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Brief for Appellant: First Annual Pace National Environmental Moot Court Competition

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No. 88-1001

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

ACME INDUSTRIES, INC.,
Appellant,

v.

NATIONAL COUNCIL FOR THE
PROTECTION OF THE ENVIRONMENT,
Appellee,

v.

STATE OF NEW UNION,
Intervenor.

BRIEF FOR APPELLANT

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* The winning briefs published in this issue are reprinted essentially in their original form. The editorial staff of the Pace Environmental Law Review made minor revisions to citation form, spelling and grammar. The outline, writing style, case and statutory law use remains that of each group of authors.

QUESTIONS PRESENTED

- I. Whether the district court correctly dismissed counts alleging violations of Acme Industry's NPDES permit on the grounds that there were no continuing violations, thus rendering moot a section 505 action under the Clean Water Act, 33 U.S.C. § 1365 (1982)?
- II. Whether the district court erred in declining to rule on the validity of the toxicity limit contained in Acme's NPDES permit? ^{lii}

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OPINIONS BELOW

The opinion of the District Court, No. Civ. 86-631, August 31, 1988, is unreported.

STATUTES INVOLVED

This case involves the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387, title 40 of the Code of Federal

Regulations implementing that Act, and the Administrative Procedure Act sections governing judicial review of administrative agency actions, 5 U.S.C. §§ 558, 701-706.¹

STATEMENT OF THE CASE

I. *Procedural History*

Appellant Acme Industries, Inc. ("Acme") joins appellee National Council for the Protection of the Environment ("NCPE") and intervenor State of New Union in filing petitions to appeal controlling questions of law from the opinion issued by the U.S. District Court for the District of New Union in the case of *National Council for the Protection of the Environment v. Acme Industries, Inc.*, No. Civ. 86-631, decided August 31, 1988. Order of the Court, Case No. 88-1001 (12th Cir. Sept. 15, 1988).

In that case NCPE alleged that Acme was in violation of section 301(a)(1) of the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1311(a)(1) (R. 2). NCPE alleged that Acme had violated the terms of past and present National Pollution Discharge Elimination System ("NPDES") permits issued pursuant to section 402 of the Act, 33 U.S.C. § 1342, to Acme's organic chemical manufacturing plant, located in Fairwater, New Union (R. 2). The NPDES permits were issued by the United States Environmental Protection Agency ("EPA") subsequent to applications made to that agency by Acme (R. 3-4).

NCPE claimed jurisdiction under section 505 of the Act, 33 U.S.C. § 1365, which authorizes private citizens to enforce the Act under certain circumstances (R. 2). NCPE sought an injunction against future violations and civil penalties (R. 2).

The State of New Union filed a motion to intervene, which was granted (R. 2).²

The parties filed cross motions for summary judgment (R. 2). The district court granted Acme's motion for summary judgment and dismissed counts alleging pH, BOD, and TSS violation's of Acme's permit (R. 11). The court held that any such violations were moot on grounds that those violations are not continuing violations as required to maintain a section 505

action under the Clean Water Act (R. 11). NCPE is appealing this decision.

Claiming that the district court had no jurisdiction to decide the matter, the court denied Acme's motion for summary judgment as to the invalidity of the toxicity limit contained in Acme's 1987 NPDES permit (R. 12). Acme appeals this decision.

The district court found, pursuant to 28 U.S.C. § 1292(b), that its ruling constituted "controlling issues of law as to which there is substantial ground for difference of opinion and that immediate appeal may materially advance the ultimate termination of the litigation." (R. 13).

On September 15, 1988, the Twelfth Circuit, pursuant to 28 U.S.C. § 1291(b) and Rule 5 of the Rules of Appellate Procedure, granted the parties' petitions for review.

II. *Factual Background*

Appellant Acme Industries, Inc. ("Acme") is a manufacturing company that operates a plant in Fairwater, New Union (R. 3). Acme manufactures organic chemicals which are subsequently used in many of America's household products (R. 3). The manufacturing process necessitates some discharge of H_2O water and other substances into the Fairwater River (R. 3). This practice has been followed throughout the years since Acme brought its plant to the city of Fairwater (R. 3).

In 1974, Acme applied for a permit from the Environmental Protection Agency ("EPA") under the National Pollution Elimination Discharge System contained in the CWA, 33 U.S.C. § 1342 (R. 3). The permit set forth limitations on the pH (acidity/alkalinity), the biological oxygen demand ("BOD") (organic material which consumes oxygen in river water), and total suspended solids ("TSS") (organic particles suspended in water) in the effluent released by Acme (R. 3). The State of New Union certified the effluent limitations, saying that the limits met the state's water quality standards (R. 3). State certification of the limitations in NPDES permits is required by section 401 of the Act, 33 U.S.C. § 1341. The State's standards were more stringent than those which would

have met the EPA's national standards under 33 U.S.C. § 1311(b)(1)(A) (R. 4). In other words, the state's standards called for a more stringent limitation than the "best practicable control technology" standard set by the EPA (R. 3).

Acme undertook the expense of installing a water treatment plant in an effort to meet these very stringent standards before the July 1, 1977 deadline required by the NPDES permit (R. 4). For the most part Acme was able to meet the standards by July 1, 1977, but unfortunately not 100% of the time (R. 4).

When the permit expired in 1979, Acme requested the EPA to renew the permit (R. 4). The permit was extended by operation of law with the same terms under 40 C.F.R. § 122.6 until July 1, 1987, when the EPA issued another permit with a new set of standards (R. 4).

Under the 1987 permit, the pH limit remains the same but the amounts of BOD and TSS which may be released are increased (R. 5). The State of New Union certified these limitations to the EPA as necessary to meet the water quality standards set for the Fairwater River by the state (R. 4-5). The new limitations are still more stringent than those which would have been required by the EPA as national standards (R. 6).

Acme has demonstrated that with its new water treatment plant it is complying with the pH limits and is discharging far less than the amounts of BOD and TSS allowed by the permit (R. 8). There have been rare occasions beyond Acme's control, during a power outage and extreme weather conditions, when the new treatment plant was rendered inoperative and the permit standards were temporarily exceeded (R. 6-8).

