Pace Environmental Law Review

Volume 6
Issue 2 *Spring 1989*

Article 5

April 1989

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

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Recommended Citation

David I. Goldberg, John R. Mayo, and Michael P. Running Jr., *Brief for Appellee: First Annual Pace National Environmental Moot Court Competition*, 6 Pace Envtl. L. Rev. 393 (1989)
DOI: https://doi.org/10.58948/0738-6206.1500
Available at: https://digitalcommons.pace.edu/pelr/vol6/iss2/5

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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 APPELLEE

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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. Are Acme's pH, BOD, and TSS violations of its 1974 and 1987 NPDES permits moot where Acme has failed to prove that it has put in remedial measures which clearly eliminate the cause of those violations?

II. Is a holder of an NPDES permit with a new effluent limitation liable for violations in an enforcement action while the state certification and limitation are being appealed? [ii]

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OPINIONS BELOW

The opinion of the United States District Court for the District of New Union granting Acme Industries, Inc.'s motion for summary judgment is set forth in the record at pages 9-11.

The opinion of the United States District Court for the District of New Union granting National Council for the Protection of the Environment's and the State of New Union's motion for summary judgment is set forth in the record at pages 11-12.

JURISDICTION OF THE COURT

The jurisdictional statement is omitted pursuant to Rule 4(c) of the 1989 National Environmental Law Moot Court Competition.

STATUTES AT ISSUE

Section 1365(a) of the Clean Water Act, 33 U.S.C. § 1365(a) (1986), and section 1369(b)(2) of the Clean Water Act, 33 U.S.C. § 1369(b)(2) (1986), are set out in the Appendix.

STATEMENT OF THE CASE

I. *Statement of Facts*

Acme Industries, Inc. (Acme) operates an organic chemical manufacturing facility in the City of Fairwater, New Union (R. 3). Acme discharges its wastewater into the Fairwater River, which is heavily used for recreational purposes (R. 3).

In 1974, the United States Environmental Protection Agency (EPA) first issued Acme a National Pollution Discharge[2] Elimination System (NPDES) permit requiring Acme to install and operate a wastewater treatment facility by July 1, 1977 (R. 3). The NPDES permit set effluent limitations on pH, biochemical oxygen demand (BOD), and total suspended solids (TSS) (R. 3). These effluent limitations were certified by the State of New Union (State) under section 401 of the Clean Water Act (Act), 33 U.S.C. § 1341 (1988), as necessary to meet the State's water quality standards (R. 3).

Prior to July 1987, Acme operated under its 1974 NPDES permit which was extended by operation of law when Acme filed an application for reissuance of the permit in 1979 (R. 4). Acme never met the BOD or TSS limitations established in

the 1974 permit on a consistent basis (R. 4, 8). The EPA issued a new permit in July of 1987, which included a toxicity effluent limitation that New Union had required in its certification as necessary to meet state water quality standards (R. 4). The 1987 permit contained the same pH effluent limitation as the 1974 permit, but increased the allowable discharge of BOD and TSS (R. 5). By August of 1987, Acme's BOD and TSS discharges were generally within the 1987 limitations, although it had at least fourteen violations in each of the previous two winters (R. 8).

NCPE promptly challenged the BOD and TSS effluent limitations established in the 1987 permit under 40 C.F.R. Part 124, asserting that they were not legal under the newly enacted "anti-degradation" provision in 33 U.S.C. § 1342(o)[3] (1988) (R. 6). Acme challenged the toxicity limitation in the same proceeding (R. 6). These challenges are currently pending before the EPA (R. 6). Acme has also challenged the State's certification of the 1987 permit in state court alleging several state grounds (R. 4). The state court dismissed Acme's challenge for lack of jurisdiction (R. 4-5).

Acme violated its pH limitation on a regular basis about thirty percent of the time when a manually operated treatment system was utilized (R. 6). Since Acme installed a mechanized treatment system in June of 1985, Acme has violated the pH effluent limitation when a power outage caused its mechanized treatment system to fail (R. 6-7).

Acme has violated the toxicity effluent limitation on a continuous basis since the limit was first established in 1987, including a two week period every winter (R. 8, 11-12).

II. *Proceeding Below*

The United States District Court for the District of New Union held that the pH, BOD, and TSS violations were not likely to continue and granted Acme's motion for summary judgment (R. 10, 11). The district court held that Acme violated the toxicity effluent limitation on each occasion a toxicity test was conducted, and granted NCPE's and the State's motion for summary judgment (R. 12).

SUMMARY OF THE ARGUMENT

The district court had jurisdiction to decide the merits of[14] NCPE's complaint even though Acme is not currently violating its NPDES permit. Acme bears the burden of proving that it is absolutely clear that the cause of those violations cannot reasonably be expected to recur. The district court applied the wrong standard of mootness and therefore erroneously granted summary judgment for Acme. Material questions of fact remain as to whether Acme has put in place remedial measures that completely eradicate the causes of its violations.

