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NOTE

***Atlantic States Legal Foundation, Inc. v.
Eastman Kodak Co.: The Second
Circuit Affirms the NPDES Permit
as a Shield and Tries to Sink
the Clean Water Act***

JOANNA BOWEN*

The article examines a Second Circuit Court of Appeals decision in which the court held that a National Pollutant Discharge Elimination System (NPDES) permit issued under the Clean Water Act (CWA) shielded an industrial discharger from an enforcement action for discharging pollutants not listed on the permit and that if state law includes a prohibition from discharging pollutants not listed on the permit, it is not enforceable by citizen plaintiffs. The author asserts that the court misinterpreted both the CWA and EPA's policy on the scope of a NPDES permit, and is-

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sued an opinion that frustrates Congressional intent behind the CWA. The article examines the NPDES permit application, discusses the history of litigation between the parties and examines the Second Circuit decision.

In *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*,¹ the Second Circuit Court of Appeals affirmed a lower court decision² holding that a citizen suit may not be brought pursuant to section 505 of the Clean Water Act (CWA)³ to enjoin the discharge of pollutants that were not listed in a state permit issued according to the CWA.⁴ The court held that the discharge of pollutants not listed in a valid, state issued CWA permit does not violate the CWA.⁵ In addition, the court held that even if state law prohibits the discharge of pollutants not listed in a permit, citizen plaintiffs are not authorized by section 505 to bring an enforcement action because such a state requirement would be broader than the requirements of the CWA.⁶

At issue is the legal significance of a National (or State) Pollutant Discharge Elimination System (NPDES or SPDES) permit. Citizen groups argue that the CWA prohibits the discharge of pollutants without a permit and that a permit grants authorization to discharge only those pollutants expressly listed on the permit in amounts not exceeding permit limits.⁷ Under this narrow interpretation of the scope of a

1. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

2. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 809 F. Supp. 1040 (W.D.N.Y. 1992), *aff'd*, 12 F.3d 353 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

3. Federal Water Pollution Control Act § 505, 33 U.S.C. § 1365 (1988) [hereinafter CWA].

4. New York State Pollution Discharge Elimination System (SPDES) permits are issued pursuant to N.Y. ENVTL. CONSERV. LAW § 17-0815 (McKinney 1984).

5. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 354 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

6. *Id.*

7. Amicus Brief of Natural Resources Defense Council, American Littoral Society, Columbia Basin Institute, Raymond Proffitt Foundation, Public Inter-

permit, the discharge of a pollutant in an amount exceeding the permitted limit or the discharge of any pollutant not listed on the permit is a violation of the permit and of the CWA and is a proper subject of a citizen suit under CWA section 505.

CWA permittees argue that a permit grants a general authorization to discharge, restricting only those pollutants expressly limited in the permit.⁸ They argue that compliance with the prohibitions and other terms expressly stated in a permit constitutes compliance with both the permit and the CWA, shielding the permittee from liability for discharging other pollutants.⁹ Kodak further argued that if New York law prohibits the discharge of pollutants for which no effluent limits have been set, the state law lacks a counterpart in federal law and thus is not enforceable by the Environmental Protection Agency (EPA) or by private citizens.¹⁰

Dischargers argue that it is impossible to monitor every pollutant in their waste streams, and that if a NPDES permit is defined to allow the discharge of only those pollutants specifically limited on the permit, compliance with a permit will be impossible and permittees will be vulnerable to enforcement actions despite their efforts to obey the law.¹¹ They argue that such a narrow interpretation of a permit would overwhelm the permitting authorities and bring the permitting process to a standstill because dischargers would demand that effluent limitations be established for every

est Research Group of New Jersey, Oregon Environmental Council, Oregon Natural Resources Council, Delaware Riverkeeper, New Jersey/New York Baykeeper, San Francisco Baykeeper and Hudson Riverkeeper Fund, in Support of Appellant at 7, Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1993) (No. 93-7091) [hereinafter Amicus Brief in Support of Appellant].

8. Amicus Brief of the Chemical Manufacturers Association, The Chamber of Commerce of the United States, The American Petroleum Institute, and the American Forest and Paper Association at 1, Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1993) (No. 93-7091).

9. *Id.*

10. Brief for Defendant-Appellee at 33-34, Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1993) (No. 93-7091) [hereinafter Brief for Defendant-Appellee].

11. *Id.* at 38-39.

pollutant potentially discharged, a task they say is impossible.¹² Environmentalists insist that allowing a NPDES permit to act as a shield for the discharge of pollutants not limited in the permit gives permittees a free hand to discharge unlimited quantities of pollutants and is at odds with both the plain meaning and the Congressional intent of the CWA.¹³

Recent questions regarding the EPA's position on the scope of the shield associated with NPDES permits prompted EPA officials to internally circulate a policy statement on the issue which called for consideration of changes in that policy and the permitting process.¹⁴ The EPA takes the position that the NPDES permit shields a permittee from an enforcement action for discharging pollutants listed on the permit within the limits and conditions stated on the permit and for discharging those pollutants for which the permit authority has not established limits or conditions, but which were clearly identified as present during the permit application process.¹⁵ The EPA plans to propose changes for the municipal application requirements in 1994 and the industrial application requirements in 1995.¹⁶

12. *Id.* at 39.

13. Brief for Plaintiff-Appellant at 22-23, Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1993) (No. 93-7091).

14. Memorandum from Robert Perciasepe, Assistant Administrator for Water, Steven A. Herman, Assistant Administrator for Enforcement and Jean C. Nelson, General Counsel to Regional Administrators and Regional Counselors (July 1, 1994) (on file with the *Pace Environmental Law Review*) [hereinafter Perciasepe Memorandum].

15. *Id.* at 3.

16. *Id.* at 4. The issue is really one of burden allocation. Environmentalists argue that the burden should be on the discharger to make a full and accurate disclosure of all pollutants in the effluent. Amicus Brief in Support of Appellant, *supra* note 7, at 25. They further argue that if a pollutant that is being discharged is not addressed on the permit, the burden should be on the discharger to ask the regulatory agency to specifically address that pollutant. *Id.* at 28. Dischargers argue that they have fulfilled their burden of disclosure on a permit application if they disclose the presence of the pollutants the permitting agency asked about. Brief for Defendant-Appellee, *supra* note 10, at 18. They further argue that if a particular pollutant is not addressed on the permit, it should be assumed that the administrator chose not to limit it. *Id.* Environmentalists, then, would place the burden on the discharger to disclose and to seek regulation of every pollutant in the discharge, whereas dischargers would

I. Background

a. The Permit Application

An analysis of what the CWA requires of any discharger begins with the question of whether it discharges a pollutant requiring a permit. The basic prohibition of the CWA is 33 U.S.C. § 1311(a), CWA section 301(a), which states, “[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of *any pollutant* by any person shall be unlawful.”¹⁷ CWA section 402 sets forth the statutory basis for permits, generally called NPDES permits, and gives the EPA Administrator authority to approve state programs to issue state permits, referred to in New York as SPDES permits.¹⁸ Section 402(k) states that “[c]ompliance with a permit issued pursuant to this section shall be deemed compliance for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health.”¹⁹ Section 1319 pertains to government enforcement of the CWA,²⁰ and section 1365 pertains to enforcement through citizen suits.²¹ The other sections encompass different methods for establishing effluent limitations in permits.²²

All dischargers of pollutants must get NPDES permits.²³ Application forms are provided by the EPA regional administrator where there is no approved state permitting program,

place the burden on the administrator to ask about pollutants in the discharge and to limit those that she chooses to limit. The EPA’s policy takes a middle road by placing the burden of full disclosure in an application on the discharger and requiring the administrator to affirmatively state specific limits on the permit or accept as lawful the discharge of any pollutant disclosed in the application if it is not limited on the permit.