The new permit also added a new effluent standard, a toxicity limitation (R. 4). This limitation is not required by the Clean Water Act (R. 4). It is a limitation set solely by the New Union Department of Environmental Protection ("Department") (R. 4). Acme challenged this standard in state court on the basis that: 1) the water quality standard was void for vagueness; 2) the Department failed to give adequate public notice of the action in violation of the state's Administrative Procedures Act, N. Un. Civ. Code § 36.108; 3) the effluent

limit test was an arbitrary and capricious application of the standard in that it measures the effect of the water¹⁵ expelled by Acme on saltwater brine shrimp rather than the effect on any living creature actually existing in Fairwater River; and 4) the Department offered no opportunity for comment or presentation of evidence with regard to adoption of the effluent limit for the permit certification (R. 4-5). The state court denied Acme any relief, saying merely that it had no jurisdiction to hear the case (R. 5).

Acme has worked diligently to meet this arbitrary standard and is pleased to report success in the last two years (R. 8). Acme remains opposed to the toxicity standard as it was improperly promulgated and unnecessarily stringent (R. 5). The company has taken its request for review to the EPA and this administrative appeal is at present pending before the Agency (R. 6).¹⁶

SUMMARY OF ARGUMENT

NCPE's claims as to BOD, TSS, and pH effluent limitations should be dismissed as moot. Acme's permit was validly issued under the CWA. The fact that the high water quality of the Fairwater River is unaffected is ample evidence supporting EPA's finding that the permit was consistent with the CWA, including the new anti-backsliding provision. Thus, the new permit is valid and supersedes the previous permit. NCPE has no grounds to sue for violations of the previous permit.

Acme is entitled to an upset defense in its permit. It has complied with its permit to the utmost of its ability. The standards were only exceeded on rare occasions, due to circumstances completely beyond Acme's control. In order to make the NPDES system viable, an upset defense must be contained in all federal permits, including Acme's. As the only deviations from Acme's permit were permissible upsets, NCPE has no claim for violations of the 1987 permit and its suit is moot.

The state court dismissed the challenge of the toxicity standards for lack of jurisdiction. The EPA is prohibited from

reviewing the controversy by Agency regulations, and the circuit court has not been granted specific review of 33 U.S.C. § 1341 under the CWA's judicial review statute, 33 U.S.C. § 1369. Clearly, under these circumstances, Acme's challenge of the toxicity limitations contained in its 1987 NPDES permit should be heard in the district court pursuant to the Administrative Procedure Act and federal question jurisdiction.¹⁷

ARGUMENT

I. NCPE'S CITIZEN SUIT FOR ENFORCEMENT IS MOOT.

A. *Acme's 1987 NPDES permit is valid.*

1. The State of New Union complied with all permit procedures and conditions under the Clean Water Act in revising the effluent limitations in Acme's NPDES permit.

Acme's most recent NPDES permit ("1987 permit") was issued by the EPA under section 1342(a)(1)(A) of the Clean Water Act, which grants to the EPA authority to issue such permits if the permit conditions comply with certain other sections of the CWA. 33 U.S.C. § 1342(a)(1)(A) (1982). In this case, section 1311 must be complied with in order to authorize EPA to grant a permit. 33 U.S.C. § 1311 (1982).

Section 1311 provides that if federal effluent limitations would be insufficient to meet state water quality standards, states must establish any more stringent effluent limitations which would bring state waters into compliance with state standards. 33 U.S.C. § 1311(b)(1)(C) (1982 & Supp. 1988). Thereupon, with regard to permits like Acme's which are issued after February, 1987 pursuant to those provisions, compliance with those state promulgated effluent limitations by permittees is required as expeditiously as practicable, but in no case later than March 31, 1989. 33 U.S.C. § 1311(b)(3)(B) (1982 & Supp. 1988).

In this case, the State of New Union has aspired to water quality standards in the Fairwater River which are even higher¹⁸ than those required by federal law. Those state stan-

dards approved by the EPA as consistent with the purposes of the CWA, 40 C.F.R. § 131.5(a) (1987) limit the amount of permissible effluent discharge in permits issued by the EPA to permittees along the Fairwater River. The effluent limitations in Acme's 1987 permit have been certified by New Union as consistent with the EPA approved state standards. Thus, Acme's 1987 permit was validly issued under the provisions of the CWA.

2. The new permit standards are consistent with the anti-backsliding requirements of the Clean Water Act.

NCPE's contention that the 1987 permit is invalid under the "anti-backsliding" provision of the CWA is entirely unfounded. Although section 1342(o) is a new provision as yet largely uninterpreted by the courts, its meaning is plain on its face. Likewise, it is plain that New Union's certification of Acme's 1987 effluent limitations are in complete harmony with that provision.

The anti-backsliding provision contained in section 1342(o) of the CWA regulates conditions under which effluent limitations in NPDES permits may be modified. Acme's permit, established pursuant to section 1311(b)(1)(C), may only be modified to contain a less stringent effluent limitation than the previous permit if such modification is in compliance with section 1313(d)(4). 33 U.S.C. § 1342(o)(1) (1982 & Supp. 1988).

Section 1313(d)(4) in turn limits revision of effluent limitations in two ways. First, where the applicable overall⁹ water quality standard has not been attained, a permit may only be revised if its terms will assure attainment of the standard or the standard itself is revised to coordinate designated uses of the water with the actual water quality attained. 33 U.S.C. § 1313(d)(4)(A) (1982 & Supp. 1988). Second, where the water quality standard has been attained, effluent limitations based on a total maximum daily effluent limitation in an NPDES permit may be revised to the extent that the revision is consistent with the "antidegradation" policy of the CWA.

33 U.S.C. § 1313(d)(4)(B) (1982 & Supp. 1988).

In this case, there is no indication that New Union's water quality standards have not been attained. To the contrary, the original water quality standards were necessary to "preserve" the quality of the river for sport fishing, boating, and swimming purposes (R. 3). In addition, New Union increased permissible effluent discharge of Acme's operations because other sources of effluent in the river had ceased, thus allowing Acme to "increase its BOD and TSS discharges without violating the State's water quality standards" (R. 5). It is clear from the record that the high water quality standards for the Fairwater River have already been attained. Thus, effluent limitations in NPDES permits may be revised to the extent they are consistent with the antidegradation policy of the CWA.

The antidegradation policy referred to is defined in 40 C.F.R. § 131.12 (1987). Every state's ambient water quality standard must contain an antidegradation policy in order to be approved by the EPA. 40 C.F.R. § 131.6 (1987). At a minimum such policy must:¹⁰ 1) protect existing uses designated by the state; and 2) where the quality of water necessary to support fish, wildlife, and recreation is achieved, it must be maintained unless the state finds that lower water quality is necessary to accommodate important local economic or social development. If water quality standards are lowered out of economic or social necessity, the state is still required to assure that the quality shall be at least sufficient to protect existing designated uses of the water, and the state must guarantee that it will impose the highest regulatory requirements for point sources which discharge effluent into that water. 40 C.F.R. § 131.6 (1987).