Because the Clean Water Act recognizes no de minimus exception for intermittent or sporadic violations, Acme is liable for its single pH violation. As of the time the complaint was filed, Acme's pH violations are continuing because they have not provided contingency arrangements for their automated lime-addition system.

Acme's intermittent BOD and TSS winter violations and sporadic pH violations are just as much a violation of the Clean Water Act as a polluter who is continually violating the Act.

For the purposes of this enforcement action, Acme is bound by the limitations of its 1974 permit which it has continuously violated. The 1987 BOD and TSS limitations are stayed for the purpose of this action. Even if the less stringent BOD and TSS limitations are considered valid, Acme is continuously violating them because it has failed to put in place remedial measures which clearly eliminate the cause of these violations.

The civil penalties attributable to Acme's pH, BOD, and TSS violations are not moot even if injunctive relief is now held to[15] be moot.

Congress expressed an intent to have the states play a major role in the reduction of the nation's water pollution in the Clean Water Act. The proper forum to review the state's certification is state court. The plain language of the Clean Water Act states that the substantive requirements of an NPDES permit is not reviewable in a civil or criminal enforce-

ment proceeding.

Acme is precluded from having its 1987 permit judicially reviewed because it has not exhausted its administrative remedies as required by the Clean Water Act and its regulations.

Acme is strictly liable for its toxicity violations regardless of its current appeals. The district court correctly granted summary judgment for NCPE and New Union because the undisputed facts establish that Acme is liable for its toxicity violations.[6]

ARGUMENT

I. ACME'S PH, BOD, AND TSS VIOLATIONS ARE CONTINUING VIOLATIONS OF ITS NPDES PERMIT AND THEREFORE NCPE'S CITIZEN SUIT IS NOT MOOT.

NCPE's citizen suit was properly brought under section 505 of the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1365(a) (1986). Where federal or state authorities fail to enforce a discharger's compliance with its National Pollution Discharge Elimination System ("NPDES") permit, private citizens may commence a civil action against any person alleged to be "in violation" of the conditions of either a federal or state permit. 33 U.S.C. § 1365(a)(1). In *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987), the Supreme Court resolved a split among the courts of appeal by holding that a citizen suit could not be maintained for wholly past violations. 108 S.Ct. at 382-83. The Court specifically held, however, that a federal court has jurisdiction under section 1365(a) where citizen-plaintiffs make a good faith allegation of a continuing or intermittent violation. 108 S.Ct. at 384. NCPE alleged in its complaint that Acme has violated and continues to violate the terms of its NPDES permits (R. 2), so therefore jurisdiction was proper under *Gwaltney*.

Although Acme is not currently violating its NPDES permit, the district court had jurisdiction to decide the merits of NCPE's complaint. The *Gwaltney* Court concluded that a good faith allegation was all that was necessary for purposes

of subject⊥[7] matter jurisdiction because section 1365 states that a citizen suit may be brought against any discharger "alleged to be in violation" of the Act. 108 S.Ct. at 384. Drawing on the legislative history the Court concluded that "an intermittent polluter - one who violates permit limitations one month of every three - is just as much 'in violation' of the Act as a continuing violator." *Id.* Therefore, the fact that Acme may not have been violating its permit when the complaint was filed or even afterward is of no consequence to the court's subject matter jurisdiction.

Acme bears the burden of proving that the violations are not continuing and therefore moot. *See Gwaltney*, 108 S.Ct. at 386. The Court recognized that since only a good faith allegation of a continuing violation was necessary for jurisdiction, defendant polluters would need protection from lawsuits that become meritless due to the defendant's subsequent compliance. *Id.* The Court therefore held that a polluter may move for summary judgment on the ground that the violations have become moot. *Id.* However, to protect plaintiffs from defendants who seek to evade sanctions by predictably claiming they have come into compliance, the Court set a very heavy burden on the polluter. *Id.*

The district court in the present case applied the wrong standard of mootness and therefore erroneously granted summary judgment for Acme (R. 11). This court reviews that holding de novo by determining from the record whether no genuine issues of⊥[8] material fact exist. *Wheeler v. Hurdman*, 825 F.2d 257, 260 (10th Cir. 1987), *cert. denied*, 108 S.Ct. 503 (1988); *International Union, United Auto, Aerospace and Agric. Implement Workers of America, Inc. v. National Right to Work Legal Defense and Educ. Found., Inc.*, 781 F.2d 928 (D.C. Cir. 1986); *Grisby v. CMI Corp.*, 765 F.2d 1369 (9th Cir. 1986). Likewise, this court reviews de novo the district court's determination that a violation is moot. *See Sample v. Johnson*, 771 F.2d 1335, 1338 (9th Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986).

Chief Judge Romulus held that a violation becomes moot if it merely "ceased after the suit was filed but prior to trial" (R. 10). In contrast, the *Gwaltney* Court held that to have a

case dismissed as moot the polluter must "demonstrate that it is *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." 108 S.Ct. at 386 (quoting *United States v. Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1953)) (emphasis in original).