17. CWA § 301(a), 33 U.S.C. § 1311(a) (emphasis added).

18. CWA §§ 402(a), (b), 33 U.S.C. §§ 1342(a), (b).

19. CWA § 402(k), 33 U.S.C. § 1342(k).

20. CWA § 309, 33 U.S.C. § 1319.

21. CWA § 505, 33 U.S.C. § 1365.

22. Section 1311 pertains to effluent limitations, § 1312 to water quality related effluent limitations, § 1316 to national standards of performance, and § 1317 pertains to toxic and pretreatment effluent standards. CWA §§ 301, 302, 306, 307, 33 U.S.C. §§ 1311, 1312, 1316, 1317.

23. 40 C.F.R. § 122.21(a) (1993).

or by the Director of the state program where there is an approved state program.²⁴ The NPDES permit specifies effluent limitations applicable to the permit holder, as well as monitoring, reporting and recordkeeping requirements.²⁵

Answers to detailed questions about the facility and its expected discharges are required on the NPDES permit application.²⁶ In addition, the applicant must provide quantitative data obtained by approved analytical methods pertaining to specific pollutants to accurately describe effluent characteristics.²⁷ For purposes of this portion of the NPDES permit application, "an applicant is expected to know or have reason to believe that a pollutant is present in an effluent based on an evaluation of the expected use, production, or storage of the pollutant, or on any previous analyses for the pollutant."²⁸ Each applicant must report such data for specified pollutants²⁹ and for additional pollutants as required for its appropriate industry category.³⁰ Applicants are also required to provide such additional information as may be requested by the Director of the permitting program so that she can reasonably "assess the discharges from the facility to determine

24. *Id.*

25. CWA §§ 402(a)(2), (b)(2), 33 U.S.C. §§ 1342(a)(2), (b)(2).

26. Requirements for the NPDES permit application are specified in 40 C.F.R. § 122.21 which is promulgated under the statutory authority granted to EPA in CWA § 402(a)(1). Information required of applicants includes a description of the activities conducted by the applicant which require it to obtain a NPDES permit, a listing of all relevant environmental permits received or applied for by the facility, a topographic map extending one mile beyond the property boundaries of the source depicting the facility and each of its intake and discharge structures, and a description of the nature of the business. 40 C.F.R. § 122.21(f)(1)-(8) (1993). In addition, existing manufacturing dischargers must identify each outfall location, provide a line drawing of the water flow through the facility with a water balance showing operations contributing wastewater to the effluent and treatment units, provide a narrative identification of each type of process, operation, or production area which contributes wastewater to the effluent for each outfall, describe any intermittent or seasonal flows, report a reasonable measure of actual production if an effluent guideline promulgated under CWA § 304 applies, and describe any abatement requirements or compliance schedules it is subject to. 40 C.F.R. § 122.21(g)(1)-(6) (1993).

27. 40 C.F.R. § 122.21(g)(7) (1993).

28. *Id.*

29. 40 C.F.R. § 122.21(g)(7)(i)(A) (1993).

30. 40 C.F.R. § 122.21(g)(7)(ii) (1993).

whether to issue a NPDES permit.”³¹ The Director may waive reporting requirements for specific pollutants in the application if she has other adequate information to support the permit issue.³² A NPDES permit application is complete when the Director receives a completed application form and any supplemental information is completed to her satisfaction.³³

CWA section 402 authorizes the EPA Administrator to grant each state the authority to issue permits as long as the state permitting requirements are at least as stringent as those established by the EPA in the NPDES program.³⁴ In New York, a SPDES permit application must conform to or be more stringent than all of the requirements for a NPDES permit.³⁵ A state permitting program may have a greater scope of coverage than required by federal law, but such additional coverage is not part of the federally approved program.³⁶ Upon approval of a state permitting program, the EPA suspends its issuance of NPDES permits and grants the state authority to issue permits.³⁷ However, actions to enforce state permit requirements under a federally approved state permitting program may be undertaken by the EPA,³⁸ by the state issuing the permit,³⁹ or by citizens.⁴⁰

New York’s SPDES program was approved in 1973.⁴¹ Section 17-0815(3) of New York’s Environmental Conservation Law requires that all SPDES permits include as a condition: “that the discharge of any pollutant not identified and authorized by such permit or the discharge of any pollutant more frequently than or at a level in excess of that permitted

31. 40 C.F.R. § 122.21(g)(13) (1993).

32. 40 C.F.R. §§ 122.21(g)(7)(i)(B), (g)(9) (1993).

33. 40 C.F.R. § 122.21(e) (1993).

34. CWA § 402(c)(2), 33 U.S.C. § 1342(c)(2).

35. 40 C.F.R. § 123.25(a) (1993).

36. 40 C.F.R. § 123.1(i)(2) (1993).

37. CWA § 402(c), 33 U.S.C. § 1342(c).

38. CWA § 402(i), 33 U.S.C. § 1342(i).

39. CWA § 402(b), 33 U.S.C. § 1342(b).

40. CWA § 505, 33 U.S.C. § 1365.

41. N.Y. ENVTL. CONSERV. LAW § 17-0815 (McKinney 1984).

by such permit shall constitute a violation of the terms of the permit."⁴²

A copy of each permit application and each permit issued under the NPDES or SPDES program must be made available to the public.⁴³ In addition, section 402 requires that the permitting authority provide an opportunity for a public hearing on each application before permit issue.⁴⁴

The CWA also requires permittees to monitor their discharges by taking samples of their effluents, and to file regular reports with the EPA Administrator.⁴⁵ These discharge monitoring reports (DMRs) are available to the public.⁴⁶ These reports must be certified by an authorized representative of the discharger.⁴⁷ The permit holder is also required to report its own effluent limit violations to the permitting authorities and to the public.⁴⁸ In addition to routine reporting requirements, permittees must notify the Director as soon as they know or have reason to believe that the discharge of any toxic pollutant which is not listed in the permit will exceed prescribed notification levels.⁴⁹

b. Enforcement of the Clean Water Act Through Citizen Suits

The CWA authorizes citizens to bring suit in federal district court against any person who is alleged to be in violation of an effluent standard or limitation under the CWA or an order issued by either the EPA Administrator or a state with respect to such a standard or limitation.⁵⁰ The district court may issue an injunction, apply civil penalties of up to \$25,000 per day per violation,⁵¹ and award litigation costs to the pre-

42. *Id.* at § 17-0815(3).

43. CWA, § 402(j), 33 U.S.C. § 1342(j).

44. CWA §§ 402(a)(1), (b)(3), 33 U.S.C. §§ 1342(a)(1), (b)(3).

45. CWA § 308(a)(A), 33 U.S.C. § 1318(a)(A).

46. CWA § 308(b), 33 U.S.C. § 1318(b).

47. 40 C.F.R. § 122.41(k) (1993).

48. 40 C.F.R. § 122.41(l) (1993).

49. 40 C.F.R. § 122.42(a) (1993).

