Narrow interpretation is consistent with the CWA but would impede the enforcement of the CWA with frivolous law suits and place a tremendous burden on the states.*

Because a broad interpretation of the authorization permitted under issuance of an NPDES permit would essentially give dischargers a right to pollute and would frustrate the very essence of the CWA, the court would have no choice but to adhere to a strict interpretation of permits if water quality standards were unenforceable. Under a narrow interpretation, a discharger would violate the terms of the permit whenever a pollutant is discharged that has not been specifically authorized by the permit in the form of an effluent limitation. While this interpretation would enforce strict, controlled compliance with the CWA, it would also create a situation where industries could be penalized for the discharge of even trace amounts of any pollutant not expressly authorized by an effluent limitation. *See Atlantic States Legal Found. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2nd Cir. 1994). The burden and specificity required to rationally limit every chemical present in effluent in order to protect industries from perpetual penalties would be tremendous. *See PUD No.1 of Jefferson County*, 511 U.S. at 717-18; *Atlantic States Legal Found.*, 12 F.3d at 357. This interpretation would ineffectively implement the CWA because courts would be forced to address frivolous claims regarding trace amounts of pollutants. In the interest of public policy, the court should enforce water quality standards to avoid a strict interpretation of the permits, while still ensuring protection of the waters of the United States.

However, if the court does choose not to enforce water quality standard provisions in the permits, this strict interpretation of NPDES authorization would still hold XXX accountable for violating its permit. No selenium was expressly authorized in the XXX permit, so discharge of selenium is a violation of the permit. XXX could have applied for authorization to discharge selenium at the time the permit was issued, especially because XXX was aware that it would be

discharging selenium. To avoid violating the CWA, XXX should either have complied with the conditions set forth in the permit or taken a more proactive role in attaining a permit that reflected its activity. Claiming a right to pollute, however, is not consistent with the CWA and therefore is not an available assertion for XXX.

CONCLUSION

For the foregoing reasons, FOR urges that the decision of the United States District Court for the District of New Union to deny the motion to dismiss filed by XXX should be upheld with the exception that FOR urges that the District Court's decision with regards to the reviewability of XXX's NPDES permit be overruled.

APPENDIX

33 U.S.C. § 1311(a):

> 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. § 1313:

(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 notifica-

tion, 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.

(b) Proposed regulations

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if—

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) 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.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of efflu-

ent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard 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 standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(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 estab-

lish 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 re-

quired 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.

(e) Continuing planning process

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this chapter.

(2) Each State shall submit not later than 120 days after October 18, 1972, to the Administrator for his approval a proposed continuing planning process which is consistent with this chapter. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this chapter. The Administrator shall not approve any State permit program under subchapter IV of this chapter for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable areawide waste management plans under section 1288 of this title, and applicable basin plans under section 1289 of this title;

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;
(D) procedures for revision;
(E) adequate authority for intergovernmental cooperation;
(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;
(G) controls over the disposition of all residual waste from any water treatment processing;
(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 1311 and 1312 of this title.
(f) Earlier compliance
Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.
(g) Heat standards
Water quality standards relating to heat shall be consistent with the requirements of section 1326 of this title.
(h) Thermal water quality standards
For the purposes of this chapter the term "water quality standards" includes thermal water quality standards.
33 U.S.C. § 1317(a)(2):

> Each toxic pollutant listed in accordance with paragraph (1) of this subsection shall be subject to effluent limitations resulting from the application of the best available technology economically achievable for the applicable category or class of point sources established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title. The Administrator, in his discretion, may publish in the Federal Register a proposed effluent standard (which may include a prohibition) establishing requirements for a toxic pollutant which, if an effluent limitation is applicable to a class or category of point sources, shall be applicable to such cate-

gory or class only if such standard imposes more stringent requirements. Such published effluent standard (or prohibition) shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and the extent to which effective control is being or may be achieved under other regulatory authority. The Administrator shall allow a period of not less than sixty days following publication of any such proposed effluent standard (or prohibition) for written comment by interested persons on such proposed standard. In addition, if within thirty days of publication of any such proposed effluent standard (or prohibition) any interested person so requests, the Administrator shall hold a public hearing in connection therewith. Such a public hearing shall provide an opportunity for oral and written presentations, such cross-examination as the Administrator determines is appropriate on disputed issues of material fact, and the transcription of a verbatim record which shall be available to the public. After consideration of such comments and any information and material presented at any public hearing held on such proposed standard or prohibition, the Administrator shall promulgate such standard (or prohibition) with such modification as the Administrator finds are justified. Such promulgation by the Administrator shall be made within two hundred and seventy days after publication of proposed standard (or prohibition). Such standard (or prohibition) shall be final except that if, on judicial review, such standard was not based on substantial evidence, the Administrator shall promulgate a revised standard. Effluent limitations shall be established in accordance with sections 1311(b)(2)(A) and 1314(b)(2) of this title for every toxic pollutant referred to in table 1 of Committee Print Numbered 95-30 of the Committee on Public Works and Transportation of the House of Representatives as soon as practicable after December 27, 1977, but no later than July 1, 1980. Such effluent limitations or effluent standards (or prohibi-

tions) shall be established for every other toxic pollutant listed under paragraph (1) of this subsection as soon as practicable after it is so listed.

33 U.S.C. § 1341(d):

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(b):

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

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

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

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

(i) violation of any condition of the permit;

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

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

(D) control the disposal of pollutants into wells;

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

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

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

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

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

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

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

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

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

33 U.S.C. § 1342(c)(1):

> Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

33 U.S.C. § 1342(c)(3):

> Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

33 U.S.C. § 1342(d)(2):

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

33 U.S.C. § 1342(d)(4):

> In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

33 U.S.C. § 1362(7):

> The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1365(a):

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):

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. § 1370:

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting

control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

40 C.F.R. § 121.2(a)(3):

A statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards;

40 C.F.R. § 131.3(b):

Criteria are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use.