Taken to its logical extreme, under the district court's approach a polluter could temporarily shut down its operation, have the case dismissed as moot, and then recommence its polluting in violation of the Act. Voluntary cessation of allegedly illegal conduct does not deprive the court of the power to hear and determine the case, in that it does not make the case moot. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). The rule adopted by the Chief Judge Romulus in the instant case not only violates the standard enunciated in *Gwaltney* but also frustrates the Clean Water Act's goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1986). This court should reverse and remand this case because material questions of fact remain regarding whether Acme has put in place remedial measures which made it absolutely clear that its pH, BOD, and TSS violations would not reasonably be expected to recur when NCPE's complaint was filed. *See Chesapeake Bay Found. v. Gwaltney of Smithfield*, 844 F.2d 170, 171 (4th Cir. 1988), *on remand from*, 108 S.Ct. 376; *Kaufman v. Johnston*, 454 F.2d 264 (3d Cir. 1972).

Under both the majority and concurring opinions in *Gwaltney*, NCPE has to prove the existence of ongoing violations at some point to prevail on the merits. *Gwaltney*, 844 F.2d 170, 171 n. 1 (4th Cir. 1988). At the same time, however, Acme must prove that it has put remedial measures in place that clearly eliminate the cause of the violation. *See Gwaltney*, 108 S.Ct. at 387 (Scalia, J. concurring); *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 815 (N.D. Ill. 1988).

A. *The pH violations are not moot because Acme has not proved that its remedial measures have clearly eliminated the cause of its pH violations and NCPE*

has proven that the violations are continuing.

The district court granted summary judgment for Acme because it believed that it was unlikely that Acme's pH violations would recur, that is that they were moot (R. 10-11).[10]

Because both parties have moved for summary judgment in this case (R. 2) the court must draw all reasonable inferences from the undisputed facts in favor of the nonmovant on each motion. *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326 (7th Cir. 1987); *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 804 n. 2 (N.D. Ill. 1988).

Although the Supreme Court held that long-standing principles of mootness should be applied to section 1365 actions, they did not have to determine how and when a violation's mootness is to be judged because neither of the parties argued mootness in their briefs. Benson, *Clean Water Act Citizen Suits After Gawltney: Applying Mootness Principles in Private Enforcement Actions*, 4 J. LAND USE & ENVTL. L. 143, 153 (1988). On remand in *Gwaltney* the Fourth Circuit held that citizen-plaintiffs could prove ongoing violations (continuing or intermittent) in either of two ways: (1) by proving that violations continue on or after the date the complaint is filed; or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence of intermittent or sporadic violations. *Chesapeake Bay Found. v. Gwaltney of Smithfield*, 844 F.2d 170, 171 (4th Cir. 1988). *Accord Sierra Club v. Union Oil of California*, 853 F.2d 667, 671 (9th Cir. 1988).

The correct time to measure mootness in this case is when the suit was filed. *See Gwaltney*, 844 F.2d at 172. On remand the Fourth Circuit stated:[11]

> Consistent with the guidance of the Supreme Court majority and concurring opinions, the district court may wish to consider whether remedial actions were taken to cure violations, the *ex ante* probability that such remedial measures would be effective, and any other evidence presented during the proceedings that bears on whether the risk of the defendant's continued violation had been

> completely eradicated *when citizen-plaintiffs filed suit.* *Id.* (emphasis added).

Gwaltney, 844 F.2d at 172.

Thus the relevant question is whether as of July 1986 Acme had put in place remedial measures that completely eradicated the possibility of a recurring pH violation.

Although no pH violations have occurred since the complaint was filed in July 1986 there is evidence from which the district court could have found a reasonable likelihood of that violation recurring. The last pH violation occurred due to a power outage after Acme had mechanized its lime addition system (R. 6). It can be inferred that a violation may occur again because Acme has done nothing to provide contingency arrangements in the event such an outage reoccurs.

The fact that the last pH violation occurred in 1985 should be of no consequence to the resolution of this issue. In *Gwaltney* the citizen suit was filed in June 1984. The last chlorine violation had occurred in October 1982 and the last total Kjeldahl nitrogen (TKN) violation occurred in May 1984. The district court on remand held that Gwaltney was liable for both chlorine and TKN violations because the remedial measures put in place after the last violation did not remove the likelihood of future violations. *Chesapeake Bay Found. v.*⊥[12] *Gwaltney of Smithfield*, 688 F. Supp. 1078, 1079 (E.D. Va. 1988). Similarly, in the present case Acme has put in place remedial measures, but there still exists a likelihood of recurring pH violations.

Although the district court did not reach Acme's affirmative defense of upset (R. 10 n.4), the requirements imposed in meeting that defense show by analogy that Acme is still in violation of its pH limitation. An upset is an exceptional incident that must be unintentional, temporary, and beyond the reasonable control of the permittee. 40 C.F.R. § 122.41(n) (1987). Furthermore, the upset defense is unavailable when violations have been caused by improperly designed or inadequate treatment facilities. *Id.* Acme's pH violation would not fall within the definition of an upset because its treatment facilities are improperly designed in that they do not provide

for a backup manual lime-addition system or a backup power source. These contingencies are well within Acme's control especially since prior to the current system Acme was manually adding lime (R. 6). By analogy, this court should hold that Acme's pH violation is continuing because their remedial measures have not clearly eliminated the cause of that violation, and even if they had, Acme would not be entitled to the upset defense. *See Gwaltney*, 108 S.Ct. at 387.