New Union's ambient water quality standard is consistent with the antidegradation policy required by the federal regulations. New Union has not changed its ambient water quality standards. Rather, the ambient standards which were previously certified as necessary to protect the river for sport fishing, boating, and swimming are still in effect with respect to BOD, TSS, and pH content. Acme's permit was changed because other discharges into the Fairwater River had ceased,

allowing Acme's permit to be modified without any effect on ambient water quality of existing uses of the river. Therefore, the existing uses designated by the state are protected, as required by the federal regulations.

Additionally, the revised permit standards do not affect the state's ability to maintain the quality of water necessary to support fish, wildlife, and recreation. Again, the overall quality of the water is not degraded by the modification of ¹¹ Acme's permit. Given the fact that the Fairwater River water quality has not in any way been compromised by the effluent limitations in the 1987 permit, the permit modification is clearly consistent with the antidegradation policy of section 1313(d)(4) of the CWA.

3. EPA's issuance of the 1987 permit constituted implicit recognition of the legal validity of New Union's water quality standards and certified effluent limitations for the Fairwater River.

The step-by-step process of EPA supervision of New Union's water quality standards and effluent limitations ensures that the final NPDES permit is consistent with the CWA as a whole, including the provisions regulating backsliding and degradation.

A water quality standard which is established pursuant to state law automatically comes into effect unless the EPA Administrator finds that it is inconsistent with the chapter of the CWA regulating standards and enforcement. 33 U.S.C. § 1313(c) (1982). Among the elements which must be part of a state water quality standard submitted to the EPA for review is an antidegradation policy. 40 C.F.R. § 131.6 (1987). If the standard is deficient, the EPA must take steps to bring it into compliance with the CWA. Otherwise, it becomes the water quality standard for the state waters to which it applies. 33 U.S.C. § 1313(c) (1982).

Once a water quality standard is in effect for a body of water, compliance with that standard is brought about by setting effluent limitations to govern the terms of permits which will be issued to sources located along that body of ¹² water.

If a state like New Union has adopted a water quality standard that cannot be met by the effluent limitations established pursuant to federal law, it may adopt any more stringent effluent limits which are necessary to meet or maintain that water quality standard. 33 U.S.C. § 1311(b)(1)(C) (1982 & Supp. 1988). Such effluent limits must be certified by the state, showing that the effluent limitations will not violate the applicable water quality standard. 33 U.S.C. § 1341(a)(1) (1982). Finally, a federally issued permit under section 1342 of the CWA must contain those effluent limitations necessary to comply with the applicable water quality standards. 33 U.S.C. § 1342(a) (1982).

In short, a federally issued NPDES permit is the result of a thorough, step by step EPA review. For a permit to be issued, the EPA must find that the state water quality standards comply with the CWA (including the antidegradation policy), that state certified effluent limitations will meet that standard, and that the terms of the permit reflect those conditions.

4. The EPA's findings leading to the issuance of the 1987 NPDES permit were a proper exercise of statutory authority.

In granting or denying a license, the EPA is required to give an opportunity for a public hearing. 33 U.S.C. § 1342(a)(1) (1982). The Administrative Procedure Act ("APA") requires licensing hearings to be conducted in accordance with sections 556 and 557 of that Act. 5 U.S.C. § 558 (1982). Agency action conducted pursuant to those¹³ sections may be set aside by a reviewing court only if it is "unsupported by substantial evidence." 5 U.S.C. § 706(2) (1982). "The record must include 'such relevant evidence as a reasonable mind might accept as adequate to support' the EPA's determinations." *Marathon Oil v. EPA*, 564 F.2d 1253, 1266 (9th Cir. 1977) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)).

There is no evidence that the EPA's actions in granting revisions of BOD and TSS effluent limitations in the 1987

permit are valid under this standard. It is important to note that the overall water quality of the Fairwater River remains unaffected by the changed permit. NCPE contends that the permit must be overturned by this court because it violates the anti-backsliding provisions of section 1342. As noted above, revision of effluent limitations for a water quality based permit is permissible under that section only if it complies with the antidegradation policy of section 1313(d)(4).

The effluent limitations in Acme's 1987 permit are well within that policy. The overall water quality has not been changed, thus leaving intact all of New Union's designated uses for the Fairwater River, including fish, wildlife, and recreation as required by the antidegradation provisions. It cannot be said that these permit terms are unsupported by substantial evidence. To the contrary, there is substantial evidence in the record of the district court that the 1987 permit is not violative of the provisions of the CWA. It is not unreasonable for an agency to grant a permit which does not affect the overall quality of a body of water, and which requires more¹⁴ stringent standards than what would be required by federal law. Also, the fact that the 1987 permit terms comply with the provisions of the CWA, as shown above, mandates the conclusion that the EPA was not outside its statutory authority in approving the revised effluent limitations and granting the 1987 permit.

The State of New Union perceived Acme's consistent progress in cleaning up its manufacturing process, and in recognition of that effort, has taken advantage of the termination of other sources to revise Acme's effluent limitations, thus making it possible for Acme to operate within the law. This court should encourage, not hinder, this partnership between government and industry in the national effort to eliminate water pollution.

B. Acme is in compliance with the 1987 NPDES permit.

Acme is aware of its duty under federal law not to discharge effluent except in accordance with a valid NPDES per-

mit. 33 U.S.C. § 1311(a) (1982). It is clear that Acme is complying with that obligation.

There has not been a single violation of the pH standard in Acme's NPDES permit since June, 1985 when Acme installed a sophisticated, computer operated lime addition system. The only deviation during that period was caused by a power outage beyond Acme's control (R. 7-8).

As to the stringent BOD and TSS standards imposed by New Union, Acme has made substantial and continuing progress in its efforts to continuously reduce the levels of these pollutants¹⁵ (R. 8). As a result of its continual efforts to reduce water pollution, Acme has achieved effluent limits consistent with those in the 1987 permit since 1986 (R. 8). But Acme did not cease its efforts the moment it reached the legal minimum; instead, it has worked to improve its effluent reduction performance over time (R. 8). Acme has installed modern treatment facilities and redesigned its manufacturing process to increase the efficiency of its treatment process (R. 8).

Since the 1987 permit was issued, there has been only one instance of exceeding the BOD and TSS permit limitations. In a period of extreme cold during the winter of 1987 the treatment process was adversely affected (R. 8). These incidents were permissible deviations under the NPDES system.