50. CWA § 505(a)(1), 33 U.S.C. § 1365(a)(1).

51. CWA § 309(d), 33 U.S.C. § 1319(d).

vailing party.⁵² Most citizen suits are based on violations reported in DMRs.⁵³

c. The Kodak Park Facility

Kodak operates an industrial facility known as Kodak Park in Rochester, New York.⁵⁴ Kodak manufactures sensitized film and paper, laboratory chemicals, and other products at this site.⁵⁵ The facility contains an on-site wastewater treatment plant that operates twenty-four hours per day, seven days per week.⁵⁶ Wastewater treated at the plant is discharged into the Genesee River and is subject to a SPDES permit issued by the New York State Department of Environmental Conservation (DEC).⁵⁷

Kodak's first permit was a NPDES permit issued by the EPA in 1975.⁵⁸ In July 1979, Kodak applied to the DEC to renew its permit, but the DEC declined to act on the application and Kodak's NPDES permit remained in effect.⁵⁹ In its SPDES permit application, Kodak provided the DEC with a Form 2C describing estimated discharges of 164 substances from its outfalls and also completed an Industrial Chemical Survey (ICS).⁶⁰ The original survey requested information about 144 substances, but the DEC "restricted the inquiry to chemicals used in excess of specified minimum levels."⁶¹ The DEC issued Kodak a SPDES permit, effective November 1,

52. CWA § 505(d), 33 U.S.C. § 1365(d).

53. Lisa Cooper, *Clean Water Act*, in ENVIRONMENTAL REPORTING AND RECORDKEEPING REQUIREMENTS 32, 41 (2d ed. 1992).

54. Brief for Defendant-Appellee, *supra* note 10, at 5.

55. *Id.*

56. *Id.* at 6.

57. *Id.*

58. Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353, 354-55 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

59. *Id.* at 355. If a discharge permit renewal has been applied for under the CWA and "final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) Section 1311, 1316, or 1342 of this title, or (2) Section 407 of this title." CWA § 402(k), 33 U.S.C. § 1342(k). This will be true unless the delay was caused by the failure of the applicant to furnish the information required to complete the application. *Id.*

60. 12 F.3d at 354.

61. *Id.*

1984, which contains both general conditions and special reporting requirements devised to implement both the CWA and New York Environmental Conservation Law section 17-0815.⁶² Kodak's SPDES permit contains effluent limitations for twenty-five pollutants, and action levels for eight pollutants.⁶³ This permit requires that if an action level is exceeded, the permittee must undertake intensive monitoring of the pollutant, and if discharge levels higher than the action levels are confirmed, the permit is to be reopened for consideration of revised action levels or effluent limits.⁶⁴ The permit also contains General Condition 1(b) which states that "the discharge of any pollutant not identified and authorized . . . by this Permit shall constitute a violation of the terms and conditions of this Permit."⁶⁵

d. Prior Litigation Between the Parties

Atlantic States Legal Foundation, Inc. (ASLF) is a not-for-profit environmental group based in Syracuse, New York.⁶⁶ In the interests of its members residing in the Rochester area, ASLF filed suit under CWA section 505.⁶⁷

ASLF filed its first letter of intent to sue Kodak on April 17, 1989, informing Kodak, the DEC and the EPA that it intended to sue Kodak for violating the terms of its permit.⁶⁸ ASLF filed its first complaint against Kodak on August 11,

62. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 354 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839). By its terms, Kodak's SPDES permit would have expired November 1, 1989 and Kodak applied to renew the SPDES permit in May 1989, but because the DEC has not issued a final determination on the application, the 1984 permit remains in effect. *Id.*

63. *Id.*

64. *Id.* at 355 n.2.

65. Brief for Defendant-Appellee, *supra* note 10, at 34.

66. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 125 (2d Cir. 1991).

67. *Id.* at 125.

68. *Id.* When a party sues under CWA § 505 (a)(1), "[n]o action may be commenced . . . prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order." CWA § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A).

1989, alleging that Kodak violated its SPDES permit by discharging pollutants into the Genesee River and Paddy Hill Creek in quantities exceeding effluent limitations contained in the permit.⁶⁹ ASLF based its accusations on the DMRs filed with the DEC by Kodak pursuant to its SPDES permit for the period of March 1, 1987 to May 31, 1989 which revealed at least twenty-seven permit violations, including excessive discharges of cyanide, xylene, suspended solids, methylene chloride, lead, zinc, nickel, silver, cadmium, dichloropropane and chloroform.⁷⁰ ASLF sought a declaratory judgment as to Kodak's past and ongoing violations, an injunction against future violations, a court order that authorizes ASLF to test Kodak's discharges for the next year (at Kodak's expense), access to any documents from Kodak to the EPA, or the DEC regarding Kodak's permit, maximum civil penalties under the CWA⁷¹ and attorneys' fees and costs.⁷²

On March 12, 1990, ASLF filed a second notice of intent to sue Kodak.⁷³ This second notice accused Kodak of discharging pollutants greater than permitted amounts and of discharging unpermitted pollutants.⁷⁴ On April 5, 1990, Kodak and the DEC agreed to a civil consent order which required Kodak to pay a penalty of \$1,000,000, with \$200,000 being designated as a penalty for water pollution violations at the Rochester facility and another \$200,000 for other permit violations.⁷⁵ Kodak also agreed to:

submit a report to the DEC summarizing the history of its operations in Rochester; prepare and submit a management practices code in order to enhance public awareness of the dangers associated with the facility and inform the public of plans for responding to spills or excess releases;

69. 933 F.2d at 125-26.

70. *Id.* at 126.

71. *See* CWA § 309(d), 33 U.S.C. § 1319(d).

72. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 126 (2d Cir. 1991); *see* CWA § 505(d), 33 U.S.C. § 1365(d).

73. 933 F.2d at 126.

74. *Id.*

75. *Id.*

pay for the costs of on-site monitoring by state employees;
and submit to a comprehensive environmental audit.⁷⁶

In addition, Kodak pleaded guilty to a two-count criminal misdemeanor complaint in Rochester City Court, admitting to one count of unlawful dealing in hazardous wastes and to one count of failing to notify the DEC of excessive releases in a timely fashion.⁷⁷ Kodak also agreed to pay an additional \$1,000,000 fine and \$150,000 in support of local emergency planning.⁷⁸ New York "released Kodak from further criminal liability and waived its right to additional penalties for pre-April 5, 1990 environmental violations at the Rochester facility."⁷⁹

ASLF filed a third notice of intent to sue Kodak on May 25, 1990, alleging ongoing violations.⁸⁰ ASLF then moved to amend its original complaint to include the allegations listed in the second and third notices.⁸¹ On September 18, 1990, the district court considered the motion to amend the complaint and the cross motions for summary judgment and dismissed the complaint, holding that it was rendered moot by Kodak's agreement with government authorities.⁸² ASLF appealed that judgment, and the Second Circuit Court of Appeals held that a citizen suit cannot proceed if the settlement reached by state officials reasonably assures that the violations alleged in the citizen suit have ceased and will not recur.⁸³ The court also held that a plaintiff in a properly commenced citizen suit terminated by such a settlement may

76. *Id.*

77. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 126 (2d Cir. 1991).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 126-27.

82. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 809 F. Supp. 1040, 1042 (W.D.N.Y. 1992), *aff'd* 12 F.3d 353 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

83. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991). Citizens may not sue for wholly past violations, but must allege an ongoing violation. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987).

be entitled to attorneys' fees as a prevailing party.⁸⁴ The case was remanded for a determination of whether the settlement between Kodak and the state had caused the violations alleged by ASLF to cease and had eliminated any realistic prospect of their recurrence.⁸⁵ After remand, ASLF moved to amend its complaint to include discharges exceeding levels in Kodak's SPDES permit which occurred after the filing of the complaint and discharges not expressly mentioned in the permit.⁸⁶ The district court granted the motion to include the exceedances, but denied the motion to include discharges not mentioned in the permit and the case was then settled.⁸⁷

II. The Second Complaint — The Discharge of Unlisted Pollutants

A. Procedural History

On November 14, 1991, ASLF again filed suit, alleging that Kodak was in violation of its SPDES permit and of the CWA by discharging pollutants that were not specifically authorized on Kodak's SPDES permit since April 1, 1990.⁸⁸ ASLF based its complaint on information submitted by Kodak on "toxic chemical release forms" (Form Rs).⁸⁹ Kodak is required to submit Form Rs to both the EPA and the DEC under section 313 of the Emergency Planning and Community Right-To-Know Act (EPCRTKA).⁹⁰ Form Rs differ from DMRs in that they contain estimates of discharges of chemi-

84. 933 F.2d at 127. "[R]easonable attorney and expert witness fees" may be awarded to the prevailing party, "whenever the court determines such an award is appropriate." CWA § 505(d), 33 U.S.C. § 1365(d).

85. Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 809 F. Supp. 1040, 1042 (W.D.N.Y. 1992), *aff'd*, 12 F.3d 353 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

86. *Id.*

87. *Id.*

88. *Id.* at 1041-42.

89. *Id.* at 1042.

90. Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 809 F. Supp. 1040, 1042 n.4 (W.D.N.Y. 1992), *aff'd*, 12 F.3d 353 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839) (citing Emergency Planning and Community Right-to-Know Act § 313, 42 U.S.C. § 11,023 (1988)) [hereinafter EPCRTKA]. The EPCRTKA is also known as Title III of the Superfund Amendments and Reauthorization Act.

cals used in the manufacturing process and do not contain precise measurements based on sampling and analysis of effluent actually discharged.⁹¹ ASLF sought a declaratory judgment as to Kodak's past and ongoing violations, an injunction against future violations, a court order that authorizes ASLF to test Kodak's discharges for the next year (at Kodak's expense), access to any documents from Kodak to the EPA or the DEC regarding Kodak's permit, maximum civil penalties under the CWA, attorneys' fees and costs.⁹²

After discovery, ASLF moved for summary judgment as to Kodak's liability in relation to the post-April 1, 1990 discharge of one or more of sixteen of the twenty-seven pollutants listed in the complaint.⁹³ The sixteen pollutants at issue in the summary judgment motion⁹⁴ are listed as toxic chemicals under the EPCRTKA section 313(c).⁹⁵ ASLF based its motion for summary judgment on information regarding nine of the sixteen substances listed in Kodak's Form Rs submitted to the EPA for the years 1989-91.⁹⁶ The remaining seven substances were listed in Kodak's permit application, Form 2C or ICS.⁹⁷ ASLF argued that General Condition 1(b) of Kodak's SPDES permit and CWA section 301 prohibit the

91. 809 F. Supp. at 1043. An observer might conclude that ASLF's case would have been stronger if it had gone to court with reports of actual samples taken from Kodak's outfalls revealing measured amounts of toxics. However, the Second Circuit stated that given its disposition of the case, the failure to produce actual sample analyses was of no consequence. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 356 n.7 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

92. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 356 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

93. *Id.*

94. *Id.* at 356 n.6 (The 16 pollutants are acetonitrile, acetone, dibutyl phthalate, diethanolamine, ethylene glycol, glycol ethers, manganese, methanol, methyl ethyl ketone, methyl isobutyl ketone, n-butyl alcohol, 1,1,1-trichloroethane, 1,1,2-trichloroethane, 1,4-dioxane, 2-methoxyethanol, and toluene.).

95. EPCRTKA § 313(c), 42 U.S.C. § 11,023(c).

96. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 356 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

97. *Id.* at 356 n.7.

discharge of any pollutant not specifically authorized in Kodak's SPDES permit.⁹⁸

Kodak also moved for summary judgment, asserting that the CWA does not prohibit the discharge of pollutants not specifically assigned effluent limitations in a NPDES/SPDES permit.⁹⁹ Kodak argued that CWA section 402(k) shielded it from liability in an enforcement action because it establishes that compliance with the limitations listed on the permit constitutes compliance with the CWA.¹⁰⁰ In addition, Kodak argued that if the permit prohibited such discharges, it would be a state requirement that is broader than the federal NPDES permit program and thus not enforceable via a citizen suit.¹⁰¹

On December 28, 1992, the district court denied ASLF's motion for partial summary judgment, granted Kodak's cross-motion for summary judgment, and dismissed the case.¹⁰² ASLF appealed, and the Second Circuit affirmed the decision, holding that the discharge of pollutants not listed in a valid permit issued pursuant to the CWA is not unlawful under the CWA and that citizens may not bring such a suit to enforce New York State regulations.¹⁰³ On October 3, 1994 the Supreme Court denied ASLF's certiorari petition.¹⁰⁴

B. The First Issue: The SPDES/NPDES Permit as a Shield

In reaching its decision that a valid NPDES/SPDES permit shields the discharger from liability for discharging pollutants not listed on the permit, the Second Circuit Court of

98. *Id.* at 356.

99. *Id.*

100. Brief for Defendant-Appellee, *supra* note 10, at 16.

101. *Id.*

102. Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 809 F. Supp. 1040, 1047 (W.D.N.Y. 1992), *aff'd*, 12 F.3d 353 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

103. Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353, 354 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

104. Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

Appeals first considered whether the plain language of the CWA prohibits the discharge of any pollutants not expressly permitted in a NPDES/SPDES permit.¹⁰⁵ The court found the relevant CWA section to be section 402(k).¹⁰⁶ To interpret section 402(k), the court relied on a quote from the Supreme Court in a footnote of the *E.I. du Pont de Nemours v. Train*.¹⁰⁷ decision.¹⁰⁸ "[T]he Supreme Court has noted that '[t]he purpose of [Section 402(k)] seems to be . . . to relieve [permit holders] of having to litigate in an enforcement action the question whether their permits are sufficiently strict.'"¹⁰⁹ The court interpreted the footnote to mean that polluters may discharge pollutants not specifically listed in their NPDES or SPDES permits if they comply with their reporting requirements.¹¹⁰ However, the court left out a significant portion of the sentence it quoted, a portion which would change the apparent meaning of the sentence. The full sentence is, "[t]he purpose of section 402(k) seems to be *to insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict.*"¹¹¹ The Seventh Circuit Court of Appeals, in *Inland Steel v. EPA*, interpreted the same footnote to mean "that a permit insulates the permit holder from any change in the regulation until the change is incorporated into the permit."¹¹² Thus, the Seventh Circuit interpreted the permit shield provision to insulate the permit holder from an enforcement action based on a new or more stringent effluent limitation promulgated after the issuance of a permit before its incorporation into the permit. This is a much narrower

105. 12 F.3d at 356-57.

106. *Id.* at 357 (referring to CWA § 402(k), 33 U.S.C. § 1342(k)).

107. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977).

108. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

109. *Id.* (citing *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977)).

110. 12 F.3d at 357.

111. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977) (emphasis added).

112. *Inland Steel Co. v. EPA*, 574 F.2d 367, 373 (7th Cir. 1978).

interpretation of section 402(k) than the Second Circuit reached. In *United States v. Ketchikan Pulp Co.*, the district court in Alaska also cited *Inland Steel* and interpreted section 402(k) to protect permit holders against retrospective changes in regulations, not to authorize permit holders to discharge any pollutant not specifically precluded by a permit.¹¹³

The overall structure and thrust of the CWA is forward-looking toward the goal of eliminating pollution from the nation's waters.¹¹⁴ It contains provisions that are, by nature, technology-forcing and anticipate that the EPA will necessarily make revisions in effluent limitations to stay current; more stringent limitations are encouraged, while backsliding is forbidden.¹¹⁵ Thus, CWA section 402(k) is needed to protect permittees from enforcement actions based on new or more stringent effluent limitations promulgated after the issuance of a permit.¹¹⁶

The Second Circuit next considered the EPA's interpretation of the CWA permitting scheme.¹¹⁷ The court, citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,¹¹⁸ noted that the "EPA's reasonable interpretations of the

113. *United States v. Ketchikan Pulp Co.*, Civ. Case No. A92-587 (D. Alaska 1992).

114. CWA § 101, 33 U.S.C. § 1251.

115. CWA § 402(o), 33 U.S.C. § 1342(o).

116. CWA § 402(k), 33 U.S.C. § 1342(k).

117. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

118. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In *Chevron*, the Court formulated a policy regarding statutory interpretation by an administrative agency when the subject matter of the statute is complex or beyond the ordinary. To determine if an EPA policy statement is a reasonable interpretation of the CWA, one must begin with an analysis of Congressional intent. "If the intent of Congress is clear, . . . the agency, must give effect to the unambiguously expressed intent of Congress. . . . [I]f the statute is silent or ambiguous with respect to the specific issue, the question . . . is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 842-43. If Congress has expressly left the statute's interpretation to the agency, any regulatory interpretations will not be altered unless they are "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843. Where Congress implicitly authorized the agency to formulate its own construction, any reasonable interpretation will stand. *Id.* at 843-44.

Act are due deferential treatment in the courts."¹¹⁹ The court, however, misconstrued the EPA's interpretation of the CWA when it found that the EPA agreed with Kodak's contention that a NPDES permit authorizes the discharge of pollutants not specifically listed on the permit.

To ascertain the EPA's interpretation of what is authorized by a NPDES permit, the court focused primarily on two memoranda written by EPA officials.¹²⁰ The first memorandum was written in 1976 and was from the EPA Deputy Assistant Administrator for Water Enforcement to Regional Enforcement Director, Region V.¹²¹ It stated that "it is impossible to identify and rationally limit every chemical or compound present in a discharge of pollutants."¹²² It further stated that "compliance with such a permit would be impossible and anybody seeking to harass a permittee need only analyze that permittee's discharge until determining the presence of a substance not identified in the permit."¹²³ The second memorandum the court considered was written in 1992 and was from the Director, Office of Wastewater Enforcement and Compliance to Water Management Division Directors, Regions I-X.¹²⁴ It stated that the "EPA did not intend to require water quality-based permit limitations on all pollutants contained in a discharge"¹²⁵ The court interpreted these memoranda to indicate that the EPA recognized that industrial facilities may discharge pollutants not listed on their NPDES/SPDES permits.¹²⁶ The court's reliance on internal memoranda from the EPA is in contradiction to the holding of the Sixth Circuit Court of Appeals in *Ford Motor Company v. USEPA*.¹²⁷ In *Ford Motor Company*, the court

119. 12 F.3d at 358 (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984)).

120. *Id.* at 357.

121. *Id.*

122. *Id.*

123. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

124. *Id.* at 358.

125. *Id.*

126. *Id.* at 359.

127. *Ford Motor Co. v. EPA*, 567 F.2d 661 (6th Cir. 1977).

considered whether the EPA properly vetoed modifications to Ford's NPDES permit, and held that "ad hoc national policy determinations developed through internal agency memoranda standing alone without promulgating regulations or guidelines through public notice and/or an opportunity for a public hearing, are not proper procedures for EPA to enforce the [CWA]."¹²⁸ Thus, the Second Circuit's interpretation of the EPA's internal memoranda should not have been the cornerstone of its decision.

The court also considered a comment made by the EPA in 1980 in the Federal Register pertaining to the proposed application-based limits approach to CWA implementation.¹²⁹ The application-based limits approach would have required permit holders to adhere to limits on pollutants not expressly limited in their permits that were based on the anticipated discharge level for that pollutant reported in their permit applications.¹³⁰ The EPA rejected this approach and implemented notification levels.¹³¹ The comment noted by the court was that "[t]here is still some possibility . . . that a [NPDES or SPDES] permittee may discharge a large amount of a pollutant not limited in its permit, and EPA will not be able to take enforcement action against the permittee as long as the permittee complies with the notification requirements [pursuant to the CWA]."¹³² The court noted that the EPA, in the comment, called this possibility a "regulatory gap,"¹³³ and that the EPA noted that "the final regulations control discharges only of the pollutants listed in the [NPDES or SPDES] permit application"¹³⁴ The court interpreted this to indicate that the EPA supported Kodak's position —

128. *Id.* at 671-72.

129. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 358 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839) (referring to 45 Fed. Reg. 33,523 (1980)).

130. 45 Fed. Reg. 33,522-23 (1980).

131. *Id.* at 33,523.

132. 12 F.3d at 358 (citing 45 Fed. Reg. 33,523).

133. 12 F.3d at 358.

134. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 358 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839) (quoting 45 Fed. Reg. 33,523) (alteration in original).

that a NPDES permit acts as an authorization to discharge pollutants as long as the permit holder complies with the expressly stated limits on the permit and complies with notification requirements for pollutants not mentioned on the permit.¹³⁵

It would seem more accurate to characterize the comment in the Federal Register as illustrating the EPA's support for the position that declaration of pollutant discharges in a permit application absolves a discharger from liability for the discharge of that pollutant later, even if not expressly limited on the NPDES permit. This interpretation comports with the litigation position taken by the EPA in *United States v. Tennessee Gas Pipeline Co.*¹³⁶ Tennessee Gas argued that it was shielded from an enforcement action for discharging PCBs into Lake Sibley, Louisiana because PCBs were not expressly limited on its NPDES permit.¹³⁷ The U.S. argued that Tennessee Gas could not be shielded from discharging PCBs because it had not disclosed them on the permit application.¹³⁸

The U.S. also took this position in *United States v. Ketchikan Pulp Co.*¹³⁹ The U.S. argued that Ketchikan Pulp could not use its NPDES permit as a shield for discharging red liquor, cooking acid and magnesium oxide, all pollutants which were not listed on its permit, when Ketchikan had not revealed the discharges in its permit application.¹⁴⁰

135. 12 F.3d at 358.

136. Ruling, *United States v. Tennessee Gas Pipeline Company*, No. 91-1428 (W.D. La. 1991) (included in the addendum of supplemental authority in Brief for Plaintiff-Appellant, Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F. 3d 353 (2d Cir. 1993) (No. 93-7091)).

137. *Id.* at A4.

138. *Id.* at A5, n.4.

139. Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment and in Support of United States' Cross-Motion for Partial Summary Judgment at A7, *United States v. Ketchikan Pulp Co.*, Civ. Case No. A92-587 (D. Alaska 1992) (included in addendum of supplemental authority in Brief for Plaintiff-Appellant, Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1993) (No. 93-7091)).

140. *Id.* at A7-A8.

Although ASLF cited both of these arguments in its brief,¹⁴¹ the court declined to give them any weight, calling them “inapposite” and stating that one citation was to a “court’s summary of the U.S. Attorney’s argument in a footnote to an unpublished opinion in the Western District of Louisiana” and the other citation was to “a U.S. Attorney’s brief in an Alaska case, not signed by any EPA lawyer.”¹⁴² The court should not have dismissed these arguments. Both cases arose out of enforcement actions taken by the EPA, thus the arguments put forth by the U.S. Attorneys in both cases reflect litigation positions taken by the EPA. The court should have accepted the litigation position as being the agency’s interpretation of the NPDES permitting scheme under the CWA. The Supreme Court, in *Martin v. Occupational Safety and Health Review Commission*,¹⁴³ noted “that agency ‘litigating positions’ are not entitled to deference when they are merely appellate counsel’s ‘post hoc rationalization’ for agency action, advanced for the first time in the reviewing court,”¹⁴⁴ but held that a citation issued by the Secretary of Labor under OSHA, i.e., an enforcement action, “is agency action, not a post hoc rationalization of it.”¹⁴⁵ Thus, the litigation position taken by the U.S. in both *Tennessee Gas* and *Ketchikan Pulp* reflects the EPA’s interpretation of the NPDES permitting scheme under the CWA.

Kodak distinguished itself from *Tennessee Gas* by pointing out that Tennessee Gas did not disclose in its permit application that it would be discharging the pollutant at issue

141. Brief for Plaintiff-Appellant at 25, Atlantic States Legal Foundation Inc. v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1993) (No. 93-7091).

142. Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353, 358 n.9 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

143. 499 U.S. 144 (1991). This argument was made, and this case cited, in the Memorandum in Opposition to Defendant’s Motion for Partial Summary Judgment and in Support of United States’ Cross-Motion for Partial Summary Judgment at 8, United States v. Ketchikan Pulp Co., Civ. Case No. A92-587 (D. Alaska 1992) (included in addendum of supplemental authority in Brief for Plaintiff-Appellant, Atlantic States Legal foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1993) (No. 93-7091)).

144. 499 U.S. at 156.

145. *Id.* at 157.

in the enforcement action and claimed that, in contrast, Kodak fully complied with all permit application requirements.¹⁴⁶ However, nine of the sixteen substances listed in ASLF's motion for summary judgment against Kodak may not have received regulatory inquiry by the DEC in the permitting process due to Kodak's failure to disclose their presence in the waste stream on its NPDES permit application.¹⁴⁷ The court ignored this fact, mentioning in a footnote that the nine substances appeared on Kodak's Form R's, the source of ASLF's information, and were subject to DEC regulation.¹⁴⁸ Apparently, the court found compliance with the EPCRTKA to be equivalent to disclosure of pollutants on a NPDES permit application. However, nothing in the regulations governing NPDES permit applications suggests that compliance with other environmental regulations releases a discharger from making full and accurate disclosure of all pollutants in its wastestream on its NPDES permit application.

The court, in finding that the EPA's interpretation of the NPDES permitting scheme supports Kodak's argument — that a NPDES permit authorizes the discharge of any pollutant not expressly limited on the permit — attributed to the EPA an interpretation that the agency does not support. Kodak's position would reward a discharger for failing to fully and accurately disclose all pollutants present in a discharge by granting a shield from liability for any pollutant not mentioned in the application if it is also not mentioned on the permit. The EPA's opposition to this position was clearly stated by the U.S. Attorney in a brief in the *Ketchikan Pulp* case: "[t]his argument is contrary to the language and purpose of the Act. It would transform every NPDES permit from a limited authorization to discharge into a practically unlimited license to pollute, useless as a means of water pol-

146. Brief for Defendant-Appellee at 23, Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353 (2d Cir. 1993) (No. 93-7091).

147. Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co., 12 F.3d 353, 356 n.7 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

148. *Id.*

lution control.”¹⁴⁹ Nevertheless, the court found the EPA to be in agreement with Kodak on its interpretation of the NPDES permit as a shield, and found the interpretation to be reasonable, while finding ASLF’s interpretation to be “absolutist and wholly impractical.”¹⁵⁰

Alternatively, the court could have viewed the EPA’s apparent policy to pursue enforcement actions only against dischargers who fail to disclose the presence of pollutants in a NPDES permit application or who violate specified regulatory limits, as merely an exercise of the EPA’s prosecutorial discretion in enforcing the CWA, rather than as the EPA’s interpretation of the legal significance of a NPDES permit.¹⁵¹ CWA section 505 does not compel citizens to abide by the EPA’s selective enforcement criteria in their suits to enforce effluent standards or limitations under the CWA. Citizens may bring suits to pursue violators who are not being diligently prosecuted by the government.¹⁵² In enacting the CWA citizen suit provision, Congress recognized that the government had limited resources for enforcement actions and intended for citizens to supplement government CWA enforcement efforts.

In July 1994, in response to questions regarding its position on the NPDES permit shield issue, the EPA distributed to its regional administrators and regional counsels a memorandum entitled “Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits.”¹⁵³ In this policy statement, the EPA states that the NPDES permit will authorize, within the limits and subject to the condi-

149. Memorandum in Opposition to Defendant’s Motion for Partial Summary Judgment and in Support of United States’ Cross-Motion for Partial Summary Judgment at 2, *United States v. Ketchikan Pulp Co.*, Civ. Case No. A92-587 (D. Alaska 1992) (included in addendum of supplemental authority in Brief for Plaintiff-Appellant, *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993) (No. 93-7091)).

150. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

151. *See, e.g., Heckler v. Chaney*, 470 U.S. 821 (1985).

152. CWA § 505(a), (b), 33 U.S.C. § 1365 (a), (b).

153. Perciasepe Memorandum, *supra* note 14.

tions set forth in the permit, the discharge of pollutants which have been specifically limited in the permit or pollutants which the permit, fact sheet, or administrative record explicitly identify as controlled through indicator parameters; pollutants for which the permit authority has not established limits or other permit conditions, but which are specifically identified as present in facility discharges during the permit application process; and pollutants not identified as present but which are constituents of wastestreams, operations or processes that were clearly identified during the permit application process.¹⁵⁴ The memorandum additionally states that the EPA will review its position on the scope of the shield provided by section 402(k) and that the EPA plans to update the NPDES application regulations with a proposal for changes to the municipal application requirements in 1994 and a proposal for changes to industrial application requirements in 1995.¹⁵⁵

A *Chevron* analysis¹⁵⁶ of the EPA's policy reveals that it is in keeping with Congressional intent behind the CWA and, therefore, is a reasonable construction of the statute. In CWA section 301, Congress stated that the discharge of a pollutant by a person without a permit shall be unlawful.¹⁵⁷ Section 402 authorizes the EPA Administrator to issue a permit for the discharge of any pollutant or combination of pollutants upon conditions that such discharge will meet certain standards.¹⁵⁸ The plain words of these two sections indicate that Congress intended to make the discharge of pollutants unlawful except for those pollutants specifically authorized in a NPDES permit. In the words of *Chevron*, "the intent of Congress is clear . . . [and] that is the end of the matter."¹⁵⁹ Adding the words of section 402(k) to the analysis does little to dispel this interpretation. Section 402(k) merely states that

154. *Id.* at 2.