The suit for the pH violation is not moot and may be maintained even though only one violation occurred between June 1985 and July 1986. It has been recently held that an action may be[13] maintained under section 1365(a) for even minor or infrequent violations of the Act. *Sierra Club v. Union Oil of Cal.*, 813 F.2d 1480, 1490-91 (9th Cir. 1987) *vacated* 108 S.Ct. 1102 (1988), *reinstated*, 853 F.2d 667 (9th Cir. 1988); *see also Hamker v. Diamond Shamrock Chemical Corp.*, 756 F.2d 392 (5th Cir. 1985). Furthermore, in *Gwaltney* the court of appeals on remand stated that "[i]ntermittent or *sporadic* violations do not cease to be ongoing until the date when there is no real likelihood of repetition." 844 F.2d at 172 (emphasis added).

Judicial recognition that a citizen enforcement action can be maintained for even a single violation is bolstered by the fact that all courts which have faced infrequent or sporadic violations have held that the Clean Water Act provides no exception for de minimis violations. *Union Oil*, 813 F.2d at 1491; *Connecticut Fund for the Env't, Inc. v. Upjohn Co.*, 660 F. Supp. 1397, 1418 (D.Conn. 1987); *Student Pub. Interest Group of N.J. v. A.T. & T. Bell Laboratories*, 617 F. Supp. 1190, 1206 (D.N.J. 1985). By relying on the fact that Acme had violated its pH limitation once in the year preceding the complaint, the district court implicitly recognized a de minimis exception (R. 10). Not only is this in contrast to the weight of authority, but it violates the Act's clear intention to penalize any discharge of pollutants in violation of a permit. *See* 33 U.S.C. §§ 1311(a), 1319(d) (1986).

It is clear from the discussion above that NCPE has proven the existence of ongoing pH violations and Acme has failed to[14] meet its heavy burden. As Chief Judge Romulus

correctly noted, the situation with the BOD and TSS violations is more complicated (R. 10), but it will become crystal clear from the following discussion that Acme has not met its burden here either.

B. *NCPE has proven that Acme's violations of its BOD and TSS limitations are continuing and Acme failed to prove that its remedial measures have completely eliminated the cause of those violations.*

1. Acme is in continuous violation of its 1974 limitations which remain in effect for the purposes of this suit.

The district court erroneously measured Acme's compliance with its permit limitations at the time the motions were decided (R. 11). As previously discussed in this brief at page 10 it is clear that the Supreme Court held in *Gwaltney* that mootness is to be judged as of the date the suit was filed. *Chesapeake Bay Found. v. Gwaltney of Smithfield*, 844 F.2d 170, 172 (4th Cir. 1988). When this suit was filed in July of 1986 the only NPDES permit that Acme had was its renewed 1974 permit (R. 11). The undisputed facts in the record make clear that Acme never met its 1974 BOD and TSS limitations (R. 8). Therefore, this court should hold that Acme's BOD and TSS violations are not moot because it had not put in place remedial measures which completely eradicated the cause of those violations at the time the complaint was filed. *See Gwaltney*, 844 F.2d at 172.

Moreover, even if Acme's performance is measured after the ⊥[15] complaint was filed, when the changes in its manufacturing process were implemented, it was still continuously violating the 1974 limitations (R. 8) which are the only effective limits for the purposes of this action. The district court correctly held that it did not have jurisdiction to hear NCPE's challenge to the validity of Acme's reissued 1987 permit (R. 11). 33 U.S.C. § 1369(b)(2) (1986). This legal conclusion is, however, of no consequence to the disposition of the mootness issue. The regulations covering judicial and administrative review of permit limitations and conditions provide that after

the EPA has issued a final permit for an existing source, any interested person may request an evidentiary hearing before the Regional Administrator. 40 C.F.R. § 124.74(a) (1987). NCPE has made such a request which is pending before the EPA (R. 6). While this formal request is pending on the validity of the 1987 BOD and TSS limitations, the regulations provide that the 1974 permit limitations remain in effect. *See* 40 C.F.R. § 124.60(c)(1) (1987). That section provides: "[i]f a request for a formal hearing is granted in whole or in part under section 124.75 regarding a permit for an existing source . . . the force and effect of the contested conditions of the final permit shall be stayed." *Id.*

In *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801 (N.D. Ill. 1988), the citizen-plaintiffs brought suit for violations of Outboard's NPDES permit limitations for polychlorinated biphenyls (PCB's). Under the state approved⊥[16] permit system, Illinois had reissued Outboard's 1983 permit in 1987 with stricter conditions. Outboard appealed the conditions and also sought modification. The district court held that for the purposes of *Gwaltney*, Outboard was bound by its 1983 permit limitations which it was held to be continuously violating. 692 F. Supp. at 814. Similarly, in the present case NCPE's appeal stays the effect of Acme's 1987 BOD and TSS limitations, and keeps in effect the 1974 limitations. Therefore, this court should reverse the district court and hold that Acme is continuously violating its BOD and TSS violations, because the 1974 permit remains in effect until its appeal is finally resolved.