C. *The only incidents of noncompliance with the 1987 NPDES permit were permissible upsets.*

1. All federal NPDES permit holders are entitled to an upset defense.

Federal law makes available an affirmative defense of "upset" in suits for enforcement of federally issued NPDES permits. This defense was first established in *Marathon Oil v. EPA*, 564 F.2d 1253 (9th Cir. 1977).

In *Marathon Oil*, the 9th Circuit held that permits, which on their face require 100 percent compliance, are invalid under the CWA. The court found that since the standard necessarily involved some incidents of noncompliance due to the occasional fallibility of technology, it would be unreasonable

to set an impossible standard requiring compliance at all times with the ¹⁶ effluent limitations. As a matter of policy, it was held to be preferable to base liability on whether the deviations were avoidable. If so, it would be consistent with the CWA to enforce the permit against the violator.

In so holding, the court rejected EPA's contention that it could allow for unavoidable accidents by declining to prosecute. The court noted that EPA's magnanimity would not alter the permit holder's liability to citizen enforcement suits, and that if EPA were to enforce, the permittee could not request dismissal on the basis of an unavoidable accident. *Id.* at 1273. Therefore, the court required EPA to include an upset provision in the permit.

Although it was not expressly stated that *Marathon Oil* mandates upset provisions for water quality based permits (effluent limits set to achieve ambient water quality standards) in addition to those which contain technology based standards (effluent limitations requiring implementation of certain technologies), the rationale of *Marathon Oil* clearly applies to water quality based permits. There are two overriding policies which must be considered. First, whether a permittee will be held liable for uncontrolled or unanticipated circumstances, even though all due care is taken to comply with the terms of the permit. Second, whether a permittee is entitled to notice as to what will constitute a violation, rather than having to wait to be sued. The interests underlying these two important policies are identical for water quality based permit holders and technology based permit holders. ¹⁷

As to the first element, there is no evidence that the CWA was intended to be a strict liability system. Rather, the regulatory system requires all effluent sources to employ their best efforts to move toward the national goal of eventual elimination of pollutants from the nation's waters. 33 U.S.C. § 1251(a)(1) (1982 & Supp. 1982). This is reflected in the standards imposed by the CWA.

For example, the NPDES permit for *Marathon Oil* required application of the best practicable control technology currently available. *Marathon Oil* at 1257. That standard is based on "the average performance of the best existing

plants", taking into account the relation between the costs and benefits of effluent reduction by a particular method. *American Meat Institute v. EPA*, 526 F.2d 442, 453 (7th Cir. 1975); 33 U.S.C. § 1311(b)(1)(A) (1982); 33 U.S.C. § 1314(b)(1)(B) (1982 & Supp. 1988). In other words, a permittee is not required to implement effluent reductions at any cost; the CWA has due regard to the importance of reducing effluent without destroying the industry which produces them.

Similarly, the "best control technology currently available" standard imposed by the CWA requires consideration of the "reasonableness of the relationship between the costs of attaining a reduction in effluents, and the effluent reduction benefits derived" 33 U.S.C. § 1314(b)(1)(B) (1982 & Supp. 1988). Again, the statute harmonizes the need for effluent reduction with the need for viable industry. This inherent policy of the CWA cannot be construed to require an industry to be held liable for¹⁸ incidents completely beyond its control.

Such an interpretation would not weaken the regimen of the CWA. "The EPA is free . . . to place the burden on the permit holder of producing relevant data and proving that the upset could not have been prevented." *Marathon Oil* at 1273. A properly limited upset provision for all NPDES permits:

Imparts a construction of "reasonableness" to the standards as a whole and adopts a more flexible system of regulation than can be had by a system devoid of "give." . . . [A] regulatory system which allows flexibility, and a lessening of firm proscriptions in a proper case, can lend strength to the system as a whole. "The limited safety valve permits a more rigorous adherence to an effective regulation."

Portland Cement Assoc. v. Ruckleshaus, 486 F.2d 375, 399 (D.C. Cir. 1973), *cert. denied*, 417, U.S. 921 (1974) (quoting *International Harvester Co. v. Ruckleshaus*, 478 F. 2d 615, 641 (D.C. Cir. 1973)) (citations omitted).

The second factor in deciding whether an upset defense should be available to water quality based permit holders is whether they are any less entitled than technology based per-

mit holders to notice of what will constitute a violation of the CWA for which they will be held liable. Courts which have considered this issue have overwhelmingly answered in the affirmative.

In *Portland Cement*, the D.C. Circuit considered whether it was necessary to include formal upset provisions under the Clean Air Act. The court recognized that “[c]ompanies must be on notice as to what constitutes a violation.” *Id.* at 399. Where no formal upset defense exists, the EPA can only limit liability for unauthorized effluent discharge due to extraordinary circumstances by otherwise properly equipped and¹⁹ operated plants by choosing not to enforce the permit. That method of enforcement is inadequate.

As the *Marathon Oil* court pointed out, discretionary enforcement is small consolation to a permittee whom the EPA chooses to sue, since it can never anticipate under what circumstances it may be held liable. Indeed, if there is no way to anticipate liability, a permittee has no means or incentive to find ways to improve performance.

In sum, it would be incompatible with the basic premise of the CWA, as well as inconsistent with fundamental notions of fair play and justice, to hold that formal upset provisions are not required in all NPDES permits. Such a provision would not undermine the goals of the CWA because *Marathon Oil* limited its definition of upset to those beyond the control of the permit holder. *Marathon Oil* at 1272. To hold that an upset defense is not required would deprive permittees of the means and incentive to implement the most efficient treatment technology. If enforcement is uncertain industries will not do their utmost to avoid upsets. But, if liability can be avoided by constant proper operation of treatment facilities and the installation of technology sufficient to meet all foreseeable needs, the goals of the CWA will be advanced. Thus, whether or not upset provisions exist, deviations from permit limitations will continue to occur under extraordinary circumstances. The sole question is whether the permit holder should be required to bear the burden for something which it could not prevent.²⁰

2. Acme is entitled to an upset defense in its 1987 NPDES permit.

The underlying rationale of the *Marathon Oil* holding applies to Acme's water quality based permit. There have been only two instances of noncompliance with Acme's 1987 permit. The effluent limitation for pH content was exceeded when a power outage halted the operations of the pH treatment system (R. 6). The problem was immediately corrected thereafter when power returned to the plant (R. 6-7). The effluent limitations in the 1987 permit for BOD and TSS were exceeded during a period of extreme cold during the winter of 1987, which adversely affected the treatment process (R. 8).