155. *Id.* at 4.

156. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); see also *supra* text accompanying note 118.

157. CWA § 301(a), 33 U.S.C. § 1311(a).

158. CWA § 402(a), 33 U.S.C. § 1342(a).

159. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

compliance with a permit shall be deemed compliance with the CWA.¹⁶⁰ The plain words of section 402(k) indicate that, although the discharge of a pollutant is unlawful under section 301, if the discharge of the pollutant is authorized by a permit, the discharger will be deemed to be in compliance with the CWA.¹⁶¹ Thus, the plain words of the statute indicate that a NPDES permit acts as a limited authorization to discharge pollutants. The question remains, if a particular pollutant is not listed on a permit, can the permit act as an authorization to discharge it?

The EPA's policy answers this question with yes — if the pollutant was either explicitly or implicitly identified by the discharger as being present in its effluent on the NPDES permit application.¹⁶² This policy provides an incentive to industrial dischargers to make a full disclosure of all pollutants it anticipates will be present in its effluent at the time of the application. Such full disclosure furthers the Congressional objectives of the CWA. Congress declared the objective of the Act is to achieve "the national goal that the discharge of pollutants into the navigable waters be eliminated."¹⁶³ In section 1251(e), Congress stated that "[p]ublic participation . . . shall be provided for, encouraged, and assisted by the Administrator and the States."¹⁶⁴ As a means of achieving these goals, Congress set forth a statutory basis for the NPDES permits.¹⁶⁵ The Supreme Court has found that the "[NPDES] permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the [CWA]."¹⁶⁶ Thus, the importance of the NPDES permits in the goal of elimination of water pollution cannot be overstated.

160. CWA § 402(k), 33 U.S.C. § 1342(k).

161. *Id.*

162. Perciasepe Memorandum, *supra* note 14.

163. CWA § 101(a), 33 U.S.C. § 1251(a).

164. CWA § 101(e), 33 U.S.C. § 1251(e).

165. CWA § 402, 33 U.S.C. § 1342.

166. *Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 205 (1976).

In addition, "[t]he NPDES program fundamentally relies on self-monitoring."¹⁶⁷ The role that self-monitoring plays in the permitting and enforcement processes dictates that complete and accurate disclosure of pollutants in industrial discharges be required on the NPDES permit application in order to implement Congressional intent. The EPA designed the application requirements for a NPDES permit to elicit full disclosure of pollutants present in a discharge.¹⁶⁸ As the EPA argued in *Ketchikan Pulp*, "[t]he failure of permit applicants to accurately describe their proposed discharges fatally undermines this program. Obviously, if the applicant does not inform EPA of a discharge, EPA cannot determine whether it should impose conditions to control or eliminate it."¹⁶⁹

In addition, the regulations promulgated by the EPA to carry out the Congressional intent of providing for public participation in the regulation of water pollution would become ineffective if dischargers were rewarded for failing to give full disclosure of all anticipated pollutants in their permit applications. The NPDES permit application is open to inspection by the public, and the permit is not issued without the opportunity for a public hearing.¹⁷⁰ Thus public participation and comments are an integral part of the permitting process. Citizens cannot comment on pollutants if they do not have fair notice that the pollutants exist. Without fair and accurate disclosure of all anticipated pollutants in the effluent, the public is denied participation in the process of eliminating all pollutants. Therefore, the EPA's policy, by providing an incentive to dischargers to disclose all pollutants in their waste

167. *Sierra Club v. Union Oil Co. of California*, 813 F.2d 1480, 1491 (9th Cir. 1987), *vacated on other grounds*, 485 U.S. 931 (1988).

168. See 40 C.F.R. § 122.21 and *supra* section I for a description of NPDES permit application requirements.

169. Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment and in Support of United States' Cross-Motion for Partial Summary Judgment at A17, *United States v. Ketchikan Pulp Co.*, Civ. Case No. A92-587 (D. Alaska 1992) (included in addendum of supplemental authority in Brief for Plaintiff-Appellant, *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993) (No. 93-7091)).

170. CWA §§ 402(a)(1), (b)(3), 33 U.S.C. §§ 1342(a)(1), (b)(3).

streams in the NPDES permit application, furthers Congressional intent and is a reasonable interpretation of the CWA and an aid in enforcement.

However, this policy must be accompanied by careful scrutiny of the application by the permitting authority during the permitting process, by promulgation and implementation of continually updated effluent guidelines for an increasingly broad range of pollutants, and by rigorous enforcement to make the NPDES permit function as an effective tool in eliminating pollutants from the nation's waters. As the EPA reviews the NPDES permit application regulations and effluent guidelines,¹⁷¹ careful consideration should be given to the level of detail required of a permittee in a permit application, in the effluent limits imposed in the permits, and in compliance monitoring required. Dischargers often make "impossibility" the focus of their arguments in their battle against tight environmental regulations.¹⁷² The memoranda Kodak chose to present to the court in support of this argument were written up to eighteen years ago. The EPA and the courts should not ignore scientific advances and the increased ease with which computerized sampling techniques can reveal the presence of even trace amounts of chemicals in a waste stream. It should not be assumed that scientific limitations that existed decades ago preclude today's full and accurate disclosure and regulation of pollutants. It is the stated goal

171. See 59 Fed. Reg. 25,859 (describing the EPA's proposed plans for revising and developing effluent guidelines). "To ensure that effluent guidelines remain current with the state of the industry and with available control technologies, sec. 304(b) of the Act provides that EPA shall revise the effluent guidelines at least annually if appropriate. In addition, sec. 301(d) provides that EPA shall review and if appropriate, revise any effluent limitation required by sec. 301(b)(2)." *Id.* at 25,861. In 1992, EPA established an effluent Guidelines Task Force, an advisory committee with members from industry, citizen groups, state and local government, the academic and scientific communities, and EPA regional offices to recommend improvements to the effluent guidelines program. *Id.* at 25,865. EPA established the Task Force pursuant to a consent decree in *NRDC v. Reilly*, Civ. No. 89-2980 (D.D.C. 1992). *Id.* at 25,862.

172. Amicus Brief of the Chemical Manufacturers Association, The Chamber of Commerce of the United States, The American Petroleum Institute, and the American Forest and Paper Association at 13-14, *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993) (No. 93-7091).

of the CWA to eliminate the discharge of pollutants into navigable waters, not merely to limit their discharge.¹⁷³ As science advances, more stringent regulations should be enacted and the courts should support them.¹⁷⁴ Section 402(k) will serve its proper function by shielding permittees from enforcement actions based on regulations enacted after their permits were issued.

C. The Second Issue: Citizen Suits to Enforce State Programs

Having interpreted the CWA to shield Kodak from liability under federal law for discharging pollutants not listed in its NPDES permit, the court turned its attention to New York regulations and held that "states' standards may be enforced under the CWA by the states or the EPA . . . but private citizens have no standing to do so."¹⁷⁵ The court examined the terms of Kodak's SPDES permit, and found conflicting provisions. The final clause of General Condition 1(b), required under New York law, states that "the discharge of any pollutant not identified and authorized or the discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by this permit shall constitute a violation of the terms and conditions of this permit."¹⁷⁶ However, the court found other wording on the permit, in General Condition 1(b) and in Special Reporting Requirement 2(a), which allude to discharges of pollutants not identified by the permit.¹⁷⁷ Both provisions require that Kodak notify the DEC if it discharges pollutants that it did not report on its SPDES permit application.