2. Acme is in continuous violation of its 1987 limitations.

Even if the less stringent BOD and TSS limitations are considered valid, Acme is continuously violating them because as the Supreme Court made clear in *Gwaltney*, an intermittent polluter is just as much "in violation" of the Act as a continuous violator. 108 S.Ct. at 384. Acme has violated its 1987 BOD and TSS limitations over a two week period in each of the last two winters (R. 8). Although they have put in

place remedial measures aimed at meeting these limitations, they have failed at least 28 times in the last two years (R. 8). Intermittent or sporadic violations such as these do not cease to be ongoing until there is no real likelihood of repetition. *See Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 172 (4th Cir. 1988); *Sierra Club v. Union Oil of Cal.*, 853⊥[17] F.2d 667, 671 (9th Cir. 1988). Since changing their manufacturing process prior to August 1986, Acme has done nothing to prevent further winter violations of its BOD and TSS limitations (R. 8). Another winter is approaching and it will undoubtedly be cold in New Union. To prevent violations from occurring this winter, this court should hold that these violations are not moot and that Acme is subject to injunctive and monetary penalties. *See Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 688 F. Supp. 1078, 1079 (E.D. Va. 1988).

The facts and final resolution of *Gwaltney* make clear that Acme's BOD and TSS violations are not moot. In *Gwaltney* the evidence demonstrated that the defendant had a history of repeated wintertime violations of its TKN limitation. The most recent violations had occurred in the winter preceding the filing of the citizen suit. Although no violations had occurred after the complaint was filed, the district court adduced from the expert testimony that as of the time the complaint was filed there was a continuing likelihood of a recurrence of the intermittent TKN violation. 688 F. Supp. at 1079. The court therefore held that Gwaltney was liable for its violations and reinstated civil penalties. *Id.* at 1080. Similarly, in the present case this court should hold that Acme is liable for its BOD and TSS violations since cold weather occurs every winter in New Union, and up to this time Acme has done nothing to prepare for it.

The Clean Water Act does not provide exceptions for acts of⊥[18] God which interfere with the functioning of a polluter's treatment system. Congress intended that any discharge of pollutants in violation of a permit limitation be penalized. *Student Pub. Interest Group of N.J. v. A.T. & T. Bell Laboratories*, 617 F. Supp. 1190, 1206 (D.N.J. 1985); 33 U.S.C. §§ 1311(a), 1319(d). Compliance with the Act is a matter of strict

liability and a defendant's intention to comply, or a good faith attempt to do so does not excuse a violation. *United States v. Earth Sciences*, 599 F.2d 368, 374 (10th Cir. 1979); *Connecticut Fund for the Env't v. Upjohn Co.*, 660 F. Supp. 1397, 1409 (D.Conn. 1987). In excusing Acme's winter violations of its BOD and TSS limitations, the district court created an exception which does not exist in the Clean Water Act. If the district court's decision is upheld it will be in violation of the explicit intent of the Act to penalize all violations. *See Sierra Club v. Union Oil of California*, 813 F.2d 1480, 1491 (9th Cir. 1988).

Even if Acme had affirmatively pled the upset defense and properly followed the procedures in 40 C.F.R. section 122.41, it would still be liable for the wintertime violations. *See Union Oil*, 813 F.2d at 1490. The district court implicitly held that Acme was excused from these violations due to upset (R. 11). Leaving aside the fact that it was Acme's responsibility to plead and prove upset (40 C.F.R. § 122.41(n)), Acme's violations are not an upset because they are attributable to inadequately designed treatment facilities. In *Union Oil* the[19] Ninth Circuit reversed the district court's holding of upset for violations attributable to heavy rainfalls because the plant was inadequately designed to deal with the normally expected rainfall. 813 F.2d at 1490. Similarly, Acme's treatment system is inadequately designed to deal with regularly occurring cold weather (R. 8). The fact that even the extraordinary defense of upset is inapplicable is further evidence that Acme's BOD and TSS violations are continuing and not moot.

C. *Even if Acme's pH, BOD, and TSS violations are now held to be moot, this case should not be dismissed because the civil penalties are not moot.*

If this court holds that the pH, BOD, and TSS violations are now moot because their is no real likelihood of recurrence, but at the time the complaint was filed there was still a chance of recurrence, the civil penalties for the past violations still present a live controversy. Even though the Supreme Court stated that citizens may seek civil penalties only in a

suit brought to enjoin or otherwise abate an ongoing violation, the Court did not say that civil penalties become moot if injunctive relief is unwarranted. *Gwaltney*, 108 S.Ct. at 382. The district court in this instance held that the entire case had become moot because the violations had ceased after the complaint was filed (R. 11). The concurring Justices in *Gwaltney* suggested otherwise:

> When a company has violated an effluent standard or limitation it remains, for purposes of section 505(a), "in violation" of that standard or limitation so long as it has not put in place remedial measures that⊥[20] clearly eliminate the cause of the violation. It does not suffice to defeat subject matter jurisdiction that the success of the attempted remedies becomes clear months or even weeks after the suit is filed. Subject matter jurisdiction "depends on the state of things at the time the action is brought"; if it existed when the suit was brought, "subsequent events" cannot "oust" the court of jurisdiction.