Acme is entitled to an upset defense for both of these incidents. In both cases the cause of the problem was due to circumstances completely beyond Acme's control. There is no showing that Acme is guilty of improper operation of its facilities. Acme had already done everything in its capacity to improve its treatment processes, yet its improved performance was not enough to avoid the effects of these extreme conditions.

- D. *A citizen enforcement suit may not be maintained where there are no ongoing current violations of a NPDES permit.*

Section 1365 of the CWA authorizes any citizen to bring a civil action against any person alleged to be in violation of an effluent limitation. The United States Supreme Court has read the language of that section as proscribing citizen suits for wholly past violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 108 S. Ct. 376 (1987). That¹²¹ holding precludes NCPE from maintaining a suit against Acme either for the occasional violations of its present permit or for violations of its previous permit.

"Wholly past violations" include violations of existing permits which are no longer continuing. However, the Court did note that suit could be brought where a permit holder is not in violation at the moment of suit but is likely to violate again in the future. The Court gave an example of such an

intermittent violator as "one who violates permit limitations one month out of every three" *Id.* at 384. Clearly, the Court was referring to regular and consistent violations separated by significant time intervals where the permit holder has not corrected the cause of the violations.

This definition excludes Acme's circumstances. In Acme's case there have only been two violations of the 1987 permit terms. In one case the pH standard was exceeded during a power outage (R. 6-7). In another incident different effluent limitations for BOD and TSS were exceeded in a period of extreme cold during the winter of 1987 (R. 8). Thus, each standard was violated only once in circumstances which are not likely to recur, and which in any case are completely beyond Acme's control. These are not the type of circumstances the Court had in mind when it defined an intermittent polluter as one who repeatedly and consistently violates permit standards.

"Wholly past violations" also exclude citizen enforcement for violations of a previous permit which is no longer in force. The Supreme Court in *Gwaltney* relied heavily on the present tense in the statutory language of section 1365 in ²² holding that citizen suits could not be maintained for wholly past violations. *Id.* at 381-82. The Court noted that such a suit could only be maintained for a violation of a permit limitation "which is in effect" under the CWA. *Id.*; 33 U.S.C. § 1365(f) (1982). Based on the Court's reasoning and the clear language of the statute, it is apparent that suit may not be maintained for violations of a previous permit.

This conclusion is also inherent in the concept of mootness which does not allow maintenance of a suit where "there is no reasonable expectation that the wrong will be repeated." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 448 (2d Cir. 1945)). Furthermore, NCPE's suit for violation of Acme's expired permit is invalid under article III of the U.S. Constitution which only permits a court to hear an actual "case or controversy." U.S. Const. art. III.

Acme has shown that the 1987 permit was issued in compliance with all the procedural and substantive requirements

of the CWA. The 1987 permit is valid and in effect, superseding any previous NPDES permits issued to Acme. The rare incidents of noncompliance with the 1987 permit terms are not violations, but are attributable to permissible upsets which should be included in Acme's NPDES permit as a matter of federal law. Since there are no continuing violations of Acme's past or present NPDES permits, NCPE has no grounds to subject Acme to a suit for enforcement under section 1365 of ²³ the CWA. Therefore, under the rule of law unambiguously stated in the CWA and unequivocally interpreted by the Supreme Court, NCPE's claims are moot and must be dismissed.

II. THE DISTRICT COURT ERRED IN REFUSING TO RULE ON THE VALIDITY OF THE TOXICITY LIMIT IN ACME'S NPDES PERMIT.

A. *The state and district courts both deny jurisdiction over a challenge of the validity of the toxicity limitation.*

A year after this case was filed in district court, EPA issued a new NPDES permit to Acme (R. 4). The new permit, issued in July, 1987, added an additional effluent limitation: "The discharge shall not be toxic to the indigenous biota of the Fairwater River such that a 10% concentration of the treated effluent kills more than 50% of test species in a 96 hour *in situ* bioassay performed in accordance with EPA's standard test method." (R. 4).

The State of New Union required this effluent limitation in its section 1341 certification of the 1987 NPDES permit, adding that the "effluent limitation was developed by the New Union Department of Environmental Protection to implement the state's narrative water quality standard which forbids the discharge of 'toxic chemicals in toxic amounts.'" (R. 4).

EPA's standard test method for measuring toxicity involves using brine shrimp as a test organism (R. 8). Brine shrimp are a salt water species and do not naturally inhabit the Fairwater River, nor could they survive in fresh water (R. 8).

Acme immediately challenged the new standard by filing a complaint in state court (R. 4). Acme based its complaint on²⁴ the following:

- 1) the water quality standard was void for vagueness;
- 2) the standard had been adopted without following the state's Administrative Procedures Act, N.Un. Civ. Code 836.108;
- 3) the effluent limit was an arbitrary and capricious application of the standard; and
- 4) the Department afforded no opportunity for comment or presentation of evidence with regard to adoption of the effluent limit for the permit certification.

(R. 4-5).

The state court summarily dismissed Acme's challenge, stating merely that the state court had no jurisdiction to hear the complaint (R. 5).

In the interim, NCPE moved in district court to amend its complaint to include violations of the new toxicity limitation (R. 5). The motion was granted (R. 5). Acme brought its challenge of the legality of the standard to the district court as a defense to NCPE's claims. Acme asked the district court to first rule on the validity of the toxicity limit in Acme's NPDES permit before ruling on NCPE's claims. The district court, like the state court, refused to hear the challenge echoing the state court's denial of jurisdiction (R. 12). The court held that review of the validity of the toxicity limitation would be proper before the EPA in an administrative appeal with subsequent appellate review before the Twelfth Circuit (R. 12).

The district court also held that the toxicity limitations²⁵ were effective and enforceable (R. 12). What the court failed to realize was that by joining the state court in denying jurisdiction over Acme's case, the court left Acme with no forum in which to bring its challenge to the arbitrary toxicity limitations which have been imposed by the State of New Union.

- B. *The state certification process mandated by the Clean Water Act does not designate a forum for review.*

The CWA does not designate a process for review or a forum for appealing an improperly promulgated effluent limitation contained in the state certification of a proposed NPDES permit.

Prior to issuance of an NPDES permit, the state must certify the effluent limitations needed to meet the state water quality standards. The state certification procedures under the CWA are codified in section 401, 33 U.S.C. § 1341.