The court also considered the fact that the DEC notified Kodak in September, 1988, that it was aware of forty-five

173. CWA § 101(a)(1), 33 U.S.C. § 1251(a)(1).

174. See *Duquesne Light Co. v. Environmental Protection Agency*, 698 F. 2d 456 (D.C. Cir. 1983) (technical impossibilities are not a condition for exemption from the Clean Air Act).

175. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 358 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

176. *Id.* at 359 n.10.

177. *Id.* at 359.

substances released into the Genesee River out of which only twenty-three were specifically limited or monitored by the SPDES permit.¹⁷⁸ The DEC advised Kodak to give additional attention to only four of these.¹⁷⁹ The court interpreted this response by the DEC to indicate that the "DEC's view of the SPDES permit is the same as the EPA's."¹⁸⁰ In the same way that the court misinterpreted the EPA's view of the NPDES permit, the court misinterpreted the DEC's view of a SPDES permit. The court seemed to take the permit provisions and the actions taken by the DEC in regard to Kodak's discharge of pollutants not listed on its SPDES permit - provisions and actions designed to elicit full disclosure of the pollutants present in the discharge - to show that New York law does not prohibit the discharge of pollutants not listed on a SPDES permit.

However, the court stated that it did not have to resolve the issue, because if New York law does prohibit the discharge of pollutants not listed on the SPDES permit, the New York law is not enforceable through a citizen suit under CWA section 505.¹⁸¹ The court relied on 40 C.F.R. § 123.1(i)(2) which states that "[i]f an approved State program has greater scope of coverage than required by Federal law the additional coverage is not part of the Federally approved program."¹⁸²

Because the court found that the CWA allows the discharge of pollutants not expressly limited on a NPDES permit, the court held that a state permitting plan that prohibits the discharge of pollutants not listed on a SPDES permit would have greater scope of coverage than is required by the CWA.¹⁸³ Thus, the court reasoned that the additional coverage would not be part of the federally approved program and

178. *Id.*

179. *Id.*

180. *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 359 (2d Cir. 1993), *cert. denied*, 63 U.S.L.W. 3238 (U.S. Oct. 3, 1994) (No. 93-1839).

181. *Id.* at 359-60.

182. *Id.* at 359 (quoting 40 C.F.R. § 123.1(i)(2) (1993)).

183. 12 F.3d at 359.

would not be enforceable through a citizen suit under CWA section 505.¹⁸⁴

In reaching this conclusion, the court apparently gave no merit to the arguments put forth in the brief by the State of New York as *Amicus Curiae*. The state argued that because the CWA allows states to add their own requirements to their permitting programs so long as such requirements are "not less stringent than those of the Act," and because the CWA provides for federal enforcement of SPDES permits, a citizen suit may be brought under the CWA to enforce provisions of a SPDES permit that are "not less stringent than required by federal law."¹⁸⁵ The state further argued that the General Condition 1(b) of the SPDES permit does not provide broader scope of coverage than is required by federal law, even if the court construed it to be more stringent than required by federal law.¹⁸⁶ The state cited the example given in the regulations illustrating what is meant by "greater scope of coverage."¹⁸⁷ The example states: "[i]f a State requires permits for discharges into publicly owned treatment works, these permits are not NPDES permits."¹⁸⁸ The example illustrates a situation in which a state imposes a permit requirement for a group of dischargers that would not be subject to NPDES permit requirements under federal law. Thus, the phrase "greater scope of coverage" in the regulation seems to refer to expanded jurisdiction, not to more stringent requirements. The state also attached to its brief as a supporting document the letter from the EPA Administrator granting approval of the New York SPDES permitting program.¹⁸⁹ In the letter, the EPA Administrator explicitly emphasized the authority of the federal government to enforce the terms of the New York SPDES permits.¹⁹⁰ Thus, it appears that the

184. *Id.* at 359-60.

185. Brief for State of New York as *Amicus Curiae* at 4, *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 12 F.3d 353 (2d Cir. 1993) (No. 93-7091) [hereinafter *New York Amicus Brief*].

186. *Id.*

187. *Id.* at 14.

188. *Id.* at 15.

189. *Id.* at A-5.

190. *New York Amicus Brief*, *supra* note 185, at 4.

General Condition 1(b) on New York's SPDES permits is considered by EPA to be part of the federally approved program under the CWA.

While the court cited policy implications in its holding on the permit shield issue, it did not do so on this issue, apparently ignoring the state's policy arguments in its brief. The state argued that the enactment of more stringent requirements than are required by federal law does not take the SPDES program out of the realm of the federal program and that a decision to the contrary frustrates "the right granted to the States under the [CWA] to enact stricter standards than those imposed by Congress."¹⁹¹ The state also argued that enforcement programs would be frustrated if the decision meant that "a State would have to bring a separate action to enforce those provisions that are stricter than those of the federal program."¹⁹² Thus, the effects of this holding could be quite significant, and the issue is bound to be the subject of future litigation.¹⁹³

III. Conclusion

The Second Circuit Court of Appeals, in holding that a NPDES permit shields the permittee from liability for discharging pollutants that are not listed on the permit, misinterpreted the wording of the CWA, attributed to the EPA a position that the EPA does not support, and frustrated Con-

191. *Id.* at 2-3.

192. *Id.* at 3.

193. While Kodak managed to emerge the victor in this suit and deal a blow to the CWA in the process, it has not been able to escape liability for its pollution of the Genesee River. On October 8, 1994 the New York Times reported that Kodak, "threatened with a federal lawsuit under the Resource Conservation and Recovery Act of 1976 . . . agreed to pay a \$5 million fine and spend tens of millions more to repair sewers and cut the use of toxic chemicals at its manufacturing plant" in Kodak Park. James C. McKinley Jr., *Kodak Is Fined \$5 Million For Toxic Chemical Leaks*, N.Y. TIMES, Oct. 8, 1994, at 29. The article also reported that Kodak "agreed to spend \$12 million to reduce or eliminate the use of toxic chemicals such as methanol, toluene, formaldehyde and chlorofluorocarbons." *Id.* Although the President of the Kodak Vista Neighborhood Association cited health concerns, a Kodak Vice President was quoted as saying "[t]his settlement is not about human health nor major environmental impact. It's about compliance with complex regulations." *Id.*

gressional intent behind the NPDES permitting system. In contrast, the EPA's current policy -that a NPDES permit shields the permittee from liability for discharging pollutants not listed on the permit only when the pollutants were fully disclosed in the permit application process - is a reasonable interpretation of the CWA and will further efforts to eliminate pollutants from the nation's waters if it is accompanied by vigorous efforts to set a broad range of continuously updated effluent limitations and strict enforcement.

In holding that citizens are barred from pursuing enforcement actions to enforce a SPDES permit provision prohibiting the discharge of pollutants not specifically listed on the permit, the court misinterpreted the regulations implementing the State NPDES programs under the CWA. In addition, the court's decision frustrates the right granted to states under the CWA to enact more stringent requirements than are required by federal law and keep these requirements within the federally approved program, seriously complicating enforcement programs for SPDES permits.