108 S.Ct. at 387.

The Supreme Court has held in other settings that when a plaintiff seeks monetary or declaratory relief in addition to an injunction, even if the injunction becomes moot the rest of the suit survives. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8 (1978); *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974); *Powell v. McCormack*, 395 U.S. 486, 498-99 (1969). Lower federal courts have also held this principle applicable to government actions to enforce the Clean Water Act. *E.g., United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1000 (9th Cir. 1980). Moreover, at least one court of appeals has held this principle applicable to citizen suits as well. *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986). In that pre-*Gwaltney* case the court followed the good faith allegation rule ultimately adopted by the Supreme Court. It held that "[a] plaintiff who makes allegations warranting injunctive relief in good faith, judged objectively, may recover a penalty judgment for past violations *even if the injunction proves unobtainable.*" *Id.* (emphasis added).

This approach seems especially appropriate in view of the purposes and legislative history of section 1365. The Supreme[21] Court has recognized that the Clean Water Act allows citizens to enforce the Act as private attorney generals. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16-17 (1981). Section 1365 allows citizens to vindicate a public right which embodies a noneconomic interest in clean water. See Senate Comm. on Pub. Works, 93d Cong., 1st Sess., *A Legislative History of the Water Pollution Control Act Amendments of 1972* at 221 (Comm. Print 1973). A citizen-plaintiff's ability to enforce this public right is further bolstered by the Act's authorization of civil penalties, payable to the United States Treasury, in private enforcement actions. 33 U.S.C. § 1365(a)(2) (1986). This court should hold that NCPE's claims for civil penalties survives, even if the injunctive relief is held to be moot because NCPE is acting as a private attorney general enforcing the public's rights under section 1365.

II. ACME IS LIABLE FOR THE CONTINUING VIOLATIONS OF ITS TOXICITY LIMITATION IN THIS ENFORCEMENT ACTION.

In granting partial summary judgment for NCPE and the State, the district court held that Acme was liable for violations of its 1987 toxicity limitation even though its appeal of that limitation was pending before the EPA (R. 12). This court reviews that holding de novo by determining from the record whether no genuine issues of material fact exist. *See, Wheeler v. Hurdman*, 825 F.2d 257, 260 (10th Cir. 1987). The court must draw all reasonable inferences from the undisputed facts in favor of Acme regarding this motion. *See DeValk Lincoln Mercury v. Ford Motor Co.*, 811 F.2d 326, 329 (7th Cir. 1987).[22]

A. *The district court is without authority to review New Union's certification of Acme's 1987 NPDES permit.*

Acme's 1987 NPDES permit added a toxicity effluent lim-

itation because New Union believes it is necessary for the achievement of its state water quality standards (R. 4). Acme challenged the State's certification of this permit in state court alleging several state grounds (R. 4-5). Ultimately, the state court dismissed the action for lack of jurisdiction (R. 5). It is unclear whether Acme attempted to appeal this decision to a higher state court or whether relief was sought through the New Union Department of Environmental Protection ("NUDEP").

The resolution of Acme's certification challenge is of no consequence to the issue of liability for its toxicity violations, because this issue cannot be decided in a federal administrative or judicial forum. *See Roosevelt Campobello Int'l. Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982). The Clean Water Act indicates that the federal courts are not the appropriate forum in which to seek review of the certification process. *Id.*

Congress expressed in the Clean Water Act an intent to have the states play a major role in the reduction of the nation's water pollution. 33 U.S.C. § 1251(b) (1986). That section provides that "[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the⊥[23] development and use including restoration, preservation, and enhancement of land and water resources." 33 U.S.C. § 1251(b) (1986). Moreover, a discharger may not obtain a federal license to construct or operate any facility which may discharge pollutants into navigable waters without a state certification. 33 U.S.C. § 1341(a)(1) (1986). Additionally, section 1341(d) allows a state to condition any certification upon compliance with any requirement that the state agency deems appropriate under state law. *Mobil Oil Corp. v. Kelley*, 426 F.Supp. 230, 234 (S.D. Al. 1976). Since New Union applied state law in its certification of Acme's permit, it would be inappropriate for a federal authority to review its actions. *See Roosevelt Campobello*, 684 F.2d at 1056.