Congress intended that the states develop their own permit programs, 33 U.S.C. § 1342(b), and as an interim step, the certification provisions allow states which do not administer an NPDES permit program to be involved in the process. "The purpose of the certification mechanism . . . is to assure that Federal licensing or permitting agencies cannot override state water quality requirements." 1972 U.S. Code Cong. & Admin. News, 3735 (92d Cong.). EPA continues to have veto power over certification and NPDES permits, but the states, through denial of certification, may also forbid the issuance of an NPDES permit. 33 U.S.C. § 1341 (1982).²⁶

Despite congressional intent to keep the states involved in the process, Congress failed to provide a forum for judicial review of state actions taken pursuant to the federal statute. Two sections of the CWA provide for judicial review of actions taken pursuant to the Act, 33 U.S.C. § 1365 and 33 U.S.C. § 1369. Neither section provides for judicial review of section 1341 certification. This has resulted in a variety of rulings by the federal courts attempting to interpret the intent of Congress.

1. A few federal courts have designated the state courts for jurisdiction over section 1341 certification.

The courts have tried to fill the void where Congress was less than clear about its intended forum for challenges to state actions under section 1341. In the legislative history the fol-

lowing comment is recorded:

It should also be noted the Committee continues the authority of the State . . . to act to deny a permit and thereby prevent a Federal license from issuing to a discharge source with such State Should such an affirmative denial occur no license or permit could be issued . . . *unless the State action was overturned in the appropriate courts of jurisdiction.*

1972 U.S. Code Cong. & Admin. News 3735 (92nd Cong.) (emphasis added).

Although the CWA does not set forth a forum for appeal of state certification decisions, some courts have found that certification under section 1341 is set up as "an exclusive prerogative of the state." *Mobile Oil Corp. v. Kelly*, 426 F. Supp. 230, 234 (S.D. Ala. 1976). *Mobile Oil* holds that the "parties seeking initial relief in a federal district court and ¹²⁷ bypassing available avenues of state relief should be directed to state avenues when the questions involved concern the workings of a state regulatory scheme, state political question, or the interpretation of state agency orders under state law." *Id.*; see also, *Roosevelt Campobello Int'l Park v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982).

In the instant case, the district court did not find jurisdiction in the state court but held that proper review would be through the EPA with an appeal available thereafter in the court of appeals.

In *Lake Erie Alliance, Etc. v. United States Army Corps of Engineers*, 526 F. Supp. 1063 (W.D. Pa. 1981), the State of Ohio had certified an NPDES permit and the certification was reviewed by the Ohio Environmental Board of Review, whose decision had been affirmed by the Court of Appeals of Franklin County, Ohio. The district court cited *Mobile Oil* and agreed that the state had the exclusive right to review section 1341 certification. The court then addressed the res judicata effect of the state court ruling: "Res judicata makes conclusive a final valid judgment, and if the judgment is on the merits, precludes further litigation of the same cause of action by the

parties [T]here is no question but that the Ohio decision was a final one on the merits." *Id.* at 1074.

Acme's case can be distinguished from *Lake Erie Alliance* because the state court in this case did not rule on the merits, but merely dismissed for lack of jurisdiction. Here there has been no *res judicata* effect in this case, and therefore Acme's challenge may be heard in another forum.²⁸

The issue of no state remedy was addressed in *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977). The court held that "[a]ssuming that the state standards are consistent with the Act and are not reviewable in the state courts . . . the only remaining possible challenge is a federal action against the state officers responsible for their enforcement alleging deprivation of a federal constitutional right." *Id.* at 836. The court in *U.S. Steel* added that the hearing may encompass the issue of whether the procedure by which the state adopted its regulations "offended" due process. *Id.* The procedure by which New Union adopted the arbitrary toxicity limitation in its state certification and which EPA included in Acme's NPDES permit certainly offended due process.

As noted above, Acme challenged the validity of the toxicity limitation promulgated by the New Union Department of Environmental Protection in the state of New Union. That court's refusal to accept jurisdiction left Acme with two alternatives: 1) appeal to the EPA; or 2) petition the district court to rule on the toxicity limitation's validity in NCPE's suit against Acme, and then rule on the Acme's alleged violation. Since the State of New Union is a party to that suit, Acme would be bringing the claim against those who had promulgated the disputed toxicity limitation. Both appeals appear futile in that the district court denied jurisdiction and EPA is not permitted by regulation to hear Acme's challenge.²⁹

2. EPA is prohibited by Its regulations from reviewing state certification under section 1341.

The district court in this case appears to believe that Acme is not foreclosed from challenging the regulations despite that court's refusal to find jurisdiction. The court seems

to find solace in the fact that Acme had filed for review before the EPA and thereafter could supposedly seek review of the EPA decision in the Twelfth Circuit. However, the federal regulations and the courts clearly establish that EPA has no jurisdiction to hear Acme's challenge to the validity of state-made toxicity limitations.

EPA was charged with the task of developing guidelines and regulations for the CWA. Challenges to EPA rulemaking may be made under 40 C.F.R. Part 124. The regulations speak directly to challenges made to state-mandated effluent limitations contained in the state certification of the NPDES permit: "Review and appeals of limitations attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in this part." 40 C.F.R. § 124.55(e) (1987). Thus, the EPA is foreclosed from hearing any challenge to the toxicity limitation promulgated by the State of New Union, which EPA included in Acme's 1987 NPDES permit.

The courts have followed this rule. The district court in *Lake Erie Alliance, Etc.*, 526 F. Supp. 1063, held that "state certification under the Clean Water Act is set up as the exclusive prerogative of the state and is not to be reviewed by any agency of the federal government." *Id.* at 1074; *see also*, ¹³⁰ *Roosevelt Campobello Int'l Park*, 684 F.2d 1041, 1056.

The Seventh Circuit made a similar determination in *U.S. Steel*, 556 F.2d 822 (7th Cir. 1977), in an action challenging state water quality standards. The statutory provisions, regulations, and responsibilities for promulgating state water quality standards are similar to those for state certification of effluent limitations. 33 U.S.C. § 1313 (1982); 33 U.S.C. § 1341 (1982). The court in *U.S. Steel* held that the EPA had a limited scope of review of the state promulgated standards. The court noted that the EPA's only authority to review the standards is conferred by section 1313 of the Act which empowers the Agency to determine whether the standard meets or is consistent with the applicable requirements of the Act. Since section 1311(b)(1)(C), preserves the right of the states to impose limitations more stringent than the federal limitations and requires the EPA to include those more stringent limita-

tions, the court found that the Agency had been given no authority to set aside or modify those limitations in a permit proceeding. Although the plaintiff in *U.S. Steel* argued that the district court should have required EPA to consider the constitutionality of the state water quality standards, the district court held that the Agency had no authority to consider the validity of the standards and denied relief. The Seventh Circuit affirmed.¹³¹

Accordingly, Acme is foreclosed from EPA review by Agency regulations and by judicial decisions, as well as being denied a forum in the state or district courts on jurisdictional grounds.