The majority of federal courts have held that the proper forum to review the appropriateness of a state's certification is state court, and that the federal courts and federal agencies

are without authority to review the validity of the state's certification procedures. *Roosevelt Campobello Int'l. Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982); *U.S. Steel Corp. v. Train*, 556 F.2d 822, 837-39 (7th Cir. 1977); *Lake Erie Alliance for the Protection of the Coastal Corridor v. U.S. Army Corps of Eng'rs*, 526 F. Supp. 1063, 1074 (W.D. Pa. 1981); *Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 235 (S.D. Ala. 1976). The *Mobil Oil* Court summed it up best when it held that "[s]ince EPA was not intended to exercise any review over State action on certification and since no other federal agency may[24] exercise review under the National Environmental Policy Act, it follows that the proper forum for judicial review of state certification is in state court." 426 F. Supp. at 235.

It is clear from the discussion above that the proper forum for Acme to challenge the state certification is state court. The district court also correctly held that it did not have jurisdiction to hear Acme's challenge to the actual toxicity limitation (R. 12).

B. *The district court does not have the authority to review Acme's challenge to the validity of its toxicity limitation.*

The plain language of the Clean Water Act states that the substantive requirements of an NPDES permit are not reviewable in a civil or criminal enforcement proceeding. 33 U.S.C. § 1369(b)(2) (1986). Where the language of a statute is clear on its face it is to be given its plain meaning. *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 107, 108 (1980). The language of section 1369(b)(2) is unambiguous, and thus the district court correctly held that it did not have jurisdiction to review Acme's toxicity limitation in NCPE's enforcement action (R. 12). *See Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 821 (N.D. Ill. 1988).

Furthermore, Acme is also precluded from having its 1987 permit judicially reviewed because it has not exhausted its administrative remedies as required by the Act and its regula-

tions. *See Sierra Club v. Union Oil of Cal.*, 813 F.2d 1480, 1487 (9th Cir. 1987). *Cf. Nat'l Wildlife* ⊥[25] *Fed'n v. Consumers Power Co.*, 657 F. Supp. 989, 1000 (W.D. Mich. 1987) (holding citizen-plaintiffs challenging effluent limitations must exhaust administrative remedies). Section 1369(b)(1) provides that only the federal courts of appeal may review the EPA Administrator's action in promulgating or approving an effluent limitation. 33 U.S.C. § 1369(b)(1)(E). The EPA's regulations provide however, that for the purposes of judicial review under section 1369(b), final agency action does not occur unless and until a party has exhausted its remedies under subparts E and F and section 124.91. 40 C.F.R. § 124.60(g) (1987). Subparts E and F of Part 124 detail the procedures for evidentiary and non-adversarial review hearings respectively. While Acme has appealed its final 1987 toxicity limitation to the EPA, the EPA has not made a final decision on that appeal (R. 6). Therefore, Acme has not exhausted its administrative remedies and is not entitled at this point to judicial review. *See Union Oil*, 813 F.2d at 1488.

Acme is further precluded from judicial review because it has not attempted to pursue other available administrative remedies such as seeking modification of its permit under 40 C.F.R. section 122.62 (1987). *See Union Oil*, 813 F.2d at 1487. It is also impossible that Acme has complied with section 124.91 which is a prerequisite to judicial review. 40 C.F.R. § 124.60(g). Section 124.91 requires that a party make a request to the EPA Administrator after an initial decision or recommendation has been made on the appeal ⊥[26] hearing. 40 C.F.R. § 124.91 (1987). The EPA has not made an initial decision on Acme's appeal (R. 6). This requirement applies whether Acme sought review under subpart E or F. *See* 40 C.F.R. Pt. 124, app. A, fig. 2 at 180-81 (1987). Thus, Acme is a long way from exhausting its administrative remedies and would not even be entitled to review by the court of appeals.

It is unclear whether even the EPA can review Acme's appeal of its toxicity limitations because the EPA regulations provide that state review procedures are to be followed when challenges are brought on effluent limitations attributable to state certification. 40 C.F.R. § 124.55(e) (1987). That section

provides: "[r]eview and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in this part." *Id.* In the instant case the toxicity limitations were deemed necessary by New Union in its certification for meeting the state water quality standards (R. 4). Although EPA's authority to review Acme's appeal is not precisely before this court, the fact that even the EPA cannot review the toxicity limits supports the district court's holding.

Acme's appeal of the toxicity limitations does not stay its effect. In its appeal and challenge of the State's certification, Acme is essentially seeking to have the toxicity limitation revoked (R. 4-5). This situation is distinguishable from that with Acme's BOD and TSS limitations discussed above at page 15. There the 1987 permit limitations are stayed pursuant to 40⊥[27] C.F.R. section 124.60(c)(1) because there are 1974 limitations to be applied. This rule cannot logically be applied to the toxicity limitations for the simple fact that there would be no limitation in effect during the pendency of the judicial and administrative appeals.

Holding newly promulgated effluent limitations effective during appeal is consistent with the purposes and policy of the Clean Water Act. First, the Act's clear intention is to penalize *any* discharge in violation of an NPDES permit. 33 U.S.C. §§ 1311(a), 1319(d). Secondly, if new limitations are not held effective, the Clean Water Act's goal of prohibiting the discharge of toxic pollutants in toxic amounts is violated. *See* U.S.C. § 1251(a)(3) (1986). If this were not the case, polluters could constantly challenge new limitations and continue to pollute the nation's waters while their appeals are tied up in judicial and administrative tribunals. Polluters must litigate these issues on their own time. *U.S. Steel Corp. v. Train*, 556 F.2d 823, 855 (7th Cir. 1977). *Cf. Train v. Natural Resources Defense Council, Inc., Inc.*, 421 U.S. 60, 92 (1975) (holding that requests for a variance under the Clean Air Act are carried out on the polluter's, not the public's time).

While Acme's appeal is pending before the EPA it continues to be liable for its toxicity violations. *See Natural Re-*

sources Defense Council, Inc. v. Outboard Marine Corp., 692 F. Supp. 801, 810-11 (N.D. Ill. 1988).[28]

C. *The district court correctly granted summary judgment for NCPE and New Union because the undisputed facts and evidence establish that Acme is liable for its toxicity violations.*

Regardless of whether Acme's toxicity limitation is ultimately held to be valid, Acme is liable for the violations of New Union's water quality standards. *See* 33 U.S.C. §§ 1311(b)(1)(C), 1341(d) (1988). States may properly impose water quality standards which are more stringent than those required by a NPDES permit. *Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 490 (9th Cir. 1984), *cert. denied*, 471 U.S. 1140 (1985). In enacting section 1370 Congress specifically declined to attempt to preempt the field of water pollution legislation, and essentially invited the states to enact standards more stringent than the federal requirements. *Mianus River Preservation Comm'n. v. Adm'r EPA*, 541 F.2d 899, 906 (2d Cir. 1976). The technology-based treatment requirements under section 301(b) of the Act represent the minimum level of control that must be imposed in a NPDES permit. *Student Pub. Interest Research Group of N.J. v. P.D. Oil & Chem.*, 627 F. Supp. 1074, 1088 (D.N.J. 1986). Where the state has adopted water quality standards, as New Union has (R. 4), the permit may impose stricter effluent limitations in order to achieve those standards. *P.D. Oil & Chem.* 627 F. Supp. at 1088; 33 U.S.C. § 1311(b)(1)(c); 40 C.F.R. § 122.44(d). New Union's state water quality standards included in Acme's NPDES permit are independently enforceable and therefore Acme's violations subject it to liability. *See Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 631[29] (D.Md. 1987); 33 U.S.C. §§ 1341(d), 1311(b)(1)(C).

Acme's Discharge Monitoring Reports (DMRs) clearly show that it has previously, and continues to violate the toxicity limitation and therefore establishes its liability. *See Connecticut Fund for the Env't, Inc. v. Upjohn Co.*, 660 F. Supp. 1397, 1417 (D.Conn. 1987). It is well settled that DMRs may

be used as evidence to establish a violation of a permit limitation. *Id.* at 1416-17; *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 452 (D.Md. 1985); *Student Pub Interest Research Group v. Monsanto Co.*, 600 F. Supp. 1479, 1485 (D.N.J. 1985). One purpose of requiring DMRs is to avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of violations of requirements of the Act should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay. S. Rep. No. 92-414, 92d Cong. 2d Sess., *reprinted in*, 1972 U.S. Code Cong. & Admin. News 3730. Therefore, the district court in the present case correctly relied upon Acme's DMRs in establishing liability for toxicity discharge violations (R. 12).

It is uniformly held that permit-holders are strictly liable for violations of an NPDES permit. *E.g.*, *United States v. Earth Sciences*, 599 F.2d 368, 374 (10th Cir. 1979); *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 821 (N.D. Ill. 1988). As discussed above, where review could have been obtained under section 1369(b)(1), paragraph (2) provides that the substantive requirements of Acme's NPDES permit are not reviewable in an enforce⊥[30]ment proceeding. 33 U.S.C. § 1369(b)(2). Where there is evidence of a violation liability may properly be decided through a motion for summary judgment. *Outboard Marine*, 692 F. Supp. at 821; *Student Public Interest Research Group of N.J. v. Monsanto Co.*, 600 F. Supp. 1479, 1485 (D.N.J. 1985). In a case very similar to the instant one the court granted summary judgment for the citizen-plaintiffs based on the discharger's DMRs. *Student Public Int. Research Group v. P.D. Oil and Chemical*, 627 F. Supp. 1074 (D. N.J. 1986). The court specifically held that the DMRs could properly be used as an admission in order to determine whether a violation has occurred. *Id.* at 1090. *Cf.*, *United States v. Ward*, 448 U.S. 242, 251 (1980). Since in the present case there is no dispute of material fact concerning Acme's toxicity violations of its NPDES permit based upon its DMRs, summary judgment is appropriate. *See P.D. Oil*, 627 F. Supp. at 1090.

CONCLUSION

For the above stated reasons it is respectfully requested that this court reverse the district court's granting of summary judgment for Acme on it pH, BOD and TSS violations and affirm the district court's granting of summary judgment to NCPE and New Union on Acme's toxicity violations.