C. *Since section 1369 specifically provides for judicial review in the court of appeals of certain sections of the CWA, all other sections should be entitled to jurisdiction in the district court.*

1. The federal courts refuse to grant jurisdiction in the court of appeals to claims under CWA sections which are not enumerated in section 1369.

The district court in this case has ruled that the Twelfth Circuit has jurisdiction to review Acme's challenge to the toxicity limitation only after EPA has finished a review of the issue. As previously noted, under EPA's own regulations the Agency is not able to review the state certification. Further, it is questionable whether even the court of appeals has jurisdiction to review the validity of the toxicity limitation.

The CWA strictly controls the right of review under the Act. According to section 509 of the CWA, 33 U.S.C. § 1369, the promulgation of national standards of performance (33 U.S.C. §§ 1316-17), the initial issuance of permits by the EPA (33 U.S.C. § 1342), the decision to allow or deny state assumption of the permit program (33 U.S.C. § 1342(b)), the promulgation of the national regulations limiting effluent discharges (33 U.S.C. §§ 1311, 1312, 1316 & 1345), and the approval or disapproval of state individual control strategies (33 U.S.C. § 1314(1)) are all reviewable within 120 days in the court of appeals for the circuit in ¹³² which the plaintiff does business or

resides. 33 U.S.C. 1369(b)(1) (1982 & Supp. 1988).

Congress chose to limit federal circuit court review to the above mentioned sections of the Act. Section 1341, the state certification section at issue in this case, was not a provision Congress chose to have reviewed by the circuit court, even though there has been controversy over the proper forum for such review (*See Lake Erie Alliance*, 526 F. Supp. 1063; *Mobile Oil Corp.*, 426 F. Supp. 230) and despite congressional amendment of section 1369 as recently as 1987.

It is helpful, when analyzing where jurisdiction lies for judicial review of section 1341 challenges, to note what the courts have held on challenges to other CWA sections which were omitted from section 1369 review. As noted above, a closely analogous section is section 1313, which calls for state development of water quality standards. As noted above, section 1313 is statutorily similar to section 1341. Like section 1341, section 1313 decisions by the state are reviewed and approved or disapproved by EPA. 33 U.S.C. § 1313(c)(3) (1982). There is no provision in section 1369 for judicial review in the court of appeals of EPA's decision to approve or disapprove the state water quality standards.

The Second Circuit in *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513 (2d Cir. 1976), a case in which Bethlehem Steel Corporation challenged the water quality standards issued by the State of New York, concluded that review must begin in the district court according to the provisions of the Administrative Procedure Act. The arguments were as follows.¹³³

Since section 1369 did not provide for review of the EPA's action under section 1313, Bethlehem Steel attempted to characterize the approval process as part of the approval of effluent limitations under section 1311. This was similar to an argument used successfully in earlier cases challenging the meaning of section 1369. See *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977). Bethlehem Steel argued that this interpretation would avoid the bifurcated review that would arise if review of the issuance of effluent limitations occurred in the court of appeals, while review of the EPA approval of state water quality plans was heard in the district courts. *Bethlehem Steel* at 517. The court admitted concern

about the possibility of piecemeal litigation, but expressed more concern about the congressional intent behind section 1369: "[I]t seems . . . that when a jurisdictional statute sets forth with such specificity the actions of an administrative agency which may be reviewed in the court of appeals, a litigant seeking such review of an action that is not specified bears a particularly heavy burden." *Id.* at 518.

Defendant EPA argued that section 1369 provided review for only those actions which have a national impact. Since state water quality standards are limited to waters within a particular state, there is no national impact. The Agency contended that prompt review of national standards is of greater importance because of the far greater number of affected individuals.

The Second Circuit was convinced by EPA's argument, and although the court felt that review of all EPA actions should¹³⁴ be in one court, the court concluded that it was constrained by congressional intent as evidenced by the specificity of section 1369.

Congress has demonstrated the same intent to prevent court of appeals review of the state certification process under section 1341 by choosing not to include that section in section 1369.

The circuit court in *Natural Resources Defense Council, Inc. v. Train*, 519 F.2d 287 (D.C. Cir. 1975), found jurisdiction in the district court for review of EPA's promulgation of toxic substance standards. The court found that since the Act did not provide for review of the challenged EPA action under section 1369, it "would be consigned to jurisdictional limbo under FWPCA," *Id.* at 291, and therefore the district court had jurisdiction under the Administrative Procedure Act. The court held that the APA provided for review of administrative actions not expressly made unreviewable by the Act to determine whether there has been an abuse of discretion. 5 U.S.C. § 706(2)(A); *NRDC, Inc.* at 291.

In *Central Hudson Gas, Etc. v. EPA*, 587 F.2d 549 (2d Cir. 1978), the court clearly set forth the issue of congressional intent as it applies to section 1369:

It is clear that if the agency action sought to be reviewed falls within one of the . . . categories described in 33 U.S.C. § 1369(b)(1), the jurisdiction of the court of appeals is exclusive. . . . It is also clear, however, that the . . . categories . . . do not cover all forms of possible agency action 'If Congress had so intended, it could have provided that all EPA action under the statute would be subject to review in the court of appeals, rather than specifying particular actions and leaving out other[s].'

Id. at 556-57 (quoting *Bethlehem Steel*, 538 F.2d 513, 517).³⁵

2. This case should find jurisdiction in the district court under the Administrative Procedure Act and under federal question jurisdiction.

The general grant of federal question jurisdiction is found in 28 U.S.C. § 1331(a), which gives the district courts jurisdiction to review federal agency actions. *Califano v. Sanders*, 430 U.S. 99 (1977). The issue Acme raised in the district court arises under the laws of the United States because the basis for Acme's action is a violation of 33 U.S.C. § 1341. The CWA does not contain any provision that precludes review of this action by the district court. "[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). There has been no such showing in this case.

The Court in *Central Hudson Gas*, after enumerating the benefits which result from a system in which issues of law are resolved first by the district court and then by the court of appeals concluded:

[W]e are not inclined to favor an expansive construction of our own exclusive jurisdiction, because to do so would deprive us of the wisdom and sound judgment which the district judges apply to questions we are eventually called upon to review. It is reasonable to assume that Congress intended us to have the help we need.

Central Hudson Gas at 557.

Acme's challenge is not of national importance needing expeditious review in the court of appeals. This is an issue of a permit issued to one company which contains an unlawfully promulgated effluent limitation mandated by a state agency.¹³⁶ The district court is the proper forum to examine the validity of a defective state action which profoundly affects a federally mandated permit issued by a federal agency pursuant to federal law.

The Administrative Procedure Act, 5 U.S.C. §§ 701-706, also provides for district court review of Acme's claim. The APA provides that "[a] person . . . adversely affected by an agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1982). Section 704 reads: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704 (1982).

The toxicity limitation attached to New Union's state certification was incorporated into the NPDES permit issued by EPA, thus becoming an "agency action." The Agency reviewed the effluent limitations in the state certification for compliance with the CWA and found that the limitations were more stringent than those required by the Act (R. 6). The effluent limitations, including the toxicity limitation, were incorporated pursuant to 33 U.S.C. § 1311(b)(1)(c). The permit issued by the Administrator became a final agency action.

The APA, in section 706, allows the district court to "hold unlawful and set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; . . . (C) without observance of procedure required by law; . . . " 5 U.S.C. § 706(2) (1982). In the instant case, Acme¹³⁷ will be able to demonstrate the arbitrary nature of the toxicity limitation. Acme has shown that the state agency failed to hold appropriate hearings and violated a statutorily mandated notice period. EPA requires that the states develop procedures for public notice and public hearings prior to the issuance of state certifications. 33 U.S.C. § 1341 (1982). Logically, EPA should expect that state certification is completed in accor-

dance with the notice and hearing provisions. Therefore, if EPA issues a NPDES permit with provisions unlawfully promulgated by the state, it would follow that the permit would be defective and would be ripe for review under the Administrative Procedure Act.

III. IF THE CIRCUIT COURT FINDS THAT THE DISTRICT COURT LACKS JURISDICTION, REVIEW OF THE VALIDITY OF THE TOXICITY LIMITATION CONTAINED IN ACME'S NPDES PERMIT SHOULD BE HEARD IN THE TWELFTH CIRCUIT COURT OF APPEALS.

If this court finds that there is no jurisdiction in the district court to hear Acme's petition, this court should find jurisdiction in the court of appeals for review of the validity of the disputed toxicity limitation in Acme's NPDES permit. The 1987 NPDES permit which the EPA issued to Acme contained the toxicity limitation. Thus EPA has approved that limitation pursuant to the federal regulations. EPA made a determination that the toxicity limitation proposed by the State of New Union was at least as stringent as its own standards and limitations (R. 6). 33 U.S.C. § 1341(a)(1) (1982); 33 U.S.C. § 1311(b)(1)(C) (1982).

The issue of challenges to the explicit authority for³⁸ judicial review under section 1369 has been raised in the past. Soon after the FWPCA of 1972 was passed, EPA promulgated effluent guidelines under section 304, 33 U.S.C. § 1314, a section which Congress did not grant section 1369 review. Because of the ambiguity of the APA's authority under section 301, 33 U.S.C. § 1311, challenges were brought in both the district court and the court of appeals. Jurisdiction was premised in the court of appeals under section 1369. Review was sought in the district court under the Administrative Procedure Act (5 U.S.C. §§ 701-706), the Declaratory Judgement Act (28 U.S.C. §§ 2201-2202), and under federal question jurisdiction (28 U.S.C. § 1331).

The Supreme Court decided the question in 1977, concluding that the EPA did have section 1311 authority to issue

effluent limitations and that this authority encompassed the guidelines issued under section 1314. *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977). Therefore, the federal court of appeals was judged to have jurisdiction to hear cases concerning section 304.

The *E.I. duPont* court found that Congress intended through section 1369 to strictly control the right of review because the legislators recognized that courts would find most EPA actions reviewable under the APA. Therefore, Congress limited review to the forum which would be most expeditious, thereby preventing a bifurcated review process.

EPA has oversight of the state-created effluent limitations under section 1311(b)(1)(C), and section 1369 provides court of appeals review of section 1311. Thus, the ¹³⁹ court of appeals should have the ability to review the toxicity limitation in Acme's NPDES permit. Section 1341 mandates that the state must base its certification on a number of CWA sections, including sections 1311 and 1317. Section 1311 concerns effluent limitations and section 1317 provides for standards for toxic materials. Both sections are reviewable under section 1369.

Section 1311(b)(1)(C) effectively incorporates into federal law all state water quality standards, schedules of compliance, laws, or regulations which are more stringent than otherwise provided by federal law. Therefore, the court of appeals should be an appropriate court to review Acme's NPDES permit and the toxicity limitation contained in that permit.

Issues are ripe for review in the court of appeals under 1369 after the APA has issued the permit, and no review by the EPA is required as suggested by the district court in this case.

If this court does not find that the district court erred in dismissing Acme's request for review of the state certification of the NPDES permit, then Acme is without a forum to challenge the toxicity limitations. To reiterate, Acme has been denied jurisdiction by both the state and district courts. Acme is prohibited by EPA regulations from gaining review before the Agency. Because of this lack of due process, immediate review should be granted by this court under section 1369.¹⁴⁰

CONCLUSION

Acme petitions this court to provide a forum for Acme's challenge concerning validity of the arbitrary and vague toxicity limitation mandated by the state in its certification of the 1987 NPDES permit approved and issued by the EPA. The district court is the proper forum to hear that limited challenge. In the alternative, Acme asks this court to be the court of last resort, hear the challenge, and render an opinion as to the legality of the toxicity limitation.

The scope of Acme's 1987 permit for other pollutants is defined by the high level of water quality New Union has set for the Fairwater River. Acme and the State of New Union are working together to preserve the Fairwater River. Acme is applying state of the art technology, gradually reducing its effluent discharge every year. The State of New Union, recognizing Acme's good faith effort, has taken advantage of the cessation of other point sources in the area to modify Acme's permit, allowing Acme to operate in compliance with the CWA without adversely affecting the high water quality of the Fairwater River. This is the kind of partnership which the EPA has approved as allowing the maximum benefit to society while ensuring progress toward the ultimate goals of the CWA: reasonable further progress toward the total elimination of water pollution. This court should encourage this type of partnership by allowing New Union to offset effluent reductions in order to allow other sources to operate in compliance with the law and within the bounds of technological feasibility.